

CITATION: *Johnston v. The Shelia Morrison Schools*, 2013 ONSC 1528
COURT FILE NO.: 09-CV-379550CP
DATE: March 12, 2013

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:	)	
	)	
GREG JOHNSTON and TIM WILLIAMSON	)	<i>Celeste Poltak, and Jonathan Bida</i>
	)	for the Plaintiffs
	)	
Plaintiffs	)	
	)	
– and –	)	
	)	
THE SHEILA MORRISON SCHOOLS and SCOTT MORRISON	)	<i>Elizabeth Bowker</i> for the
	)	Defendants
	)	
Defendants	)	
	)	
	)	
Proceeding under the <i>Class Proceedings</i> <i>Act, 1992</i>	)	HEARD: March 12, 2013
	)	

PERELL, J.

REASONS FOR DECISION

I. INTRODUCTION

[1] Greg Johnston and Tim Williamson are the Representative Plaintiffs in a certified class action against The Shelia Morrison Schools and Scott Morrison.

[2] The Plaintiffs bring a motion for an order that the court (a) approve the \$4 million settlement of the action; (b) approve Class Counsel's fees of \$1 million, (exclusive of disbursements and tax); (c) approve an honorarium payment of \$5,000 for each Plaintiff; and (d) dismiss the action without costs.

[3] For the reasons that follow, I grant the relief requested.

II. FACTUAL AND PROCEDURAL BACKGROUND

[4] Mr. Morrison was the headmaster of the Sheila Morrison School, which was a co-educational, residential, and day school located near to the City of Barrie for children been 10-18 years of age who suffered from learning disabilities and behaviour

problems. The school operated from 1977 until, after the commencement of this action, it was closed for the 2009-10 academic year.

[5] Messrs. Johnston and Williamson, who were students at the school, commenced this action in May 2009.

[6] In the action, it is alleged that the Defendants were negligent and in breach of their fiduciary obligations to the students at the school. The Plaintiffs allege that the students were physically, sexually, emotionally, and psychologically abused at the school. They allege that the students were deprived, endangered, exploited, and kept captive and isolated at the school. They allege that the funding for the school was inadequate to meet the needs of the students who resided at the school. They allege that as a result of the defendants' conduct, they and the other class members suffered abuse. The Statement of Claim seeks \$20 million in compensatory damages and \$10 million in punitive damages.

[7] On June 23, 2009, the Defendants, who were then represented by Redway & Butler LLP, filed a Notice of Intent to Defend.

[8] On August 18, 2009, the Defendant Scott Morrison was granted leave to represent himself and the Sheila Morrison School.

[9] In February 2010, although not initially formally retained, Stieber Berlach LLP, became involved in this action for the Defendants. In April 2010, Stieber Berlach LLP was formally retained to defend the Defendants.

[10] By order dated June 7, 2010, on consent, Messrs. Johnston's and Williamson's action was certified as a class proceeding. See *Johnston v. Sheila Morrison Schools* 2010 ONSC 3334.

[11] Koskie Minsky, LLP is Class Counsel. The action was supported by the Class Proceedings Fund.

[12] The Defendants denied liability. They asserted that they took all reasonable steps to ensure that students were provided with a safe and secure learning environment. They assert that they took reasonable precautions to ensure each employee was properly trained. They also asserted that the claims are barred by the *Limitations Act, 2002* and that, in any event, the damages claimed are unforeseeable, excessive and too remote to be recovered.

[13] Both Defendants are impecunious, and the recovery of any judgment has been a matter of concern to the Plaintiffs from the outset of the proceedings. The only source of recovery is insurance funds, and the availability of insurance coverage has been unclear.

[14] An adequate assessment of available insurance did not occur until after Steiber Berlach LLP became involved, and it was not until April 2012 that Class counsel gained its current understanding of what insurance might be responsive to the claims alleged.

[15] An analysis of the coverage reveals that the Defendants have gaps in their insurance coverage. There are four different insurers, and the insurance limits for

insured years fluctuate, from \$1 million in some years to \$10 million in others. The insurance limit for one year and for one insurer cannot be used to pay for insured events occurring in other years. It seems to be the case that the Defendants' insurers will only respond for incidents that occurred during the policy periods for which they provided insurance coverage. This means there will be little or no recovery for incidents of abuse that occurred in the eight uninsured years (i.e. 25% of the class period).

[16] Further, Temple Insurance has taken an off-coverage position, and the other insurers have defended pursuant to reservation of rights. Further still, significantly, the policies have various exclusions for abuse claims. Accordingly, depending on the wording of the particular policies, there may be additional years for which there is no insurance. The availability of insurance coverage might have to be litigated if this proceeding is not resolved by settlement.

[17] After the certification, the parties began preparation for the trial of this action, including preparation for documentary production and examinations for discovery. Class Counsel received thousands of documents in some 30 bankers' boxes containing documents of the defendants spanning approximately 32 years.

[18] The examinations for discovery took place over the course of three days in August 2011. Both Greg Johnston and Tim Williamson were examined and answered detailed questions about their personal experiences at the Sheila Morrison School and the abuse they alleged they suffered. This was a difficult experience for both Representative Plaintiffs.

[19] The action was set down for trial in March 2012, potential witnesses were contacted, will-say statements were prepared, and four experts were retained by the Plaintiffs.

[20] The Plaintiffs' experts opined on: (a) the standards for the management, operation and supervision of a private school; (b) the appropriate conditions for the residence and care of persons with developmental disabilities, including learning disabilities and behavioural difficulties; (c) the sort of damages students would suffer from abuse; and (d) the methodology by which damages could be assessed on an aggregate basis.

[21] Whether an aggregate assessment was available was a contentious issue, and in the absence of an aggregate assessment, the common issues trial would have to be followed by individual assessments.

[22] The Defendants responded with several expert reports, leading to a reply report by the Plaintiffs' damages experts.

[23] On December 17, 2012, the parties attended a mediation before Justice John C. Murray.

[24] At the mediation (which the Plaintiffs attended along with the damages experts), all parties engaged in lengthy discussions with the mediator. The mediation resulted in a settlement in principle whereby the Defendants will pay \$4 million in full settlement of

the action, without any reversion of settlement funds to the Defendants and without the Defendants' involvement in structuring the claims process.

[25] On February 7, 2013, the parties signed the Settlement Agreement. The highlights of the settlement are as follows:

- The Defendants will pay \$4 million to settle all claims in the action, class counsel fees, notice and administration costs, and taxes.
- If there is any residual following the distribution of the settlement fund, there is no reversion to the Defendants.
- The settlement fund is distributed in accordance with a claims process that is similar to the process approved by the court in *Baxter v. Canada*, [2006] O.J. No. 4698 (S.C.J.).
 - The proposed claims process is designed to provide a balance between: (i) compensating class members for their experiences; (ii) ensuring the claims process is efficient, timely and cost effective; and (iii) recognizing that all former students, regardless of personal experiences, ought to receive some compensation for exposure to the adverse environment at the school.
 - Class members file a claim setting out how long they attended the school, whether they stayed in residence, and detailing their experiences, including any alleged abuse by staff or students.
 - The claims administrator will allocate points according to a points allocation system that corresponds to the students' report about their time at the school.
 - Once the claims administrator has determined the points for each claim, it will distribute the settlement funds in proportion to the points awarded, subject to certain restrictions.
 - The claims process excludes claims for a person who was a student at the school for a short period of time (less than two months during the regular school year or less than 4 weeks during the summer) and who does not claim that he or she suffered any abuse.
 - The claims process limits compensation to a maximum of \$50,000. This maximum is meant to recognize that the class

members had common experiences in attending the school that may not be easily quantified.

- This maximum may be increased to up to \$100,000 as part of a second allocation if there is a residual amount remaining after the initial allocation among class members.
- Any settlement funds remaining following the initial allocation and the second allocation will be paid equally among: (a) the Hincks-Dellcrest Centre; (b) the Aisling Discovery Child and Family Centre; and (c) the William J. McCordic School; and (d) the Learning Disabilities Association of Ontario, to be used for charitable purposes.
- The Plaintiffs choose these organizations because they provide services similar to the services that the Sheila Morrison School was meant to provide; visualize:
 - The Hincks-Dellcrest Treatment Centre provides mental health services to more than 8,000 infants, children, youth and their families.
 - Aisling Discoveries Child and Family Centre is a United Way Member Agency and is accredited by Children's Mental Health Ontario. Aisling provides free services to children who are experiencing or are at risk of developing social, emotional or behavioural problems.
 - The William J. McCordic School is a special education school in the Toronto District School Board for students with developmental disabilities.
 - The Learning Disabilities Association of Ontario (LDAO) is a registered charity dedicating to improving the lives of children, youth and adults with learning disabilities.
- There is a full release and provisions that bar proceedings against third parties that may claim over from the Defendants.
- The parties will not comment publicly on the action or settlement in a manner that casts the conduct of any party in a negative light.
- Class Counsel's Legal fees, the Class Proceedings Fund Levy of ten percent, the costs of notice and the costs of administration of the claims process are paid out of the settlement funds.

[26] The following chart summarizes the net recovery of the class.

Deductions from Gross Settlement	Amount	Balance
		\$ 4,000,000.00
Reimburse CPC-paid disbursements	\$ 163,228.57	\$ 3,836,771.43
Unpaid disbursements	\$ 4,548.35	\$ 3,832,223.08
Counsel Fees (x1.39)	\$ 1,000,000.00	\$ 2,832,223.08
Tax on fees	\$ 130,000.00	\$ 2,702,223.08
Administration costs	\$ 133,820.00	\$ 2,568,403.08
Honorarium to Rep. Plaintiffs	\$ 10,000.00	\$ 2,558,403.08
Statutory CPC Levy (10% of net)	\$ 255,840.31	\$ 2,302,562.77
Net funds to class:		\$ 2,302,562.77

[27] Class counsel understands that there are likely less than 600 former students of Sheila Morrison School, and it is possible there are as few as 400. Accordingly, the settlement is equal to an average of approximately \$7,500 to \$10,000 per student.

[28] The claims process provides estimates of compensation. Using four examples: (1) a class member who claimed no abuse at all would receive estimated net compensation of \$3,833; (2) a class member who suffered physical assaults without either serious or observable injury would receive estimated net compensation in the range of \$7,513 to \$13,647; (3) a class member who suffered a serious injury such as a broken arm would receive estimated net compensation of \$12,573 to \$20,240; and (4) a class member who suffered a sexual assault (level 3 out of 4) would receive estimated net compensation of \$20,240 to \$24,840.

III. SETTLEMENT APPROVAL

[29] Section 29(2) of the *Class Proceedings Act, 1992* provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.), at para. 43.

[30] In determining whether a settlement is reasonable and in the best interests of the class the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arms-length bargaining and the absence of collusion; (h) the information conveying to the

court the dynamics of, and the positions taken by, the parties during the negotiations; and, (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra* at para 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.), at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra* at para. 45.

[31] In the case at bar, the Plaintiffs submit that the settlement is fair, reasonable and in the best interests of the class. They submit that a payment of \$4 million represents a substantial recovery for class members that is more certain and timely than any judgment on the common issues or subsequent individual assessments.

[32] The Plaintiffs submit that continuing the litigation includes the risks that: (a) liability would not be established; (b) proven damages would be similar to or less than the settlement amount; and (c) there would be little or no recovery because the defendants are impecunious, there is limited insurance, and the insurers may ultimately deny coverage.

[33] In my opinion, having regard to the various criteria set out above, the outcome of this class action is fair, reasonable, and in the best interests of the Class Members.

[34] Indeed, in my opinion, having regard to very substantial risk factors and the considerable difficulties associated with recovering insurance proceeds, the settlement achieved is a very good result for the class members. The distribution scheme proposed appears to be a good one.

IV. FEE AND HONORARIUM APPROVAL

[35] Turning to the matter of Class Counsel's fee request, the fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at para 13; *Smith v. National Money Mart*, [2010] O.J. No. 873 (S.C.J.), at paras 19-20; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.), at para 25.

[36] Factors relevant in assessing the reasonableness of the fees of class counsel 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: *Smith v. National Money Mart*, *supra*, at paras. 19-20; *Fischer v. I.G. Investment Management Ltd.*, *supra*, at para 28.

[37] Class Counsel has prosecuted this action on behalf of the class and without compensation to the point of the pre-trial and common issues trial. It has incurred

1,701.8 hours in time in prosecuting this action as of February 28, 2013. The total fees docketed as of February 28, 2013 are \$720,228 (exclusive of tax).

[38] Class counsel, Koskie Minsky LLP, seeks fees of \$1.0 million based on four years of litigation and a base fee of more than \$720,000. The requested counsel fees represent 25% of the gross settlement proceeds, or a multiplier of less than 1.4.

[39] The requested fee, representing 25% of recovery and a 1.39 multiplier, is consistent with the success achieved and risks undertaken.

[40] The Representative Plaintiffs, who were actively involved in this litigation, support class counsel's fee request.

[41] In my opinion, Class Counsel's fee request is more than reasonable and fair and should be approved as asked. Class Counsel are to be commended for taking on the risk of this class action for a small group and seeing the action to a fair settlement.

[42] Class counsel seek honorarium payments of \$5,000 for each of Greg Johnston and Tim Williamson.

[43] The honorarium payments are appropriate. Mr. Johnston and Mr. Williamson committed a significant amount of time to directing this litigation. They were involved through pleadings, certification, examinations for discovery, preparation for trial and mediation. In this case, Mr. Johnston and Mr. Williamson were the face of this action, and their personal experiences became public record. Mr. Johnston and Mr. Williamson were required to describe the abuse they allege in the statement of claim, to swear affidavit evidence in support of certification (exposing themselves to potential cross-examination), to discuss that abuse in examinations for discovery and, if the matter proceeded to trial, to give testimony in front of one of their alleged abusers. The honorarium is not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice.

V. CONCLUSION

[44] For the above reasons, I grant the relief requested.

Perell, J.

Released: March 12, 2013

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SUPERIOR COURT OF JUSTICE**

BETWEEN:

GREG JOHNSTON and TIM WILLIAMSON

Plaintiffs

- and -

**THE SHEILA MORRISON SCHOOLS and
SCOTT MORRISON**

Defendants

REASONS FOR DECISION

Perell, J.

Released: March 12, 2013.