SUPREME COURT OF YUKON

Citation: *GX v Yukon (Government of)*, 2023 YKSC 22

Date: 20230502
S.C. No. 22-A0097
Registry: Whitehorse

BETWEEN:

GX, by their Guardian ad litem, YY and
TA by their Guardian ad litem BB in a representative capacity on behalf of all students and former students of Jack Hulland Elementary School who were subject to holds and restraints and/or who were locked in a room and/or placed in seclusion between January 1, 2002 and June 30, 2022

PLAINTIFFS

AND

Government of Yukon, Department of Education
Jack Hulland Elementary School Council of Attendance Area #22

DEFENDANTS

Before Chief Justice S.M. Duncan

Counsel for the Plaintiffs	James R. Tucker and David Jones
Counsel for the Defendant, Government of Yukon, Department of Education	I.H. Fraser
Counsel for the Defendant, Jack Hulland Elementary School Council of Attendance Area #22	Vincent Larochelle and George Filipovic (by video)

REASONS FOR DECISION

Introduction

[1] Two plaintiffs have commenced a lawsuit on behalf of certain students who attended Jack Hulland Elementary School between 2002 and 2022 and allege they were subject to holds and restraints and/or were locked in a room and/or placed in seclusion at school. The representative plaintiffs have sued the Jack Hulland

Elementary School Council of Attendance Area #22 (“School Council”) and the Government of Yukon, Department of Education (“Yukon government”).

[2] The representative plaintiffs now bring an application for court approval of a settlement agreement with the School Council and at the same time for an order of certification of this matter as a class proceeding against the School Council for the purpose of the settlement. This is a proposed partial settlement of the action. The action is proposed to continue against the Yukon government.

[3] The School Council consents to this order and Yukon government states they agree with the relief sought in the order.

[4] The proposed settlement agreement is to dismiss the action against the School Council. In exchange, the School Council will provide documents and information to the plaintiffs for use in their claims against the Yukon government.

[5] The issues are:

a. whether the test for certification of the proceeding against the School Council in the context of a settlement agreement is met; and

b. whether the settlement agreement is adequate, fair, reasonable and in the best interests of the class.

Legal Context

[6] A class proceeding is a legal action brought by one or more representative plaintiffs on behalf of others who claim to have experienced the same or similar harm as a result of actions or inactions by the same defendants. A class action is a well-used procedure in product liability cases (*Gariepy v Shell Oil Co* (2002), 21 CLR (3d) 98 (“*Gariepy*”)), other mass wrongs such as environmental damage (*Hollick v Toronto*

(City), 2001 SCC 68 ("*Hollick*")), or residential schools (*Fontaine et al v Canada et al*, 2006 YKSC 63 ("*Fontaine*")). It is generally used where the potential numbers of plaintiffs in the class are large, and the amount of damages owing to each plaintiff may not be sufficient to allow them to pursue their claims individually. It allows claims that might not otherwise be heard to be brought to court.

[7] The goals of a class action proceeding are generally threefold – access to justice for the plaintiffs, judicial economy for the courts, and behaviour modification of the defendants (*Hollick* at para. 15).

[8] Unlike most other jurisdictions in Canada, the Yukon does not have any legislation to govern class proceedings. This action has been started under Rule 5(11) of the *Rules of Court* which provides:

> Where numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (17), the proceeding may be commenced and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them.

[9] The Supreme Court of Canada wrote in *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46: "[a]bsent comprehensive [class action] legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them" (at para. 34). This approach was adopted and followed by this Court in *Fontaine* (at paras. 32 and 34).

Issue a: Test for Certification in the Context of Settlement has been Met

[10] There are generally four conditions to be fulfilled for certification of a class action. The test for certification of a class action for the purposes of settlement is less rigorous than certification for the purpose of litigation. Courts have justified this lesser test on the

basis that proceeding with a full certification hearing separate from and before the settlement fairness hearing would cause unnecessary delay and costs (*Haney Iron Works Ltd v The Manufacturers Life Insurance Company, dba Manulife Financial* (1998), 169 DLR (4th) 565 ("*Haney Iron Works*")). Further, in the context of settlement, underlying concerns of the court about the manageability of the class proceeding are not present (*Gariepy* at para. 27).

[11] The questions of approval of the proposed settlement and the certification are intertwined and should be considered together. The certification is contingent on the reasonableness of the settlement, while the implementation of the settlement requires the certification of the proceeding (see *Leonard v The Manufacturers Life Insurance Company*, 2020 BCSC 933 at para. 26).

[12] The approach set out in *Haney Iron Works* and followed in subsequent cases (*Gariepy*, *Leonard*) is for the court to determine first whether there is a *prima facie* case for certification. If yes, then the court must consider whether the settlement is adequate, fair, reasonable and in the best interests of the class.

[13] Here, a *prima facie* case for certification has been established.

[14] The four conditions necessary for certification of a class proceeding are:

a. The class members must be capable of clear definition.

   Here, the class members are described as "all students and former students at Jack Hulland Elementary School who were subject to holds and restraints and/or who were locked in a room and/or placed in seclusion between January 1, 2002 and June 30, 2022." The class members are objectively identifiable.

b. There are issues of fact or law common to all class members.

Here, counsel have identified the following common issues. They are whether the Council:

i. owed a duty of care to the settlement class members;

ii. breached a duty of care owed to the settlement class members;

iii. owed a fiduciary duty to the settlement class members;

iv. was vicariously liable for the conduct of the school staff; and

v. engaged in conduct that merited an award of punitive damages.

These are appropriate causes of action and common issues.

c. All class members will benefit from the successful prosecution of the action to some extent, and success for some class members will not mean failure for others. This is a modification from the earlier test which was described simply as success for one class member means success for all the members. The more flexible modern approach means that while members cannot have conflicting interests, class members can benefit from a class action to varying degrees (*Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at para. 45).

Here, success for some class members on the common issues will not result in failure for others. There are no conflicting interests among the members in the consideration of the common issues that have been identified.

d. The representative plaintiffs must adequately represent the class. Here, the two representative plaintiffs are parents of two of the students in the proposed class. They have provided filed affidavits confirming their willingness and ability to act as representative plaintiffs. No concerns or objections to this have been expressed.

Issue b: Settlement Agreement is Adequate, Fair, Reasonable and in Best Interest of Class

[15] Class action legislation usually contains a provision that in order for a settlement agreement to be binding on class members, it must be approved by the court. This Court in *Fontaine* applied this same principle at common law.

[16] The test for approval is whether the settlement is adequate, reasonable, fair, and in the best interests of the class as a whole. While court approval of a settlement should not be a rubber stamp, neither should it require a re-opening of the settlement agreement to rewrite or modify its terms, nor an examination of the merits of the case (*Fontaine* at paras. 43-44; *Dabbs v Sun Life Assurance Co. of Canada* (1998), 40 OR (3d) 429 (Ont Gen Div) ("*Dabbs*")). Any settlement is the result of compromise, and only where the settlement shows the compromise is unreasonable, should the court intervene.

[17] Partial settlements in the context of class actions have been encouraged by courts because of their contribution to the goals of judicial economy and access to justice. Where the settlement is a partial one, the criteria to be satisfied should be without prejudice to the ability of the other defendants to defend the action in a way that is not prejudicial to them.

[18] Factors that have been considered in the determination of whether to approve a settlement agreement include:

a. likelihood of recovery or likelihood of success;

b. amount and nature of discovery evidence;

c. settlement terms and conditions;

d. recommendation and experience of counsel;

e. future expense and likely duration of litigation;

f. number of objectors and nature of objections;

g. presence of good faith and absence of collusion;

h. the degree and nature of communications by counsel and the representative plaintiff;

i. information conveying to the court the dynamics of and the positions taken by the parties during the negotiations.

[19] Other factors have been considered that are fact and context specific do not apply here (*Fontaine* at paras. 40-42 citing *Dabbs*; *Parsons v Canadian Red Cross Society* (1999), 103 OTC 161 (Ont Sup Ct); *Reid v Ford Motor Company et al,* 2006 BCSC 1454).

[20] In *Jeffery v Nortel Networks*, 2007 BCSC 69, the court synthesized these factors into the following four broad questions:

> [28] …
>
> - Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based on a proper analysis of the claim?

- Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?

- On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation? and

- Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement?

[21] Here, in answer to the first broad question, the plaintiffs are represented by an experienced legal team, including counsel who has practised litigation in the Yukon for over 25 years, and counsel located in Vancouver with expertise in class action litigation. Their written and oral submissions in this hearing demonstrate their negotiation of the terms of the settlement agreement on behalf of the plaintiffs, and their appropriate analysis of its ability to address the plaintiffs' claims. This settlement will reduce costs and the duration of the litigation as there will be fewer lawyers and parties at the certification hearing and trial.

[22] In assessing the second broad question, counsel for the plaintiffs and the School Council advised that the settlement agreement was negotiated in good faith and without collusion or extraneous considerations. A review of the settlement terms and conditions confirms its focus on the resolution of the issues in the claim.

[23] The third broad question require the most scrutiny. The plaintiffs will be well-served by accepting the settlement rather than proceeding with the litigation. The primary reason is the plaintiffs' inability to recover damages from the School Council even if they are successful in proving liability. The current Chair of the School Council,

Taelor Mason, has attested that the asset limit of the School Council is $50,000 and it has no insurance policy. To pursue litigation against the School Council would result in nothing of value to the plaintiffs, even if they were successful.

[24] The School Council has relevant documents and information that will assist the plaintiffs in assessing and prosecuting their claims. The settlement agreement includes cooperation clauses that require the School Council to produce relevant non-privileged documents to the litigation in their possession within a certain time period, along with an ongoing obligation to continue to produce additionally discovered relevant documents. A knowledgeable School Council representative and counsel for the School Council are to provide a "proffer" of information relevant to the action (meaning they will provide to counsel for the plaintiffs facts or evidence in support of elements of the action). Finally, the School Council agrees to produce a witness at trial to testify to the authenticity and admissibility of School Council documents. In exchange for this cooperation, the action will be dismissed against the School Council and they will not be required to participate at the certification motion, or at trial. These terms will contribute to efficiency and cost reduction for the plaintiffs, without sacrificing information needed for prosecuting the case.

[25] The litigation will continue against the other defendant, the Yukon government. The ability of members of the class to opt out of the class, should they wish to pursue an individual claim, or not pursue a claim at all, is deferred to a later date. This is to allow members of the class to make a decision after more information is available, through the certification and discovery process. There is no harm caused to the plaintiffs by a deferral of the opt-out process.

[26] If the matter proceeds to trial, liability may be apportioned by the Court as between the two defendants, the Yukon government and the School Council. However, the Yukon government will not be responsible for any damages attributable to the School Council. Nor will the Yukon government be entitled to make any claim against the School Council for contribution and indemnity. The Yukon government remains able to make any arguments in its defence implicating the School Council. This part of the order that bars the Yukon government from seeking contribution and indemnity from the School Council does not change the situation for the plaintiffs, as economic recovery from the School Council is not possible, given its financial status. The bar order similarly does not prejudice the Yukon government as it does not change the risks for them in this litigation. It permits the Yukon government to agree with the relief sought in this application.

[27] The settlement agreement does not contain a release of the plaintiffs' claims against the School Council, because of its potential effect on the ability to continue the claims against the non-settling defendant. It does contain a provision entitled "covenant not to sue" which prohibits the plaintiffs from continuing their claims against the School Council once the settlement agreement is approved.

[28] No counsel fees are claimed at this time.

[29] Given the plaintiffs' inability to recover financially against the School Council, it is in the best interests of the class to resolve the matter against the School Council as early as possible, without sacrificing the production of the relevant documents and information from the School Council for use in the prosecution of their claims. This compromise provides certainty, simplifies the litigation proceeding, and avoids further

costs, risks, and delays of litigation. On a cost/benefit analysis, the plaintiffs are well-served by accepting the settlement rather than pursuing the litigation.

[30] The final question is whether the class members have received sufficient notice and are favourably disposed towards the settlement. Court-approved notice of this proposed settlement was provided through several public newspaper advertisements, and more targeted notices posted on participating plaintiff law firm websites and provided directly to known proposed class members. Four individuals contacted the plaintiffs as a result of the public notices. There were no objections from any of the proposed class members. The notice provisions and information provided to the class members were sufficient.

Conclusion

[31] This class action will be certified against the School Council for the purpose of the settlement agreement between the plaintiffs and the School Council. I approve the settlement agreement as adequate, fair, reasonable, and in the best interests of the class.

[32] I thank counsel for their cooperation in negotiating this compromise solution which will advance access to justice and the efficient resolution of these claims in a way that does not prejudice any of the parties. I also thank all counsel for their thorough submissions at the hearing of this matter.

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DUNCAN C.J.