

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF MONCTON

MC-596-2018

Neutral Citation: 2024 NBKB 219

2024 NBKB 219 (CanLII)

BETWEEN:

JESSY TIMOTHY ROSE and LEE MITCHELL

Plaintiffs

– and –

THE PROVINCE OF NEW BRUNSWICK

Defendant

DECISION

BEFORE: Chief Justice Tracey K. DeWare

AT: Moncton, New Brunswick

DATE OF HEARING: November 28, 2024

DATE OF ORAL
DECISION: November 28, 2024

APPEARANCES: Basia Sowinski and Mike Dull, on behalf of the Plaintiffs

Denis Thériault and Véronique Guitard, on behalf of the
Defendant

DeWare, C.J. (Orally)

INTRODUCTION

[1] There are two motions before the Court. A request for an order approving the settlement agreement reached between the parties in this class action and a request for an order approving the proposed disbursement of legal fees to class counsel.

[2] The plaintiffs suggest that the proposed settlement should be approved for two key reasons:

- 1) The Common Experience, Physical Injury and Psychological Injury Payments are fair and reasonable; and
- 2) The terms and conditions of the settlement agreement ensure a purposeful and clear distribution process.

[3] The plaintiffs maintain that the proposed Common Experience Payment of \$5,000.00 is reasonable in this case. The payment of \$5,000.00 is intended to compensate for emotional distress, minor property loss and minor inconvenience. The plaintiffs compare this settlement amount with the Common Experience Payment of \$8,178.00 approved in ***Blair v. Toronto Community Housing Corp.***, 2013 ONSC 4237 (CanLII). In ***Blair***, the plaintiffs were displaced , lost personal property as well as earning potential as a result of an apartment fire. Some of the losses

suffered by the plaintiffs in **Blair** did not occur in this case as the plaintiffs were inmates at a correctional centre and thus did not lose significant personal property nor was their earning ability curtailed as a result of the fire.

[4] In addition to the Common Experience Payments, there are two additional pools of funding available for individuals who can establish physical or psychological harm arising out of the fire. As with the Common Experience Payments, individuals can apply in writing for payment from the Physical and/or Psychological Injury Payment Fund. This process is all paper based and will be assessed and distributed by a third party claims administrator.

[5] I have reviewed the affidavits of the representative plaintiffs, Jessy Rose and Lee Alexander Mitchell. I have reviewed the pre-hearing brief submitted by Ms. Sowinski and Mr. Dull and considered their oral submissions. I acknowledge the defendant's consent to the request for settlement approval and their oral submissions in support of the plaintiff's motions.

[6] This matter has been underway now for six years, and the fire itself occurred seven years ago. The defendants have not admitted liability for wrongdoing in this case. The parties have arrived at their negotiated settlement agreement fully cognizant of both the risks and the costs of continuing onto trial. Experienced counsel are involved in this matter and

negotiations have taken place following discovery and several years of litigation.

- [7] As required, the plaintiffs provided notice of the request for approval of the settlement agreement. None of the potential 162 class members have come forward to contest the proposed settlement agreement nor have they filed an objection. There is no one present in court today to raise an objection to the proposed settlement agreement. Ms. Sowinski has been in contact with approximately 85 of the potential 162 class members and none have expressed opposition to the settlement agreement proposed.
- [8] In my view, there is value to the members of this class for the matter be settled and compensation available for them quickly. The fees and disbursements for class counsel will be deducted prior to the disbursement of funds. Each class member will be provided a cheque for \$5,000.00, or more if they are entitled to payment as a result of physical or psychological harm.
- [9] Approval of a settlement for an action filed under the ***Class Proceedings Act***, RSNB 2011, c 125 is governed by section 37(1)(a) of the ***Act*** which mandates court sanction of any proposed agreement. The legal test for approval of a class action settlement as set out in ***Parsons v. Canadian Red Cross Society***, 2014 ONSC 2021 (CanLII) is whether the settlement is fair, reasonable and in the best interest of the class as a whole. The

Court must be satisfied that the settlement falls within the zone of reasonableness.

- [10] Justice Strathy’s comments in *Ainslie v. Afexa Life Sciences Inc.*, 2011 ONSC 6094 (CanLII) are helpful to the Court’s current consideration of these issues:

“(…) It is not the court’s responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented – as they clearly are in this case – by highly reputable counsel with expertise in class action securities litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.”

- [11] Class counsel has recommended approval of the settlement in this matter and is of the view it conforms with the requirements of the criteria for the approval of a settlement in a class action proceeding. I agree.

- [12] The request for the approval of the settlement agreement are approved upon the terms set out in the settlement agreement including the following:

- (i) The Gross Settlement Amount is \$1,275,000.00; and
- (ii) The Gross Settlement Amount is allocated as follows:
 - (a) Common Experience Payment: \$810,000.00
 - (b) Physical Injury Payment: \$115,000.00
 - (c) Psychological Injury Payment: \$200,000.00
 - (d) Contribution Towards Costs and Disbursements: \$25,000.00

(e) Claims Administration Expenses: \$125,000.00

[13] There is also before the Court a motion for the approval of the payment of legal fees and disbursement for class counsel. I am satisfied there was considerable risk involved for Mr. Dull and his law partners in embarking upon this litigation on behalf of a marginalized group of individuals seeking compensation for damages arising out of alleged negligence in the unique institutional setting of a correctional centre. The contingency fee agreement of 30 percent is fair and reasonable given these inherent risks and falls well within the acceptable range of fee agreements in the context of high risk class action proceedings.

[14] On this basis, the Court approves the requested order for legal fees and disbursements. Legal Fees are approved in the amount of \$344,155.83 plus HST of \$51,623.37, as well as disbursements in the amount of \$2,813.96. Further, there has been a request for payment of an honorarium for both representative plaintiffs, Jessy Rose and Lee Alexander Mitchell. The Court approve these \$5,000.00 honorarium payments to the representative plaintiffs and acknowledges class counsels' undertaking to make these payments from the available legal fees.

[15] The plaintiffs' motions are granted and the requested orders will be executed by the Court.

DATED at Moncton, N.B., this 28th day of November 2024.

Tracey K. DeWare
Chief Justice of the Court of King's Bench
of New Brunswick