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ARTICLE

Charitable Reversal: Court of Appeal Rejects Conditional Approval of Class Counsel's Fees

In *Welsh v. Ontario*, Justices Sharpe, Juriensz and Roberts of the Ontario Court of Appeal granted the appeal of the representative plaintiffs in a class action and set aside the decision of the lower court judge that had approved payment of class counsel's fees on condition that class counsel donate a portion of those fees to charity.

The class action concerns whether the Province of Ontario was negligent in its management and operation of three schools for the Deaf. The claims advanced on behalf of 4,500 former students included serious allegations of physical, sexual and emotion abuse.

A settlement provided for a \$15 million compensation fund, of which a maximum of 25% could go to class counsel's fees. Any settlement funds remaining after providing notice to the class members, paying their claims and administering the claims process would revert to the Province.

At the motion to approve the settlement, class counsel requested approval of fees in the maximum amount permitted by the settlement, or \$3.75 million. The motion judge approved the settlement but also ordered, without first raising the issue or hearing submissions of the parties, that class counsel could only receive the requested \$3.75 million on condition that class counsel donate \$1.5 million of those fees to a charity for the Deaf, to be named and approved by the motion judge. The motion judge further ordered that the \$2.25 million balance of fees would be subject to a proportional reduction depending on the amount of settlement funds that reverted to the Province following the claims process.

The Court of Appeal agreed that the order conditionally approving fees must be set aside. By requiring class counsel, without the parties' input or consent, to donate part of its fees to a designated charity, the Court held that the motion judge effectively altered the settlement agreement and inserted a material condition that the parties had not agreed to. This result would also impact the surplus settlement funds that the parties had agreed would revert to the Province. If the motion judge had concerns with approving the amount of fees requested, the Court noted that the appropriate course of action would have been to allow the parties an opportunity to make submissions and, if they desired to do so, agree to change the terms of the settlement in order to address those concerns.

The Court remitted the matter for a new hearing before a different judge on the class action list to consider all of the factors involved in approving class counsel fees, including (a) the factual and legal complexities of the matter 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; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

While creativity in structuring class settlements and fees structures may be appreciated, in its decision the Court of Appeal has set clear limits to judges' authority in these matters, particularly with respect to altering the settlement the parties have made.

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