Settlement approval is not guaranteed in class actions

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In *Grann v. HMQ in Right of the Province of Ontario* (*Grann*), the Ontario Superior Court dismissed a motion for settlement approval, a decision that reminds counsel that courts are not merely a rubber stamp for settlements in the class actions context. The decision is a rarity given that settlements are to be encouraged and the vast majority of them are approved by courts. Therefore, these rare decisions are not only a reminder that settlement approval is not guaranteed, but also clarify the boundary between settlements that are fair, reasonable and in the best interests of the class and those that are not.

Background

All settlements in actions filed under Ontario's *Class Proceedings Act, 1992* (the Act) must be approved by a court. The court's supervisory role is meant to ensure that the interests of absent class members are protected and to fill the adversarial void created by the fact that both class counsel and defence counsel share a mutual interest in having the settlement approved. In the Law Commission of Ontario's (LCO) *Final Report on Class Actions Objectives Experiences and Reforms*, dated July 2019, (the Report), the LCO found that it was unclear whether all judges were sufficiently scrutinizing the settlements before them. As such, the LCO recommended that certain common law standards for settlement approval be codified and that parties be required to disclose certain information about the settlement.

As of October 1, 2020, the Act requires that a settlement be fair, reasonable and in the best interests of the class to be approved. Typically, judges have interpreted this standard to mean that settlements that fall within a zone of reasonableness should be approved and often consider the "Dabbs" factors, which includes:

- Amount and nature of discovery evidence;
- Settlement terms and conditions;
- Recommendations and experience of counsel;
- Future expenses and likely duration of litigation;
- Recommendation of neutral parties;
- Number of objectors and nature of objections; and
- The presence of good faith, arm's length bargaining and the absence of collusion.

In addition, for all class actions commenced on or after October 1, 2020, the party seeking approval of a settlement must disclose information about the settlement, including why the settlement is fair and reasonable, the risks/possible recovery if litigation continues, the total number of class members and expected recovery arising from the settlement.

The legislative changes, and cases like *Grann*, signal that courts will scrutinize the settlements that come before them to determine if they are reasonable, fair and in the best interests of the class.

The decision

In November 2014, class counsel filed a statement of claim on behalf of former Crown wards. The statement alleged that the Crown breached its fiduciary, statutory and common law duties to the Crown wards or acted negligently by failing to consider and to take reasonable steps to protect and pursue the Crown wards' rights to recover compensation for damages sustained, as a result of criminal or tortious acts of which Crown wards were victims. As former Crown wards, many of the class members recounted the humiliation and abuse they suffered from assault in the guise of discipline. This included being locked outside for long periods during cold weather, being singled out for punitive treatment compared to biological children of the foster parents, being left hungry, being treated as free labour, and in some cases groomed for or being sexually abused. In the statement of claim, the class sought $100 million plus punitive damages of a further $10 million.

In January 2017, the court certified the class and the parties entered into mediation, which culminated in an agreement on January 28, 2021. The key terms of the settlement provided for:

- a lump sum settlement fund of $10 million;
- honoraria for current and former representative class plaintiffs;
- aggregate or basic compensation for each eligible class member of $3,600;
- notification of the settlement to all class members;
- the ability of class members to start individual actions for compensation from individuals or institutions that harmed them based on a limited release that allows class members to pursue tortfeasors to make other claims;
- a simplified paper based claims process that avoids cross examination;
- assurance from the Province that it will not claw back settlement funds from other social assistance that class members may be receiving; and
- a payment of class counsel fees in the amount of $2 million (in addition to costs awards received to date).

Like the 60 objectors who testified at the settlement approval hearing, the Court had difficulty in finding that the above terms were fair, reasonable and in the best interests of the class, despite Justice Pierce having no doubt that the parties engaged in good faith, arm's length bargaining and there were reputable, experienced counsel on both sides.

Primarily, the Court found that the recovery was not meaningful in comparison to the experience of abuse faced by the class members. In particular, the court noted that the net amount of the settlement funds (approximately $6 million) was less than 10 per cent of the amount initially sought by the class. The court described the $3,600 per class member as a 'nuisance value' outside the zone of reasonableness, particularly when compared to the fact that the Criminal Injuries Compensation Board awarded upwards of $25,000 plus expenses for counselling, and civil courts granted higher amounts.

Class counsel emphasized the importance of the limited release, which would allow class members to pursue individual claims against those who harmed them. The court rejected the argument that the limited release was a meaningful benefit. To leave class members to seek individual remedies undermined the purpose of class actions and was unrealistic given the hurdles of time and expense that each would face, as well as impossible for those whose records had been lost, destroyed or never properly created. This includes the many former Crown wards who were not believed when they complained of abuse and neglect.

The court also concluded that neither the Crown's concession not to clawback the settlement amount or the paper application in lieu of testimony were meaningful benefits, particularly given that the paper application required disclosure of the childhood trauma. Lastly, the court noted the unfortunate lack of an apology as a part of the settlement, stating that the "cost is minimal but the returns for the dignity and healing of the Crown wards would be substantial."

Takeaways

While the facts in the *Grann* case, such as the harms alleged by the class members, were particularly egregious, the case does provide helpful insight for class action settlements more generally:

1. Good faith, arm's length negotiations do not guarantee settlement approval. While good faith, arm's length negotiations are necessary they may not be enough to ensure that a court finds a settlement to be fair, reasonable and in the best interests of the class.
2. A Court asked to approve a settlement will consider the compensation ultimately being offered to class members, the amount initially sought and what is a reasonable range in the jurisprudence given the allegations. If a Court concludes that defendants are paying too little, it may deny settlement approval, giving class counsel a significant advantage when returning to the negotiating table.
3. It may not be a meaningful benefit to class members to provide a limited release that will permit them to pursue individual claims, since the point of class actions is to overcome the cost and difficulty that are inherent in a multitude of individual claims.
4. Counsel should pay close attention to the quantity and nature of the objections.
5. It is not always about the dollars and cents. Behaviour modification is a goal of the class actions regime and although an apology may not be relevant in all cases, the parties can think of the kinds of behaviour modification that would be beneficial to the class members, feasible for the defendant and helpful in convincing the court that a settlement is fair and reasonable.

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