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Firm ordered to pay $1.5 million in fees to charity

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Koskie Minsky LLP is seeking leave to appeal an Ontario Superior Court of Justice order to donate $1.5 million of its legal fees to charity.

The order comes as part of the decision in *Welsh v. Ontario*, a class action lawsuit that alleges the Ontario government was negligent and failed in its fiduciary duties and duties to care for students at three provincially run schools for the deaf. This failure, the lawsuit alleges, led to children, who often lived at the schools, being physically and sexually abused.

The appeal does not affect how much class members can receive, says Robert Gain, an associate at Koskie Minsky, who worked on the case.

“This does not impact the distribution of the settlement funds to the class,” says Gain. “We are in the process of finalizing that plan for distribution and will be rolling it out shortly.”

In a decision released May 24, Superior Court Justice Paul Perell approved the $15-million gross settlement, which has a maximum net value of $9.2 million. Koskie Minsky, which represented the plaintiffs, asked for $3.75 million plus HST in legal fees. The judge granted the fees on the condition that the law firm donate $1.5 million of the money to a charity or charities that benefit the deaf community. The court must approve the charities, the decision says. The judge also ordered the fees, but not the donation, be reduced in proportion to any money left in the settlement fund that reverts back to Ontario.

Students who attended Ernest C. Drury School for the Deaf in Milton and Robarts School for the Deaf in London between Sept. 1, 1963 and Aug. 23, 2016 and Sir James Whitney School for the Deaf in Belleville between Sept. 1, 1938 and Aug. 23, 2016 are eligible for the settlement, the decision says. It estimates that 4,500 students are eligible.

Four students objected to the settlement, the decision says.

Stephanie DiGiuseppe, principal at DiGiuseppe Law in Toronto, who represented Aaron Zachary Smith, an objector, says the appeal of the fees is “disappointing.”

She called the judge’s decision to order class counsel to donate to charities that support the deaf a “high point of the decision.”

“For the survivors of these communities, that’s not just a token. That’s a real fundamental part of a settlement in a case where their dignity has really been directly violated by the actions of the defendant,” she says.

Smith objected to the settlement because he felt it was too low, she says. He was also concerned because only students who were physically or sexually abused receive compensation, she says.

Perell certified the lawsuit in 2016, but he hesitated to approve the settlement, calling it “a disappointing outcome.”

The agreed amount is “inadequate to bring substantive access to justice for class members,” he wrote. The distribution plan was “unfair and unreasonable,” he wrote, because it only compensates students who allege physical and sexual abuse. The original lawsuit, filed in 2015, had claimed $325 million in damages and sought compensation for various emotional and psychological traumas, including alienation from family members, substandard education and difficulty finding employment. Family members of students could also have applied for compensation, the decision says.

Since then, class counsel has conceded that only physical and sexual abuse claims would be compensated and that no family members would receive money, the decision says.

“This class action was not a class action for the lower-hanging litigation fruit of vindicating individual victims of assault perpetrated by the guardians and teachers,” Perell wrote. “It was a class action with the aim of achieving substantive access to justice for the victims of systemic negligence and systemic breaches of fiduciary duty.”

Perell approved the settlement because it was better than a trial.

“The proposed settlement was a product of hard bargaining and it was preferable to approve the settlement than to give the class as a whole the false hope that continuing litigation would produce a more favourable outcome,” he wrote.

The judge didn’t want the government to receive money left in the settlement fund after claims were paid, so he ordered class counsel to make a charitable donation. This will benefit class members who don’t receive settlement money.

The Ontario government denied all allegations of wrongdoing, the decision says. The ministry of the attorney general declined an interview with *Law Times*, saying in an email that it did not want to comment on a case that was subject to appeal.

Under the terms of the settlement, the maximum one person can receive is $22,500 for the most severe sexual assault and $15,000 for the most severe physical assault, for a total of $37,500, or perhaps up to $45,000 depending on how many claims are awarded, the decision says.

Susan Vella**,** a senior litigator who leads the sexual and institutional abuse and Aboriginal Rights groups at Rochan Genova LLP in Toronto, says this is very low.

The average award in Ontario for pain and suffering caused by childhood sexual assault is between $144,000 and $290,000, she says. This does not include further compensation people can receive for loss of income, treatment costs and other damages.

“What [the amount in the *Welsh* case] suggests is that there was a significant discount for litigation risk that must have been taken into account,” Vella says.

She says non-monetary compensation, such as an apology or public commemoration of some sort, helps people heal.

Ordering class counsel to donate part of the fees to a charity is “a very unusual thing to do,” says Jasminka Kalajdzic, a University of Windsor law professor who studies class actions. Judges can’t change the amount of an approved settlement, she says. They can order counsel to lower their fees if they think they are too high, she says.

It’s difficult to determine what is reasonable in a tort case like this, she says.

“There’s no way to identify what the overall damage for the entire class is. You can’t measure it by looking at, for example, profit,” she says. “This isn’t a situation where the government defendant profited by their wrongdoing.”