

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
TERRY EMMS) *David Thompson and Matthew G. Moloci for*
) *the Plaintiff*
Plaintiff)
)
- and -)
)
CHRISTIAN ECONOMIC ASSISTANCE) *Ward Branch for the Defendant Christian*
FOUNDATION and ONTARIO) *Economic Assistance Foundation*
ALLIANCE OF CHRISTIAN SCHOOL)
SOCIETIES) *William Chalmers for the Defendant Ontario*
Defendants) *Alliance of Christian School Societies*
)
)
Proceedings under the *Class Proceedings Act, 1992*) HEARD: December 8, 2015
)

PERELL, J.

REASONS FOR DECISION

[1] Pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the Plaintiff Terry Emms commenced a proposed class action against the Christian Economic Assistance Foundation (“CEAF”) and the Ontario Alliance of Christian School Societies (“OACSS”). On consent, Mr. Emms moves for certification of the action, approval of a settlement, and approval of Class Counsel’s fee, including a \$5,000 honorarium for Mr. Emms. For the reasons that follow, the motion is granted.

[2] CEAF was a registered charity, whose charitable status was revoked by the Canada Revenue Agency on July 20, 2013. Before its de-registration, CEAF, with the endorsement of the OACSS, developed a tax credit program known as a School Support Program. The idea behind the Program was that a taxpayer would receive a charitable donation receipt for the amount of tuition paid to enroll a student at a private Christian school. The Program had been designed in 1985, but in 2010, the Canada Revenue Agency disallowed the tax credits and characterized the School Support Program as a tax avoidance scheme.

[3] The result was that taxpayers like Mr. Emms, who had enrolled his son at John Knox Christian School, were denied the amounts claimed as charitable donations and were reassessed and penalized.

[4] On August 23, 2013, Mr. Emms entered into a retainer agreement with Scarfone Hawkins LLP that provides for a 30% contingency fee calculated after all expenses, including disbursements, have been deducted.

[5] On August 29, 2013, Mr. Emms commenced a proposed class action against CEAF and OACSS.

[6] The proposed Class is defined as follows:

All individuals who participated in the SSP for the taxation years 2009, 2010, 2011 and 2012, and who were reassessed by CRA, which reassessments resulted in the disallowance of the charitable donation tax credits related to participation in the SSP.

[7] The proposed common issues for certification and settlement approval purposes are as follows:

(a) Was it a term of the contract of participation in the SSP that participants would receive a charitable donation receipt that would be recognized by CRA for tax credit purposes?

(b) If the answer to (a) is yes, has the contract been breached by the Defendants?

(c) Did the Defendants owe a duty of care to participants?

(d) If the answer to (c) is yes, what was the nature and extent of that duty?

(e) Has the duty of care owed by the Defendants to SSP participants been breached?

(f) Are the Defendants liable to Class Members for damages?

(g) If the answer to (f) is yes, what is the amount of that liability?

(h) Does the conduct of the Defendants justify an award of punitive damages in the circumstances?

(i) If the answer to (h) is yes, what is the amount of punitive damages to be awarded?

[8] Mr. Emms and CEAF and OACSS have negotiated a settlement under which the Defendants consent to certification for settlement purposes. Under the settlement, without admitting liability, the Defendants have agreed to pay up to \$1.5 million in exchange for a release of the claims against them.

[9] After deduction of costs of settlement administration, Class Counsel fees, taxes and disbursements and costs of notice, the balance of the settlement funds will be distributed to Class Members *pro rata* subject to a maximum of 46.41% of their total donation (46.41% is the maximum combined federal and provincial tax bracket). The amount available per Class Member will be dependent upon the number of Class Members who submit a claim form. Class Counsel will be responsible for administering the settlement and administration costs are capped at \$100,000.00 plus taxes. If there is a residue, it will be remitted to the Defendants, but a residue is not anticipated.

[10] The services performed by Class Counsel before this hearing have a value of approximately \$248,290.66 inclusive of HST.

[11] Class Counsel is asking to be paid its contingency fee of 30% of the Settlement Fund as agreed to in the retainer agreement, exclusive of taxes and disbursements. Its fee request is \$508,500.00 inclusive of tax. Disbursements incurred inclusive of tax total \$12,904.27.

[12] Class Counsel seeks approval of a \$5,000 honorarium for Mr. Emms.

[13] Mr. Emms approves of the settlement and Class Counsel's fee request. There were no objectors to the settlement after notice was given to the putative Class Members.

[14] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify an action as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims or defences of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and there is a workable litigation plan.

[15] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22. However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements: *Bellaire v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 16; *National Trust Co. v. Smallhorn*, [2007] O.J. No. 3825 (S.C.J.) at para. 8; *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.) at para. 9.

[16] I am satisfied that in the context of the proposed settlement that all the criterion for certification have now been satisfied and I, therefore, conclude that this action should be certified for settlement purposes.

[17] Section 29(2) of the *Class Proceedings Act, 1992* provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.) at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[18] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and, (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra* at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra*, at para. 45; *Kidd v. Canada Life Assurance Company*, *supra*.

[19] In determining whether to approve a settlement, the court, without making findings of fact about the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the

claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General) supra*, at para. 10. An objective and rational assessment of the pros and cons of the settlement is required: *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

[20] In my opinion, having regard to the various factors used to determine whether to approve a settlement, the Settlement Agreement should be approved.

[21] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.) at para. 13; *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.) at para 25.

[22] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters 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: *Smith v. National Money Mart, supra*, at paras. 19-20; *Fischer v. I.G. Investment Management Ltd., supra*, at para. 28.

[23] In the circumstances of this case, I am satisfied that Class Counsel's fee request is fair and reasonable and it, along with Mr. Emms' honorarium, should be approved.

[24] Orders accordingly.



Perell, J.

CITATION: Emms v. Christian Economic Assistance Foundation, 2015 ONSC 7664
COURT FILE NO.: CV-13-487917CP
DATE: 20151208

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

TERRY EMMS

Plaintiff

– and –

**CHRISTIAN ECONOMIC ASSISTANCE
FOUNDATION and ONTARIO ALLIANCE OF
CHRISTIAN SCHOOL SOCIETIES**

Defendants

REASONS FOR DECISION

PERELL J.

Released: December 8, 2015