

CITATION: Goyal v. Niagara College of Applied Arts and Technology, 2020 ONSC 739
COURT FILE NO.: CV-15-534310CP
DATE: 2020/02/07

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
ANISH GOYAL and CHINTAN)	<i>Darcy R. Merkur and Lucy Jackson for the</i>
ZANKAT)	<i>Plaintiffs</i>
)	
Plaintiffs)	
)	
- and -)	
)	
)	
NIAGARA COLLEGE OF APPLIED)	
ARTS AND TECHNOLOGY)	
)	<i>John C. Field and Dianne Jozefacki for the</i>
Defendant)	<i>Defendant</i>
)	
)	
-and-)	
)	
THE ATTORNEY GENERAL OF)	
CANADA)	
)	
)	
Third Party)	
)	
Proceeding under the <i>Class Proceedings</i>)	HEARD: February 6, 2020
<i>Act, 1992</i>)	

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In 2015, pursuant to the *Class Proceedings Act, 1992*,¹ Anish Goyal and Chintan Zankat commenced a proposed class action against the Niagara College of Applied Arts and Technology. Messrs. Goyal and Zankat were international students at the College, and they alleged that Niagara College misrepresented that its General Arts and Science Program would qualify for a work permit under Citizenship and Immigration Canada/Immigration, Refugees and Citizenship

¹ S.O. 1992, c. 6.

Canada's ("Immigration Canada") Post-Graduation Work Permit Program ("PGWP Program").

[2] This is a motion for certification of their class action for settlement purposes, for approval of the \$3 million settlement, for approval of Class Counsel's fee (\$950,750, all inclusive), and for approval of honoraria for Messrs. Goyal and Zankat (\$10,000 each). The Plaintiffs also seek ancillary relief, including the appointment of Epiq Class Action Services Canada as Administrator of the settlement funds.

[3] For the reasons that follow, the motion is granted.

B. Facts

[4] Niagara College is a college of applied arts and technology established under the *Ontario Colleges of Applied Arts and Technology Act, 2002*.² It operates as community college in Welland, Ontario.

[5] For some time, pursuant to the *Immigration and Refugee Protection Act* and its regulations,³ Immigration Canada has had a program known as the Post-Graduation Work Permit Program ("PGWP Program"). Under this Program, qualifying students who have graduated from a participating Canadian post-secondary school institution are issued an open work permit for any type of employment without the prerequisite of an existing job offer. This work permit has a term from eight months up to a maximum of three years.

[6] Niagara College offered a General Arts and Science Program that it promoted to international students as means to qualify for a three-year work permit under Immigration Canada's PGWP Program.

[7] Mr. Goyal was an international student from India who had a B.A. in engineering and who had completed a one-year project management program at Centennial College in Toronto. Mr. Goyal enrolled in the General Arts and Science Program Program at Niagara College in September 2014 for the purpose of securing a three-year PGWP upon graduation. He graduated in January 2015 after taking six courses, five of which were completed online. He applied for a PGWP and it was denied by Immigration Canada because of the number of online courses. Denied a work permit, he was informed that he had to leave Canada by November 2015. With the assistance of an immigration lawyer, he applied for a temporary residence permit to remain in Canada. Until his status was resolved his employment was compromised and he was unable to work full time.

[8] Mr. Zankat was an international student from India who had a commerce degree and who had completed a one-year financial planning program at George Brown College in Toronto. Mr. Zankat enrolled in the General Arts and Science Program Program at Niagara College in May 2014 for the purpose of securing a three-year PGWP upon graduation. He graduated in August of 2014 after taking six courses, five of which were completed online. He applied for the PGWP and as was the case of Mr. Goyal, Mr. Zankat's application was refused and he was informed that he had to leave Canada by May 2015. He applied for a further student permit and was allowed to remain in Canada. He was unable to work while his status was under review.

[9] Mr. Goyal and Mr. Zankat retained Thomson Rogers to prosecute an action against Niagara

² S.O. 2002, c. 8, Sch. F.

³ S.C. 2001, c. 27. *Immigration and Refugee Protection Regulations*, SOR/2002-227.

College. There was a contingency fee retainer agreement.

[10] With instructions from Messrs. Goyal and Zankat, Thomson Rogers entered into a co-counsel agreement with Ravin Jain of Green and Spiegel LLP, an immigration law lawyer.

[11] Messrs. Goyal's and Zankat's action against Niagara College was commenced on August 13, 2015. In their proposed class action, Messrs. Goyal and Zankat alleged Niagara College misrepresented that students who graduated from the General Arts and Science Program would be eligible for the three-year PGWP Program.

[12] The proposed class definition is as follows:

(a) A "Primary Class": all international students who graduated from the GAS [General Arts and Science] Program at Niagara College between September 1, 2013 and August 31, 2016 who were initially denied a 3 year PGWP due to distance learning and subsequently reapplied for, and obtained, a PGWP under Operational Bulletin 631; and

(b) a "Secondary Class": all international students who graduated from the GAS Program at Niagara College between September 1, 2013 and August 31, 2016 who were initially denied a 3-year PGWP due to distance learning and who did not subsequently receive a PGWP under Operational Bulletin 631.

[13] It is estimated that there are 114 Primary Class Members and 55 Secondary Class Members.

[14] The Plaintiffs pleaded causes of action in negligence, negligent misrepresentation, fraudulent misrepresentation, breach of the *Consumer Protection Act, 2002*⁴ and breach of the *Immigration and Refugee Protection Act*.⁵

[15] The Plaintiffs allege that as a result of the misrepresentations, the Class Members suffered general damages, loss of past and future income and income earning capacity, loss of competitive advantage, delayed entry into the workplace and various out-of-pocket expenses.

[16] The Plaintiffs propose the following common issues:

a. Did Niagara College represent to the Class Members that:

i. successful completion of the General Arts and Science Program would qualify Class Members for a three-year PGWP? and/or

ii. it designed the General Arts and Science Program and courses such that graduation Class Members would qualify for a three-year PGWP under Citizenship and Immigration Canada rules (together the "Work Permit" Representations")

b. If the Work Permit Representations were made, were they untrue, inaccurate and/or misleading? Was Niagara College negligent in making the Work Permit Representations? and

c. Did Niagara College breach Part III of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A?

[17] After the commencement of the proposed class action, on December 7, 2015, the Federal

⁴ S.O. 2002, c. 30, Sch. A.

⁵ S.C. 2001, c. 27.

Court released its decision in *Appidy v. Canada (Citizenship and Immigration)*.⁶ Mr. Appidy was an international student and a graduate of Niagara College's General Arts and Science Program. Before his admission to Niagara College, he had studied at Fanshawe College in London, Ontario, and he had received transfer credits when he enrolled at Niagara College. Mr. Appidy sought judicial review of Immigration Canada's denial of his application for a work permit under the PGWP Program. Mr. Appidy's judicial review application was successful. The Federal Court held that Immigration Canada's decision had been unreasonable because it had considered only the courses that had been taken at Niagara College and did not take into account courses that Mr. Appidy had taken at Fanshawe College.

[18] After the release of the *Appidy* decision, on July 15, 2016, Niagara College delivered its Statement of Defence, and on July 18, 2016, Niagara College issued its Third Party Claim against Immigration Canada for negligence and misfeasance in public office.

[19] In its Statement of Defence, Niagara College denied making any misrepresentations and alleged that Immigration Canada had unreasonably and without lawful authority changed the terms of the PGWP program.

[20] In April 2018, the Attorney General was successful in having the negligence claim struck out for failure to show a cause of action.⁷ Niagara College, however, was allowed to advance a claim for misfeasance in public office in the third party proceeding.

[21] The parties had mediation sessions in January with the Honourable Mr. Warren Winkler presiding and another mediation in September 2019 with the Honourable Mr. Collin Campbell presiding. They came to a settlement agreement subject to court approval. The parties signed a Memorandum of Agreement on September 10, 2019.

[22] The value of the settlement is \$3 million. The major terms of the settlement agreement are as follows:

- Niagara College will consent to the certification of the action for settlement purposes.
- Class Counsel will be responsible for the distribution of the settlement proceeds.
- \$2,317,500 payable to the Primary Class Members.
- Primary Class Members are eligible to be paid \$20,000 per claimant.
- \$412,500 payable to Secondary Class Members.
- Secondary Class members are eligible to be paid \$7,500 per claimant.
- \$10,000 each payable to the Representative Plaintiffs.
- \$250,000 towards Class Counsel's legal costs, disbursements and administration inclusive of HST.
- If the action is certified and the settlement approved, the Class Members will receive a detailed notice setting out their opt-out rights and their rights to participate in the settlement.
- The settlement is condition on an opt-out threshold (10 or greater opt-outs) not being

⁶ 2015 FC 1356.

⁷ *Goyal v. Niagara College of Applied Arts and Technology*, 2018 ONSC 2768

exceeded.

- The settlement is conditional on the Attorney General of Canada consenting to an Order dismissing Niagara College's claim against it without costs.
- The parties will seek a final Order that will contain, among other things, a release of Niagara College except with respect to the enforcement of the Order and the terms of the settlement. The final Order will dismiss the class action on a without costs basis, once the terms of the settlement have been carried out.

[23] Class Counsel and the Representative Plaintiffs recommend approval of the settlement.

[24] It is estimated that the costs of administration will be under \$25,000.

[25] The Notice of the Settlement Approval Motion was posted on Thomson Rogers webpage on or about December 16, 2019. Notice was also sent by regular mail to all Class Members on or about December 20, 2019. No objections to the settlement have been received.

[26] Class Counsel is requesting a legal fee of \$825,000 plus HST of \$107,250 and disbursement of \$18,500 for a total payment of \$950,750. Of this sum, Green and Speigel LLP will allocate 20% for the co-counsel fee.

C. Discussion and Analysis

1. Certification for Settlement Purposes

[27] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) the claims or defences of the class members raise common issues of fact or law; (4) a class proceeding would be the preferable procedure; and (5) 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.

[28] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met.⁸ However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements.⁹

[29] I am satisfied that the criterion for certification for settlement purposes are satisfied in the immediate case.

2. Settlement Approval

[30] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

⁸ *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 22 (S.C.J.).

⁹ *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.) at para. 9; *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 16 (S.C.J.); *National Trust Co. v. Smallhorn*, [2007] O.J. No. 3825 at para. 8 (S.C.J.).

Discontinuance, abandonment and settlement

29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

[31] 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.¹⁰

[32] 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 the 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.¹¹

[33] In determining whether to approve a settlement, the court, without making findings of fact on 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.¹² An objective and rational

¹⁰ *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

¹¹ *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.); *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69; *Fakhri v. Alfalfa's Canada, Inc.*, 2005 BCSC 1123.

¹² *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

assessment of the pros and cons of the settlement is required.¹³

[34] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.¹⁴ A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.¹⁵

[35] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the terms and the scheme of distribution under the proposed settlement.¹⁶

[36] In my opinion, the settlement in the immediate case is a good settlement and all fair, reasonable and in the best interests of the Class Members. I approve the Settlement Agreement.

3. Fee Approval

[37] 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.¹⁷

[38] 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.¹⁸

[39] The court must consider all the factors and then ask, as a matter of judgment, whether the

¹³ *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

¹⁴ *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.); *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.).

¹⁵ *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 at para. 13 (S.C.J.).

¹⁶ *Welsh v. Ontario*, 2018 ONSC 3217.

¹⁷ *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).

¹⁸ *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233.

fee fixed by the agreement is reasonable and maintains the integrity of the profession.¹⁹

[40] In my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, Class Counsel's fee request in the immediate case should be approved.

4. Honorarium

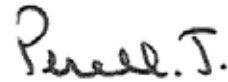
[41] Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated by an honorarium.²⁰ However, the court should only rarely approve this award of compensation to the representative plaintiff.²¹ Compensation for a representative plaintiff may only be awarded if he or she has made an exceptional contribution that has resulted in success for the class.²²

[42] Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases. In determining whether the circumstances are exceptional, the court may consider among other things: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and activities undertaken in advancing the litigation; (e) communication and interaction with other class members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.²³

[43] In my opinion, the honorarium requests in the immediate case should be granted.

D. Conclusion

[44] For the above reasons, I grant the motion.



Perell, J.

Released: February 7, 2020

¹⁹ *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (B.C.C.A.).

²⁰ *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 at para. 28 (Gen. Div.).

²¹ *Sutherland v. Boots Pharmaceutical plc*, *supra*; *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 71. (S.C.J.); *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.).

²² *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at paras. 55-71.

²³ *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.

CITATION: Goyal v. Niagara College of Applied Arts and Technology, 2020 ONSC 739
COURT FILE NO.: CV-15-534310CP
DATE: 2020/02/07

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ANISH GOYAL and CHINTAN ZANKAT
Plaintiffs

- and -

**NIAGARA COLLEGE OF APPLIED ARTS AND
TECHNOLOGY**
Defendant

- and -

THE ATTORNEY GENERAL OF CANADA
Third Party

REASONS FOR DECISION

PERELL J.

Released: February 7, 2020