

CITATION: Sagharian v. Ontario (Education), 2012 ONSC 3478
COURT FILE NO.: CV-05CV287168-CP
DATE: 20120615

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992, S.O. 1992, C. 6*

BETWEEN:

)	
)	
CHRISTOPHER SAGHARIAN, a minor by his)	<i>David Baker, for the plaintiffs</i>
Litigation Guardian, Taline Sagharian, ANDREW)	
CESARIO, a minor by his Litigation Guardian,)	
Patricia Cesario, JOSHUA MARTINI, a minor by)	
his Litigation Guardian, Anna Martini, NOAH)	
MARTINI, a minor by his Litigation Guardian,)	
Anna Martini, BRANDON ROBINSON, a minor)	
by his Litigation Guardian, Karen Robinson,)	
ADAM SHANE, by his Litigation Guardian,)	
Lynn Shane, TALINE SAGHARIAN and)	
HAROUT SAGHARIAN, PATRICIA CESARIO)	
and PASQUALE CESARIO, ANNA MARTINI)	
and UMBERTO MARTINI, KAREN)	
ROBINSON and LESTER ROBINSON, LYNN)	
SHANE and DAVID SHANE)	

Plaintiffs

- and -

)	
)	
HER MAJESTY THE QUEEN IN RIGHT OF)	<i>Robert E. Charney, for Her Majesty The</i>
ONTARIO, AS REPRESENTED BY THE)	<i>Queen in Right of Ontario</i>
MINISTER OF EDUCATION, THE MINISTER)	
OF CHILDREN AND YOUTH SERVICES)	

- and -

)	
)	
YORK REGION DISTRICT SCHOOL BOARD,)	<i>Michael Peerless, for the School Boards</i>
YORK CATHOLIC DISTRICT SCHOOL)	
BOARD, PEEL DISTRICT SCHOOL BOARD,)	
DUFFERIN-PEEL CATHOLIC DISTRICT)	
SCHOOL BOARD, TORONTO DISTRICT)	
SCHOOL BOARD, TORONTO CATHOLIC)	
DISTRICT SCHOOL BOARD, DURHAM)	

DISTRICT SCHOOL BOARD)
)
 Defendants)

)
) **HEARD:** April 25, 2012

C. HORKINS J.

[1] The statement of claim in this action was issued under the *Class Proceedings Act 1992*, S.O. 1992, c. 6 ("*Class Proceedings Act*") on April 5, 2005.

[2] The plaintiffs are autistic children and their parents. The statement of claim alleges that the defendants failed to provide or to fund Applied Behavioural Analysis ("ABA") intervention, speech therapy, occupational therapy and other programs and services for persons with autism as part of Ontario's education system. The plaintiffs seek declaratory relief pursuant to the *Canadian Charter of Rights and Freedoms* ("*Charter*") as well as damages for the violations of the rights of class members alleged in the claim.

[3] As a result of orders made in this action and the development of relevant law, there is no chance that this action will succeed. As a result, the plaintiffs seek an order from the court discontinuing this proceeding pursuant to s. 29 of the *Class Proceedings Act*. All parties consent to this order on a without costs basis. None of the plaintiffs are seeking to convert this proceeding into an individual action.

[4] The Office of the Children's Lawyer has been given notice of this motion and takes no position regarding the relief that is sought.

[5] Relief specific to the plaintiff Andrew Cesario is requested. Patricia Cesario is a plaintiff and the litigation guardian of her son Andrew. On October 25, 2009, Patricia Cesario died. As a result, the following orders are issued on consent:

- (i) Pasquale Cesario is appointed the Litigation Guardian for the minor Plaintiff, Andrew Cesario.
- (ii) The estate of Patricia Cesario, as represented by its executor, Pasquale Cesario replaces Patricia Cesario as a plaintiff.
- (iii) Service of the Motion Record on Pasquale Cesario on April 16, 2012 is deemed to be service on Andrew Cesario's Litigation Guardian and the Executor of the Estate of Patricia Cesario in compliance with the *Rules of Civil Procedure*.

BACKGROUND

[6] In September 2006, the defendant Her Majesty The Queen in Right of Ontario ("Ontario") brought a motion to strike out the claims against it. The defendant school boards also moved to strike out paragraphs from the statement of claim due to a failure to plead material facts and because allegations in impugned paragraphs were frivolous, vexatious or an abuse of process.

[7] Cullity J. granted partial relief to the defendants on March 12, 2007 (*Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, [2007] O.J. No. 876), striking the portions of the claim founded on negligence, misfeasance in public office, *parens patriae*, fiduciary duty and s. 7 of the *Charter*. Cullity J. did not strike the claims based on s. 15 of the *Charter*.

[8] Cullity J.'s decision turned in large part on his interpretation of the Ontario Court of Appeal decision in *Wynberg v. Ontario*, (2006), 82 O.R. (3d) 561 (C.A.) which was an action brought by other parents of children with autism involving similar, if not the same claims as those in this case. The action against Ontario in *Wynberg* included a claim of age-based discrimination and a claim of disability discrimination in violation of s. 15 of the *Charter* for the government's failure to provide certain services to the plaintiff children. In *Wynberg*, the Court of Appeal allowed an appeal from the trial judge's decision and dismissed the *Wynberg* action in its entirety.

[9] The plaintiffs appealed the decision of Cullity J. and, on May 23, 2008, the Court of Appeal dismissed the plaintiffs' appeal and allowed the cross-appeal of the defendants. The Court of Appeal struck the age based s. 15 claim in its entirety. It also struck the disability based s. 15 claim with leave to amend. The disability claim as pleaded was not different from the claim that was struck in *Wynberg*. While the Court of Appeal granted leave to amend the disability claim, it stated at para. 24 it is "far from clear that the appellants can plead a disability claim that is compellingly different from that already determined in *Wynberg*" (*Sagharian (Litigation guardian of) v. Ontario (Minister of Education)*, [2008] O.J. No. 2009).

[10] The Court of Appeal stated at para. 31 that if the s. 15 discrimination claim could be successfully "restructured" then it would be "necessary to restructure their s. 1 claim, which argues that the s. 15(1) breaches are not reasonable and justifiable limits within the context of a s. 1 analysis." The s. 1 claim was struck with leave to amend.

[11] The statement of claim also alleged negligence against the school boards. The Court of Appeal agreed with Cullity J. that the pleading did not "delineate any separate operational decisions by the school boards" and, as a result, such claims would fail. While there was no motion by the school boards to strike this claim, the plaintiffs were given leave to amend since the pleading as it stood could not survive a motion to strike.

[12] The plaintiffs' application for leave to appeal to the Supreme Court of Canada was dismissed the plaintiffs' on December 4, 2008.

[13] Although the plaintiffs were given the opportunity to amend their pleading they have not done so because the only facts available to be pled are those based on policy decisions relating to funding and delivery of ABA and other related services in Ontario's education system.

ANALYSIS

[14] Pursuant to s. 29 of the *Class Proceedings Act*, a proceeding that has been commenced under this act cannot be discontinued without the approval of this court: *Epstein v. First Marathon Inc.*, [2000] O.J. No. 452 (S.C.J.); *Vermell v. Barnado's* (2004), 73 O.R. (3d) 13 (S.C.J.) at paras. 11- 14.

[15] The policy reasons for requiring court approval for the discontinuance of a proposed class proceeding include: (1) deterring plaintiffs and class counsel from abusing the class action procedure by bringing a meritless class proceeding (a so-called strike suit) to extract a payment as the price of discontinuing the class proceeding; and (2) providing an opportunity to ameliorate any adverse effect of the discontinuance on class members who might be prejudiced by the discontinuance: see *Hudson v. Austin*, [2010] O.J. No. 2015 (S.C.J.); *Durling v. Sunrise Propane Energy Group Inc.*, [2009] O.J. No. 5969 (S.C.J.) at paras. 14-29; *Sollen v. Pfizer*, [2008] O.J. No. 4787 (C.A.), aff'g [2008] O.J. No. 866 (S.C.J.); *Campbell v. Canada (Attorney General)*, [2009] F.C.J. No. 50 (T.D.).

[16] The test for approving discontinuance concerns questions of whether the putative class members will be prejudiced. The abandonment or discontinuance does not have to be beneficial or in the best interests of the putative class members. See *Coleman v. Bayer Inc.*, [2004] O.J. No. 1974 (S.C.J.) at paras. 30-39. See also: *Coleman v. Bayer Inc.*, [2004] O.J. No. 2775 (S.C.J.); *Burnett Estate v. St. Jude Medical Inc.*, [2008] B.C.J. No. 192 (S.C.); *Bouchanskaia v. Bayer Inc.*, [2004] B.C.J. No. 2101 (S.C.).

[17] A motion for withdrawal or discontinuance should be carefully scrutinized, and the court should consider, among other things, whether the proceeding was commenced for an improper purposes and whether the defendant will be prejudiced. See *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (C.A.); *Holmes v. Jastek Master Builder 2004 Inc.*, [2007] S.J. No. 689 (Q.B.) at paras. 16-18.

[18] This motion does not raise any of the above noted concerns. Counsel and the plaintiffs have carefully considered the viability of this proceeding. They have concluded that based on the law and the facts that are available to be pleaded, that there is no prospect of success. Understandably, the plaintiffs are concerned about their exposure to costs if this proceeding is not discontinued.

[19] Putative class members were given notice of this motion. No one objected to this motion. They must be given notice of this discontinuance which I have provided for below.

[20] In addition to the orders made in paragraph 5 above, I order that this action is discontinued on the following terms:

- (1) The discontinuance will be effective on October 31, 2012.

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- (2) Within 30 days of release of this decision counsel for the plaintiffs and counsel for the school boards shall post on their respective websites for a period of one year, a copy of this order and reasons.
- (3) Within 30 days of release of this decision counsel for the plaintiffs shall send a copy of this court's order and reasons to Autism Ontario for publication on its website.



C. Horkins J.

Released: June 15, 2012

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Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTER OF EDUCATION, THE MINISTER OF CHILDREN AND YOUTH SERVICES

- and -

YORK REGION DISTRICT SCHOOL BOARD, YORK CATHOLIC DISTRICT SCHOOL BOARD, PEEL DISTRICT SCHOOL BOARD, DUFFERIN-PEEL CATHOLIC DISTRICT SCHOOL BOARD, TORONTO DISTRICT SCHOOL BOARD, TORONTO CATHOLIC DISTRICT SCHOOL BOARD, DURHAM DISTRICT SCHOOL BOARD

Defendants

REASONS FOR JUDGMENT

C. Horkins J.

Released: June 15, 2012