IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Fontaine et al.* v. *Canada et al.,* 2006 YKSC 63

Date: 20061215
Docket No.: S.C. No. 05-A0140
Registry: Whitehorse

Between:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANNE DENE, JAMES FONTAINE in his personal capacity and in his capacity as Executor of the Estate of Agnes Mary Fontaine, deceased, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE McCULLUM, CORNELIUS McCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

And

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS IN THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINSTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL,

HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME – AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSTITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE AND INSTITUT DES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE, LES SOEURS DE JESUS-MARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA COPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTRÉAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITÉ DES T.N.O. HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC. – LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON – THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES – GRANDIN, LES OBLATES DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE – ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD , ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIÉPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONAIRES OBLATES SISTERS DE ST. BONIFACE – THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER – THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIE – FORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC.

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Kirk Baert	Counsel for the Plaintiffs (National Certification Committee)
Laura Cabott and Dan Shier	Independent Counsel for the Plaintiffs
Debra Fendrick	Independent Counsel
John Phillips	Counsel for the Assembly of First Nations
Janice Payne	Counsel for the Inuit Organizations
Catherine Coughlan	Counsel for Canada

Alex Pettingill — Counsel for the Protestant Church Entities
Pierre Baribeau — Counsel for the Catholic Church Entities

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Indian Residential School system has been a dark period of Canadian history. The purpose of the system was to destroy the language and culture of the aboriginal people of Canada. The government of Canada and certain churches separated aboriginal children from their families and placed them in inadequately funded institutions where they were prohibited from speaking their languages and practising their cultures. There are an estimated 79,000 Indian Residential School survivors alive today, down from an estimated 83,000 in 2001. Approximately 15,000 are pursuing individual tort claims against Canada and the churches. It is estimated that Indian Residential School survivors are dying at a rate of approximately 1,000 to 1,300 per year.

[2] Our court system is unable to accommodate such a large number of claims in a timely manner. The current number and location of court claims are as follows:

Active Litigation and Plaintiffs	Statement of Claims	Plaintiffs
Alberta	1,432	3,950
British Columbia	313	830
Manitoba	289	1,157
New Brunswick	1	1
NWT	20	29
Nova Scotia	1	582
Nunavut	6	191
Ontario	101	657
Quebec	16	89
Saskatchewan	2,112	2,949
Yukon	46	103
Total Active	4,337	10,538

[3] Canada entered into a Political Agreement with the Assembly of First Nations on May 30, 2005, committing to work together to achieve “a just and fair resolution of the Indian Residential School legacy”.

[4] Canada appointed former Supreme Court of Canada Justice Frank Iaccobucci to negotiate a Canada wide settlement with representatives of the survivors and their families, representatives of aboriginal organizations, including the Assembly of First Nations and Inuit groups, and church groups. The negotiations were prolonged and difficult but resulted in an Agreement in Principle signed on November 20, 2005, and a final Settlement Agreement signed by June 2006.

[5] The lawyers for all parties now appear in nine separate jurisdictions (Alberta, British Columbia, Manitoba, Northwest Territories, Nunavut, Ontario, Quebec, Saskatchewan and Yukon) seeking the certification of the class action and approval of the settlement. If the court approves, there are two alternatives. It can approve the settlement unconditionally and provide supervision to ensure that timelines and payments are met. Or, it can approve conditionally in an attempt to improve the settlement and send the parties back to the negotiating table. I have decided to certify the class action and approve the settlement unconditionally, retaining supervisory jurisdiction so the parties may return to court for directions or remedies. The only certainty in sending the parties back to the negotiating table, in the best case scenario, is further delay. Delay has a serious impact on Indian Residential School survivors who are dying at a rate of 25 a week.

Have You Ever Heard a Whole Village Cry?

[6] This question was asked by a First Nation woman who spoke in court. It captures in one sentence the horror and pain experienced by the parents and children in

aboriginal communities when government and church representatives appeared in cars, trucks, vans and planes, to take the children away to institutions. It is not possible to do justice to the stories of 79,000 aboriginal people in this judgment. Suffice it to say that although there were some benefits, the majority of the survivors found it to be a devastating experience. It was all the more so for those who suffered physical assaults, sexual assaults and psychological harm.

[7] The Royal Commission of Aboriginal Peoples concluded that the Residential School system was a blatant attempt to re-socialize aboriginal children with the values of European culture and obliterate aboriginal languages, traditions and beliefs. The inferior education, mistreatment, neglect and abuse that resulted are a concern to all Canadians. The Assembly of First Nations and National Chief Phil Fontaine have pursued a Canada wide settlement since 1990.

THE SETTLEMENT

[8] The settlement provides compensation for individual survivors as well as healing programs and benefits for their families and communities. It is a compensation package that is beyond the jurisdiction of any court to create. It is much more than the settlement of a tort-based class action; it is a Political Agreement. The Settlement Agreement itself, without schedules, is 78 pages in length. It is signed by Canada, the Assembly of First Nations and Inuit organizations as well as church entities and the numerous lawyers involved in the negotiation. It consists, among other things, of:

1. <u>The Common Experience Payment</u>

[9] Each survivor will be eligible to receive $10,000 for their first year of attendance at an Indian Residential School and $3,000 for each subsequent year. Canada will set aside a fund of $1.9 billion in order to compensate each student living at May 30, 2005.

If there is a surplus of funds in excess of $40 million, former students will receive an additional sum of up to $3,000 each. Any surplus under $40 million will go to aboriginal organizations for healing and education initiatives. The $40 million threshold was arrived at by taking into account the administrative costs of a payout to individual survivors. If $1.9 billion proves insufficient, Canada will supplement the funding. An applicant who is denied may appeal to the National Administration Committee, and if denied at that level, to the appropriate court. I will address the National Administration Committee below.

2. The Independent Assessment Process

[10] This part of the Settlement Agreement requires the greatest scrutiny as it requires claimants to release their court actions against the government and churches in exchange for the claims permitted under the Independent Assessment Process.

[11] The Independent Assessment Process is intended to replace and improve the Alternative Dispute Resolution process which began in 2003 and has resolved 1,000 of the approximately 5,000 outstanding claims in that process.

[12] The Alternative Dispute Resolution process uses a team of carefully selected adjudicators to, in effect, act as judges to hear and decide claims. Although it is an improvement over the court litigation process, it was estimated in 2004 that it would take 53 years to conclude the process. To address this in the Independent Assessment Process, Canada has agreed to increase the number of adjudicators from 48 to 86 and hold 2,500 hearings per year. Canada has agreed to settle all these claims within 6 years of the implementation date of the Settlement Agreement.

[13] The Alternative Dispute Resolution has many draw backs identified by claimants and the Assembly of First Nations. It is limited to sexual assaults and serious physical assaults. The Catholic Church was not part of the process so some claimants only

received 70% of their award. The Alternative Dispute Resolution process is completely controlled by Canada and can be changed unilaterally.

[14] The Independent Assessment Process has certain enhancements over the Alternative Dispute Resolution process. It provides greater certainty as it would be part of a court order. It will address claims for sexual assaults, serious physical assaults and serious psychological harm. It has increased the overall compensation from a former limit of $245,000 to $275,000 and all individuals will receive 100% of their award. The list of Indian Residential Schools has been expanded to include boarding facilities. Sexual abuse by other students is included and liability for sexual and physical abuse extends to all adult persons lawfully on the school premises. Actual income loss, which was not compensable previously, has been added with awards up to $250,000. In very serious cases, the adjudicator can refer the income issue to court where there is no compensation ceiling. Provision has also been made for settlement of claims without a hearing.

[15] The Independent Assessment Process is set out in a 67-page document attached as a schedule to the Settlement Agreement. The purpose of such a document is to ensure uniformity in the processing of claims by the adjudicators. There is a review process that permits a claimant to ask the Chief Adjudicator or designate to review an adjudicator’s decision to determine if it contains a palpable and overriding error.

[16] Two classes of admittedly weaker claims are not included in the Independent Assessment Process. They are family class members who are related to survivors and deceased class members who resided at Indian Residential Schools between 1920 and 1997, but died before May 30, 2005. However, these classes may opt out and go to

court. They are also eligible to participate in the healing and reconciliation components of the settlement set out below.

3. The Truth and Reconciliation Commission and Commemoration

[17] The Settlement Agreement allocates $60 million to create a Truth and Reconciliation Commission. The purpose of the Commission is to allow survivors, their families and communities, churches and government, to participate in a collective process to facilitate reconciliation as well as create a permanent record. The Church groups will co-operate with the Commission. The Commission will receive approximately $20 million to allocate to communities for memorials or ceremonies.

4. Healing

[18] Canada will pay $125 million to the Aboriginal Healing Foundation to fund culturally appropriate healing programs. Canada also agrees to continue to provide “existing mental health and emotional support services” to survivors in the Independent Assessment Process, Common Experience Payment recipients, and those participating in truth and reconciliation or commemorative initiatives.

5. Legal Fees

[19] Canada will pay the legal fees to three groups of lawyers involved in the various class actions and Settlement Agreement no later than 60 days after the Implementation Date, which will be well before survivors will receive their Common Experience Payments. The National Consortium will receive $40 million, the Merchant Law Group up to $40 million and $20 million will go to the Independent Counsel. These fees relate to the various class actions across the country but not the fees to be charged to individuals involved in the Independent Assessment Process. The total potential legal

fee of $100 million represents a recovery in the order of 5% in exchange for the release of individual retainer agreements in the order of 30%.

[20] The legal work of the three national groups goes back to the mid-1990's and involves substantial hours in pursuing class actions as well as the advocacy and negotiations with the federal government. Canada was not very receptive to the concept of a financial benefit for each residential school survivor until the Political Agreement was signed on May 30, 2005.

[21] The National Consortium, which represents approximately 5,500 individual survivors, has already proceeded through a verification process with The Honourable Frank Iaccobucci who has approved their compensation.

[22] The Merchant Law Group fees have yet to be verified but the group has agreed to a verification procedure.

[23] The Independent Counsel represents approximately 4,000 individual survivors and they have worked diligently on individual cases which broke new ground with common law precedents or Alternative Dispute Resolution processes which assisted in the overall national settlement objective.

[24] The fees for the three national groups are designed to avoid any fees to their clients in recovering the Common Experience Payment. For those survivors without counsel, the application for the Common Experience Payment is designed to permit individuals to apply on their own behalf. First Nations and Canada will provide assistance to individuals to complete and file their applications for the Common Experience Payment.

[25] Legal fees for the Independent Assessment Process are treated differently as that is a separate claim process. Canada will pay 15% of awards as a contribution to

legal fees. Independent Counsel have agreed to cap their fees at 30%. Any individual survivor can utilize the normal court procedure to challenge the fees charged by their lawyer.

Administration of the Settlement Agreement

[26] Under this heading, I am going to address the actual administration of the Common Experience Payment and the Independent Assessment Process. The administration is clearly not independent but rather funded by Canada and administered by Canada with input from the National Administration Committee. The National Administration Committee is composed of one representative from each of Canada, church organizations, Assembly of First Nations, the National Consortium, Merchant Law Group, Inuit representatives and Independent Counsel. The members will be compensated at their hourly rates.

[27] Canada will pay the initial $1.9 billion to a Trustee who is, in effect, two federal Cabinet Ministers. The purpose of the trust is to pay survivors the Common Experience Payment according to the Settlement Agreement. The trust can earn interest. The trust terminates when all obligations have been paid under the Settlement Agreement but no later than January 1, 2015. All administrative expenses are paid by Canada, but not out of the $1.9 billion. The Trustee decides which claimants will be paid, subject to the right of the claimant to apply to the National Administration Committee, and eventually to court, if a claim is denied in whole or in part. The Settlement Agreement provides that the Trustee is subject to other duties and responsibilities as the courts may order.

[28] The mandate of the National Administration Committee is a broad one including among others the interpretation and implementation of court orders, hearing appeals for Common Experience Payments and bringing certain issues to court. A simple majority

of 4 members may refer disputes to the appropriate court where the dispute arose but ss. 4.11(10) and (11) prohibit a reference to court where a vote of the National Administration Committee "would increase the costs of Approval Orders whether for compensation or procedural matters" unless the Canada representative approves. This is referred to as the Canada veto. Canada will pay all costs of administration for the Common Experience Payment and the Independent Assessment Process. However, the Canada veto limits the ability of the National Administration Committee to remedy problems in the process that may increase the costs of administration.

[29] The Canada veto does not apply to Canada's commitment to process 2,500 claims annually in the Independent Assessment Process, and the right of the National Administration Committee to apply to the courts to supervise and enforce the commitment.

[30] The Canada veto only applies to the National Administration Committee. It does not apply to court applications by Indian Residential School survivors or the court's general supervision of all aspects of the operation and implementation of the Settlement Agreement.

ANALYSIS

Should the Class Action be Certified?

[31] The Yukon, like many other jurisdictions, does not have comprehensive class action legislation. Rule 5(11) of the *Rules of Court* sets out the terms for representative proceedings, another word for class proceedings:

> Where numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (17), the proceeding may be commenced and, unless the court otherwise orders, continued by or against

> one or more of them as representing all or as representing one or more of them.

[32] In *Western Canadian Shopping Centres Inc.* v. *Dutton,* 2001 SCC 46 at para. 34, McLachlin C.J. stated that “Absent comprehensive legislation, the court must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them.” This power is extremely useful in this residential school class action to ensure that the procedures available to survivors in northern Canada are no less than those available to survivors in those provinces which operate under comprehensive class action legislation. In the same way that statute law draws upon the principles of common law, the inherent power of the courts can be used to ensure similar treatment to class members in all nine jurisdictions.

[33] *Dutton*, at para. 38, set out the four conditions that must be met for the approval of a class action in the absence of legislation. I will address each one and relate it to this proceeding.

1. The class action must be capable of clear definition. This is necessary to ensure that the class members receive notice of the terms and are bound by the judgment. It is not necessary that every member be named or known. In this case, the class is defined as all persons in Canada who resided at an Indian Residential School from 1920 forward, living or dead, and their family members.

   The class is divided into 3 groups which I will define generally:

   i.) Survivor Class means all persons who resided at an Indian Residential School between January 1, 1920 and December 31, 1997 (when the last school closed) who are living, or were living as of May 30, 2005, and residing in one of the jurisdictions;

ii.) Family Class means, among other things, the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class member who resided in one of the jurisdictions;

iii.) Deceased Class means all persons who resided at an Indian Residential School between 1920 and 1997, who died before May 30, 2005, and who, at the date of their death resided in one of the jurisdictions.

The proposed class definition provides clear criteria to identify those who have a potential claim, those who will be bound by the result, and thus those to whom notice must be given.

2. There must be issues of fact or law common to all class members.

Counsel have proposed the following common issues:

(a) By their operation or management of Indian Residential Schools during the Class Period (1920 to 1996), did the Defendants breach a duty of care they owed the Survivor Class and the Deceased Class to protect them from actionable physical or mental harm?

(b) By their purpose, operation or management of Indian Residential Schools during the Class Period, did the Defendants breach a fiduciary duty they owed to the Survivor Class and the Deceased Class or the Aboriginal or treaty rights of the Survivor Class and the Deceased Class to protect them from actionable physical or mental harm?

(c) By their purpose, operation or management of Indian Residential Schools during the Class Period, did the Defendants breach a fiduciary duty they owed to the Family Class?

(d) If the answer to any of these common issues is yes, can the court make an aggregate assessment of the damages suffered by all Class members of each class as part of the common trial?

These common issues exist for all members of the class as demonstrated by the considerable body of case law in British Columbia, Alberta and Saskatchewan. All class members share a common ingredient that can best proceed by way of class action.

3. With regard to the common issues, success for one class member must mean success for all. All the class members will benefit from the successful prosecution of the action but not necessarily to the same extent. This will certainly be the case in this class action as proposed in the settlement.

4. The class representative must adequately represent the class. The two proposed representatives in this jurisdiction are willing to represent the class. Their work will be partially completed if the class action is certified and the settlement approved. The settlement includes a litigation plan in the form of the Independent Assessment Process and most, if not all survivors who are proceeding with claims have counsel to assist them. Nevertheless, the class representatives must be vigilant in instructing counsel where problems occur in implementing the settlement.

The common law test for class certification does not include the “preferable procedure test” found in some class proceedings legislation. The test requires that the court be satisfied that the class proceeding would be a fair, efficient and manageable method of advancing the class and preferable to other procedures. However, *Dutton*, at para. 51, states that the court has the ultimate discretion, to be applied in a flexible and liberal manner, to seek a balance between efficiency and fairness in the final determination of whether the class action should proceed. I find these tests to be similar to some extent. I conclude that this class proceeding should

be certified as it offers a reasonably fair and timely resolution of a longstanding tragedy.

Jurisdiction of the Court

[34] As *Dutton* clearly sets out at para. 34, the courts must fill a legislative void under their inherent power to settle the rules of practice and procedure in class proceedings.

[35] It is also important in this particular class action that the parties and class members have similar rights to those jurisdictions that have comprehensive class proceeding statutes.

[36] By way of example, the Province of British Columbia has a *Class Proceedings Act* R.S.B.C. 1996, chapter 50. I will refer to the British Columbia *Class Proceedings Act,* as it is similar to the other jurisdictions involved.

[37] The role of the court is set out in s. 12 of the *Class Proceedings Act* as follows:

> 12 The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[38] In my view, this is the same jurisdiction that this Court has under *Dutton*, and it is expressly stated in the draft orders proposed by counsel.

[39] Pursuant to the inherent jurisdiction of this Court, the following rules apply in addition to the rights granted to survivors under the Settlement Agreement:

1. In the usual class certification, it would be appropriate to provide an appeal process from the Common Experience Payment procedure. In this case, the claimant is provided with an appeal to the National Certification Committee which has a majority of claimant representatives. The claimant, where the National

Certification Committee denies a Common Experience Payment claim, in whole or in part, may appeal to the appropriate court. I would add that an order for interim costs may be appropriate as the amount of such claim will necessarily be somewhat modest compared to the legal fees required to pursue the claim.

2. The survivors claiming in the Independent Assessment Process have a right of review of the decision of an adjudicator by the Chief Adjudicator or designate on the basis of whether the decision contains “a palpable and overriding error”. To be consistent with the jurisdictions with class proceedings statutes, the claimants in the Independent Assessment Process shall have a right of appeal to this Court. Once again, an order for interim costs may be appropriate.

Should the Settlement be Approved?

[40] Class action settlements must be approved by the court to be binding. This is a common feature of all class proceeding statutes and should be an essential requirement of the common law. The test for settlement approval is whether the settlement is fair, reasonable and in the best interests of the class as a whole. Conversely, the court should not reject a settlement unless it is inadequate, unfair or unreasonable.

[41] In *Dabbs* v. *Sun Life, Assurance Company of Canada*, [1998] O.J. No. 1598 (Gen. Div.), Sharpe J. as he then was, provided the following list of considerations for the approval of proposed settlements:

1. Likelihood of recovery, or likelihood of success.
2. Amount and nature of discovery evidence.
3. Settlement terms and conditions.
4. Recommendation and experience of counsel.
5. Future expense and likely duration of litigation.

6. Recommendation of neutral parties if any.
7. Number of objectors and nature of objections.
8. The presence of good faith and the absence of collusion.

This list has been added to in subsequent cases as in *Parsons* v. *Canadian Red Cross Society*, [1999] O.J. No. 3572 (Sup. Ct. Just.) at paragraph 72:

9. The degree and nature of communications by counsel and the representative plaintiff.
10. Information conveying to the court the dynamics of, and the positions taken by the parties during the negotiations.

and in *Reid* v. *Ford Motor Co.*, 2006 BCSC 1454:

11. If counsel fees were negotiated in the settlement, how big a factor are they?
12. Have the absent class members received adequate notice of the proposed settlement?

[42] I would add two further considerations:

1. The extent to which the class ultimately determines the acceptance or rejection of the settlement.
2. The extent to which the settlement represents a political accord.

I add these considerations because of the unique nature of this Settlement Agreement. It has been negotiated not only by legal counsel representing the 79,000 Indian Residential School survivors but by their national political representatives.

[43] Sharpe J. also approved the judgment of Callaghan A.C.J.H.C. in *Sparling* v. *Southam Inc. et al* (1988), 66 O.R. (2d) 225 (H.C.J.), at page 230, where he stated that

"courts consistently favour the settlement of lawsuits in general". Callaghan A.C.J.H.C. went on to say:

> In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal.

[44] In *Gariepy* v. *Shell Oil Co.*, [2002] O.J. No. 4022 (Sup Ct. Just.), Nordheimer J., after referring to the remarks cited above, stated at paragraph 44:

> It is not the function of the court in reviewing a settlement to reopen the settlement or to attempt to re-negotiate it in the hope of improving its terms. Simply put, the court must decide either to approve the settlement or to reject it. Similarly, in deciding whether to approve the settlement, the court must be wary of second-guessing the parties in terms of the settlement that they have reached. Just because the court might have approached the resolution from a different perspective, or might have reached a resolution on a different basis, is not a reason to reject the proposed settlement unless the court is of the view that the settlement is inadequate or unfair or unreasonable.

[45] I am going to divide my analysis into two parts. The first will consider the global terms of the settlement. The second part will consider the administration of the settlement.

The Global Settlement

[46] The superior courts of this country have been dealing with Indian Residential School claims for about ten years depending on the specific jurisdiction in question. During that time, a great deal of case law has been developed which has permitted the claims to advance. However, the number of cases that have actually proceeded to trial is not significant. There are a variety of reasons for that. The document discovery in these cases is massive and time-consuming. In many cases, the delay is for months

and years as the government and churches review ancient files and records in a large number of departments and locations across the country.

[47] In the Court of Queen's Bench of Alberta, which has the largest number of claims, all the cases have been under global case management so that certain test cases could proceed. Those test cases have been delayed pending this settlement application. Simply put, our court system is not designed to accommodate such a large number of claims in a timely manner. From this perspective, it is likely that most courts will welcome this application to certify a class action and approve the Settlement Agreement.

[48] From a common law point of view, the Common Experience Payment is an extraordinary resolution to a complex political and cultural dispute. It is inconceivable that a court would provide a remedy that compensates all Indian Residential School survivors with a financial benefit without proof of loss, by simply proving that a survivor attended an Indian Residential School. That is not to say that survivors did not suffer loss of language and culture, but simply to acknowledge the unique aspect of the remedy which could only be granted in a political forum.

[49] Another positive aspect of the Settlement Agreement is the fact that the Common Experience Payment has no global cap and the expenses to administer the payments are covered by Canada, also without a cap. The same applies to the Independent Assessment Process. There is no necessity for the courts to monitor the global costs incurred by Canada. The courts can focus on the delivery of benefits and the assessment of claims under its general supervisory jurisdiction.

[50] The Independent Assessment Process is an improvement on the former Alternative Dispute Resolution process in terms of the increased cap for individual awards and the additional coverage for serious psychological harm and actual income loss. Despite all the drawbacks of the Alternative Dispute Resolution process, it has taken in 5,000 claimants and concluded 1,000 in three years. This process has already reduced the burden on the courts. However, the process has been slow and the commitment to process 2,500 claims a year is a considerable improvement. Again, there is no global cap on the amount or number of awards in the Independent Assessment Process or the costs of administration. The advantage of building and improving on the Alternative Dispute Resolution process is that there is no requirement to reinvent the wheel. The system is working now and, in my view and certainly the view of the parties, will get better. I note that the three Yukon counsel, with experience in the Alternative Dispute Resolution process, and carrying the bulk of the Yukon survivor claims, endorse the Independent Assessment process. There is no evidence before me that requires the introduction of changes at this stage.

[51] I am not going to repeat the benefits of the Settlement Agreement previously set out. However, there is one very significant commitment that does not often get coverage. I am referring to the agreement of Canada to continue to provide existing mental health and emotional support services to those survivors proceeding through the Independent Assessment Process, Common Experience Payment recipients, and those participating in truth and reconciliation or commemorative initiatives. This is an enormous benefit for Indian Residential School survivors because one of the most consistent concerns raised by survivors themselves in this Court is the apparent lack of such support services. While the word “existing” may be a limiting factor, the

commitment of Canada is clear and has undoubtedly created expectations that must be fulfilled. If closure is the goal for Indian Residential School survivors, this is a means to achieve that end. In addition to the terms of section 8.02 of the Settlement Agreement, Canada has made the following commitment:

> Health Canada will expand its current Indian Residential Schools Mental Health Support Program to be available to individuals who are eligible to receive compensation through the Independent Assessment Process, as well as to Common Experience Payment Recipients, and to those participating in Truth and Reconciliation and Commemoration activities. It will offer mental health counselling, transportation to access counselling and/or Elder/Traditional Healer services and emotional support services, which include Elder support. Health Canada will offer these services through its regional offices, including the Northern Secretariat which has an office located in Whitehorse, Yukon.

[52] There is a further aspect to this Settlement Agreement that bears comment. The Assembly of First Nations and Inuit organizations have played a central role in negotiating and reaching this agreement. These organizations have appeared in court with the counsel for the survivors supporting the Settlement Agreement. It is therefore more than a settlement of a tort-based court action. It is a political accord to bring closure to an historic and ongoing grievance. Their affirmation of this Settlement Agreement is a significant factor. Courts must be wary of second-guessing this political accord.

[53] It is also significant that court approval of the Settlement Agreement is subject to the approval of Indian Residential School survivors individually. Those that prefer the court process may opt out of the Settlement Agreement, hopefully after careful consideration and legal advice. If more than 5,000 survivors do opt out, the Settlement

Agreement is void unless Canada agrees to waive its right to treat the Settlement Agreement as void. Obviously, there is little advantage to continuing large numbers of court actions and the Settlement Agreement at the same time. The ultimate acceptance or rejection of the Settlement Agreement is, appropriately, for the survivors themselves to decide.

ADMINISTRATION OF THE SETTLEMENT AGREEMENT

[54] The Settlement Agreement is not perfect as every counsel pointed out. I am going to address some of the shortfalls. On balance, I do not find that any of them, individually or collectively, cause me to reject the Settlement Agreement or approve it conditionally and send the parties back to the negotiating table. The main concerns arise in the administration of the Independent Assessment Process. However, those concerns or “deficiencies” as some courts describe them can be remedied, if necessary, under the court’s supervisory jurisdiction. They should not hold up the benefits of the Settlement Agreement available to the majority of the Indian Residential School survivors who do not have a claim under the Independent Assessment Process.

The Canada Veto

[55] The Canada veto refers to paragraphs 14.11(9), (10) and (11) of the Settlement Agreement. Decisions of the National Administration Committee to refer disputes from the Committee to court that “would increase the costs of approval orders, whether for compensation or procedural matters”, may be vetoed by Canada. The courts are not permitted to review Canada’s veto. This veto, while problematic, must be placed in context. The only other reference to the Canada veto is under paragraph 6.03(3) which states that the Canada veto does not apply to an application by the National

Administration Committee for court enforcement of the commitment to process 2,500 Independent Assessment Process claims a year. I interpret the Canada veto to apply only to decisions of the National Administration Committee to refer their disputes to court. It does not apply to the rest of the Settlement Agreement which is under the general supervisory jurisdiction of the courts. It does not prohibit any party or individual survivor from accessing the courts if they feel Canada is not living up to its obligations. On the other hand, it does allow Canada, on behalf of the taxpayer, to have some ultimate cost control over decisions of the National Administration Committee, which is under the voting control of plaintiff representatives.

[56] But the Canada veto does mean that the administration of the process for resolving claims is not independent, a characteristic that is usually desirable for the process to resolve claims in a class action. However, counsel for the plaintiffs and counsel for the Assembly of First Nations and the Inuit organizations are prepared to live with the Canada veto because the financial burden on Canada is open-ended. There are no global caps on the financial obligation to conclude this Settlement Agreement. In a very real sense, this is a challenge for Canada. Canada created the problem and it must now implement the Settlement Agreement in a fair and reasonable manner under the direction and supervision of the courts.

Legal Fees

[57] I find the legal fees problematic, not in the global amount, but in the early payment for achieving what is undoubtedly an outstanding political agreement. My concern is that once the lawyers are paid out, they will have little interest in assisting the survivors who may have continuing issues over relatively small amounts of the Common

Experience Payment and Independent Assessment Process claims that remain unresolved. There is no simple resolution of this problem, although counsel that brings such issues to court may apply for interim costs and be awarded those costs in appropriate cases.

[58] Plaintiffs' counsel had various explanations with respect to the Common Experience Payment. Some said the legal fee was a pre-payment for work to be done and that counsel had undertaken to work on the Common Experience Payment problems. The unresolved Common Experience Payment problems still present a concern.

[59] Similarly, once an award is granted under the Independent Assessment Process, further reviews or appeals to court will not necessarily be covered by retainer agreements.

[60] The other aspect of the legal fees issue is that under the Independent Assessment Process, Canada only pays an additional 15% of the award for legal fees which will typically be 30%. Several survivors raised this issue in Court. The balance of the lawyers' fees will inevitably come off the award.

[61] In Yukon, it would not be unusual for 100% of legal fees to come off the award with the defendant paying court costs which are usually less than a lawyer's contingency fee. So in that sense, Canada's contribution of 15% is a distinct improvement over the court process where the full extent of disputed liability remains. Moreover, the 15% paid by Canada is a far sight better than the uncertainty of a trial where success is not guaranteed.

[62] In my view, it will be important for Canada to report to the courts on those claims for the Common Experience Payments and the Independent Assessment Process that are refused, as well as the grounds for doing so, on an annual basis.

DECISION

[63] To summarize, I certify the class action and approve this Settlement Agreement as fair, reasonable and in the best interests of the class as a whole. I have expressed concerns about some aspects of the administration of the Settlement Agreement and legal fees. However, it is a political and legal compromise that rewards all survivors to some degree and pays reasonable compensation to those with claims of sexual assault, serious physical assault and serious psychological harm. It provides a path forward to resolve claims that have overwhelmed the court system. It provides a timely resolution in circumstances where the survivors are dying at a rate of 1,000 to 1,300 or more a year. It is time to move on for Indian Residential School survivors who want to bring closure to a very dark chapter in the ongoing relationship between Canada and its aboriginal people.

VEALE J.