

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: (1) 500-06-000293-056
(2) 550-06-000021-056 (Hull)
(3) 500-06-000308-052

DATE: December 15, 2006

BY: THE HONOURABLE DANIEL H. TINGLEY, J.S.C

(1) JOHN BOSUM (Mr. Bosum)
-and-
(2) CLIFFORD HOUSE et al
-and-
(3) MORRIS CARDINAL et al
Plaintiffs

v.
ATTORNEY GENERAL OF CANADA (Canada)
Defendant

-and-
THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESES OF CARIBOO, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE CATHOLIC DIOCESE OF MOOSONEE, THE SYNOD OF THE DIOCESE OF WESTMINSTER, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE DIOCESE OF SASKATCHEWAN, THE SYNOD OF THE DIOCESE OF YUKON, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (ALSO KNOWN AS THE NEW ENGLAND COMPANY), THE PRESBYTERIAN CHURCH IN CANADA, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), IMPACT NORTH MINISTRIES, THE

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BAPTIST CHURCH OF CANADA
 THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, ARCHIDIOCÈSE OF VANCOUVER - THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON CORPORATION SOLE, THE ROMAN CATHOLIC DIOCESE OF WHITEHORSE, LA CORPORATION ÉPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, THE CATHOLIC EPISCOPAL CORPORATION OF MACKENZIE - FORT SMITH, THE ARCHIEPISCOPAL CORPORATION OF REGINA, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION ÉPISCOPALE ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE ST-BONIFACE, LA CORPORATION ÉPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES - THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY - LA CORPORATION ÉPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON, LA CORPORATION ÉPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, MISSIONARY OBLATES - GRANDIN , LES PÈRES MONTFORTAINS, THE OBLATES OF MARY IMMACULATE ST.PETER'S PROVINCE, LES RÉVÉRENDIS PÈRES OBLATS DE MARIE IMMACULÉE (PROVINCES DU CANADA - EST), THE SISTERS OF SAINT-ANN, THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (ALSO KNOWN AS THE SISTERS OF THE CHILD JESUS), THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, THE SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITÉ DES TERRITOIRES DU NORD (T-N-O), LES SOEURS GRISES DE MONTRÉAL/THE GREY NUNS OF MONTREAL, (LES SOEURS DE LA CHARITÉ (SOEURS GRISES) DE L'HÔPITAL GÉNÉRAL DE MONTRÉAL), THE GREY NUNS OF MANITOBA INC. (ALSO KNOWN AS LES SOEURS GRISES DU MANITOBA INC.), THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE, LES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE AND INSTITUT DES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE NICOLET (ALSO KNOWN AS LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE), LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA, LES MISSIONNAIRES OBLATS DE ST-BONIFACE - MISSIONARY OBLATE SISTERS OF ST. BONIFACE, LES SOEURS DE LA CHARITÉ D'OTTAWA (ALSO KNOWN AS SISTERS OF CHARITY OF OTTAWA), SISTERS OF CHARITY OF ST. VINCENT DE PAUL OF HALIFAX (ALSO KNOWN AS SISTERS OF CHARITY OF HALIFAX), LES SOEURS DE NOTRE-DAME AUXILIATRICE, LES SOEURS DE ST-FRANCOIS D'ASSISE, THE SISTERS OF THE PRESENTATION, INSTITUT DES SOEURS DU BON-CONSEIL, LES SOEURS DE LA CHARITÉ DE ST-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RÉSIDENCES OBLATES DU QUÉBEC, OBLATES OF MARY IMMACULATE ST.PETER'S PROVINCE, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC., THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, HÔTEL-DIEU DE NICOLET, LES OBLATES DE MARIE IMMACULÉE DU MANITOBA

Defendants

JUDGMENT

(On an Amended Motion for Authorization to bring a
 Class Action and to Approve a Settlement Agreement)

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[1] Mr. Bosum, other Plaintiffs, Canada and the other Defendants all ask the Court to authorize a national class action invoking claims arising from the establishment and operation throughout Canada of Indian Residential Schools and to approve the Settlement Agreement reached by the parties after lengthy negotiations.

[2] Similar applications have been made before the Superior Courts of other jurisdictions in Canada. Counsel for the parties authorized the judges hearing their applications across Canada to communicate with each other before and after the hearings.

[3] The Court has had the advantage of reviewing the reasons for judgment of Regional Senior Justice Winkler of the Ontario Superior Court of Justice¹ and of Chief Justice Brenner of the Supreme Court of British Columbia.² In full agreement with the Chief Justice, the Court agrees with and adopts the reasons and conclusions of Mr. Justice Winkler. His concerns as regards certain elements of the Settlement Agreement are shared by this Court, particularly as regards the ongoing duties and requirements of the Courts following authorization and during implementation of the Settlement Agreement.

THE FACTS

[4] Since Confederation, approximately 130 Indian Residential Schools were established. Most closed their doors during the 1970's although the last such school only closed in 1996. These institutions, administered largely by religious organizations under the supervision of the Federal Government, operated under policies that resulted in the removal of Aboriginal children from their families and communities, their assimilation through practices designed to extinguish their Aboriginal character - languages, traditions and beliefs - and upon graduation, their integration into a non-Aboriginal or "Canadian" society.

[5] After many years of difficult and protracted negotiations, a final Settlement Agreement was signed by all parties in May and June, 2006. In addressing the spiritual, mental and physical harm resulting from these long-standing policies and practices, the proposed Settlement Agreement seeks to resolve currently outstanding individual and class claims brought on behalf of the Survivors of the Indian Residential School system and their families and to bring a measure of closure to these Survivors and their families.

¹ Baxter & Baxter et al v. The Attorney General of Canada et al, Ontario Superior Court of Justice, No. 00CV-192059CP; 2006-12-15.

² Quatell et al v. Attorney General of Canada, Supreme Court of British Columbia, Docket L051875; 2006-12-15.

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[6] The Settlement Agreement was negotiated by legal representatives of the Survivors and their families, representatives of Aboriginal organizations and communities, including the Assembly of First Nations ("AFN") and Inuit Groups, church groups and the appointed Federal representative, the Honourable Frank Iacobucci. It provides for compensation to individuals as well as healing initiatives at both personal and community levels.

[7] On September 8, 2006, the Court heard objections to the Settlement Agreement from eight class members. Several other class members also expressed their objections in writing. As Mr. Chief Justice Brenner notes in his judgment, the individual stories presented to the Court recount experiences of children forcibly taken from their homes, families and communities. In this context, numerous objectors expressed their concerns that the deceased parents of the Survivors - referred to as the "first victims of the residential schools" - were not recognized by the Settlement Agreement.

[8] Other objections were raised suggesting that the compensation offered by the Agreement did not adequately address the harm suffered by the Survivors, their families and communities and that compensation under the Common Experience Payment (CEP) was not offered for the years spent by the Survivors in boarding schools and hospitals.

[9] A few objectors expressed their concerns about transferring compensation funds to the Indian Brotherhood Trust Fund or the Unuvialuit Education Fund. They submitted that these funds should only be available for the Survivors and their families. There was concern as well about both a lack of consultation with members of the Aboriginal communities in arriving at the Settlement Agreement and the difficulties of notifying Aboriginal communities about the Settlement Agreement, issues going to process and informed consent.

DISCUSSION

A. Authorization

[10] Class authorization in Québec is governed by Book IX of our Code of Civil Procedure. Article 1003 C.C.P. requires that (a) the recourses of the members raise identical, similar or related questions of law and fact; (b) the facts alleged seem to justify the conclusions sought; (c) the composition of the group makes the application of articles 59 (representative actions) or 67 (joinder of actions) difficult or impracticable; and (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately. While article 1003 C.C.P. does not mention, as a condition of class authorization, that the "class proceeding would be the

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preferable procedure for resolution",³ article 4.2 C.C.P. requires that litigants must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action.⁴ Thus the "preferable procedure" requirement under the Ontario Class Proceedings Act⁵ discussed by Mr. Justice Winkler at paragraphs [23] to [52] of his judgment⁶ are every bit as applicable to class action proceedings in Québec as they are in Ontario.

[11] All of the parties agree that this class action should be authorized in order that the Settlement Agreement, once approved, can be implemented. Absent issues going to public order, Courts should be loathe to interfere with arms' length agreements reached between litigants. Most if not all of the issues raised in these proceedings concerning authorization have been addressed in the Cloud affair,⁷ a case very similar to our case. The reasons given by the Ontario Court of Appeal to justify certification in Cloud apply as well to our case. Accordingly, the Court will authorize this action, subject to what is said below.

B. Approval

[12] Settlements are by their very nature compromises. As such, they do not give the parties exactly all they want. Absent the Settlement Agreement, individual and class claimants pursuing their claims through Canadian courts will face a host of challenges that will certainly contribute to complex, lengthy and costly litigation. Worse, many claimants may experience serious difficulties in establishing legal liability within prescriptive periods.

[13] Should certain class members not be satisfied with the terms of the Settlement Agreement, they have the choice of opting out to pursue their own claim in a way that is tailored to their particular individual circumstances. Objectors need not be bound by the perceived failings of the Settlement Agreement. They may opt out and pursue in the normal fashion the claims they assert, bearing in mind the obstacles alluded to above.

[14] While the presence in the Settlement Agreement of opt-out provisions support its judicial approval, the Court must also consider whether the Agreement is fair, reasonable and in the best interests of the class as a whole.⁸ As such, the Court is also

³ A requirement in Ontario. See S.5 (1) *Class Proceedings Act, 1992*, S.O. 1992, c.6.

⁴ And see Bouchard c. Agropur Coopérative, C.A. Québec 200-09-005067-050, 2006-10-18 at paragraph [44].

⁵ *Supra*, Note 3.

⁶ *Supra*, Note 1.

⁷ Cloud v. Canada (Attorney General), (2004) O.J. No. 4924 (C.A.). The class certified in Cloud is a party to the Settlement Agreement.

⁸ See for example Dover c. Dow Corning Corporation et al., C.S.M. 500-06-000016-934; 1998-07-10 at pages 4 to 8 inclusive.

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required to take account of its supervisory role in overseeing the fulfillment of the terms of the Agreement.⁹

[15] The requirement in the Settlement Agreement that any "material amendment" to the Approval Orders requires the unanimous ratification of all the Canadian Courts that made such Orders may very well prove to be unfeasible or even, in Mr. Justice Winkler's view, unworkable. Rather, the use of exemplification proceedings¹⁰ may be a much more expeditious mechanism to enforce changes to Approval Orders that are intended to apply in all jurisdictions.

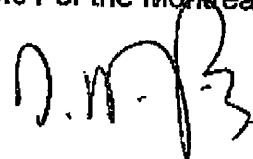
[16] In those cases where an amendment relates only to a specific class, class member or a local issue, the ratification requirement would appear to be superfluous. In this context, it may be prudent to clarify the occasions when unanimity is actually required.

C. Conclusion

[17] Accordingly, subject to the correction of the "deficiencies" noted above and in the judgment of Mr. Justice Winkler, the Court will authorize the Class action as proposed, approve the Settlement Agreement, appoint Mr. Bosum as representative Plaintiff for the "Survivor Class", "Family Class" and "Deceased Class" and identify questions of fact and law to be treated collectively. The Court will be available on short notice to confer with Counsel either in chambers or by telephone prior to February 9, 2007 when the hearing of this matter will resume.

[18] **FOR THESE REASONS, THE COURT:**

[19] **CONTINUES** the hearing on Mr. Bosum's Amended Motion for Authorization to Institute a Class Action and to Obtain the Status of Representative and Approval of Settlement Agreement to February 9, 2007 in room 16.01 of the Montreal Courthouse at 09h30.



DANIEL H. TINGLEY, J.S.C.

⁹ As noted by Mr. Justice Winkler in his judgment, supra Note 1, at paragraph [21] and discussed in depth at paragraphs [22] to [52] inclusive.

¹⁰ See for example, Title Four of Book Ten in the Civil Code of Québec comprising Article 3155 to 3168 C.C.Q.

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Me Gilles Gareau
Me Fredy Adams
ADAMS GAREAU – Montreal
Attorneys for Petitioners – Member of the National Consortium

Me Celeste Poltak
Me Kirk Baert
KOSKIE MINSKY – Ontario
Attorneys for Petitioners – Member of the National Consortium

Me Owen Falquero
MERCHANT LAW GROUP – Montreal
Attorney for Clifford House

Me Nathalie Drouin
Department of Justice Canada – Montreal
For the Attorney General of Canada

Me Paul Vickery
Me Francis Archambault
Department of Justice Canada – Ottawa
For the Attorney General of Canada

Me Catherine A. Coughlan
Department of Justice Canada – Edmonton, Alberta
For the Attorney General of Canada

Me Pierre L. Baribeau
LAVERY, DE BILLY – Montreal
Attorney for the Catholic Entities

Me W. Roderick Donlevy
McKERCHER McKERCHER & WHITMORE LLP – Saskatoon
Attorney for the Catholic Entities

Me Alexander D. Pettingill
CASSELS BROCK & BLACKWELL LLP – Toronto
Attorney for the Protestant Entities

Me Gilles Gagné
GAGNÉ BENNETT – Montreal

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Me John Kingman Phillips
DOANE PHILLIPS YOUNG LLP – Toronto
Attorney for National Chief Phil Fontaine

Date of hearing: September 8, 2006