Date: 20061215
Docket: CI 05-01-43585
(Winnipeg Centre)
Indexed as: Semple et al v. The Attorney General of Canada et al
Cited as: 2006 MBQB 285

COURT OF QUEEN'S BENCH OF MANITOBA

	)	**COUNSEL**
B E T W E E N:	)	
	)	
CHRISTINE SEMPLE, JANE MCCALLUM, STANLEY THOMAS NEPETAYPO, PEGGY GOOD, ADRIAN YELLOWKNEE, KENNETH SPARVIER, DENIS SMOKEDAY, RHONDA BUFFALO, MARIE GAGNON, SIMON SCIPIO, AS REPRESENTATIVES AND CLAIMANTS ON BEHALF OF THEMSELVES AND ALL OTHER INDIVIDUALS WHO ATTENDED RESIDENTIAL SCHOOLS IN CANADA, INCLUDING BUT NOT LIMITED TO ALL RESIDENTIAL SCHOOLS' CLIENTS OF THE PROPOSED CLASS COUNSEL, MERCHANT LAW GROUP, AS LISTED IN PART SCHEDULE 1 TO THIS CLAIM AND THE JOHN AND JANE DOES NAMED HEREIN, AND SUCH FURTHER JOHN AND JANE DOES AND OTHER INDIVIDUALS BELONGING TO THE PROPOSED CLASS, INCLUDING JOHN DOE I, JANE DOE I, JOHN DOE II, JANE DOE II, JOHN DOE III, JANE DOE III, JOHN DOE IV, JANE DOE IV, JOHN DOE V, JANE DOE V, JOHN DOE VI, JANE DOE VI, JOHN DOE VII, JANE DOE VII, JOHN DOE VIII, JANE DOE VIII, JOHN DOE IX, JANE DOE IX, JOHN DOE X, JANE	)	**Plaintiffs:**
	)	**National Certification Committee**
	)	Mr. K. Baert, Ms. C. Poltak, Mr. W. Percy and Mr. J. Horyski
	)	**Assembly of First Nations and National Chief Phil Fontaine**
	)	Mr. J.K. Phillips
	)	**Merchant Law Group**
	)	Mr. N. Rosenbaum

DOE X, JOHN DOE XI, JANE DOE XI, JOHN DOE XII, JANE DOE XII, JOHN DOE XIII, JANE DOE XIII BEING A JANE AND JOHN DOE FOR EACH CANADIAN PROVINCE AND TERRITORY, AND OTHER JOHN AND JANE DOES, INDIVIDUAL, ESTATES NEXT-OF-KIN AND ENTITIES TO BE ADDED,	)	
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	)	**Defendants:**
	)	**The Attorney General of Canada**
	)	Ms. K. Coughlan, Ms. J. Oltean and Ms. A. Kenshaw
	)	**United Church of Canada, Anglican Church in Canada, Presbyterian Church in Canada**
	)	Mr. A. Pettingill
	)	**All Catholic entities**
	)	Mr. R. Donlevy and Mr. P. Baribeau

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 ATHABASCA,)
THE SYNOD OF THE ANGLICAN)
CHURCH 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 EPISC)
EPISCOPAL CORPORATION OF)
HALIFAX, LES SOEURS DE NOTRE)
DAME-AUXILIATRICE, LES SOEURS)
ST. FRANCOIS D'ASSISE, INSTITUT)
DES SOEURS DU BON CONSEIL,)
LES SOEURS DE SAINT-JOSEPH DE)
SAINT-HYACINTHE, LES OEUVRES)
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 SOEURS)
OBLATES DE L'ONTARIO, LES)
RESIDENCES OBLATES DU QUEBEC,)
LA CORPORATION EPISCOPALE)
CATHOLIQUE ROMAINE DE LA)
BAIE JAMES (THE ROMAN)
CATHOLIC EPISCOPAL)
CORPORATION OF JAMES BAY))
THE CATHOLIC DIOCESE OF)
MOOSONEE, SOEURS GRISES DE)
MONTREAL/GREY NUNS OF)
MONTREAL, SISTERS OF CHARITY)
(GREY NUNS) OF ALBERTA, LES)
SOEURS DE LA CHARITE 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 OBLATS 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 ARCHIEPISCOPALE 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.	)	**Judgment delivered:**
	)	**December 15, 2006**

SCHULMAN J.

[1] It is rare for this Court to have an opportunity to determine an issue of national and historic importance. This motion for an order certifying a class action and approving settlement of Residential School Litigation presents this Court with such an opportunity.

[2] The motion has been brought with the consent of all parties. For more than a century the Government of Canada, hereafter referred to as Canada, implemented a policy under which it compelled Aboriginal children to leave their homes and attend Indian Residential Schools, hereafter referred to as IRS, that were supervised by Canada and run by various churches. This policy was designed to reengineer Aboriginal people into a European model by educating them to abandon their language, culture and way of life and adopt the language, culture and religions of other Canadians. Looking back on the policy in 2006, it is an understatement to say that it is well below standards by which we like to think we treat other people and created problems for the Aboriginal people which require being addressed on a pan Canadian basis. There were 130 schools and they were located in all the provinces and territories of Canada except Newfoundland, New Brunswick and Prince Edward Island. While attending the schools many of the children were abused physically, sexually and emotionally and they suffered damage that in turn has adversely affected generations of Aboriginal people. The proposed settlement, which the parties are anxious to have concluded, provides for and creates unique and comprehensive remedies to

solve a serious problem that has confronted this country for decades. The agreement provides that it must be approved by judges in nine provinces and territorial courts and the settlement will fail unless all nine judges approve the settlement on substantially the same terms and conditions as provided in the settlement agreement.

[3] As in all cases where a Court is asked to approve a settlement involving vulnerable plaintiffs, this Court must ask itself before considering a rejection of the settlement, whether it can guarantee a better result. Before granting approval subject to conditions which call for significant changes to the agreement, a Court must ask itself whether it is worth risking the unravelling of the agreement and leaving nearly 80,000 Aboriginal people and their families to pursue the remedies available to them prior to the agreement being signed.

[4] As I understand it one or more of the judgments released by my colleagues in other provinces attach at least four conditions to their approval of the settlement. One of the conditions relates to the question of who is going to supervise the administration of the settlement. The agreement provides that the administration is to be supervised by the defendant, the Attorney General of Canada, whom I refer to as Canada. The condition of the judgments is that there be independent supervision subject to reporting to the Court. The judgment suggests that this may not be a material change in the agreement. I will discuss the risks that are created by the attaching of that and other conditions, in para. 33 of this judgment.

[5] In addressing the issues presented, I deal with the following matters;

a) the present plight of litigants and other persons who may wish to make a claim;

b) an outline of the proposed settlement;

c) the principles applicable to a motion for certification and how they relate to this case;

d) the principles relating to Court approval and how they relate to this case;

e) the recommendation of counsel for the represented parties;

f) the positions advanced by persons not represented by counsel either in writing or in person;

g) improvements suggested by Winkler J. in the Baxter case;

h) the risks of a conditional approval; and

i) conclusion.

a) The present plight of litigants and other injured persons;

[6] There are approximately 78,000 Aboriginal persons alive who attended and resided in Indian Residential Schools. Most of them live in Canada, although some live in the United States. Their numbers reduce weekly as 25 of them die.

Ten thousand of them have sued the federal government and churches and perpetrators of abuse. Of them, 11 per cent or 1100 have sued in Manitoba in one or another of 289 actions. If these 78,000 people were to pursue the remedies to which they may be entitled, through the court process, it would present our court system and all those people with a daunting challenge. As a result of pre-trial procedures including Judicially Assisted Dispute Resolution Conferences the vast majority of civil actions in Manitoba are settled before trial. In our Court fewer than 100 civil cases each year are brought to trial. These abuse claims are claims which are least likely to settle before trial. It is hard to imagine, in the event of claims being commenced for 11 percent of 78,000 or 8500 persons, when we would next take on any other civil trial if all the Manitoba claims were readied for trial. What would happen to the workload of the other Courts in Canada if the rest of the claims were sued and set down for trial?

[7] Now let us look at the situation confronting Aboriginal people who were devastated over the years by the events referred to in the pleadings. Many of them are impoverished. Many of them are illiterate. Culturally many of them are shy, reserved and reluctant to give evidence in Court. Relatively few of their claims have been tried to date. At the trials held to date, the plaintiffs have suffered the embarrassment of being required to give evidence publicly about the abuse they suffered many years before. In many of the cases they were required to recount their painful experience on prolonged examinations for discovery. One case took 16 years to wend its way to trial, appeal and the

Supreme Court. The trial lasted 60 days. Another claim by 26 plaintiffs lasted six years. The trial was conducted in three segments a total of 108 days. Other cases have taken between two and six years from start to finish. Many of the plaintiffs are of very modest means and the cost of engaging experts, conducting assessments and leading the evidence at trial is very great.

[8] In the context of this litigation, every plaintiff must overcome enormous hurdles in order to succeed in an action and realize on any judgment obtained. Starting with the question of realizing a judgment, it is in most cases of abuse, not good enough to obtain judgment against the perpetrator of abuse, because he or she may not have sufficient assets to pay the judgment. Consequently, it is necessary for each and every plaintiff to find a legal basis for holding Canada or a church liable, and in the case of the churches there is a real question of their ability to pay one or more of the judgments.

[9] While we live in an era where unrepresented litigants are filing their own claims in unprecedented numbers, making a claim in these circumstances requires the preparation of a written pleading which will test the skills of an experienced pleader. Pleadings prepared below the minimum standard run the risk of being struck out or dismissed fairly early in a proceeding. Legal representation is pretty well a must in these claims.

[10] If the Aboriginal plaintiffs find lawyers who will represent them and have the required expertise, one of the first problems to be addressed is whether the

claim can be brought on a timely basis or whether it will be barred by the **Limitation of Actions Act** C.C.S.M. c. L 150 and like legislation in other provinces. In Manitoba the legislature attempted in 2002 to amend the statute and relieve plaintiffs from the harshness of a 30 year ultimate limitation period (S.M. 2002, c.5, s.4) but the amendment is unlikely to help many of this class of plaintiff because it is a principle of law that a defendant acquires a vested right to have the benefit of any limitation period in place at the time a wrong is committed even if the limitation provision is later repealed.

[11] If a member of this class of plaintiffs is able to overcome the limitation problem which is inherent in these decades old claims, the claims may be met with attempts by the defendants to defeat the claims on a long list of grounds, a few of which I will describe briefly, many of which have not been tested in Court. Firstly, it may be argued that loss of language, culture and identity is not an item of damage for which Courts are able to award compensation. Secondly, the only legal basis for imposing liability against the federal government is by proof that a servant of Canada would be personally liable, if sued and that Canada is vicariously liable. In the case of claims pre-dating 1953, one would have to base the claim in negligence and show that the acts in question took place in the course of the wrong-doers employment. It was only by means of a legislative change in 1953 that Canada became liable for intentional torts of its servants. However, it may be argued that Canada is not liable for the tortious acts of all its employees. In one case the Supreme Court held that in order to support a

finding of vicarious liability there had to be a strong connection between what the employer was asking the employee to do and the wrongful conduct. The Court rejected a claim against a school where a man who was employed as a baker, driver and odd-job man assaulted a student in his living quarters. In negligence claims defendants might try to justify the actions of their servants by establishing that the operation of the schools and treatment of students met the standards of the times or contemporary standards. When one makes a claim in a civil action against another based on conduct that amounts to a crime, the burden of proof to be satisfied is proof on a balance of probabilities commensurate with the seriousness of the allegation. This is higher than the usual burden of proof in a civil trial.

[12] In November 2003 Canada created an ADR system as an alternative to litigation. Under the ADR program victims of IRS are permitted to make claims for damages for acts of physical and sexual abuse by school employees. The amount of the award is set by one of 32 full time adjudicators based on a grid consisting of several categories for which an adjudicator is able to make an award to a limit of $245,000.00. The amounts awarded vary from province to province. The adjudicators do not have the authority to award damages for lost earnings. Canada pays 70 percent of the amount of the award leaving it to the claimant to collect the other 30 percent from the church sponsor of the IRS in question. Since inception 5000 claims have been filed and 4000 of them are outstanding.

b) An outline of the proposed settlement;

[13] The settlement makes provision for payment by Canada with participation by several church defendants, of six kinds of payments, two of which are to residential students directly provided they were alive on May 30, 2005, and the rest of which address the broad social implications of the IRS legacy. Firstly, all former students alive at the above date will receive the sum of $10,000.00 for the first year of attendance in an IRS and a further sum of $3,000.00 for each year of attendance thereafter. An IRS student who attended one or more schools for say 12 years will receive $10,000.00 plus 11 times $3,000.00 or $43,000.00 without proof of legal liability on the part of anyone else and without proof of physical or sexual abuse. This category of payment is described as a Common Experience Payment (C.E.P.). It recognizes the common experience of all former students and arguably recognizes the loss of their culture, family ties and identity. Unless the student intends to make a claim for serious physical or sexual abuse or wrongful acts which are defined, the recipient must sign a release of all claims in exchange for payment. Canada has established a fund of $1.9 billion dollars to fund payments to every student. Canada bears the risk of any insufficiency in the fund. If there is a surplus it is not repaid to Canada but is to be paid according to a formula. The first sum up to $40 million goes to the National Indian Brotherhood Trust Fund and the Inuvialuit Education Foundation to be used for educational programs for all class members. If the surplus exceeds that amount, each C.E.P. recipient receives a pro rata share in the form

of personal credits for personal or group education up to $3,000.00. Canada also pays the cost of verifying the claims and the administrative cost of distribution.

[14] Under the terms of the proposed settlement, Canada has instituted a process under which it pays, pending finalization of the settlement, the sum of $8,000.00 as an interim payment to all persons otherwise entitled to a C.E.P. who were on May 30, 2005 over the age of 65.

[15] Secondly, class members have the right to seek and obtain payment of additional compensation for serious physical abuse, sexual abuse and specified wrongful acts through an Independent Assessment Process known as IAP. The parties, having observed the ADR process in action for more than a year, conducted studies, noted the shortcomings and proposed a series of significant improvements that have been incorporated into the settlement agreement. The awards under IAP consist not only of the damage award of the ADR process with a limit increasing to $275,000.00 but also compensation for lost earnings of up to $250,000.00. Compensation is paid in full by Canada not only for acts of employees but also for acts of any adult lawfully on the IRS premises. Where the claim is for abuse by fellow students the onus shifts to Canada and the Churches to show that it had reasonable supervision in place at the time. Unlike the Court process, the IAP process follows the inquisitorial mode. The adjudicator questions the witnesses at a closed or private hearing. Canada has committed itself to provide resources to ensure that at least 2500 IAP hearings

will be conducted each year and that all claims described as continuing claims be resolved within 6 years. There is provision for claims being referred to the courts in some circumstances, for example where the amount that a court might award exceeds the limit that the adjudicator might award. Any major changes to the IAP requires Court approval.

[16] In addition to the fact that the IAP process is an improvement over the former ADR system as described in para. 15, there are eight additional improvements as follows: an expanded list of compensable acts; a decreased threshold for proof of abuse; for claims resolved prior to the IAP without church contribution, a 30 per cent top up where less than 100 per cent was received; for claims processed under IAP payment on a scale that is uniform across the country; for claims referred to the Courts, a waiver of all limitation defences; a means to compensate non student invitees for abuse suffered up to the age of 21; an independent screening process for IAP claims; and a means for claimants to give evidence by video conference in cases of failing health.

[17] Thirdly, the settlement provides for Canada to fund to the extent of $60 million for five years, the setting up of a Truth and Reconciliation process, directed by a Commission consisting of nominees of former students, Aboriginal organizations, Churches and Canada. The goals of the Commission are to acknowledge the IRS experience; provide a safe setting for individuals to address the Commission; witness, promote and facilitate truth and reconciliation events at both national and community levels; educate the Canadian public about the

IRS system and its impacts; create and make public a record for future study; prepare a report on the legacy of the IRS; and support commemorative events.

[18] Fourthly, the settlement provides for a number of commemorative initiatives at national and community levels with a budget of $20 million and for the establishment of a $125 million dollar endowment over five years to fund Aboriginal healing programs.

[19] In addition, 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.

[20] In addition, the Church organizations have agreed as part of the settlement to provide cash and in-kind services to a maximum of $102.8 million to develop new programs for class members and their families.

[21] Importantly, Canada will be paying from a separate fund legal fees for the conduct of the various Court actions, for negotiation of the settlement agreement, for conduct of the C.E.P. claims and a contribution toward legal fees to be earned on the IAP claims to the extent of 15 percent of the awards. I will say more about this in para. 30 and 31.

[22] The settlement agreement does not bind any member of the class to seek or accept the benefits provided in the agreement. It makes provision for class members to opt out of making a claim for C.E.P. and proceeding with a court claim. Para. 4.14 creates a threshold that if 5,000 persons opt out the agreement is invalidated and court approval set aside unless Canada chooses to waive compliance within a prescribed period.

c) The principles applicable to a motion for certification of a class action;

[23] This motion for certification has been brought pursuant to **The Class Proceedings Act** C.C.S.M. c. C130. Section 4 provides:

> **Certification of class proceeding**
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> 4. The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of two or more persons;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
>
> (e) there is a person who is prepared to act as the representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class of notifying class members of the class proceeding, and

(iii) does not have, on the common issues, an interest that conflicts with the interests of other class members.

All parties consent to the order being made. However the consent of the defendants is conditional on the settlement being confirmed by this Court and the Courts in eight other jurisdictions. The statute provides with regard to settlements:

> **Settlement, discontinuance and abandonment**
>
> 35(1) A class proceeding may be settled, discontinued or abandoned only
>
> (a) with the approval of the court; and
>
> (b) on the terms the court considers appropriate.
>
> **Court approval of settlement**
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> 35(2) A settlement may be concluded in relation to the common issues affecting a subclass only
>
> (a) with the approval of the court; and
>
> (b) on the terms the court considers appropriate.
>
> **Settlement not binding unless approved**
>
> 35(3) A settlement is not binding unless approved by the court.

It does not specify the matters to be considered in deciding whether to approve a settlement.

[24] In my view it is clear that all of the criteria have been met for certification of the action as a class action. I wish to discuss briefly the requirement of s. 4(d) that a class proceeding be "the preferable procedure for the fair and efficient resolution of the common issues."

[25] For the purpose of this section the class proceeding is the class proceeding sought by the parties including the implementation of the settlement with the C.E.P. payments (para. 13), IAP payments (para. 15), national and community based programs (paras. 17 to 20) and regime for payment of legal fees (paras. 30 and 31). That this procedure is preferable to the alternative which faces 78,000 claimants, our court systems and our community is self evident. I agree with the submissions of counsel that without rubber stamping a consent order a Court may properly be flexible and relax the standards that might be expected of a moving party in a contested motion. In the case of **Gariepy v Shell Oil Co.** [2002] O.J. No. 4022, Nordheimer J. stated at para. 27:

> ¶27 The first issue is whether this action should be certified as a class proceeding for the purposes of the proposed settlement. The requirements for certification in a settlement context are the same as they are in a litigation context and are set out in section 5 of the Class Proceedings Act, 1992. However, their application need not, in my view, be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed.

In my view that means that the preferable procedure requirement has been satisfied in the circumstances of this case leaving any question of manageability

or administration of the carrying out of the settlement agreement as a matter to be considered along with all other aspects of the settlement in deciding whether to approve it.

d) Principles relating to approval of a settlement;

[26] The minimum standards for obtaining court approval of a settlement have been described by the author in Class Actions in Canada by Ward K. Branch 2006 Canada Law Book Aurora, as follows:

> **16.30** While the Acts do not specify the test for approval, courts have held that the court must find that in all the circumstances the settlement is fair, reasonable and in the best interest of those affected by it. The settlement must be in the best interests of the class as a whole, not any particular member. Settlement approval should not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness. In *Dabbs v. Sun Life Assurance Co. of Canada*, the court stated that the following factors were a useful list of criteria for assessing the reasonableness of a proposed settlement:
>
> (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.
>
> These factors have been adopted in many other cases both inside and outside Ontario. It is not necessary that all of the enumerated factors be present in each case, nor is it necessary that each factor be given equal weight in the consideration of any particular settlement.

To these factors I would add that the court should also consider whether the refusal of approval or attaching of conditions to approval, puts the settlement in jeopardy of being unravelled. It should be remembered that there is no obligation on parties to resume negotiations, that sometimes parties who have reached their limit in negotiation, resile from their positions or abandon the effort. The reality is that based on the assertions made at our hearing, many unrepresented Aboriginal people want the agreement affirmed, want the process expedited and not delayed, and the fact is that expectations have been created by announcement of the settlement and by the making of interim payments referred to in para. 14.

[27] While the proposed settlement may not be perfect, it certainly is within a zone of reasonableness. In my view it is fair, reasonable and in the best interest of the parties. In a companion proceeding, the motion for certification and approval in Ontario in the case of **Charles Baxter, Sr. and others v. The Attorney General of Canada** [2006] 00-CV-192059CP Winkler J. raises a concern about the manageability of the settlement of the action. That is certainly a matter to be considered on a motion for approval of a settlement. If, for example, a settlement were made with a party whose financial stability was in doubt the question might be more significant than in a case like this where the principal payer is the Government of Canada. I will say more about my view of this question in para. 32 when I address the question of whether the issue is one which makes the settlement less than perfect but reasonable and whether

Winkler J.'s proposal should be left as a suggestion for the parties to consider without making it a condition of approval.

e) Recommendation of counsel;

[28] The settlement agreement was negotiated by all parties with the benefit of experienced counsel. Counsel have not only signed the agreement but they have jointly recommended to the Court that the settlement be approved. Moreover a number of them have provided affidavits in support of the motion.

f) Position of the parties who are not represented by counsel;

[29] Fourteen persons filed written objections or comments in advance of the hearing. Several hundred persons, many of them members of the class, attended the hearing. Nineteen persons made oral presentations at the hearing touching on a number of subjects. Several of them supplemented the written presentations that they had filed in advance. Of those who complained about the settlement, more often it was because it was felt that payment should be made sooner rather than later. No substantive reason was offered for rejecting the settlement. Mr. Baert, counsel for the National Consortium responded to some of the points raised, providing clarification of the terms of the settlement. For my part I found the presentations moving and persuasive evidence as to how pervasive the damage caused to the Aboriginal community by the IRS policy and as to why it is in everyone's interest that the settlement be implemented without delay.

g) The feature of the settlement relating to payment of legal fees;

[30] The judges in the companion judgments have analyzed the provisions of the settlement agreement relating to payment of legal fees. The claims to fees are large, multiples of ten million, but many years work have gone into the various proceedings by experienced counsel. The fees in question are being paid by Canada from a fund which is separate from the source of payment to the members of the class. Most of the legal bills have been reviewed by or by persons employed by Canada's representative and he has recommended payment of them. There is an issue relating to the claim for fees of one law firm but the settlement agreement sets out a reasonable formula for determination of the firm's fees. The area of concern for me is the question of the absence of express provision in the agreement for review of legal fees on IAP claims. Under the settlement agreement Canada will on the making of an award, pay to each claimant's counsel an additional 15 percent of the award on account of legal fees. It appears that many of the lawyers who will be conducting the proceedings in the IAP claims are acting on contingency agreements entered into before the settlement agreement was made. None of the agreements are before the court but it appears that prior to the making of the settlement agreement many contingency agreements were entered into under which law firms may be entitled to claim 30 per cent or more of the recovery in a court action. One firm that claims to represent several thousand claimants has undertaken not to charge any IAP claimant more than 15 percent of the recovery in addition to the

amount received from Canada. That is, the firm has agreed to limit its claim to fees to 30 percent of the amount of the recovery. Even if every law firm in Canada were to agree to do the same, there is a risk that IAP claimants may be called on to pay unreasonably large amounts. On the IAP claims, liability is not in issue as the parties must have contemplated in composing the contingency agreements. There may be settlements short of hearing in some cases. It is easy to visualize circumstances in which no or relative small fee might be justified in addition to the contribution made by Canada.

[31] Under section 55 of the **Legal Profession Act** S.M. 2002 c.44, lawyers practicing in Manitoba must give clients a copy of the contingency agreement on execution of it, failing which it will be unenforceable. Further, along with a copy of the agreement they must give the client a copy of the section that articulates their right to apply for a declaration that the agreement is unfair and unreasonable. However, the evidence shows that many members of the class are illiterate and likely not aware of their rights to have their legal bills reviewed. While no evidence was led on the point one presenter did tell us that she put her name on a list provided by a law firm which she believed related to an offer of information about making an IRS claim. She later was told that she had signed a contingency agreement and when she tried to terminate the services of the law firm she was told that she could not do so. Winkler J. has made a very practical suggestion in the *Baxter* case for implementing a procedure for review of legal fees in the IAP claim. I recommend that the parties give serious consideration to

implementing his suggestion. Members of the class made negative comments at the hearing before me about the amounts paid to lawyers and about the conduct of lawyers who persuaded them to sign contingency agreements. In this paragraph I have approved the settlement as it relates to payment for work done to this time. This settlement is historic and I feel sure that once implemented, Canadians will look back with pride on the way the parties have agreed to put to rest the issues arising from the IRS legacy. An effective review of the legal fees would ensure that the IRS legacy would not be viewed as a windfall to the legal profession.

Critique of the settlement

[32] In the *Baxter* case Winkler J. has identified four deficiencies in the settlement agreement. The deficiencies have been summarized by Ball J. in para. 19 of his judgment in the companion case of **Sparvier v The Attorney General of Canada** 2006 SKQB (see his draft) as follows:

> (a) Financial information sufficient to enable the courts to make an informed decision regarding the anticipated cost of administration of the IAP will be provided for the purposes of approval and thereafter on a periodic basis (para. 52);
>
> (b) An autonomous supervisor or supervisory board will oversee the administration of the IAP, reporting ultimately to the court (para. 52);
>
> (c) The adjudicator hearing each case under the IAP will regulate counsel fees to be charged having regard to the complexity of the case, the result achieved, the intention to provide claimants with a reasonable settlement, and the fact that an additional

> 15% of the compensation award will be paid as fees by Canada (para. 78); and
>
> (d) The parties will establish a protocol for determining the manner in which issues relating to the ongoing administration of the settlement will be submitted to the courts in each jurisdiction for determination. This will ensure that the requirement for unanimous approval of all courts of any material amendment will not unduly hinder or delay the ability of the courts to make timely decisions (para. 81).

While I agree that the settlement might be better if the four changes were made, it might still be regarded imperfect for a variety of reasons. In para. 31 of my judgment I have articulated my concerns about the desirability of making provisions for review of counsel fees on IAP claims. However, I would not make such a provision a condition of approval. Of the remaining conditions the ones that raise a red flag are (a) and (b) relating to production of financial information and supervision of the administration of the CEP and IAP. Of this, Winkler J. has made the following findings in *Baxter*:

> [38] The potential for conflict for Canada between its proposed role as administrator and its role as continuing litigant is the first issue that must be addressed. One of the goals of this settlement is to resolve all ongoing litigation related to the residential schools. The structure of the administration must be consistent with this aim and not such as to render itself subject to claims of bias and partiality based on apparent conflicts of interest. If such perception exists, it has the potential to taint even those areas where the neutrality is more enshrined such as the adjudication process. Accordingly, the administration of the plan must be neutral and independent of any concerns that Canada, as a party to the settlement, may otherwise have. In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class

members and insulate the government from unfounded conflict of interest claims. To effectively accomplish this separation and autonomy it is not necessary to alter the administrative scheme by replacing the proposed administration or by imposing a third party administrator on the settlement. Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government. By extension, such person, or persons, once appointed by the government and approved by the courts, is not subject to removal by the government without further approval from the courts. This is consistent with the approach taken in all class action administrations and there is no reason to depart from that approach in this instance.

[39] The autonomous supervisor or supervisory board envisioned by the court will have the authority necessary to direct the administration of the plan in accordance with its terms, to communicate with the supervisory courts and to be responsible to those courts. Simply put, it cannot be the case that the "administrator", once directed by the courts to undertake a certain task, must seek the ultimate approval from Canada. The administration of the settlement will be under the direction of the courts and they will be the final authority. Otherwise, the neutrality and independence of the administrator will be suspect and the supervisory authority of the courts compromised.

[40] The foregoing are organizational issues that relate to what may be called the "executive oversight" role in the administration. There are other issues in relation to the operational framework for delivery of the benefits under the settlement, particularly with respect to the costs of administration.

[42] Absent any explanation, the current costs of the ADR program appear to be excessively disproportionate when considered against the typical costs of administering a class action settlement. This court has never approved a settlement where the costs of administration exceed the compensation available let alone where the cost excess is a factor of three. It is no answer as was suggested in argument that since Canada, as defendant, has committed to funding the administrative costs separately from the settlement funding, the court need not be concerned with the quantum of that cost. This proposition must be rejected for two reasons. First, it ignores the court's supervisory role in class

> actions. Secondly, it fails to recognize how the peculiar aspects of certain terms of this settlement relating to funding can impact unfairly on the class members while at the same time leaving the courts powerless to provide a remedy. This is addressed in more detail below. Thirdly, it fails to recognize that this is not a settlement where the administration is being paid out of a fixed settlement fund. The administrative costs will be paid from the general revenues of the government. This leads to a certain precariousness in respect of the administration and leads to the prospect of the ongoing administration of the settlement becoming a political issue to the potential detriment of the class members.
>
> [44] This combination of inadequate information and absolute veto power over expenditures is unacceptable. The court cannot approve a settlement without adequate information to ensure that the class members' interests are being protected and that it will be able to maintain an effective ongoing supervisory role. As stated in *McCarthy* (No. 2474) at para. 21:
>
> > …a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party.

It strikes me that an issue is being raised as to who, as between the courts and Canada, is to have ultimate control over the administration of the settlement. The settlement of this case is too important to the parties affected and is so fair and reasonable, that it is inappropriate to engage in that debate in this case. Canada has shown its good intentions in so many ways and the parties, after a lengthy and complex series of negotiations, have accepted that Canada will have the supervisory role. Issues like this one can well be left for other settings.

i) Risks of not unconditionally approving the settlement;

[33] The settlement agreement provides:

> 16.01 Agreement is Conditional
>
> This Agreement will not be effective unless and until it is approved by the Courts, and if such approvals are not granted by each of the Courts on substantially the same terms and conditions save and except for the variations in membership contemplated in Sections 4.04 and 4.07 of this Agreement, this Agreement will thereupon be terminated and none of the Parties will be liable to any of the other Parties hereunder, except that the fees and disbursements of the members of the NCC will be paid in any event.

This provision largely mirrors the condition set out in the settlement agreement referred to in **Parsons v. Canadian Red Cross Society** [1999] O.J. No. 3572 at para. 127. However, one could argue that the four conditions referred to in Winkler J.'s judgment in the *Baxter* case are much more substantial than the two conditions imposed in *Parsons*. Winkler J. has stated in para. 36 of *Baxter*:

> [36] I turn now to the specific deficiencies that must be addressed in the proposed administrative scheme. In my view they are neither insurmountable nor do they require any material change to the settlement agreement itself.

In para. 85 of *Baxter* he also stated, "The changes that the court requires to the settlement are neither material nor substantial in the context of its scope and complexity." There is another view that is reasonably arguable, that the conditions are not "substantially the same as" the terms of the settlement agreement. If the alternative interpretation is adopted it will be open to Canada to treat the settlement agreement as terminated and 78000 Aboriginal claimants will be returned to their pre-settlement plight. Also there will be nothing to compel the parties to resume negotiation and if they do, there is a risk that they

will resile from positions agreed to. In other words there is a risk that the settlement will unravel although it is in its present form well within a zone of reasonableness.

j) Conclusion.

[34] Having reviewed the material that has been placed before this court I have reached the conclusion that the order of certification of a class action should be granted and the settlement should be approved unconditionally. An expectation has been created on the part of class members that they would receive payments and many have received interim payments. It would be unfortunate if this creative effort by all parties were brought to a halt and the whole settlement unravelled because of the imposition of conditions which may well have been rejected in the course of negotiations of the agreement. Negotiation involves give and take on the part of negotiating parties and the negotiation concluded with a settlement which cries out for confirmation.

_____

J.