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NUNAVUT COURT OF JUSTICE
La Cour de justice du Nunavut

Citation:	***Ammaq et al. v. Canada (Attorney General)*, 2006 NUCJ 24**
Date of Judgment (YMD):	2006-12-19
File Number:	08-05-401 CVC
Registry:	Iqaluit
Plaintiffs:	**Michelline Ammaq, Blandina Tulugarjuk and Nunavut Tunngavik Incorporated**
	-and-
Defendant:	**Attorney General of Canada**

Before:	The Honourable Mr. Justice R. Kilpatrick
Counsel (Plaintiffs):	Janice Payne and Steven Foulds
Counsel (Defendant):	Michele Annich
Location Heard:	Iqaluit, Nunavut
Date Heard:	October 10-11, 2006
Matters:	*Nunavut Rules of Court*, R.N.W.T. R-010-96, as duplicated for Nunavut by s.29 of the *Nunavut Act*, S.C. 1993, c. 28, Rules 62, 657-661

REASONS FOR JUDGEMENT

(NOTE: This document may have been edited for publication)

I. INTRODUCTION

[1] There is a brooding resentment for a life that is damaged. There is anger for a childhood that is lost. There is profound emptiness and a sadness that comes from the loss of an opportunity to be raised in a nurturing family environment. There is only a memory of survival; a memory scarred by pain, anxiety and humiliation. Then there is the loneliness, a solitude caused by years of isolation from language, culture, and extended family. Michelline Ammaq is left with a great yearning to know a life that has never been lived. These feelings are the unfortunate legacies, the bitter byproducts, of a residential school experience.

[2] These feelings are shared by many who passed through Canada's 'Indian' residential school system. Michelline Ammaq is joined by other former students in bringing a legal action against the authorities responsible for the creation and implementation of this 'Indian' residential school system in Canada. In human terms, the objectives underlying this litigation are varied. Some seek redress in the form of financial compensation for what has been lost. Some seek public recognition, and an apology for the suffering inflicted and the harm sustained. Some seek an opportunity to rebuild damaged lives through access to remedial programs. Almost all litigants struggle to understand their residential school experiences. There is a need for reconciliation so that a healing journey can be completed. For many who attended the residential schools, it is already too late - Death has intervened.

[3] The applicants seek an order certifying their litigation as a class proceeding within the meaning of Rule 62 of the *Nunavut Rules of Court,* R.N.W.T. R-010-96, as duplicated for Nunavut by s.29 of the *Nunavut Act,* S.C. 1993, c. 28 (*Rules*). With the consent of all the litigants, approval is also sought for the terms of a negotiated settlement. The consent of the Defendants to the certification motion is conditional upon this Court approving the proposed settlement. The Defendants' consent to these two

applications also turns upon parallel applications being successful in eight other jurisdictions in this country. If approval of this settlement is not given, the litigation now pending before this Court would continue. In Nunavut, there are presently six statements of claim filed on behalf of 191 claimants.

II. APPLICATION FOR CERTIFICATION

[4] Nunavut does not have class action legislation. It is left to the common law and this Court's inherent jurisdiction to regulate any proposed class action. The *Rules* provide as follows:

> *"62. Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all."*

[5] Four criteria are necessary for approval of a common law class action. They are as follows:

1. The members comprising the proposed 'class' must be clearly defined;

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

3. With respect to these common issues, success for one class member must mean success for all, though not necessarily to the same extent; and

4. The proposed class representatives must adequately represent the proposed class.

[6] The proposed class in this action is comprised of three categories of potential claimants. The 'survivor' class is defined as all persons in Canada who resided at an "Indian Residential School" between January 1, 1920 and December 31, 1997, who were living as of May 30, 2005, in one of the identified jurisdictions. The 'family' class includes a spouse, child, parent,

grandparent or grandchild of a 'survivor'. The 'deceased' class covers all persons who attended an Indian residential school between 1920 and 1997 who died before May 30, 2005. I am satisfied that these definitions provide sufficient objectively verifiable criteria to identify those with a potential claim under the proposed class action. The first criterion is satisfied.

[7] I am also satisfied that there are at least four legal issues that are shared in common by the proposed class members. These issues are identified by the litigants as follows:

> 1. By their operation or management of Indian Residential Schools during the class period (1920 to 1997), 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 ?
>
> 2. 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 ?
>
> 3. By their purpose, operation or management of Indian Residential Schools during the class period, did the Defendants breach a fiduciary duty that they owed to the family class ?
>
> 4. 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 ?

[8] These class members as defined would all be bound by the result of any legal determination of these four issues in the context of this proposed class action. The third criterion is therefore met.

[9] The individual characteristics of the proposed class of Plaintiffs are set out in the affidavit materials filed by the applicants. I am satisfied that the proposed representative Plaintiffs reflect a broad cross-section of potential claimants from all three classes as defined by the proposed class action. These Plaintiffs collectively provide a fair and adequate representation for the survivor, family and deceased classes. The affidavit material filed on behalf of these proposed representative plaintiffs deposes that these plaintiffs or their representatives are both willing and able to effectively represent the class of which they are a part and so advocate their respective class interests. The fourth and final criterion for certification is therefore also met.

[10] There are significant advantages accruing to both the Court and the litigants associated with this matter proceeding as a class action.

[11] Much judicial economy is achieved by avoiding unnecessary duplication of fact finding and legal analysis. The residential school litigation in its present form is likely to consume a significant quantity of judicial resources. In this jurisdiction, the Nunavut Court of Justice would be hard pressed to accommodate the demands associated with extensive litigation on the common issues of fact and law raised by the pleadings. The class action would result in a more effective use of these scarce judicial resources. Claims that are pursued individually could potentially wait years for resolution in a court that is already strained to capacity.

[12] The substantial costs associated with this type of litigation in Nunavut are likely to be reduced through cost sharing arrangements made between individual plaintiffs. This would enhance the impecunious litigant's access to justice. Many citizens in Nunavut might not otherwise have the financial resources needed to litigate. If pursued as individual claims, the substantial costs associated with litigation in Nunavut might eat up most, if not all of any anticipated recovery in damages in many cases.

[13] The Defendants can also achieve greater economy by pooling resources and sharing costs. They would be required to defend only once.

[14] There are strategic and tactical disadvantages to individual litigants posed by certification as a class action. A defendant may wish to raise different defenses with different groups of Plaintiffs. Individual class members of Plaintiffs may also wish to raise issues that are not necessarily shared by all members of their class. This becomes very difficult to do in the context of class action litigation. While the potential always exists for these disadvantages to arise after certification, none of the parties to this motion and none of the citizens appearing to speak to this motion identified specific areas of concern.

[15] On balance, I conclude that in this jurisdiction both efficiency and fairness favors approval of the motion for certification as a class action.

III. TERMS OF THE PROPOSED SETTLEMENT

[16] There are four key elements of the proposed *Indian Residential Schools Settlement Agreement*[1] (*Settlement*) before the Court. These are:

1. The Common Experience Payment;

2. The Independent Assessment Process;

3. Truth and Reconciliation, Commemoration and Healing; and

4. In Kind Services Provided by Church Organizations and Canada

[1] *Settlement Agreement*, online: Indian Residential Schools Class Action Settlement - Official Court Website: http://www.residentialschoolsettlement.ca/settlement.html

A. The Common Experience Payment (CEP)

[17] All members of the survivor class will receive a cash payment. The amount of this payment will vary with the length of time actually spent in the residential school. Each survivor is to receive $10,000 for the first year of attendance and $3000 for each year or part of a year thereafter. There are estimated to be approximately 79,000 eligible claimants under this class.

[18] This payment is intended to compensate all survivors for the hardships associated with their 'common experience'. It is not intended to provide compensation for physical or sexual abuse or other acts of willful misconduct committed by school authorities or agents. This is to be the subject of a second head of compensation outlined under the independent assessment process.

[19] The Defendant Canada has budgeted 1.9 billion dollars for the common experience payments and is committed to increase this amount if needed.

[20] Payout of this type of claim is to be made upon proof of attendance at a designated residential school. An aggrieved claimant has a right of appeal in the first instance, to the National Administration Committee, and then to a court of competent jurisdiction.

B. The Independent Assessment Process (IAP)

[21] Claimants may seek additional compensation for acts of physical or sexual abuse or other wrongful acts as defined by the *Settlement*. Compensation from $5000 to a maximum of $275,000 is available under this head, with an additional sum of up to $250,000 available on proof of actual income loss.

[22] Proof of the wrongful act and consequential harm must be established. Canada is to provide an independent review process to adjudicate these claims and is committed to

processing a minimum of 2500 such claims per year. It is estimated that there may be as many as 15,000 claimants under this head of compensation.

[23] Canada has agreed to settle all of these claims within six years and to ensure that sufficient resources are in place to meet this objective. Canada is further committed to ensure that a claimant is given a hearing date within nine months of the claim being filed.

[24] In the event that Canada fails to meet its commitment to adequately resource the IAP, the committee charged with overall administration of this program, the National Administration Committee (NAC) may apply to the Court for an order to address this issue.

[25] The administrative costs associated with this review process are to be paid for separately by Canada and will not impact upon the amount of funds available for payment of compensation to survivors. There is no cost estimate provided for the administration of the IAP.

[26] It is anticipated that many or most of these claims will be resolved using an informal inquisitorial method presided over by an adjudicator. However, the *Settlement* does provide that an adjudicator may refer a matter to court for resolution:

> (a) where the evidence suggests that the claim for actual income loss or consequential loss of opportunity may exceed the maximum compensation available under the IAP;
>
> (b) where the evidence indicates that the claimant suffered catastrophic physical harm for which greater compensation may be available from the Court than the IAP;
>
> (c) in any case where the complexity and extent of evidence required to address the alleged harms makes recourse to the courts more appropriate.

[27] Where an adjudicator refers an IAP claim to the Court for resolution, the defendant Canada is obligated under the proposed settlement to waive any applicable defenses arising from a Statute of Limitations.

[28] The *Settlement* provides for a right of appeal from any decision of an adjudicator to the Chief Adjudicator. Beyond this, there is no additional right of appeal to the Courts.

C. Truth and Reconciliation, Commemoration and Healing

[29] In addition to the monetary compensation provided by the CEP and IAP, the *Settlement* provides three additional benefits.

[30] Sixty million dollars is committed to establish a Truth and Reconciliation process through the establishment of a Commission with a five-year mandate to:

> (a) acknowledge residential school experiences, impacts and consequences;
>
> (b) provide an appropriate and safe setting for individuals to speak of their experiences;
>
> (c) witness, promote, and facilitate truth and reconciliation events at both national and community levels;
>
> (d) educate the Canadian public about the residential school system and its impacts;
>
> (e) create an historical record of the 'Indian residential school system' for future study and use;
>
> (f) produce a report on the 'Indian residential school system', its effects and ongoing legacy.

[31] A further twenty million dollars is committed to fund commemorative events at both a national and local level. Control of this budget is given to the Truth and Reconciliation Commission who will administer any applications made to fund commemorative events.

[32] One hundred twenty five million dollars is committed to fund healing programs through the Aboriginal Healing Foundation.

[33] All three classes and their families, as defined by the agreement, are able to benefit from these settlement provisions and any programs or services created under this head.

D. In Kind Services Provided by Church Organizations and Canada

[34] The various church organizations are collectively committed to provide both cash and in kind services to a maximum of $102.8 million dollars to develop new programs for class members and their families. Canada is required to continue any existing mental health and emotional support services to survivors participating in the various settlement initiatives including truth and reconciliation events.

IV. CRITERIA FOR APPROVAL OF A CLASS ACTION SETTLEMENT AGREEMENT

[35] Many stand to be affected by the proposed resolution. The Court has an obligation to scrutinize the proposed settlement to ensure that it fairly meets the interests of all who stand to be affected by it, including those who are not presently represented by counsel.

[36] It is for this reason that the Court has an overriding responsibility to ensure that any proposed settlement is fair and reasonable before approving its terms. The proposed settlement must be in the best interests of the class as a whole.

[37] The settlement agreement that is presented for approval was the product of extensive negotiation conducted over a significant period of time. Some of the best legal minds in Canada were engaged in this process. The proposed agreement has the support of many of this country's leading aboriginal organizations. In this jurisdiction, it has the support of Nunavut Tunngavik Incorporated. It has the support of the Honourable Frank Iacobucci, former justice of the Supreme Court of Canada, who was instrumental in mediating the settlement discussions that ultimately resulted in this agreement being created. It has the support of all of the parties, both plaintiffs and defendants, who appeared on this motion.

[38] As in the case of any negotiated agreement there has been both 'give' and 'take' by all of the parties over a broad range of issues covered by the negotiations. Compromises are inevitably made in the course of reaching such an agreement. For this reason, it is inappropriate to apply a standard of perfection to the end product. Considerable deference must be shown to the process underlying the negotiated settlement.

[39] The decision to approve the proposed settlement agreement must be based upon an objective standard of reasonableness; a standard that takes into account the needs and interests of the class as a whole. Subjective considerations related to individual litigants do not determine whether the settlement receives court approval. It is only where these subjective concerns are of such number or magnitude that the settlement is rendered unfair, inadequate or unreasonable to the class as a whole, that court approval should be withheld. This is so because what is 'best' for an individual litigant may not be achievable or fair for the larger class of which the litigant is only a part.

[40] In applying this objective standard to this settlement proposal a number of criteria stand out in importance.

A. Likelihood of Success – Risk of Loss

[41] There are risks associated with any litigation. As the potential risk of loss increases, the advantages associated with the certainty of a negotiated settlement become an increasingly important factor in a court's decision to approve any proposed resolution. In assessing the weight to be attached to this criterion, the Court is not called upon to decide the merits of the litigation. It looks only to an assessment of the risks associated ith the claim being advanced when balanced against prospective defenses to liability or recovery raised by the pleadings.

[42] In this case, the Plaintiffs face a significant risk of loss on an issue of liability. Limitation defenses are raised against all three classes of Plaintiffs. A claim of statutory immunity is raised by Canada in relation to alleged intentional torts arising before 1953. Canada's exposure is limited by law to vicarious liability only by virtue of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c.C-50.

[43] The Defendants collectively raise a 'standard of the day' defense, by arguing that the schools were operated in accordance with the standards of the time, thus occasioning no breach of either duty or of the applicable standard of care. The Defendants are only accountable if their conduct fell below the standards prevailing when the cause of action arose.

[44] The Defendant Canada argues that it is not open to any court to review the government policy behind the creation of the 'Indian' residential school system. It is argued that government policy is not a 'justiciable' issue. This is said to offend the common law doctrine of Parliamentary supremacy. It is argued that any cause of action based upon an attack of this government policy must fail for this reason.

[45] It is argued that the common law to this point has not recognized loss of culture or language as giving rise to a legal claim of any kind.

[46] In addition to these potential defenses, claims made by the family class are attacked on the basis that these claims are either not recognized by statute or common law, or that they fail to meet the rigourous common law standards necessary to perfect such claims.

[47] The deceased class has additional problems associated with having to establish a claim in the absence of the deceased. The deceased was obviously in the best position to give evidence concerning his or her treatment and conditions within the school. He or she is no longer available to testify.

[48] This class must overcome legislation in many jurisdictions which prohibits or limits actions to recover damages by the estate of a deceased person.

[49] I conclude that all three classes of Plaintiffs face significant legal risks in pursing litigation through the courts. Significant advantages accrue to all three classes by favoring the certainties achieved by negotiation over the uncertainties posed by pursuing litigation in court.

B. Time and Cost of Litigation in Nunavut

[50] The cost of litigation in Nunavut is significantly higher than anywhere else in the country. Air travel is necessary given the distance and geography of the Territory. There are no roads between communities. There are no trains or public transit systems. Witness travel costs are a very substantial component of the costs associated with litigation in Nunavut. Lawyer travel also adds to the expense of proving a complex claim in a lengthy trial process. All lawyers presently involved in this litigation are resident outside the Nunavut territory. The 'experts' likely to be retained for the purpose of prosecuting or defending these claims are also resident outside the territory.

[51] The extremely high cost of litigation in this jurisdiction puts this type of complex litigation out of the financial reach of most Nunavummiut. The expenses associated with proving an individual claim would likely eat up any potential recovery in many, if not most claims. The groups most likely to benefit from complex court-based litigation would be the local airlines and the legal community.

[52] Nunavut is this country's only 'unified trial court'. Its three justices are expected to provide all services ordinarily provided by provincial and superior courts in all criminal and civil matters. They also sit in an appellate capacity. All three justices are presently working to capacity. This Court's lack of judicial resources limits the Court's flexibility to accommodate a significant volume of civil litigation. Significant delays in reaching trial can be expected as a result.

[53] The proposed settlement, if accepted, provides a claims resolution process that is at least as expeditious as any that this Court could be expected to provide and at far less cost to the individual litigant in Nunavut. All of these considerations clearly weigh in favor of the proposed settlement.

C. Personal Circumstances of the Plaintiffs

[54] Time has already taken a heavy toll upon the survivor class. Many have died. This number grows larger, and is accelerating, with each passing month. Many of the potential claimants in the survivor class are elderly and in poor health. Their ability to sustain the stress associated with a lengthy trial diminishes with age. Memories are fading. Their ability to successfully prove a claim is affected by this.

[55] Many of the members of both the survivor and the family class need remedial programming now to address the dysfunction associated with the survivor's experiences. In many cases, the survivor's dysfunction continues to be passed on to family members long after the residential school experience has ended. The social impact of the 'Indian residential school' has become

inter-generational in scope. Any delay in providing remedial programming serves only to enhance this dysfunction and delay effective recovery of the larger family unit.

[56] I conclude that the needs and interests of both the survivor and family classes are prejudiced by delay. The life circumstances of these two groups weigh heavily in favour of settlement approval and a speedy resolution of their claims.

D. Number and Nature of Objections

[57] A two-day hearing was made available to any citizens wishing to voice concerns about the terms of the proposed settlement. This hearing was publicized thoughout Nunavut in accordance with a communications plan approved by the Court. Written submissions were invited to be made by those who either lacked the means to travel to Iqaluit or who preferred to do so in writing. Those who made submissions in Nunavut did so overwhelmingly in favor of the proposed settlement.

[58] This Court has reviewed the submissions filed with the courts in the other eight jurisdictions. Some citizens complained that the CEP payment is too small, and should be increased. Some argued that the descendants of former students now deceased should be able to benefit from the CEP awarded to survivors. Some argued that the cut-off date of May 30, 1995, is arbitrary and that persons who died before the settlement was signed should be able to receive the monetary benefits through their estate. Some had insisted that monetary compensation should be accompanied by a formal apology made by the various Defendants in a public forum.

[59] In an agreement of this scope and complexity, there will inevitably be some dissent. Any potential claimants who are not prepared to accept the proposed settlement in full satisfaction of their claim, do not have to do so. They have the ability to opt out of the provisions of this settlement, but must do so within five months of the settlement being approved. If they do so, they must then accept all of the risks and disadvantages associated with pursuit of this litigation in the courts.

E. Access to Justice and the Inuit Healing Perspective

[60] Many Nunavummiut stand to benefit from the terms of the proposed settlement. This is so whether the benefit takes the form of direct monetary compensation or access to the programming created by it. The settlement associated with this class action provides greater access to 'justice' than that associated with a particular individual's legal victory in a courtroom.

[61] This is a settlement that is fashioned with Inuit perspectives in mind. It is holistic in its scope. It provides tangible benefits; benefits directed not only at the individual claimant, but at the larger aboriginal community of which the claimant is a part. It is forward-looking. It provides some redress in the form of monetary compensation for past misdeeds while focusing on the need to heal. It addresses the healing needs of the survivor and the larger family unit through the provision of remedial programming. It provides for community healing through a Truth and Reconciliation Commission and related commemorative events. No legal victory in a courtroom could ever hope to do this. This Court is not equipped to address the holistic healing perspectives of the individual, his or her family and the community in a way that does justice to the larger Inuit and aboriginal perspectives on life, on living and on conflict resolution. The settlement agreement proposes to do just that.

[62] The Inuit understand justice to be a dynamic human process. It is 'doing justice' that is important. Justice is a process that restores harmony and balance to relationships that are damaged. Success is not measured solely by the size of an individual's damage award, but by the number of survivors and their families who can be reconciled with their past. The Inuit expression of justice is multi-dimensional and encompasses the interests and needs of all who are affected by the problem at issue.

[63] No amount of monetary compensation can ever restore what has been lost by the Inuit survivors of the 'Indian' residential schools and their families. No settlement agreement has the power to undo what has been done in the past. No price can be put on the many lives that have not been lived or on the many missed opportunities for advancement of life.

[64] The proposed settlement does not try to do this. It does provide a means for moving forward. It does provide a measure of closure for individual survivors, their families and the families of the deceased class, together with their respective communities. It does provide a useful forum to understand what happened and why. It does so in a meaningful and culturally sensitive way. At a national level, it offers an opportunity for reconciliation, and an opportunity to learn from the mistakes of the past.

V. ANALYSIS

[65] There are some areas of concern that have been identified by fellow judges in companion judgments in other jurisdictions on this motion for certification and settlement approval. In some instances, the Court's approval has been given conditionally upon the parties resolving these deficiencies. These deficiencies include:

> (a) the lack of sufficient financial information to enable the courts to make an informed decision about the anticipated cost of the Independent Assessment Process;
>
> (b) the lack of an autonomous supervisor to oversee the administration of the IAP who would be accountable to the Court for the implementation of this part of the settlement; and
>
> (c) the absence of any summary review mechanism for legal fees charged by lawyers who assist claimants under the IAP.

A. Certainty of Delay and Risk of Termination

[66] In a perfect world, it would be desirable to see these deficiencies remedied before the agreement is approved. I am not convinced that these deficiencies are individually or collectively serious enough to warrant sending the settlement agreement back to the parties for further negotiation. Should this Court approve the settlement 'conditionally', the identified deficiencies would have to be corrected before full approval is granted.

[67] Any 'conditional' approval will inevitably result in delay. Further delay is not in the best interests of the various class members for all of the reasons identified earlier in this judgment.

[68] There is a real risk that the settlement agreement may unravel in the course of further negotiations. The parties cannot be compelled to negotiate amendments or additions to the existing agreement. They might choose to reopen negotiations on other aspects of the agreement as a condition of doing so. The *Settlement* provides as follows:

> "16.01 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."

[69] A requirement that the parties create an autonomous supervisory board to administer the IAP might be regarded as a substantial change to the structure of the existing agreement. This might result in the existing agreement being lost entirely. This is a risk that this Court is reluctant to take. Too much is at stake.

B. Absence of Financial Plan

[70] Evidence of a financial plan is often of crucial importance to a Court's assessment of the viability of a settlement proposal made in the private sector. The existence of financial and material resources sufficient to administer the proposed settlement cannot be assumed. These resources are often limited. The Court must be assured through evidence that the resources necessary to fully implement the settlement plan are present or will become available. If the resources are not equal to the task proposed, the Court may well reject the proposed settlement as unrealistic or unworkable.

[71] In the context of this settlement proposal, the expenses associated with the administration of the IAP and CEP are backed by the material and financial resources of Canada's largest public government. While the financial plan for the administration of this settlement is not before the Court, Canada is committed through the agreement to provide and pay for sufficient resources to clear a minimum number of claims per year. Canada is accountable to the Court under the agreement if it fails to do so. Canada's performance in this respect is to be monitored by the NAC.

[72] This Court does not view evidence of a financial plan as being necessary to assess the viability of the proposed settlement. I am satisfied that the resources of the Federal government are equal to the task that lies ahead. If these expenses prove to be more significant than originally anticipated by Canada's representatives, the program administrators may have to answer to Treasury Board. The politicians may then have to answer to their electorate. But the job will get done. This Court will be there to ensure that Canada meets the solemn commitments undertaken in this settlement agreement.

C. Absence of An Independent or Neutral Supervisor of the IAP

[73] Under the terms of the settlement agreement, the IAP is to be administered by Canada. Canada is one of the party litigants. Canada will be instructing agents to pursue its interests as a litigant in the context of any hearings held under the IAP. At the same time, Canada is charged with overseeing the administration of the IAP itself. This is said to lend itself potentially to a perception of bias or partiality arising from a possible conflict of interest.

[74] Such a conflict is more apparent than real. The administrative services of the Nunavut Court of Justice are provided by government. Government is often a party litigant in disputes coming before this Court and the courts of other provinces and Territories. The Judiciary is independent of government. The Judiciary does not answer to government and, in this country, jealously defends its independence. The adjudicators under the IAP are similarly independent of government, though their administrators under this settlement agreement are not.

[75] While it may be preferable to have an independent or autonomous administrator running the IAP, I am satisfied that this is not an essential prerequisite to the impartial administration of justice under the proposed settlement agreement. A reasonable person, fully apprised of the facts, would understand that control of the administrative machinery of the IAP does not and cannot allow Canada to dictate how an adjudicator decides a particular case.

[76] The terms of this settlement agreement were negotiated and agreed to by lawyers acting for potential claimants under this proposed IAP model. It is not this Court's place to second guess the reasons for the parties agreeing to adopt this particular model.

[77] I am not convinced that the absence of an autonomous Supervisor of the IAP is of sufficient concern to block this Court's approval of the settlement proposal.

D. Absence of any Summary Review Procedure for Fees Charged by Counsel to Clients Engaged in the IAP

[78] Most of the claimants pursuing compensation through the IAP will likely have counsel to assist them through this process. Most of these lawyers will likely be compensated on the basis of contingency fee arrangements entered into with their clients. Many of the IAP claimants entered into these fee arrangements prior to the settlement agreement being reached.

[79] Under the *Settlement*, Canada is only obligated to pay counsel 15 per cent of any award made to the client through the IAP. Many of the contingency fee agreements provide for payment of fees based upon percentages well in excess of this amount. Any fees exceeding the 15 per cent paid by Canada will be absorbed by the client, and will come off the top of any award in damages. There may well be situations arising where the stipulated legal fee becomes grossly disproportionate to the work done or the risk undertaken.

[80] In the absence of any specific review provision in the settlement agreement, the client is left to the common law and any prevailing statutory provisions to review or 'settle' the lawyer's account. Many jurisdictions have introduced legislation to give clients a statutory remedy to challenge a contingency fee agreement that is unfair or unreasonable. Nunavut has not done so because a speedy and inexpensive remedy for review is available through the *Rules* of the Nunavut Court of Justice.

[81] These *Rules* regulate not only the form of the contingency fee agreement (Rule 658), but require the agreement to be filed with the Court within 15 days of its execution (Rule 659). The contingency fee agreement must advise the client of his or her right to have the compensation payable under the agreement reviewed by the Clerk of the Court or a Judge. If the agreement fails to comply with the form required by the *Rules*, or has not been filed, the lawyer’s compensation is limited to what would otherwise have been payable in the absence of the agreement.

[82] The *Rules* go on to provide that such an agreement may be reviewed at any time up to one year from the day the lawyer has been paid pursuant to the terms of the agreement (Rule 661). A judge reviewing such an agreement has all of the powers available to a clerk on a taxation of a solicitor and client bill of costs. Rule 661(4) provides that on such a review, a Judge can confirm, vary or disallow the contingency agreement entirely.

[83] While the proposed settlement agreement may not provide for a review mechanism, there is an effective remedy still available to aggrieved citizens in this jurisdiction to address any problems that may arise. When the 'flaw' is weighed against the risks associated with requiring the parties to renegotiate a summary review procedure, the balance still weighs heavily in favor of settlement approval.

VI. LEGAL FEES

[84] The *Settlement* requires that this Court approve the legal fees that are to be payable to counsel for services rendered under this agreement. This area has been the subject of considerable study and analysis in companion judgments issued in other jurisdictions on this motion. Ball J. in *Sparvier et al. v. Canada (Attorney General) et al.*, 2006 SKQB 533, provided an extensive overview and, at paragraph 45, outlined some of the common law criteria usually applied to an assessment of legal fees, which include:

> (a) the time expended by counsel on the clients behalf;
>
> (b) the legal complexity of the matters;
>
> (c) the degree of responsibility assumed by counsel;
>
> (d) the monetary value of the matters at issue;
>
> (e) the results achieved and the contribution of counsel to the result; and
>
> (f) the importance of the matter to the clients.

Taking into account these criteria, this Court finds that the fee structure proposed by the settlement agreement is both fair and reasonable.

VII. CONCLUSION

[85] When viewed objectively from the standpoint of the interests and needs of the larger classes involved, I conclude that the proposed settlement is both fair and reasonable. It is in the best interests of all concerned, both claimants and defendants, to put this matter behind them. The settlement agreement may not be perfect, but it does not have to be, in order to win court approval.

[86] Much additional work needs to be done to ensure that Nunavummiut receive the benefits and services contemplated by this agreement. The creation of community-based services and programs for the survivor and family classes, the hosting of commemorative events, and the participation of class members and communities in the activities of the Truth and Reconciliation Commission will require applications of various kinds to access funding. Every effort needs to be made to assist the isolated communities of Nunavut to develop funding proposals appropriate to their needs.

[87] It would be helpful if NTI remained involved in this larger process by ensuring that the expertise necessary to develop these funding proposals is available to those communities needing it. Such expertise will be necessary if the communities are to pursue the broader healing and reconciliation objectives contemplated by this agreement. It may be useful, given the size of the Territory, to develop a strategic Territory-wide plan to implement this part of the settlement agreement.

[88] Funding protocols must also be developed that recognize the high costs associated with the delivery of services to the citizens of this Territory. The number of citizens in Nunavut to benefit from programs may be small when compared to the numbers living in the south. Yet the costs associated with program delivery are many times that of similar services delivered in the other provinces and territories. This is Nunavut's reality; a reality imposed by distance, climate and geography. Economies of scale are difficult, if not impossible to achieve. Any funding formula based on numbers alone would be an injustice to the citizens of this Territory.

[89] This Court approves the proposed settlement unconditionally. It does so with the expectation that the co-operative and conciliatory approach that resulted in the creation of this historic consensus will continue to characterize the parties' relationship with each other in the future.

[90] The Court extends its gratitude to the many citizens who had the courage to speak openly of their experiences and feelings on the hearing of this motion. The Court wishes them every success in the healing journey that lies ahead.

Dated at the City of Iqaluit this 19th day of December, 2006

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Mr. Justice R.G. Kilpatrick
Nunavut Court of Justice