QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2006 SKQB 533**

Date: **2006 12 15**
Docket: Q.B.G. No. 816/2005
Judicial Centre: Regina

BETWEEN:

KENNETH SPARVIER, DENNIS SMOKEYDAY, RHONDA BUFFALO, 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 DOE X, JOHN DOE XI, JANE DOE XI, JOHN DOE XII, JANE DOE XII, JOHN DOE XIII, JANE DOE XIII, and other John and Jane Does Individuals and Entities to be added

PLAINTIFFS

- and -

ATTORNEY GENERAL OF CANADA, and other James and Janet Does Individuals and Entities to be added

DEFENDANT

Counsel:

Kirk M. Baert and Celeste Poltak	for the plaintiffs and the National Certification Committee
Catherine A. Coughlan and John Terry	for The Attorney General of Canada
P. Jonathan Faulds	for the National Consortium of Counsel
Eugene Meehan, Q.C., E. F. Anthony Merchant, Q.C. and Casey R. Churko	for the Merchant Law Group
Bonnie B. Reid	for the Unaffiliated Counsel
W. Rod Donlevy and Michel G. Thibault	for the Catholic Entities
Alexander D. Pettingill	for the Protestant Entities
John K. Phillips and Laura C. Young	for the Assembly of First Nations

Proceeding under *The Class Actions Act*, S.S. 2001, c. C-12.01

FIAT
December 15, 2006

BALL J.

---

[1] All parties apply for certification of this action as a class proceeding and for approval of a proposed settlement, including approval of legal fees payable to the plaintiffs' counsel. Similar applications for approval have been made to superior courts in eight other Canadian jurisdictions.

[2] As a term of the proposed settlement, the parties have agreed to combine this and all other outstanding residential schools' litigation into one *omnibus* class action to be filed in every jurisdiction. If all nine jurisdictions approve the settlement on substantially the same terms and conditions, it is expected that all of the litigation will be brought to an end.

[3] I have had an opportunity to review draft decisions of other courts which summarize the history of the Residential Schools' system pursued by Canada, eloquently describe the tragic consequences for many Indian children and their families, explain the need to settle (or to implement a means of settling) their outstanding claims, and analyze the elements of the proposed settlement. I will not attempt to supplement what has already been stated on those subjects. I agree with and adopt the decision of Winkler R.S.J. in *Baxter v. Canada (Attorney General)*, Court File No. 00-CV-192059CP. The Courts in British Columbia, Alberta and Quebec have reached substantially the same conclusions as the Court in Ontario on the basic questions of class action certification and approval of the settlement. I will briefly explain why I agree with the Courts in those jurisdictions. I will then address the Merchant Law Group ("MLG") fee issue in somewhat greater detail than the other Courts.

[4] This settlement is unique in that it responds to historic wrongs perpetrated against First Nations' people in Canada. As Winkler R.S.J. has stated in *Baxter, supra*:

[2] For over 100 years, Canada pursued a policy of requiring the attendance of Aboriginal children at residential schools, which were largely operated by religious organizations under the supervision of the federal government. The children were required to reside at these institutions in isolation from their families and communities, for varying periods of time. This policy was finally terminated in 1996 with the closing of the last of the residential schools and has now been widely acknowledged as a seriously flawed failure. In its attempts to address the damage inflicted by, or as a result of, this long-standing policy, the settlement is intended to offer a measure of closure for the former residents of the school and their families.

[3] The flaws and failures of the policy and its implementation are at the root of the allegations of harm suffered by the class members. Upon review by the Royal Commission on Aboriginal Peoples, it was found that the children were removed from their families and communities to serve the purpose of carrying out a "concerted campaign to obliterate" the "habits and associations" of "Aboriginal languages, traditions and beliefs," in order to accomplish "a radical re-socialization" aimed at instilling the children instead with the values of Euro-centric civilization. The proposed settlement represents an effort to provide a measure of closure and, accordingly, has incorporated elements which provide both compensation to individuals and broader relief intended to address the harm suffered by the Aboriginal community at large.

CERTIFICATION OF CLASS ACTION

[5] Certification of a Saskatchewan action as a class action is based on the criteria set out in *The Class Actions Act,* S.S. 2001, c. C-12.01. Pursuant to s. 6 of the Act, the court must be satisfied that:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class;

(c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;

(d) a class action would be the preferable procedure for the resolution of the common issues; and

> (e) there is a person willing to be appointed as a representative plaintiff who:
>
> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

The requirements for certification of a class action in Saskatchewan are similar, if not identical, to the requirements in other Canadian jurisdictions with class action legislation. I am satisfied that all of the requirements for certification of this action as a class action have been met. However, the action cannot be certified on this motion unless the proposed settlement is also approved.

APPROVAL OF SETTLEMENT

[6] The accepted test for approving a class action settlement is whether it is fair, reasonable, and in the best interests of the class as a whole. The settlement in this case has five main elements:

(a) A Common Experience Payment ("CEP") to be paid to all persons who resided at an Indian Residential School in Canada between January 1, 1920 and December 31, 1997, and who were living as of May 30, 2005;

(b) An Independent Assessment Process ("IAP") under which a former residential school student can seek additional compensation for sexual or serious physical abuse;

(c) A Truth and Reconciliation Process, including the establishment of a Truth and Reconciliation Commission;

(d) Funding for commemorative activities; and

(e) Funding to the Aboriginal Healing Foundation for healing programs over a five-year period.

The elements of the settlement are thoroughly reviewed in a number of the other decisions and I need not add to what has been said. The settlement clearly provides significant benefits for class members that, for legal and practical reasons, would not be recovered through individually litigated claims. The CEP is notable in that it will compensate all class members living as at May 30, 2005, solely on the basis that they attended a Residential School. In addition, if the IAP is administered efficiently and expeditiously, impediments to recovery will be removed for those who suffered serious physical or sexual abuse during their Residential School experience.

[7] Several members of the Survivor Class filed written material or attended at the hearing in Regina to comment on the merits and deficiencies of the proposed settlement. Most, though not all, spoke in favour of the settlement in spite of its perceived imperfections. Some had concerns about how and when the settlement would

be implemented and the benefits would be paid. Some were hoping for a forum in which to relate their memories of the residential school system.

[8] The Courts in the other jurisdictions appear to have heard similar representations. Again, the comments of Winkler R.S.J. in *Baxter, supra*, are apropos:

> [11] From the evidence of the objectors who spoke at the hearing, based both on personal experience and in relation to the experiences of family members, it was clear that the effects of the residential school legacy were lasting and profound. Unfortunately, a motion for certification and approval of a compromise settlement is an inadequate forum for dealing with the underlying issues. Indeed, the very essence of the proposed settlement is to provide proceedings designed specifically for that purpose. The fact that the court is not reviewing in detail the history of residential schools in Canada or the individual histories of former residents is not to in any way diminish the significance of either the history or the impact on the individuals.

[9] One objection to the settlement was that the estates of members of the Survivor Class who died before May 30, 2005, would not be entitled to receive the CEP. I agree that the critical date will operate arbitrarily. It is essential that the personal representatives of the estates of those who will be excluded from the settlement are clearly notified that unless they opt out their rights will be extinguished.

[10] A group of former Residential School students at Ile-a-la-Crosse who are pursuing a separate proposed class action (*Aubichon et al. v. Attorney General of Canada*, Q.B.G. No. 2036/2005, J.C. Regina) objected to being excluded from the terms of the Settlement Agreement. The exclusion of the Ile-a-la-Crosse group may be one of the Settlement Agreement's more significant imperfections. However, I accept that compromises are a reality in any settlement. I also accept this agreement represents

the best that could be achieved for the greatest number of class members; indeed, reaching agreement has been a remarkable achievement for which all parties deserve a great deal of credit.

[11] There are, however, concerns with respect to the planned administration and implementation of the settlement which are identified by Winkler R.S.J. in *Baxter, supra*, and in the decisions of Brenner C.J. in British Columbia, McMahon J. in Alberta, and Tingley J. in Quebec. The courts in those jurisdictions have decided to approve the settlement subject to the concerns being addressed. I will explain why I agree with their approach.

REQUIREMENTS FOR APPROVAL OF SETTLEMENT

[12] In *Baxter*, Winkler R.S.J. has observed that a key term of the settlement is merely access to a modified claims' procedure which will represent the start, rather than the end, of litigation for individual class members advancing claims under the IAP. Many such claims are expected, and it is estimated that the recoverable benefits may be in the order of $2 billion to $3 billion. For these reasons, Winkler R.S.J. concluded that the adjudication procedure must be shown to be manageable. As he stated at para. 29:

> [29] This is particularly so where the claims resolution procedure represents a primary benefit under the settlement, and leaves the individual entitlement to a deferred resolution, with its attendant costs, burdens and risks. In other words, it cannot be the case that the class members receive nothing more than the opportunity to litigate their claims in a extra-judicial process that offers no material advantages over normal course litigation. Otherwise, the class members are compromising their

> rights, and possibly the entirety of their claims, without receiving a corresponding benefit for having done so.

[13] Quite apart from the various sections of the Settlement Agreement which explicitly engage the courts' supervisory jurisdiction, the courts generally have jurisdiction over the administration of class action settlements. (In confirmation of that principle counsel cited *Smith v. Brockton (Municipality)*, 2004 O.J. No. 789 (QL) (Ont. S.C.J.) in which Winkler J. provided detailed directions to the administrator of the Walkerton Compensation Plan). I note that the draft order sought by the parties on this application states that the "Court's jurisdiction is preserved for the purposes of supervision, operation and implementation of the agreement and this judgment."

[14] Those who would approve the Settlement Agreement immediately in this case are understandably concerned that deferral will at best cause unacceptable delay for elderly claimants and at worst cause the entire settlement to collapse. I understand and share their concerns. However, for the courts to carry out their supervisory role they must be given adequate information regarding the anticipated costs of IAP administration. As well, Canada's administrative role under the IAP must be separated from the adjudicative process and an autonomous supervisor or supervisory board must report ultimately to the courts. I am persuaded that pausing to address the deficiencies now may serve to avoid unmanageable problems later. If the parties are committed, the necessary assurances can be provided without undue delay.

[15] In my respectful view, given Canada's role in the creation and operation of the Residential Schools' system for over a century, Canada's resolute defence of individual claims by members of the Survivor Class for over a decade and the

adversarial climate in which the Settlement Agreement was negotiated, class members should now receive assurances that their IAP claims will be expeditiously and efficiently adjudicated and that Canada's administrative role will be separated from the adjudication process. Moreover, as Brenner C.J. points out in *Quatell v. Canada (Attorney General)*, Docket: L051875, Vancouver, at para. 12, separating Canada's administrative role from the litigation process will serve to insulate Canada from unfounded conflict of interest claims.

[16] In addition to the concerns I have outlined regarding the IAP, I agree that the legal fees to be charged to IAP claimants must be controlled. I can add nothing useful to what has been stated on that issue by Brenner C.J., McMahon J., and Winkler R.S.J. (I agree with McMahon J. that although the parties should not make approval of a class action settlement conditional upon approval of legal fees, as they have done in this case, I will not allow that concern to stand in the way of granting this application).

[17] Finally, I agree with Winkler R.S.J.'s concerns that the ongoing administration of the settlement will be frustrated if decisions must be obtained in all nine jurisdictions on all matters. One need look no further than this application to appreciate the fact that efforts to achieve unanimity are always time consuming and often unsuccessful.

[18] To summarize, I concur that the following matters identified by Winkler R.S.J., are to be addressed (references are to the relevant paragraphs in the *Baxter, supra*, judgment):

(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).

[19] I am approving the entire settlement as "fair, reasonable and in the best interests of the class as a whole" subject to receiving assurances that the identified deficiencies will be addressed. My approval will extend to those portions of the Settlement Agreement which provide for payment of legal fees and disbursements to

the National Consortium, to independent counsel and to Merchant Law Group ("MLG").

MERCHANT LAW GROUP FEES

[20] In this decision I will consider, in somewhat greater detail than the other courts, those portions of the Settlement Agreement which provide for payment of legal fees and disbursements to MLG. I will begin by identifying the relevant legislation and *The Queen's Bench Rules*.

Legislation and *The Queen's Bench Rules*

[21] Sections 38(1) of *The Class Actions Act*, S.S. 2001, c. C-12.01 states:

> **38**(1) A class action may be settled, discontinued or abandoned only:
>
> (a) with the approval of the court; and
>
> (b) on the terms the court considers appropriate.

[22] The relevant portions of s. 41 of *The Class Actions Act* states:

> **41**(1) An agreement respecting fees and disbursements between a lawyer and a representative plaintiff must be in writing and must:
>
> (a) state the terms under which fees and disbursements are to be paid;
>
> (b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class action; and
>
> (c) state the method by which payment is to be made, whether by lump sum or otherwise.

> (2) An agreement respecting fees and disbursements between a lawyer and a representative plaintiff is not enforceable unless approved by the court, on the application of the lawyer.
>
> ...
>
> (5) If an agreement is not approved by the court, the court may:
>
> (a) determine the amount owing to the lawyer respecting the fees and disbursements;
>
> (b) direct an inquiry, assessment or accounting pursuant to *The Queen's Bench Rules* to determine the amount owing; or
>
> (c) direct that the amount owing be determined in any other manner.

Although subsection 41(2) contemplates that the application for approval of legal fees will be brought by the lawyer to whom the fees will be payable, all parties bring this application.

The Contractual Provisions

[23] The portions of the Settlement Agreement which provide for payment of legal fees to MLG were negotiated by representatives of both sides, most notably by the Federal Representative, The Honourable Frank Iacobucci, Q.C. and by Mr. Tony Merchant, Q.C. of MLG. On November 20, 2005, Mr. Iacobucci and Mr. Merchant signed an agreement (the "Merchant Fee Verification Agreement" or the "MFVA") which stated:

> Agreement Between the Government of Canada and the Merchant Law Group Respecting the Verification of Legal Fees
>
> The Government of Canada and the Merchant Law Group agree that in addition to the requirement to provide an affidavit as set out in Article ■ [*sic*] of the Agreement in Principle, the Merchant Law Group's fees shall be subject to the following verification process.

1) The Merchant Law Group's dockets, computer records of Work in Progress and any other evidence relevant to the Merchant Law Group's claim for legal fees shall be made available for review and verification by a firm to be chosen by the Federal Representative the Honourable Frank Iacobucci.

2) The Federal Representative shall review the material from the verification process and consult with the Merchant Law Group to satisfy himself that the amount of legal fees to be paid to the Merchant Law Group is reasonable and equitable taking into consideration the amounts and basis on which fees are being paid to other lawyers in respect of this settlement, including the payment of 3 to 3.5 multiplier in respect of the time on class action files and the fact that the Merchant Law Group has incurred time on a combination of class action files and individual files.

3) If the Federal Representative is not satisfied as described in 2) above, he and the Merchant Law Group shall make all reasonable efforts to agree to another amount to be paid to the Merchant Law Group for legal fees.

4) If the Federal Representative and the Merchant Law Group cannot agree as described in 3) above, the amount to be paid to the Merchant Law Group for legal fees shall be determined through binding arbitration, but that amount shall in no event be more than $40 million or less than $25 million. The arbitration shall be by a single arbitrator who shall be a retired judge:

(a) selected by the Federal Representative and the Merchant Law Group from a list comprising:

  (i) John Major,

  (ii) Peter Cory,

  (iii) John Morden, or

  (iv) Allan McEachern; and

(b) if not so jointly chosen, then chosen by the Federal Representative in consultation with Tony Merchant and appointed in accordance with the Saskatchewan *Arbitration Act*, with the arbitration to take place in Saskatchewan.

"Tony Merchant"

"Frank Iacobucci"

"November 20, 2005"

"Toronto, Ontario"

[24] Immediately after the Merchant Fee Verification Agreement was signed, an Agreement in Principle ("AIP") was signed by all interested parties, including Mr. Iacobucci as Federal Representative and Mr. Merchant as the representative of MLG. The AIP, which was approved by the Federal Cabinet on November 22, 2005, provided for payment of legal fees to MLG, to a group of 19 other law firms (known as the National Consortium) and to other individual lawyers. One portion of the AIP stated:

> WHEREAS legal counsel have done very substantial work on behalf of Eligible CEP Recipients for many years, have contributed significantly to the achievement of the Agreement in Principle and have undertaken not to seek payment of legal fees in respect of the Common Experience Payment to be paid to Eligible CEP Recipients, Canada agrees to compensate legal counsel in respect of their legal fees as follows.
>
> ...
>
> 4. The National Consortium and the Merchant Law Group shall each be paid $40,000,000 plus reasonable disbursements, and GST and PST, if applicable, in recognition of the substantial number of Eligible CEP Recipients each of them represents and the class action work they have done on behalf of Eligible CEP Recipients. Paragraphs 1, 2 and 3 above shall not apply to any lawyer who is a partner of, employed by or otherwise affiliated with a National Consortium member law firm or the Merchant Law Group.
>
> 5. The Federal Representative shall engage in such further verification processes with respect to the amounts payable to the Merchant Law Group and National Consortium as have been agreed to.
>
> 6. No lawyer or law firm that has taken part in these settlement negotiations or who accepts a payment for legal fees from the[sic] Canada shall charge an Eligible CEP Recipient any fees or disbursements in respect of the Common Experience Payment paid to the Eligible CEP Recipient.

[25] After further negotiation, the AIP was finalized by a Settlement Agreement which was approved by the Federal Cabinet on May 10, 2006. The Settlement

Agreement dealt extensively with payment of legal fees to lawyers representing residential school claimants. The following provisions were relevant to the MLG claim:

> **13.05 No Fees on CEP Payments**
>
> No lawyer or law firm that has signed this Settlement Agreement or who accepts a payment for legal fees from Canada, pursuant to Sections 13.06 or 13.08, will charge an Eligible CEP Recipient any fees or disbursements in respect of the Common Experience Payment.
>
> **13.08 The National Consortium and the Merchant Law Group Fees**
>
> (1) The National Consortium will be paid forty million dollars ($40,000,000.00) plus reasonable disbursements, and GST and PST, if applicable, in recognition of the substantial number of Eligible CEP Recipients each of them represents and the class action work they have done on behalf of Eligible CEP Recipients. Any lawyer who is a partner of, employed by or otherwise affiliated with a National Consortium member law firm is not entitled to the payments described in Section 13.02 and 13.06 of this Agreement.
>
> (2) The fees of the Merchant Law Group will be determined in accordance with the provisions of the Agreement in Principle executed November 20, 2005 and the Agreement between Canada and the Merchant Law Group respecting verification of legal fees dated November 20, 2005 attached hereto as Schedule "V", except that the determination described in paragraph 4 of the latter Agreement, will be made by Justice Ball, or, if he is not available, another Justice of the Court of Queen's Bench of Saskatchewan, rather than by an arbitrator.
>
> (3) The Federal Representative will engage in such further verification processes with respect to the amounts payable to the National Consortium as have been agreed to by those parties.
>
> (4) In the event that the Federal Representative and either the National Consortium or the Merchant Law Group cannot agree on the amount payable for reasonable disbursements incurred up to and including November 20, 2005, under

> Section 13.08(1) of this Agreement, the Federal Representative will refer the matter to:
>
> (a) the Ontario Superior Court of Justice, or an official designated by it, if the matter involves the National Consortium;
>
> (b) the Saskatchewan Court of Queen's Bench, or an official designated by it, if the matter involves the Merchant Law Group;
>
> to fix such amount.

[26] Attached as Schedule "V" to the Settlement Agreement was the Merchant Fee Verification Agreement executed November 20, 2005.

The Positions of the Parties

[27] Canada and MLG both say that they support the approval of the entire Settlement Agreement, including those provisions which provide for payment of legal fees to MLG. However, they claim to have very different understandings of what the Agreement means.

[28] MLG submits that the Settlement Agreement requires Canada to immediately pay legal fees of $40 million (plus GST and PST) and disbursements of $3,606,266.00 (plus GST) to MLG for a total of $49,369,243.00. Canada submits that it is not obligated to pay anything until MLG verifies facts relevant to its claim. As set out in my fiat of August 1, 2006 (2006 SKQB 362) Canada has filed affidavits asserting that MLG failed or refused to provide satisfactory verification. Canada says that by approving the Settlement Agreement the Court will only be approving a process whereby the appropriate fees payable to MLG can be determined.

[29] In summary, both parties ask the Court to approve the Settlement Agreement as it relates to MLG, but they are almost $50 million apart in their understanding of what it requires. Obviously, the Court cannot approve an agreement for the payment of fees unless it understands how much is to be paid or how that amount is to be determined.

Interpretation of the Agreements

[30] An agreement is to be interpreted according to its plain, literal and ordinary meaning. This reflects the common sense proposition that parties most often mean what they say, particularly in formal documents. The paramount question is the intention of the parties. Having regard to the context in which the agreement was reached, the law does not attribute an intention to the parties that they plainly could not have had.

[31] Although both parties may now claim to have had different understandings of what the contractual terms mean, the intention of the parties can be ascertained from the contractual provisions quoted above. The language is reasonably plain and unambiguous.

[32] The Merchant Fee Verification Agreement stated that Canada would pay legal fees to MLG after a firm to be chosen by Mr. Iacobucci received, for review and verification, "dockets, computer records of work in progress and any other evidence relevant" to MLG's claim. If Mr. Iacobucci was not satisfied from the evidence provided that the amount of legal fees to be paid was reasonable and equitable, he and MLG would "... make all reasonable efforts to agree to another amount." If they still could not agree, s. 13.08(2) of the Settlement Agreement stated that the amount to be

paid would be determined by "... Justice Ball, or if he is not available, by another justice of the Court of Queen's Bench for Saskatchewan but that amount shall in no event be more than $40 million or less than $25 million."

[33] The MFVA does not obligate MLG to provide proof that it had a substantial solicitor/client relationship, or that it had entered into contingency or any type of retainer agreements, with any specified number of clients, although all of that information is relevant. It does not obligate MLG to verify that it had accumulated any minimum amount of unbilled time on class action files or on a combination of class action files and individual files, although time spent is also relevant. Conversely, the MFVA does not obligate the Federal Representative to accept as satisfactory whatever information is provided by MLG.

[34] Counsel for Canada submitted that the agreements with MLG amounted to nothing more than a verification process. This would mean that Canada has no obligation to pay anything until it is satisfied MLG has verified unspecified data. This would put Canada in the position of deciding when, and if, it would pay any amount. I do not agree with that submission.

[35] Read together, the agreements anticipate that MLG and the Federal Representative might be in the situation they are now in—that is, in a dispute over whether MLG has provided enough relevant evidence to satisfy the Federal Representative that the fees to be paid are reasonable and equitable. The parties expressly agreed that if the Federal Representative is not so satisfied the matter will be determined by a judge of this Court. They also agreed that even if determined in that manner, the amount to be paid will be no less than $25 million and no more than $40

million. (In the MFVA, which was incorporated into the AIP, the parties had agreed that the dispute would be decided by one of four named arbitrators acting in accordance with the provisions of the Saskatchewan *Arbitration Act, 1992*, S.S. 1992, c. A-24.1. By changing the forum from arbitration to the court in the Settlement Agreement, they changed the method for resolving the dispute from an arbitration under *The Arbitration Act, 1992* to the trial of an issue under *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01).

[36] I have stated that these agreements were negotiated by The Honourable Mr. Iacobucci, Q.C., as the Federal Representative, and by Mr. Merchant, Q.C., as MLG's representative. Both have a wealth of experience. Both had a thorough understanding of the issues. The Government of Canada surely knew that it had agreed to pay MLG at some point no less than $25 million dollars and as much as $40 million. MLG surely knew that it had agreed to verify its claim for payment of anything more than $25 million.

[37] Although MLG joined with all other parties in urging the Court to approve the entire Settlement Agreement, including the provisions for payment of MLG's legal fees, written submissions filed by MLG argued that the MFVA attached as Schedule "V" to the Settlement Agreement is unenforceable because of ambiguity and/or illegality.

[38] It is contradictory for MLG to argue that an entire agreement should be approved, and at the same time argue that part of it is unenforceable. The argument that the MFVA is too ambiguous to be enforced is rejected: I have already stated that

the intent of the parties is sufficiently clear and unambiguous to be enforced. Winkler R.S.J. came to the same conclusion in *Baxter, supra,* at para. 67.

[39] MLG's argument that the MFVA is "illegal" is based on the proposition that the MFVA may require disclosure of MLG's billing records and client files, which MLG says contain privileged solicitor/client information. MLG takes that argument a step further by asserting that it is not permitted to disclose who its clients are, whether or not it has been formally retained by them, or what those retainer agreements might provide, because all of that information is privileged.

[40] In my fiat dated August 1, 2006, I accepted the proposition that the MFVA does not require MLG to disclose privileged solicitor/client information to the Federal Representative's designated firm, Deloitte and Touche, LLP, unless MLG's clients first provide informed consent. It follows that the MFVA does not require MLG to do anything "illegal."

[41] It does not follow, however, that all of the information over which MLG claims privilege is, in fact, privileged. MLG's claim for legal fees is based on the proposition that it has spent many hours pursuing individual Residential School claims and a number of class actions. MLG is not entitled to be paid for work done for their clients without establishing who the clients are and that legal work was done on their behalf.

[42] The names of MLG's clients have already been provided to Canada by way of individual statements of claim. At one point MLG provided information about many of its contingency agreements to the Federal Representative's designate, Deloitte and

Touche, LLP. On this motion it placed in evidence copies of contingency agreements entered into with the plaintiffs in all of its proposed class actions. Thus, MLG has acknowledged by its actions that its fee arrangements with those clients are not privileged.

ANALYSIS

[43] I now turn to the question of whether the provisions of the Settlement Agreement requiring payment of legal fees and disbursements to MLG warrant court approval. All parties urge the Court to approve the entire Settlement Agreement, including those portions relating to MLG. They point out that the fees and disbursements will not be paid from the amounts available to the members of the class, but over and above those amounts. Although one party suggested that the fees and disbursements payable to all of the lawyers should be approved because they are not being paid by class members and because Canada has "unlimited resources," I do not agree. The Court must decide whether the fee arrangements, which are part of the overall settlement, are "fair and reasonable." This means that counsel are entitled to a fair fee which may include a premium for the risk undertaken and the result achieved. It also means however, that the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class members as a whole.

[44] Fees payable to plaintiffs' counsel in class actions are determined by reference to factors established by judicial authorities. Those factors are often said to be:

(a) time expended by the solicitor;

(b) the legal complexity of the matters;

(c) the degree of responsibility assumed by the solicitor;

(d) the monetary value of the matters at issue;

(e) the importance of the matter to the client;

(f) the degree of skill and competence demonstrated by the solicitor;

(g) the results achieved and the contribution of counsel to the result;

(h) the ability of the client to pay; and

(i) the client's expectations as to the amount of the fees.

(*Fischer v. Delgratia Mining Corp.*, [1999] B.C.J. No. 3149 (S.C.) at para. 22; *Killough v. Canadian Red Cross Society*, [2001] B.C.J. No. 2631 (S.C. at paras. 22 and 23; *Knudsen v. Consolidated Food Brands Inc.*, [2001 B.C.J. No. 2902 (S.C.) at para. 38; *Windisman v. Toronto College Park* (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.), para. 8; and *Gariepy v. Shell Oil Co.*, [2003] O.J. No. 2490 (S.C.J.) at para. 13).

[45] Other decisions sometimes add additional factors to the list, such as the risk of no recovery, the expectation of a larger fee in a contingency case, the integrity of the legal profession, and public policy concerns. (See, for example, *White v. Canada (Attorney General)*, 2006 BCSC 561; [2006] B.C.J. No. 760 (QL) (B.C.S.C.); *Endean v. Canadian Red Cross Society*, 2000 BCSC 971; [2000] 8 W.W.R. 294; (2000), 78 B.C.L.R. (3d) 28 (B.C.S.C.) and *Lam v. Ajinomoto U.S.A. Inc.*, 2004 BCSC 651; (2004), 47 C.P.C. (5th) 122 (B.C.S.C.)). Although some decisions have stated that a factor to be considered is "the character and standing of counsel in the profession," in my view that is not a factor that should be considered because it is not capable of

measurement. Fees should not be based on a subjective sense of a lawyer's personality, public profile or popularity. They should be based on the factors listed above as supported by the evidence.

[46] The "evidence" filed by MLG on this application was contentious. On July 17, 2006, Mr. Merchant filed a lengthy affidavit sworn by MLG's office manager, Donald Outerbridge, which I substantially ignored because it was replete with inadmissible evidence (see 2006 SKQB 362 at para. 18). Mr. Merchant responded by filing another affidavit of Mr. Outerbridge on September 13, 2006 that was more argumentative and contained much more inadmissible evidence than the first affidavit. The second Outerbridge affidavit was filed much too late to allow Canada to fairly respond, yet MLG opposed any adjournment. The second affidavit was therefore held to have no evidentiary value and treated as nothing more than the written submission of Mr. Merchant. (As a submission, it will be referred to below as the "Outerbridge submission").

[47] Quite apart from the evidence, MLG's position on which factor or factors should be most important was unclear. For example:

- MLG claims to act for clients numbering "in excess of 10,000" (at para. 250 of the Outerbridge submission the number is said to be "in the range of 8,000 to 10,000 individual claimants"), but argues that its fees should not be determined according to the number of clients it represents. (Edward Nagel, a Senior Manager of Deloitte and Touche LLP, deposes in an affidavit sworn June 15, 2006 that in January of 2006 MLG provided

an electronic listing of 8,560 clients with whom it claimed to have a solicitor/client relationship);

- MLG says that it has contingency agreements with "over 4,000" clients, but contends that the number of clients with whom it had those agreements is not the most important consideration. (The affidavit of Edward Nagel deposes that in January of 2006 Deloitte's representatives obtained photocopies of 4,823 retainer agreements). For the purpose of this decision I will assume that all of those agreements provide for the payment of a contingency fee); and

- Although paragraph (2) of the MFVA expressly incorporated work in progress as a relevant consideration and referenced the Ontario approach of utilizing "a 3 to 3.5 multiple in respect of the time spent on class action files," MLG asserts that unbilled time or work in progress should not be the paramount consideration.

[48] MLG also argues that in paying legal fees "the Government is buying out lawyers' contingency entitlement" because "MLG is giving up its right to one-third of anything that is recovered by our clients." That submission presupposes that MLG has entered into contingency agreements with all of its residential school clients; that those agreements obligate all of the clients to pay MLG a contingency fee of 33⅓% of the total recovery at every stage of the litigation; and that MLG is in a position to "sell" its entitlement to contingent fees to Canada like some sort of commercial financing paper.

[49] The flaws in the argument are manifest: MLG does not have contingency agreements with all of the clients it claims to represent; it is not entitled to a percentage of the recovery for clients with whom it does not have contingency agreements; it is not in a position to "sell" its representation of clients, retained or otherwise, to anyone; and there is no evidence the contingency agreements it does have provide for fees of 33% at any stage of the litigation.

[50] MLG filed its contingency agreements with the plaintiffs in this and other class actions. All of those agreements provide for a contingency fee of 20% of any recovery effected prior to examinations for discovery. Thus, the only evidence is that where MLG has contingency agreements, it is not entitled to 33⅓% of all recovery at all stages of the litigation.

[51] Although I have rejected many of the arguments advanced by MLG, I find one comparison to be relevant. The MFVA stated that the fees payable to MLG will fairly compare to fees payable to other counsel. That means the fees payable to MLG should fairly compare to the fees of $40 million payable to the National Consortium of 19 law firms and of approximately $20 million payable to other independent lawyers. The affidavit of Darcy Merkur filed on behalf of the National Consortium establishes that its 19 law firms represent a total of 4,826 individual residential school claimants. This can be compared to the 4,823 retainer agreements identified by Edward Nagel in his review of MLG files in January of 2006.

[52] I will now apply the evidence on this application to the factors listed in paragraphs 44 and 45 above.

(a) **Time Expended by the Solicitor**

[53] Judicial decisions uniformly list time spent as the first factor to be considered in approving fees for plaintiffs' counsel in class actions. Paragraph (2) of the MFVA recognized that MLG had "incurred time on a combination of class action files and individual files" and stated that this time "... including the payment of a 3 to 3.5 multiplier" was a relevant factor to be considered.

[54] Although MLG claims to have done "tens of millions of dollars worth of work in the last 10 years" it has not verified that claim: nor has it differentiated between time spent on client files with contingency agreements and time spent on files without contingency agreements. At para. 557 of its submission filed September 14, 2006, MLG claims to have spent $8.5 million worth of class action time and $43 million worth of individual action time. This can be contrasted with the statement at para. 510 of the Outerbridge submission that the value of work done to May 30, 2005 was "in the range of $36,000,000."

[55] The Outerbridge submission also asserts at para. 327 that "MLG lawyers did 193,000 hours of work." At paragraph 494 it states that Mr. Merchant himself worked close to 5,000 billable hours annually in the years 2000, 2001 and 2003. Simple arithmetic says that equals 13.7 hours everyday for 365 consecutive days. The implication is that a significant portion of these hours were spent on residential school files.

[56] Although a lawyer may arbitrarily assign time to files in a way that adds up to 5,000 hours each year, I do not accept that any lawyer, no matter how driven, actually works 5,000 meaningful hours each year. Taxing officers do not approve fees based on recorded hours multiplied by a claimed hourly rate (MLG's counsel on this motion, Mr. Meehan, is said to have an hourly rate of $750.00) without considering the nature of the problem and reasonable value to the client. Similarly, fees for counsel in class actions cannot be calculated using a multiplier of 3 to 3.5 times recorded hours without regard to whether the recorded time was actually worked and, more importantly, whether it represented value to the client.

[57] Since time spent is relevant to approving legal fees in class actions, satisfactory verification of time actually worked by MLG on residential schools' litigation will be required if the parties are unable to reach agreement on fees without a trial. It will be incumbent on MLG to provide that verification in a reliable format that does not breach solicitor/client confidentiality. Although that verification has not yet been provided, for reasons to be explained below I accept that the time spent by MLG on residential schools' litigation has been substantial.

(b) <u>The Legal Complexity of the Matters</u>

[58] All parties agree that members of the Survivor, Deceased and Family Classes were confronted by many significant legal and practical problems which could only be overcome by extensive litigation and political pressure and only resolved by a negotiated settlement. The legal issues were complex. They included a variety of limitation periods, the extent to which Canada and the churches were immune from or

vicariously liable for the negligence of others, the limits of liability for the actions of others, and the extent to which damages could be recovered.

[59] The litigation risks confronting individual plaintiffs and the members of each class were extremely high. Those risks were accepted by all counsel, including MLG. For a number of years, they represented a substantial number of clients at their own expense and without any assurance of meaningful recovery.

(c) The Degree of Responsibility Assumed by the Lawyer

[60] The joint factum of the plaintiffs lists the number of active Indian Residential School litigation claims and plaintiffs in Canada:

Active Litigation and Plaintiffs	Statements of Claim	Plaintiffs
Alberta	1432	3950
British Columbia	313	830
Manitoba	289	1157
New Brunswick	1	1
NWT	20	29
Nova Scotia	1	582
Nunavut	6	191
Ontario	101	657
Quebec	16	89
Saskatchewan	2112	2949
Yukon	46	103
Total Active	4337	10538

The 2,112 individual residential school claims commenced in Saskatchewan amounted to almost one-half of the 4,337 claims commenced in Canada. I take judicial notice of the fact that MLG filed a significant majority of the individual Saskatchewan claims. MLG also commenced a total of 14 class proceedings in Canadian jurisdictions.

[61] Although most MLG claims never reached the examination for discovery stage in Saskatchewan, some 155 individual MLG actions were scheduled for pre-trial conferences. A number were settled. Some went to trial, with mixed success. Appeals were taken to the Court of Appeal and at least one appeal was heard by the Supreme Court of Canada. (See *H.L. v. Canada (Attorney General)*, 2005 SCC 25; [2005] 1 S.C.R. 401).

[62] MLG claims to have advanced some $3.6 million in recoverable disbursements for residential school plaintiffs. Given the number of actions commenced by the firm and the actual costs of carrying that litigation, the disbursements claimed are not inconceivable. However, as with time worked, it will be incumbent on MLG to verify its disbursements in a reliable format that does not breach solicitor/client privilege.

[63] In addition to the litigation pressures brought to bear on Canada, political pressures were substantial. The joint factum of the plaintiffs states at paragraph 144:

> 144. By May 2005, at the time of entering into the Political Agreement, there were significant pressures on Canada to come to the negotiating table. Various stakeholders had pushed the IRS agenda in the media, to develop public awareness and obtain support. Pressure was also being brought to bear in the political arena, and of course, there was a

> significant and increasing volume of litigation, including the first certified IRS class proceeding.

[64] MLG supplements this in its own submission. It argues that it made an important contribution to the settlement from both a legal and a political perspective. Mr. Merchant contends that he had access to many individuals who had the authority to make political decisions, including various Federal Cabinet Ministers, and that his efforts were instrumental in bringing about the Settlement Agreement.

[65] Although MLG claims to be a law firm with multiple offices in various provinces, the number of lawyers in the firm is not significant by national standards. The Outerbridge submission states at para. 499 that "the Merchant family has injected $1.6 million after tax dollars into the firm over the past few years, in order to assist through their work and cash injection in funding the residential school disaster." Mr. Merchant states that he has three sons who are lawyers working for the law firm, and that neither he nor any of his sons have drawn any income from the firm since 1999. He appears to have "bet the firm" on an outcome that was far from certain.

(d) <u>The Monetary Value of the Matter to the Client</u>

[66] The value of the CEP to be paid to each member of the Survivor Class can be calculated with some certainty. It is expected to average in excess of $23,000.00 per member with total payments amounting to as much as $1.9 billion. Each member of the Survivor Class will receive no less than $10,000.00. In view of the significant legal and practical hurdles facing individual class members, the monetary value to the client

of the CEP recovery is significant. I will address this in more detail under the heading "Results Achieved."

(e) The Importance of the Matter to the Client

[67] It would be an oversimplification to conclude that the settlement was equally important to all members of the Survivor Class, the Deceased Class and the Family Class. The reality is that the importance to each person will depend upon his or her individual experiences and the extent to which those experiences affected his or her life and the lives of others. While the monetary recovery may be most important to some, for others the acknowledgment that the misconceived Indian Residential School system was injurious to them will be much more significant. For the latter group, access to healing, truth telling and commemoration will be of more significant value. However "value" is to be determined by each member of each class. The importance of the matter to them cannot be understated.

(f) The Degree of Skill and Competence Demonstrated by the Lawyer

[68] With respect, if the skill and competence demonstrated by MLG on this motion were the sole consideration it would not bode well for the approval of a substantial legal fee for MLG. On this application MLG twice filed voluminous affidavits and submissions immediately before or during hearings which gave Canada no reasonable opportunity to respond. The submissions were repetitive, self-serving, contradictory and at times incoherent. On the other hand, they contained candid assessments of the weaknesses in the Settlement Agreement when all of the other parties seeking approval tended to focus exclusively on the strengths.

[69] No one suggests that the degree of skill and competence demonstrated by MLG on this application was representative of the work done by MLG over the years. Perhaps a better indicator of the work done was the end result, which would not have been achieved without the determined and ultimately effective efforts of all counsel, including MLG.

(g) The Results Achieved

[70] The result achieved for the members of the class is to be considered, not in isolation, but as one part of the bigger picture. As a starting point in assessing the results achieved, due regard should be given to the difficulties confronting members of the class at the outset. There were major legal and practical hurdles facing members of each of the Survivor, Deceased and Family Classes in this action, including limitation issues and litigation realities. Suffice it to say that the hurdles to recovery and the litigation risks were daunting.

[71] The results achieved are impressive, but difficult to quantify. The Settlement Agreement provides a lump sum compensation, the CEP, to all living Indian Residential School Survivors living as of May 30, 2005. It establishes the IAP which improves the Alternate Dispute Resolution process now in place for resolving claims for individual abuse. In addition, the settlement provides funding to the Aboriginal Healing Foundation, establishes a Truth and Reconciliation Commission, and provides funding for certain commemoration activities.

[72] I have attempted to determine the potential value of the Settlement Agreement for class members by adding together the identifiable costs of each component. The value of some components can be estimated with relative certainty.

[73] It is estimated that approximately 80,000 members of the Survivor Class may be entitled to apply for the CEP with the average claim being $23,750.00. The Government of Canada has set aside $1.9 billion to satisfy all of those potential claims. All parties agree that the total payments will probably be less than that, with MLG stating that the surplus may be as much at $500 million. If the actual amounts paid out are less than $1.9 billion, than the first $40 million of surplus will go to Aboriginal organizations for healing and education initiatives, and any remainder will provide former Residential School students with "personal credits" of up to $3,000.00 each.

[74] In addition to the CEP, the Settlement Agreement provides for payments of an initial endowment of $125 million to the Aboriginal Healing Foundation to fund culturally appropriate healing programs to address the healing needs of the class; the sum of $60 million for a Truth and Reconciliation Commission to be established to engage in a collective process with the community of survivors; and the sum of approximately $20 million for national and community based commemoration activities "... to honour and pay tribute to former Indian Residential School students and their families through acknowledging their experiences." When these payments are added to the anticipated $1.9 billion value of the CEP, the total value of the benefits is approximately $2.1 billion.

[75] All parties suggest that if the Settlement Agreement is approved the total value to class members will be between $4 billion and $5 billion. If that is true, then

under the IAP between $2 billion and $3 billion will be paid out as compensation to victims of serious physical or sexual assault while in attendance at a Residential School. However, no party could estimate either the number of individuals who might advance such claims or the anticipated payout to these claimants. Over and above the payout will be the unknown (or at least undisclosed) cost of administering the IAP. This is one of the deficiencies to be corrected as a condition of approving the settlement.

[76] For these reasons I cannot begin to place a monetary value on the IAP benefits with any degree of reliability. Even if I could, I would not take them into account in determining the amount of legal fees to be approved now. The reason is that lawyers remain entitled to receive payment of fees for any amounts that may be recovered by their clients under the IAP in addition to any amounts to be awarded now for settling the class action. Not only has the Government of Canada agreed to increase any IAP award by 15% to pay for legal fees, but lawyers may charge an additional contingency fee to clients over and above that 15%. Regulating these additional fees has been identified as a concern by Winkler R.S.J. in *Baxter, supra,* at paras. 69 to 77 and in this decision at para. 18(c) above. Since the hearing of this motion all counsel have stated that they will limit their total fee to 30% of the amount recovered under the IAP, inclusive of the 15% to be paid by Canada. Even so, I agree that each adjudicator must have authority to approve the amount of legal fees and disbursements payable to counsel on IAP applications. I would add that no contingency fee should be permitted on the recovery of disbursements.

[77] Plaintiffs' counsel submits that even if the value of the IAP cannot be quantified with any certainty, the fact that the process has been created with fewer limitations on what claimants may recover and more efficiency in processing their

claims should be considered in awarding legal fees at this time. I do not accept that proposition. It is true that the IAP will enable claimants to recover awards that they might not have recovered otherwise, but it will also enable their lawyers to charge fees on the amounts recovered that they would not have otherwise been able to charge. In my view, to compensate lawyers for the creation of the IAP and to compensate them again when funds are recovered under the IAP would amount to double compensation.

[78] I will proceed on the assumption that legal fees for class counsel should reflect recovery for class members of approximately $2 billion rather than the $4 or $5 billion figure advanced by the parties. That said, the recovery remains extremely large by all legal standards in Canada.

[79] MLG claims to have contributed 40% to 50% to the overall settlement. The estimate is a self-serving one about a matter that cannot be measured with any certainty, but I accept that MLG's contribution was substantial. I have observed that the Settlement Agreement was the result of a combination of litigation and political pressures brought to bear on the Government of Canada. I have accepted that MLG made a significant contribution to the litigation pressures through the sheer quantity of individual claims filed in various Canadian jurisdictions. There is no reason to believe that MLG's contribution to the political pressure was any less than that of the law firms who form the National Consortium or the independent lawyers.

[80] Even if it is arbitrarily assumed that MLG made a proportionate contribution to the total recovery of only one-half of what it claims, it would be credited with recovering perhaps $400 million to $500 million for class members. On

those assumptions, a minimum fee of $25 million would amount to 5% to 6¼%. From that perspective the fee range agreed to by both parties was not unreasonable.

(h) The Ability of the Client to Pay

[81] The ability to pay of class members who will benefit from the settlement is not relevant because Canada has agreed to pay the fees of plaintiffs' counsel over and above the amount to be paid to the members of each class. I have observed that the ability to pay of Canada and those who fund the public purse is not the issue; the question is whether they receive fair value for their expenditure.

(i) The Client's Expectations as to the Amount of the Fees

[82] It would appear that slightly less than one-half of the MLG clients who commenced individual actions entered into contingency agreements which provided for payment of fees as a percentage of the eventual recovery. Others, the majority, presumably expected to pay for work done on a fee for service basis. How much work was done for the latter group has yet to be determined with any certainty. Suffice it to say, however, that both groups of clients expected to pay significant fees.

SUMMARY

[83] This action will be certified as a class action and the Settlement Agreement approved in its entirety upon the Court receiving satisfactory assurances that the deficiencies identified in para. 18 of this decision will be addressed. Approval of the

Settlement Agreement will include those portions which provide for payment of legal fees to the National Consortium, to Merchant Law Group and to independent counsel.

[84] I find that the provisions of the Settlement Agreement requiring payment of legal fees and disbursements to MLG are clear and enforceable. If the Federal Representative and MLG cannot agree on an amount, it shall be determined by an action to be brought in the Court of Queen's Bench for Saskatchewan with the amount of legal fees payable to MLG to in no event be more than $40 million or less than $25 million. If the parties cannot agree and an action becomes necessary, it will be incumbent on MLG to adduce all relevant evidence to verify its claim in a format that does not breach solicitor/client privilege. If MLG does not do so, it cannot expect to receive payment of more than $25 million.

[85] Having regard to all relevant factors I find that the agreed minimum amount and the process for determining the actual amount payable to MLG will be approved as part of an entire Settlement Agreement.

D. P. Ball J.