Court of Queen's Bench of Alberta

Citation: Northwest v. Canada (Attorney General), 2006 ABQB 902

Date:
Docket: 0501 09167
Registry: Calgary

Between:

Flora Northwest, Adrian Yellowknee, Michael Carpan, Kenneth Sparvier, Dennis Smokeyday, Rhonda Buffalo, Marie Gagnon, Simon Scipio, as representatives and claimants on behalf of themselves and all other individuals who attended Residential Schools in Canada, including but not limited to all Residential Schools' clients of the proposed Class Counsel, Merchant Law Group, as listed in part in Schedule 1 to this Claim, and the John and Jane Does named herein, and such further John and Jane Does and other individuals belonging to the proposed class, including John Doe I, Jane Doe I, John Doe II, Jane Doe II, John Doe III, Jane Doe III, John Doe IV, Jane Doe IV, John Doe V, Jane Doe V, John Doe VI, Jane Doe VI, John Doe VII, Jane Doe VII, John Doe VIII, Jane Doe VIII, John Doe IX, Jane Doe IX, John Doe X, Jane Doe X, John Doe XI, Jane Doe XI, John Doe XII, Jane Doe XII, John Doe XIII, Jane Doe XIII, being a Jane and John Doe for each Canadian province and territory, and other John and Jane Does Individuals, Estates, Next-of-Kin and Entities to be added

Plaintiffs

- and -

Attorney General of Canada

Defendant

Proceedings under the *Class Proceedings Act*, S.A. 2003, c. C-16.5

Decision of the
Honourable Mr. Justice T.F. McMahon

Introduction

[1] This motion in Alberta seeks certification of a class action under the *Class Proceedings Act*, S.A. 2003, c. C-16.5 ("CPA") and approval of a settlement of that action (the "Settlement"). The same motion is also brought in Ontario, Quebec, Manitoba, Saskatchewan, British Columbia, Nunavut, Yukon and Northwest Territories. Certification would result in the same class action being brought in all nine jurisdictions. Underlying these motions are several class actions in other jurisdictions and thousands of individual actions in all nine jurisdictions. All arise from claims by former students of Indian Residential Schools and their families resulting from the operation of the schools established under Canada's authority and operated initially by various religious organizations and later by Canada between 1920 and 1997.

[2] The Settlement is supported by all the parties. The claims are unique in many of the issues raised. The Settlement is equally unique and likely without precedent in its scope.

Background of the Alberta Litigation

[3] It is estimated that nationally there are approximately 79,000 former students encompassed by the proposed Settlement. Beginning in about 1994 more than 10,000 former students sued. The Plaintiffs say that at this point the jurisdictional breakdown is this:

Jurisdiction	Plaintiffs in Active Litigation
Alberta	3,950
British Columbia	830
Manitoba	1,157
New Brunswick	1
Northwest Territories	29
Nova Scotia	582
Nunavut	191
Ontario	657
Quebec	89
Saskatchewan	2,949
Yukon	103
Total	10,538

[4] It will be seen that the largest number of Plaintiffs is in Alberta, about 37.5%. The vast majority are in the prairie provinces of Alberta, Saskatchewan and Manitoba, about 76.4%. These numbers do not, of course, reflect the entire class or the current places of residence of the entire class. In addition there were about 5,000 claims advanced through an ADR process established by Canada.

[5] Because Alberta had no class action legislation until April 1, 2004, the actions here came under case management by this Court beginning in 1999. The claims included intentional torts, negligence, loss of language and culture, breach of fiduciary and statutory duties. The Alberta test cases had been scheduled for trial when the settlement discussions began.

Court to Court Communication

[6] It should be recorded that in this case all counsel consented, and indeed urged, the responsible courts in the nine jurisdictions to communicate with one another during deliberations. The goal was to achieve consistency in decisions, where possible, and without infringing upon the independence of each court. That process has been very helpful and is to be encouraged when cross-border class action proceedings arise. A similar process has been codified in guidelines adopted in B.C. and Ontario in the insolvency area. As a result, I have had the opportunity to review the draft reasons of several of my colleagues.

Certification

[7] Given that the parties have reached a proposed settlement, S. 4 of the CPA applies:

> 4 Where a plaintiff has reached a settlement with a defendant in respect of a proceeding prior to the proceeding's being certified but certification of the proceeding as a class proceeding is being sought as a condition of the settlement for the purpose of imposing the settlement on persons who will be class members in respect of the proceeding if the proceeding is certified as a class proceeding, those persons, on the application for certification being commenced, constitute a settlement class with respect to the proceeding for which certification is being sought.

[8] For certification to occur, the requirements of S. 5(1) must be satisfied:

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;

(c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;

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

(e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,

(i) will fairly and adequately represent the interests of the class,

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

(iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

...

(3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

(4) The Court may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e).

(5) Notwithstanding subsection (3), where an application is made to certify a proceeding as a class proceeding for the purposes of binding members of a settlement class, the Court may not certify the proceeding unless the Court has approved the settlement.

[9] All parties support certification, conditional upon settlement approval.

[10] In Alberta, the most recent appellate authority on certification of class proceedings is *Ayrton v. PRL Financial (Alta.) Ltd.* (2006), 384 A.R. 1, 2006 ABCA 88. The Court confirmed again that the policy reasons behind class proceedings legislation are access to justice, judicial economy and behaviour modification.

[11] In the circumstances of this case, consideration of the required elements of S. 5 can be brief. The pleadings disclose the causes of action described earlier. There is an identifiable settlement class of persons.

[12] The claims raise common issues which include:

1. Whether the Defendants breached a duty of care owed to the settlement class members to protect them from harm.

2. Did the Defendants breach a fiduciary duty or a treaty right of the settlement class members.

3. Can the Court make an aggregate assessment of damages.

[13] A class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. I take into account the factors described in S. 5(2). In addition, it can briefly be said that the alternative of continuing with the thousands of individual actions, with the risk of inconsistent decisions between jurisdictions, is not attractive. Certification and settlement brings the prospect of recovery as well to perhaps 60,000 additional claimants who have not sued.

[14] Lastly, the named representative Plaintiffs satisfy the requirements of S. 5(1)(e).

The Proposed Settlement

[15] The proposed Settlement comprises four main elements:

1. Common Experience Payments ("CEP")
A CEP will be paid to each former student alive as at May 30, 2005 and who resided at an Indian Residential School before December 31, 1997. The payment will be $10,000 for the first year of attendance and $3,000 for each full or part year thereafter. The payment is intended to recognize the common experience of all former students and is based upon attendance alone. It is estimated that there may be up to 79,000 such claimants. Canada has designated $1.9 billion for these payments and will increase that amount if needed. There is also agreement as to the disposition of any surplus if CEP paid out does not reach $1.9 billion.

2. Independent Assessment Process ("IAP")
Claimants may seek additional compensation for physical or sexual abuse or for other defined wrongful acts - all collectively called "Continuing Claims". Canada will establish an adjudicative process by which adjudicators will hear from claimants and witnesses and award compensation. There is a point system to fix compensation. There is an appeal process if the claimant is dissatisfied. An award can range from $5,000 to $275,000. In addition there can be an award for proven actual income loss to a maximum of $250,000. There may be as many as 15,000 IAP claims. No cost estimate has been provided but the cost could exceed the CEP. The cost of administering this program will be very significant. Again, no cost estimate has been provided.

3. Truth and Reconciliation, Commemoration and Healing.
The Settlement contemplates a Truth and Reconciliation Commission to provide forums for individuals to come forward; to educate and record the history of the residential schools system. In addition there will be commemoration events and healing programs. The total budget for this part of the Settlement is $205 million.

4. The various church organizations are to provide cash and in-kind services for programmes for class members and their families.

[16] In addition to these elements Canada agrees to pay some of counsel's legal fees and on certain terms. The Settlement provides opting out provisions and addresses implementation of the Settlement, assuming approval. Finally, the Settlement provides that unless it is approved in its entirety and by all Courts, it will terminate.

Administration of the Settlement

[17] The proposed Settlement will take years to unfold. It contemplates continued Court supervision and involvement in several areas including the following:

- addition of institutions
- CEP application process
- CEP appeal procedure
- resource disputes for the IAP
- receive reports from and supervise the Trustee
- dispute resolution

[18] Winkler J. of the Ontario Superior Court of Justice in his draft reasons properly makes the point that approving courts must be satisfied, particularly on behalf of absent class members, that those class members are not surrendering litigation rights merely to become entangled in an under-resourced and unworkable extra-judicial resolution process. The specific concerns which he raises relate to the execution or performance of the undertakings made in the Settlement, particularly by Canada. Generally, I share those concerns. The Settlement contemplates the continued involvement of the Courts. So does the legislation.

[19] The administration of the Settlement should, in my view, be from a centre which is geographically positioned where most claimants reside. Remoteness between authority and the claimants has long been an issue and should not continue.

[20] I am concerned specifically about one matter regarding the CEPs. Plaintiffs' counsel are to receive all of their fees for CEP work within 60 days of the implementation date. The result is that they will be paid before their clients receive any money. Thus there is no incentive for counsel to assist their existing clients with the preparation, filing and validation of their applications for their CEP and any appeals. I would prefer an undertaking to be filed with the Court from each of the Plaintiffs' counsel that they will undertake that work at no additional cost for each one of their clients. Absent that, I need to see a plan which will protect those clients.

[21] For those eligible CEP recipients who have not retained counsel, they will have to rely upon the notice program to learn of their rights under the Settlement. Those persons will number

in the tens of thousands. There does not seem to be any means planned by which they can obtain assistance to perfect their applications or their appeals. That too should be addressed.

[22] These issues do not arise in respect of the IAP because the legal fees are not paid in advance of the claimants' award. Nevertheless, the complexity and volume of IAP claims will generate significant administrative costs. The parties must craft a mechanism for the IAP Oversight Committee to report to the Court and carry out the Court's directions as necessary.

Test for Settlement Approval

[23] S. 35 of the CPA requires Court approval of a class action settlement but provides no standard or test for such approval. Other jurisdictions state the test as whether the settlement is fair, reasonable and in the best interests of the class as a whole. That test is itself reasonable and I adopt it. *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372.

[24] A settlement need not be perfect; it need not be the best for every class member. Settlements by their nature are a product of negotiations and compromises. The law looks to whether the settlement falls within a range of reasonableness. *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.J.); *Sawatzky v. Societe Chirurgicale Instrumentarium Inc.* (1999), 71 B.C.L.R. (3d) 51 (S.C.).

Factors in Assessing the Settlement

[25] There are a number of relevant factors to consider in assessing this Settlement. Given that all counsel urge approval and that relatively few objections have been heard, I can be brief.

1. Likelihood of Success and the Risk of Loss:

[26] Any litigation carries legal risks. The greater the risk of loss the more urgent the need to settle on the best possible terms. Here the risk to the Plaintiffs was great. There were novel claims advanced, including loss of language and culture. The Plaintiffs also faced serious limitation defences. As well, Canada could claim some statutory immunity to intentional torts. Canada's liability for torts generally is limited to vicarious liability only: *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, S. 3.

[27] The Defendants might have argued that the operation of the schools met the prevailing standards in the early years in which they operated and thus no breach of duty might be found. The Plaintiffs' attack on government policy might be found to be not justiciable. Certain derivative claims would face serious attack. In summary, the Plaintiffs faced very significant risks in this litigation.

2. Time and Cost of Outstanding Litigation:

[28] The earlier the settlement, the greater the litigation cost avoided. In this case, although the Alberta test cases were essentially ready for trial, that was not true in other jurisdictions. Even in Alberta there was the prospect of appeals and of a party's refusal to accept a test case judgment as representative. Additional expense and delay would have been significant.

3. The Terms of the Settlement:

[29] Does the Settlement on its face seem fair and reasonable? Given the lengthy litigation, at least in Alberta, and the intense negotiations towards settlement with all parties in agreement, there is an appearance of reasonableness to the Settlement. Also, the CEP part of the Settlement is effectively a "no fault" payment.

4. Recommendation and Experience of Counsel:

[30] All counsel here support the Settlement. Many of the ones known to this Court are experienced and capable.

5. The Personal Circumstances of the Plaintiffs:

[31] Many of these claimants are elderly. Too many have died since the actions began. Time is not on their side. Early settlement is critical.

6. Third Party Recommendations:

[32] Approval of the Settlement is urged by the Honourable Frank Iacobucci who led the Settlement discussions, and by the Assembly of First Nations.

7. The Number and Nature of Objections:

[33] In Alberta only 87 persons objected. Some said that the CEP was inadequate in quantum, others said that the cut-off date of May 30, 2005 (by which date only those claimants then alive are eligible for CEP) is unfair. Some say the descendants of former residents should receive the CEP. Still others complained that money alone is inadequate and that the government must apologize. One group of 64 persons complained of the fees of the Merchant Law Group and the treatment they have received from that law firm. Twenty-two objectors who appeared at the hearing addressed the Court. The short answer to these relatively few objections is that after protracted and difficult litigation and then intense settlement discussions, this is without doubt the best settlement available. For those who are unwilling to accept that opinion, there is the ability to opt out. If the opt out group exceeds 5,000 nationally, then the Settlement is terminated, subject to Canada's right to waive this provision.

8. Does the Settlement meet the objectives of improved access to justice; deter future wrongs and promote judicial economy:

[34] Here there are thousands of former students who have not brought claims. Many no doubt could not afford to; or live in remote areas or did not culturally or otherwise comprehend the process. They now have access to an amount of compensation that they would not otherwise have. The non-financial elements of the Settlement may offer some deterrence, if deterrence is needed, in a modern Canada. The benefits to lessening the trial burden on judicial systems already strained is obvious.

[35] In the result, I conclude that the Settlement for class members is fair and reasonable and in their best interests.

Legal Fees in Respect of CEP

1. The Settlement - Article 13

[36] The Settlement provides by Article 13 that the Plaintiffs' legal fees and disbursements plus applicable taxes will be paid by Canada from a separate fund. Most, if not all of Plaintiffs' counsel took retainer agreements from their clients which entitle them to a percentage of the money recovered. Given that Canada has agreed to pay the fees, the CEP recovery by class members will not be diminished by legal fees. From Canada's perspective that was an important element of the Settlement and it obviously advances the interests of the class members.

[37] The Settlement recognized three groups of Plaintiffs' counsel: the National Consortium, independent counsel, and the Merchant Law Group. The Settlement provides that no counsel who signed the Settlement or who accept a payment of legal fees from Canada will charge any fees or disbursements in respect of the CEP. Any recovery under the IAP is not subject to this restriction and is subject to whatever fee arrangements counsel make with their client.

[38] The Settlement provides that the per client fee for a member of the independent counsel group will be based upon the lesser of work in progress as at November 20, 2005 or $4,000 plus reasonable disbursements and taxes. There is a verification process available to Canada.

[39] As to the National Consortium (a group of 19 law firms) the Settlement provides for a payment of $40 million plus reasonable disbursements and taxes.

[40] In respect of the Merchant Law Group, there is a detailed verification process agreed to. By a collateral agreement between only Canada and the Merchant Law Group and attached as a schedule to the Settlement, it was agreed that the fees for that law firm would not exceed $40 million and would not be less than $25 million, unless otherwise agreed.

2. The Proposed Orders

[41] The proposed certification and settlement approval order declares that the Settlement is fair and reasonable and is incorporated by reference into the order. Plaintiffs' counsel has proposed an additional order dealing only with legal fees. That order declares that Canada shall pay the fees as provided in Article 13, which Article is expressly approved. It further orders the particular payment of $40 million to the National Consortium plus reasonable disbursements and taxes, and declares those fees to be fair and reasonable.

3. Support for the Fees

[42] There is unanimous support from all counsel for the Settlement as to fees. Counsel for the National Consortium of Plaintiffs' counsel naturally urges that their fees of $40 million be approved as fair and reasonable. The group of lawyers comprising "Independent Counsel" also supports the request for Court approval of their fees to be paid by Canada.

[43] The Merchant Law Group has agreed to a verification process respecting their fees and supports approval of that process. A dispute has arisen in respect of compliance with this process which I need not deal with here.

[44] Canada argues that the fees, except for Merchant, are fair and reasonable and should be approved. As to Merchant, Canada urges Court approval of the Settlement respecting the Merchant fees, including the verification process.

[45] The Third Party church organizations also seek Court approval of the legal fees. The Assembly of First Nations, an association of Band chiefs, supports the fee payments and urges Court approval.

[46] In short then, the payor (Canada) and the payees (the law firms) have agreed in writing on either the amounts to be paid or the means of determining those amounts. All of them say that the fees and the process to verify fees are fair and reasonable. The churches echo that opinion. The distinguished federal representative in the settlement negotiations, the Honourable Frank Iacobucci, offers the same opinion.

[47] Lastly, the executive branch of the Government of Canada has twice approved the legal fees and the verification process; first by approving the agreement in principle on November 22, 2005 and secondly by approval of the Settlement on May 10, 2006.

4. Opposition to the Fees

[48] Some objections to the legal fees from individual Plaintiffs in Alberta have been received, describing the amount in respect of the Merchant Law Group as "offensive" and "outrageous".

5. Should the Court be Involved in the Approval of these Fees?

[49] Although no party raised this issue, there is a question whether judicial approval of these legal fees is required in circumstances where the fees are paid by the Defendant. The fees relate only to the CEP. The payor and the payees accept the fees and the process for determining the fees as being fair and reasonable. The class members have no direct financial interest in the fees in the sense that their recovery of the CEP is not diminished by those fees.

[50] There is no statutory requirement for Court approval of these agreed upon fees or their verification process. S. 39 of the CPA provides that a contingency fee agreement is "not enforceable" unless a) at or before the certification hearing the agreement is approved by the Courts and b) after the settlement agreement is approved the Court ensures that the fees and disbursements payable under the agreement are fair and reasonable in the circumstances.

[51] S. 39(7) provides that if the contingency agreement is not approved or followed then the Court may determine the fees and disbursements or direct a process for determining the fees and disbursements.

[52] However, all parties agree that S. 39 is not engaged in this case. That is so because Canada and not the class is paying these legal fees. Payment is not being made under the contingency or retainer agreements held by the lawyers. These fees do not come out of or diminish the class members' recovery. It is only when the class members are paying the fees that the CPA expressly requires Court approval of those fees. The Alberta class action legislation followed upon the report of the Alberta Law Reform Institute No. 85 dated December 2000. Page 156 of that report provides the rationale for Court approval of legal fees in class proceedings:

> This is necessary to protect the interests of class members whose recovery will be reduced by the lawyer's fees and generally to prevent abuses of the system.

[53] So Court approval of these legal fees under S. 39 is not required in these circumstances.

[54] S. 35 of the CPA requires Court approval of the settlement of a class proceeding before it is binding. All parties seek Court approval of legal fees and the verification process on the basis that the fees are part of the overall settlement; and S. 35 requires approval of the settlement of a class proceeding.

[55] But the settlement contemplated by S. 35 is a settlement in which the class members have a direct financial interest. Court approval of a settlement between competent contracting parties is not usually required. It is not the Court's role to approve uncontested legal fees between a lawyer and a third party payor in the absence of incapacity at law or some statutory requirement.

[56] The rationale for Court approval of a settlement in class proceedings is that, once approved, all class members, even those who never sued and are not present, will be bound and all members will pay their share of the legal fees, subject of course to any opting out provisions.

In this case the class members have no direct financial interest (except perhaps as taxpayers) in whatever amount Canada has agreed to pay to Plaintiffs' counsel. Canada can pay whatever it chooses to pay if the lawyers will accept. Canada may view the social or political need to end this litigation as overriding any reservations it may have as to legal fees. Those are not issues for judicial consideration.

[57] The position taken by all parties is that the Court should retain jurisdiction to approve legal fees in class proceedings even when the class members are not paying and S. 39 is not applicable.

[58] Canada argues that the public interest requires Court supervision of the legal fees because, in this case, the public treasury is the source of the funds. That does not, however, respond to the issue where the payor may be in the private sector. It is also argued that there can be the appearance or even the risk of real collusion between plaintiffs' counsel and the defendant in the absence of judicial review.

[59] Although the CPA does not require the parties to submit an agreement as to legal fees for judicial approval where the fees are not being paid pursuant to a contingency fee agreement between the lawyer and the plaintiffs, I am persuaded that there is a principled reason for Court review of legal fees where approval is sought by the parties. In order to preserve the integrity of class proceedings and to guard against any abuse, such as improper favourable treatment of fees in exchange for a lessor class settlement, Court review is warranted.

6. Should the Court Permit the Approval of the Class Settlement to be Conditional upon Court Approval of Legal Fees?

[60] The link between the approval of the Settlement and the approval of legal fees arises from the following articles of the Settlement:

> **Article 2.02 Effective in Entirety**
> None of the provisions of this Agreement will become effective unless and until the Courts approve all of the provisions of this Agreement, except that the fees and disbursements of the NCC will be paid in any event.
>
> **Article 4.05 Consent Certification**
>
> ...
>
> (2) Consent certification will be sought on the express condition that each of the Courts, pursuant to the applications for consent certification under Section 4.05(1), certify on the same terms and conditions; including the terms and conditions set out in Section 4.06 save and except for the variations in class and subclass membership set out in Sections 4.02 and 4.04 of this Agreement.

Article 4.06 Approval Orders
Approval Orders will be sought:

(a) incorporating by reference this Agreement in its entirety;

...

(h) ordering and declaring that the fees and disbursements of all counsel participating in this Agreement are to be approved by the Courts on the basis provided in Articles Four (4) and Thirteen (13) of this Agreement, except that the fees and disbursements of the NCC and the IAP Working Group will be paid in any event.

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

[61] The result is that unless each Court approves the legal fees and the verification process as being fair and reasonable and orders their payment, the class members settlement, even if standing alone it is fair and reasonable, will "terminate". That in my view is both unfortunate and unfair to class members, none of whom have any financial interest in the quantum of these legal fees. It is true that in return for Canada undertaking to pay the fees, the lawyers surrender any right to claim fees in respect of a CEP from clients who receive such payment. Thus it can be said that class members have an interest in Canada assuming the burden for the legal fees, but they have no interest in the amount of those fees.

[62] The conflict was avoided in a case upon which the Plaintiffs rely: *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (S.C.J.), where at paragraph 59 the Court said:

> I turn to the final issue and that is the approval of the fees which DuPont has agreed to pay Class Counsel as part of the settlement. I am able to separate my consideration of this aspect of the overall settlement from my approval of the basic settlement itself due to the fact that Mr. Eizenga advised me that he is prepared to separate the approval of the settlement proper from the approval of the fees so that the settlement could proceed. In other words, counsel were prepare to "take their chances" on the fees issue in order to allow the settlement itself to move forward. I wish to commend plaintiff's counsel for the manifest fairness they demonstrate in taking that position.

[63] Counsel before me refused to acquiesce to a separate consideration of the fees. All parties maintain that it is essential to this Settlement that all Courts must approve the entirety of the Settlement, including Article 13 regarding legal fees, or the Settlement terminates. That is, the Court cannot approve the settlement for the class members and vary the fee agreement. It is impossible to determine who represented the interests of the class members when that

arrangement was made. Certainly not Canada. Plaintiffs' counsel would have been conflicted. Counsel for the Assembly of First Nations (AFN) says that his client was without conflict and approved the deal. But his client is an association of chiefs. I have no evidence of their mandate to speak for and bind the class members. Plaintiffs' counsel cites a brief oral decision of Slatter J. (as he then was) in *Roth and Fifield v. Her Majesty the Queen in Right of Alberta*, an unreported decision dated December 20, 2005. This decision appears to be the only other Alberta decision on a class settlement. The case dealt with class proceedings arising from alleged underpayment to and overpayment of recovery from recipients under the *Assured Income for the Severely Handicapped Act*, R.S.A. 2000, c. A-45 and predecessor statutes. Alberta, a defendant, paid the fees of class counsel under the settlement agreement. However, the issue I now consider was not put before Slatter J.

[64] Canada, supported by the AFN, argues that it was critical to them that the entire CEP be received by the eligible recipients, without deduction for legal fees under any retainer agreements. The only way to accomplish that, they said, was for Canada to pay the fees in return for Plaintiffs' counsel surrendering their claims to a percentage of the recovery under their retainer agreements. Plaintiffs' counsel would only accept that trade off if they had certainty as to their fees or the formula to determine their fees.

[65] The argument is understandable but it does not address the underlying problem. When the settlement for the class members is made conditional upon approval of the agreed legal fees, the class members cannot and do not receive independent legal advice as to the merits of their settlement alone. The opinion of Plaintiffs' counsel in respect of the fairness of the class settlement can be perceived to be influenced by counsel's view on the adequacy of their fees. I say "perceived" because in the course of the seven years of case management of this litigation in Alberta I have been struck, but not surprised, by the skill and dedication of nearly all counsel involved. Their loyalty to their clients' interests is not in question.

[66] However, if S. 39 applied, fairness of the legal fees would be determined only after the underlying settlement was approved. The Settlement in this case, linking the two approvals, is inconsistent with S. 39. The legislature has carefully separated the two approvals. There is good reason for that. To ensure the independence of the advice the class members receive as to their settlement, the class settlement must be resolved first and not be made conditional upon the lawyers' fees being approved. That principle applies with equal force when the fees are paid by a third party such that S. 39 does not apply.

[67] Nevertheless I am persuaded that this litigation is unique. This is not merely about commercial interests and resolving a dispute. This Settlement is between Canada and its First Nations people. It is about responding to historic wrongs. It concerns claimants who are elderly and for whom time cannot wait. Beyond compensation, there are social and political issues that this Settlement seeks to address. In all those circumstances I am not prepared to sacrifice a settlement for the class members in order to address the legal fees separately. That issue can and will be left for another day.

[68] I specifically do not wish to be seen as endorsing a practice of linking approval of a class settlement to approval of legal fees. Such linkage runs counter to the careful scheme of two separate approvals contemplated by the CPA and creates an unanswerable conflict no matter who is the payor. In cases where the defendant pays the legal fees, a process parallel to S. 39 should in my view be followed in all but the rarest of cases.

7. Factors to Assess the Reasonableness of Legal Fees

[69] The test is whether the fees sought are reasonable: *Gariepy v. Shell Oil Co.*, [2003] O.J. No. 2490 (S.C.J.).

[70] The relevant factors include the following:

1. The time expended by counsel.
2. The complexity of the issues.
3. The degree of responsibility assumed by counsel.
4. The monetary value in issue.
5. The importance of the matter to the clients.
6. The degree of skill and competence demonstrated by counsel.
7. The results achieved.
8. Ratio of the fees to recovery.
9. Whether a multiplier should be applied and if so at what level.
10. Whether in contingency cases the fees as a matter of policy are sufficient to provide an economic incentive to counsel.

8. Review of these Legal Fees

a. Independent Counsel

[71] The Settlement provides that each lawyer in this group who had either a retainer agreement or a substantial solicitor-client relationship with a former student as at May 2005 would be paid for outstanding work in progress as at November 20, 2005, to a maximum of $4,000. In return the lawyer would not charge any fees in respect of the CEP. The Settlement provides a verification process, both as to the number of clients and the amount of the outstanding work in progress. The Settlement also provides for payment of fees at a normal hourly rate for the time spent negotiating the Settlement and for any work required during the course of the administration of the Settlement once approved.

[72] The evidence is that independent counsel represent more than 4,000 former students. The group consists of 19 separate law firms. This group has been involved in the active pursuit of this litigation for many years. Many of these lawyers have been successfully involved in the alternate dispute resolution process as well.

[73] Given the likely average CEP received by each of their clients, the agreement to accept a payment of only work in progress to a maximum of $4,000 is obviously fair and reasonable.

b. National Consortium

[74] The National Consortium consists of 19 law firms across the nine jurisdictions. They represent between 7,500 and 8,000 claimants. In return for a proposed fee of $40 million to be divided amongst the 19 firms, they surrender any fees due under retainer agreements for CEP and undertake not to charge fees on the CEP recovery to current and future clients. The affidavit of Darcy Merkur, a lawyer with one of the member law firms, confirms the following facts.

[75] This group pursued or supported litigation in eight of the nine jurisdictions. Their work began as early as 1994. The group actively pursued extra-legal activities as well in order to increase pressure on Canada. They co-ordinated efforts with the AFN and appeared with clients at parliamentary committee hearings. In Alberta, members of this group took the lead over the course of seven years of case management to move cases through numerous interlocutory motions, extensive document production, and some 245 days of examinations for discovery. Eight experts were retained and briefed and reports obtained at the expense of the lawyers. Pre-trial briefs were prepared. Nationally, the group's disbursements totalled nearly $2.5 million and they recorded more than 100,000 hours of time. The issues raised in the litigation were extremely complex. The $40 million when distributed will see the individual firms receive as little as $96,000 to as much as $7.8 million. In the case of many firms, there were a number of lawyers working on the litigation over the course of time. In 2005 this group was involved in protracted and intense negotiations leading towards settlement. The settlement amount allocated for the CEP is $1.9 billion. The degrees of responsibility and skill brought to the litigation in Alberta was generally high. There were a few counsel who chose to be passengers, but most readily assumed the responsibilities and conducted themselves in accord with the highest standards. The results achieved are impressive. The risks faced by counsel were extraordinary. There were significant legal issues to answer; there was the prospect of years of trials and appeals with no or very little reward at the end. Those are only the legal risks. There were political uncertainties as well. Canada was not an ordinary defendant.

[76] The matter of legal fees was a subject of intense negotiations leading to settlement. This was no "friendly" deal. It was recognized that the National Consortium included both class counsel and counsel for thousands of individual Plaintiffs. Many had contingency agreements, some of which called for fees of 15%, 25% and more. The National Consortium provided a calculation of its fees under existing retainer agreements and class action fees. The estimate of fees range from $72.75 million to $92.5 million. Settlement was reached at $40 million.

[77] On all of these facts I am satisfied that the proposed fee to the National Consortium is fair and reasonable and should be approved. I am supported in my conclusion about those fees by the opinion of the federal representative who led the settlement discussions; by Canada, who will pay the fees; and by the AFN, which claims to be something of a "neutral" party in the matter of fees. The simple fact is that but for the legal skills and strategies employed by these and other lawyers, these claims were very likely to die like the rest of the claimants in a very few years. $1.9 billion in CEP is going to flow to the surviving claimants because and only because of the determined efforts of Plaintiffs' counsel. They have earned their compensation.

c. Merchant Law Group

[78] This law firm ("Merchant") commenced class actions in six jurisdictions. In Alberta they commenced thousands of individual actions before Alberta's class action legislation was in place. Throughout the case management of the action in Alberta, however, Merchant was of little assistance and was generally unhelpful in moving the test cases forward. They were often absent from case management conferences. The Settlement provides that the fees of Merchant will be determined in accord with the Agreement in Principal dated November 20, 2005 and a collateral agreement made between Canada and Merchant attached as Schedule V and also dated November 20, 2005. That collateral agreement provided for a four step verification process, ending with a determination by the Saskatchewan Court of Queen's Bench. That collateral agreement further provided that Merchant would be paid a minimum of $25 million and a maximum of $40 million. The extensive verification procedure arose from the concerns of the federal representative Frank Iacobucci, Q.C. as expressed in his affidavit of August 10, 2006:

> 2. The discussions of legal fees with Tony Merchant, Q.C., representing the Merchant Law Group ("MLG"), were particularly long and complex. As described in detail at paragraph 26 of this affidavit, I had and continue to have a number of very serious concerns about the information put forward by MLG to justify its position on legal fees. These concerns include:
>
> (a) uncertainty about the number of former residential schools students who had retained MLG;
>
> (b) lack of evidence or rationale to support the MLG's claim that it had Work-in-Progress of approximately $80 million on its residential school files; and
>
> (c) an apparent discrepancy between the amount of class action work MLG represented it had carried out and the amount of class action work it had actually done.

[79] He further deposed that "without this verification there is no way to determine whether $40 million in legal fees is a reasonable and equitable amount to pay to MLG." Presumably it would for the same reason be equally difficult to determine if $25 million is a reasonable amount. A fair and reasonable fee cannot be determined merely by counting the number of retainer agreements held by Merchant, particularly given the circumstances under which some of those agreements were alleged to have been obtained. A fair and reasonable fee is to be earned by useful work; not merely by obtaining signatures on a form or recording time on internal records.

[80] At the hearing, counsel for Merchant when asked directly, acknowledged that that firm supported the motion to approve the Settlement. Yet in its 136 page written submission Merchant argues that this Court must either order payment of $40 million to it or reject the entire Settlement. Apart from that dazzling conflict with the interests of its clients, that position conflicts with Merchant's own collateral agreement with Canada and with its stated position at

the hearing. In any event, I am asked only to approve the Settlement which, in respect of Merchant's fees, describes a verification process. That verification process is, in my view, fair and reasonable and is thus approved. I need not and do not approve any specific sum in respect of Merchant fees or disbursements.

Legal Fees for the Independent Assessment Process

[81] Article VI in Schedule D of the Settlement creates the independent assessment process. That process is a substitute for the current ADR process and is intended to provide a forum for the resolution of the "continuing claims". Those claims include allegations of physical and sexual assault and certain other defined wrongful acts. There could be as many as 15,000 such claims. Awards will range from $5,000 to $275,000. Proven actual income loss may be awarded in addition, to a maximum of $250,000. Canada will also pay an additional 15% of the award, plus disbursements, where a client has been represented by counsel, as partial reimbursement for legal fees. It can be expected that counsel will charge in excess of that 15%. The three groups of Plaintiffs' counsel represented here have agreed to "cap" their fees at 30% for "standard" track matters. The result is that for IAP claims, the total fees could dwarf the amount payable in fees for CEP claims. The Settlement deliberately does not address fees for IAP claims as it does for CEP claims. The affidavit of D. Merkur says at paragraph 18:

> The Settlement Agreement also recognizes that some counsel will be performing future work on behalf of individual clients who pursue further compensation through the Individual Assessment Process established by the Settlement Agreement (the "IAP"). With respect to such future work, the Settlement Agreement takes a hand's off approach to whatever retainer agreements might exist between counsel and client. However, it does provide that Canada shall pay a further 15% of any IAP award to help defray lawyer's fees. This is a continuation of the approach taken by Canada under the IAP's predecessor, the Dispute Resolution process established in November 2003 (the "DR process").

[82] However, the Court cannot take a "hand's off" approach. The suit having been certified as a class proceeding, the Court is obliged to ensure the fairness and reasonableness of all fees. While S. 39 of the CPA should apply, these circumstances involving thousands of IAP claims, to be resolved over a period of years, calls for a different solution. I concur with my colleagues in other jurisdictions and direct that the legal fees arising from IAP claims are to be approved in Alberta in the manner prescribed by S. 39, but before the adjudicator who heard the claim. Schedule D to the Settlement requires that the adjudicators have law degrees and relevant experience. In determining the appropriate fees, they will have regard to all relevant factors, including the greatly reduced risk at this stage, the absence of examination for discovery and the simplified adjudicative process. Also, there can be no double recovery. Plaintiffs' counsel cannot be paid a second time for the services to which the fees approved by Article 13 relate. The adjudicators will perform the function of a taxing officer pursuant to the Alberta Rules of Court and have regard to the Code of Professional Conduct regarding lawyers' fees.

[83] Claimants must have the right of appeal from the adjudicators to the approving court on the matters of fees.

[84] It may have been preferable had Canada, instead of paying an additional 15% of these awards, merely contracted with lawyers in each jurisdiction to represent IAP claimants at arm's length, much as legal aid does in many provinces. However, that was not done, so this procedure is necessary.

[85] After the hearings, Plaintiffs' counsel suggested that the NAC mediate or decide fee disputes. That group, however, lacks the necessary independence.

Form of Orders

[86] The proposed form of order certifying the action and approving the Settlement requires some minor corrections which were discussed with counsel at the hearing.

1. Paragraph 13 would have the Court declare the Settlement "fair, reasonable, adequate and in the best interests of the class members". S. 35 of the CPA requires only that the Settlement be "approved" and the Order should be limited to those words. The Settlement is no doubt approved because it is fair and reasonable and in the best interests of the class members but those are the reasons, not the result. The term "adequate" is superfluous.

2. Paragraph 14 of the Order would have the Court go beyond approval and order that the Settlement "shall be implemented and the parties are directed to comply with its terms, subject to any further Order of this Court" (underlining added). The Settlement however goes well beyond providing relief at law. For example, it contemplates certain truth and reconciliation national events whose purpose is to engage and educate the public through mass communication. The Settlement further contains a "commemoration policy directive" as Schedule J, designed to assist in healing and reconciliation. The carrying out of these and like terms are matters of social and political policy for the executive and legislative branches of government to determine. The Courts should not be called upon to order government to comply at this stage. See *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 77 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.* (2005), 74 O.R. (3d) 758 at para. 153 (S.C.J.).

   In the context of the overall Settlement, approval by the Court is sufficient.

3. Paragraph 34 of the proposed Order needs to be clarified given the definition of "Eligible CEP Recipient" in paragraph 1(k).

Conclusion

[87] In addition to the concerns raised by the courts in other jurisdictions, I require the following matters to be addressed for reasons already given:

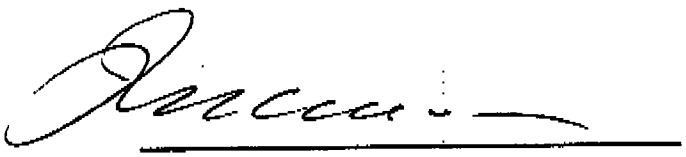
1. Establish a plan for assisting CEP claimants through and including appeals.
2. Establish a plan for Court supervision and direction for the IAP.

3. Agree that the Adjudicators will set the legal fees for IAP claims, subject to the clients' right of appeal to the Court.

[88] In my view, none of these go to the substance of the Settlement. Instead, they relate to the manner of the administration of the Settlement, which is the responsibility of the courts.

[89] Upon the parties providing a satisfactory response to these matters, the appropriate Orders will issue certifying the class proceeding and approving the Settlement.

Heard on the 12th and 13th days of October, 2006.
Dated at the City of Calgary, Alberta this 14th day of December, 2006 .



T.F. McMahon
J.C.Q.B.A.

Appearances:

Mr. K.M. Baert
for the Plaintiffs and the National Certification Committee
Mr. D.P. Carroll and
Mr. P.J. Faulds, Q.C.
for the Plaintiffs and the National Consortium of Counsel
Ms. C.A. Coughlan and
Mr. P. Vickery
for the Attorney General of Canada
Mr. W.R. Donlevy
for the Catholic Settling Church Entities
Mr. S.J. Page
for the Protestant Settling Church Entities
Ms. J.A. Summers
for Merchant Law Group
Mr. J.K. Phillips
for the Assembly of First Nations
Ms. K. Trace
for certain Catholic Non-Settling Entities