IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Quatell v. Attorney General of Canada***, 2006 BCSC 1840

Date: 20061215
Docket: L051875
Registry: Vancouver

Between:

Camble Quatell, Peggy Good, Adrian Yellowknee, 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

Before: The Honourable Chief Justice Brenner

Reasons for Judgment

COUNSEL FOR THE PLAINTIFFS:	MERCHANT LAW GROUP E.F. Anthony Merchant, QC PETER GRANT & ASSOCIATES Peter Grant KOSKIE MINSKY LLP Kirk M. Baert NEILLIGAN O'BRIEN PAYNE Janice Payne DOANE PHILLIPS YOUNG John Kingman Phillips
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Counsel for the Catholic Entities:	MCKERCHER MCKERCHER WHITMORE LLP W. Roderick Donlevy
Counsel for the General Synod of the Anglican Church of Canada and Agent for service of other Religious Entity Defendants:	CASSELS BROCK & BLACKWELL LLP S. John Page
Dates and Place of Hearing:	October 10, 11, 12, 13 and October 23, 2006 Vancouver, B.C.

INTRODUCTION

[1] This is an application for certification of this action as a class proceeding and for approval of a proposed settlement. The underlying case relates to claims arising throughout Canada as a result of the existence and operation of institutions known collectively as “Indian Residential Schools.” Parallel proceedings have been filed in nine jurisdictions in Canada and approval of the proposed settlement in each jurisdiction is a condition precedent to the resolution of all of the pending class action cases.

[2] The residences and numbers of the proposed class members may be seen in the following information assembled in 2001 and provided to the court by one of plaintiff’s counsel:

Ontario (including Atlantic) - 11,257

Quebec – 10,479

Manitoba – 8,736

Saskatchewan – 14,911

Alberta – 11,002

British Columbia – 14,391

Territories – 7,724

Counsel advise that these numbers have likely reduced by some 6% as of 2006.

[3] The parties authorized the judges in the nine jurisdictions to communicate with each other prior to, during and following the hearings in each jurisdiction. I have reviewed the draft Reasons for Judgment of Regional Senior Justice Winkler of the

Ontario Superior Court of Justice. I have also reviewed the draft Reasons of McMahon J of the Alberta Court of Queen's Bench and Ball J of the Saskatchewan Court of Queen's Bench. My colleagues have summarized the history of the residential schools and the tragic consequences for many who attended. They also describe and analyze the settlement terms. I concur with their reasons and analysis.

[4] I conclude that the requirements for certification pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 have been met and the proposed settlement is fair, reasonable and in the best interests of the Class, subject to the matters raised by Winkler J and itemized by Ball J at paragraph 19 of his reasons. In these reasons, I deal with certain additional matters raised during the B.C. application.

[5] In this court the hearing proceeded for five days. In addition to the submissions of counsel, in excess of eighty objectors spoke directly to the court. Many others filed written submissions either at the hearing or subsequently. In his reasons, Winkler J comments that the residential school policy "has now been widely acknowledged as a seriously flawed failure." In their statements to the court, the objectors underscored the accuracy of that observation. Most spoke of their experience at residential school. While each had an individual story to tell, there were also common shared themes that ran through many of the submissions: being taken from home, often forcibly, at an early age; having their language and culture banned; and being prevented from even communicating with their siblings at the same school. They described poor or inadequate food, harsh corporal punishment and instances of physical and sexual abuse.

[6] Many of the objectors had concerns with the proposed settlement. Others supported it. Yet others spoke of being torn between the advantage of accepting the proposed settlement and their concerns with a number of the provisions of the Settlement Agreement.

[7] This settlement represents a compromise of disputed claims. For that reason it is undoubtedly the case that claimants will not be happy with every provision of the settlement. Some might well choose to reject it. However, those members of the class who decide that the disadvantages of the Settlement Agreement outweigh its advantages are free to opt out of the provisions of the ***Class Proceedings Act*** and pursue their individual claims against the defendants. If they choose to opt out, nothing in this class proceeding will affect them or any actions they may choose to bring. In my view, the opt out right supports approval of the agreement.

[8] Another factor favouring approval of the agreement is the Common Experience Payment ("CEP"). This may be claimed by any class member solely on the basis of attendance at an Indian Residential School. They do not have to prove that they suffered any injury or harm; they are only required to establish the fact of their attendance.

[9] A repeated theme in these cases is the effect that attendance at Indian Residential Schools had on the language and culture of Indian children. These were largely destroyed. However, no court has yet recognized the loss of language and culture as a recoverable tort. Even if such a loss was actionable, most claims would now be statute barred by the ***Limitation Act***, R.S.B.C. 1996, c. 266. The CEP can

therefore be viewed, at least in part, as compensation for a loss not recoverable at law. In my view, this represents an important advantage to the class.

[10] The class members who wish to also advance a claim for serious physical or sexual abuse can choose to participate in the Independent Assessment Process ("IAP"). The IAP should provide a fair and expeditious means of having these claims assessed and paid. Since most claims for abuse of a non-sexual nature are also statute barred under B.C. law, the IAP offers a recovery mechanism not otherwise available to the class members in this province.

[11] That said, it is nonetheless imperative that the administrative deficiencies raised by Winkler J be addressed. For more than 100 years, Canada was principally responsible for the residential schools. In the leading case of ***Blackwater v. Plint***, [2005] 3 S.C.R. 3, 2005 SCC 58, the Supreme Court of Canada ruled that Canada was 75% at fault for the abuse suffered by students at the Alberni Indian Residential School.

[12] Many objectors expressed concern over the fact that Canada, the very party that was largely responsible for creating this problem, will be administering this settlement. Not surprisingly, the class members do not have a high level of confidence in Canada's ability to fairly or properly deal with them. In my view, this particular dynamic adds additional weight to the concerns articulated by Winkler J.

[13] I agree that Canada's administrative function should be completely isolated from the litigation function, with an autonomous supervisor or supervisory board reporting ultimately to the courts. As Winkler J states in his Reasons, this separation

will serve to protect the interests of the class members and insulate Canada from unfounded conflict of interest claims.

[14] In saying this I am not critical of the efforts of the parties, including Canada, to date in this case. Likely, the parties focussed on reaching an acceptable settlement and only when that was done turned their minds to its execution. Some of the challenges are accurately described in the affidavit material filed by Canada. However, what is readily apparent to everyone in this case is the necessity to avoid yet another exercise in failed paternalism, real or perceived. For this reason I agree with Winkler J and would condition my approval on the filing of an administration plan acceptable to the courts.

LEGAL FEES

[15] My colleagues in the other jurisdictions deal with the legal fees component of the settlement in their reasons. I agree with the conclusions of Winkler, McMahon and Ball JJ. I would approve the legal fees of the National Consortium and the independent counsel group as proposed. I would also approve the process which has been agreed upon for approval of the fees of the Merchant Law Group. In doing so, I note the extensive analysis of Ball J with respect to the fees of the Merchant Law Group; I agree with his findings and conclusions. That said, I do want to deal with a couple of the matters raised by my colleagues.

[16] It is a term of the Settlement Agreement that the legal fees must be approved by the courts and this approval is made a condition precedent to the settlement proceeding. In British Columbia, application for approval of legal fees in a class

proceeding is commonly made at the same time as the application for certification and approval of the settlement. However, these applications are made on separate motions and approval of the substantive settlement is not made conditional on the approval of class counsel fees. The linkage in the case at bar between the terms of the substantive settlement and counsel's fees is of concern to me for the reasons set out by McMahon J.

[17] While I appreciate that in this case the legal fees (at least for the CEP and up to 15% of the IAP awards) are being paid by Canada and not the members of the class, it is nonetheless my view that the settlement of a class action should not be made conditional on the approval by the court of class counsel's fees. Even where the fees are to be paid by a defendant, the court retains a statutory obligation to ensure that the settlement of a class proceeding is fair, reasonable and in the best interests of the class. In order to make that determination, the court must conduct a review of the legal fees independent of the terms of the substantive settlement to ensure that both of these components meet the statutory fairness test. To do that, court approval of class counsel fees should not be made a term of a class proceeding settlement.

[18] In this case, while I am prepared to grant the approvals as outlined earlier, I do so only after de-linking the legal fees application from the substantive settlement and after separately reviewing the extensive evidence filed in support. That evidence demonstrates the risks assumed and the amount of time and work expended by class counsel in this lengthy and difficult case. Hence I conclude that

the fees, and in respect of the Merchant Law Group the process, are fair, reasonable and in the best interests of the class members.

[19] One issue that arose during the hearing was the question of counsel's fees for the IAP. Under the terms of the settlement, Canada has agreed to pay up to 15% over and above any IAP award to the IAP counsel for legal expenses. During the course of the hearings, the Merchant Law Group, the National Consortium and the independent counsel groups all agreed that they would charge their clients no more than an additional 15% of any IAP recovery.

[20] I agree that the final fee award should be determined by the IAP arbitrator. In my view, the 30% total figure for legal fees should be viewed as a maximum amount that would only be recoverable in the most time-consuming or difficult of cases.

ISSUES ARISING

[21] I now propose to respond to a number of issues that arose during the B.C. hearing.

DAY STUDENTS NOT COVERED

[22] This agreement and the certification will cover only those individuals who were in residence at an Indian Residential School. Many individuals attended these schools, but only as day pupils. While they did not live at the residential schools, their housing arrangements were nonetheless problematic. They, as well, were forced to live far from their homes and families; they too suffered loss of language and culture. They were subject to abuse both at the residential schools during the

day and in the homes where they lived outside school hours. They experienced similar challenges to those who resided at the schools.

[23] Counsel for the plaintiffs advised me that the inclusion of the day students in the settlement was the subject of extensive negotiation. They said that the agreement was a compromise, which in the result meant they could not achieve the inclusion of these students in the class.

[24] However, although they are excluded from the settlement, the defendants have agreed that day students will be eligible to advance an IAP claim should they so choose. If they participate in the IAP process, those day students who suffered serious physical abuse will be able to advance claims that are likely statute barred. Those who wish to advance claims for sexual abuse will have a choice between the IAP process and the court system. In addition, since the day students are not class members, there will be no need for them to formally opt out in order to preserve their IAP claim, which they will be at liberty to advance within the time limits set out in the Settlement Agreement.

HEALING FUND

[25] Canada has agreed to commit $125 million over five years for a healing fund. Many objectors said that the funding would be insufficient and the timeline too short. Many objectors observed that the damage done by the Indian Residential Schools went on for over a century and that the healing process would likely and understandably take longer than five years.

[26] The healing fund is a very positive aspect of the Settlement Agreement. While more may be required, it does contain a provision (paragraph 8.01) wherein Canada can revisit the question of the healing fund on or before the fourth anniversary of the fund. While Canada is not obligated to extend the time or the funding under the Settlement Agreement, that provision at least contemplates a review to assess whether the object of the healing fund has been met.

VERIFICATION PROCESS

[27] To receive the CEP, class members must prove their attendance at an Indian Residential School. For most members of the class this will not cause any difficulty as attendance records are available. However, for some members of the class particularly the older members, the Churches and/or Canada have either lost or destroyed the attendance records and, hence, it will be difficult for them to prove their CEP claims. At the hearing, counsel advised me that Canada was working to overcome this difficulty. At the end of the hearing counsel advised that Canada has agreed to convene a meeting of the National Administration Committee to consider solutions. Counsel advised that they expected to be able to report a resolution of this problem to the court by the end of November.

[28] It is important that CEP recoveries for the class members not be prejudiced because Canada or the other defendants have discarded the attendance records. Given the advanced years of those most affected by this, an early solution is imperative. I will look forward to the further report from counsel.

NOTIFICATION

[29] The notice of certification and the Settlement Agreement must be communicated effectively to the members of the class. Notwithstanding the extensive efforts to advise those affected of this hearing, many objectors said they failed to receive notice. By the end of the hearings, counsel advised that there was a general consensus on the need to review the present proposal for the Phase Two Notice. Counsel have agreed to convene a meeting of the National Certification Committee to review the proposed Phase Two Notice of the proposal, having regard to the objectors' submissions. The final form of the Phase Two Notice will be reviewed and considered by the court when it is brought back to the court for approval.

APOLOGY

[30] The Settlement Agreement and the financial commitments of Canada and the other defendants to resolve the Indian Residential School claims is a very positive development. However, many of the objectors said that if the parties, both class members and defendants, are to successfully put the tragedy of the Indian Residential Schools behind them, it is necessary that a full and appropriate apology be proffered to those who have suffered as a result of these schools. Minister Jane Stewart did read a statement of regret in the House of Commons several years ago, but many of the objectors said that this was insufficient.

[31] The Leadership Council of British Columbia is an unincorporated entity comprised of the Executive of the Assembly of First Nations (BC Region), the First Nations Summit and the Union of British Columbia Indian Chiefs. The Leadership Council submitted that

> "a formal and unequivocal apology from the Prime Minister of Canada to the Aboriginal People of Canada must be an integral part of this settlement. It is further submitted that in order to work towards achieving true resolution, the form of apology should include a request for forgiveness."

[32] As I explained at the hearing, the court does not have the power to order or direct Canada to issue such an apology. Even if the court had such power, an apology offered pursuant to an order of the court would be of doubtful value; its underlying compulsion would destroy its effectiveness.

[33] However, I received many eloquent and passionate submissions from objectors seeking a suitable recognition by Canada of the inordinate suffering of the Aboriginal peoples caused by the Indian Residential School experience and expressing the hope that they could receive a full apology from the leader of Canada's government.

[34] There is an important cultural component to this. As submitted by counsel for the Leadership Council of British Columbia:

> "Aboriginal Justice Systems almost always stress reconciliation. Aboriginal Justice Systems also usually stress the need to restore harmony and peace to a community. Leaving parties dissatisfied or with feelings of inadequacy or lack of completion does not restore community harmony or peace. For Aboriginal students of Residential Schools and their families, an apology will acknowledge the wrong

> suffered by them and validate their struggle for compensation and redress."

[35] Although I am making no order and I am issuing no directions, I would respectfully request counsel for Canada to ask that the Prime Minister give consideration to issuing a full and unequivocal apology on behalf of the people of Canada in the House of Commons.

[36] Clearly by committing to these settlement negotiations and by entering into the Settlement Agreement and the ongoing process, Canada has recognized its past failures with respect to the Indian Residential Schools. However, based on what I heard during these hearings and in other residential school litigation, I believe that such an apology would be extremely positive and would assist the objective of all parties in achieving the goal of a national reconciliation.

[37] I would also respectfully suggest that Canada give consideration to offering an appropriate statement at the opening of the Truth and Reconciliation Commission. While this is ultimately for Canada and the Commission to decide, I would suggest that such a statement delivered in the early stages of the Commission's hearings would do much to emphasize both Canada's recognition of the extent of the failure of past policy as well as Canada's desire to achieve a national reconciliation with the Aboriginal people of Canada. It would also serve to underscore and emphasize the importance of the work to be carried out by this Commission.

CONCLUSION

[38] I conclude by confirming that I find this action should be certified and that the proposed settlement is fair, reasonable and in the best interests of the class members. I propose an early hearing with counsel so that the administrative deficiencies in the agreement can be rectified and the appropriate orders finalized and entered.

"D. Brenner, CJSC"

The Honourable Chief Justice Brenner