COURT FILE NO.: 00-CV-192059CP
DATE: 2006/12/15

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
CHARLES BAXTER, SR. and ELIJAH BAXTER et al.	**Kirk M. Baert** and **Celeste Poltak**, for the National Certification Committee
	L. Craig Brown, for the Baxter Plaintiffs
	Russell Raikes and **Mohamed Moussa**, for the Cloud Plaintiffs
	Jon Faulds, for the Alberta Plaintiffs
Plaintiffs	
- and -	
THE ATTORNEY GENERAL OF CANADA	**Paul Vickery** and **Catherine Coughlan**, for the Defendant
Defendant	
- and -	
THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA et al. (see APPENDIX A for a full list of Third Parties)	**John McKiggan** and **Arnold Pizzo McKiggan**, for the National Consortium
	S. John Page, for the Anglican Church Entities
Third Parties	**Rod Donlevy** and **Pierre Baribeau**, for the Catholic Entities

) **John Phillips**, for the Assembly of First
) Nations
)
) **Janice Payne**, for the Inuit Organizations
)
) **Peter Grant,** for the Unaffiliated Counsel
)
) **Anthony F. Merchant**, **Evatt Merchant**
) and **Jane Ann Summers,** for the Merchant
) Law Group
)
) **Susan M. Vella** and **Nathaniel Carnegie**,
) for certain objectors
)
) **Paulette Pummells**, for The New England
) Company
)
) **Randy Bennett** and **Jordan Nichols**,
) Court-Appointed Monitor
)
) **HEARD:** August 29, 30, & 31, 2006

Proceeding under the *Class Proceedings Act, 1992*

Winkler R.S.J.:

Overview

[1] The plaintiffs bring this motion, on consent, for a certification of the action as a class proceeding and approval of a proposed settlement including payment of class counsel fees. The action relates to claims arising throughout Canada as a result of the existence and operation of institutions known collectively as "Indian Residential Schools" ("IRS"). As is often the case on this type of motion, it is the position of the parties that in the event that the proposed settlement is not approved by the court, the consent to certification is a nullity and the parties will continue with litigation in the normal course. The proposed settlement before the court also includes terms relating to the payment of fees for lawyers other than class counsel. These lawyers have been advancing claims in individual litigation. It is proposed that this individual litigation will be terminated and the claims encompassed by the settlement. These payments are a departure from the norm and arise mainly as a result of the extensive litigation that has already been commenced in relation to the underlying class claims. In that respect, counsel for both plaintiffs and defendants anticipate that the settlement, if approved, will largely end all existing litigation relating to IRS. This is explained in more detail below.

[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 schools 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.

[4] The parties are proposing a Canada-wide settlement, with approval orders being sought in this court and the superior courts of eight other provinces and territories. They have asked the courts to depart from the normal practice and approve, as a term of the settlement, the combining of all outstanding litigation relating to the residential schools, into a single class action which will effectively be filed in each jurisdiction in Canada if approval of the settlement is granted. As a result of this approach, the class of former residents, identified as the "Survivor" class in the record, is estimated to number almost 79,000 persons. This national class is generally described as "All persons who resided at an IRS in Canada between January 1, 1920, and December 31, 1997, who were living as of May 30, 2005…".

[5] The national "Survivor" class will effectively be sub-classed for the purpose of determining which of the nine approving courts has jurisdiction over the claim of a specific class member. This will be accomplished by modifying the general class description with an additional province of residence requirement. The Ontario court, in addition to the jurisdiction over the residents of Ontario, will also have jurisdiction over the claims of the current residents of those provinces where approval has not been formally sought, specifically, New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island, as well as over the claims of those persons no longer resident in Canada. In addition, the class in *Cloud v. Canada* (2004), 73 O.R. (3d) 401 (C.A.), which is currently the only certified action in respect of the residential schools litigation, will be included in the proposed settlement.

[6] In addition, under its terms, the settlement will only be effective if there is unanimous approval by the courts on "substantially the same terms and conditions".

[7] Under the proposed settlement, all members of the Survivor class will receive a cash payment, with the amount varying according to the length of time each individual spent as a student in the residential schools system. This class-wide compensatory payment, which is referred to as the Common Experience Payment ("CEP"), is one of five key elements of the settlement before the court. In addition, there is an Independent Assessment Process ("IAP"),

which will facilitate the expedited resolution of claims for serious physical abuse, sexual assaults and other abuse resulting in serious psychological injury. The foregoing elements are aimed at personal compensation for the students who attended the schools. The other three elements of the settlement are designed to provide more general, indirect benefits to the former students and their families. These elements are the establishment of a Truth and Reconciliation Commission, with a mandate to make a public and permanent record of the legacy of the schools, in conjunction with the earmarking of a significant portion of the settlement fund for healing and commemoration programs.

[8] In my view, the proposed compensation components of the settlement are fair and reasonable, if they are delivered in an expeditious manner consistent with the intention expressed in the settlement. However, I have concerns that there are aspects of the planned administration and implementation of the settlement that may have a deleterious impact on the benefit of the settlement to the class members. I am approving the settlement, subject to those concerns being satisfactorily addressed. My reasons follow.

The Role of the Court

[9] Whenever a proposed settlement comes before the court for approval in circumstances where the subject matter clearly has broader social and political implications, it is useful to review the court's role and, by extension, the proper limits of its jurisdiction. The court must review the settlement on established legal principles, to determine whether it is fair, reasonable and in the best interests of the class as a whole. As stated in *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.), at para. 77:

> …it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

[10] On a settlement approval motion, the court's review is not directed toward the merits of the action but rather is concerned with whether the settlement meets the criteria for court approval. Thus, in accordance with this approach, the record must explain in general terms the alleged wrongs and the factual background supporting the claims. This is consistent with the position that the settlement represents a compromise in which the defendants are not admitting liability but rather are joining with the plaintiffs in presenting the compromise to the court as a fair resolution of the outstanding issues. Consequently, on a motion of this nature supported by a record of this type, it is not appropriate for the court to make findings of fact on the merits of the litigation from which the settlement emanates. Instead, the court must examine the settlement in the context of the record before it. That examination includes a review of the allegations underlying the claims, the defences advanced in response and any objections to the settlement, to

determine whether the settlement is "fair, reasonable and in the best interests of the class as a whole".

[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.

[12] In like fashion, the fact that the court is not making findings on the merits of the litigation on this motion ought not to be taken to mean that the approval process is a mere formality, or in the vernacular, a "rubber stamping" by the court. The court has an obligation under the *Class Proceedings Act* ("CPA") to protect the interests of the absent class members, both in determining whether the settlement meets the test for approval and in ensuring that the administration and implementation of the settlement are done in a manner that delivers the promised benefits to the class members. In seeking the approval of the court, the plaintiffs and defendants essentially seek the benefits of having the court sanction the settlement. Such approval cannot be divorced from the obligation it entails. Once the court is engaged, it cannot abdicate its responsibilities under the CPA.

The Settlement

[13] The residential schools are the subject of approximately 15,000 ongoing claims at present. Some of these claims are being advanced in traditional court litigation and some through the government's existing alternative dispute resolution process. The litigation stream includes a number of class actions, including the present proceeding and the *Cloud v. Canada* action that was certified previously. In a bid to negotiate a global resolution to this litigation, Canada appointed the Honourable Frank Iacobucci as its chief negotiator on May 30, 2005. Multi-party negotiations ensued from June 2005 through to November 2005, when an Agreement in Principle was reached. The details of the settlement were finalized and approved by the federal cabinet on May 10, 2006. The negotiations involved representatives from native communities, church groups, the federal government and various legal counsel.

[14] In keeping with the objective of a global resolution, the settlement is pan-Canadian and meant to encompass all outstanding litigation. There are five elements to the compensation it provides. Two elements provide individual compensation for the Survivor class members, while the remaining three are initiatives designed to address broader historical and future concerns of the Survivor class members, their families and their communities at large.

[15] Individual compensation for the Survivor class members will be provided through the CEP and through access to an expedited IAP for certain serious claims.

[16] The CEP is based on verified attendance at one of the residential schools. Claimants will receive a base payment of $10,000 for attendance plus $3,000 for each additional year or part

year of attendance. $1.9 billion will be allocated to a trust fund under the settlement for the purpose of making these payments. In the event that such amount is insufficient to pay all of the verified claims of the Survivor class members, Canada has agreed to supplement with the additional funding necessary to ensure full payment for all such claims. Another provision of the settlement deals with the prospect of a surplus in the original fund for the CEP. In the event that the verified claims do not exhaust the original $1.9 billion, additional compensation, up to $3000 per person, will be paid to the claimants if the surplus exceeds $40 million. Any additional surplus amount after those supplementary payments have been made will be transferred to aboriginal organizations for healing and education programs. Similarly, if the surplus at first instance is less than $40 million, there will be no additional individual compensation but rather, the entire amount will be transferred to aboriginal organizations.

[17] The CEP is intended to provide class-wide relief based on attendance alone at a residential school. The IAP, on the other hand, will be available to a more limited number of class members who are also advancing personal claims based on abuse suffered while resident at a school. In respect of those claims, additional compensation will be available where the class member establishes that he or she suffered serious physical abuse, sexual abuse or other abuse leading to serious psychological harm. Remedies available under this process include compensation for non-economic loss, i.e. pain and suffering, along with compensation for "loss of opportunity", future care and other consequential harm. Compensation for these claims will be capped at $275,000 plus a modest additional amount for future care. There is an additional provision for payments for actual income losses, where they are proven in accordance with the standards applicable to the process, up to a maximum of $250,000. The latter amount will be determined based on the same legal and factual analysis for such loss of income that is utilized in regular court proceedings. Canada will fund this program without any cumulative cap on the total amount of compensation to be paid.

[18] The individual compensation aspects of the settlement are complemented by the provision of funding for three initiatives that will provide broader community based benefits. The Aboriginal Healing Foundation will be given an initial endowment of $125 million "to support the objective of addressing the healing needs of Aboriginal People affected by the Legacy of Indian Residential Schools, including the intergenerational impacts, by supporting holistic and community-based healing to address needs of individuals, families and communities…". There will be a Truth and Reconciliation Commission established, with funding of $60 million "to contribute to truth, healing and reconciliation", through hearings and reports as necessary, with an objective of creating a permanent and public record of the "legacy of the residential schools". Finally, an additional $20 million has been earmarked for commemorative projects.

[19] The individual compensation will not be diminished by the costs of administration of the programs. Canada has agreed to bear all internal administrative costs associated with the delivery of the CEP and IAP.

[20] The legal fees of class counsel are being paid directly by Canada, subject to approval by the courts. Such payments are over and above the amount of money available to be paid as compensation to the class members. In view of the extensive litigation already under way, there

were also negotiations with individual claimant counsel which resulted in an agreement that such counsel would be paid directly by Canada, subject to a limit per case, on the understanding that claimants need make no further payment to those counsel with respect to the claim for, or receipt of, a CEP. However, claims made under the IAP will be subject to additional legal fees to be paid by the claimant. Canada has also agreed to pay successful claimants an amount equal to 15% of any award to partially defray those fees.

Law and Analysis

[21] As stated above, my concerns do not go to the compensation elements of the settlement. Although not perfect in every respect, or perhaps in any respect, perfection is not the standard by which the settlement must be measured. Settlements represent a compromise between the parties and it is to be expected that the result will not be entirely satisfactory to any party or class member. My concerns with respect to this settlement go to its administration, the actual legal fees that may be charged to the class members, the potential fettering of the jurisdiction of this court as a result of some of the terms and the scope of the class to be bound by the settlement.

The CPA Requirements

[22] The administrative concerns may be best explained in the context of a certification analysis. Whether a motion for certification is being conducted on a contested basis or on consent for the purposes of settlement, the criteria set out in s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, must be met. Briefly put, those requirements are (a) the existence of a cause of action, (b) shared by an identifiable class, (c) from which common issues of fact or law arise, (d) for which a class proceeding would be the preferable procedure for resolution and (e) for which there is a representative plaintiff who has produced a workable litigation plan and who can fairly and adequately represent the interests of the class members without conflict on the common issues.

[23] On this motion, it is clear that the criteria are met with respect to the existence of a cause of action, identifiable classes, common issues and representative plaintiffs without conflicts on the common issues who can adequately represent the class members. However, the preferable procedure criterion must also be satisfied. It is now trite law that for a class proceeding to be the "preferable procedure" for the resolution of the claims of a given class, it must represent a "fair, efficient and manageable" procedure that is "preferable" to any alternative method of resolving the claims.

[24] The manageability aspect of the preferable procedure criterion is often the point of contention on opposed certification motions. The plaintiffs assert that courts adopt a less rigorous standard with respect to consent certifications for settlement. I do not share this view. Settlements may mandate a different approach, but this is because the process of arriving at a settlement often leads to the parties adopting a claims procedure that alleviates some or all of the manageability concerns that arise in class actions with respect to the determination of individual claims. As stated by Nordheimer J. in *Gariepy v. Shell Oil Co.*, O.J. No. 4022 (S.C.J.), at para. 27:

> …The requirements for certification in the settlement context are the same as they are in a litigation context and are set out in section 5 of the *Class Proceedings Act, 1992*. However, their application need not, in my view, be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed. (Emphasis added.)

[25] A similar view was expressed by the United States Supreme Court in *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997). The majority held, at p. 620, that "[c]onfronted with a request for settlement-only class certification, a …court need not inquire whether the case, if tried, would present intractable management problems, …for the proposal is that there be no trial."

In short, this means that while the certification test is not "relaxed" in the literal sense in the context of settlement, the test may be more easily satisfied in certain circumstances. However, the underlying assumption in both *Gariepy* and *Amchem* is that the administrative claims procedure will satisfy any manageability concerns, thereby leaving the case amenable to certification. However, the court must still examine the proposed claims procedure to ensure that it will indeed be a "manageable" process.

[26] In a contested certification motion, the court expects that the plaintiff moving for certification will be able to demonstrate that the action is manageable as a class proceeding, in part, through the provision of a workable litigation plan. It may be safely assumed that the defendant, in the traditions of the adversarial system, will bring any deficiencies in the plan to the attention of the court. This safeguard is not present where certification is sought on consent for the purpose of approving a settlement because the plaintiff and the defendant have a joint interest in seeing the settlement approved. Accordingly, the court must be vigilant in scrutinizing the settlement, and in particular, its claims resolution and distribution mechanism, to ensure that the interests of the absent class members who are being bound by the settlement will be adequately protected.

[27] In any event, the representative plaintiff and the defendant focus on the certification issues but this often provides a distorted perspective with respect to the individual claims. The representative plaintiff and the defendant may resolve the macro issues through a settlement but this most often represents the real start, rather than the end, of the litigation for the individual class member, especially in those cases, as here, where a key term of the settlement is merely access to a modified claims resolution procedure.

[28] The fact that a settlement may provide only a modified claims resolution procedure for the class members is not objectionable in and of itself. However, the court must be especially cautious to ensure that the whole of the process does in fact confer an actual benefit to the class members individually. Thus, the need for a "workable litigation plan", although it may be framed as a plan of administration, remains in full force.

[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 an 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.

The Manageability of the Claims Procedures

[30] The court cannot make the determination as to whether a claims resolution procedure confers a benefit on class members in a vacuum. Typically, evidence is proffered regarding the claims procedure that must be followed in order for class members to obtain benefits under the settlement, along with an administration plan demonstrating that the resources are in place or will be in place to ensure that the benefits are delivered on a timely basis. This information is, in all material respects, the "litigation plan" which addresses the manageability concerns for the purposes of certification.

[31] In the present case, both the CEP and IAP components will require claims procedures. While the CEP may be relatively straightforward, the sheer volume of anticipated claims, at approximately 79,000, requires a careful consideration of the administrative plan, and the resources available to carry out that plan. The court must be assured that the class members will receive the promised benefits in a timely manner. Similar, if not stricter, scrutiny must be applied to the proposed IAP, in view of counsel's concessions that it will indeed be more complicated and more time-consuming than the CEP process and in consideration of the very serious issues it is meant to address for certain class members.

[32] As a starting point, it should be noted that the record before the court is not sufficient to make a determination that the proposed processes can be conducted in a "fair, efficient and manageable" manner. There was no administration plan filed. An affidavit sworn by Luc Dumont, the current Director General of Operations at the Office of Indian Residential Schools Resolution Canada, was proffered setting out some details of the number of personnel that would be assigned to administering the settlement. However, it did not contain sufficient detail to satisfy the court that the administration of the settlement will be efficiently and effectively carried out.

[33] This lack of information may have to do with the framing of the administration proposal in the settlement which only requires Canada to "commit sufficient resources" to ensure that a targeted number of claims can be processed on an annual basis. Some counsel conceded that this amounts to asking the court to "take it on faith" that the settlement can be properly administered. With the CPA now in its second decade, this court has sufficient experience with the administration of settlements in large and complex class actions to recognize the dangers in this approach. Further, the absence of detailed information about the plan of administration does not meet the standard of disclosure required on a motion for approval of settlements. As stated in *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.J.) at para. 19:

> The Court is obligated to carefully scrutinize proposed settlements in a class proceeding. Nonetheless, where settlement proposals are advanced on uncontested

> motions, in my view, there is a positive obligation on all parties and their counsel to provide full and frank disclosure of all material information to the Court.

The requirement for "full and frank disclosure" is manifest when the court is called upon to evaluate a settlement of this scope and magnitude and clearly extends to pertinent information about the proposed administration of the settlement.

[34] Moreover, I cannot accede to the submission of counsel for the Assembly of First Nations ("AFN") that, notwithstanding the currently unsatisfactory administration plan, the court should simply take a "wait and see" approach to the settlement administration because of the flexibility under the CPA to address deficiencies at a later point. The flexibility of the CPA may be properly utilized to address the inevitable but unforeseeable issues that may arise in the course of complex litigation or the administration of a settlement. On the other hand, it would be an abdication of the court's role under the CPA to fail to address foreseeable deficiencies at this stage. As this court noted in *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 567 (S.C.J.) at para. 19:

> Settlement approval in class proceedings cannot be granted on a speculative basis. As stated above, the court has a duty to safeguard the interests of absent class members, especially where those class members are being asked to surrender rights in return for a settlement which is not reflective of the damages suffered on a case by case basis. The court cannot perform its duty in the absence of evidence. As stated by Sharpe J. in *Dabbs* at paragraph 15:
>
> > ... the court cannot exercise its function without evidence. The court is entitled to insist on sufficient evidence to permit the judge to exercise an objective impartial and independent assessment of the fairness of the settlement in all the circumstances.

[35] The court must protect the interests of the absent class members. Taking a "fix it later" approach in respect of concerns that are both readily apparent and capable of being addressed now does not meet that obligation. The AFN submission harkens back to the mistaken assumption that there is a relaxed standard to be employed under the CPA in respect of certification where settlement approval is sought. The parties moving for approval of a settlement that entails the possibility that class members will have to engage in a further dispute resolution process must satisfy the court that the process, and indeed the settlement administration in its totality, will be "fair, efficient and manageable". Where concerns are raised as to the structure and resources in place, or contemplated, to administer the settlement, the court cannot adopt a relaxed standard to the detriment of the proposed class members.

The Administrative Deficiencies

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

[37] I preface my comments with a caution that the court has a general concern whenever a defendant proposes to change roles and become the administrator of a settlement. There must be a clear line of demarcation between the defendant as litigant and the defendant as neutral administrator. Further, there must be an express recognition by the defendant proposed as administrator that the settlement is being implemented and administered in a court supervised process and not subject to the direction of the defendant either directly or indirectly. The difficulty in drawing the distinction, and adhering to the underlying concept, is the reason why the court must be especially circumspect when considering the approval of a defendant as administrator. The line is even more blurred in this case where Canada, as defendant, will still be an instructing respondent in respect of individual claims made under the IAP.

[38] The potential for conflict for Canada between its proposed role as administrator and its role as continuing litigant is the first issue that must be addressed. One of the goals of this settlement is to resolve all ongoing litigation related to the residential schools. The structure of the administration must be consistent with this aim and not such as to render itself subject to claims of bias and partiality based on apparent conflicts of interest. If such perception exists, it has the potential to taint even those areas where the neutrality is more enshrined such as the adjudication process. Accordingly, the administration of the plan must be neutral and independent of any concerns that Canada, as a party to the settlement, may otherwise have. In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class members and insulate the government from unfounded conflict of interest claims. To effectively accomplish this separation and autonomy it is not necessary to alter the administrative scheme by replacing the proposed administration or by imposing a third party administrator on the settlement. Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government. By extension, such person, or persons, once appointed by the government and approved by the courts, is not subject to removal by the government without further approval from the courts. This is consistent with the approach taken in all class action administrations and there is no reason to depart from that approach in this instance.

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

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

[41] It is beyond dispute that the administration of this settlement will be expensive in absolute terms. In fact, there is evidence before the court that the current ADR process, upon which the IAP is based, was costing 3 times as much to administer as it was delivering in compensation in the early stages of operation. Since the IAP appears to be essentially the same plan as the ADR with minor modifications there are obvious concerns. The material before the court relating to the proposed settlement is devoid of specific cost analysis relating to its administration. Moreover, there were no submissions made by any party regarding contemplated changes in the administration that would serve to reduce costs.

[42] Absent any explanation, the current costs of the ADR program appear to be excessively disproportionate when considered against the typical costs of administering a class action settlement. This court has never approved a settlement where the costs of administration exceed the compensation available let alone where the cost excess is a factor of three. It is no answer, as was suggested in argument, that since Canada, as defendant, has committed to funding the administrative cost separately from the settlement funding, the court need not be concerned with the quantum of that cost. This proposition must be rejected for a number of reasons. First, it ignores the court's supervisory role in class actions. Secondly, it fails to recognize how the peculiar aspects of certain terms of this settlement relating to funding can impact unfairly on the class members, while at the same time leaving the courts powerless to provide a remedy. This is addressed in more detail below. Thirdly, it fails to recognize that this is not a settlement where the administration is being paid out of a fixed settlement fund. The administrative costs will be paid from the general revenues of the government. This leads to a certain precariousness in respect of the administration and leads to the prospect of the ongoing administration of the settlement becoming a political issue to the potential detriment of the class members.

[43] The settlement administration cost is typically estimated by the parties when they seek court approval for a settlement. This enables the court to evaluate whether the claims under the settlement will be processed and compensation delivered to the class members in a satisfactory manner. Here, the parties have departed from the normal course and propose only a "commitment to fund" approach to the administration, with no budget, no information relating to cost and no commitment to provide any greater level of information to the court in the future. Moreover, the non-disclosure is compounded by the fact that Canada intends, by the express terms of the settlement, to maintain a veto over additional administrative expenditures.

[44] This combination of inadequate information and absolute veto power over expenditures is unacceptable. The court cannot approve a settlement without adequate information to ensure that the class members' interests are being protected and that it will be able to maintain an effective ongoing supervisory role. As stated in *McCarthy* (No. 2474) at para. 21:

> …a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party.

[45] The scope of the problem with the combination of undisclosed costs and overriding government veto is revealed by simple extrapolation from the evidence that was provided. The IAP program is estimated to provide potential total compensation in the amount of $2 to $3 billion. If the current ADR process cost to compensation ratio of 3:1 is maintained, this means that administration costs of this program alone will be in the range of $6 to $9 billion, effectively dwarfing the benefits provided to the class. Should this scenario come to pass, the remedy may not be the expenditure of more dollars, but rather the re-allocation of funds to generate greater efficiencies or a more effective and expeditious administration. I caution that these numbers are based on limited data and conjecture by counsel. They do indicate, however, the possible magnitude of the problem and reveal the need for more precise information.

[46] I have not ignored the provision in the settlement providing an exception to the government veto in respect of its commitment to fund the IAP program to ensure that a minimum of 2500 claims are processed per year. While presented as a benchmark of performance, it is in fact an effective veto over any attempt to increase the number of claims processed over and above the 2500 per year target. The evidence is that the class members are elderly and dying at a rate of approximately 1000 per year. It is possible that efficiencies may be gleaned from the reallocation of funds without increasing expenditures. The structure of the settlement cannot be such as to preclude the administrator or the court in its supervisory role from considering options to improve the delivery of benefits.

[47] The principles engaged on this motion for settlement approval are twofold. First, the settlement must be fair, reasonable and in the best interests of the class as a whole. Secondly, the court must make its decision on a fully informed basis, bearing in mind that the court has an obligation to oversee the settlement until all of the benefits have been distributed to the class members.

[48] The IAP portion of the settlement is the area where the greatest administrative cost expenditure will occur. It is clear from Mr. Dumont's affidavit and the evidentiary record on the motion that the IAP is to be a continuation of the existing unilateral ADR program under a new name. As he states at paragraph 4:

> "Based on experience with the current ADR process, the additional resources required in order to meet the continuing obligations related to the current ADR process and <u>to meet new obligations related to the implementation of the IAP</u> will number approximately 445 persons." (Emphasis added.)

He further deposes that "the current ADR process will have 48 adjudicators as of October 31, 2006" and although he states that "adjudicators employed in the ADR process will not be automatically transferred to the IAP" he also notes that "the Criteria for the Selection of Adjudicators in the IAP is the same criteria used for selecting model A adjudicators in the ADR" and that therefore "planning has proceeded on the expectation that many ADR adjudicators will apply to be IAP adjudicators and will be successful in the procurement process."

[49] Mr. Dumont's evidence was offered based on his current experience with the ADR process. That may be the best guide available at the moment as to the requirements of the

administration of the settlement. However, his evidence lacks any financial details as to the current or estimated costs of the administration. Further, as he states in para. 2. “the information provided in the affidavit is based on Canada’s current planning assumptions, some of which will require further development, in co-operation with the other parties to the [settlement]”. This pinpoints precisely the area of concern for the court. Mr. Dumont acknowledges that the administration plan is in a developmental stage. Nonetheless, under the terms of the proposed settlement, once approval is granted, the court is to have no role in approving any further developments in the implementation of the settlement without the acquiescence of Canada.

[50] The parties have put before the court an admittedly incomplete administration plan while at the same time attempting to foreclose the court’s oversight role. This is unacceptable. As stated above, the role of the court in a class proceeding does not terminate at the point of settlement approval. It has an ongoing obligation to oversee the implementation of the settlement and to ensure that the interests of the class members are protected.

[51] I do not want the foregoing to be misunderstood as imparting a requirement that the court be the *de facto* administrator of the settlement. Rather, the court must be in a position to effectively evaluate the administration and the performance of the administrator and, further, be empowered to effect any changes that it finds necessary to ensure that the benefits promised under the settlement are being delivered. Any terms of the settlement that attempt to curtail this jurisdiction cannot be sanctioned by the court.

[52] In conclusion, this element of the settlement is problematic on two fronts. First, financial information sufficient to make an informed decision regarding the administration of the settlement, in particular the CEP program and the IAP, must be provided for the purposes of approval and thereafter on a periodic basis. Secondly, the provisions of the settlement relating to the ability of the court to exercise its ongoing jurisdiction over its administration must be consistent with the obligations of the court to the class members under the CPA. This will also require, as stated above, the appointment of an autonomous supervisor or supervisory board reporting ultimately to the court. In respect of this latter point, although I would not make it a condition of approval, I would strongly encourage that the administrator engage the assistance of a consultant experienced in the administration of complex class action settlements.

The Legal Fees

[53] The next issue to be addressed relates to the legal fees component of the settlement. The settlement agreement contemplates the payment of legal fees on two fronts. First, there will be payment for class counsel and certain unaligned “independent counsel” who have been representing claimants in individual actions. Secondly, the agreement has a provision regarding fees under the IAP in which Canada has undertaken to pay, in respect of any compensation awarded under the process, an additional 15% to assist the claimant with his or her legal fees in advancing the claim.

[54] The payment to class counsel and independent counsel is anticipated to be in the range of $85-$100 million, divided as follows: $40 million to the National Consortium, $25-40 million to the Merchant Law Group and approximately $20 million to the independent or unaffiliated

counsel. I will address the basis for the range, as opposed to a fixed amount, for the fees of the Merchant Law Group later in these reasons.

[55] The basis for the fees being paid under the settlement differs amongst each of the groups. The counsel group identified as the National Consortium is comprised of 19 member law firms, practicing collectively in 8 provinces and 2 territories. Within the National Consortium some firms were advancing primarily class actions, some primarily individual actions and some were advancing both. As of May 30, 2005, the National Consortium represented, on a collective basis, 4826 named individual residential school survivors across the country. As part of the settlement, the National Consortium members agreed to waive any contingent fees on the CEP already incurred and to not charge fees to any future or prospective clients in respect of the CEP.

[56] Darcy Merkur, a partner with Thomson, Rogers, one of the member firms of the National Consortium, filed an affidavit in support of the legal fees. He states at para. 17:

> The $40 million, plus applicable taxes, payable by Canada to the National Consortium is intended to compensate Consortium members for the work they have done to November 20, 2005 and their agreement to waive their individual contingency retainer agreements by not charging fees to their clients on the CEP. It also compensates for their agreement not to charge fees on the CEP to any future or prospective clients, a substantial consideration given that there are an estimated 60,000 potential CEP clients who are not presently represented.

[57] Mr. Merkur deposes that he personally reviewed the dockets of the member firms of the National Consortium for the purpose of providing the federal representative with a summary during the negotiations. Based on his analysis of the information, as of October 15, 2005, the class action portion of the docketed time was categorized as follows in paragraph 132 of his affidavit:

Value of Lead Counsel's time in active class actions:	$3,952,533.75
Value of Consortium time in support of the *Baxter* Action:	$3,009,495.19
Value of Consortium time in support of the Alberta test cases:	$5,461,896.85
Value of Consortium time in other class actions:	$ 42,239.75
Value of Consortium time in other representative actions:	$1,101,147.48.

In addition, Mr. Merkur states that between October 15 and November 20, 2005, the class members docketed additional time valued at $708,660.00. The total amount of class counsel time for the National Consortium is approximately $14.6 million based on these figures. When compared against the $40 million dollars being sought, it represents a request for a multiplier of approximately 2.73.

[58] Mr. Iacobucci has also filed an affidavit in support of the settlement. In the section dealing with fees for the National Consortium, he deposes at para. 32:

> The National Consortium has prepared an affidavit describing the work done collectively by the National Consortium and each of its members, the proposed distributions of the $40 million payment to each of its members, and the rationales for the amounts of these payments. In accordance with the fees verification agreement between Canada and the National Consortium, I have reviewed the affidavit and agree that the payment of $40 million in legal fees, plus GST and PST of $3,213,048.99 and disbursements of $2,402,173.56 is fair and reasonable having regard to the substantial legal work, including significant class action work, undertaken by the National Consortium and its members over many years and the fact that National Consortium members, like others signing the agreement, have undertaken not to seek payment of any legal fees in respect of the Common Experience Payment.

[59] In his submissions on the fee issue, Mr. Baert, on behalf of the National Consortium, stated that the $40 million fee being sought by the consortium, and indeed the entire $100 million that might be paid to all of the "class" counsel groups, was justified on the basis of the CEP component alone notwithstanding any other benefits that were achieved for the class through the settlement.

[60] The settlement provides that the "class" fee will be paid in a lump sum within 60 days of the implementation date. It is not conditional on the take-up rate for the CEP nor is it tied to specific percentages of the CEP fund being utilized. Accordingly, while the total potential fee of $100 million represents less than 5% of the CEP fund, on the current estimates of 79,000 claimants, the percentage, as it relates to direct payments to the class members, could rise substantially depending on the number of claimants that come forward. Although any remainder in the CEP fund will not be returned to Canada in the event that there are less claimants than anticipated, the maximum increase to any claimant in the event of a surplus in the CEP fund is $3,000. The balance of the monies would be utilized for purposes of general benefit to the class.

[61] Premium fees are awarded in respect of class actions in recognition of the risk undertaken and result obtained for the class. The risk in this case was self-evident given the complexity of the action, the uncertainty of success because of the novel causes of action asserted, the difficulties relating to damages assessments and the protracted litigation. Further, as this court recognized in *Parsons*, the fact that the parties engage in negotiations does not necessarily diminish the risk faced by class counsel. The elimination of the risk is only achieved once the court has approved the settlement.

[62] Looking only at the CEP component, there has been considerable success achieved for the class members. The evidence filed on the settlement indicates that this particular element was a serious bone of contention between the parties and the plaintiffs' insistence on compensation for the class members on this front coupled with the defendant's intransigent refusal to give ground was an effective barrier to engaging in meaningful negotiations for a significant period of time. Having held fast to the point, the plaintiffs and their counsel reaped a significant benefit for the class members.

[63] Those counsel who are regarded as "independent" in that they are neither members of the National Consortium or the Merchant Law Group but who are instead representing individual claimants will receive payments of fees under the settlement. These lawyers will receive payments of up to $4,000 for each retainer agreement or substantial solicitor-client relationship as of May 30, 2005. The rationale for this is set out in Mr. Iacobucci's affidavit at para. 26:

> Sections 13.05 and 13.06 of the Settlement Agreement establish the fundamental principle for the payment of legal fees under the Settlement Agreement, namely, each lawyer who had a retainer agreement or a substantial solicitor-client relationship (a "Retainer Agreement") with a former student as of May 30, 2005 will be paid for outstanding Work-in-Progress up to a cap of $4,000, so long as he or she does not charge any fees in respect of the Common Experience Payment. The requirement that a Retainer Agreement exist as of May 30, 2005 is intended to avoid providing a windfall to lawyers who "signed up" clients once my appointment and the existence of the settlement discussions was known.

[64] The fees to be paid to the "independent counsel" relate to individual retainers and the process contemplated will ensure their verification. There was an objection raised in respect of the $4000 cap per retainer for the independent counsel fees in respect of Work-in-Progress. It was argued that this provision serves to disadvantage those individual claimants whose counsel have already expended more than the cap amount in pursuit of their individual claims. The underlying assumption is that there will be counsel who will not agree to accept the $4000 in full settlement of their outstanding accounts and instead bring a claim for fees against any of their clients who file a claim for the CEP instead of opting out of the settlement.

[65] The "cap" objection was not addressed by any counsel moving, or supporting the motion, for settlement approval at the hearing. However, as a group, "independent counsel" were represented at the bargaining table and the proposal set out in the settlement was arrived at through negotiation. Given the number of independent counsel who appear to have accepted this proposal, the lack of information before the court as to the scope of any potential problem in this regard and the reality that no viable alternative was proposed, I cannot accede to this objection as a basis for rejecting either the settlement as a whole or this term in particular. I have no concerns with either the proposed process for verification of the fees of the "independent counsel" or the amounts.

[66] As stated above, there was a range set out for the fees of the Merchant Law Group as opposed to a fixed number. In addition, a different verification process was followed. This too was addressed by Mr. Iacobucci in his affidavit. At para. 34 he states:

> The verification process agreed to with the Merchant Law Group is different from the verification process for the National Consortium because of the very serious concerns that I had and continue to have with respect to the Merchant Law Group fees. These concerns include:
>
> (a) uncertainty about the number of former residential school students that Merchant Law Group purports to represent;

> (b) lack of evidence or rationale to support the Merchant Law Group'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 Merchant Law Group represented it had carried out and the amount of class action work it had actually done.

Mr. Iacobucci goes on to set out the proposed verification process in paragraph 35 of his affidavit. He states:

> The Merchant Law Group agreed to the following four-part verification process set out in the Merchant Fees Verification Agreement.
>
> > (a) First, 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 will be made available for review and verification by a firm to be chosen by me.
> >
> > (b) Second, I will review the material from the verification process and consult with the Merchant Law Group to satisfy myself 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 a 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.
> >
> > (c) Third, if I am not satisfied that the $40 million is a fair and reasonable amount in light of this test, the Merchant Law Group and I will make reasonable efforts to agree on another amount.
> >
> > (d) Fourth, if we cannot reach agreement, the amount of the fees shall be determined by Mr. Justice Ball or, if he is not available, another Justice of the Court of Queen's Bench in Saskatchewan.

[67] The fee verification process for the Merchant Law Group has been a source of contention and has generated a motion before Justice Ball in Saskatchewan. On that motion, Canada was seeking to enforce the terms of the agreement with the Merchant Law Group pursuant to the settlement. At the time, the parties had not moved before any court for approval of the settlement and Justice Ball dismissed the motion as premature. Now that the parties have moved for settlement approval, a motion in which the Merchant Law Group has participated, the issue is joined and no longer premature. Indeed, the verification process is a term of the settlement agreement.

[68] No argument of any force has been advanced as to why the contemplated fee verification process is not binding upon the Merchant Law Group. I am not persuaded by the argument that there are solicitor-client confidentiality considerations that prevail over the agreed process, especially in the context of a class action settlement where the benefit of engaging in the process will enure to the clients in that their legal fees, as verified, will be paid by the defendant. Further, I do not accept Mr. Merchant's argument that the current dispute between Canada and the Merchant Law Group relating to the fee verification process can hold up the entire settlement approval. In my view, the fee component of the settlement as it relates to the Merchant Law Group is the process agreed upon for arriving at the actual fee request. That process is clear from the agreement. Once an amount has been determined through this process, it will be assessed by the courts as to reasonableness on the same basis as are the fees of other "class" counsel. I see no reason to depart from the agreed process or to delay approval of the settlement on this basis.

[69] In my view the "class" portion of the legal fees are reasonable. That does not conclude the fee analysis, however.

[70] It is apparent from the record that the class counsel fees might only represent a portion of the total fees that will be payable on behalf of those class members who make claims under the IAP. The IAP is meant to address the more serious personal injury claims. It is almost certain that most claimants will require the assistance of counsel to advance their claims in this process. Under the terms of the settlement, Canada has agreed to pay an additional 15% on top of any compensation awarded under the IAP to help defray the legal costs of claimants. However, notwithstanding this, lawyers representing individual IAP claimants will be charging contingent fees in excess of 15% payable by Canada. The settlement does not prevent this practice nor does it restrict the amount of such contingent fees payable by the claimant. Indeed, the absence of any control mechanism on individual fee arrangements appears to have been a conscious choice in the drafting of the settlement. This is evident from Mr. Merkur's affidavit. He deposes 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 [IAP] established by the Settlement Agreement. 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. (Emphasis added.)

[71] During argument, Mr. Merchant advised the court that the Merchant Law Group would limit its contingent fees to an additional 15% of any IAP compensation award, for a total of 30% when added to the amount to be paid by Canada. Although this position regarding fees was eventually adopted by all counsel appearing at the hearing, this voluntary concession does not limit the fees that may be charged by other lawyers who may act for claimants under the IAP.

[72] It is estimated that the number of claimants under the IAP may reach 15,000. Mr. Merchant suggested that the total value of the settlement could be as much as $5 billion when all of the claims made under the IAP have been adjudicated. No other counsel challenged this number. Accordingly, when the value of the other benefits under the settlement are subtracted from this total, the IAP could generate over $2.5 billion in compensation. If this number is correct, it means that additional legal fees payable by Canada will total $375 million. Further, if the additional amount of fees charged by lawyers to individuals is held to another 15%, the total fees to counsel under the IAP alone would total $750 million. This is in addition to the "class" fee of $100 million for total legal fees of $875 million, if all contingent fee agreements are limited to 30%, which is not the case. Again, these numbers are based on limited data and conjecture by counsel.

[73] As stated above, the parties decided to take a "hand's off" approach with respect to the IAP contingent counsel fees. This position was urged upon the court as the proper approach. I cannot accede to this submission. During argument, I expressed a concern that in the event of issues arising between the IAP claimants and their respective counsel relating to fees, the claimant would have no effective recourse to challenge the reasonableness of any additional fees charged. Counsel responded that such claimants could follow the general procedures available in their province or territory of residence with respect to assessments of legal fees. In consideration of the evidence adduced in support of the counsel fee proposals, this appears to be an illusory remedy at best. As Mr. Merkur, addressing the difficulties counsel have in representing claimants in this case, deposes at paragraph 25 of his affidavit:

> Both Thomson, Rogers and Richard Courtis, our co-counsel, have toll free numbers that our client can call. In a typical week we will field some 50 calls from residential school survivors. We have found that many of our clients have literacy problems that make it extreme difficulty [sic] for them to fully understand our regular update correspondence, even when written with such limitations in mind. Our clients often call us for clarification of certain points set out in our letters and we spend much time doing this. Because of the geographic dispersion of our clients it is often difficult if not impossible to visit regularly with them in person. A further problem is miscommunication spread within the Aboriginal communities caused by false rumours about settlements and funds received.

Further, at paragraph 26 he deposes:

> Because of these challenges the process of making legal representations available to residential school claimants is more time consuming and difficult than with most other types of clients. Gathering information from clients in order to prepare pleadings and respond to motions, and meetings with clients in order to get ready for examinations for discovery and other litigation steps are more difficult than in conventional litigation.

[74] In the face of this evidence, it is difficult to accept that the claimants will be in a position to successfully navigate the legal system to ensure that their rights are protected in regard to the

legal fees they might have to pay. Accordingly, the suggestion that such disputes or concerns should be left to ordinary course litigation to be resolved must be rejected.

[75] As a general principle, wherever a settlement incorporates a claims resolution procedure, the entirety of that procedure is to be conducted under the supervision of the court. This must of necessity include the relationship between counsel and clients engaged in the process, especially where the legal fees or part thereof are paid pursuant to the settlement. As stated above, the court must ensure that claimants obtain the expected benefits of the settlement.

[76] One of the purported benefits of the settlement is the fact that it presents a comprehensive scheme for dealing with all issues arising from the residential school program. In keeping with the general principle, claimants must have recourse within the administration of this settlement to challenge the reasonableness of the fees they are charged by counsel.

[77] In my view, the submissions of Mr. Merchant on the contingent fee issue may serve as a guide. Mr. Merchant made representations to the court that he spoke from personal experience in that he has been involved in a number of contested trials relating to the residential schools. Accordingly, it appears that his suggestion that an additional 15% was appropriate was based on that experience. Further, a fee of 30% on a contingent basis is a substantial retainer in any event.

[78] There must be a process to regulate fees charged by counsel under the IAP. All individual retainer agreements relating to the IAP must be provided to the adjudicator hearing the case after an award is rendered but before compensation is paid. All fees charged or to be charged to the individual claimant must be clearly set out. This means that any counsel participating in the process will be under an obligation to make full disclosure in respect of the fees charged, directly or indirectly to the claimant, including disbursements and taxes. The adjudicator will assess the reasonableness of the fee having regard to the complexity of the case, the result achieved, the intent of the settlement to provide successful claimants with reasonable compensation and the fact that an additional 15% of the compensation awarded will be paid by Canada. The adjudicator's decision as to fees may be subject to appeal to the Chief Adjudicator or his designate in respect of errors in principle. Directions to pay to any person other than the claimant an amount in excess of the fees, including disbursements and any applicable taxes, determined to be reasonable by the Adjudicator will be considered void.

The Jurisdiction of the Courts

[79] I turn now to the jurisdiction of the supervisory courts. At the outset, it must be recognized that once the parties have sought the approval of the courts for the settlement, they have attorned to the jurisdiction of each of those courts. To the extent that the terms of the settlement attempt to restrict the ability of any of the approving courts' jurisdiction to deal with matters pertaining to the settlement, including its ongoing administration, such provisions are unacceptable. By the same token, I accept that in a multi-jurisdictional settlement such as this, a provision requiring unanimous approval by all of the supervising courts prior to a "material" amendment being made to the agreement is not an unreasonable provision. Such a requirement does not infringe on the jurisdiction of this or any other court in the context of this settlement. Joint approval of the settlement has been sought from all of the supervisory courts, on the

understanding that the settlement will fail unless it is approved by all of the courts. Accordingly, it follows that if a material amendment were to be sought by the parties, such an amendment would also require unanimous approval by the courts.

[80] My concern goes to the provisions of the settlement that may impact on the ability of this and every other approving court to exercise its respective power over the implementation and administration of the settlement, as it affects the class members under its specific jurisdiction. This concern was raised with the parties and it was not alleviated by the submissions made in response. This court has had considerable experience with the administration of complex class proceeding settlements. The problems with logistical coordination on a timely basis alone, notwithstanding any other difficulties that may arise, renders any approach that requires unanimous approval of 9 courts unworkable in dealing with issues related to specific classes and class members. It is especially troubling where there is a class that has a large number of elderly members and time is of the essence in dealing with issues.

[81] I do not suggest that the parties need rewrite the agreement to deal with this issue. It is common in complex class actions that problems of this nature are dealt with by way of protocols prepared by the parties, in consultation with the courts, to ensure that the administration functions as intended. In my view, the jurisdictional concerns may be addressed by way of such a protocol, to be approved by all of the courts.

The Class Definitions

[82] Finally, I will deal with the issue arising from the proposed class definition as it relates to those who attended a residential school but died prior to May 30, 2005. The proposed settlement would exclude the estates of such persons from making claims under the CEP program or the IAP. It was argued that this provision was negotiated to ensure that the surviving members of the class benefited as much as possible from the direct compensation available. The incongruity of this argument is apparent in the submission that an estimated 1,000 class members have died since May 30, 2005 and, given the large number of elderly people in the class, this number is increasing. There was open disagreement between class counsel as to whether the estates of those persons deceased prior to May 30, 2005, had a sustainable claim in any event. What is clear is that an arbitrary line has been drawn between class members in similar circumstances. Here, the estate of a person who died on May 29, 2005, is not entitled to make a claim whereas the estate of a person dying on May 30, 2005, is so entitled. Certain of the objectors characterized this arbitrary approach as being unfair.

[83] A key point about this arbitrary distinction is that the estates of those persons who died prior to the May 30, 2005, deadline will not receive CEP or IAP compensation. Nonetheless, it is still the intention to have those estates bound by the settlement terms in that their claims will be extinguished by the general releases to be granted if the settlement is approved. While it is not uncommon, or necessarily objectionable, to draw distinctions between class members for the purposes of distributing compensation from a global fund, in those cases where a distinction is drawn, compensation is usually paid to claimants on both sides of the divide albeit in reduced amounts on one side.

[84] Where the intention is to bind potential class members without direct compensatory payment, the court must apply careful scrutiny to the provisions of the settlement seeking to effect that result. This analysis must be conducted on a case by case basis. Here, it was contended that the indirect benefits to the family members of the deceased class members, through the healing and commemoration initiatives, was a countervailing benefit given in exchange for the right being extinguished by the settlement. In addition, the estates of those class members whose direct claims are being extinguished may exercise their opt out rights in order to pursue their individual litigation. I agree with these submissions, but would add that the opt out notices must be drafted in a manner to make it clear that these rights are being extinguished under this settlement.

Conclusion

[85] In conclusion, subject to the correction of the deficiencies noted above, I would certify the action as a class proceeding as proposed and approve the settlement as being "fair, reasonable and in the best interests of the class as a whole". The changes that the court requires to the settlement are neither material nor substantial in the context of its scope and complexity. It would serve the interests of the proposed class to have these issues dealt with in an expeditious manner and to that end, I am prepared to grant the parties a reasonable period, not to exceed 60 days from the date of these reasons, to complete the required changes. I will make myself available on short notice to deal with any issues that may arise.

WINKLER R.S.J.

Released: December 15, 2006

APPENDIX A

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF CARIBOO, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE DIOCESE OF MOOSONEE, THE SYNOD OF THE DIOCESE OF WESTMINISTER, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE DIOCESE OF SASKATCHEWAN, THE SYNOD OF THE DIOCESE OF YUKON, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE PRESBYTERIAN CHURCH IN CANADA, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA), THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF CALGARY, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, THE ROMAN CATHOLIC BISHOP OF VICTORIA, THE ROMAN CATHOLIC BISHOP OF NELSON, THE CATHOLIC EPISCOPAL CORPORATION OF WHITEHORSE, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD – McLENNAN, THE CATHOLIC ARCHDIOCESE OF EDMONTON, LA DIOCESE DE SAINT-PAUL, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF MACKENZIE, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, THE ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT-BONIFACE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF SAULT STE. MARIE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE MISSIONARY OBLATES OF MARY IMMACULATE – GRANDIN PROVINCELES PERES MONTFORTAINS (also known as THE COMPANY OF MARY), JESUIT FATHERS OF UPPER CANADA, THE MISSIONARY OBLATES OF MARY IMMACULATE – PROVINCE OF ST. JOSEPH, LES MISSIONAIRES OBLATS DE

MARIE IMMACULEE (also known as LES REVERENDS PERES OBLATS DE L'IMMACULEE CONCEPTION DE MARIE), THE OBLATES OF MARY IMMACULATE, ST. PETER'S PROVINCE, LES REVERENDS PERES OBLATS DE MARIE IMMACULEE DES TERRITOIRES DU NORD OUEST, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (PROVINCE U CANADA – EST), THE SISTERS OF SAINT ANNE, THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS), THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERT (also known as THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERTA), THE SISTERS OF CHARITY (GREY NUNS) OF THE NORTHWEST TERRITORIES, THE SISTERS OF CHARITY (GREY NUNS) OF MONTREAL (also known as LES SOEURS DE LA CHARITÉ (SOEURS GRISES) DE I'HÔPITAL GÉNÉRAL DE MONTREAL), THE GREY SISTERS NICOLET, THE GREY NUNS OF MANITOBA INC. (also known as LES SOEURS GRISES DU MANITOBA INC.), THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE, LES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE and INSTITUT DES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE (also known as LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE) DE NICOLET AND THE SISTERS OF ASSUMPTION, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA, THE DAUGHTERS OF THE HEART OF MARY (also known as LA SOCIETE DES FILLES DU COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY), MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEART AND MARY IMMACULATE, or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE), LES SOEURS DE LA CHARITE D'OTTAWA (SOEURS GRISES DE LA CROIX) (also known as SISTERS OF CHARITY OF OTTAWA - GREY NUNS OF THE CROSS), SISTERS OF THE HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDER OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE), THE SISTERS OF CHARITY OF ST. VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX), LES SOEURS DE NOTRE DAME AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, SISTERS OF THE PRESENTATION OF MARY (SOEURS DE LA PRESENTATION DE MARIE), THE BENEDICTINE SISTERS, INSTITUT DES SOEURS DU BON CONSEIL, IMPACT NORTH MINISTRIES, THE BAPTIST CHURCH IN CANADA

Third Parties

COURT FILE NO.: 00-CV-192059CP
DATE: 2006/12/15

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CHARLES BAXTER, SR. and ELIJAH BAXTER, et al.

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

- and -

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA et al. (see APPENDIX A for a full list of Third Parties)

Third Parties

REASONS

W.K. Winkler, R.S.J.

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