Federal Court  Cour fédérale

Date: 20150603

Docket: T-1542-12

Citation: 2015 FC 706

PROPOSED CLASS ACTION

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, ON HIS OWN BEHALF AND ON BEHALF OF ALL THE MEMBERS OF THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND AND THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND, CHIEF GARRY FESCHUK, ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SECHELT INDIAN BAND AND THE SECHELT INDIAN BAND, VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE AND RITA POULSEN

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

REASONS FOR ORDER

HARRINGTON J.

[1] Were it not for the fact that students who attended Indian Residential Schools by day, but did not sleep over, were left out of the *Indian Residential Schools Settlement Agreement* [IRSSA], this proposed class action would probably not have been taken. The IRSSA provided compensation to those who attended at and resided at Indian Residential Schools. Their classmates who attended the same classes, but who went home at night, received nothing.

[2] The current plaintiffs are day students who attended the Kamloops Residential School between 1949 and 1969 or the Sechelt perhaps beginning 1941 and ending in 1969; descendants of day students (many of whom are dead), as well as the members of the bands and the bands themselves on whose lands the schools were located. They seek declarations that the Federal Government (hereinafter "Canada") did them harm and that they, among others things, suffered cultural, linguistic and social damage. They also seek compensation.

[3] Their motion before me is to certify a class action in which all day students at some 140 schools covered by the IRSSA would be plaintiffs, together with all their descendants, including those not yet born. Although our class action proceedings are on an opt-out basis, rather than on an opt-in basis, they further propose that those Indians Bands upon which the residential schools were located may opt-in. The proposed class period is from 1920 until 1997. It was in 1920 that the *Indian Act* was amended to provide for compulsory school education for Indian children. The last residential school is said to have closed in 1997.

[4] Conditions for certifying class proceedings are now set out at rules 334.12 and following of the *Federal Courts Rules*. Although I shall refer to the rules in greater detail, an action shall be certified if:

a. the pleadings disclose a reasonable cause of action;

b. there is an identifiable class of two or more persons;

c. the claims raise common questions of law or fact;

d. the procedure is the preferable one for the just and efficient resolution of the common issues of law or fact; and

e. there is an appropriate representative plaintiff.

I had occasion to consider these issues in *Momi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 738, [2007] 2 FCR 291. The full text of rule 334.16 is appended hereto.

[5] In order to put this motion in context, it is first necessary to review the IRSSA, the previous motions in this action, the plaintiffs' latest amended statement of claim and Canada's opposition to certification. I shall then consider the components of a viable class action.

I. The Indian Residential School Settlement Agreement (IRSSA)

[6] Indian Residential Schools were first organized and administered by Christian religious entities, without government involvement. However, s 91(24) of the *Constitution Act, 1867*

provides that the exclusive legislative authority of the Parliament of Canada extends to "Indians, and lands reserved for the Indians". By 1920, the *Indian Act* required Indian children, as therein defined, between the ages of 7 and 15 to attend school. Canada set the policy and became involved in the organization and management of Indian Residential Schools. There were Indian Residential Schools, which also accepted day students, and Indian Day Schools. The latter do not figure in this action. I should add that land claims and treaty rights are not in issue either.

[7] Later on, Canada purchased places for Indian children in regular provincial public schools. Beginning in 1988, litigation arising from former students' experiences at Indian Residential Schools, including claims for damage from sexual and physical abuse and loss of language and culture were launched. Indeed, there were thousands of court actions commenced by individuals or groups, as well as a number of proposed class actions, and at least one certified class action. In May 2005, Canada appointed retired Supreme Court Justice, the Honourable Frank Iacobucci, as Federal Representative to work with legal counsel for former students, and representatives thereof such as the Assembly of First Nations and other aboriginal groups, as well as counsel for various religious organizations involved in the operation of those schools.

[8] An agreement in principle was reached in November 2005, and finalized 8 May 2006. To give effect to the settlement, applications for approval and for certification of class actions, on consent, were brought and obtained in nine different provincial jurisdictions. There were four components:

a. A Common Experience Payment of $10,000 for a student who prior to 31 December 1997 resided at one or more Indian Residential School for one school year or part thereof, and $3,000 for any subsequent year or part thereof.

b. An Independent Assessment Process (IAP). This provided compensation for sexual abuse and serious physical abuse claims, assessed on an individual basis.

c. Funding for truth, recognition and commemoration.

d. Funding for healing.

[9] Within the class was a subclass, the "family" class comprising parents, children, grand-parents, grand-children, siblings and spouses of a person who had resided at an Indian Residential School. The family did not receive direct compensation but benefitted in the sense that funds were provided for healing and commemoration and a Truth and Reconciliation Commission was established.

[10] Day students were not entitled to receive a Common Experience Payment. However, they were entitled to apply within the Independent Assessment Process, provided they signed a broadly worded release, and likewise indirectly benefitted from the funding provided for healing and commemoration and the Truth and Reconciliation Commission.

[11] There was one exception to the exclusion of day students from the CEP, the "Cloud" class which comprised all individuals who were members of the classes certified by the Ontario Court of Appeal in *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401, 247 DLR (4th)

667. The *Cloud* action related to the Mohawk Institute Residential School in Ontario and had been certified prior to the appointment of Mr. Justice Iacobucci. The classes included day students. They received Common Experience Payments. This is rather a sore point with the present plaintiffs in this action.

II. History of this Action

[12] From the outset, the plaintiffs have only named Her Majesty in Right of Canada as sole defendant. Canada moved to have the action stayed on the basis that it intended to claim contribution or indemnity from the religious orders involved in the operation of the Kamloops and Sechelt Indian Residential Schools. It took the position that this Court did not have jurisdiction over its action against those religious orders so that s. 50.1 of the *Federal Courts Act* required the action be stayed.

[13] It was not unreasonable to seek contribution or indemnity. In *Blackwater v Plint*, 2005 SCC 58, [2005] 3 SCR 3, it had been held that both Canada and the religious order were vicariously liable for the activities of a sexual predator. Furthermore, various religious orders had participated in the IRSSA. I dismissed the motion as I was of the view that this Court had jurisdiction over the third party proceedings (*Gottfriedson v Canada*, 2013 FC 546). That decision was upheld in appeal (*Canada (Attorney General) v Gottfriedson*, 2014 FCA 55). Pending that appeal, and without prejudice to its position. Canada actually instituted third party proceedings in this Court against the Order of the Oblates of Mary Immaculate in the Province of British Columbia, the Roman Catholic Archbishop of Vancouver, the Roman Catholic Bishop of Kamloops, the Sisters Of Instruction of the Child Jesus, and the Sisters of Saint Ann.

[14] In turn, the plaintiffs amended their Statement of Claim to make it perfectly clear they were only seeking recovery from Canada to the extent it could not pass that liability through to the religious orders. Thus if, as in *Blackwater*, Canada were to be found 75% liable and the religious orders 25% liable, the plaintiffs would only recover the 75%. This strategy was modeled on a Pierringer Agreement named after a Wisconsin case which permitted a plaintiff to settle with one defendant leaving the remaining defendants only responsible for the loss they actually caused. On that basis, the religious orders moved to have the third party action against them struck. I agreed (*Gottfriedson v Canada*, 2013 FC 1213). That decision was not appealed. However, Canada has not let this point go. It submits that the action should not be certified because necessary parties, the religious orders, are missing. However, that was a choice for the plaintiffs to make. On a nationwide basis there would be hundreds of religious orders named as third parties. The examinations for discovery would be endless. The members of the "survivor" class hope to have this matter resolved before they are all dead. Furthermore, the religious orders which were actually named as third parties have all agreed not to oppose motions for discovery of them as non-parties.

III. The First Re-Amended Statement of Claim

[15] The First Re-Amended Statement of Claim comprises 94 paragraphs spread out over 36 pages.

[16] The plaintiffs seek declarations that Canada owed them and was in breach of fiduciary constitutional, statutory and common law duties in relation to the establishment, funding, operation, supervision and control of Indian Residential Schools; that their aboriginal rights were

breached and that the *Indian Residential School Policy* caused cultural, linguistic and social damage. Canada did not act honourably. They seek reconciliation, but as well they claim pecuniary and non-pecuniary general damages, and exemplary and punitive damages.

[17] There are three proposed classes of claimants. The first class is the "survivor" class being all Aboriginal persons who attended at an identified residential school from 1920 to 1997. The second class is the "descendant" class being all persons who are descendant from "survivor" class members. The third class, the "band" class, means the Tk'emlúps te Secwépemc Indian Band (Kamloops), the Shíshálh Band (Sechelt), as well as any other Indian band which had members of the "survivor" class or in whose community a residential school was located, and which is specifically added to the action.

[18] It is alleged that the purpose of the *Indian School Policy* was to assimilate the Aboriginal Peoples of Canada into Euro-Canadian society. Day students were forbidden from using their mother tongues at school, even on the playgrounds, and were punished if they did. There is a long list of alleged damages inflicted, including loss of language, culture, spirituality, Aboriginal identity, emotional and psychological harm, isolation, loss of self-worth, fear, humiliation, embarrassment and a propensity to addiction.

[19] It is also alleged that the actions were taken maliciously and were intended to cause harm so that punitive and aggravated damages should be awarded.

[20] The plaintiffs submit that the common issues are whether through the purpose, operation or management of the residential schools:

a. Canada breached its fiduciary duty to protect their language and culture;

b. Canada breached their cultural and linguistic aboriginal rights;

c. Canada breached its fiduciary duty to protect them from actionable physical or mental harm; and

d. Canada breached its duty of care to protect them from actionable physical or mental harm.

If so, can the Court make an aggregate assessment of damages suffered by the classes? Was Canada guilty of misconduct that justifies an award of punitive damages and, if so, what amount ought to be awarded?

[21] This summary is based upon paragraph 177 of plaintiffs' Memorandum of Fact and Law.

IV. Canada's Position

[22] Canada opposes the motion for certification on the grounds that not one of the requirements of rule 334.16 of the *Federal Courts Rules* has been met. Its position shall be set out in greater detail as the conditions set forth in rule 334.16 are considered one by one. Suffice it to say for now Canada submits the pleadings do not disclose a reasonable cause of action in that it will be impossible to prove that there was a residential school policy or, if there was,

matters of policy are not justiciable. In any event, the claims are time barred. There may not be an identifiable class of two or more persons because of overlapping with the IRSSA which disqualifies many individuals. Common questions do not predominate as many of the proposed plaintiffs were members of the IRSSA's family class or applied for IAP payments. A class proceeding is not the preferable procedure. A representative action would be better. The ability of the representative plaintiffs to properly represent the interests of the classes is highly questionable.

[23] An excellent roadmap through the pros and cons of certifying a proposed class action is to be found in the decision of Mr. Justice Strathy, then of the Ontario Superior Court of Justice, in *Ramdath v George Brown College of Applied Arts and Technology*, 2010 ONSC 2019. The test for certification under the Ontario *Class Proceedings Act* is similar to that found in the *Federal Courts Rules*.

[24] As elaborated therein, and the cases therein cited, proposed class action proceedings should be generously construed to give access to justice, to promote judicial efficiency and to lead to behaviour modification. Apart from the requirement that the pleadings disclose a reasonable cause of action, "the evidentiary requirement for certification is low-the plaintiffs need only show "some basis in fact" for each of the certification requirements…" The allegations are taken as true unless patently ridiculous or patently incapable of proof. Novel questions of law not fully settled must be permitted to proceed, and the pleadings must be read leniently.

[25] Mr. Justice Strathy continued at paragraph 40: "Certification is decidedly not a test of the merits of the action. The question for a judge on a certification motion is not "will it succeed as a class action?", but rather "can it *work* as a class action?"

V. Do the Pleadings Disclose a Reasonable Cause of Action

[26] The fundamental allegation in the pleadings, the First Re-Amended Statement of Claim, is that it was Canada's policy to solve the "Indian problem" by eliminating Indians. They would be assimilated into "white man" society by the systematic erosion of their languages and cultures.

[27] Although Canada has yet to file a Statement of Defence, it raises a number of reasons why the First Re-Amended Statement of Claim does not disclose a reasonable cause of action. It will be impossible to prove there was such an Indian policy. Even if there was, matters of government policy are not justiciable; they are beyond the jurisdiction of the courts. Furthermore, there has never been a judgment for loss of language and culture.

[28] The plaintiffs assert aboriginal rights, such rights are communal in nature. Individuals may allege such rights as a shield, *i.e.* as a defence against, for instance, illegal hunting and fishing charges, but not as a sword.

[29] Furthermore, according to Canada, the claims are time barred.

[30] Canada also raises other issues which are best considered under other subsections of rule 334.16 of the *Federal Courts Rules*.

[31] Rule 334.16(1)(*a*), which requires that the pleadings disclose a reasonable cause of action, is similar to rule 221, which permits a court to strike out pleadings on the same basis. The leading case on point is the decision in *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959. The Supreme Court held that the test to be applied was whether it was "plain and obvious" that the pleadings disclosed no reasonable claim. "[I]f there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat"." It is certainly not for the Court, at this stage, to weigh the applicant's chances of success. See also *Attorney General of Canada v Inuit Tapirisat et al*, [1980] 2 SCR 735 and *Operation Dismantle v The Queen*, [1985] 1 SCR 441.

[32] Also relevant is *Dyson v Attorney-General*, [1911] 1 KB 410 at 419, in which Fletcher Moulton LJ said:

> Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers.

[33] Although it has not been decided that loss of language and culture in circumstances such as those alleged by the plaintiffs gives rise to an action, it does not follow that the plaintiffs should be "driven from the judgment seat" at this stage. A novel cause of action should be allowed to proceed. See *George Brown*, above; the *Law Society of Upper Canada v Ernst & Young* (2003), 65 OR (3d) 577; and *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45.

[34] I discount the nine judgments giving effect to the IRSSA, as they were on consent. However, Mr. Justice Hugessen considered the possibility in *Joseph v Canada*, 2008 FC 574. He was ruling on a motion for advanced costs. At paragraph 18, he noted that the issues raised were of great importance not only to the plaintiffs but also to the Crown and other aboriginal peoples. One issue was: "Whether a claim for cultural loss is cognizable at law and, if so, how it should be valued." Furthermore, this issue did not prevent the Ontario Court of Appeal from certifying *Cloud*, above, the Newfoundland and Labrador Court of Appeal in *Anderson v Attorney General*, 2011 NLCA 82, and the Ontario Divisional Court in *Brown v Canada (Attorney General)*, 2014 ONSC 6967. I am satisfied that *prima facie* the First Re-Amended Statement of Claim discloses a reasonable cause of action. More will be said on this topic when we come to consider whether the claims raise common questions of law or fact. For instance, prior to the enactment of the *Crown Liability Act* in 1953, the Crown was not vicariously liable for torts committed by its servants or agents. This might have the effect of cutting down the membership of both the "survivor" class and the "descendant" class.

[35] Canada then argues that it will be impossible for the plaintiffs to prove there was a nationwide Indian residential schools policy. Indeed, the plaintiffs' complaints should be more properly levied against the religious orders who taught at the schools, and they have been let go.

[36] However, the only pleading, the First Re-Amended Statement of Claim, sets out particulars in great detail, including loss of language and cultural traditions.

[37] The plaintiffs also allege a Statement of Reconciliation issued by Canada in 1998. Whether or not treatment of First Nations students in Indian Residential Schools was malicious as alleged, or simply misguided, the statement says in part:

> Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures and outlawing spiritual practices.

[38] More will be said about a formal Canadian policy when common questions of law or fact are considered.

[39] Canada is certainly correct in submitting that certain matters of policy are not justiciable, and that the plaintiffs have failed to distinguish between acts of Parliament and the administration of statutes and regulations. However, a viable argument can be made that indefensible applications of policy may be actionable. Just recently, the Federal Court of Appeal refused to strike an action based on policy for failing to disclose a reasonable cause of action in *Paradis Honey Ltd. v Canada*, 2015 FCA 89. The point may be novel, but it is not beyond reasonable doubt.

[40] Aboriginal rights were recognized in s 35 of the *Constitution Act, 1982*. These were rights which existed before the first European settlers arrived and which continuously existed up to 1982. The Supreme Court has held that such rights are communal. See, for instance, *R v Sparrow*, [1990] 1 SCR 1075, *R v Vanderpeet*, [1996] 2 SCR 507 and *R v Pawlee*, 2003 SCC 43, [2003] 2 SCR 207.

[41] Canada submits that the members of the proposed "survivor" class and proposed "descendant" class cannot exercise such rights on an individual basis. Furthermore, the bands are more recent entities and cannot exercise these rights either. Thus, there may be rights, but no remedy. I cannot accept that proposition. Although in a different context, the tort of nuisance, in *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc.*, 2015 BCCA 154 (CanLII), the Court of Appeal for British Columbia was of the view that recognition of aboriginal rights could not result in Aboriginal peoples actually having less rights than the population at large. As stated by Justice Tysoe at paragraph 66: "As any other litigant, they should be permitted to prove in the action against another party the rights that are required to be proved in order to succeed in the claim against the other party."

[42] At this stage, it is not necessary to set the boundaries of aboriginal rights of language and culture. These are human rights which existed long before the arrival of European settlers. In *Mahe v Alberta*, [1990] 1 SCR 342, the Supreme Court was faced with s 23 of the *Canadian Charter of Rights and Freedoms* which deals with the rights of English or French linguistic minorities to have their children receive primary and secondary school instruction in that language. As Chief Justice Dickson stated at page 362:

> My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them. The cultural importance of language was recognized by this Court in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 748-49:
>
> > Language is not merely a means or medium of expression; it colors the content and meaning of

> expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity. [Emphasis added.]

> Similar recognition was granted by the Royal Commission on Bilingualism and Biculturalism, itself a major force in the eventual entrenchment of language rights in the Charter. At page 8 of Book II of its report, the Commission stated:

> > Language is also the key to cultural development. Language and culture are not synonymous, but the vitality of the language is a necessary condition for the complete preservation of a culture.

[43] Again, it is not plain and obvious that the plaintiffs cannot succeed.

[44] The potential defence of time bar is most troubling. In all likelihood, there is at least one day student who attend one of the Indian Residential School in 1920, who is still alive. Taking such a person being under disability until the age of majority, which used to be 21, all the components of an action had been in place since the early 1940s. The Saskatchewan Court of Queen's Bench refused to certify a class action going back to World War I as all the elements of the cause of action should have been discovered years before and, thus, were barred by the statute of limitations. Alternatively, discoverability would predominate as an individual rather than a common issue (*Daniels v Canada (Attorney General)*, 2003 SKQB 58). However, this decision preceded the decision of the Supreme Court in *Manitoba Metis Federation Inc. v Canada (Attorney General),* 2013 SCC 14, [2013] 1 SCR 623, on which more shall be said.

[45] Although an action in tort against the Crown did not lie until 1953, an action in the Exchequer Court based on equity was possible (*Cloud,* above). Section 3 of the *Federal Courts Act* provides that this Court is a court of law, equity and admiralty.

[46] The plaintiffs submit that I should not take time bar into consideration at this time because it has not been pleaded. If it had, they would have replied that the applicability of the statute of limitation or latches is an open question in such circumstances. Time bar has been recognized by the Supreme Court in such case as *Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372. In *Manitoba Metis*, above, the Metis sought declaratory relief for the purposes of reconciling the descendants of the Metis people of the Red River Valley and Canada. The Court held that the honour of the Crown was engaged. Although claims for personal remedies might be time barred (which was not in issue), the applicable statutes of limitation could not prevent the Court from issuing declarations. Mr. Justice Rothstein, with whom Mr. Moldaver concurred, issued a strong dissent. He said:

> [156] In this case, the majority has created a new common law constitutional obligation on the part of the Crown — one that, they say, is unaffected by the common law defence of laches and immune from the legislature's undisputed authority to create limitations periods. They go this far notwithstanding that the courts below did not consider the issue, and that the parties did not argue the issue before this Court. As a result of proceeding in this manner, the majority has fashioned a vague rule that is unconstrained by laches or limitation periods and immune from legislative redress, making the extent and consequences of the Crown's new obligations impossible to predict.
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> …
>
> [230] Limitations statutes are driven by specific policy choices of the legislatures. The exceptions in such statutes are also grounded in policy choices made by legislatures. To create a new judicial exception for those fundamental constitutional claims that arise

> from rifts in the national fabric is to engage directly in social policy, which is not an appropriate role for the courts.
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> …
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> [254] My colleagues suggest that the above rationales have little role to play in an Aboriginal context, where the goal of reconciliation must be given priority. In so doing, the majority's reasons call into question this Court's decisions in *Wewaykum*, at para. 121, and more recently in *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372. In *Lameman*, this Court specifically stated that policy rationales that support limitations periods "appl[y] as much to Aboriginal claims as to other claims" (para. 13 (emphasis added)). Without doing so explicitly, it appears that the majority has departed from the legal certainty created by *Wewaykum* and *Lameman*, in favour of an approach where "reconciliation" must be given priority.

[47] Given these comments, far be it for me to hold that it is plain and obvious that the claims are time barred. Although s 35 of the *Constitution Act, 1982* only recognized then existing aboriginal rights, and did not create rights, it was only thereafter that the nature and extent of those rights became the subject of intense litigation. The *sui generis* relationship between Canada and its Aboriginal peoples, with its fiduciary and honourable aspects, is judge-made and very fluid. The last chapter is far from being written.

VI. Is There an Identifiable Class of Two or More Persons?

[48] Pursuant to rule 334.15(5)(c) of the *Federal Courts Rules*, Canada was obliged to provide an estimate of the number of members in the proposed classes. According to the affidavit of Deanna Sitter, Resolution Manager with Settlement Agreement Operations, Resolution-Individual Affairs, Aboriginal Affairs and Northern Development Canada, who has been involved with matters relating to Indian Residential Schools since the year 2000, Canada has

been able to identify 196 former day students at Kamloops Residential School and 80 former day students at the Sechelt Residential School during the class period. There was no consistent method of recording student attendance, and some documents have not been located. Thus, it may be that the number provided is low. In any event, there are certainly more than two.

[49] Ms. Sitter is, quite naturally, unable at this time to provide an estimate of the members of the descendant class, which can easily cover five or more generations. Suffice it to say that there are certainly more than two descendants.

[50] Finally, there are two members of the "band" class with the possibility of adding up to another 140 or so.

[51] This requirement has been met.

VII. Common Questions of Law or Fact

[52] This is where evidence comes into play:

a. Are there common questions of fact and law?

b. Do these common questions predominate over questions affecting only individual members?

c. Would a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings?

d. Would the class proceeding involve claims that are or have been the subject of other proceedings?

[53] The common question is whether there was a nationwide Indian Residential School Policy. I am guided by Mr. Justice Rothstein's remarks in *Pro-Sys Consultants Ltd. v Microsoft Corp.*, 2013 SCC 57, [2013] 3 SCR 477, where he said at paragraph 118, with respect to expert evidence:

> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[54] The plaintiffs provided proposed expert evidence from Dr. John Milloy, a history professor who specializes in Indian affairs and Dr. Marianne Boelscher Ignace, an expert in linguistics. Canada responded to the affidavit of Dr. Milloy with the evidence of Dr. E.R. Daniels, who had a long career with the Department of Indian Affairs, and to the evidence of Dr. Ignace with Dr. K. David Harrison.

[55] Canada moved to have the affidavits of Dr. Milloy and Dr. Ignace struck. Dr. Milloy could hardly hold himself out as a neutral expert prepared to assist the Court given his many writings over the years and Dr. Ignace failed to disclose an interest in that her husband and children would fall within the "survivor" and "descendant" classes.

[56] To deal first with Dr. Ignace, I refused to strike her affidavit. A personal interest is not an absolute bar (*Mouvement laîque québécois v Saguenay (City)*, 2015 SCC 16 per Gascon J. at paragraphs 103 and following.

[57] Furthermore, Dr. Ignace's evidence could be helpful to Canada in that she agreed that many factors have led to the erosion and disappearance of languages spoken by small groups of people. Marshall McLuhan's Global Village has its downside. The issue to be tried, however, is whether the Indian School Policy played a role.

[58] Neither the evidence of Dr. Milloy nor Dr. Ignace, nor the replies of Dr. Daniels and Dr. Harrison are relevant in determining whether the First Re-Amended Statement of Claim discloses a reasonable cause of action. They are relevant in terms of determining whether there is some basis in fact for the commonality requirement, as stated by Mr. Justice Rothstein, above.

[59] I also dismissed the motion to strike Dr. Milloy's affidavit. It is not necessary to decide whether he lacks sufficient objectivity to assist the Court at trial, but he was the vehicle by which many historical records were put into play.

[60] Based on the historical records appended to Dr. Milloy's affidavit and on the cross-examination of Dr. Daniels, it is not plain and obvious that there was not an Indian Residential School policy as alleged in the First Re-Amended Statement of Claim. This was a nationwide policy which satisfies the commonality requirement. In the 1870s, the Government of Canada commissioned the Davin Report (the *Report on Industrial Schools for Indians and Half-Breeds*)

which came out in 1879. The report states, among other things: "If anything is to be done with the Indian, we must catch him very young…The Children must be kept constantly within the circle of the civilized conditions."

[61] Mr. Davin had studied the situation in the United States and recommended industrial, *i.e.* residential schools: "But it was found that the day school did not work because the influence of the wigwam was stronger than the influence of the School. Industrial Boarding Schools were therefore established…"

[62] The day students in this case claim that if anything they are worse off because every night they went home to their families which were ridiculed by day.

[63] The Annual Report of the Department of Indian Affairs of 1895 deems the acquisition of the English (or French) language to be a necessity: "So long as he keeps his native tongue, so long he will remain a community apart." The policy was to be executed "with as much vigor as possible". Educated English speaking Indians would be enfranchised, and become accustomed to the ways of civilized life. This would bring about rapidly decreased expenditures "until the same should forever cease, and the Indian problem would have been solved."

[64] Dr. Daniels testified that if there were insufficient day schools available on reserves between the years 1920 and 1979, a day student could attend a residential school. The same curriculum and school conditions applied to both day students and residential students. It was not until 1971 that bands were given a stay in modifying the provincial school curricula, which were

adopted by Canada. Modifications to the curricula needed sanction from the Department of Indian Affairs. One *Program for Studies for Indian Schools* stated: "Every effort must be made to induce peoples to speak English and to teach them to understand it. Insist on English even during the supervised play. Failure in this means wasted efforts."

[65] Another report expressed gratification that many Indians were becoming educated and, thus, enfranchised. It would be good administration, with respect to enfranchisement, if the Department could enfranchise individual Indians or a band of Indians "without the necessity of obtaining their consent thereto".

[66] A report of the Deputy Superintendent General states that amendments to the *Indian Act* gave the Department "control and remove from the Indian parent the responsibility for the care and education of his child, and the best interest of the Indians are promoted and fully protected."

[67] The 1921 Report refers to the Government deciding to adopt a parental policy toward the native to educate and protect him and to give him a chance to develop and prosper.

[68] The Report of the Deputy Superintendent General in 1933 notes that enfranchised Indians cease to be Indians within the meaning of the *Indian Act* and are no longer wards of the Crown. An Indian who became a medical doctor or a lawyer, or entered holy orders, was *ipso facto* enfranchised and no longer an Indian.

[69] As noted above, the linguistic experts are of the view that a number of factors have led to the loss of language and culture within small groups of people. It would be up to the trial judge to decide what role, if any, the Indian Residential School Policy played. It is certainly arguable that it did play a role.

[70] I am satisfied that the claims raised common questions of law and fact, which predominate over questions affecting only individual members. Given the high cost of litigation and the relatively small recoveries for each individual, there would not be a significant number who have a valid interest in controlling separate proceedings. Furthermore, an aggregate award would be appropriate.

[71] Clearly, there are individual issues. Apart from time bar, the record already shows that some students resided at residential schools certain years, and attended those schools as day students other years. They received common experience payments.

[72] Deemed or signed releases is another individual issue. The Court orders approving the IRSSA released Canada and the religious orders on very broad terms.

[73] In addition, some day students participated in the Individual Assessment Process and signed broadly worded releases.

[74] Those who participated in the IAP signed a release which provided that in consideration of acceptance into the IAP (not actual payment), Canada was fully finally and forever released and discharged:

> …from any and all actions or causes of action, liabilities, claims and demands whatsoever of every nature or kind for damages, contribution, indemnity, costs, expenses and interest which I ever had, now have or may in future have against them (whether I now know about these claims or causes of action or not, arising or related to:
>
> a. My participation in a program or activity associated with or offered at or through any Indian Residential School, and
>
> b. The Operation of an Indian Residential School.

[75] The present issue is not whether Canada was released, but rather whether membership in the "survivor" and "descendant" classes should be cut down on that basis. I think not. These issues would have to be assessed on an individual basis. The scope and context of the releases also have to be considered. Notices went out expressly excluding day students from the Common Experience Payment portion of the settlement. Any settlement, no matter how broadly worded, has its limits.

[76] It will be up to the trial judge to decide whether the release covers years in which residential students only attended day classes. The "survivor" class already excludes the years in which such students resided at the schools. It is also somewhat peculiar that a residential school student who received a Common Experience Payment was entitled to apply in the Individual Assessment Process, while on the other hand, those who were excluded from the Common Experience Payment were barred from pursuing such rights they might have if they participated in the IAP, a distinct process.

[77] A release must be considered in context. In *London & South Western Railway v Blackmore*, [1861-73] All ER Rep Ext 1694, Lord Westbury stated at page 623:

> The general words in a Release are limited always to those things, which were specifically in the contemplation of the parties at the time when the Release was given.

[78] In order to interpret the wording of a Release, one must look at the intention of the parties and context in which the Release was prepared; see: *Taske Technology Inc. v Prairiefyre Software Inc*., [2004] OJ No 6019 (QL), 3 BLR (4th) 244; *Arcand v Abiwyn Co-Operative Inc*, 2010 FC 529.

[79] The interpretation of IRSSA is not beyond judicial review. In *Fontaine v Canada (Attorney General)*, 2014 MBQB 200, the Manitoba Court of Queen's Bench was reviewing decisions in the IAP process. Ms. Fontaine had received a Common Experience Payment as a residential student. She also applied for an IAP. It had been determined in the process that at the time she suffered abuse she was an employee not a student. Nevertheless, the Court held, in the circumstances, that an employee was a resident entitled to apply for an IAP.

VIII. Is the class proceeding the preferable procedure?

[80] In my view, a class proceeding is the preferable procedure, preferable over test cases or representative proceedings. Furthermore, there is already a representative aspect to this case when it comes to the "band" class. Under rule 334.39 of the *Federal Courts Rules*, these proceedings are a no-cost basis. This serves as a clear advantage to the plaintiffs as the outcome of the case is far from certain.

[81] Class proceedings were certified in similar actions, such as *Cloud, Armstrong* and *Brown*, above, and indeed appears to be, more and more, the route preferred by the Supreme Court. In *Bank of Montreal v Marcotte*, 2014 SCC 55, [2014] 2 SCR 725, the Court reiterated that class actions ensure the economy of judicial resources, enhance access to justice and serve to avoid conflicting judgments.

[82] Canada points out that an argument can be made that a representative action would be preferable based on historical precedent. However, as Lord Denning M.R. said in *Letang v Cooper*, [1964] 2 All ER 929 at p 932:

> I must decline, therefore, to go back to the old forms of action in order to construe this statute. I know that in the last century MAITLAND said "the forms of action we have buried but they still rule us from their graves." But we have in this Century shaken off their trammels. These forms of action have served their day. They did at one time form a guide to substantive rights; but they do so no longer. Lord Atkin told us what to do about them:
>
> > "When these ghosts of the past stand in the path of justice, clanking their medieval chains, the proper course for the judge is to pass through them undeterred"
>
> see *United Australia, Ltd. v. Barclays Bank, Ltd.* [1940] 4 All E.R. 20 at p. 37.

IX. Are There Appropriate Representative Plaintiffs?

[83] Another requirement is that there be a representative plaintiff, or in this case plaintiffs, who would fairly and adequately represent the interests of the classes; who have prepared a workable plan which includes notifying class members how the proceedings is progressing; are

not in conflict of interest; and provide a summary of agreements respecting fees and disbursements.

[84] Canada submitted that some of the proposed representatives are in conflict of interest or cannot otherwise represent a particular class because they were covered by the IRSSA; while others did not have a deep enough appreciation of their duties and the risk involved, including the risk of being liable for costs. There is also some ambiguity within the "band" class.

[85] At this stage of the proceedings, I am prepared to accept the proposed representatives, all of whom have given affidavits. If, as time goes on, one or more representatives prove to be inadequate, or in conflict, there is a large pool of potential representatives. Our largest courtroom in Vancouver was packed for four straight days of very dry, very legalistic submissions.

[86] The proposed notice requirements are satisfactory, but dates have to be filled in and the schools in question are to be specifically identified before the order is actually signed.

[87] An agreement respecting fees and disbursements between the representative plaintiffs and the solicitors of record has been delivered to the Court under seal and remains under seal, at least for the time being. Canada has the right to audit bands which, in turn, are concerned that solicitor/client privilege could be put in issue. Canada may bring on a motion for disclosure of the fee arrangements to independent counsel who will be barred from participating in the litigation and who will undertake not to discuss the fee arrangement with Canada's litigation team. Similar arrangements have been made in the past.

X. Contents of Order

[88] If the Court is satisfied that the matter should proceed as a class action, and I am, rule 334.17 of the *Federal Courts Rules* provides details that are to be contained in the certification order.

[89] I am invoking rule 394 of the *Federal Courts Rules* and calling upon the parties to prepare for endorsement a draft order to give effect to these reasons. The order only becomes effective and delays to appeal only begin to run once it has been signed and issued.

XI. The Classes

[90] I accept the "survivor" class as proposed. However, I cannot agree with the description of the "descendant" class and some of the common questions of law or fact proposed by the plaintiffs. The "descendant" class concurrently runs five generations or more and purportedly includes descendants not yet born. This may create, as Chief Justice Cardozo said in *Ultramares Corp. v Touche, Niven & Co.*, 255 NY 170, 174 NE 441 (CA, 1931), at page 179, "a liability in an indeterminate amount for an indeterminate time to an indeterminate class." The "survivor" class covers day students who attended Indian Residential Schools from 1920 to 1997.

[91] During argument, I raised the possibility of a young girl so traumatized by her experiences as a day student that she turned her back on her band, on her community and on Canada. She went to another country, married and learned another language. Her great-great-grand-children who, of course, never met her, might have asked their grand-mother what her

grand-mother was like. The grand-mother did not know much about her own grand-mother other than she spoke with a strange accent and would not discuss her youth. These great-great-grand-children would form part of the "descendant" class, as much as those who always remained within the band. The experiences of descendants may be so different in so many respects that the class has to be cut down. I say this in tandem with the fact that I will not disturb the "band" class, which has to remain in place because of Canada's arguments about who can assert aboriginal rights and because there may well have been damage suffered to the community at large. If there is a communal right, it is arguable that there is also a communal remedy.

[92] Furthermore, it would be daunting for some to establish on an individualized basis that one had an ancestor several generations back who was aboriginal, much less that he or she attended an Indian Residential School as a day student.

[93] The *Citizenship Act* has been amended with respect to children born outside Canada to a Canadian parent. Although they are Canadian by operation of law, if they, in turn, have children born outside Canada those children are not automatically Canadian citizens. I shall limit the "descendant" class to the first generation. These descendants claim in their own right which creates difficulties in a classical tort analysis. What duty of care was owed? However, similar classes have been certified, and I see no reason to eliminate this class at an early stage.

[94] Furthermore, I am leaving the "band" class untouched. If harm was suffered, it was within the bands and their members, as opposed to individuals who may be completely unaware that they have some aboriginal ancestry.

XII. The Common Issues

[95] The common issues are set out in plaintiffs' Memorandum of Fact and Law. As stated above, one issue was whether Canada breached its fiduciary duty owed to the "survivor", "descendant" or "band" class to protect their language and culture. These are aboriginal rights which existed prior to the Royal Proclamation of 1763. For the purposes of this case, the issue is not whether there was a duty to protect, but whether there was a duty not to take steps to destroy. As Ms. Sitter points out in her affidavit, day students at Kamloops Residential School came from more than 50 different communities, with different languages and cultures. Day students at Sechelt Resident School came from some 30 different communities. Furthermore, there was some overlapping. It would have been impossible to foster protection of all those languages and cultures at the Indian Residential Schools. Thus, I will only certify a duty not to destroy as a common issue.

[96] The second common issue was whether Canada breached the aboriginal rights of the classes. As discussed during argument, language and cultural rights extend beyond aboriginal rights. They are human rights. I would rephrase the issue as being whether Canada breached the cultural and/or linguistic rights, be they aboriginal or otherwise, of the "survivor", "descendant" or "band" class.

[97] Another proposed issue was whether Canada breached its fiduciary duty to protect the "survivor" class from actionable physical or mental harm. This case is not about physical abuse. The "survivor" class had the opportunity to participate in the IAP. I would leave in "mental

harm", bearing in mind that Canada was not vicariously liable for torts committed by its servants or agents prior to the enactment of the *Crown Liability Act* in 1953.

[98] As mentioned above, some of the particulars of the notice procedure have to be confirmed. The plaintiffs suggest that Canada pay for the costs relating to giving notice. However, no evidence has been led to support the proposition that Canada pay the costs of that program forthwith.

XIII. Conclusion

[99] As mentioned above, in accordance with rule 394 of the *Federal Courts Rules*, the plaintiffs are to prepare for endorsement a draft order to implement these reasons, hopefully approved as to form and content by Canada. If the parties cannot agree thereon, they are at liberty to request a case management conference. As one cannot appeal reasons, I repeat that the delays to appeal shall only begin to run once the order is executed.

"Sean Harrington"
Judge

Ottawa, Ontario
June 3, 2015

APPENDIX

FEDERAL COURTS RULES **SOR/98-106**	***RÈGLES DES COURS FÉDÉRALES*** **DORS/98-106**
Rule 334.16	**Règle 334.16**
334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	**334.16** (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :
(*a*) the pleadings disclose a reasonable cause of action;	*a*) les actes de procédure révèlent une cause d'action valable;
(*b*) there is an identifiable class of two or more persons;	*b*) il existe un groupe identifiable formé d'au moins deux personnes;
(*c*) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	*c*) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
(*d*) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	*d*) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
(*e*) there is a representative plaintiff or applicant who	*e*) il existe un représentant demandeur qui :
(i) would fairly and adequately represent the interests of the class,	(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

(*a*) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

(*b*) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

(*c*) the class proceeding would involve claims that are or have been the subject of any other proceeding;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;

(*d*) other means of resolving the claims are less practical or less efficient; and

d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;

(*e*) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

(3) If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact that are not shared by all of the class members so that the protection of the interests of the subclass members requires that they be separately represented, the judge shall not certify the proceeding as a class proceeding unless there is a representative plaintiff or applicant who

(3) Si le juge constate qu'il existe au sein du groupe un sous-groupe de membres dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe de sorte que la protection des intérêts des membres du sous-groupe exige qu'ils aient un représentant distinct, il n'autorise l'instance comme recours collectif que s'il existe un représentant demandeur qui :

(*a*) would fairly and adequately represent the interests of the subclass;

a) représenterait de façon équitable et adéquate les intérêts du sous-groupe;

(*b*) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members as to how the proceeding is progressing;

b) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du sous-groupe et tenir les membres de celui-ci informés de son déroulement;

(*c*) does not have, on the common questions of law or fact for the subclass, an interest that is in conflict with the interests of other subclass members; and

c) n'a pas de conflit d'intérêts avec d'autres membres du sous-groupe en ce qui concerne les points de droit ou de fait communs;

(*d*) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

d) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1542-12
STYLE OF CAUSE:	CHIEF SHANE GOTTFRIEDSON, ON HIS OWN BEHALF AND ON BEHALF OF ALL THE MEMBERS OF THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND AND THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND, CHIEF GARRY FESCHUK, ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SECHELT INDIAN BAND AND THE SECHELT INDIAN BAND, VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE AND RITA POULSEN v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATES OF HEARING:	APRIL 13-16, 2015 AND JUNE 2, 2015 BY TELECONFERENCE BETWEEN VANCOUVER, TORONTO AND OTTAWA
ORDER AND REASONS	JUSTICE HARRINGTON
DATED:	JUNE 3, 2015

APPEARANCES:

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John Kingman Phillips Patric Senson	

Michael Doherty Sheri Vigneau A. Reddy Nick Claridge	FOR THE DEFENDANT

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