Kuptana v. Attorney Gen.of Canada, 2007 NWTSC 01 Date: 2007 01 15
Docket: CV S-0001-2005-000 243

BETWEEN:

ROSEMARIE KUPTANA, as a representative of that class of individuals who are enrolled as beneficiaries of the Inuvialuit Trust, and who attended a Federal Day School, Indian Residential School, Hostel, or other school of a residential nature, in various locations across Canada, all of which were established and administered by, or otherwise the responsibility of, the Government of Canada.

Plaintiff, Applicant

-and-

THE ATTORNEY GENERAL OF CANADA

Defendant

Application for certification of a class action and approval of a settlement agreement.

Heard at Yellowknife, NT: October 3-4, 2006

Reasons filed: January 15, 2007

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Kuptana v. Attorney Gen.of Canada, 2007 NWTSC 01 Date: 2007 01 15
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BETWEEN:

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Plaintiff, Applicant

-and-

THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR JUDGMENT

[1] The application before the Court is unique. The Court is requested to approve a substantial amendment to the Statement of Claim by which these proceedings were commenced in 2005, to then certify the within proceedingsas a class action,and finally to approve a multi-billion dollar settlement agreement which has been achievedas part of a Canada-wide settlement of Indian Residential School (IRS) claims.

[2] The plaintiff commenced this representative action in this Court against the Government of Canada on behalf of all former IRS studentsenrolled as beneficiaries of the Inuvialuit Trust. The parties to the Canada-wide Settlement Agreement, with the plaintiff's concurrence, have chosen the within representative action as the vehicle for implementing the Settlement Agreement in this jurisdiction, i.e., the Northwest Territories. The proposed Settlement Agreement resolves thousands of individual

claims and lawsuits, and numerous class actions, that have been brought by IRS survivors and their families.

[3] These claims and lawsuits against the federal government and various religious organizations arise as a result of the IRS system which existed in Canada for more than 100 years. They relate to a tragic and shameful chapter in the history of our country's relationship with its aboriginal peoples.

[4] The IRS system and its effect on Canada's aboriginal communities was summarized by the Royal Commission on Aboriginal Peoples ten years ago as follows:

> "Put simply, the Residential School system was an attempt by successive governments to determine the fate of Aboriginal people in Canada by appropriating and reshaping their future in the form of thousands of children who were removed from their homes and communities and placed in the care of strangers. Those strangers, the teachers and staff, were, according to Hayter Reed, a senior member of the department in the 1890s, to employ "every effort ...against anything calculated to keep fresh in the memories of the children habits and associations which it is one of the main objects of industrial education to obliterate." Marching out from the schools, the children, effectively re-socialized, imbued with the values of European culture, would be the vanguard of a magnificent metamorphosis: the 'savage' was to made 'civilized', made fit to take up the privileges and responsibilities of citizenship.
>
> Tragically, the future that was created is now a lamentable heritage for those children and the generations that came after, for Aboriginal communities and, indeed, for all Canadians. The school system's concerted campaign "to obliterate" those "habits and associations", Aboriginal languages, traditions and beliefs, and its vision of radical re-socialization, were compounded by mismanagement and underfunding, the provision of inferior educational services and the woeful mistreatment, neglect and abuse of many children — facts that were known to the department and the churches throughout the history of the school system."

[5] In recent years the Government of Canada, and Canadians generally, have acknowledged that the IRS system was wrong and was inappropriately developed to assimilate aboriginal persons. In 1998 the federal government, issued a Statement of Reconciliation in which it apologized for the failures of the IRS system, saying , in part,:

> "...Sadly, our history with respect to the treatment of Aboriginal people is not something to 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 spiritualpractices. We must recognize the impact of these actions on the once self sustaining nations that were desegregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the *Indian Act.* We must acknowledge that the results of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.
>
> Against the backdrop of these historical legacies, it is a remarkable tribute to the strength and endurance of Aboriginal people that they have maintained their historic diversity and identity. The Government of Canada today formally expresses to all Aboriginal people in Canada our profound regret for past actions of the Federal Government which have contributed to these difficult pages in the history of our relationship together.
>
> One aspect of our relationship with Aboriginal people over this period that requires particular attention is the Residential School System. This system separated many children from their families and communities and prevented them from speaking their own languages and from learning about their heritage and cultures. In the worst cases, it left legacies of personal pain and distress that continued to reverberate in Aboriginal communities to this date. Tragically, some children were the victims of physical and sexual abuse.
>
> The Government of Canada acknowledges the role it played in the development and administration of these schools. Particularly to those individuals who experienced the tragedy of sexual and physical abuse at Residential Schools, and who have carried this burden believing that in some way they must be responsible, we wish to emphasize that what you experienced was not your fault and should never have happened. To those of you who suffered this tragedy at Residential Schools, we are deeply sorry. In dealing with the legacies of the Residential School program, the Government of Canada proposes to work with First Nations, Inuit, Metis people, the Churches and other interested parties to resolve the longstanding issues that must be addressed. We need to work together on a healing strategy to assist individuals and communities in dealing with the consequences of the sad era of our history..."

[6] The proposed Settlement Agreement is the culmination of many years of difficult negotiations, the resolution of approximately 5000 pending lawsuits across Canada, and thousands of other claims advanced through an ADR process. It seeks to acknowledge and to redress in part, the destruction of individual lives and also an entire way of life. Its focus is on both compensation and healing. One of its objectives is to address these issues in an identical or consistent fashion in each jurisdiction in

Canada. The class of individuals who are entitled to cash compensation under the proposed Settlement Agreement is estimated to number about 80,000 persons, of whom several hundred are resident in the Northwest Territories.

[7] The four main components of the proposed Settlement Agreement are as follows:

(a) Cash compensation for residential school experience:
This is termed the Common Experience Payment (CEP) in the proposed Settlement Agreement. Each survivor of the IRS system is entitled to receive $10,000 for their first year of IRS attendance, plus an additional $3,000 for every year attended thereafter. It is estimated that there are 80,000 individuals who are entitled to a CEP. It is also estimated that the average CEP will be approximately $23,000. The federal government has set aside $1.9 billion to fund the CEP.

(b) Cash compensation for abuse: Survivors of the IRS system can seek additional compensation for sexual abuse, serious physical abuse, and serious psychological abuse claims through an Independent Assessment Process (IAP). The IAP purports to be an improved version of the previous ADR process. The federal government has allocated resources to allow a minimum of 2500 IAP hearings per year. All IAP claims are to be processed within approximately 5 years. The proposed compensation levels are comparable to those provided by current Canadian case law. Awards up to $275,000 will be available under the IAP for proven acts of harm. A further award of up to $250,000 is available for proven actual income loss.

(c) Truth and Reconciliation Commission: The proposed Settlement Agreement establishes this commission with a budget of $60 million for a 5-year mandate to make a public and permanent record of the IRS legacy.

(d) Commemoration and Healing: $20 million is allocated to national and community based commemorative initiatives to honor and pay tribute to IRS survivors and their families through acknowledging their experiences. A $125 million endowment will be made to the Aboriginal Healing Foundation to fund healing programs that address the healing needs of the IRS survivors, over a 5 year period.

[8] The hearing of the application before the Court (i.e., to substantially amend the Statement of Claim, to certify the within proceedings as a class action, and to approve the Settlement Agreement) took place at the Yellowknife Courthouse on October 3-4, 2006. Similar hearings were held in eight other Canadian jurisdictions. Extensive notice of the October 3-4 hearing in Yellowknife was given to potential class members, allowing them an opportunity to object to the proposed SettlementAgreement, either in person or in writing.

[9] A number of written objections (4) were filed with this Court prior to October 3, 2006 by potential class members resident in this jurisdiction, pursuant to the public notice disseminated in the months preceding the October 3-4 hearing. (It is noteworthy that whereas there are potentially 80,000 class members to whom this Settlement Agreement is primarily addressed, there was a total of approximately 200 objections filed in the nine Canadian courts where hearings were scheduled).

[10] In summary, there are three complaints or matters contained within the four written objections received by this Court: (i) the amount of the proposed CEP compensation is inadequate, (ii) there are flaws in the proposed process for implementing the Settlement Agreement, and (iii) questions are posed regarding the terms of the Settlement Agreement. With respect to these latter questions, these were satisfactorily answered, in my view, at the October3 -4 public hearingby counselfor the parties to the Settlement Agreement.

[11] With respect to the complaints regarding the process of implementing the proposed Settlement Agreement (e.g., the process for verification of eligibility for the Advance Payment program for elders and later, presumably,for the CEP program)I am satisfied that these complaints, while valid criticisms, can be addressed by those charged with implementing the SettlementAgreement and do not constitutea reason for withholding Court approval of the Settlement Agreement. Any such flaws in implementation, in my respectful view, do not taint the fairness of the Settlement Agreement as a whole.

[12] With respect to the assertion that the proposed CEP compensation is inadequate, this specific objection was also made by a few potential class members who attended the October 3-4 hearing in person, as discussed below.

[13] In addition to the four written objections received by the Court prior to the October 3-4 hearing, 15 individuals who are potential class members attended the October 3-4 hearing and made oral presentations regarding the proposed Settlement Agreement. Only a few spoke in opposition to the proposed Settlement Agreement, primarily on the ground of the inadequacy of the proposed Common Experience Payment. Many spoke in favor of the proposed Settlement Agreement,but in any event wished to share with the Court both their experiences in the IRS systemand their views, as survivors of the IRS system, regarding the proposed Settlement Agreement.

[14] I was impressed, and moved, by the oral presentation made to the Court on October 3-4 by survivors of the IRS system. These survivors were very articulate in explaining the impact on them individually of their experience in the IRS system many years ago, and the impact on their lives since that time. It is impossible not to be moved by these presentations.

[15] I respectfully agree with the comment made by many of the survivors that the $10,000/$3,000 Common Experience Payment to be provided in the proposed Settlement Agreement is insufficient compensation for what they endured; however I add that no amount of money could fully redress the injury to them, e.g., loss of culture, loss of language. These survivors are victims and cannot be made whole by this Settlement Agreement or any settlement agreement. No one, and no amount of money can undo what has been done to them. One of the lawyers representing many of the potential class members resident in the NWT stated that most of his clients are of the view that they deserve more but also realize that “this is the best deal they will see in their lifetime, and they accept it as a fair compromise”.

[16] I note that, in any event, there is an “opting-out” provision in the Settlement Agreement. No one who objects to it will lose anything by this agreement.

[17] There is evidence before the Court of the extensive, hard fought negotiations which led to the Agreement-in-Principle in November 2005. The negotiationswere led by the Honourable Frank Iacubucci, as Federal Representative, and in an affidavit filed with this Court he states that the mandate was to achieve a final and comprehensive settlement of legal claims arising out of attendance at Indian residential schools, to bring all pending litigation in Canada to an end, and to recommendtruth, reconciliation, commemoration and healing processes for the aboriginal communities. It was intended

that the negotiations would produce a settlement that would include all former IRS students, whether or not they were currently or actively pursuing claims against the federal government or the religious organizations. Participants in the negotiations included not only the dozens of lawyers representing claimants in the thousands of pending individual actions and class actions throughout Canada and lawyers representing the federal government and the religious organizations but also lawyers and other representatives, of aboriginal organizations such as the Inuvialuit Regional Corporation, Nunavut Tunngavik Inc., Assembly of First Nations, etc.

[18] The Agreement-in-Principle was approved by the federal government and led to the execution of the Settlement Agreement on May 8, 2006. The SettlementAgreement itself comprises approximately 800 pages, inclusive of appendices and schedules.

[19] It is an understatement to say that the results achieved by the parties to these negotiations are impressive.

[20] Article 16.01 of the Settlement Agreement states that the Agreement is conditional upon the approval of each of nine named Courts in Canada (including this Court) in substantially the same terms and conditions.

[21] As it is my intention to grant approval, I see no purpose in reviewingwithin these reasons further details of this comprehensive Settlement Agreement. In any event, the document is part of the public record on the Court file.

[22] I turn to the request for certification of the within proceedings as a class action. In contrast to many jurisdictions in Canada which have specific class proceedings statutes, there is no such legislation in the Northwest Territories. There is provision, however, in the Rules of Court and in the common law jurisprudence for a class action or representative action such as contemplated both in the within proceedings commenced in 2005 and in the proposed Amended Statement of Claim.

[23] Rule 62 states:

> Where numerous persons have a common interest in the subject of an intendedaction, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

[24] In *Western Canadian Shopping Centres v. Dutton,* 2001 SCC 46, the Supreme Court of Canada provided guidance to trial courts when determining whether to allow a lawsuit to proceed as a class action. It is significant that the *Dutton* decision involved the interpretation of the then equivalent Rule in Alberta to our Rule 62. It was held that in assessing the suitability of a Court proceeding for certification as a class action, the Court must be satisfied that:

(1) the proposed "class" must be capable of clear definition;

(2) there must be issues of fact or law common to all class members;

(3) with regard to the common issues, success for one class member must mean success for all. (All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests);

(4) the proposed class representative must adequately represent the class.

[25] Upon due consideration of the comprehensive material before the Court on this application, including the proposed Amended Statement of Claim. I am satisfied that these requirements are met.

[26] Allowing this proceeding to continue (as proposed in the Amended Statement of Claim) as a class action offers many advantages over a multiplicity of individual lawsuits in this Court. As stated in *Dutton*, these include:

(a) the class action serves judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis, and

(b) by allowing fixed litigation costs to be divided over a large number of plaintiffs, the class action improves access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually.

[27] I turn now to that part of the application before the Court wherein the Court is asked to approve the Settlement Agreement.

[28] To my knowledge, no previous decision of this Court has considered the criteria for approval of an agreement which would settle a class action. As I understand it, in those jurisdictions where class proceedings legislation exists, it is a statutory requirement that a class action can only be settled with the approval of the Court. Counsel on this application have kindly referred me to a number of decisions, notably from British Columbia and Ontario, which have considered the principles which come into play in exercising this judicial discretion. From a review of those decisions,I glean the following principles:

(a) To approve a settlement, the Court must be satisfied that it is fair, reasonableand in the best interests of the class.

(b) "Fairness" is not a standard of perfection.

(c) "Reasonableness" allows for a range of possible resolutions. To be approved, a settlement need only fall within a "zone or range of reasonableness".

(d) In its assessment of the proposed settlement, the Court's focus must be the impact on the class as a whole, and not the perspective of, or the demands of, an individual class member.

(e) When the proposed settlement is the result of arms-length negotiationsinvolving experienced counsel representing the class of plaintiffs, there is a strong presumption of fairness.

(f) While it is not for the Court to simply "rubber-stamp" a settlement proposal, it is not the Court's role to substitute its own judgment for that of the parties who negotiated the settlement at arm's length, to re-write or modify the terms of the proposed settlement, nor to unduly dissect the proposedsettlement with a view to perfection in every respect.
Dabbs v. Sun Life [1998] O.J. No. 2811
Parsons v. Red Cross [1999] O.J. No. 3572
Knudsen v. Consolidated Food 2001 BCSC 1837
Vitapharm v. Hoffman-LaRoche [2005] O.J. No. 1118
Nunes v. Air Transat [2005] O.J. No. 2527

[29] I have considered carefully all of these principles as applied to the present application. I also take particular note of the risk of recovery or success if this settlement is rejected and the litigation continues in the normal course, given its complexity, the novel nature of some of the causes of action, limitation issues, the history of protracted and unproductive litigation in the past 10-15 years, the overwhelming costs of litigation in today's society, etc.

[30] In the result, it is abundantly clear to me that this settlementis in the best interests of the proposed class members when comparedto the alternativeof the risks, the delays, and the costs of litigation. The terms of the Settlement Agreement are fair and reasonable. Those proposed class members who are dissatisfied with the terms of the Settlement Agreement have the right, under its terms, to opt out of the Settlement Agreement and pursue their own individual claim in their own way.

[31] Accordingly, I grant the orders sought, substantially in the form of the draft orders submitted by counsel and marked as exhibits 1, 2,and 3 on the hearing of the application.

[32] In concluding these reasons on the main application before the Court, I wish to commend counsel responsible for preparation and filing of the Pre-hearing Briefs. These briefs were well done, and of much assistance to the Court.

[33] Finally, I turn briefly to a separate, peripheral Notice of Motion which was ostensibly before the Court at the October 3-4 hearing. I refer to a Notice of Motion put forward on behalf of the Defendant Attorney-General of Canada, dated September 29, 2006 and attached to a fax letter from Michele Annich, counsel for the Attorney-General of Canada. The motion seeks to strike part or all of the affidavit of Donald Outerbridge filed with the Court on September28, 2006. The Outerbridgeaffidavit was submitted to the Court by the Merchant Law Group on September 28, 2006.
There was no one before the Court on the October 3-4 hearing asking the Court to do anything in particular with the Outerbridge affidavit. Accordingly I made no reference to the Outerbridge affidavit and therefore I need not consider the Notice of Motion of the Attorney-General of Canada in relation thereto.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT
this 15th day of January, 2007.

Counsel:

Janice Payne, representing the Plaintiff, and Nunavut TunngavikInc., and the proposed Plaintiffs.

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Dale Cunningham, representing proposed Plaintiffs

Laura Young, representing the Assembly of First Nations

Catherine Coughlan, representing the Attorney-General of Canada

Michele Annich, representing the Attorney-General of Canada

Alexander Pettingill, representing some proposed Church Defendants

Rod Donlevy, representing some proposed Church Defendants