ATLANTIC POLICY CONGRESS OF FIRST NATION CHIEFS SECRETARIAT INC.

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To: Former Indian Residential School Survivors, Chiefs, Council Members, and First Nations Organizations

Fr: Violet Paul, Senior Policy Analyst

Re: Summary of Nine Court Decisions on Final Settlement Agreement

Date: February 1, 2007

The APCFNC hired Michael Taylor, from Presse Mason Law Office, Bedford, Nova Scotia, to summarize the enclosed nine court decisions in relation to the attached final settlement agreement. The Policy Congress recognizes that it may be difficult for some to read the cases in their entirety and therefore have provided a summary in plain language format. If you have any questions or required additional information please feel to contact my office at 1-877-667-4007 or email me at violet.paul@apcfnc.ca.

For those of you who have family members and for those of you who are former students, who **do not have legal counsel** and wish to discuss further, please contact Mr. Taylor at 1-800-630-2254, or email him at mtaylor@pressemason.ns.ca.

Where does the Indian Residential Schools Settlement Program Stand?

A summary of the recent decisions by various Canadian jurisdictions regarding the existing Settlement Agreement.

Prepared for the Atlantic Policy Congress of First Nation Chiefs Secretariat Inc.

Introduction

The Indian Residential Schools Settlement Program is finally making some significant progress. Once the existing Settlement Agreement was drafted, there were applications before nine jurisdictions across Canada for the purpose of certifying various law suits as class actions and requesting that the Settlement Agreement be approved as written. These hearings where held between August and October of 2006. The decisions have now all been completed, with the last one being received in early January. The purpose of this report is to explain the decisions made by the various Courts, and to summarize where the entire process stands at present.

The Settlement Agreement is basically made up of five essential elements:

a) A Common Experience Payment (CEP) to be paid to all persons who resided at an Indian Residential School in Canada between January 1, 1920 and December 31, 1997, and who were living as of May 30, 2005;
b) An Independent Assessment Process (IAP) under which a former Residential School student can seek additional compensation for sexual or serious physical or other abuse;
c) A Truth and Reconciliation Process, which includes the establishment of a Truth and Reconciliation Commission;
d) Funding for commemorative activities;
e) Funding to the Aboriginal Healing Foundation for healing programs over a five year period.

By asking for the Courts in Canada to approve the Settlement Agreement, all the parties involved in negotiating that agreement were taking a step towards doing away with the need to launch separate lawsuits against the Government and the Churches. These parties were responsible for running and maintaining the Residential Schools across Canada, which resulted in various abuses being committed against Survivors. Without the Settlement Agreement being accepted by the Courts, it would still be necessary for anyone who attended an Indian Residential School to bring a law suit against the parties, either on their own or by way of a class action law suit. The Settlement Agreement as proposed, is mainly seen as a reasonable compromise, although it is not without its problems. Many people feel that the compensation being offered is simply not enough, while at the same time recognizing that it is likely the best compromise that could be reached considering the length of time that has passed, the various problems in trying to bring these law suits, and the aging population of Survivors.

The first hearing was held in Ontario. This hearing was held before an experienced Judge of the Superior Court of Ontario who has a great deal of experience in dealing with class action law

suits. Much of what he said in his decision was referred to by the Courts which held hearings after the Ontario hearing, and many of his comments were used in those various decisions when they were written by the Judges. The Judge who presided over that hearing was Mr. Justice Winkler.

The Ontario Court recognized many of the findings made by the Royal Commission on Aboriginal Peoples, which stated, among other things, that the plan to assimilate Native children was seriously flawed. The Court also recognized that the settlement would only be effective if all nine Courts approved it on "substantially the same terms and conditions".

After setting out the various components of the Agreement, the Court said that it found the Settlement Agreement was fair and reasonable if the services were delivered in a reasonably quick fashion consistent with the intentions expressed in the Settlement Agreement document. However, it was quick to point out that the Court was not simply there to "rubber stamp" the Agreement, nor was it there to examine how good a deal it was or whether anyone was guilty of anything. Rather, it was to look at the Settlement Agreement to see if it is a fair resolution of the outstanding issues as a compromise, and is "fair, reasonable, and in the best interests" of the Survivors.

The Judge recognized that a Court hearing was not a proper forum to examine the underlying problems which led up to the agreement being negotiated. He also stressed that not reviewing the history of the Residential Schools during the hearing does not diminish the significance of what happened there.

When the hearing started, there were approximately 15,000 ongoing claims, some by way of law suits and some through the Alternative Dispute Resolution Process. To try and resolve these claims, the Honorable Frank Iacobucci (a retired Supreme Court of Canada judge), was appointed as chief negotiator by Canada in May 2005, which resulted in an Agreement in Principle being approved by the Government of Canada on May 10, 2006. This led eventually to the drafting of the Settlement Agreement which was now before the Courts.

The Court's main concern was how the program was going to be administered. The Judge wanted to make sure it was a "manageable" process. He wanted to be very careful that the parties on both sides were making sure that the Agreement could work the way it should.

Because the lawyers on both sides did not present a written management plan detailing how the claims would be handled when they were received, the Judge was not satisfied that it would work the way it should. However, he was satisfied that the Agreement could be approved with some minor changes.

The Judge found that there were four areas which needed to be addressed before he would give unconditional approval. Those were:

1. Administrative deficiencies;
2. Legal fees;
3. The jurisdiction of the Courts;
4. The class definitions.

1. **Administrative Deficiencies**

The Settlement Agreement proposed that the Government of Canada would put the resources in place to process the claims and they would also run the process. The Judge was concerned that there would be a conflict of interest between their role of Administrator and their role as one of the parties to the original law suits. It is necessary that the Administrator of the program be neutral and independent of any concerns the Government may have. The judge decided that the best way to ensure this was to make sure that the person or group supervising the administration of the program reported to and took direction , if necessary, from the Courts, and not the Government.

Since the current Alternative Dispute Resolution Process was costing so much to administer, the Judge was concerned that there would be enough money available to process the claims. The Court did not have enough information before it to be certain of that and could not simply accept that the Government of Canada was committed to funding it as required. The lawyers for both sides urged the Judge to simply accept that the funding would be made available as required, since the language of the Settlement Agreement appeared to provide an assurance that the Government would have to provide whatever is necessary. The Judge wanted more details and certainty that the money would be there. Although the Settlement Agreement stated that a minimum of 2500 claims per year would be processed, he was concerned that this figure would be seen as the maximum number required, and felt that if the numbers could be increased, that should be done. The only way to be sure that that could possibly be achieved would be to provide details of the kinds of administrative issues that must be confirmed in order for the program to take effect properly.

2. **Legal Fees**

The amount of legal fees was seen by some as being very high, but the Judge looked at the fact that because of all the years of work leading up to the Settlement Agreement, the Common Experience Payment was achieved. Since that was a big sticking point for a long time, it was seen as a huge victory for Survivors that the Government and the Churches were not previously willing to agree to. Also, the lawyers involved did all of the work required for years without being paid anything. For some individual lawyers and law firms, this was a very significant financial burden.

The Judge wanted to make sure that unfair legal fees were not being charged for work done under the IAP. So, he is requiring that all lawyers must make full disclosure of all legal fees they are charging, including disbursements and taxes. These fees will be reviewed by the adjudicators handling the claims to make sure they are fair. Since the Government of Canada is adding an additional 15% to any settlement awarded through the IAP, the Court wants to ensure that any additional amounts charged by lawyers is fair.

3. **Jurisdiction of the Courts**

Because there were Courts in nine different areas of Canada making decisions on the Settlement Agreement, it was decided that the parties would prepare written policies to deal with how any

problems which arose would be resolved. This way, it would not be necessary to have a Court in one jurisdiction make a decision that may not be followed in another part of the country.

4. **Class Definitions**

The Judge was concerned that the date of May 30, 2005 was chosen as a "cut off" date for the estates of a deceased Survivor to claim compensation under the CEP portion of the Settlement Agreement. While he did not require any significant change on this issue, he said that the opt-out notice, which would be sent out to let the estates of deceased Survivors know that they could still start independent law suits, must specifically tell them that they would have no rights under the Settlement Agreement should they decide to sue the Government and Churches themselves.

The Judge felt that the recommendations he made for changes to the Settlement Agreement were not too difficult to make. He has given the parties 60 days from the date of his decision, which is until February 15, 2007, to make the changes so that the Settlement Agreement will be fully approved.

Alberta

The decision from the Alberta Court began by pointing out the numbers of people who had started law suits in claims for attendance at Indian Residential Schools. It noted that several test cases were already scheduled to go to trial (dates for trial had already been set) when negotiations for the Settlement Agreement started.

After reviewing the background leading up to the Settlement Agreement being put forward, it focused on the areas it was concerned with. The first issue was legal fees, and the Court analyzed whether it should be involved in ensuring the legal fees were reasonable, in light of the fact that the parties to the Agreement had agreed not to charge fees on the Common Experience Payment and had agreed they would not charge more than a total of 30% of the settlement obtained under the IAP. In the end, it decided that, although the Court must be involved in order to ensure fairness, the legal fees would be approved by the adjudicator who reviewed the claim, not the Court itself. In deciding this, the Court noted that the adjudicators must be lawyers and must have relevant experience in dealing with the kinds of issue which would arise during the claims process. The Court also specifically noted that any claimant could appeal the amount of fees being paid through a court application.

The Court also wanted the parties to establish a plan for assisting CEP claimants through and including appeals since most of those claimants will be doing that part of the claim without legal counsel. Further, it was required that the parties establish a plan for Court supervision and direction for the IAP, to ensure it is working as it is supposed to. Otherwise, the Court had no difficulty with the Settlement Agreement and approved it.

Yukon

The Court in the Yukon, after reviewing the various elements of the agreement, decided to approve the Settlement Agreement unconditionally, retaining supervisory jurisdiction so the parties can return for directions or remedies. This simply means that, if the parties decide that there is an issue that has to be clarified, and they are not able to reach agreement on it themselves, they would be able to return to the Court and have a Judge listen to the problem and make a decision on how it should be interpreted.

There is no class action legislation in the Yukon. Many provinces across the country have specific laws that deal with the issue of starting class action law suits on behalf of numerous people who are in the same position with the same issues. Despite the fact that this legislation does not exist in the Yukon, the Court felt that the agreement was a compromise, which allows a resolution of all the issues, and that it had the power to proceed and approve the settlement if it felt that it was appropriate.

Similar to several other Courts, the main concern of the Yukon Court was how the IAP was going to be administered. However, it felt that, since Canada had committed to provide the funding which would enable it to administer the program, with no maximum amount being fixed, there would not be a problem in making sure the program worked as intended. This finding was in contrast to some of the other provinces, which decided that they would need to follow the procedure more closely to make sure that all of the resources were in place to make sure the program worked as intended.

While most of the decision from this Court centered on an analysis of the various parts of the agreement, and the law behind how such an agreement should be viewed and approved, it essentially adopted the agreement as it was drafted and approved it without difficulty.

British Columbia

The Judge in the British Columbia Court reviewed the decisions from Ontario, Alberta, and Saskatchewan and agreed with the reasons and analysis of the Settlement Agreement. The hearing there took five days, and more than eighty objectors spoke to the Court. The Court felt that there were several good reasons to approve the Settlement Agreement, such as the existence of the opt-out provision, which would allow anyone who did not agree with the Settlement Agreement to sue the Government and Churches for compensation on their own. The fact that the CEP is available is also significant, since no harm must be proven to get it; a claimant only needs to show that he or she attended the school. This would not be the case if a claim was taken to trial in a normal law suit situation.

The Judge did agree that there should be an independent supervisor to administer the settlement process. It should not be done by the Government of Canada, which is what the Settlement Agreement contemplates. This is to ensure that it is handled fairly and without conflict.

While the Court approved the legal fees (for the work done by lawyers up to this point in negotiating the Settlement Agreement) as outlined in the Settlement Agreement, the Judge made

it clear, in British Columbia, legal fees are not normally part of the Settlement Agreement in a class action. They are usually settled by way of separate applications before the Court, rather than having them tied into the remaining terms of any Settlement Agreement.

Since all of the lawyers who signed the settlement agreed that they would not charge more than 15% for legal fees over and above the 15% the Government is paying for work done through the IAP (meaning a maximum of 30% on any settlement), the Court said that 30% would only be acceptable in cases where there was an exceptional amount of work to be done in advancing the claim, or that the issues were particularly complex.

The Court noted that one of the problems with the CEP process was that some records of attendance at an IRS were lost or destroyed, delaying claims. The lawyers involved in the hearing are going to report back to advise the Court how they propose to fix these problems so people whose records haven't been found will be able to make their claims.

Another area of concern was that many people complained that they did not receive notice of the hearing before the Court. There is going to be a further meeting of the parties involved to review the "Phase Two Notice", that is to be sent out advising Survivors what is taking place next and how they can make their claims. This is to, hopefully, ensure that the notices are sent out to the right numbers of people and the areas where they would most likely be found.

While the Court stated it did not have the power to order the Government of Canada to apologize, it urged the lawyers for the Government to ask the Prime Minister to give a full and unequivocal apology on behalf of the people of Canada in the House of Commons.

In concluding his remarks, the Judge approved the Settlement Agreement as long as the administrative deficiencies could be fixed. The final order of the Court would then be issued.

Northwest Territories

This Court began its review of the application to certify the class action and approve the Settlement Agreement by quoting from the written report from the Royal Commission on Aboriginal Peoples and from the Federal Government's written Statement of Reconciliation from 1998, wherein it apologized for its role in damaging Aboriginal culture and values and stated that it was remarkable that Aboriginal people have been able to maintain their historic diversity and identity.

While agreeing that the $10,000/$3000 CEP is insufficient compensation, the Court recognized what most of the people who appeared for the hearing stated: It was the best that they would likely ever see and was a fair compromise.

Similar to some of the other jurisdictions, there is no law in place to certify class actions, but the Court determined that it had the power to do so through its own Rules of Court. The Court did not spend additional time reviewing all of the details of the Settlement Agreement because it stated it was prepared to approve it without conditions.

Quebec

The decision from this Court was by far the shortest in length and basically agreed with the Ontario and B.C. Judges. The Court had reviewed the reasons given by the Judges in Ontario and British Columbia, and stated that it agreed with the conclusion reached by Justice Winkler in Ontario, specifically. He pointed out the problems that the claimants would have in trying to pursue their claims through a trial process.

Nunavut

As in the other jurisdictions in Canada, the Nunavut Court was asked to do two things: 1) Certify the litigation (law suit) as a class action; and 2) Approve the Settlement Agreement being proposed. While Nunavut, like some of the other jurisdictions in Canada, does not have a specific law allowing class actions, the Court determined it had the power to do both in any event. Significantly, it reviewed the difficulties the claimants would face if they were forced to take their cases to trial. The Judge stated, quite clearly, that there were significant legal risks being faced by the different claimants and that there were many advantages to trying to settle the claim. One of the biggest problems for claimants in Nunavut would be the very high cost of litigation because of travel difficulties and limited judicial resources. He went as far as to say that it was quite conceivable that the costs could easily be more than any settlement received by individual claimants in some cases.

The Court reviewed the problems with the Agreement identified by the other Judges, such as lack of a detailed financial plan for implementation of the programs, a separate supervisory board to administer the IAP, absence of a plan for reviewing legal fees and the amount of legal fees chargeable. However, it felt that these were not problems significant enough to only give conditional approval to the Agreement and possibly cause more delay. This Court, like many others, was extremely sensitive to the fact that Survivors were part of an aging population and had waited a significant period of time already to see some kind of compensation awarded as a result of the years of abuse suffered.

Although it reviewed the various problems identified by the other Courts, and did so in some detail, it was of the view that further Court intervention was not necessary. It therefore approved the settlement unconditionally.

Saskatchewan

The Saskatchewan Court reviewed the decisions of several other Courts, and specifically said that it agreed with, and adopted, the decisions of the Ontario Court.

The Court recognized that the May 30, 2005 "cut-off" date, was apparently arbitrary, or chosen without an obvious reason. However, similar to other Courts, the Judge was only able to state that it must be clearly communicated to the estates of the members of the Survivor Class who died before that date, that they must opt-out of the Settlement Agreement or their rights to sue the Government and Churches will disappear.

There is also a group of former Residential Schools students at Ile-a-la-Crosse who are pursuing a separate proposed class action. They objected to being excluded from the Settlement Agreement. The Judge recognized this as significant, but ruled that it was part of the compromise and should not stop the approval of the Settlement Agreement as written.

While recognizing that if he only approved the Settlement Agreement on certain conditions, as other jurisdictions did, there may be more delays, the Judge felt that the program had to be done correctly from the beginning so that Survivors could be assured that their claims would be dealt with as promised.

The most detailed part of the Saskatchewan Court's decision was regarding the legal fees to be paid to the Merchant Law Group ("MLG"), which claims to represent over 10,000 individual Survivors. This, as the Court pointed out, has yet to be verified, and is the subject of significant concern. The reason for the extensive focus on this issue was because, during the hearing, the Government and MLG had a different understanding of how much MLG would be paid and how the proper amount of legal fees would be determined. Despite this disagreement, they both wanted the Court to approve the Settlement Agreement without further delay. The main problem which gave rise to the disagreement between the Government and MLG was surrounding whether MLG should receive forty million dollars as payment for its role in reaching the Settlement Agreement, or fees which will be dependent on how much work MLG could show they had done. In the end, the Court determined that the fees payable to MLG would be somewhere between twenty five million and forty million dollars, depending on the documents it was able to provide regarding the work it had done and the number of clients it represented.

This issue is currently under appeal by both the Government of Canada and MLG and it appears that it will cause further delays in the compensation program as a whole. The Government is urging the Courts to take the view that the Settlement Agreement will not be delayed as a result of this appeal. However, the MLG is making it widely known that this appeal will cause a delay for the entire settlement process. The Courts will have to make a determination on this issue, but it is clearly causing some uncertainty across the country regarding when the program will be implemented.

In conclusion, the Saskatchewan Court approved the Settlement Agreement in its entirety subject to it receiving satisfactory assurances that some of the problems it had identified would be addressed.

Final Summary of the Status of the Agreement

Upon review of all of the Court decisions across the country, it is clear that all of the Courts feel that the Settlement Agreement is fair and reasonable and should form the basis of the Settlement program moving forward. However, this can only be accomplished once the concerns of several of the Courts have been addressed, such that they are confident that the program will be implemented as required, and it will be done in a fair fashion. It appears that those issues must be clarified within 60 days of the Court's decision in Ontario, which is by February 15, 2007. Once full approval has been given, the five month opt-out period will begin to run in order to allow all potential claimants to decide whether or not they wish to be governed by the Settlement Agreement, or whether they wish to sue independently. This period is required by law under

class action legislation, so it is certain that all members of the classes covered by the Settlement Agreement have the opportunity to decide whether or not they wish to take part in the Settlement as proposed. It will cause delays which no one wants to see take place, especially given the aging population, and the length of time it has taken to reach this point. However, it is a safeguard that is put in place to make sure that everyone is protected in their rights to respond to what is being proposed.

If the opt-out period concludes without at least 5000 Survivors deciding to withdraw from the Settlement Agreement, the program should move forward as planned. At that point, the Government will be providing notice through various forms of media regarding how claims can be made, and how the appropriate forms can be accessed. It is anticipated that the Common Experience Payments will be dealt with first, but individual claims through the Independent Assessment Program should be in the preparation stages so that the claims under this portion of the Agreement can be moved forward as quickly as possible. There will most likely be a huge volume of claims made and submitted during a short period of time, so there will be a back log of claims.

For regular updates on what is taking place, it will be very helpful for people to refer to the website which has been set up by the Government of Canada for that purpose. You can check by logging onto www.residentialschoolsettlement.ca to receive updates, and to review all of the documents which form part of the Settlement Agreement. There are also contact telephone numbers which can be called to ask questions.