September 12, 2006

Atlantic Policy Congress
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Re: Class Action Certification Hearing - Toronto

The Atlantic Policy Congress and Mike Taylor of Presse Mason and Associates from Halifax, Nova Scotia attended the Certification Hearing in Toronto on August 29th, 30th and 31st, 2006. Since we had decided that the most appropriate way for the APC to deal with this matter was to not make formal objections, we attended essentially as an observer to monitor the hearing and report back regarding the issues that were discussed throughout the proceedings. The hearings were held at the Superior Court of Justice in Toronto and commenced at 10:00 am on Tuesday August 29th, 2006. The bulk of the presentations made to the court were made by Kirk Baert, who was representing the plaintiff's lawyers. He is a lawyer for the Cloud Class Action survivors. He began by setting out the agenda that he would be following during the hearing over the next three days.

Mr. Baert's presentation began by going through all of the terms of the settlement agreement. His focus was on four aspects of the agreement. Those were:

1. CEP;
2. Funding for survivors and relatives for programs related to Healing and Commemoration;
3. IAP; and
4. Truth and Reconciliation Commission.

1. **CEP**

1.9 billion dollars had been committed to this aspect of the program and would be increased if not enough to cover all of the individual claims. The Judge questioned Mr. Baert on the term in the agreement that stated that "best efforts" would be used to ensure that the full CEP can be kept.

It was explained that the Federal Government has been negotiating with the Provinces to ensure that amounts received under the CEP would not be "clawed back" from those on government assistance, i.e. that they can keep the entire amount, rather than lose that amount for welfare, etc.

Since Provincial Governments deal with Social Assistance Programs, the Federal Government can not control how that is handled. Most Provinces have responded positively, so that those in receipt of Assistance will not have to pay back the Provincial Government the amount that they receive on the CEP which is over what they are entitled to on Assistance.

It was also explained that if all of the money set aside for the CEP was not used up it would be distributed according to a formula. If the surplus was less than $40,000,000.00 it would go into some of the programs being set up. If it was more than $40,000,000.00 it would be distributed evenly among the Survivors, to a maximum of $3,000.00 each. In any event, the surplus would not simply go back to the Government.

Applications for the CEP can be made up to four years after the Implementation Date of the Agreement. That date is determined by a formula set out in the Agreement. It will be after all possible appeals have been completed. The court was advised that they can expect approximately 80,000.00 claims for the CEP. The Agreement states that applications will be processed, and a decision rendered within 60 days of the application, and that payment should be made within 35 days of the decision.

2. **IAP**

Since the ADR process was flawed, the new IAP was developed. If the CEP claim is accepted, Survivors and can go through the IAP to make claims for various forms of abuse suffered. If a Settlement is reached the Survivor must sign a Release in favour of Canada and the Church Organizations. The plan is to hold up to 2500 hearings per year to process all claims, and it is expected that <u>all</u> claims will be completed within six years of the Implementation date. The process will be supervised by the Courts and the Courts can intervene to Order the government to commit more resources to make sure that the process is working and can be completed as stated.

* This issue was a subject of lengthy debate between the Judge and the lawyers involved. The Judge has serious concerns about how the Agreement was worded to give the Courts the power to step in if there is a problem in getting claims processed. Although it states that Canada can be Ordered to commit resources, that process would take time, if it was required. It would mean further delays for people who have already waited a very long time to get this matter settled.

The response from the lawyers for both the Survivors and Government was that they were confident that it would work. This wasn't quite satisfactory to Justice Winkler. He wanted to hear some specifics to satisfy him that there were enough resources in place <u>now</u> to make the process work. A lot of time was spent talking in circles on this issue but Justice Winkler's point was clear: You may feel that everything is set to work properly, but you have to be able to convince me before I will sign the Order that you want.

Justice Winkler was being very protective of the right of the Survivors, and made it clear that he wasn't there to "rubber stamp" the agreement. He was not going to be satisfied by a bunch of lawyers telling him that it would all work out, without some proof. At this point in the Hearing, it

was agreed that they would come back to this issue when more specific information on resources was available.

At one point during the discussion, Paul Vickery, the lawyer for the Government of Canada, suggested that the Judge make a proposal as to how his concerns could be met. We were unsure as to whether this meant that he was inviting the Judge to make changes to the agreement. Paul Vickery explained that he was mainly asking the Judge what type of information he would like to hear about. He also advised that they were putting the details together for the end of the hearing. (You may recall that we were given a clear indication that the agreement could not be changed during this hearing process. That is the reason that we felt we should clarify with Mr. Vickery exactly what his point was when he invited the Judge to make suggestions.)

Next, Mr. Baert went over some of the Affidavits that were in the Court Brief. These Affidavits were from other parties (mainly lawyers) who had been involved in this and other Class Action Proceedings before, talking about prior experiences and why this one would be better. Again, Justice Winkler said that he really wasn't interested in comparisons with other processes, or with opinions that this process will work. At one point he said "it is a simple question, what are the resources?"

Setting aside the question of resources for the time being, they went over how the deal would work. There are standardized levels of compensation up to a maximum of $275,000.00 under the IAP (not including claims for loss of income and special losses). There are more harms which can be claimed for than under the earlier ADR process, such as claims alleging that <u>any</u> adult who was on the school premises with consent of the school administrators, abused a student in any way. A claim for up to $250,000.00 could be advanced for loss of income, with a possibility that it could be unlimited if the claim was referred to an Adjudicator for further determination.

At this point the question of additional funding came up. The Judge had concerns about the jurisdiction of the Court to order that. He was mainly concerned with whether an individual Court could order it, or whether it would take all nine Courts in the various Provinces to agree before it could be ordered. They spent some time on this issue and the Judge is clearly worried whether the Agreement, as written, will give enough power to the Courts in each Region to make the changes required. Ultimately, this is an issue that Justice Winkler is going to have to reconcile on his own. I don't think that the lawyers were able to clearly settle it for him during the hearing.

There is a Point System in the Compensation Rules. Essentially, points are assigned for various acts of physical, sexual, or emotional harms experienced by students. The points are totaled and the amount of compensation awarded depends on how many points have been assigned as a result of the Survivor's overall experience.

The Standard of Proof used to decide a claim, if it goes to a hearing, is the same that is used in a civil claim. That is, proof on a Balance of Probabilities. This simply means that the decision maker must be satisfied that it is more likely than not that the allegation is true. However, the

more serious the allegation, the more cogent, or compelling the evidence must be to satisfy the decision maker.

Decisions that are being made by Adjudicators are to be provided in writing within 30 days for “Standard Track” hearings and within 45 days for the more complex hearings. Any decision made by an Adjudicator may be appealed to the Chief Adjudicator. This is only to determine whether some kind of error was made by the Adjudicator at the initial hearing. It is not done to see if a different Adjudicator will give a better award.

The Court was then advised on how the Adjudicators would be chosen, and roughly how many were already in place. Essentially, anyone applying to be an Adjudicator had to meet a long list of qualifications to be chosen. These were made up of experience in legal and non legal situations which are considered important for Adjudicators to have in order to do an effective job.

There was next a brief overview of the Application form and how it was to be completed, where it could be obtained, and how it was designed to be “user friendly”. What is also mentioned in the IAP manual is that Health Canada would be available to assist with support for Survivors through this process.

The final part of the presentation on the IAP dealt with issues surrounding the funding for the IAP. It was stressed that the Agreement required that there be “full and timely implementation” of the process so that the Court could be comfortable with the statement that enough funding would be available to make it work. Once again, Justice Winkler questioned Mr. Baert on problems that could arise in interpretation of the Agreement. For example, he wanted to know if “implementation” of the Agreement was meant to mean the same as “completion” of the process. He wasn’t really challenging on that point but was making the point that some of the language in the Agreement was not as clear as he would like to see it.

The final two items covered under the Terms of Settlement were the Truth and Reconciliation and Commemoration. There is $60,000,000.00 allocated for the Truth and Reconciliation commission to embark on a program of recognition of harms done to Survivors and application of programs to recognize and acknowledge the past injustices and move towards helping the Survivors and other parties in a culturally sensitive and safe manner.

There has been $20,000,000.00 committed for both National and Community based memorial and commemorative projects. There is an additional $120,000,000.00 to be provided to the Aboriginal Healing Foundation. This will include the creation and improvement of memorials, as well as honoring, educating, and paying tribute to former students, their families and their communities. There will also be acknowledgment that there has been a systemic impact created by the residential school system.

There was then an overview of the four main Church groups involved and their respective contributions to the funds making up the Agreement total.

The Court was then told about the role of the National Administration Committee in assuring that the Settlement Agreement is administered properly and that any disputes that arise during the process are dealt with in a timely and fair manner. The Committee has been described as "Plaintiff Friendly", since most of it's members are lawyers who have been involved in putting the Agreement together on behalf of Survivors.

The next topic of discussion was legal fees. There is a formula in place for payment to all of the lawyers involved in negotiating the Settlement Agreement. The Judge had some questions about payment of fees for the IAP. One thing that he mentioned was that the Agreement does not prevent Survivors from being charged a fee even if their claim is not successful. It was quickly pointed out that there is an overwhelming expectation that lawyers will be doing all work on a Contingency Fee basis, so there is no financial risk to Survivors.

He was particularly concerned that the $8,000.00 Advance be protected from any claims to have it spent on legal fees. It was highlighted that the advance payments were for CEP and not subject to legal fees by any of the parties signing the Agreement. It was also confirmed that any advances would not have to be paid back if the deal falls apart.

(As an aside, It should be pointed out that, even if a lawyer was not a signatory to the Agreement, he or she would not be welcomed by Survivors if they were told that they were going to be charged fees on the CEP. It is allowable, since these lawyers were not part of the group that negotiated the Agreement but I can't imagine anyone trying to do it.)

Approval of Agreement

There was a clause in the Agreement that says that it is not effective until approved by all courts in "substantially the same terms". The Judge wanted clarification on this phrase, and it seemed that his interpretation raised some concerns in his mind about whether the individual courts had to agree to all the terms as set out, or whether there was some room for a slight adjustment. This is something that he is going to have to give more thought to on his own.

Proposed Orders

Next the Proposed Orders were discussed. As part of this Certification Hearing, the parties submitted draft orders that they wanted signed to give effect to the Agreement to make it binding on everyone.

One of the immediate questions that the Judge had was how the different Class Members were differentiated. He was provided with details of how the different Actions came about and how they were all joined in the process that we now have.

Day 2 of the hearing started off with lengthy discussions over the decision making power of the Courts in each jurisdiction and how differences of opinion between/among court might be

resolved to give effect to the Agreement. **This** was the single biggest problem that the Judge had with the Agreement, as I see it. He is very concerned about the problem of an Order from one Court not being enforceable in another area of the Country with the result that some Survivors will be treated differently, according to where they live. He suggested that the only way that it could work is if one court takes the lead for all. This is not contemplated by the Agreement.

One specific problem which the Judge identified was dealing with funding for the program. If a Court in one jurisdiction ordered that the Government provide more money to make the process work, it appears that all Courts in the Country would have to make the same Order to make it mandatory that they do so. He felt that this could be impossible, since it would be very difficult to get nine Courts to agree on any one issue.

Certification of the Class Action

The next proposed issue was the discussion of the certification of the Action. That is the test that the Court needs to apply to the decision of whether or not to agree to certify. Since Justice Winkler is very experienced in the area of Class Actions - probably more than most Judges in the Country (he headed up the Walkerton tainted water case, and the hepatitis C case), he advised counsel that he didn't need to hear much on that issue. What he did want to hear about was the manageability of the program. That is, the nuts and bolts of how it was going to be run, how many people were in place, the resources already committed to it, etc.

The lead Government lawyer, Paul Vickery, advised that he would been speaking more on that the next day, since they were still gathering information on it. The Judge then set out a list of issues that he wanted to hear more details on, so that they could focus on the things that he saw as potential deal killers.

Mr. Baert provided some statistics for the Court as well. He advised that 1.9 billion dollars was being set aside for the CEP, and that it was to go to compensate for an average attendance of 4 to 5 years. This means that the average CEP will be approximately $22,000.00. There were 172 formal Objections filed across the Country, with 41 coming from Ontario, and the largest number coming from B.C.. Justice Winkler made a good point that it wasn't the number of objections that were important rather it was the substance of the objections.

It was pointed out that many of the objectors stated that the Agreement could be better in someway but that was not the test. This test is whether the overall Agreement is in the "realm of reasonableness", not whether it is fair to one group or another. This test clearly creates a problem for one of our main issues: that is that the cut off date for different Class members is different.

When it was pointed out to the Judge that most of the Family Class members felt that the Agreement was fair, he said that that simply highlighted the fact that people had high expectations that the process would work, so his need to be satisfied was justified. In fact he stated " I have to be satisfied that their expectation is well founded".

Justice Winkler brought up another issue regarding legal fees. He pointed out that there was nothing to regulate these charged by individual lawyers. He suggested that perhaps the Adjudicator could fix the fees, as part of the Hearing process, if there is one (keep in mind that the Claims could be settled without a Hearing if the award is acceptable to the Survivor). Counsel agreed that this was an issue that they would discuss but it seems like an odd way to do it.

Deceased Class Issue

The “cut off” date was up next. Justice Winkler pointed out that the issue was why the May 30, 2005 date was selected. The response was that this was the date that the Political Accord was signed. While Justice Winkler did not seem overly impressed with that explanation, he did not ask any further questions about it, or express any concerns regarding the different dates being applied to different class members.

In justifying the cut off date, it was pointed out that in all but four of the Provinces of Canada the deceased would have no claim at all. Once a person dies, their claim for damages dies with them. Since most Survivors are in Alberta, Manitoba and Saskatchewan where there is no right for a claim of a deceased person to continue, the majority of Survivors would lose out. By setting a date, it was a way of allowing many to benefit from the Agreement who would not be able to otherwise.

One of the practical problems pointed out by counsel was that treating the Deceased Class the same as the living Survivors would have had a huge impact on the amount of money available to the living claimants, since the same amount set aside would simply be divided among more people.

There was then a relatively short discussion on how the different groups of lawyers were being paid and the amount of time that they put in to reach this point in the process. Some of the Survivors had already launched lawsuits, or were prepared for trial. Some cases had gone to the Supreme Court of Canada. Therefore, some of the lawyers involved did most of the work and will get the major share of the money set aside. For example, $40,000,000.00 has been set aside for the National Consortium group of Lawyers, and it is expected that a few of the law firms involved may receive in the range of $15,000,000.00 out of that total. The rest would be divided according to a formula that the remaining group has agreed upon.
The second half of day two started off with various lawyers for different groups of Plaintiffs explaining their involvement, plus John Phillips for the AFN and the lawyers for the various Church organizations.

The last speaker of the day was a lawyer representing 10 Plaintiff’s from Pelican Cove, who had their own lawsuits ongoing. Her concern was that Survivors who were still before the Courts and who hadn’t become part of the draft settlement Agreement were only getting a maximum of $4,000.00 towards their legal fees covered. She insisted that they were not being treated fairly, and were actually being penalized because they chose to continue their claims. However, it was

pointed out that she had been asked numerous times to join the group, but chose not to, and it was too late to complain after she made a conscious decision to advise her clients to go their own way.

Day 3 started with individual objectors coming forward. This was by far the most emotional part of the hearing. Here is a list of the various objections:

1. Applicable Schools

There are some run by Mennonite groups which were not recognized. It appears that the abuses suffered there were the same as at other schools.

2. The cut off date of May 30, 2005 works a hardship for families whose loved ones passed away before then, and can't have their claims submitted on their behalf.

3. Not enough information was made available and much of what was was not accurate. Many people simply didn't know what was happening with the process.

4. Records are missing for many Survivors. They put in claims only to be told that there was no record that they ever attended a Residential School.

5. Lack of consultation with Survivors in putting the Agreement together.

6. More money should be made available.

7. Fear that the money made available for Healing will be eaten up by Band counsels, Friendship centers, personal expenses and false accounting.

8. Loss of opportunity for family members affected by parents attending Residential Schools. The effects are inter-generational.

9. Potential violation of international human rights by having to sign waivers for claims such as cultural genocide.

10. The IAP "point system" is degrading.

11. No opportunity to confront abusers.

12. Unfairness of the opt out period.

13. A lack of recognition of difference between "Survivor" and "School Attendee".

14. Healing dollars seem to be an afterthought.

15. Not all types of grievances are being addressed. Examples are injuries that were sustained that should have led to claims at the time that they happened, and such injuries due to negligence (example slip and fall accidents).

16. Family members of children who died in Residential Schools are not compensated, nor were those children even recognized as being in attendance.

17. Cloud Class Members were not allowed to opt out. This was later addressed and counsel agreed that this would be changed, to allow them to opt out if they wish to.

Next, Paul Vickery presented an Affidavit outlining the resources already in place to run the program. He pointed out that until the Agreement is certified, they <u>can't</u> go out and rent offices, lease equipment, etc.. But he stressed that the money was available to do it.

Once again the issue of legal fees was addressed. Justice Winkler was concerned that the CEP would be used for fees. The national consortium lawyers agreed that they would not use it directly or indirectly for fees. As far as the concern that an unfair percentage (for Contingency Fees) would be charged for the IAP, the different Provinces have mechanisms to control that. Paul Vickery suggested that government could put a 1-800 number in effect for people to call with concerns regarding legal fees.

Justice Winkler was concerned for people with disabilities who might have to attend a hearing. He felt that someone confined to their home should not have to come to a hearing; perhaps it should go to them. Mr. Baert said that counsel would address this and advise him before the Quebec Hearing.

Next was the presentation by Tony Merchant on behalf of the Merchant Law Group. He started off by essentially criticizing the Agreement, which was a cause for confusion for me, as well as others, as it turned out. Paul Vickery actually interrupted to ask which side he was on. His presentation was supposed to be how his fees were to be determined.

The Merchant Law Group claims to represent some 8,000 plus Survivors. However, these numbers have not been confirmed. He also pointed out that his firm will (only) take 15% of the Survivors settlement (on top of the 15% paid by the Government). This means a total of 30%. He pointed out that the standard for Contingency Fees in (Western Canada) is 35-40%.

He was clearly concerned with the amount that he would receive, because the Agreement in Principal stated that he would get $40,000,000.00. The proposed settlement Agreement contains a formula to determine how much he would get, with a maximum of $40,000,000.00 and a minimum of $25,000,000.00. He wanted something more concrete in place.

To conclude, it appeared that Justice Winkler was definitely taking the concerns of the Survivors to heart. He obviously was being as diligent as possible in pursuing questions that were designed to ensure that the most important issues were dealt with, and that the rights of the Survivors were protected. It appeared that many of the people in attendance agreed with quite a bit of what he said. I suspect that he gave a great deal of comfort to those in attendance who were concerned that the court process would simply be an opportunity for the Courts to put on a show and rubber stamp the Agreement for the Government and the lawyers who were involved in negotiating the Settlement Agreement. We certainly got the sense that the objections being made by the various people in attendance where going to be taken very seriously.

If you have any specific concerns or questions about individual aspects of the Hearing, let me know and I will attempt to address them as needed.
Sincerely,

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