

CANADA / JUDGMENT

Brandon v. Canada

2025 FC 443

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Brandon v. Canada

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T-805-24

Decision Content

Date: 20250310

Docket: T-805-24

Citation: 2025 FC 443

Vancouver, British Columbia, March 10, 2025

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

MATTHEW BRANDON (THROUGH HIS LITIGATION GUARDIAN CHRIS GARDINER)

Plaintiff

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

I. Introduction [1] This is a motion to strike the Plaintiff's Statement of Claim (the "Claim") without leave to amend. The motion is brought by the Defendant, His Majesty the King in right of Canada ("Canada") pursuant to Rule 221 of the Federal Courts Rules, SOR/98-106 [Rules].

[2] Canada asks that the Claim be struck in its entirety because it discloses no reasonable cause of action and because it is barred by the Indian Residential Schools Settlement Agreement's release.

[3] For the reasons that follow, the motion is granted, and the Claim is hereby struck without leave to amend.

II. Background A. The Plaintiff [4] The Plaintiff, Matthew Brandon, is of First Nation ancestry. He was born on June 21, 1991, to two Residential School survivors. At a young age, Matthew Brandon suffered physical abuse by his father that caused brain damage and left him with an intellectual disability, delirium static encephalopathy, cerebral palsy, and dysarthria.

[5] At 18 months of age, Matthew Brandon was apprehended by the Saskatchewan Ministry of Social Services and became a permanent ward of the Ministry. After he was apprehended, he was placed in more than nine different placements. In 2002, he returned to his current foster parents and has been under their care ever since.

B. The Indian Residential Schools Settlement Agreement [6] The devastating harms of residential schools – both direct and intergenerational – on survivors, their families, and all Indigenous peoples are undeniable. As the Supreme Court explained in *Canada (Attorney General) v Fontaine*, 2017 SCC 47 at paragraph 1:

From the 1860s to the 1990s, more than 150,000 First Nations, Inuit, and Métis children were required to attend Indian Residential Schools operated by religious organizations and funded by the Government of Canada. As Canada has acknowledged, this system was intended to "remove and isolate children from the influence of their homes, families, traditions and culture" ("Statement of Apology to former students of Indian Residential Schools" of the Right Honourable Stephen Harper on behalf of Canada, June 11, 2008 (online)). Thousands of these children were abused physically, emotionally, and sexually while at residential schools.

[7] In 2006, Canada entered into the Indian Residential Schools Settlement Agreement ("IRSSA"). The IRSSA made individual compensation available to all persons who resided at Residential Schools through the Common Experience Payment ("CEP"). The IRSSA also created the Independent Assessment Process, which provided additional compensation for those that suffered physical and sexual abuse.

[8] The IRSSA also included three initiatives designed to address the broader historical and future concerns of the IRSSA class members, their families, and their communities at large (Baxter v Canada (Attorney General), 83 OR (3d) 481, 2006 CanLII 41673 (ONSC) [Baxter] at para 14). The IRSSA created the Truth and Reconciliation Commission, provided an endowment to the Aboriginal Healing Foundation to support the healing needs of Indigenous people affected by the legacy of Indian Residential Schools, including intergenerational impacts, and gave an additional \$20 million for commemorative projects.

[9] The IRSSA expressly binds all “Class Members”, defined as:

Each and every person

Who, at anytime prior to December 31, 1997, resided at an Indian Residential School in Canada; or

Who is a parent, child, grandparent, grandchild, sibling or spouse of a person who, at anytime prior to December 31, 1997, resided at an Indian Residential School in Canada.

[10] The IRSSA, including its release, has been approved and incorporated by reference into the orders of nine Superior Courts across Canada (Baxter; Bosum c Canada (Attorney General), 2006 QCCS 5794; Fontaine v Canada (Attorney General), 2006 NUCJ 24; Fontaine et al v Canada et al, 2006 YKSC 63; Kuptana v Canada (Attorney General), 2007 NWTSC 1; Northwest v Canada (Attorney General), 2006 ABQB 902; Quatell v Attorney General of Canada, 2006 BCSC 1840; Semple et al v The Attorney General of Canada et al, 2006 MBQB 285; Sparvier v Canada (Attorney General), 2006 SKQB 533).

[11] The release includes the following clause:

11.01 Class Member and Cloud Class Member Releases

- (1) The Approval Orders will declare that in the case of Class Members and Cloud Class Members:
 - a) Each Class Member and Cloud Class Member has fully, finally and forever released each of the Releasees from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including for damages, contribution, indemnity, costs, expenses and interest which any such Class Member or Cloud Class Member ever had, now has, or may hereafter have, directly or indirectly arising from or in any way relating to or by way of any subrogated or assigned right or otherwise in relation to an Indian Residential School or the operation of Indian Residential Schools and this release includes any such claim made or that could have been made in any proceeding including the Class Actions or the Cloud Class Action whether asserted directly by the Class Member or Cloud Class Member or by any other person, group or legal entity on behalf of or as representative for the Class Member or Cloud Class Member.

[12] As counsel for Canada stated at the hearing, IRSSA was an early first step towards reconciliation with Indigenous peoples. Indeed, since the IRSSA, there have also been other class action settlement agreements relating to Residential Schools. In *McLean v Canada*, 2019 FC 1075, the Federal Court approved a settlement agreement for students that attended Indian Day Schools. More recently, the Court approved a settlement agreement for students who attended Residential Schools during the day across Canada (*Tk'emlúps te Secwépemc First Nation v Canada*, 2021 FC 988) and for the reparations for the destruction of language and culture suffered by those who attended Residential Schools as Day Scholars (*Tk'emlúps te Secwépemc First Nation v Canada*, 2023 FC 327).

C. Plaintiff's Statement of Claim [13] The Plaintiff filed the Claim on April 2, 2024, as a proposed class proceeding on behalf of the children of Residential School survivors who were alive anytime between February 28, 2022, and the date of certification ("Proposed Class Members").

[14] The Claim states that the Plaintiff suffers from physical and intellectual disabilities caused by the severe physical abuse of his father, who had attended a Residential School. The Claim asserts that the harm caused to the Plaintiff and the class is rooted in the wrongs of the Residential School system.

[15] The Claim makes reference to a number of pieces of legislation and/or potential causes of action, including:

common law duties and "systemic negligence";

fiduciary duty;

the Canadian Charter of Rights and Freedoms, ss 7 and 12, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. RSQ c C-12 [Charter];

the Québec Charter of Human Rights and Freedoms, CQLR c C-12, s 4;

the Canadian Human Rights Act, RSC 1985, c H-6, ss 2 and 3(1); and

genocide and crimes against humanity.

[16] In the Claim, the Plaintiff seeks multiple interlocutory and mandatory orders, general damages, aggravated damages, special damages, punitive damages of \$500 million, exemplary damages, damages on an aggregated basis, plus interest, legal costs of the action, and costs of administering a plan of distribution of the recovery in the action.

D. The Amended Statement of Claim [17] On October 23, 2024, the Court ordered the Plaintiff to provide a written response to the perceived deficiencies in the Claim identified by Canada and to provide any proposed Amended Statement of Claim by November 25, 2024. No Amended Statement of Claim was filed by that date.

[18] In response to this motion to strike, the Plaintiff filed an Amended Statement of Claim (“Proposed Amended Claim”) dated February 5, 2025. The Proposed Amended Claim limits the alleged causes of action to the tort of negligence and limits the requests for relief to compensatory and aggravated damages, punitive damages, and interest.

[19] The Proposed Amended Claim states that Canada owed Second-Generation Residential School Survivors a duty of care to teach their parents, Residential School survivors, with necessary life skills to function as peaceful and well-functioning adults in Canadian society upon their release. Canada breached this duty by releasing Residential School survivors from their control without preparing them to be responsible parents, and with the knowledge that they already were and likely to continue causing harm to others, including their own children. The harms suffered by the Plaintiff and others, which include psychological conditions, intergenerational trauma, physical harm, loss of income and financial independence, loss of enjoyment of life and special damages, losses and expenses for medical treatment, were reasonably foreseeable and a proximate consequence of Canada’s breach of its duty of care to Second-Generation Residential School survivors.

III. Issues [20] The issue is whether it is plain and obvious that the initial Statement of Claim, and a subsequent Amended Statement of Claim, which is discussed further below, disclose no reasonable cause of action, or that the Claim has no reasonable prospect of success.

[21] As discussed at the hearing, the determinative issue on this motion is whether the Claim is barred by the IRSSA release. In deciding this issue, I must resolve the following sub-issues raised:

Does the IRSSA bind the Proposed Class Members?

Can the Court consider the IRSSA release on this motion to strike?

IV. Preliminary Issue [22] The Plaintiff argues that the Defendant’s motion to strike is moot in light of their Proposed Amended Claim, filed in response to the Defendant’s motion. The Plaintiff asserts that he may amend the Claim “as a right” anytime before a defence is filed, and that this Court should accept the Proposed Amended Claim and render the motion to strike moot (citing to 806700 Ontario Inc v Khan, 2018 ONSC 6364 at paras 44-45 and Vale Canada Limited v Solway Investment Group Limited, 2021 ONSC 7562 at paras 51-52).

[23] As indicated in an Oral Direction by Associate Judge Ring dated February 10, 2025, and discussed during the hearing, the Federal Court’s practice regarding a motion to strike, and particularly, the interplay between Rules 200 and 221 of the Rules, differs from that of motions to strike in provincial courts. In the Federal Court, a moving party’s rights cannot be defeated by a subsequent step taken by the other party, including on a motion to strike (Verma v Canada, 2006 FC 1353 [Verma] at para 14; Rickard v Canada, 2024 FC 1915 at paras 6-7).

- [24] Accordingly, and contrary to the Plaintiff's assertions, this Court is not obliged to accept the Plaintiff's Amended Statement of Claim, but may accept it, where leave is sought (Verma at para 14). Alternatively, the Court may accept the Proposed Amended Claim to show how problems raised in a motion to strike could be overcome (Paradis Honey Ltd v Canada (Attorney General), 2015 FCA 89 at para 80). In either case, the Court's acceptance of an amended statement of claim does not automatically render the motion to strike moot.
- [25] At the hearing, counsel for Canada accepted that the Proposed Amended Claim can be viewed as part of the Plaintiff's responding submissions to demonstrate how the Claim may be amended. I agree that this is the appropriate way forward and will accept the Proposed Amended Claim into the court record on this basis. The motion to strike therefore proceeds based on the record before it, asking whether the proposed amendments can cure the defects of the Claim. At the hearing, the Plaintiff confirmed abandonment of all other causes of actions except for negligence.
- [26] Notwithstanding the above, I would be remiss not to remind parties of the importance of respecting Court orders, timelines, and rules. As mentioned, Associate Judge Ring ordered the Plaintiff to rectify any deficiencies in the Statement of Claim raised by Canada by November 25, 2024. Canada complied with the Order and gave the Plaintiff notice of its identified issues. The Plaintiff did not comply. At the hearing, counsel for the Plaintiff stated that "Rule 200 trumps any order of this Court". This is wrong; Rule 200 of the Rules does not provide such a right. Even if this were true, a party must respect a potentially "wrong" Court Order until it is formally struck down or amended (Warman v Canada (Human Rights Commission), 2012 FC 1296 at paras 27-28, *aff'd* 2014 FCA 192). Subsequently, just two days before the hearing, and after filing an Amended Statement of Claim with no response to the merits of Canada's motion, the Plaintiff submitted over 50 case authorities, which he intended to rely upon during his oral submissions, the majority of which were not in his motion materials. This is unacceptable and prejudicial to the Defendant, depriving them of a proper reply. This Court's rules and procedures ensure just, fair, and expedient proceedings. The Court does not condone such blatant disregard for these processes.

V. Law Applicable to a Motion to Strike [27] Rule 221(1)(a) of the Rules permits the Court to make an order striking a pleading with or without leave to amend on the ground that it discloses no reasonable cause of action. The onus is on the defendant who seeks to establish that there is no cause of action (Edell v Canada, 2010 FCA 26 at para 5).

[28] In *La Rose v Canada*, 2020 FC 1008, the Court set out the law as it applies to motions brought pursuant to Rule 221 of the Rules:

[16] The test on a motion to strike is whether it is plain and obvious that the pleadings disclose no reasonable cause of action, or that the claim has no reasonable prospect of success (*Hunt v Carey Canada Inc*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959 at 980; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [Imperial Tobacco]). The threshold to strike a claim is high and the matter must proceed to trial where a reasonable prospect of success exists.

- [17] The material facts pleaded in the Statement of Claim must be taken as true, unless the allegations are based on assumption and speculation (*Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441 at para 27 [*Operation Dismantle*]). It is incumbent on the Plaintiffs to clearly plead the facts in sufficient detail to support the claims and the relief sought. The material facts form the basis upon which to evaluate the possibility of the success of the claim (*Imperial Tobacco*, above at para 22; *Mancuso v Canada* (National Health and Welfare), 2015 FCA 227 at paras 16-17, leave to appeal to SCC refused, 36889 (23 June 2016)).
- [18] Further, the pleadings must be read as generously as possible, erring on the side of permitting a novel but arguable claim to proceed to trial (*Imperial Tobacco* at para 21; *Atlantic Lottery v Corp Inc v Babstock*, 2020 SCC 19 at para 19 [*Atlantic Lottery*]).
- [19] The test on a motion to strike considers the context of the law and the litigation process. It “operates on the assumption that the claim will proceed through the court system in the usual way – in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedents” (*Imperial Tobacco* at para 25).
- [29] In order to strike a pleading without leave to amend, any defect in the pleading must be one that cannot be cured by amendment (*Simon v Canada*, 2011 FCA 6 at para 8).

VI. Analysis A. Are the Proposed Class Members Bound by the IRSSA? [30] The Plaintiff asserts that the IRSSA is not a legal impediment to the Claim because it does not bind any of the Members of the Class who were minors and infants at the time of the execution of the IRSSA. This is because the Proposed Class Members, as infants and minors, received no or negligible benefit from the IRSSA. The Plaintiff argues that any contract that is not for the infant’s benefit or that contains stipulations disadvantageous to him or her is void as it is a release of an infant’s rights. Relatedly, the Plaintiff states that even if the IRSSA could be interpreted as granting a release on behalf of the Proposed Class Members who were infants at the time of the Residential School Settlement, it would be void and not enforceable as it would constitute the release of their rights.

- [31] The Plaintiff further argues that no Proposed Class Member is bound by the Residential School Settlement or court orders because they received no notice that they were bound and that their rights were in jeopardy and being surrendered.
- [32] Canada argues that the resolution and release of the IRSSA includes all claims potentially advanced on behalf of the purported class in this action. Canada notes that the Plaintiff misidentified the purported class as “heirs” in the IRSSA and described the IRSSA class as the “ancestors” to this purported class. Canada also states that, contrary to the Plaintiff’s assertions, IRSSA Class Members are bound by the class settlement and the court orders regardless of whether specific individuals received actual notice (311736 *Canada Ltd v Cozy Corner Bedding*, 2020 ONCA 235 [*Cozy Corner*] at paras 28-32, 65; *Charlton v Musashi Bockenau GmbH & Co KG*, 2024 BCSC 428 at para 20).

- [33] I agree with Canada that the Proposed Class Members are not “heirs” in the IRSSA, but are expressly included in the definition of “Class Members”. The Plaintiff is a child of a person who, prior to December 31, 1997, resided at an Indian Residential School in Canada. Moreover, the IRSSA expressly binds all Class Members, including Persons Under Disability, which the IRSSA defines to include minors (IRSSA, Art. 1.01). Even if the Proposed Class Members were “heirs”, the IRSSA states that it will “enure to the benefit of and be binding upon all respective heirs” [emphasis added] (IRSSA, Art. 18.07). The IRSSA explicitly covered all claims and bound the children of Residential School survivors, regardless of the age of the child.
- [34] Furthermore, I note that the Plaintiff failed to explain how this action does not fall within the actions contemplated by the release. During the hearing, the Plaintiff attempted to characterize the alleged cause of action as arising from “future acts and omissions” not contemplated by the release, analogizing to the case of IAP Claimant H-15019 v P. James Wallbridge, 2019 ONSC 1627 [IAP], aff’d 2020 ONCA 270 [IAP, ONCA]. In IAP, the Court found that a cause of action was not barred by the IRSSA release because it arose from a factual situation that occurred after the settlement approval order was signed and during the implementation of the IRSSA [IAP, ONCA at paras 31-36]. Unlike the case of IAP, the factual allegations of this Clam are not “future acts or omissions” that occurred after the Approval Order was signed. The wrongs the Plaintiff allege relate to the mistreatment of and failure to teach non-violent parenting skills to Residential School survivors. These factual allegations are the actions contemplated and explicitly covered by IRSSA and the release. It is not open to this Court to relitigate those issues that the IRSSA resolved and brought finality to nearly 20 years ago.
- [35] The Plaintiff’s argument that the IRSSA cannot bind infants and minors because they received “no or negligible benefit from the IRSSA” fails in light of the nine court approval orders. In Baxter, the Court dealt with the question as to whether it was appropriate to exclude the estates of persons who attended Residential Schools but died prior to May 30, 2005, from making claims under the CEP, while still binding those estates to the agreement and its releases. In response, the Court said:
- [84] Where the intention is to bind potential class members without direct compensatory payment, the court must apply careful scrutiny to the provisions of the settlement seeking to effect that result. This analysis must be conducted on a case by case basis. Here, it was contended that the indirect benefits to the family members of the deceased class members, through the healing and commemoration initiatives, was a countervailing benefit given in exchange for the right being extinguished by the settlement. In addition, the estates of those class members whose direct claims are being extinguished may exercise their opt out rights in order to pursue their individual litigation. I agree with these submissions, but would add that the opt out notices must be drafted in a manner to make it clear that these rights are being extinguished under this settlement.

- [36] Although Baxter addressed the question with respect to a different set of class members, the Court's holding applies here. The Court was aware of and considered the fact that the IRSSA had the effect of extinguishing claims of certain class members who are not entitled to receive direct compensation under IRSSA. Even if the Proposed Class Members did not receive a direct benefit from the IRSSA, this does not negate the validity and enforceability of the IRSSA. There is no reason to interfere with the nine court approval orders finding that the IRSSA was fair, reasonable and in the best interests of the class of a whole, which again, explicitly includes children of Residential School survivors and minors. Furthermore, as noted by Canada, the issue of intergenerational impacts raised in the Claim were identified and addressed in the IRSSA, particularly by the Aboriginal Healing Foundation created (Baxter at para 4, IRSSA, Preamble D(v) Art 3.02, 8.01).
- [37] Adequate notice was also provided to all class members, including minors. The IRSSA included a notice plan that ensured that during the opt-out period of 150 days, all persons affected by the IRSSA were informed of the agreement and how their legal rights may have been affected (IRSSA, Art 4.08). The nine court approval orders ensured that the settlement agreement, which included the notice plan, was fair to all class members. While I appreciate the Plaintiff was a minor at the time of the agreement and may not have received actual notice himself or through his Litigation Guardian, the lack of actual notice to any particular class member does not prevent the class from being bound where sufficient steps have been undertaken to provide adequate notice to the class (Cozy Corner at para 31). Given the court approval orders, and the fact that the notice plan was carried out over a decade ago, this Court cannot and should not reopen and revisit whether that notice was adequate to individual class members.
- [38] To reiterate my comments above, the intergenerational harms caused by Residential Schools are undeniable. The hardship that this Plaintiff, and no doubt many like him, have endured is horrific and profoundly distressing. However, this Court must respect the overarching objectives of certainty and finality that peruse any settlement, and particularly those relating to reconciliation. The IRSSA was the product of a desire to provide a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools (IRSSA, Preamble, B). Seeking ambiguities in settlement agreements years after approval works to create uncertainty and unpredictability in settlement agreements and disincentivizes settlement (*Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365 [*Goodswimmer*] at paras 48-49).
- [39] As stated by the Alberta Court of Appeal, "[a] paradigm under which each generation of a First Nation can reopen, renegotiate, and re-litigate previously settled claims is untenable" (*Goodswimmer* at para 49). While this was said in the context of a treaty settlement agreement, it applies equally to this proceeding wherein the Plaintiff attempts to re-litigate a previously settled claim. There is no reason to upend the finality the IRSSA brought to Canada and its class members almost 20 years ago.

[40] The Proposed Class Members, as children of Residential School survivors, are unambiguously bound by the IRSSA.

B. Can this Court look at the IRSSA release on a motion to strike? [41] At the hearing, the Plaintiff raised the argument that a court cannot deal with settlement agreement releases on a motion to strike because releases constitute a defence (citing to *Curtis v Medcan Health Management Inc*, 2021 ONSC 4584 at paras 110-111, and *Rieger v Plains Midstream Canada ULC*, 2020 ABQB 312 at para 93). In the list of its 50 additional authorities, the Plaintiff also puts forward case law for the proposition that the effect of releases (i.e., enforceability and scope) requires a determination of fact (e.g. *Simkeslak Investments Limited v Kolter Yonge L.P. Limited*, 2009 CanLII 9763 (ONSC) at paras 1, 5).

[42] Unlike the cases raised by the Plaintiff, the validity and enforceability of this release need not be determined, as that issue was resolved by the nine court approval orders. The court approval orders gave the settlement agreement, which was incorporated by reference into those orders, legally binding effect. Moreover, the definition of “class members” and the breadth of the scope of the release, which form part of those court orders, are clear on their face and do require a factual inquiry to determine their effect in this action. The relevance of the release is therefore not limited to a defence, but forms part of the legal context within which this court should consider whether the claim has no reasonable prospect of success (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42; *Millennium Funding, Inc v Bell Canada*, 2023 FC 764). The Plaintiff’s argument that it is confusing whether the definition of “child” in the IRSSA includes the “unborn” has no reasonable prospect of success.

[43] The Claim is barred by the IRSSA release, and it is therefore plain and obvious that the Claim would fail. The Claim should be struck in its entirety.

C. Should leave to amend be granted? [44] I agree with Canada that the Claim fails to properly plead or factually substantiate the essential elements of the tort of negligence and should be struck on this basis as well (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 26). The Plaintiff’s Proposed Amended Claim cures many of the problems identified by Canada’s motion to strike. However, the question before this Court is whether the proposed amendments can overcome the defects raised. Given that the Plaintiff’s claim is barred by the IRSSA release, and no pleading amendment can overcome this problem, leave to amend is denied.

VII. Conclusion [45] The Defendant’s motion is granted, and the Amended Statement of Claim is struck out in its entirety, without leave to amend.

[46] Canada did not seek costs, so none will be ordered.

ORDER in T-805-24

THIS COURT ORDERS that:

The Defendant's motion to strike the Plaintiff's Statement of Claim is granted without leave to amend; and

No costs are awarded.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-805-24

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MATTHEW BRANDON (THROUGH HIS LITIGATION GUARDIAN CHRIS GARDINER) v HIS
MAJESTY THE KING

PLACE OF HEARING:

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DATE OF HEARING:

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ORDER AND REASONS:

MANSON J.

DATED:

MARCH 10, 2025

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