

CANADA / JUDGMENT

Fontaine v. Canada

2019 BCCA 178

COURT

British Columbia Court of Appeal

DECIDED

22 May 2019

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2019 BCCA 178 Fontaine v. Canada (Attorney General)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Fontaine v. Canada (Attorney General),

2019 BCCA 178

Date: 20190522

Docket: CA44378

Between:

Ronnie Gail Scout

Appellant

(Plaintiff)

And:

Larry Philip Fontaine in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, Michelline Ammaq, Percy Archie, Charles Baxter Sr., Elijah Baxter, Evelyn Baxter, Donald Belcourt, Nora Bernard, John Bosum, Janet Brewster, Rhonda Buffalo, Ernestine Caibaiosai-Gidmark, Michael Carpan, Brenda Cyr, Deanna Cyr, Malcolm Dawson, Anne Dene, Benny Doctor, Lucy Doctor, James Fontaine in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, Vincent Bradley Fontaine, Dana Eva Marie Francey, Peggy Good, Fred Kelly, Rosemarie Kuptana, Elizabeth Kusiak, Theresa Larocque, Jane McCullum, Cornelius McComber, Veronica Marten, Stanley Thomas Nepetaypo, Flora Northwest, Norman Pauchey, Camble Quatell, Alvin Barney Saulteaux, Christine Semple, Dennis Smokeyday, Kenneth Sparvier, Edward Tapiatic, Helen Winderman and Adrian Yellowknee

Respondents

(Plaintiffs)

And:

The Attorney General of Canada, The Presbyterian Church in Canada, The General Synod of the Anglican Church of Canada, The United Church of Canada, The Women's Missionary Society of the Presbyterian Church, The Baptist Church in Canada, Board of Home Missions and Social Services of the Presbyterian Church in Bay, The Canada Impact North Ministries of the Company for the Propagation of the Gospel In New England (also known as The New England Company), The Diocese of Saskatchewan, The Diocese of the Synod of Cariboo, The Foreign Mission of the Presbyterian Church in Canada, The Incorporated Synod of the Diocese of Huron, The Methodist Church of Canada, The Missionary Society of the Anglican Church of Canada, The Missionary Society of the Methodist Church of Canada (also known as The Methodist Missionary Society of Canada), The Incorporated Synod of the Diocese of Algoma, The Synod of the Anglican Church of the Diocese of Quebec, The Synod of the Diocese of Athbasca, The Synod of the Diocese of Brandon, The Anglican Synod of the Diocese of British Columbia, The Synod of the Diocese of Calgary, The Synod of the Diocese of Keewatin, The Synod of the Diocese of Qu'Appelle, The Synod of the Diocese of New Westminster, The Synod of the Diocese of Yukon, The Trustee Board of the Presbyterian Church in Canada, The Board of Home Missions and Social Service of the Presbyterian Church of Canada, The Women's Missionary Society of the United Church of Canada, Sisters of Charity, a Body Corporate also known as Sisters of Charity of St. Vincent De Paul, Halifax, also known as Sisters of Charity Halifax, Roman Catholic Episcopal Corporation of Halifax, Les Soeurs De Notre Dame-Auxiliatrice, Les Soeurs De St. Francois D'Assise, Institut Des Soeurs Du Bon Conseil, Les Soeurs De Saint-Joseph De Saint-Hyancithe, Les Soeurs De Jesus-Marie, Les Soeurs De L'Assomption De La Saint Vierge, Les Soeurs De L'Assomption De La Saint Vierge De L'Alberta, Les Soeurs De La Charite De St. Hyacinthe, Les Oeuvres Oblates De L'Ontario, Les Residences Oblates Du Quebec, La Corporation Episcopale Catholique Romaine De La Baie James (The Roman Catholic Episcopal Corporation of James Bay), The Catholic Diocese of Moosonee, Soeurs Grises De Montreal/Grey Nuns of Montreal, Sisters of Charity (Grey Nuns) of Alberta, Les Soeurs De La Charite Des T.N.O., Hotel-Dieu De Nicolet, The Grey Nuns of Manitoba Inc.-Les Soeurs Grises Du Manitoba Inc., La Corporation Episcopale Catholique Romaine De La Baie D'Hudson - The Roman Catholic Episcopal Corporation of Hudson's Bay, Missionary Oblates - Grandin Province, Les Oblats De Marie Immaculee Du Manitoba, The Archiepiscopal Corporation of Regina, the Sisters of the Presentation, The Sisters of St. Joseph of Sault St. Marie, Sisters of Charity of Ottawa, Oblates of Mary Immaculate - St. Peter's Province, The Sisters of Saint Anne, Sisters of Instruction of the Child Jesus, The Benedictine Sisters of Mt. Angel Oregon, Les Peres Montfortains, The Roman Catholic Bishop of Kamloops, Corporation Sole, The Bishop of Victoria, Corporation Sole, The Roman Catholic Bishop of Nelson, Corporation Sole, Order of the Oblates of Mary Immaculate in the Province of British Columbia, The Sisters of Charity of Providence of Western Canada, La Corporation Episcopale Catholique Romaine De Grouard, Roman Catholic Episcopal Corporation of Keewatin, La Corporation Archiepiscopale Catholique Romaine De St. Boniface, Les Missionnaires Oblates Sisters De St. Boniface - The Missionary Oblates Sisters of St. Boniface, Roman Catholic Archiepiscopal Corporation of Winnipeg, La

Corporation Episcopale Catholique Romaine De Prince Albert, The Roman Catholic Bishop of Thunder Bay, Immaculate Heart Community of Los Angeles CA, Archdiocese of Vancouver - The Roman Catholic Archbishop of Vancouver, Roman Catholic Diocese of Whitehorse, The Catholic Episcopale Corporation of MacKenzie Fort Smith, The Roman Catholic Episcopale Corporation of Prince Rupert, Episcopal Corporation of Saskatoon, Omi Lacombe Canada Inc. and Mt. Angel Abbey Inc.

Respondents

(Defendants)

Brought pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50

Before:

The Honourable Madam Justice Garson

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated June 26, 2017 (Fontaine v. Canada (Attorney General), 2017 BCSC 418, Vancouver Registry L051875).

Counsel for the Appellant:

E. Sunchild

M. Seed

Counsel for the Respondent,

The Attorney General of Canada:

A. LeBlanc

A. Sabzevari

Counsel for the Chief Adjudicator:

C. Boies Parker, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

November 30, 2018

Place and Date of Judgment:

Vancouver, British Columbia

May 22, 2019

Written Reasons by:

The Honourable Madam Justice Garson

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fisher

Summary:

This appeal concerns the deadline for applications to the Independent Assessment Process ("IAP"), a compensation scheme established under the Indian Residential Schools Settlement Agreement ("IRSSA"). The appellant's application was submitted one day later than the commonly understood deadline due to the inadvertence of his counsel. His Request for Direction ("RFD") seeking a discretionary extension of time to apply was dismissed. He later brought a second RFD in which he submitted that, on a correct interpretation of the IRSSA and the court orders which approved it, the deadline ought to have been one day later. His RFD was dismissed on the basis that it was *res judicata*. The appellant appealed and applied for the admission of fresh evidence, namely a 2007 email regarding the deadline from a government lawyer. Held: application for fresh evidence dismissed; appeal dismissed. The email did not meet the criteria for admission as fresh evidence, in particular because it could not have been expected to have affected the outcome. The judge erred in applying cause of action estoppel to the RFD as it was not a cause of action, nor was it an abuse of process. The appeal nonetheless failed on its merits as the common interpretation of the deadline was correct.

Reasons for Judgment of the Honourable Madam Justice Garson:

I. Introduction

[1] This appeal arises under the Indian Residential Schools Settlement Agreement ("IRSSA" or "the Agreement"). Through the inadvertence of his counsel (not counsel on this appeal), the appellant, Ronnie Gail Scout, submitted his application for compensation under the Independent Assessment Process ("IAP") on September 20, 2012 rather than on the commonly understood deadline of September 19, 2012. The Indian Residential Schools Adjudication Secretariat ("IRSAS") rejected his application on the ground that it was filed one day late. Mr. Scout unsuccessfully sought leave of the court to permit the late filing of his application in a Request for Direction (RFD) (the "First RFD"). He then brought a second RFD in which he argued that on a correct interpretation of the Agreement, the deadline for applications to the IAP (the "IAP Application Deadline") was indeed September 20, 2012, and his application was submitted in time (the "Second RFD"). The Western Administrative Judge tasked with supervising the Agreement dismissed the Second RFD as she found it to be barred by the doctrine of *res judicata*.

- [2] Mr. Scout appeals that decision. He says the Administrative Judge erred in applying the doctrine of *res judicata* in the special circumstances of this case and on the basis that the doctrine has no application to RFDs. Mr. Scout also says that *res judicata* ought not to apply where its rigid application would frustrate the interests of justice. He says, even where it is applicable, the court has residual discretion to refuse to apply it.
- [3] Mr. Scout also applies for the admission of fresh evidence that pertains to Canada's alleged knowledge of the miscalculation of the IAP Application Deadline. He says that Canada ought not to be allowed to rely on its own advice as to the Deadline when it was aware that its advice was incorrect.
- [4] Mr. Scout seeks orders allowing the appeal, declaring that the Agreement has been administered on the basis of the incorrect IAP Application Deadline, and reopening the IAP application process across Canada.
- [5] The Attorney General of Canada says that the Administrative Judge properly applied *res judicata* and that in any event its calculation of the IAP Application Deadline is correct. Alternatively, Canada says that if the Agreement is ambiguous, evidence of subsequent conduct, that is reliance on the September 19 deadline for 10 years, is admissible evidence aiding in the interpretation of the Agreement.
- a. The Independent Assessment Process (IAP)
- [6] The IAP provides a mechanism for residential school survivors to receive compensation for abuse they suffered in the schools, over and above the Common Experience Payment to which all survivors are entitled. It was described as follows by Justice Côté in *J.W. v. Canada (Attorney General)*, 2019 SCC 20 (writing for a majority on this point, as acknowledged by Justice Brown at para. 175):
- [62] The IRSSA provides for two compensation schemes: the Common Experience Payment ("CEP") and the Independent Assessment Process. The CEP is a compensatory payment available to all eligible former students based on the number of years they attended an Indian Residential School ("IRS"). Compensation under the CEP process does not require proof of physical, sexual, or emotional harm (IRSSA, art. 5). The IAP, by contrast, is an adjudicative process created to resolve "continuing claims" for serious proven physical or sexual abuse, or other wrongful acts committed against individual students of an IRS (IRSSA, art. 6 and Sch. D; R.F. (Attorney General), at para. 9).
- [63] Schedule D of the IRSSA sets out the IAP Model. There are three categories of compensable continuing claims under the IAP: (1) sexual and physical assaults committed by adult employees of the government or a church entity that operated the residential school or other adults lawfully on school premises; (2) sexual or physical assaults committed by one student against another on school premises; and (3) any other wrongful act or acts committed by adult employees or other adults lawfully on school premises (Sch. D, art. I).

- [7] As Justice Côté observed, the mandate of the IAP has nearly been completed:
- [78] As of October 31, 2018, 26,669 IAP hearings had been held, or 99.95% of all anticipated hearings. Of the more than 38,000 claims filed, 99% had been resolved. There were still 199 claims in progress, with 36 hearings scheduled for a later date, 1 hearing remaining to be scheduled, 34 claims expected to be resolved through other means and 128 claims awaiting decision. Over \$3.1 billion had been paid to successful claimants, and close to 90% of IAP claims that had gone to hearing or been settled had resulted in an award in favour of the claimant (Indian Residential Schools Adjudication Secretariat, Independent Assessment Process (IAP) Statistics (online)).
- [8] The IRSSA is governed by substantially identical Approval Orders pronounced in December 2006 and January 2007 in nine courts across Canada. The Approval Orders provide that the action is certified as a class proceeding and approve the settlement of the action in accordance with the terms of the Agreement, which is incorporated by reference into the Approval Orders. In March 2007, the courts issued substantially identical Implementation Orders governing the implementation of the Agreement.
- [9] The Agreement and Approval Orders do not specify the date of the IAP Application Deadline, but provide that it falls on the fifth anniversary of the date the Agreement came into effect (the "Implementation Date"). For reasons I will explain, the parties dispute whether the Implementation Date was September 19 or 20, 2007, and therefore whether the IAP Application Deadline was September 19 or 20, 2012.
- b. Background to Mr. Scout's RFD
- [10] Mr. Scout is now 61 years old. He was a student at a residential school in Alberta for about six years. He says that he suffered serious sexual and physical abuse at the school.
- [11] Mr. Scout submitted an IAP application through his then-lawyer to IRSAS on September 20, 2012. He and his lawyer understood the IAP Application Deadline to be September 19, 2012, but the lawyer inadvertently failed to include his application with others being mailed on that day. The error was not discovered until the following day. The applications were mailed to IRSAS immediately.
- [12] IRSAS rejected the application in August or September 2013.
- [13] On November 21, 2013, Mr. Scout's former counsel submitted an RFD to the Administrative Judge seeking leave to file his IAP application. On May 5, 2014, the Administrative Judge issued her decision and reasons declining to admit the application to the IAP (the "2014 Direction"). Her reasons for judgment are unpublished: *Fontaine v. Canada (Attorney General)*, 5 May 2014, Vancouver Docket No. L051875 (B.C.S.C.). Mr. Scout did not appeal this decision.

- [14] On May 16, 2016, counsel for Mr. Scout submitted a document titled "Appeal of non-admission of application for file [number omitted]" to the Chief Adjudicator's office. The record on this appeal does not contain a decision of the Chief Adjudicator. I would proceed on the obvious assumption that the Chief Adjudicator declined to accept the appeal.
- [15] On June 14, 2016, two years after the Administrative Judge refused to extend the time in response to the First RFD, Mr. Scout filed a Second RFD on the basis that he had discovered that the IAP Application Deadline was in fact September 20, 2012, based on a reinterpretation of the formula by which the Deadline was set.
- [16] In January 2017, Mr. Scout and the respondents, Canada and the Chief Adjudicator, filed written submissions.
- [17] As noted above, the Administrative Judge refused to permit the late filing on the basis of res judicata. Her Reasons for Judgment pronounced on March 15, 2017, are indexed at 2017 BCSC 418. This is the appeal from her order.

II. Reasons for Judgment of the Administrative Judge on the Second RFD

- [18] The Administrative Judge noted that there were two main issues before her. The first issue was the correctness of the calculation of the IAP Deadline. She noted that September 19, 2012, had been the date assumed to be correct by "those involved in the administration of the [Agreement] up to this point": at para. 1. The second issue concerned Canada's preliminary objection that the application was res judicata or an abuse of process because it had already been ruled upon in the First RFD.
- [19] The Administrative Judge began by setting out the background of the Agreement and the structure put in place to administer the settlement process at paras. 9-16. She then summarized the basis on which she had rejected the First RFD. She said that she did so "in accordance with well-established law that a court exercising a supervisory jurisdiction in the context of a class action settlement has no jurisdiction to amend the terms of the agreement reached by the parties": at para. 18.
- [20] She also noted that she had found the First RFD to be indistinguishable from an earlier RFD in which she had held that to allow late claims would be to undermine the agreement reached by the parties, something a court exercising supervisory jurisdiction over a class action settlement does not have jurisdiction to do: *Fontaine v. Attorney General of Canada*, 20 November 2013, Vancouver Docket No. L051875 (B.C.S.C.). That decision, she noted, was affirmed on appeal: *Myers v. Canada (Attorney General)*, 2015 BCCA 95.
- [21] The Administrative Judge outlined the positions of both parties on the calculation of the IAP Application Deadline but then determined that she did not have to decide that question because the application was barred by the doctrine of res judicata. As she said, "[o]nce a party has been unsuccessful in court proceedings, the law does not permit that party to advance the same substantive claim again under a different legal guise": at para. 25 (citations

omitted). As I shall discuss in more detail below, *res judicata* has two branches: cause of action estoppel and issue estoppel. Although the Administrative Judge did not refer to either branch by name, she set out and applied the test for cause of action estoppel: at para. 26.

- [22] The fourth element of the test for cause of action estoppel is that the argument could have been advanced in the prior proceeding if the party now advancing it had exercised reasonable diligence. In its written submissions, Canada argued that Mr. Scout could have raised his interpretation of the IAP Application Deadline in the First RFD, but had failed to do so. Mr. Scout argued in response that in the face of the general (though mistaken) consensus that the IAP Application Deadline was September 19, 2012, a lawyer of average competence could not be presumed to have recognized that the correct deadline was September 20. The Administrative Judge accepted Canada's argument and rejected Mr. Scout's framing of the issue. She said, "The question is when should the party reasonably have known the facts on which the legal argument is based not whether the argument being advanced is so novel that previous lawyers could not be expected to have thought of it": at para. 28.
- [23] The Administrative Judge next addressed Mr. Scout's argument that *res judicata* is an equitable doctrine and that the court may not exercise its equitable jurisdiction in its supervisory role over a class action settlement. She held that *res judicata* is a procedural doctrine and applying it did not alter the substance of the agreement between the parties. It merely ensured that the parties litigated their rights under that agreement in an orderly and efficient manner: at para. 30.
- [24] Finally, the Administrative Judge considered whether the issue raised in the Second RFD was different from that in the First RFD such that *res judicata* did not apply. She concluded that it was not. The argument should have been raised in the First RFD, and the Second RFD was, on her analysis, simply a relitigation of the First.

III. Issues on Appeal

- [25] Mr. Scout states the issues on appeal in this way:

The [Administrative] Judge erred in principle when she applied cause of action estoppel by finding:

- a. The Appellant's second RFD was not separate and distinct from his first RFD.
- b. The matter of the incorrect IAP Deadline should have been argued in the Appellant's prior RFD.

- [26] Mr. Scout seeks the following relief in his factum:

The appellant seeks an Order:

- a. The Appeal is allowed

- b. The Administrative Judge's Order dismissing the Request for Direction of the Appellant be set aside.
 - c. An Order declaring that the IRSSA was not administered according to its terms in that the wrong Independent Assessment Process Application Deadline of September 19, 2012 was used rather than the correct deadline of September 20, 2012.
 - d. That Canada:
 - i. reopen the process for receiving and adjudicating IAP applications, including the Appellant's, for thirty days.
 - ii. Canada publish this reopening across Canada, and
 - iii. Canada ensure those applications are determined in accordance with the current policies and procedures; and
 - e. In the alternative to (d), that Canada reopen the process for receiving and adjudicating IAP applications for twenty four hours;
 - f. Costs of this appeal and of the court below.
- [27] Canada joins issue on the question of whether the Administrative Judge erred in dismissing the Second RFD based on the doctrine of res judicata. Canada also says that there is no merit to the appellant's substantive argument regarding the interpretation of the Agreement.
- [28] I shall first say what this appeal is not about. In the 2014 Direction, the Administrative Judge decided that she had no jurisdiction to extend the IAP Application Deadline on a discretionary basis. That decision, as I have said, was not appealed. In any event, this Court affirmed the correctness of her conclusion in Myers. Consequently there is no argument before us about extending the IAP Application Deadline on a discretionary basis.
- [29] I also observe that reopening the IAP is outside the jurisdiction of this Court. I would disregard items (d) and (e) in Mr. Scout's request for relief.
- [30] I prefer to restate the issues in the following way:
- a) As a preliminary issue, should this Court admit the fresh evidence to aid in the interpretation of the Agreement?
 - b) Did the Administrative Judge err in her application of the doctrine of res judicata on these facts?
 - c) Should the Administrative Judge have decided the interpretation issue and if so, should it be remitted to her now, or should this Court decide it?
 - d) Should this Court admit evidence of subsequent conduct to aid in the interpretation of the Agreement?

- [31] A procedural question was raised before us as to the participation of the Chief Adjudicator of the IRSAS. The Chief Adjudicator filed a factum in which he set out a brief summary of the history of the IRSSA. He addressed the question of the IAP Application Deadline, including the background, the reliance by all parties on the September 19 date, and the impact that a contrary finding would have on the finality of the Agreement. He makes no submissions on the *res judicata* question.
- [32] The role of the Chief Adjudicator has been questioned in certain proceedings in Ontario. Subsequent to the hearing of this appeal, however, all parties provided this Court with the Reasons for Judgment of the Ontario Court of Appeal in *Fontaine v. Canada (Attorney General)*, 2018 ONCA 1023, in which directions made by the Eastern Administrative Judge against the Chief Adjudicator were set aside. I conclude that the participation of the Chief Adjudicator in this appeal is no longer in question and I will say no more about it.

IV. Application for Fresh Evidence on Appeal

- [33] Mr. Scout seeks the admission of fresh evidence on appeal. This evidence consists of a partially redacted email from a Government of Canada lawyer dated August 17, 2007. There is no evidence about the provenance of this email other than that it was received by the appellant's counsel from an unknown sender. The recipient's name and position are redacted. The author expresses a legal opinion that the Implementation Date is September 20, 2007.
- [34] Mr. Scout seeks an order admitting this email in evidence as proof that Canada is, and has been for very many years, aware that the IAP Application Deadline was not September 19, 2012, but September 20. He says that in these circumstances, it would be inequitable to allow Canada to rely on the September 19 Deadline.
- [35] As is our practice, we received the evidence at the hearing of the appeal and advised the parties that we would decide on its admissibility in the course of deciding the appeal.
- [36] Admission of fresh evidence is governed by *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775. Palmer provides that fresh evidence may be admitted if it meets four criteria. They are:
- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases....
 - (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
 - (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
 - (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[Citation omitted.]

[37] The Palmer test applies to civil appeals: Korol, Re, 2014 BCCA 380 at para. 35.

[38] In my view this email does not meet the Palmer criteria. I do not accept Mr. Scout's characterization of it as amounting to an admission. As I have said, its provenance is unknown. Whether there were contrary opinions is unknown. It is dated August 17, 2007, eight months after the Approval Order was pronounced in British Columbia and one month before the Implementation Date. I infer from this constellation of dates that the opinion, if circulated, was not accepted, because as Mr. Scout acknowledges, the September 19, 2007 Implementation Date was broadly publicized. Even if the email can be taken as knowledge on someone's part that a different calculation of the Implementation Date was possible under the language of the Agreement, it is not sufficient on its own to affect the result. I would not admit the evidence other than to note that the discovery of its existence was apparently the impetus for the Second RFD. Its contents are not admissible.

V. Analysis

[39] There are two main issues on appeal. The first is the applicability of res judicata. The second is the interpretive question.

a. Res Judicata

1. Legal Framework

[40] In *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180, Justice Newbury, writing for the Court, described the underlying objectives of res judicata. As she explained, the policy reasons for its existence are well-known. It serves two important objectives: first, the interest of the community in finality of litigation, and second, the principle that a party should not be "twice vexed" for the same cause: at paras 25-26. She also noted, however, that the importance of these objectives must be balanced against fairness to litigants, and that courts are reluctant to deprive litigants of the right to have their claims adjudicated on the merits: at para. 26, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 55.

[41] As noted above, res judicata has two branches: cause of action estoppel (still sometimes called res judicata) and issue estoppel. Donald J. Lange describes cause of action estoppel and issue estoppel as follows in *The Doctrine of Res Judicata in Canada*, 3rd ed (Toronto: LexisNexis, 2010) at 1 (quoted in *Cliffs Over Maple Bay* at para. 27):

In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding.

- [42] Justice Newbury then set out the four criteria for the application of cause of action estoppel, taken from *Grandview v. Doering*, [1976] 2 S.C.R. 621. As will be discussed below, it is mainly the application of the third criterion, and to a lesser extent the fourth, that is at issue in this appeal:
- [28] The traditional criteria for cause of action estoppel, confirmed in Canada in [*Angle v. M.N.R.*, [1975] 2 S.C.R. 248], were summarized by Chief Justice Hewak in *Bjarnarson v. Manitoba* (1987) 38 D.L.R. (4th) 32 (Man. Q.B.) at 34, *aff'd.* (1987) 45 D.L.R. (4th) 766 (Man. C.A.), as taken from *Grandview v. Doering* [1976] 2 S.C.R. 621:
1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
 2. The parties to the subsequent litigation must have been parties to or in privity with the parties to the prior action [the requirement of "mutuality"];
 3. The cause of action and the prior action must not be separate and distinct; and
 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence. [At para. 6; emphasis added.]

It is perhaps unnecessary to state that the doctrine contemplates two "causes" - the first having ended in a final judgment that bars a "second claim for the same cause": see *Mohl v. University of British Columbia*, 2006 BCCA 70 at paras. 23-4. In this context, "cause of action" does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy: see also *Lange* at 147; *Comeau v. Breau* (1994) 145 N.B.R. (2d) 329 (C.A.) at para. 18; and *Letang v. Cooper* [1965] 1 Q.B. [232] (C.A.) at 242-43.

[Emphasis added by Justice Newbury; citation added.]

2. Positions of the Parties
 - i. The Appellant's Position

- [43] Mr. Scout contends that the Administrative Judge erred in applying *res judicata*. First, he says that the RFD process is not a cause of action. He says that an RFD is a *sui generis* proceeding to which cause of action estoppel cannot apply.
- [44] Second, Mr. Scout also says that the third criterion - that the cause of action in the prior action must not be separate and distinct - is not met because the First and Second RFDs were separate and distinct proceedings with different objectives. The First RFD concerned whether the court had discretion to extend the IAP Application Deadline. The court decided that it did not. Mr. Scout does not dispute that ruling. The Second RFD concerned whether the court had misinterpreted the IAP Application Deadline which Mr. Scout says is an entirely different issue. He says that each RFD relied on different material facts. In particular, the Second RFD relies on the facts that indicate that the commonly understood

IAP Application Deadline was incorrect. Therefore he says it is a separate and distinct matter.

- [45] Third, he says that the fourth criterion - that the basis of the cause of action could have been argued in the prior action had the parties exercised due diligence - is not met. He says his interpretive argument is not simply a new legal argument based on the same facts, but that it is based on a new fact - specifically, that the Deadline was actually September 20, 2012 - which could not have been known to him when he filed the First RFD. He says that due to the universal nature of the belief that the Deadline was September 19, it would be unreasonable to expect him, a vulnerable class member, to have the resources to discover that the Deadline was actually September 20.
- [46] Finally, he contends that even if the conditions for cause of action estoppel are met, it was incumbent on the Administrative Judge to exercise her discretion to refuse to apply the doctrine in the circumstances. He argues that the doctrine of res judicata is rooted in justice and where its rigid application would frustrate this purpose the court has a residual discretion to refuse to apply it, citing *Fournogerakis v. Barlow*, 2008 BCCA 223 at para. 16, and *British Columbia v. Tekavec*, 2014 BCCA 444 at paras. 17-18 and 20, leave to appeal ref'd: [2015] S.C.C.A. No. 23. He says it is not in the interests of justice to deny him or other residential school survivors the rights they were promised under the Agreement. In the result, he says the Administrative Judge should have considered the interpretation argument on its merits and that she erred in not doing so.
- [47] Below I shall explain the basis of Mr. Scout's substantive position that the IAP Application Deadline was September 20, 2012.

ii. Canada's Position

- [48] Canada says that Mr. Scout's arguments that the Second RFD is not a cause of action and that the third element of cause of action estoppel is not met because the Second RFD is a separate and distinct proceeding were not raised before the Administrative Judge.
- [49] In general, this Court is reluctant to entertain new issues raised for the first time on appeal: *Meng Estate v. Liem*, 2019 BCCA 127 at paras. 5-6. The three questions to consider in determining whether to grant leave to address a new issue were summarized in *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 45, citing *Quan v. Cusson*, 2009 SCC 62: (1) is the issue truly new; (2) is the evidentiary record sufficient; and (3) do the interests of justice support granting an exception to the general rule?

- [50] I would not dispose of these issues on the basis that they are raised for the first time on appeal. The so-called new issues are part of Mr. Scout's general challenge to the judge's application of *res judicata* and are more in the nature of supplementary arguments than new issues: *R. v. Vidulich* (1989), 37 B.C.L.R. (2d) 391 at 398 (C.A.). They are legal arguments such that there is no concern regarding the sufficiency of the evidentiary record. Finally, I see no prejudice to Canada's ability to meet them.
- [51] Canada says the new arguments are without merit because cause of action estoppel applies to RFDs and the two RFDs are not separate and distinct. Canada also argues that in any event there is no merit to Mr. Scout's argument about the correct date for the IAP Application Deadline. Even if the Agreement is ambiguous, Canada contends that the evidence of conduct of all parties subsequent to the formation of the Agreement is admissible to show that the proper interpretation of the Agreement is that the IAP Application Deadline fell on September 19, 2012. Finally, Canada says that the Second RFD is a collateral attack on the 2014 Direction and an abuse of process by relitigation.

iii. The Chief Adjudicator's Position

- [52] The Chief Adjudicator takes no position on the *res judicata* issue. He confines his submissions to the interpretive issue. I shall outline the Chief Adjudicator's position on the calculation of the IAP Application Deadline below.

3. Standard of Review

- [53] Mr. Scout and Canada acknowledge, and I agree, that whether *res judicata* applies to the disposition of the Second RFD is a question of law, reviewable on a standard of correctness. The only exception is where the judge decides not to apply the principle on discretionary grounds: *Cliffs Over Maple Bay* at para. 24.

- [54] I now turn to the question of whether the judge erred in applying *res judicata* to the facts of this case.

4. Discussion

- [55] The parties in the present matter have addressed the *res judicata* issue in terms of cause of action estoppel. As noted above, the Administrative Judge did not invoke cause of action estoppel by name, but applied the test for cause of action estoppel. She did not apply the test for issue estoppel and issue estoppel was not argued on appeal.

- [56] I shall first address Mr. Scout's argument that an RFD is not a cause of action and therefore cause of action estoppel does not apply. This is a preliminary issue that must be addressed before the Doering criteria are analyzed.

i. Does cause of action estoppel apply to RFDs?

- [57] It will be helpful at the outset to discuss the procedural nature of the RFD. It is neither a civil action, a petition, nor a judicial review.

[58] The procedure for bringing an RFD is set out in the "Court Administration Protocol" which forms "Schedule A" to the Implementation Orders:

In order to ensure the efficient and expeditious administration of the Agreement, the courts have determined that a streamlined process for addressing all matters that require court orders, directions or consideration during the course of the administration is desirable. Accordingly, the procedure set out below will be followed in respect of all such matters.

2. All matters that require court orders, directions or consideration, will be brought to the attention of the Administrative Judges at first instance by the filing of a Request For Direction. The Request will identify the party, counsel or other entity with standing in respect of the Agreement who is bringing the matter forward, the matter(s) in issue, the relief requested, whether it is on consent, or if opposed, the various positions of those in favour and those opposed. It is expected that all parties, counsel and entities with standing will cooperate to the extent that a single Request that fairly and accurately sets out the issue(s) and their positions in brief form is filed. The Judges do not expect to receive initial Requests that exceed 3 pages in length.

[Emphasis in original.]

[59] In *Fontaine v. Duboff Edwards Haight & Schachter*, 2012 ONCA 471 (Schachter) (a proceeding under the IRSSA), Justice Rouleau of the Ontario Court of Appeal described the Court Administrative Protocol as follows:

[10] Schedule "A" to the implementation orders is a Court Administration Protocol ("CAP"). The CAP sets out a process for addressing issues that may arise regarding the administration or implementation of the [Agreement]. The CAP provides that -- where a matter requires "court orders, directions or consideration" -- the party, counsel or other entity bringing the matter forward should file a "Request for Direction". The request will be brought to the attention of one of two designated Administrative Judges, who are selected from among the nine judges who heard the motions for approval of the [Agreement].

[60] Justice Rouleau held that no appeal lies from a decision of the Chief Adjudicator regarding a legal fee dispute, nor does such a decision admit of judicial review. However, the RFD process set out in the CAP provides "a process, other than an appeal or judicial review," that permits the court to review a decision by the Chief Adjudicator in the very limited circumstances where that decision reflects a failure to comply with the terms of the Agreement or Orders: at paras. 52-58. At para. 57 he described the limited nature of the review that is available under the Agreement:

[57] Thus, in the very limited circumstances where the final decision of the Chief Adjudicator reflects a failure to comply with the terms of the [Agreement] or the implementation orders, the aggrieved party may apply to the Administrative Judges for directions. These limited circumstances would include where the Chief Adjudicator upholds a decision of the Adjudicator as fair and reasonable even though the Adjudicator failed to consider the factors

set out in para. 18 of the implementation orders in arriving at his/her fee review decision in a specific case. By providing for recourse to an Administrative Judge in these limited circumstances, the parties will be able to ensure that the bargain to which they consented is respected.

- [61] The nature of the RFD process was most recently considered in J.W., which was decided after this appeal was argued. In that case, the appellant submitted an IAP claim in which he alleged that a nun had touched his genitals while he was waiting in line to take a shower. The adjudicator who heard the claim rejected it on the basis that the appellant had not established that the touching was done for a sexual purpose. The appellant exhausted the avenues for internal review but was unsuccessful. He then brought an RFD to the supervising judge, who found that the adjudicator had erred in her interpretation of the IAP and remitted his claim to another adjudicator. Canada successfully appealed on the basis that the supervising judge had no jurisdiction to intervene. At the hearing before the SCC, the Chief Adjudicator conceded that the decisions of the initial and review adjudicators were aberrant but said that he had no power under the Agreement to reopen the claim for the purpose of granting relief.
- [62] Justice Abella, writing for Chief Justice Wagner and Justice Karakatsanis, held that judicial intervention was necessary in the face of what amounted to an unauthorized modification of the Agreement contrary to the intentions of the parties. At para. 23, she held that the Agreement was contingent on judicial approval, and that judicial approval was contingent on ongoing judicial supervision. She approved of Justice Rouleau's description of the nature of the court's supervisory role, agreeing that it was not a judicial review in the administrative law sense. She held that the Agreement must be interpreted as providing for meaningful judicial supervision: at para 33.
- [63] Justice Côté, writing for herself and Justice Moldaver, concurred with Justice Abella in the result but for different reasons. She also concluded that judicial review in the administrative law sense was not available with respect to the decisions of IAP adjudicators. She stated that the foundational document, the Agreement, was a contract, whereas judicial review is only available to supervise the conduct of state actors: at paras. 101-102. She emphasized that despite the fact that Canada was a party to the Agreement and it had been approved by court order, it remained a private settlement, not a public act: at paras. 104-105. She too noted that this conclusion was consistent with Justice Rouleau's decision in Schachter: at para. 106.
- [64] Justice Côté held that judicial recourse is available through the RFD process in certain circumstances. The RFD process permits the supervising courts to provide directions regarding the implementation, administration, or amendment of the IRSSA or the implementation of the Orders. She stated:
- [113] While it is clear that the parties do not have the option of seeking judicial review of IAP decisions, they can file RFDs with the supervising courts to resolve issues relating to the implementation and administration of the IRSSA. Indeed, after fully exhausting the

mechanisms provided for in the IRSSA, certain groups or individuals may apply to the supervising courts for directions in respect of the implementation, administration, or amendment of the IRSSA. Applications are made in accordance with the Court Administration Protocol, which provides that all matters that require orders or directions must be the subject of an RFD (A.R., vol. I, at pp. 93 and 96; R.F. (Attorney General), at paras. 27-28). This Court is tasked with determining the scope of the supervising courts' jurisdiction when responding to RFDs arising from IAP decisions.

- [65] Justice Côté went on to say that authority for judicial recourse is found in the Agreement itself, the Approval and Implementation Orders, and provincial class proceedings legislation: at paras. 114-119. However, the availability of judicial recourse is limited to situations where the adjudicator failed to apply the terms of the IAP. It is on this point that she differed from the analysis of Justice Abella, but that point of difference is not important for this appeal.
- [66] Justice Brown, writing for himself and Justice Rowe, dissented in the result, but agreed with Justice Côté's analysis of the source of the Court's limited supervisory jurisdiction. It is therefore Justice Côté's reasons that appear to express the view of the majority concerning the basis of the Court's supervisory jurisdiction under the Agreement and the nature of RFDs.
- [67] In conclusion on this point, J.W. reinforces that the RFD process is unique to this Agreement. It is not a civil action. Although it bears some similarities to judicial review, it is not an administrative law remedy. It is *sui generis*.
- [68] I now turn to Mr. Scout's argument that cause of action estoppel cannot apply to RFDs because an RFD is not a cause of action.
- [69] The nature of a cause of action was defined by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, as follows:
- [54] A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common.
- [70] A similar definition was given by Lord Diplock in *Letang v. Cooper* (1964), [1965] 1 Q.B. 232 (Eng. C.A.) at 242-43: "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person." Lord Diplock's definition has been endorsed by this Court on a number of occasions: *Mohl v. University of British Columbia*, 2006 BCCA 70 at para.24; *Denman Island Local Trust Committee v. Stoneman*, 2013 BCCA 517 at para.71.

- [71] An RFD, by contrast, is not a proceeding in which one person seeks a remedy against another person on the basis of a factual situation. It is a tool that permits the supervising courts of the IRSSA to provide directions regarding the implementation, administration, or amendment of the IRSSA or the implementation of the Orders.
- [72] Mr. Scout relies on this Court's decision in *Mohl* for the proposition that cause of action estoppel does not apply to RFDs because they are not commenced in the same manner as actions, do not involve litigation between parties, and do not seek a remedy against another person.
- [73] In *Mohl*, a student had brought a judicial review petition against his university's senate committee. The petition proved unsuccessful. The student then brought a civil action against the university, prompting the university to claim *res judicata*. Justice K. Smith, writing for the Court, reasoned that the matter did not engage *res judicata*, on the basis of the distinction between the exercise of the court's supervisory jurisdiction in the judicial review, and the adjudication of an inter-party dispute in the action:
- [25] In my view, the judicial review of the decision of the Senate Committee was not an "action" for purposes of cause-of-action estoppel. The application for judicial review is the modern equivalent of the ancient prerogative writ of *certiorari* - its purpose in this case was to bring up the record of the proceedings of the Senate Committee for review by the Supreme Court in order to determine whether the Committee's discretion was improperly exercised. It was an exercise of the superintending power of the superior court over a tribunal of lower rank rather than an adjudication of a dispute between parties. Nothing in the nature of a "remedy against another person" or "a proceeding in the nature of a litigation between a plaintiff and a defendant" was involved. The dissimilarity in these functions of the Supreme Court is reflected in the Rules of Court, which distinguish between a proceeding such as a judicial review and an "action". The judicial review proceeding was an "originating application" commenced by petition, while an "action" must be commenced by a writ of summons: see Rule 1(8). Further, the remedies sought in the two proceedings differ. The objective of the judicial review proceeding was to have the administratively-assigned failing grade set aside. The objective of the appellant's action, among other things, is an award of damages against the respondent. Thus, cause-of-action estoppel does not apply to the appellant's action.

[Emphasis added.]

- [74] Canada says that Mr. Scout incorrectly interprets *Mohl* as precluding the applicability of cause of action estoppel to RFDs. It argues that *Mohl* was concerned with a comparative analysis regarding the court's distinct functions in a judicial review in an administrative law context, and an action. The Court concluded that the nature of the two proceedings, the role of the court, and the remedy sought in the two proceedings were distinct, and therefore cause of action estoppel did not attach to the second proceeding. Canada says that in contrast to *Mohl*, both proceedings here were RFDs before the Western Administrative Judge of the IRSSA. The comparative issue does not arise.

- [75] In support of this argument, Canada points to this Court's subsequent decision in *Erschbamer v. Wallster*, 2013 BCCA 76. It says that in *Erschbamer* the Court did not require the proceedings to arise from a writ of summons or notice of civil claim for cause of action estoppel to be applicable.
- [76] With respect, I do not agree with this interpretation of *Erschbamer* and *Mohl*. In *Erschbamer*, the first proceeding was brought by way of a statutory petition under s. 35 of the Property Law Act, R.S.B.C. 1996, c. 377. The petitioner sought to have a restrictive covenant and easement on her property cancelled or modified. The chambers judge dismissed her petition on the basis that she had failed to establish the absence of a practical benefit to her neighbours. She then proceeded with renovations on her home. The neighbours brought an action in which they alleged that the petitioner (now the defendant) had violated the restrictive covenant and easement. They applied to strike portions of her statement of defence on the grounds that those passages were an attempt to relitigate the first proceeding.
- [77] Justice Tysoe held that the subject matters of the two proceedings were sufficiently similar for cause of action estoppel to apply despite the fact that the first was a petition and the second was an action. He distinguished *Mohl* on the basis that the statutory petition did amount to a prior adjudication of a dispute between the parties:
- [27] In *Mohl* [t]his Court concluded that cause of action estoppel did not apply because the judicial review proceeding was not an action for purposes of cause of action estoppel. The Court made the distinction between the court exercising its superintending power in the judicial review proceeding and the court adjudicating a dispute between parties in the second proceeding.
- [28] In my view, *Mohl* is clearly distinguishable from the present case. Here, the first proceeding was not an application for judicial review. The first proceeding did involve a dispute between the parties upon which the court adjudicated. It involved the same subject matter as the second proceeding; namely, the height of the defendant's reconstructed house and the restrictive covenant. I do not think anything turns on the fact that the first proceeding was commenced by way of a petition (as opposed to a writ of summons or notice of civil claim) and sought a statutory remedy rather than a remedy at common law.
- [78] Justice Tysoe went on to reason that, in the event that cause of action estoppel was not technically available, the impugned passages in the statement of defence could still be struck out as an abuse of process: at paras. 29-30.
- [79] To summarize, the Court in *Mohl* decided that cause of action estoppel does not apply where the prior proceeding was a judicial review because a judicial review is not a cause of action. Nothing in *Erschbamer* contradicts this holding. The Court in *Erschbamer* was clear that the prior proceeding was not a judicial review, but a determination of a dispute between the parties: at para. 28.

[80] In conclusion, an RFD is neither a cause of action nor a judicial review. It is not "an adjudication of a dispute between parties", to borrow the language from Mohl. As such, cause of action estoppel would not apply to an RFD.

[81] As I conclude that the Administrative Judge erred in law in applying *res judicata* on these facts, it is unnecessary to consider the fourth Doering criterion, or whether the Administrative Judge ought to have exercised her discretion not to apply *res judicata*.

[82] As I have stated, issue estoppel was not argued and I will not address it. I will, however, discuss the related concepts of abuse of process and collateral attack.

ii. Abuse of Process and Collateral Attack

[83] The leading case on the doctrine of abuse of process is *Toronto (City)*. Justice Arbour, writing for the Court on this issue, compared and contrasted the doctrine with that of *res judicata*. She noted that abuse of process "engages 'the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute'": at para. 37. Abuse of process may be invoked where the strict requirements of issue estoppel (or cause of action estoppel) are not met, but to allow the litigation to proceed would offend such principles as judicial economy, consistency, finality, and the integrity of the justice system: at para. 37. The doctrine is attractive because it is "unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation": at para. 42.

[84] *Lange* at 190-91 notes a similar relationship between *res judicata* and the doctrine of abuse of process:

The invocation of abuse of process by relitigation has largely been a response to perceived deficiencies in the complex doctrines of issue estoppel and cause of action estoppel. Where the strict rules of an estoppel doctrine have not been met or where judicial pronouncements on estoppel doctrines create more obstacles than solutions, a simple case of abuse of process by relitigation may be established.

[Footnotes omitted.]

[85] While abuse of process is a flexible doctrine, it should be applied only where proceedings are exceedingly unfair, vexatious, or oppressive. As Justice Arbour explained:

[35] This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

[86] As Lange puts it at 188, "[T]his power is still recognized as an extraordinary remedy to be applied sparingly and only in the clearest and most obvious cases."

[87] Unlike *res judicata*, which has as one of its goals the protection of the parties from repeated litigation, the doctrine of abuse of process focuses on protecting the integrity of the justice system. Justice Arbour continued:

[43] In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. [T]he focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example.

[Citations removed.]

[88] It is my view that a finding of abuse of process is potentially applicable to successive RFDs but I would not find abuse of process is applicable to these facts. Mr. Scout's Second RFD represents a request by a vulnerable Indian residential school survivor for the courts to interpret the Agreement reached between the parties and, if it has been misinterpreted, to give it its intended effect. It cannot fairly be described as vexatious or unfair, nor would the integrity of the justice system be called into question if the court were to decide it on its merits.

[89] Finally, I will briefly address Canada's argument that the Second RFD constitutes a collateral attack. As Justice Arbour explained in *Toronto (City)*, the rule against collateral attack is generally applied when a litigant seeks to attack an order itself and its legal effect: at para. 34. I do not consider it to have application here.

[90] I therefore turn to what I shall call the "interpretive argument".

b. The "Interpretive Argument"

[91] The second issue on this appeal turns on the interpretation of certain dates in the Agreement and specifically, the IAP Application Deadline. As noted above, the Agreement and Approval Orders do not specify the date of the IAP Application Deadline. Rather, they define it in relation to certain other events.

[92] Although the Administrative Judge did not address the interpretive argument, the parties invited this Court to do so. The parties filed full written submissions on the issue in the court below and the evidentiary record is sufficient to enable us to decide it. In these circumstances, I am of the view that this Court should resolve the issue rather than remitting it to the Administrative Judge.

[93] I shall first set out what I shall describe as "the common interpretation" for calculating the IAP Application Deadline, which results in a deadline of September 19, 2012. Then I shall set out Mr. Scout's interpretation, which results in a deadline of September 20, 2012.

[94] I note at the outset that the Agreement provides by its express terms that contra proferentem, the rule which provides that ambiguity in contractual provisions is resolved against the drafter of the contract, does not apply.

1. The Common Interpretation

[95] The IAP Application Deadline is not expressly defined in the Agreement or the Approval Orders. It may only be ascertained by reference to other dates and events. The first of those is the Implementation Date. This was the date upon which the Agreement came into effect pursuant to art. 2.01 of the Agreement:

This Agreement will become effective and be binding on and after the Implementation Date on all the Parties including the Class Members and Cloud Class Members subject to Section 4.14

The Implementation Date was defined in art. 1.01 of the Agreement and para. 1(o) of the Approval Order as follows:

"Implementation Date" means the latest of:

- i. the expiry of thirty (30) days following the expiry of the Opt-Out Periods; and
- ii. the day following the last day on which a Class Member in any jurisdiction may appeal or seek leave to appeal any of the Approval Orders; and
- iii. the date of a final determination of any appeal brought in relation to the Approval Orders

[96] The first of these three options - the expiry of 30 days following the expiry of the Opt Out Period - was the last to occur. The Opt Out Period was the period of time during which a class member could opt out of the Agreement without leave of the court. Paragraph 1(s) of the Approval Order provided that the expiry date of the Opt Out Period was August 20, 2007:

"Opt Out Period" or "Opt Out Deadline" means the period commencing on the Approval Date and ending on August 20, 2007, during which an individual may opt out of this class proceeding without leave of the Court, as set out in the Approval Orders

[Emphasis added.]

[97] The 30th day after August 20, 2007 was September 19, 2007:

August 2007

September 2007

Sun

Mon

Tue

Wed

Thu

Fri

Sat

Sun

Mon

Tue

Wed

Thu

Fri

Sat

1(12)

2(13)

3(14)

4(15)

5(16)

6(17)

7(18)

8(19)

9(20)

10(21)

11(22)

12(23)

13(24)

14(25)

15(26)

20

21(1)

22(2)

23(3)

24(4)

25(5)

16(27)

17(28)

18(29)

19(30)

26

(6)

27(7)

28(8)

29(9)

30(10)

31(11)

[98] The provisions of the Agreement pertaining to the opt out procedure are of some significance to Mr. Scout's argument, so I will describe them in detail. Pursuant to art. 4.14 of the Agreement, if too many class members opted out (5,000 people, or the "Opt Out Threshold"), the entire Agreement would be rendered void unless Canada chose to waive compliance with this term of the Agreement. It had 30 days from the expiry of the Opt Out Period to decide whether to waive compliance:

4.14 Opt Out Threshold

In the event that the number of Eligible CEP Recipients opting out or deemed to have opted out under the Approved Orders exceeds five thousand (5000), this Agreement will be rendered void and the Approval Orders set aside in their entirety subject only to the right of Canada, in its sole discretion, to waive compliance with this Section of the this Agreement. Canada has the right to waive compliance with this Section of the Agreement until thirty (30) days after the end of the Opt Out Periods.

[Emphasis added.]

[99] Paragraph 27 of the Approval Order provided that the court-appointed Monitor was to submit a report to the court within 30 days of the expiry of the Opt Out Period identifying the people who had opted out (the "Opt Out Report"):

Crawford Class Action Services [the Monitor], shall, within thirty (30) days of the end of the Opt Out Period, report to this Court and advise as to the names of those persons who have opted out of this class proceeding.

[100] The deadline for the Monitor to submit the Opt Out Report and the deadline for Canada to exercise its right to waive compliance with art. 4.14 were effectively the same, although worded slightly differently: Canada could exercise its right "until thirty (30) days after the end of the Opt Out Periods" while the Monitor had to perform its obligation "within thirty (30) days of the end of the Opt Out Period". I shall refer to this deadline as the "Waiver Deadline". It is not in dispute that the Waiver Deadline fell on September 19, 2007.

[101] As it turned out, the Opt Out Threshold was not reached and art. 4.14 was not triggered.

[102] The final date of significance to this appeal is the IAP Application Deadline. Pursuant to art. 6.02(1) of the Agreement, IAP applications would not be accepted before the Implementation Date or after the IAP Application Deadline. It was defined as follows in art. 1.01 of the Agreement:

"IAP Application Deadline" means the fifth anniversary of the Implementation Date

[103] All parties to the Agreement, including the plaintiff class, have proceeded for almost a decade on the mutual understanding that the Implementation Date was September 19, 2007, and that accordingly the IAP Application Deadline was September 19, 2012.

[104] The Administrative Judge described the reliance by the administrators of the Agreement on the September 19 dates:

[16] Since 2007, those involved in the administration of the IRSSA and the IAP have almost universally understood that the Implementation Date (and thus the IAP Application Deadline) was September 19, 2007. The Chief Adjudicator points out in its submissions that the September 19, 2007 date was used by the IRSAS in outreach material it used to communicate the IAP Application Deadline to former students of Indian Residential Schools. The September 19, 2007 date was also used in the court-approved notice plan funded by Canada in 2006, part IV of which was designed to ensure that potential IAP

applicants were aware that the IAP Application Deadline was September 19, 2012.

[105] Notwithstanding this near-universal reliance on the September 19 dates, Mr. Scout contends that the Implementation Date and the IAP Application Deadline have been misconstrued by almost everyone and are in fact September 20, 2007, and September 20, 2012, respectively. I now turn to the alternative interpretation of the IAP Application Deadline as asserted by Mr. Scout.

2. Positions of the Parties

i. The Appellant's Interpretation

[106] Mr. Scout does not dispute that if the Implementation Date was September 19, 2007, then the IAP Application Deadline was September 19, 2012. His argument is that the Implementation Date was September 20, 2007, and therefore the IAP Application Deadline was September 20, 2012.

[107] Briefly, Mr. Scout says that the Agreement created three distinct time periods: the Opt Out Period (which expired August 20, 2007), the 30-day "Interim Period" (which ran from August 21 to September 19, 2007), and the five-year IAP Application Period (which he says ran from September 20, 2007 to September 20, 2012 and the respondents say ran from September 19, 2007 to September 19, 2012). He says that according to the common interpretation, the Interim Period and the IAP Application Period overlapped by one day. He says that this is wrong.

[108] Mr. Scout's argument focuses on the relationship between the Implementation Date and the Waiver Deadline. He says the Agreement would become effective at the beginning of the day on the Implementation Date. Meanwhile, the Monitor had until the end of the day of the Waiver Deadline to perform its legal obligation to submit the Opt Out Report, and - if the Opt Out Threshold were reached - Canada had until the end of that day to exercise its legal right to waive compliance with art. 4.14.

[109] Mr. Scout says that if the Implementation Date fell on the same day as the Waiver Deadline, it would have been possible, on a different set of facts, for the Agreement to become effective at the beginning of the day while there was still a chance that it would become void at the end of the day. Class members' rights would then have been vested and contingent at the same time. He says that this result is absurd.

[110] Read in the context of the entire Agreement, Mr. Scout says the Implementation Date must have been intended to be the date after the expiry of the 30 days following the expiry of the Opt Out Period: September 20, 2007. The IAP Application Deadline therefore fell on September 20, 2012, and Mr. Scout's application was submitted in time.

ii. Canada and the Chief Adjudicator's Responses

[111] Unsurprisingly, neither Canada nor the Chief Adjudicator accepts Mr. Scout's interpretation. Both of them point to the difference between paragraphs (i) and (ii) of the definition of "Implementation Date":

- i. the expiry of thirty (30) days following the expiry of the Opt-Out Periods; and
- ii. the day following the last day on which a Class Member in any jurisdiction may appeal or seek leave to appeal any of the Approval Orders;

[Emphasis added.]

[112] They say that the drafters would not have used different expressions to mean the same thing in the same definition. Therefore "the expiry of thirty (30) days" must refer to "the last day" of the 30-day period and not "the day following the last day" of that period. In effect, they submit, the appellant is asking this Court to read into the first part of the definition the words "[the day after] the expiry of thirty (30) days" - language that could have been included by the drafters, but was not.

[113] The Chief Adjudicator also takes issue with the appellant's interpretation based on the existence of a 30-day "Interim Period":

29. The appellant asked the Court to create an "interim period" between the expiry of the Opt-Out Period and the Implementation Date, and said that it must consist of 30 clear days. There is no presumption that a reference to a number of days means that they must be "clear days"; the presumption is the opposite. Further, as the requestor acknowledged, the IRSSA makes no mention of any "interim period".

[114] Furthermore, the Chief Adjudicator submits that there is no absurdity in the Agreement. He says that given all of the arrangements that would have to be in place on the Implementation Date, Canada would have had to make its decision far in advance of the Waiver Deadline as to whether it was going to waive its right or not. In addition, a purposive reading of art. 4.14 shows that it did not provide Canada with any power to cancel the Agreement after it was implemented. If Canada had in fact proceeded with the Agreement by putting the requisite funding in place and permitting IAP and CEP applications to be accepted and processed on September 19, 2007, it would have waived its rights under art. 4.14.

3. Discussion

[115] I am satisfied that the Implementation Date has been correctly understood to fall on September 19, 2007. Therefore the IAP Application Deadline fell on September 19, 2012, and Mr. Scout's claim was out of time.

[116] The Interpretation Act, R.S.B.C. 1996, c. 238 (although not applicable in a legal sense) provides some guidance as to common interpretive principles:

- (2) Subject to subsection (3), the beginning or end of a period of one day or consecutive days or of one week or consecutive weeks, expressed in relation to a reference day, is to be determined as follows:
- (a) if the reference day is before the period, by counting forward from and including the day after the reference day;
 - (b) if the reference day is after the period, by counting backward from and including the day before the reference day.
- (3) If a period described in subsection (2) is expressed as "clear" days or weeks or "at least" or "not less than" a number of days or weeks,
- (a) the beginning or end of the period, as determined under subsection (2) (a), is one day later, and
 - (b) the beginning or end of the period, as determined under subsection (2) (b), is one day earlier.

[117] Section 27(2) of the Interpretation Act, R.S.C. 1985, c. I-21, is similar, as is s. 89(3) of the Legislation Act, S.O. 2006, c. 21, Schedule F:

89.

- (3) A reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens, even if the reference is to "at least" or "not less than" a number of days.

[118] As noted in *Rookie Blue Two Inc. v. Her Majesty the Queen*, 2015 ONSC 1618, these statutory provisions codify the common law position that expressions such as "from such a day" or "until such a day" are generally interpreted as excluding the first day and including the last day: at paras. 12-14.

[119] If the Opt Out Period expired on August 20, 2007, then the expiry of 30 days following the expiry of the Opt Out Period - excluding the first day but including the last - fell on September 19, 2007.

[120] "The expiry of" September 19, 2007 must be taken to mean the end of the day, or midnight, on September 19, 2007. The fifth anniversary of that date would be midnight on September 19, 2012. Accordingly, Mr. Scout's application, received during the day of September 20, 2012, was rightly rejected pursuant to art. 6.02 of the Agreement.

[121] This interpretation is also consistent with the different wording of the first and second paragraphs of the definition of "Implementation Date". "The expiry of thirty (30) days" is the end of the last day of the period, while "the day following the last day" of any appeal period is the day after the last day of the period.

[122] In addition, when the Implementation Date is interpreted as occurring at the end of the day on September 19, 2007, the concern that class members' rights were simultaneously vested and contingent during that day does not arise.

[123] In my view, the most persuasive interpretation of the Agreement is the one I have just described. As the Agreement is not ambiguous, it is not necessary to consider whether the subsequent conduct of the parties is admissible to aid in its interpretation.

[124] In reaching this conclusion I emphasize that the calculation of the IAP Application Deadline did not prejudice Mr. Scout. Mr. Scout believed that the IAP Application Deadline was September 19, 2007, as did his lawyer and everyone else. It cannot be assumed that, had the parties interpreted the Implementation Date and IAP Application Deadline as falling one day later, he would have submitted his application on time. Mr. Scout's situation is unfortunate, but his misfortune arises from the inadvertence of his counsel and not from the interpretation of the Agreement.

[125] I would dismiss this ground of appeal.

VI. Disposition

[126] I would dismiss the application for new evidence, and dismiss the appeal.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Fisher"

Appendix

Relevant Provisions of the Approval Order (British Columbia)

1. For the purpose of this judgment, and all subsequent judgments or orders, herein, the following definitions shall apply:
 - b) "Agreement" means the Settlement Agreement entered into by the parties on May 10th, 2006, with schedules, attached hereto as Schedule "A";
 - c) "Implementation Date" means the latest of:
 - i. the expiry of thirty (30) days following the expiry of the Opt-Out Period; and
 - ii. the date following the last day on which a Class Member in any jurisdiction may appeal or seek leave to appeal any of the Approval Orders; and
 - iii. the date of a final determination of any appeal brought in relation to the Approval Orders.

- s) "Opt Out Period" or "Opt Out Deadline" means the period commencing on the Approval Date and ending on August 20, 2007, during which an individual may opt out of this class proceeding without leave of the Court, as set out in the Approval Orders;
12. The Agreement, which is attached hereto as Schedule "A", and which is expressly incorporated by reference into this judgment, including the definitions included therein, is hereby approved and shall be implemented, in accordance with this judgment and any further order of this Court.
13. This Court shall supervise the implementation of this Agreement and the judgment and, without limiting the generality of the foregoing, may issue such orders as are necessary to implement and enforce the provisions of the Agreement and this judgment.
25. No Class Member may opt out of this class proceeding after August 20, 2007, without leave of the Court.
27. Crawford Class Action Services, shall, within thirty (30) days of the end of the Opt Out Period, report to this Court and advise as to the names of those persons who have opted out of this proceeding.
33. In the event that the number of persons who would otherwise be Eligible CEP Recipients who opt out of this class proceeding exceeds five thousand (5,000), the Agreement will be void and this judgment will be set aside in its entirety subject only to the right of Canada, at its sole discretion, to waive compliance with section 4.14 of the Agreement.

Relevant Provisions of the Agreement

1.01 Definitions

In this Agreement, the following terms will have the following meanings:

"IAP Application Deadline" means the fifth anniversary of the Implementation Date[;]

"Implementation Date" means the latest of:

- (1) the expiry of thirty (30) days following the expiry of the Opt-Out Periods; and
- (2) the day following the last day on which a Class Member in any jurisdiction may appeal or seek leave to appeal any of the Approval Orders; and
- (3) the date of a final determination of any appeal brought in relation to the Approval Orders;

"Independent Assessment Process" and "IAP" mean the process for the determination of Continuing Claims, attached as Schedule "D";

"Opt Out Periods" means the period commencing on the Approval Date as set out in the Approval Orders;

1.04 No Contra Preferentum

The Parties acknowledge that they have reviewed and participated in settling the terms of this Agreement and they agree that any rule of construction to the effect that any ambiguity is to be resolved against the drafting parties is not applicable in interpreting this Agreement.

2.01 Date when Binding and Effective

This Agreement will become effective and be binding on and after the Implementation Date on all the Parties including the Class Members and Cloud Class Members subject to Section 4.14.

4.06 Approval Orders

Approval Orders will be sought:

- (a) incorporating by reference this Agreement in its entirety;
- (c) ordering and declaring that on the expiry of the Opt Out Periods all pending actions of all Class Members, other than the Class Actions, relating to Indian Residential Schools, which have been filed in any court in any Canadian jurisdiction against Canada or the Church Organizations, except for any pending actions in Quebec which have not been voluntarily discontinued by the expiry of the Opt Out Period, will be deemed to be dismissed without costs unless the individual has opted out, or is deemed to have opted out on or before the expiry of the Opt Out Periods.
- (d) ordering and declaring that on the expiry of the Opt Out Periods all class members, unless they have opted out or are deemed to have opted out on or before the expiry of the Opt Out Periods, have released each of the defendants and Other Released Church Organizations from any and all actions they have, may have had or in the future may acquire against any of the defendants and Other Released Church Organizations arising in relation to an Indian Residential School or the operation of Indian Residential Schools.
- (e) ordering and declaring that in the event the number of Eligible CEP Recipients opting out or deemed to have opted out under the Approval Order exceeds five thousand (5000), this Agreement will be rendered void and the Approval Orders set aside in their entirety subject to only to the right of Canada, in its sole discretion, to waive compliance with Section 4.14 of the Agreement.

4.14 Opt Out Threshold

In the event that the number of Eligible CEP Recipients opting out or deemed to have opted out under the Approved Orders exceeds five thousand (5,000), this Agreement will be rendered void and the Approval Orders set aside in their entirety subject only to the right of Canada, in its sole discretion, to waive compliance with this Section of the this Agreement. Canada has the right to waive compliance with this Section of the Agreement until thirty (30) days after the end of the Opt Out Periods.

6.01 IAP

An Independent Assessment Process will be established as set out in Schedule "D" of this Agreement.

6.02 IAP Application Deadline

- (1) Application to the IAP will not be accepted prior to the Implementation Date or after the IAP Application Deadline;
- (2) Where an Eligible IAP Claimant does not submit an IAP Application as prescribed in this Section 6.02(1) that Eligible IAP Claimant will not be admitted to the IAP and any such entitlement to make a claim in the IAP will be forever extinguished.

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Prepared on 29 October 2026 · Esheria