
CANADA / JUDGMENT

Fontaine v. Canada (Attorney General)

2014 BCSC 941

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Supreme Court of British Columbia

DECIDED

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2014 BCSC 941 Fontaine v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fontaine v. Canada (Attorney General),

2014 BCSC 941

Date: 20140528

Docket: L051875

Registry: Vancouver

Between:

Larry Philip Fontaine et al

Plaintiffs

And

The Attorney General of Canada et al

Defendants

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

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

May 6 - 7, 2014

Place and Date of Judgment:

Vancouver, B.C.

May 28, 2014

Nature of Application

- [1] This decision relates to the Request for Direction brought by Larry Beady, on his own behalf as well as on the behalf of several similarly situated claimants, for guidance on the proper interpretation of the term "institution" in the Indian Residential Schools Settlement Agreement (the "Settlement Agreement"). Specifically, Mr. Beady seeks clarity on whether that term should be interpreted to include ancillary facilities, such as boarding and group homes affiliated with an Indian Residential School ("IRS").
- [2] After reviewing the submissions of the parties, this court disagrees with the interpretation suggested by counsel to Mr. Beady. Applying the relevant principles of contractual interpretation and reading the Settlement Agreement as a whole, the term "institution" should not be interpreted to include ancillary facilities. A review of the extrinsic evidence surrounding the formation of the Settlement Agreement also supports this conclusion. Both approaches demonstrate that an interpretation of "institutions" that includes ancillary facilities would be contrary to the intentions of the parties to the Settlement Agreement.

Background & Overview

- (a) Administration of the Settlement Agreement

- [3] For over a century, until the program finally ended in 1996, Aboriginal children were removed from their families and communities and educated in "residential schools." The result was generations of Aboriginal youth growing up away from their families, language and culture, and many suffering sexual and other forms of abuse. The Government of Canada ("Canada") has conceded that the IRS program was a misguided policy, and has formally apologized to Canada's First Nations people for its implementation.
- [4] Canada has committed to providing compensation to affected individuals pursuant to the terms of the Settlement Agreement. On December 15, 2006, the superior courts in nine provinces and territories concurrently issued reasons approving a national settlement concluding various class actions related to IRSs throughout Canada (the "Approval Orders").
- [5] The courts subsequently issued orders on March 8, 2007, which incorporated the terms of the Settlement Agreement and otherwise addressed its implementation and administration (the "Implementation Orders"). There is a Court Administration Protocol, appended as Schedule 'A' to the Implementation Orders, which provides for ongoing supervision by the courts of the Settlement Agreement. Pursuant to that Protocol, it is the role of one of two Administrative Judges to respond to Requests for Direction in relation to the administration of the Settlement Agreement.
- [6] I am the Western Administrative Judge. Mr. Beardy made this Request for Direction to me on January 6, 2014.
- (b) Eligibility for Different Payments under the Settlement Agreement
- [7] Pursuant to the Settlement Agreement all those who attended a residential school operated by Canada are entitled to a "Common Experience Payment" ("CEP") amounting to \$10,000 for the first year of residence at an IRS and \$3,000 for every year of residence thereafter. Survivors of physical or sexual abuse are entitled to additional compensation by way of the Independent Assessment Process ("IAP"). Those types of abuse which are compensable within the IAP are labeled "continuing claims" (see Schedule D, Part I at p. 2).
- [8] The Settlement Agreement defines "Eligible CEP Recipient" and "Eligible IAP Recipient" as follows:

"Eligible CEP Recipient" means any former Indian Residential School student who resided at any Indian Residential School prior to December 31, 1997

"Eligible IAP Claimants" means all Eligible CEP Recipients, all Non-resident Claimants and includes reference to the term "Claimants" in the IAP.

- [9] "IRS" is a defined term in the Settlement Agreement:

"Indian Residential Schools" means the following:

- (1) Institutions listed on List "A" to OIRSRC's Dispute Resolution Process attached as Schedule "E";

- (2) Institutions listed in Schedule "F" ("Additional Residential Schools") which may be expanded from time to time in accordance with Article 12.01 of this Agreement; and
- (3) Any institution which is determined to meet the criteria set out in Section 12.01(2) and (3) of this Agreement.

[10] Finally, "Non-resident Claimants" is also a defined term in the Settlement Agreement:

"Non-resident Claimants" means all individuals who did not reside at an Indian Residential School who, while under the age of 21, were permitted by an adult employee of an Indian Residential School to be on the premises of an Indian Residential School to take part in authorized school activities prior to December 31, 1997. For greater certainty, Non-resident Claimants are not Class Members or Class Class Members.

(c) Procedural History of this Request for Direction

- [11] Eligibility for the CEP is at the heart of this Request for Direction. According to the Settlement Agreement, individuals who wish to receive a CEP are to submit a CEP Application to the Trustee overseeing the fund (dubbed the "Designated Amount Fund") from which the CEP are made. The Trustee will assess whether the applicant is in fact eligible for a CEP. CEP applicants dissatisfied with the result of their application can appeal this decision to the National Administration Committee ("NAC").[1]
- [12] The NAC has heard approximately 150 appeals in which one or more of the years under appeal are years in which the applicant was billeted at a private boarding home or any facility other than the IRS recognized in the above-noted schedules to the Settlement Agreement (the "Billeted Students"). The Trustee has denied CEP for these years. The NAC has upheld these denials, taking the position that such claims do not fall within the language of the Settlement Agreement.
- [13] This issue has previously been before the Administrative Judges. In December 2008, the NAC brought a Request for Guidance to the Administrative Judges for guidance regarding the CEP applications of the Billeted Students. The Administrative Judges held that an answer to this question would need to be decided on a motion with a proper evidentiary record. They also provided guidance on the procedure to be followed if the NAC were to bring such a motion. Finally, the Administrative Judges made clear that the NAC was under no obligation to bring this motion.
- [14] The NAC chose not to pursue such a motion. As a result, Mr. Beady has brought this Request for Direction.
- [15] In March 2012, Mr. Beady appeared before me to request a hearing to determine several issues, all of which were aimed at determining whether the Billeted Students are entitled to the CEP. Ultimately, I allowed Mr. Beady to bring a Request for Direction regarding the interpretation of the Approval Orders, specifically whether the Settlement Agreement should be interpreted such that Billeted Students are eligible for the CEP. I also provided

directions regarding the procedure to be followed for such a hearing, in particular, regarding Mr. Beardy's access to files of other Billeted Students for the purpose of developing the evidentiary record.

Facts

- [16] Mr. Beardy was born in Churchill, Manitoba, in 1954. In 1962, at the age of eight, he was sent to attend the McKay IRS, which was located in the town of Dauphin, Manitoba. Mr. Beardy resided at the McKay IRS from 1962 until the 1967/68 school year.
- [17] When Mr. Beardy arrived at the McKay IRS for the 1967/68 school year, school operators informed him that he and two other students would be residing outside of the McKay IRS, with a family at a private residence in Dauphin. Mr. Beardy stayed with this family at night and on weekends. During the day he continued to attend classes at the McKay IRS.
- [18] In 1968, the Department of Indian Affairs ceased providing classroom instruction at the McKay IRS. The McKay IRS became a student residence only. Regardless, from this period onwards, Mr. Beardy continued to reside at a private residence (of a different family) and attended school elsewhere.
- [19] Mr. Beardy applied for CEP for the years 1961/62 to 1970/71. Mr. Beardy received a CEP for the school years 1962/63 to 1967/68 because of his residence at the McKay IRS. Despite only having been listed in the March 1968 Quarterly Return as having been in residence for 9 days, Mr. Beardy was assessed as eligible for the CEP for the entire school year. However, Mr. Beardy did not receive a CEP for the school years 1968/69 to 1970/71, as during this period he resided at a private residence.
- [20] Consistent with my March 2012 directions, in his materials for this hearing Mr. Beardy has included documents relating to 18 representative cases. These are all individuals who are similarly situated to Mr. Beardy in that the NAC denied their CEP requests for any period of time during which they did not reside in an IRS. Some of these individuals lived in private residences while they attended classes at an IRS. Others were placed in hostels or group homes. Like Mr. Beardy, none consented to or had any input on where they would reside for the school year.
- [21] Among the documents of the representative cases were those relating to the intervener in this matter, Mr. Lawrence Baxter. Mr. Baxter was born on November 2, 1942, on the Marten Falls First Nation. In 1952, when he was 9 years old, Mr. Baxter attended the Pelican Falls IRS in Sioux Lookout, Ontario, where he remained until 1959. For the 1959/60 school year, Mr. Baxter was transferred to the Shingwauk IRS in Sault Ste. Marie, Ontario. Despite being resident at the Shingwauk IRS, Mr. Baxter attended the Anna McCrea Public School, which was adjacent to the Shingwauk IRS and was a provincially run school.

- [22] Beginning with the 1961/62 school year, the Department of Indian Affairs boarded Mr. Baxter out from the Shingwauk IRS to a foster home located in Sault Ste. Marie. The Department subsequently placed him in 4 different foster homes in the next four years. Throughout this period, Mr. Baxter did not attend classes at an IRS; instead he was enrolled at provincially run schools.
- [23] Mr. Baxter received CEP for the years 1952/53 to 1960/61 when he resided at Pelican Falls IRS and Shingwauk IRS. However, he was denied CEP for the years 1961/62 to 1964/65 on the basis that he was a home boarder during those years.

Positions of the Parties

(a) Mr. Beardy

- [24] Mr. Beardy argues that the term "institutions" in the Settlement Agreement should be interpreted to include ancillary facilities such as boarding and group homes supervised and administered by Canada in connection with IRSs. Such an interpretation of the term, Mr. Beardy submits, would lead to Billeted Students receiving CEP for the years when they resided at ancillary facilities.
- [25] Mr. Beardy argues that there is a "latent ambiguity" in the Settlement Agreement with respect to institutions. The ambiguity is caused by the fact that the definition of IRS in the Settlement Agreement refers to "institutions", but "institutions" itself is undefined. According to Mr. Beardy, the latent nature of this ambiguity is apparent when one considers the number of claimants who have sought the CEP for years in which they acknowledge being home or group boarders.
- [26] Mr. Beardy submits that it is consistent with a purposive interpretation of the Settlement Agreement to include ancillary facilities as institutions. Mr. Beardy notes that the essential aspects of the ancillary facilities satisfy the defining characteristics of a Residential School identified in Article 12.01 of the Settlement Agreement, namely:
- (a) the children are placed in a residence far away from their family homes by or under the authority of Canada for the purposes of education; and
- (b) Canada was jointly or solely responsible for the operation of the residence and care of the children there.
- [27] Mr. Beardy also submits that the existence of section 12.01 of the Settlement Agreement demonstrates the intention of the parties that those who endured similar experiences as those resident at IRSs also be eligible for CEP. Section 12.01 deals with the procedure and criteria required to add additional "institutions" to the schedule of listed IRSs.

[28] Further, Mr. Beardy notes that the Billeted Students had the same experiences as those eligible to receive the CEP. Both groups suffered from enforced separation from home, family, culture, community and language. The sharing in these common experiences is what constituted the rationale for the CEP.

(b) Mr. Baxter

[29] Counsel to Mr. Baxter, the intervener in this matter, provided submissions that were along the lines of those of Mr. Beardy. He noted that although individuals such as his client resided outside of IRSs, they were very much under the control of the Department of Indian Affairs, which set curfew and enforced performance standards. He described his client's residence at the several foster homes where he resided as part of the Shingwauk IRS's "boarding out program". He stated that this program was adopted so that the Shingwauk IRS could avoid the cost of constructing a second residence.

[30] Ultimately, counsel to Mr. Baxter argued that an interpretation of institutions that would allow Billeted Students to be eligible for CEP was a proper interpretation of the Settlement Agreement as it would allow these individuals to be properly recognized for their experiences.

[31] Further, counsel to Mr. Baxter also argued that this issue should be dealt with as a question of the interpretation of the term "institutions" rather than as part of the application process described in section 12.01 of the Settlement Agreement. Counsel argues that requiring each Billeted Student to make a request to add the facility where he or she resided to the list of institutions recognized as IRSs would be "too onerous". Counsel for Mr. Beardy agreed with this submission.

(c) Canada

[32] Canada submits that the interpretation of "institution" proposed by Messrs. Beardy and Baxter amounts to a full-scale amendment of the Settlement Agreement. Canada argues that it would broaden the definition of IRS to include a community of unidentified facilities, programs and services which were in some way tangentially supported or affiliated with an IRS.

[33] Canada submits that this issue requires a straightforward application of the principles of contract interpretation. On a plain reading of the agreement as a whole, Canada argues that the term institution includes no more than the physical residences of the IRS. Canada submits that this term should not include a private home located in the municipality where the IRS was located. Further, Canada rejects the contention that Article 12 can be used generally as a basis for enlarging the definition of IRS.

[34] Canada also submits that the distinction in the Settlement Agreement between residents and non-residents suggests that institutions should not be interpreted to include ancillary facilities. Residency at an IRS is the determinative factor of whether an individual is eligible for a CEP. There is no language in the Settlement Agreement that distinguishes between

Billeted Students and all other non-residents. As such, Canada submits that absent clear language the Settlement Agreement should not be interpreted as including the circumstances of Billeted Students in the definition of institutions.

- [35] Canada also argues that this Court should examine the factual matrix under which the agreement was entered into in determining the context of this dispute. To this end, it points to transcript evidence from the approval hearing related to the Settlement Agreement. This evidence suggests that the parties explicitly put their minds to the situation of the Billeted Students and decided that this group was excluded from the Settlement Agreement.

Analysis

- [36] As noted above, this Court finds no ambiguity in the Settlement Agreement. This is a straightforward question of contract interpretation. Applying the relevant interpretative principles, the term "institutions" should not be interpreted to refer to the ancillary facilities of an IRS.
- [37] Further, upon an analysis of the extrinsic evidence surrounding the formation of the agreement, it is clear that the parties to the Settlement Agreement intended that the Billeted Students not be included in its terms. Thus, even if there were ambiguity, because of this extrinsic evidence, that ambiguity be resolved against the positions of Messrs. Beady and Baxter.

(a) Principles of Contract Interpretation

- [38] The general principles of construction and interpretation of agreements are instructive in determining this issue. It is trite law that the aim of contract interpretation is to objectively determine the parties' intentions at the time of contract formation by referring to the words in the agreement. The British Columbia Court of Appeal explained the interpretative tools to be used in coming to this objective determination in *Gilchrist v. Western Star Trucks Inc.*, as follows:

The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made. The most significant tool is the language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations, may the court consider other matters such as the post-contracting conduct of the parties

The first inquiry, then, is to determine whether there is only one reasonable meaning to the words in the contract, or more than one. In this search one must look to the surrounding circumstances and the whole of the contract. The words of the contract must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning.[2]

[39] The Ontario Court of Appeal in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, provided a similar list of principles of contract interpretation, noting that agreements should be interpreted:

- (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
- (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
- (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),
- (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity.[3]

[40] Finally, specifically with regard to issues of interpretation of the Settlement Agreement, I agree with the comments of Goudge J.A. (sitting as an ex officio judge of the Ontario Superior Court of Justice) in *Fontaine v. AG Canada*, that the specific context in which the Settlement Agreement emerged needs to be taken into account. As Goudge J.A. noted, this agreement was the product of negotiations which:

evolved over a number of years. It is not a commercial agreement that arose after a short sharp negotiating session between two corporate entities. Its context should not be arbitrarily limited as if it were.[4]

[41] Recognizing this context does not mean that the subjective intentions of the parties should be considered. Further, understanding this context does not "drive interpretation"; however, it is helpful to the task of giving the Settlement Agreement "meaning".[5]

(b) The Settlement Agreement is clear and does not include ancillary facilities

[42] There is no ambiguity, either patent or latent, in the Settlement Agreement regarding the term "institutions". In *Leitch Gold Mines Ltd v. Texas Gulf Sulphur Co.*, the decision that counsel to Mr. Beardy described as containing the most frequently cited description of latent ambiguity, the Court describes an ambiguity as a word or expression capable on its face of two or more meanings.[6] The Court in *Leitch Gold* notes that:

As the term is used in the law of contracts, it implies that the parties knew fundamentally what they were contracting for or about but did not express it clearly when they put their intentions and agreement into writing.[7]

[43] Thus, as a question of contractual analysis, the ambiguity in question must relate to the intentions of the parties at the time of contract.

- [44] I disagree with Mr. Beady's submissions that the Settlement Agreement contains a latent ambiguity with respect to the term "institutions", specifically:
- (a) the fact that a substantial number of claimants sought CEP for years in which they acknowledge being boarders is not objective evidence of what the contracting parties intended by the term institutions at the time of the agreement. This would seem to be evidence of the subjective understanding of the agreement of these individuals. Further, given the context, it would be in the financial interest of these claimants to make a claim for as much of the settlement funds as possible. This does not speak to any ambiguity in the Settlement Agreement regarding the term "institutions";
 - (b) the fact that many of the claimants, at the time of being billeted, considered themselves to have been under the responsibility of the relevant IRS is not relevant to the question of whether the agreement is ambiguous with respect to the intentions of the parties at the time of contract;
 - (c) the fact that boarding assignments may have been controlled and supervised by the relevant IRSs is not relevant to the question of the parties' intentions at the time of contract with respect to the term "institutions"; and
 - (d) the fact that the NAC may require guidance from this Court in relation to the interpretation of this aspect of the agreement is not evidence of an ambiguity. As Canada pointed out, difficulty in interpreting an agreement is not necessarily evidence of a latent ambiguity.[8]
- [45] Reading the Settlement Agreement as whole, it is clear that the parties did not intend for the term institutions to include ancillary facilities.
- [46] I agree with Canada's submission that the distinction between residents and non-residents demonstrates the central importance of residency at an IRS to the Settlement Agreement. An "Eligible CEP Recipient" is one who resided at an IRS. This is distinguished from an "Eligible IAP Claimant" which includes "Non-resident claimants", who are those who did not reside at an IRS. As the definitions of "Non-resident Claimants" and "Eligible CEP Recipients" make clear, residency at an IRS is the central factor in determining eligibility for the CEP. Interpreting the term institutions to include habitation at locations that are not IRSs would be completely inconsistent with the importance that the parties placed on such residency.
- [47] The applicants would collapse the two categories, and remove entirely the requirement for residency at an IRS as required by the settlement agreement. If the parties intended CEP benefits for everyone who lived away from their parents, or for everyone who attended an IRS, they would have said so. Instead, CEP benefits are provided only to those who resided at an IRS.

- [48] I disagree with the submissions made by counsel to Messrs. Beardy and Baxter that section 12.01 can be used to inform the interpretation of the term "institutions". Article 12 applies when the parties are asking the court to add an institution as an IRS. This is not an Article 12 application. This submission effectively results in using the language of the article to allow the parties to circumvent the procedure that Article 12 details regarding the addition of institutions for the purposes of the Settlement Agreement.
- [49] Further, as pointed out by Canada, the interpretation that counsel to Messrs. Beardy and Baxter urged upon this court would result in interpretative absurdities. The situation of the intervener in this matter, Mr. Baxter, demonstrates this. If "institutions" is interpreted to include ancillary facilities affiliated with IRSs, then Mr. Baxter, who for a period lived outside of the IRSs and attended provincially run schools, would qualify for CEP for that period. As Mr. Baxter's situation suggests, an expanded definition of institutions would result in individuals in a variety of living arrangements, and with diverse experiences, all qualifying to receive a payment that is meant to compensate individuals for an experience that was common to them all.
- [50] The fact that this settlement occurred within the context of a class proceeding needs to be considered. Expanding the definition of "institutions" as Mr. Beardy suggests would effectively expand the class definition and cause results that are inconsistent with the principles underlying class proceedings. Class definitions are to bear a relationship to the common issues of the class such that success for one class member means success for all.[9] The more different experiences are included in the definition of institutions (and thus, the larger the class definition becomes), the more these principles become threatened. The parties cannot have intended this result.
- (c) Extrinsic evidence makes clear that Billeted Students were not included in the Settlement Agreement
- [51] As the Supreme Court of Canada held in *Eli Lilly & Co v Novopharm Ltd*, courts should only consider extrinsic evidence where the document is ambiguous.[10] In the event that I am mistaken regarding my holding on the ambiguity of the agreement and interpretation of the Settlement Agreement, the extrinsic evidence is also clear that the parties put their minds to whether to include Billeted Students in the Settlement Agreement and decided against it.
- [52] Counsel for Mr. Beardy argued before me that the extrinsic evidence shows that the parties only meant to exclude day students from the CEP (i.e., those who continued to live in their family homes while attending an IRS during the day). Counsel for Mr. Beardy submits that the parties did not turn their mind to the situation of the Billeted Students during these negotiations. A review of the submissions of the parties at the settlement approval hearing belies those submissions.

[53] There are several instances in the transcript of the approval hearing where individuals clearly are referring to Billeted Students, demonstrating that their circumstances were considered by the parties. For example, during the approval hearing Mr. Reginald Percival brought a petition on the behalf of boarding students. During his submissions, Mr. Percival clearly made reference to Billeted Students:

I do have a petition also from the boarding home students and again, I mentioned that there were some of our members that went to residential school but were also in the boarding home program at the same time, particularly the ones in Edmonton, Alberta the ones I heard from Prince George, identified a group home that was managed by the Salvation Army and indicated to me there was about 20 of them in that home, particularly there for educational purposes. And there was another group home in Kitimat that was managed by the Anglican Church and these were Nisga'a students that were sent out primarily to attend school [emphasis added]

[54] Further, counsel for a number of the objectors at the approval hearing, Mr. Allan Donovan, also made submissions that referred to the situation of the Billeted Students. During his submissions, Mr. Donovan made reference to the fact that the Settlement Agreement excluded individuals who attended IRSs, but were boarded out of the IRS:

The first issue that we'd like to discuss is the exclusion of a certain class or sub class of people from the common experience payment, and these are the people that you've heard about from numerous people - numerous Aboriginal survivors already who attended Indian residential schools, but lived off of the grounds. They either lived at boarding homes near to the school - some of them, one of our clients, lived at home and travelled to the school

To single out those who were boarded out but attended these schools, indeed, a marginalized group - within a marginalized group is simply wrong and it is not implementing what the parties were directed to implement, and that change came about by a few words that were changed from the political agreement to the settlement agreement [emphasis added]

[55] The submissions of counsel to Canada at the approval hearing, Mr. Paul Vickery, should remove any remaining doubts regarding whether the parties had the Billeted Students in mind during their negotiations. Mr. Vickery clearly referred to the Billeted Students and distinguished this group from the day students. Mr. Vickery's submissions make clear that neither group was to be included in the CEP:

There is also a question as to - a definition question, if I may put it that way. There are, for example, day students, being students who attended [IRSs] as contemplated by the agreement but did not reside there, returned home in the evening There are those who were in one or another varieties of boarding homes, whether with or without federal funding, some of which, for example, attended provincially operated day schools. There are - there is quite a continuum of individuals whose circumstances, at least at this point, appear to be arguably different from the circumstances of those resident at [IRSs], and at this point it is not intended to include the claims of those individuals in this settlement. [emphasis added]

[56] This extrinsic evidence makes clear that the parties were cognizant of the situation of the Billeted Students, and had these students in mind when negotiating the Settlement Agreement. However, the parties explicitly chose to exclude this group from the class definition and thus the CEP.

[57] This exclusion was part of a compromise with Canada. Although the Billeted Students were not included in the CEP, they were permitted to advance claims through the IAP. This compromise was discussed by Brenner CJ in his reasons approving of the Settlement Agreement:

This agreement and the certification will cover only those individuals who were in residence at an Indian Residential School. Many individuals attended these schools, but only as day pupils. While they did not live at the residential schools, their housing arrangements were nonetheless problematic. They, as well, were forced to live far from their homes and families; they too suffered loss of language and culture. They were subject to abuse both at the residential schools during the day and in the homes where they lived outside school hours. They experienced similar challenges to those who resided at the schools.

Counsel for the plaintiffs advised me that the inclusion of the day students in the settlement was the subject of extensive negotiation. They said that the agreement was a compromise, which in the result meant they could not achieve the inclusion of these students in the class.

However, although they are excluded from the settlement, the defendants have agreed that day students will be eligible to advance an IAP claim should they so choose. [emphasis added]

[58] Contrary to the submissions of counsel to Mr. Beardy, the emphasized portions above demonstrate that Brenner CJ was not discussing only day students when describing this compromise. Brenner CJ clearly was also referring to those individuals who were forced to live away from their homes, i.e., the Billeted Students. This is consistent with the submissions of Mr. Percival and Mr. Donovan above.

[59] Counsel to the parties to this agreement also made reference to this compromise and were clear that in order to secure the Settlement Agreement, the Billeted Students had to be excluded. Thus, Mr. Phillips, counsel to the Assembly of First Nations, was very clear that Billeted Students were excluded:

There's no question that the boarding school children are not included in this deal This is the best possible deal for the residential school survivors. If you tinker with it and the government walks away from it, I will describe for you the scenario that may result

On behalf of the National Chief, we ask you to recognize this deal for what it is. It is, in fact, a compromise but it's the best possible in the circumstances.

[60] This extrinsic evidence is persuasive. Combined with the factual matrix in which the agreement emerged, specifically, that there was to be a separate mechanism to compensate non-residents, interpreting institutions to include ancillary facilities would be contrary to the intentions of the parties. The parties clearly intended for residence at an IRS to be the sine qua non of eligibility for CEP.

Disposition

[61] This court obviously sympathizes with the situation of the Billeted Students, who, as Mr. Donovan described them, were a marginalized group within a marginalized group. However, it is not up to the court to reinterpret the Settlement Agreement to align with its sympathies. It can only apply the principles of contractual interpretation to determine what the parties themselves objectively intended.

[62] Using the interpretative principles discussed above, I disagree that the parties intended for the term "institutions" to include boarding homes and other residences. Both a plain reading of the agreement as a whole and a review of the extrinsic evidence make clear that the parties intended that residence at the actual IRS be the gravamen of eligibility for CEP. The interpretation suggested by Messrs. Beardy and Baxter would contradict this intention.

"B. J. Brown, J."

[1] A further appeal lies to the court: Settlement Agreement, subsection 5.09(2).

[2] *Gilchrist v. Western Star Trucks Inc.*, 2000 BCCA 70, ¶17, 18.

[3] *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, ¶24.

[4] *Fontaine v. AG Canada*, 2013 ONSC 684, ¶34 (CA).

[5] *Ibid*, ¶35.

[6] *Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co* (1969), 1 OR 469, ¶241.

[7] *Ibid*.

[8] *Paddon Hughes Development Co. v. Pancontinental Oil Ltd.*, [1998] AJ no 1120, ¶29 (CA).

[9] *Western Canadian Shopping Centres Inc. v. Dutton*, [2000] SCJ no 63, ¶38.

[10] *Eli Lilly & Co v. Novopharm Ltd.*, [1998] 2 SCR 129, ¶55.

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