

CITATION: Fontaine v. Canada (Attorney General), 2011 ONSC 4938
COURT FILE NO.: 00-CV-192059CP
DATE:20110816

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

LARRY PHILIP FONTAINE et al	)	Susan Vella for the Moving Parties,
	)	Windigo First Nations and Nishnawbe
	)	Aski Nation
)	
Plaintiffs)	
)	
)	
- and -)	
)	
)	
THE ATTORNEY GENERAL OF CANADA et	)	Catherine Coughlan and Teresa
al.	)	Crotty-Wong for the Attorney General
	)	of Canada
)	
Defendants)	
)	
)	
- and -)	
)	
)	
The Assembly of Manitoba Chiefs	)	William Percy for The Assembly of
	)	Manitoba Chiefs
Elders Without Borders	)	Michael Swinwood for Elders Without
	)	Borders
)	
Intervenors)	
)	
Motion heard in writing)	

Proceeding under the *Class Proceedings Act, 1992*

**Motion pursuant to Article 12 of the
Residential School Settlement Agreement**

Reasons for Decision

Winkler C.J.O.:**Overview**

[1] In March 2007, nine provincial and territorial superior courts across Canada issued orders approving a pan-Canadian settlement in the litigation arising from the operation of residential schools by the federal government. At the time the settlement was approved, over 130 eligible schools and other institutions were identified and listed under Schedules “E” or “F” of the Residential Schools Settlement Agreement (the “Agreement”). Class members who resided at those schools are entitled to compensation under the terms of the Agreement.

[2] The parties also included a provision in the Agreement that permitted subsequent applications to add schools or institutions to Schedule “F”. There is no difference in terms of benefits to the class members whether a school or institution is listed on Schedule “E” or “F”. The effect of the addition of a school or institution, however, is that all those persons who resided therein will become class members, with accompanying entitlement to compensation, for the purposes of the Agreement.

[3] By way of a representation order issued June 2, 2009, the Windigo First Nations Council and the Nishnawbe Aski Nation bring this motion pursuant to Article 12 of the Agreement. They seek to have the Stirland Lake High School (also known as Wahbon Bay Academy) and Cristal Lake High School (the “Institutions”) added to Schedule “F”. The Stirland Lake school was established in 1971 and the Cristal Lake school in 1976. Originally, Stirland Lake was operated as a boys school while Cristal Lake was a girls school. The operations were merged into a single Stirland Lake school in 1986. Both schools were established in remote locations, 75 kilometres

apart and roughly 300 kilometres northwest of Thunder Bay. The schools discontinued operations in 1991.

[4] The record contains the affidavits of 8 witnesses, the transcripts for those affiants who were cross-examined, and various documentary exhibits. After reviewing the evidence, it is apparent that the material facts are not in dispute. Rather, the central issues are the interpretation of Article 12 of the Agreement and its application to the factual matrix.

[5] The pertinent provisions of Article 12 read as follows:

12.01 (1) Any person or organization (the “Requestor”) may request that an institution be added to Schedule “F”, in accordance with the criteria set out in Section 12.01(2) of this Agreement, by submitting the name of the institution and any relevant information in the Requestor’s possession to Canada;

12.01(2) The criteria for adding an institution to Schedule “F” are:

- a) The child was placed in a residence away from the family home 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 resident there.

12.01(3) Indicators that Canada was jointly or solely responsible for the operation of the residence and care of the children there include, but are not limited to, whether:

- a) The institution was federally owned;
- b) Canada stood as parent to the child;
- c) Canada was at least partially responsible for the administration of the institution;
- d) Canada inspected or had a right to inspect the institution; or,

e) Canada did or did not stipulate the institution as an [Indian Residential School]

....

12.01(5) Should either the Requestor or the [National Administration Committee] dispute Canada's decision to refuse to add a proposed institution, the Requestor may apply to the Appropriate Court, or the NAC may apply to the court of the province or territory where the Requestor resides for a determination.

[6] The question of whether an institution should be added to Schedule "F" turns on the facts of the specific situation under consideration. Based on my findings and the application of the criteria in Article 12, I conclude that the Institutions must be added to the Agreement. My reasons follow.

Background

[7] The evidentiary record consists of affidavits from eight affiants, transcripts of cross-examinations and documentary materials. In addition, submissions were received from the parties and two non-parties seeking status as intervenors, which was granted.

[8] The factual background is set out in the evidence of Dr. Clair Schnupp, Algimantas Krasauskas and David Russell.

[9] Dr. Schnupp was an educator and founder of Northern Youth Programs Inc. ("NYP"). NYP, although not legally affiliated with any religious organization, was a religion-based missionary organization which adhered to the teachings of the Mennonite church.

[10] Mr. Krasauskas has a long history in education and was employed by Indian and Northern Affairs Canada from 1969 to 2005. From 1977 to 1980, he was an education counsellor at the Ministry of Indian Affairs (“Indian Affairs”) in the Sioux Lookout District Office. During his tenure at Sioux Lookout, he visited the Stirland Lake and Cristal Lake schools on a regular basis on behalf of Indian Affairs.

[11] Mr. Russell is the Director of the National Research and Analysis Directorate, with the Department of Indian Affairs and Northern Development, Resolution and Individual Affairs Sector. In that role, he made the decision to reject the application to add the Stirland Lake and Cristal Lake schools to the Agreement. Apart from Mr. Russell’s general experience with residential school matters, his knowledge comes largely from a review of the documents available in relation to the schools. Those documents were appended to his affidavit.

[12] In the fall of 1967, Dr. Schnupp founded NYP as a vehicle to provide support and counselling services to Aboriginal youth throughout Northwestern Ontario.

[13] The high school dropout rate and delinquency amongst Indian students attending urban public high schools were becoming matters of concern around the time Dr. Schnupp established NYP. By 1970, both Dr. Schnupp and Indian Affairs had received numerous requests from parents in Northwestern Ontario’s First Nation communities for the establishment of a rural residential high school at which Indian students could receive a high school education, without the stresses associated with adjustment to urban living.

[14] There were a series of informal conversations between Dr. Schnupp and Indian Affairs officials in Sioux Lookout about the problem. This dialogue eventually resulted in an agreement whereby NYP would construct and operate a residential high school facility in rural Northwestern Ontario. It would provide a non-urban high school education for male Indian students in the area. Dr. Schnupp's evidence is that an agreement in principal between NYP and Indian Affairs was reached in the spring of 1971, which called for the admission of the new school's first students in the fall of that year.

[15] Dr. Schnupp selected the location of the new school (on the north shore of Stirland Lake), and with the help of volunteers relocated existing buildings from an abandoned gold mine, constructed new buildings, installed sewer systems, fire hydrants, generators and a water supply. Approximately 20 students arrived that fall joining approximately 15 staff members at the site on Stirland Lake.

[16] In December of 1971, an agreement was executed between Canada and NYP which established the legal relationship between them as related to Stirland Lake. This agreement would be renewed annually, with or without modifications, over the next two decades until the school was closed in 1991.

[17] In 1976, Indian Affairs and NYP agreed to the establishment of a second rural residential high school. Cristal Lake, located 75 kilometres southeast of Stirland Lake, provided an almost identical educational program as Stirland Lake, but for the first time permitted the enrolment of female students in a non-urban residential high school.

[18] A number of documents have gone missing over the years relating to the Institutions. Dr. Schnupp testified that “we lost everything” as a result of a fire at NYP “sometime in the late seventies”. Although the agreements between NYP and Indian Affairs pertaining to Cristal Lake’s early years, and most of the 1970s with respect to Stirland Lake, are not in the record, by 1982 it had become the practice of Canada and NYP to execute a single annual agreement pertaining to both of the Institutions.

[19] From their respective opening dates, the Institutions were guided in their operation by advisory boards comprised of the chief of each band in the Sioux Lookout Education District (or, in practice, their delegates). The role of the advisory boards seems to have been primarily consultative in nature, serving as a conduit for information between NYP and the on-site administrators at the Institutions and the home communities of the students enrolled there. It does not appear that the advisory boards played any substantial role in the administration of the Institutions.

[20] In 1978, a group of individuals concerned with the advancement of the education of Aboriginal youth in Northwestern Ontario coalesced into an informal group known as the Northern Nishnawbe Education Council (“NNEC”). NNEC incorporated in 1979, and from that time forward played a role in the operation of the Institutions as well as other educational institutions which hosted Indian students from the area. In 1983, NNEC became a party to the annual agreements between NYP and Canada regarding the operation of the Institutions.

The Institutions

[21] The distinctions between the schools at Stirland Lake and Cristal Lake, save for the gender of the students, are few in number and minor in scope. The Institutions, although separated by some 75 kilometers, shared many pertinent characteristics, as they were founded by the same organization, shared an educational and quasi-religious mission, and were parties to near-identical relationships with Canada.

[22] The Institutions were located on the shores of two remote lakes in northwestern Ontario. They were both located in isolated areas more than 300 kilometres northwest of Thunder Bay. During the period in which the Institutions operated, they were accessible almost exclusively by way of float plane, except during some winter months when conditions made a road possible.

[23] Both of the Institutions consisted of approximately 12-15 buildings, including classroom facilities, staff and student residences, a dining hall, a gymnasium, and a chapel. Additionally, Stirland Lake included a carpentry/mechanical shop, while a home economics classroom was located at Cristal Lake. The Institutions were serviced by dedicated sewer systems, fire hydrants and electrical generators.

[24] In 1986, the Cristal Lake facility closed and was merged into the Stirland Lake school, which became a co-educational residential high school. Stirland Lake operated on this basis until 1991, when NYP determined that its mission, to the extent that it included the operation of residential high schools in Northwestern Ontario, had come to an end.

The Operating Agreements and Canada's Involvement

[25] Because of the passage of time and destruction of documents in the fire, the only documentary evidence, aside from a few letters, relating to the relationship between Canada and the Institutions consists of the agreements executed by NYP and Canada regarding the operation of Stirland Lake for the school year 1971-72 (the "1971 Agreement") and both of the Institutions for the 1981-82 academic years (the "1982 Agreement"). During this period, only Canada, as represented by Indian Affairs and NYP were parties to the agreements.

[26] The 1971 Agreement committed Canada to providing a total of \$49,750 to NYP for the 1971-72 academic year in exchange for NYP providing "a program at Stirland Lake for up to 20 grade 9 and 10 Indian boys who dropped out of high school and/or whose parents or guardians do not wish them to attend high schools training programs in urban settings."

[27] The manner in which these funds were to be allocated was set out in an attached document titled 'Annual Budget for the Stirland Lake Special Project' (the "1971 Budget"). The funding categories were labeled "Student Maintenance," "Tuition," and "Administration." Under the "Student Maintenance" category, \$21,250 was divided amongst sub-categories such as "Accommodations," "Clothing," "Allowance," and "Recreational Supplies and Educational Tours." The "Tuition" category divided an allocation of \$24,500 between teaching staff, janitorial and maintenance services, classroom supplies and rent for classrooms and shop facilities. Lastly, the "Administration" category included \$4,000 for secretarial services, communications expenses, office supplies, and travel expenses.

[28] Two aspects of the 1971 Agreement are notable with regard to funding. First, it committed Canada to provide funding for several categories of expenses which cannot easily be

divided on a per student basis, such as the entire “Administration” category. While some other expenses, such as “Clothing”, with an annual allocation of \$3,000, were clearly the product of a per student funding formula (i.e. 20 students multiplied by \$150 annual clothing allowance), there is no suggestion that the cost of secretarial services or communications equipment was, or could reasonably have been, determined on a per student basis. Rather, it appears that Canada committed to pay the entire communication cost for Stirland Lake for the 1971-72 academic year. This was corroborated by Dr. Schnupp in his cross-examination.

[29] The second noteworthy point pertaining to the 1971 Agreement is that it required the Stirland Lake budget to be approved by Canada, audited by independent auditors, and made available for further audit at the discretion of the Minister of Indian Affairs. Pursuant to fourth and fifth paragraphs of the 1971 Agreement, NYP was required to:

Submit a mutually agreed upon annual budget of \$49,750.00. The statements will be submitted on a monthly basis. (The cost breakdown is on an accompanying sheet.)

All financial books will be audited by our authorized auditors, Thorne, Gunn, Halliwell, and Christenson, Thunder Bay “F”. This financial record will be available for comment or further audit at the discretion of the Minister of the Department of Indian Affairs and Northern Development or by his authorized representative.

[30] Additionally, the 1971 Agreement stated that NYP would:

Arrange for the provision of health services, on a routine basis, as required or as necessary. [NYP] is also authorized to make emergency arrangements which would be in the best interest of the student’s personal welfare.

[31] The 1982 Agreement is the only other agreement executed by Canada and NYP that remains from the 1971-1983 period. It is a more detailed document than the 1971 Agreement, and applied to both Stirland Lake (referred to as Wahbon Bay Academy) and Cristal Lake.

[32] The 1982 Agreement defined “Tuition fee” as follows:

“Tuition fee” means the fee receivable by N.Y.P. for the provision of education to each Indian pupil in respect of the school year, as specified in paragraph 3 of this Agreement, but excluding therefrom any component attributable to expenditures for the erection of school buildings for instruction purposes and additions thereto, any pupil accommodation charge, and any debt charge.

This definition appears to have captured all of the elements of the “Tuition” category of the 1971 Budget.

[33] Additionally, the 1982 Agreement provided as follows:

5. N.Y.P. will provide the Minister [of Indian Affairs] with a copy of N.Y.P.’s current budget, together with a report in writing setting out

(a) precise details of and background material supporting the figures in the formula used in the calculation of the tuition fees contemplated in sub-paragraph 1(j) hereof;

[...]

6. NYP will provide the Minister with a report in writing setting out

(a) the per Indian pupil rate of the estimated tuition fees;

Although the 1982 Agreement did not expressly require that the budget be ‘mutually agreed upon’ by NYP and Canada, as the 1971 Agreement had stipulated, the clear implication was that Canada would review the formula used by NYP in calculating the annual tuition fee.

[34] Similarly, the components of the 1982 Addendum corresponded very closely to those of the “Student Maintenance” portion of the 1971 Budget, requiring NYP to provide student clothing, accommodation and allowance at Canada’s expense and in amounts stipulated by Canada.

[35] There are two additional aspects of the 1982 Addendum that are significant. First, paragraph 1 reads as follows:

1. N.Y.P. will operate a two-campus secondary school program. Accommodation [*sic*] will be provided for twenty (20) female students at the Cristal Lake Campus and thirty-two (32) male students at the Stirland Lake Campus.

[36] Secondly, the costs of ‘pupil maintenance’ provided by NYP pursuant to the 1982 Addendum were expressly linked to the amounts paid by Canada for other off-reserve residential education programs:

2. [...]

- (c) The pupil maintenance costs will be equivalent to that paid to the boarding homes in Sioux Lookout and to the Department of Indian Affairs and Northern Development, as follows: ...

[37] I find that the funding arrangements between Canada and NYP for the operation of the Institutions did not change in any material way over the course of the 1971-1983 period. The formal segregation of residence costs from educational costs in the 1982 Agreement and Addendum does not reflect any practical change in terms of the funding.

[38] The 1971 Agreement contained no provision for the manner in which Indian students would be enrolled at the Institutions. The 1982 Agreement, on the other hand, made provision for the responsibilities of both Canada and NYP regarding admissions. Under the heading “Covenants of Her Majesty,” Canada committed to the following:

2. The Minister will ensure that an officer of the Department provides N.Y.P. with

(a) a preliminary report in writing setting out

(i) the estimated number;

(ii) the names;

(iii) the ages;

(iv) the sex; and

(v) the probable school grades,

of Indian children who will present themselves for enrollment at the school during the subsequent school year, on or before the 15th day of May;

(b) a final report in writing confirming or varying the information set forth in the report mentioned in sub-paragraph (a), on or before the 15th day of June; and

(c) a further report or reports, if necessary, varying the information as set forth in the report mentioned in sub-paragraph (b), as soon as the Department is aware of a change or the probability of a change in such information;

in each year during the Term.

[39] NYP’s corresponding obligations under the 1982 Agreement, under the heading “Covenants of N.Y.P.,” were as follows:

4. N.Y.P. will

(a) enroll as Indian pupils the Indian children identified in a final report referred to in sub-paragraph 2(b), who present themselves for enrollment in the school for the school year as contemplated in the report;

(b) extend its best efforts to enroll any Indian child or Indian children identified in a report or reports referred to in sub-paragraph 2(c), in the school year or part of the school year contemplated in the report or reports; and

[...]

[40] In addition to the 1971 and 1982 Agreements, the evidence was that the final decision as to student eligibility for admission was made by Canada during the 1971 to 1982 period. Further, the student population at the Institutions was entirely made up of ‘Indian pupils,’ with the exception of the children of faculty and staff.

[41] The 1971 and 1982 Agreements set out the broad parameters of the course of studies to be delivered. Canada required NYP to develop and deliver educational programs meeting the basic requirements of the Ontario Ministry of Education, and, to that extent, Canada imposed upon NYP a standard against which the curriculum offered at the Institutions would be measured.

[42] Canada did not contribute to the construction costs of the facility nor did it hold title to the lands on which they were built. Indeed, the 1982 Agreement expressly stipulated that no portion of the ‘Tuition fee’ payable by Canada to NYP could include “expenditures for the erection of school buildings for instructional purposes and additions thereto...”.

[43] Notwithstanding the fact that Canada had no legal or equitable interest in the physical facilities of the Institutions, there is documentary evidence that the student residences at Stirland Lake were inspected by the Dominion Fire Commissioner (“DFC”), an officer of the federal Department of Public Works, on at least two occasions and possibly a third. There is also evidence that recommendations made by the officer during these inspections were implemented by NYP.

[44] It is clear that Canada regarded the residences as structures to which the guidelines and mandate of the Dominion Fire Commissioner applied, and conducted inspections accordingly.

[45] Canada, either directly or through a regional commercial airline, provided for student transportation to and from the Institutions.

[46] Employees of Canada, including Mr. Krasauskas, attended at the Institutions from time to time, with or without notice to NYP or its local administrators. These visits included a tour of the facility, observation of classroom instruction, one-on-one meetings with the Indian students in attendance at the time of the visit, and meetings with the principal and staff of the facility. These visits lasted several days.

[47] Mr. Krasauskas indicated that he would have conducted at least three such visits at each of the Institutions per year, typically meeting with Dr. Schnupp and the principal of the facility, observing classroom operations, and taking a walk-through of the student residences. After each visit, on his return to Sioux Lookout, Mr. Krasauskas stated that he would report any issues or

problems he had observed at the Institutions, on everything from curriculum to living conditions, to the Indian Affairs District Superintendant of Education.

[48] An issue arose in 1978-79, relating to the strictness with which discipline was enforced. This complaint led to the Pehtabun chiefs threatening to hold students out of the Institutions. These complaints were investigated by the NNEC. The final report as to the complaints was copied to the Sioux Lookout Indian Affairs office.

[49] The 1982 Agreement contained the following clause in its preamble:

WHEREAS entry into this Agreement on behalf of Her Majesty, for the education of Indian children in accordance with the Indian Act, hereinafter defined, is authorized by order in council P.C. 1963-5/389 of 9th of March 1963;

[50] From January 1, 1983 onward, the relationship between Canada and NYP relating to the Institutions changed in that the NNEC became a party to the funding agreement.

[51] The record also includes funding agreements executed by Canada, NYP, and NNEC on January 1, 1985 (the "1985 Agreement") and January 1, 1987 (the "1987 Agreement").

[52] The NNEC was added as a party to the 1983 Agreement and subsequent agreements to reflect a reorganization of responsibilities in most of the existing relationships between Canada and NYP. This reorganization evolved over the course of the three agreements before the Court for the period 1983-1991, with NNEC assuming increased administrative responsibilities with each re-negotiation.

[53] The 1983 Agreement made several alterations to the funding relationship between Canada and NYP. Minor changes were made to the student maintenance payable to NYP, now attached as an 'Appendix' (rather than an 'Addendum'), to include provision of recreation supervision, and to the tuition fee payment schedule, the entirety of which was made subject to the approval not only of Canada, as was the case in the 1982 Agreement, but also of NNEC. The entire budget of NYP was specifically stated to be subject to Canada's review and approval, and all tuition fees were made payable to NYP through NNEC:

Her Majesty shall provide funds to N.N.E.C., in accordance with the terms and conditions of this agreement, to pay to the N.Y.P. an annual tuition fee for each Indian pupil...

The 1983 Agreement also required that the tuition fee paid to NYP be calculated in a manner to be agreed upon by both Canada and NYP, and stipulated that the tuition fee so calculated would not exceed the average per student tuition fees of three neighbouring regional school boards.

[54] The 1985 Agreement ostensibly removed Canada from the decision as to whether NYP had satisfactorily performed its educational obligations by putting the payment of the tuition fees in the hands of NNEC as set out in clause 8:

When N.N.E.C. is satisfied that the educational services identified in Section 3 and the terms of this agreement have been or are being satisfactorily performed by the N.Y.P., the N.N.E.C. will pay to the N.Y.P. the tuition fees as described in Section 7...

[55] However, this provision cannot be read in isolation. A review of Clause 7 of the 1985 Agreement, makes it clear that the actual budget for the school operations was approved by Canada in negotiation with NYP. Although the NNEC may have been charged with an oversight

role as party to the agreement, it acted, in a sense, as a conduit for the payment of monies pre-approved by Canada.

[56] Similarly, whereas the 1983 Agreement had provided that Canada would make payments to NYP to support ‘special services’ provided to students and any exceptional expenses incurred in delivering cross-cultural educational programs, the 1985 Agreement shifted these funding responsibilities to NNEC. Again, however, a review of the actual terms of the agreement makes it clear that the monies were pre-approved by Canada and, where applicable, were based on rates paid by Canada elsewhere for similar services.

[57] Under the 1987 Agreement, the tuition fee payable to NYP, the manner of its calculation, and NYP’s annual budget each became subject to review and approval by both NNEC and Canada. Additionally, NNEC became the sole invoicee in relation to the cross-cultural programs delivered by NYP pursuant to the 1987 Agreement. However, the agreement notes that payment is subject to availability of funding by [Canada].

[58] As in the case of funding provisions, the 1983 Agreement inserted NNEC into the admissions process of the Institutions in a consultative role. Whereas, pursuant to the 1982 Agreement, Canada had previously been solely responsible for compiling the student list for each academic year, with input from NYP, the new arrangement provided that Canada, “in consultation with NNEC,” would provide the student list to NYP.

[59] The 1985 Agreement, in terms of admissions, followed the same pattern as the funding-related provisions, removing Canada from the process of creating the annual student list for the Institutions.

[60] Several additions were made in the 1983 Agreement with respect to the curriculum delivered by the Institutions. One of the changes was the requirement that the Institutions be inspected annually by an Education Officer of the Ontario Ministry of Education. In addition NYP was required to provide copies of all reports related to such inspections to Canada upon receipt by NYP.

[61] The 1983 Agreement also included a provision by which education officers employed by Indian Affairs obtained the right to be involved in the planning, development and improvement of educational programs offered by the Institutions. Paragraph 9 also provided Indian Affairs and NNEC with a right to 'visit' the Institutions:

Education officials representing the Department of Indian Affairs and Northern Development and/or the N.N.E.C. with the knowledge and approval of N.Y.P., may assist in planning, developing and improving a cross-cultural education program suited to the needs of the Indian children and any person authorized by the N.N.E.C. or the Department with the knowledge and approval of the Principal shall have the right to visit the schools from time to time.

[62] The 1983 Agreement also required the approval of both Canada and NNEC for any cross-cultural education programs proposed by NYP for delivery at the Institutions.

[63] The curriculum-related changes outlined in the 1983 Agreement were continued in both the 1985 and 1987 Agreements, with only one exception. By 1987, NNEC had become the approval authority for cross-cultural educational programs proposed by NYP to be offered at the Institutions.

[64] Several additional clauses of the 1983, 1985 and 1987 Agreements are important. First, all of these Agreements contained an identical clause which read:

The N.Y.P. shall retain jurisdiction over the administration, control, and operation of the schools in which Indian children are enrolled under the terms of this agreement, including the supervision of teaching personnel and all matters related to curriculum, methods of instruction and materials used for instruction, as well as all disciplinary matters.

[65] Secondly, the 1983 and 1985 Agreements each contained a provision which permitted NYP to amalgamate the Institutions at its sole discretion. This language was omitted from the 1987 Agreement because Cristal Lake had been merged into Stirland Lake the year prior.

[66] Third, as in the case of the 1982 Agreement, the 1983, 1985 and 1987 Agreements contained a clause in the preamble referencing the education provisions of the *Indian Act*:

AND WHEREAS pursuant to Section 114(1) of the Indian Act, R.S.C. 1952, Ch. 149, the Minister of Indian Affairs and Northern Development may enter into an agreement with the N.Y.P.

[67] Finally, the 1983, 1985 and 1987 Agreements contained a requirement that the Institutions be registered as Private Schools pursuant to the laws of Ontario. This requirement meant that the Institutions had to be inspected annually by a representative of the Ontario

Ministry of Education. Dr. Schnupp testified that obtaining designations as private schools, with the attendant inspections, was a requirement imposed by Canada for the purpose of ensuring that the education credits received at the Institutions would be transferable to other schools in the province. In other words, it was a manner of guaranteeing that the education offered by the schools was of proper quality.

The Residential Schools Settlement Agreement

[68] The Residential Schools Settlement Agreement is intended to offer a measure of closure for former residents of Residential Schools and their families. The preamble of the Agreement provides that all parties desired “a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools” and “the promotion of healing, education, truth and reconciliation and commemoration.” The Agreement combines compensatory, conciliatory, healing, and commemorative aspects in furtherance of these goals.

[69] The identification of an educational facility as a Residential School is critical in determining whether or not an individual will be eligible for compensation pursuant to the Agreement. To this end the parties identified a number of Residential Schools on Schedules “E” and “F” to the Agreement.

[70] The Agreement expressly entitles Schedule “E” as the contents of List ‘A’ to the Office of Indian Residential Schools Resolution Canada’s Dispute Resolution Process. As such, the sole criterion for the inclusion of an institution on Schedule “E”, as set out in the Settlement Agreement, was inclusion on List ‘A’.

[71] In recognition that Schedule “E” was not a comprehensive listing of Residential Schools, the agreement contains a process by which institutions can be designated “Additional Residential Schools” and listed on Schedule “F”. While some institutions were listed on Schedule “F” at the time of the settlement approval, additional institutions may be added if they meet the criteria set out in Article 12.

Analysis

[72] The addition of a school depends on whether the school meets the criteria set out in s. 12.01(2) of the Agreement:

12.01(2) The criteria for adding an institution to Schedule “F” are:

- a) The child was placed in a residence away from the family home 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 resident there.

[73] The Stirland Lake and Cristal Lake schools were built for the specific purpose of providing education in a residential school setting to Indian students. The responsibility for the education of those students at the time rested with Canada. The schools, although not constructed with monies provided by Canada, were created pursuant to agreements between Canada and the NYP, through which Canada financed the operation of the schools.

[74] The schools were in remote locations. Canada had final say as to the individual students who were eligible to attend and provided transportation to and from the schools for those students. Education officials from Indian Affairs regularly inspected the schools and reported

back to their superiors and to the parents of the students. Canada authorized NYP to provide both routine and emergency health services for the students. Concerning emergency health care, NYP was given a blanket consent to take such action as was necessary for the health and welfare of any child enrolled in the Institutions. Federal fire officials conducted periodic inspections of the residences.

[75] Canada specified the standards to be maintained with respect to the education of the students and generally, the curriculum that was to be offered. Canada required that the schools obtain “private school” status from the Province of Ontario for the purpose of accreditation of the students. Although the operating agreements changed over time, the essence of the relationship that endured remained the same throughout. Canada continued to provide funding, financial controls and to wield significant influence in the manner in which the schools were operated, notwithstanding the language in the 1983, 1985 and 1987 Agreements. Simply put, Canada was involved in the operation of the Institutions. Nowhere is this more evident than in the case of the complaint regarding discipline in the school.

[76] The Institutions were centered around residences operated for the purposes of education in which Indian students were placed away from the family home by or under the authority of Canada. Based on all of the evidence in the record before me, I can reach no other conclusion than that Canada was “jointly responsible” for the operation of the Institutions and the care of the children resident there.

Conclusion

[77] The Institutions satisfy the requirements of Article 12 of the Residential Schools Settlement Agreement. Accordingly, the Institutions shall be added to Schedule “F” of the Agreement.

[78] The Applicants may make submissions as to costs not to exceed three pages in length by August 31, 2011 and Canada’s responding submissions shall be delivered by September 16, 2011. As has been past practice, the submissions may be delivered to me through the office of Court Counsel.

[79] In the meantime, I direct the parties to meet with Court Counsel for the purpose of settling the terms of the order that will flow from these reasons.

Released: August 16, 2011

A handwritten signature in black ink, appearing to read 'Winkler', followed by the initials 'cgo' written in a cursive style.

Warren K. Winkler,
Chief Justice of Ontario