Court File No. T-2212-16

FEDERAL COURT

PROPOSED CLASS PROCEEDING

BETWEEN:

JESSICA RIDDLE, WENDY LEE WHITE AND CATRIONA CHARLIE

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

MEMORANDUM OF FACT AND LAW OF THE PLAINTIFFS (SETTLEMENT APPROVAL)

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(*Brown v. Canada,* Court File CV-09-00372025-00CP)

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PART I - OVERVIEW

"The treatment of Aboriginal children in Ontario's child welfare system and Canada's responsibility for what occurred are matters of public interest."[1]

1. Between 1951 and 1991, Indian and Inuit children in Canada were apprehended from their families and communities by provincial child welfare authorities, were placed with non-Indigenous foster or adoptive parents, and were not raised in accordance with their cultural traditions, nor taught their traditional languages. As a result, many of these children lost their identity as Indigenous persons and suffered mentally and physically. This tragic chapter of Canada's history has become colloquially known as the "Sixties Scoop".

2. These motions for approval of a national settlement agreement to resolve all Sixties Scoop litigation against Canada are a critical piece in bringing closure to that part of this country's past. The proposed settlement before this Court seeks to enable change and reconciliation and provide recognition and compensation for survivors of the Sixties Scoop and their families.

3. These motions also represent the culmination of unique and novel litigation across the country which arose out of a historically complicated child welfare scheme between the Federal Government and various provincial governments. The proceedings forming the framework for settlement are in no way, ordinary, but rather, the culmination of years of contested litigation, primarily in Ontario.

4. There is no dispute that the plaintiffs faced serious limitation period defences to their claims, substantive defences to the location of a fiduciary duty and arguments against any aggregate assessments of damages, all against a factual backdrop which occurred decades ago, posing all the exigencies of lost witnesses, fading memories and a lack of documentary evidence.

5. In contrast, the settlement provides streamlined compensation to survivors who were "scooped" but most importantly, it goes beyond any one individual to provide programs to

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[1] *Brown v. Canada (Attorney General)*, 2013 ONCA 18, at para. 59, Book of Authorities, Tab 8.

enable change and reconciliation and to enable healing, healing, commemoration and education to the wider Indigenous community across Canada.

6. The settlement arose out of hard-fought and protracted multi-party negotiations which occurred in various cities throughout the country between June 2017 and January 2018, overseen by a judicially-appointed mediator.

7. Measured against the uncertainty and delay associated with pursuing national certification and even any remotely possible judgment on aggregate damages in Ontario, the quantum guaranteed by the settlement, along with its streamlined, paper-based claims process, is the best evidence for why the settlement ought to be deemed fair, reasonable and in the best interests of the class.

8. Even if the damages phase had been adjudicated upon in Ontario, the proven damages could have been similar or much less than the settlement amount (particularly if one factors in continued litigation costs, appeals and potential individual assessments), not to mention all the additional years it would have taken to finally dispose of all potential appeals or resolve individual assessments.

9. Putting the case at its highest, even if an aggregate award of damages had been made within the confines of the Ontario action, that would have only bound, or been available to, class members resident in Ontario, leaving the balance of the class' claims outside Ontario on a complex and protracted litigation track. Conversely, the settlement purports to provide certain and quick compensation to class members from coast to coast to coast.

10. But by far, and most profoundly, the settlement goes far beyond what any court may have had the jurisdiction to award: a Foundation to enable change and reconciliation, in particular, access to education, healing and commemoration, intended to bridge the generations and give meaning to suffering, now and in the future. The Foundation is also intended to be a "living entity" which will survive completion of the compensatory aspects of the settlement so that it may continue to be an instrument of change and reconciliation.

11. The settlement is national in scope with court approval being sought by this Honourable Court and the Ontario Superior Court of Justice on May 29, 2018. The parties submit that the settlement unreservedly deserves the approval of this Court.

PART II - THE FACTS

A. Background Overview

12. At the moment, there exist 23 extant class proceedings across Canada, launched in both Federal Court and various provincial Superior Courts concerning the Sixties Scoop.[2]

13. At their core, these actions never sought to challenge the actual judicial decisions which permitted Indigenous children to be placed in non-Indigenous homes but rather, as Justice Belobaba succinctly described:

> "The plaintiffs are alleging that the Federal Crown had a duty or responsibility to protect and preserve the Indian children's culture and identity both when entering into the 1965 Agreement, and after the children were placed in the non-aboriginal homes, and failed to do so. They seek damages for the harm that was caused not by the court orders but by the alleged breaches of fiduciary and common law duty on the part of the Federal Crown."[3]

14. Simply put, the common issue asked whether Canada had, and did breach, any fiduciary or common law duties when it entered into various welfare services agreements with the Provinces, to take reasonable steps in the post-placement period to protect the class members' aboriginal identity:

> "The aboriginal communities in Ontario refer to it as the “Sixties’ Scoop.” For a time, and particularly for a nineteen-year period between 1965 and 1984, welfare authorities in Ontario removed many Indian and aboriginal children from their families and communities and placed them with foster or adoptive parents that were non-aboriginals. It is alleged that many of the “scooped” children lost their identity as aboriginal persons and suffered mentally and physically. The aboriginal communities describe the effects of the Sixties Scoop as horrendous, destructive, devastating, and tragic."[4]

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[2] Exhibit "79", to the Affidavit of D. Rosenfeld, sworn April 18, 2018 ("**Affidavit of D. Rosenfeld**"), at para. 106, Motion Record, Tab 6(79), p. 1715.

[3] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, at para. 10, Book of Authorities, Tab 9.

[4] *Brown v. Canada (Attorney General)*, 2010 ONSC 3095, at para. 1, Book of Authorities, Tab 7.

15. These historical events spurred litigation across the country beginning in 2009 and throughout 2017. A summary of the proceedings across Canada is set out below.

B. The Ontario Proceedings

16. A proposed class action was commenced in Ontario on February 9, 2009 styled *Brown v. Canada (Attorney General)* (Court File No. 09-CV-00372025CP) (the "**Brown Action**").[5] The Brown Action claimed damages against the Federal Crown arising from its alleged systemic assimilation policy whereby welfare authorities in Ontario removed Indigenous children from their families and communities and placed them with foster or adoptive parents that were non-Indigenous.[6]

17. The plaintiffs in the Brown Action alleged that the Federal Crown wrongfully delegated its exclusive responsibility for Indigenous persons by entering into an agreement with Ontario that authorized a child welfare program that systemically eradicated the Indigenous culture, society, language, customs, traditions and spirituality of the children.[7]

18. The action was conditionally certified as a class proceeding by the Ontario Superior Court of Justice on May 26, 2010 on behalf of the following class:

> Aboriginal persons in Ontario between December 1, 1965 and December 31, 1984 who were placed in the care of non- aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions, and practices.[8]

19. Leave to appeal the certification order was granted in February 22, 2011 and the Ontario Divisional Court allowed the appeal in December 2011, granting leave to the plaintiffs to amend their pleading and ordered that the certification motion be brought before another judge.[9]

20. The plaintiffs' appeal of the Divisional Court order was dismissed by the Ontario Court of Appeal in January 2013, subject to a minor variation of the order below. On July 15 and 16,

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[5] Exhibit "1" to the Affidavit of D. Rosenfeld, at para. 8, Motion Record, Tab 6(1), p. 229.

[6] Affidavit of D. Rosenfeld, at para. 9, Motion Record, Tab 6, p. 185.

[7] Affidavit of D. Rosenfeld, at para. 10, Motion Record, Tab 6, pp. 185-186.

[8] Exhibit "4" to the Affidavit of D. Rosenfeld, at para. 12, Motion Record, Tab 6(4), p. 330.

[9] Affidavit of D. Rosenfeld, at para. 14, Motion Record, Tab 6, p. 186.

2013, the parties appeared before Belobaba J. in the Ontario Superior Court of Justice for a re-hearing of the motion to certify the action as a class proceeding. On September 27, 2013, the court certified the action as a class proceeding on behalf of the following class:

> Indian children who were taken from their homes on reserves in Ontario between December 1, 1965 and December 31, 1984 and were placed in the care of non-aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions, and practices.[10]

21. While leave to appeal the certification order was granted by the Divisional Court, that court ultimately dismissed the defendant's appeal by order dated December 2, 2014.[11] On March 27, 2015 the Court of Appeal for Ontario dismissed Canada's leave to appeal motion to that court.[12]

22. In July 2015, the Brown Plaintiff issued a Fresh As Amended Statement of Claim[13] which Canada responded to with an Amended Statement of Defence on September 29, 2015.[14] Shortly thereafter, the Ontario Superior Court of Justice ordered that examinations for discovery by way of Written Interrogatories to be completed by February 15, 2016.[15] In August of that same year, argument on the motion for summary judgment began and continued in December. While the decision on summary judgment remained under reserve, Justice Belobaba directed that further evidence be heard by way of mini-trial, to be conducted forthwith, on the narrow issue of consultation,[16] in particular:

> If Canada had consulted with Indian Bands (as per s. 2(2) of the 1965 Agreement) what ideas or advice would have been provided that could have prevented the Indian children who had been removed and placed in non-Aboriginal foster or adoptive homes from losing their Aboriginal identity?

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[10] Affidavit of D. Rosenfeld, at para. 17, Motion Record, Tab 6, p. 187.

[11] Affidavit of D. Rosenfeld, at paras. 19-20, Motion Record, Tab 6, p. 187.

[12] Affidavit of Jeffery Wilson ("**Affidavit of J. Wilson**)" (filed under separate cover).

[13] Affidavit of J. Wilson (filed under separate cover).

[14] Affidavit of D. Rosenfeld, at para. 21, Motion Record, Tab 6, p. 187.

[15] Affidavit of J. Wilson (filed under separate cover).

[16] Affidavit of J. Wilson (filed under separate cover).

23. On February 14, 2017, the Ontario Superior Court granted summary judgment to the plaintiff and the class on the two common issues:

> When the Federal Crown entered into the Canada-Ontario Welfare Services Agreement in December 1, 1965 and at any time thereafter up to December 31, 1984:
>
> (1) Did the Federal Crown have a fiduciary or common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario who were placed in the care of non-aboriginal foster or adoptive parents from losing their aboriginal identity?
>
> Answer: Yes
>
> (2) If so, did the Federal Crown breach such fiduciary or common law duty of care?
>
> Answer: Yes[17]

24. Belobaba J. concluded that a fiduciary duty could not be established but that "when Canada entered into the 1965 Agreement and over the years of the class period, Canada had a common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario, who had been placed in the care of non-aboriginal foster or adoptive parents, from losing their aboriginal identity. Canada breached this common law duty of care."[18] No appeal was taken of this order.[19]

25. The next step following the order finding Canada liable for breaching its common law duty of care owed to the class was the damages assessment stage, which was scheduled to be heard on October 11, 2017.[20] In April 2017, the Plaintiff delivered a record in support of the damages phase of the action on an aggregate basis while Canada took the position that a separate hearing for each and every member of the class seeking compensation would be required.[21]

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[17] Affidavit of D. Rosenfeld, at para. 28, Motion Record, Tab 6, p. 188.

[18] Affidavit of D. Rosenfeld, at para. 27, Motion Record, Tab 6, p. 188.

[19] Affidavit of D. Rosenfeld, at para. 30, Motion Record, Tab 6, p. 188.

[20] Affidavit of D. Rosenfeld, at para. 31, Motion Record, Tab 6, p. 189.

[21] Affidavit of J. Wilson (filed under separate cover).

26. Just prior to the damages hearing, in September 2017, the parties to the Brown Action agreed to adjourn the motion to assess damages as an Agreement in Principle with Canada had been reached on August 30, 2017.[22]

C. The Manitoba Proceedings

27. A proposed class action was commenced on April 20, 2009 in Manitoba styled *Thompson et al. v. Manitoba et al.* (Court File Number CI-09-01-60921) (the "**Thompson Action #1**") by Merchant Law Group. A second proposed class action was commenced on March 13, 2015 in Manitoba styled again *Thompson et al. v. Manitoba et al.* (Court File Number CI-15-01-94427) (the "**Thompson Action #2**") by the Merchant Law Group. On March 2, 2016, Edmond J. was appointed the as case management judge for the Thompson #2 Action.[23].

28. A proposed class action was commenced on April 20, 2016 styled *Meeches et al. v. Canada* (Court File No. CI-16-01-01540) (the "**Meeches Action**") with Koskie Minsky LLP and Troniak Law as counsel to the plaintiffs. On April 21, 2016, Koskie Minsky LLP and Troniak Law wrote a letter to Edmond J. advising that the Thompson Action #2 and the Meeches Action were so substantially similar that a carriage motion would be necessary.[24]

29. Parties in the Thompson Action #2 and the Meeches Action attended and made submissions at a case management conference before Edmond J. in April 2016, during which a carriage motion was scheduled to be heard on June 17, 2016.[25]

30. Following a reserve on the carriage motion, on August 24, 2016. Edmond J. released Reasons for Decision granting carriage to the Meeches Action with Koskie Minsky LLP and Troniak Law as class counsel in the proposed class proceeding. The court concluded that "[t]he selection of the Meeches action and the consortium to act as lead counsel will, in my opinion, best serve the interests of the putative class and the policy objectives of the *CPA*." Edmond J.

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[22] Affidavit of D. Rosenfeld, at para. 34, Motion Record, Tab 6, p. 189.

[23] Affidavit of D. Rosenfeld, at paras. 35-36, Motion Record, Tab 6, p. 189.

[24] Affidavit of D. Rosenfeld, at paras. 40-41, Motion Record, Tab 6, p. 190.

[25] Affidavit of D. Rosenfeld, at para. 42, Motion Record, Tab 6, p. 190.

also ordered that "no other proposed class action may be commenced in Manitoba in respect of the facts pleaded in the Meeches action without leave of the court".[26]

31. Counsel in the Thompson #2 Action commenced an appeal of the carriage order in September 2016. While the appeal was extant, the Meeches Plaintiffs proposed a timetable to proceed to a certification hearing returnable in June 2017. Edmond J. ordered that the plaintiffs in the Meeches Action first file their Amended Statement of Claim and adjourned the case conference to November 15, 2016.[27]

32. At a November 15, 2016 case conference, the certification motion was set down as returnable on December 5, 2017. The Plaintiffs in the Meeches Action filed their certification record in January 2017.[28]

33. The appeal of the carriage order was heard by the Manitoba Court of Appeal on January 23, 2017. By Reasons dated July 21, 2017, the Manitoba Court of Appeal dismissed the appeal of the carriage order.[29]

34. On October 10, 2017, counsel to the plaintiffs in the Meeches Action advised Edmond J. that a National Settlement Agreement-in-Principle had been reached with Canada and that the certification motion return dates were no longer necessary and could be vacated.[30]

D. The Saskatchewan Proceedings

35. A proposed class action was commenced on August 22, 2011 styled *Thompson v. Canada* (Court File No. QBG 1642/11) (the "**Thompson Saskatchewan Action**") in Regina by Merchant Law Group. Another proposed class action was commenced on December 17, 2014 styled *Blue Waters v. Saskatchewan et al.* (Court File No. QBG 2635/14) (the "**Blue Waters Action**") in

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[26] Affidavit of D. Rosenfeld, at paras. 44-45, Motion Record, Tab 6, pp. 190-191.

[27] Affidavit of D. Rosenfeld, at para. 48, Motion Record, Tab 6, p. 191.

[28] Affidavit of D. Rosenfeld, at para. 50, Motion Record, Tab 6, p. 191.

[29] Affidavit of D. Rosenfeld, at paras. 51-52, Motion Record, Tab 6, pp. 191-192.

[30] Affidavit of D. Rosenfeld, at para. 53, Motion Record, Tab 6, p. 192.

Regina by Merchant Law Group. On September 27, 2016 Keene J. was appointed as case management judge for the Blue Waters Action.[31]

36. A proposed class action was commenced on October 7, 2016 styled *Ash v. Attorney General of Canada* (Court File No. QBG 2487/16) (the "**Ash Action**") by Koskie Minsky LLP and Sunchild Law. By letters dated October 13, 2016 and October 31, 2016, Koskie Minsky LLP and Sunchild Law requested standing to participate in the first case management conference in the Blue Waters Action at which time the need for a carriage motion between the Ash Action and the Blue Waters Action would be determined.[32]

37. On November 16, 2016, the first case management conference was held before Keene J., at which time the carriage motion was scheduled for March 2 and 3, 2017 and a timetable for exchange of motion records and briefs was ordered.[33]

38. While all of the parties had delivered their motion records and written briefs on carriage, by fiat dated March 1, 2017, the day before the commencement of the carriage hearing, Keene J., on the court's own motion, adjourned the hearing of the carriage motion *sine die* pending the release of the Manitoba Court of Appeal decision on carriage in the Meeches Action.[34]

39. On March 9, 2017, the plaintiff in the Ash Action filed a Notice of Appeal appealing the fiat of Keene J. adjourning the carriage hearing. Soon after, on March 21, 2017, another Statement of Claim was filed in a proposed class action in Saskatchewan styled *Gary Pelletier and Herb Schultz v. Attorney General of Canada* (Court File No. QGB 631/17) (the "**Pelletier Action**") by Bronstein & Co.[35]

40. On May 18, 2017, the plaintiff in the Blue Waters Action filed a notice of motion to quash the Ash Action appeal. On July 24, 2017, counsel in the Ash Action sent a copy of the Manitoba Court of Appeal decision on carriage to Keene J., and shortly thereafter, abandoned the

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[31] Affidavit of D. Rosenfeld, at paras. 54-56, Motion Record, Tab 6, p. 192.

[32] Affidavit of D. Rosenfeld, at para. 57, Motion Record, Tab 6, p. 192.

[33] Affidavit of D. Rosenfeld, at para. 60, Motion Record, Tab 6, p. 193.

[34] Affidavit of D. Rosenfeld, at paras. 61-62, Motion Record, Tab 6, p. 193.

[35] Affidavit of D. Rosenfeld, at paras. 63-64, Motion Record, Tab 6, p. 193.

appeal of the adjournment. At a case management conference on August 23, 2017, the carriage motion was rescheduled for November 15 and 16, 2017.[36]

41. On September 8, 2017, Jai Singh, counsel at Bronstein & Company wrote a letter to Eleanor Sunchild asking for copies of the carriage material. On September 14, 2017, Koskie Minsky LLP wrote to Keene J. advising that the motion for carriage should be adjourned *sine die* as an Agreement-in-Principle had been reached with Canada on August 30, 2017.[37]

E. The Alberta Proceedings

42. On August 18, 2011 an action was commenced in the Court of Queen's Bench of Alberta styled *Van Name v. Alberta et al.* (Court File No. 1101-11452) (the "**Van Name Action**") by Merchant Law Group. On October 6, 2016, the Koskie Minsky LLP and Ahlstrom Wright Oliver & Cooper commenced an action styled *Glenn v. Canada* (Court File No. 1601-13286) (the "**Glenn Action**").[38]

43. On January 19, 2017, the parties to the Glenn Action and the Van Name Action participated in a case conference before Macleod J. at which time a carriage motion was scheduled to be heard by Macleod J. on April 11, 2017 in Calgary.[39]

44. Well after the return date for the carriage motion had been set, on March 31, 2017, a proposed class action styled *Vogtmann et al. v. Attorney General of Canada* (Court file No. 1701-04509) (the "**Vogtmann Action**") was commenced in the Court of Queen's Bench of Alberta by Stephen Bronstein Law Professional Corp.[40]

45. Just days prior to the return of the carriage motion, on April 6, 2017, Stephen Bronstein wrote to Macleod J. advising that he "would like to work co-operatively with the other law firms

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[36] Affidavit of D. Rosenfeld, at paras. 65-69, Motion Record, Tab 6, pp. 193-194.

[37] Affidavit of D. Rosenfeld, at paras. 70-71, Motion Record, Tab 6, p. 194.

[38] Affidavit of D. Rosenfeld, at paras. 72, 75, Motion Record, Tab 6, pp. 194, 195.

[39] Affidavit of D. Rosenfeld, at para. 77, Motion Record, Tab 6, p. 195.

[40] Affidavit of D. Rosenfeld, at para. 80, Motion Record, Tab 6, p. 195.

to advance the actions in court" or to otherwise seek an adjournment to prepare for the carriage motion.[41]

46. By letter dated April 7, 2017, Koskie Minsky LLP wrote to Macleod J. advising the court that it would seek a stay of the Vogtmann Action and the motion proceeded as planned on April 11, 2017, with counsel in the Vogtmann Action making oral submissions but filing no materials. Macleod J. reserved his decision.[42]

47. While the carriage decision had been under reserve for some months, on June 23, 2017, a proposed class action styled *Bird v. Attorney General of Canada* (Court File No. 1701-08523) (the "**Bird Action**") was commenced by DD West LLP in the Court of Queen's Bench of Alberta.[43]

48. On July 7, 2017 Koskie Minsky LLP wrote DD West LLP stating that, given that the carriage hearing had concluded, the Bird Action was an abuse of process.[44]

49. On July 14, 2017, Mr. Klym wrote to Koskie Minsky LLP advising that he "remained open to a productive dialogue." By letter dated July 24, 2017, a copy of the Manitoba Court of Appeal decision awarding carriage to the Meeches Action was provided to Macleod J.[45]

50. DD West LLP, counsel in the Bird Action, then wrote to Macleod J. advising the court that carriage was sought "without any input from [their clients] as to their interests and needs and have directed us to so advise the Court" and advised of an intention to be heard in the carriage issue by August 18, 2017. On August 9, 2017, Macleod J. responded to Mr. Klym stating that "[t]he only matters that I may consider with respect to my decision are those that are properly brought forward to the Court in accordance with the Court rules."[46]

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[41] Affidavit of D. Rosenfeld, at para. 81, Motion Record, Tab 6, p. 196.

[42] Affidavit of D. Rosenfeld, at paras. 82-83, Motion Record, Tab 6, p. 196.

[43] Affidavit of D. Rosenfeld, at para. 84, Motion Record, Tab 6, p. 196.

[44] Affidavit of D. Rosenfeld, at para. 85, Motion Record, Tab 6, p. 196.

[45] Affidavit of D. Rosenfeld, at para. 86, Motion Record, Tab 6, p. 196.

[46] Affidavit of D. Rosenfeld, at paras. 88-89, Motion Record, Tab 6, pp. 196-197.

51. On August 14, 2017, Koskie Minsky LLP wrote to Macleod J. stating that the matter had been fully briefed, argued some time ago, and the Manitoba Court of Appeal decision has been rendered. In consequence, it "is neither fair not appropriate that this late-blooming matter be allowed to delay this matter further." [47]

52. On August 18, 2017, DD West LLP wrote to Macleod J. enclosing an application permitting the plaintiff in the Bird Action to make representations to the Court in respect of the already completed carriage application but then wrote on August 31, 2017, advising that it intended to adjourn its proposed motion *sine die*.[48]

53. On September 5, 2017, Koskie Minsky LLP wrote to Macleod J. advising that, by agreement between Koskie Minsky LLP and Merchant Law Group, given the Agreement-in-Principle that had been reached with Canada on August 30, 2017, the carriage decision currently under reserve no longer needed to be released by the Court.[49]

F. The British Columbia Proceedings

54. A proposed class action was commenced on May 30, 2011 styled *Russell v. Her Majesty the Queen* (Court File No. S-113566) (the "**Russell Action**") by Klein Lawyers. In July 2016, counsel in the Russell Action served its certification motion record.[50]

55. On December 16, 2016, a proposed class proceeding styled *Tanchak v. HMQ* (Court File No. 186178) (the "**Tanchak Action**") was commenced in British Columbia by Merchant Law Group. On March 24, 2017, a proposed class proceeding styled *Jones v. HMQ* (Court File No. S-172776) (the "**Jones Action**") was commenced in British Columbia by Stephen Bronstein Professional Corporation.[51]

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[47] Affidavit of D. Rosenfeld, at para. 90, Motion Record, Tab 6, p. 197.

[48] Affidavit of D. Rosenfeld, at paras. 91, 94, Motion Record, Tab 6, p. 197.

[49] Affidavit of D. Rosenfeld, at para. 95, Motion Record, Tab 6, p. 198.

[50] Affidavit of D. Rosenfeld, at para. 99, Motion Record, Tab 6, p. 198.

[51] Affidavit of D. Rosenfeld, at paras. 101-102, Motion Record, Tab 6, pp. 198-199.

56. On May 19, 2017, Klein Lawyers brought an application in the British Columbia Supreme Court to stay the Tanchak and Jones Actions, returnable June 21, 2017, which was adjourned to August 16, 2017 and then adjourned again to permit the parties to file additional evidence.[52]

G. Other Actions Commenced Across Canada

57. In addition to the aforementioned class proceedings, additional class proceedings concerning the Sixties Scoop were commenced as follows:

(a) *Catherine Morrisseau v Her Majesty the Queen in Right of Ontario et al* (Court File No. CV-16-565598-00CP) commenced in Ontario my Merchant Law Group on December 7, 2016;

(b) *Darcy Longman (Hall) v Attorney General of Canada* (Court File No. QGB 1794 of 2017) commenced in Saskatchewan by Aboriginal Law Group on November 24, 2017;

(c) *Mary-Ann Ward v The Attorney General of Canada et al* (Court File No. 500-06-000829-164) commenced in Quebec by Merchant Law Group on December 7, 2016;

(d) *Linda Lou Flewin v Attorney General of Canada et al* (Court File No. HFX No. 458720) commenced in Nova Scotia by Merchant Law Group on December 19, 2016; and

(e) *Charles Eshleman and Christine Mullin v. The Attorney General of Canada and the Commissioner of Yukon* (Court File No. 17-A0103) commenced in the Yukon on October 20, 2017.[53]

H. The Federal Court Proceedings

58. On December 20, 2016, a proposed class action was commenced in the Federal Court styled *Riddle v. HMQ* (Court File No. T-2216-16) (the "**Riddle Action**") by Merchant Law Group. On March 1, 2017, a proposed class action was commenced in the Federal Court styled

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[52] Affidavit of D. Rosenfeld, at para. 103, Motion Record, Tab 6, p. 199.

[53] Affidavit of D. Rosenfeld, at para. 104, Motion Record, Tab 6, p. 199.

Wendy White v. Attorney General of Canada (Court File No. T-294-17) (the "**White Action**") by Koskie Minsky LLP.[54]

59. Manson J. was assigned as case management judge for the White Action on March 17, 2017 and directed that the first case management conference in the White Action occur on April 18, 2017.[55]

60. On March 22, 2017, a proposed class action was filed in the Federal Court styled *Charlie v. HMQ* (Court File No. T-421-17) (the "**Charlie Action**") by Klein Lawyers. By direction dated March 27, 2017, Manson J. directed the parties to the White, Charlie and Riddle Actions, as follows:

(a) the first case management conference in the White Action initially scheduled for April 18, 2017 was adjourned;

(b) the White Action would now be case managed by Manson J. with the Riddle Action and the Charlie Action;

(c) a joint case management conference for the White Action, the Riddle Action, and the Charlie Action, would occur before Manson J. on April 21, 2017; and

(d) prior to the April 21, 2017 case management conference, the parties to the White Action, the Riddle Action, and the Charlie Action were to consult for the potential for an agreed upon schedule to move the proposed class actions forward, failing which they were to provide a status report to Manson J. by April 13, 2017.[56]

61. At an April 21, 2017 case management conference, Manson J. made the following direction:

(a) the parties will report to the Court on or before April 28, 2017 on whether they wish to schedule a Dispute Resolution Conference under the auspices of the Federal Court;

(b) counsel for the Plaintiff in the White Action will prepare and communicate a draft consent order pertaining to a carriage motion timetable; and

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[54] Affidavit of D. Rosenfeld, at paras. 107-108, Motion Record, Tab 6, p. 200.

[55] Affidavit of D. Rosenfeld, at para. 109, Motion Record, Tab 6, p. 200.

[56] Affidavit of D. Rosenfeld, at paras. 111-112, Motion Record, Tab 6, pp. 200-201.

> (c) counsel for Canada was to prepare and communicate a draft consent order staying the filing of any Statement of Defence as well as any subsequent steps on these actions, pending the resolution of the carriage motion or such further order of this Court.[57]

62. By order dated May 1, 2017, Manson J. ordered that Canada was not required to file a Statement of Defence unless and until one of the White Action, the Riddle Action, or the Charlie Action was certified, and that any subsequent steps in these actions were stayed pending resolution of the carriage motion or further order of the Court. By order dated July 5, 2017, Manson J. scheduled the motion for carriage for October 17 and 18, 2017 in Vancouver.[58]

63. On September 6, 2017, counsel in the White, Riddle and Charlie Actions wrote a letter to Manson J. advising that the carriage motion return dates may be vacated as a carriage motion was no longer necessary to adjudicate amongst the three competing claims, as an Agreement in Principle had been reached with Canada on August 30, 2017.[59]

64. After the Agreement-in-Principle was reached in August, on September 19, 2017, a Statement of Claim styled *Gloria Topilikon and Theresa Doreen Stevens v. Attorney General of Canada* (Court File No. T-1412-17) (the "**Topilikon Action**") was filed in the Federal Court by Bronstein & Company.[60]

65. On November 24, 2017, and well after the October 6, 2017 public announcement of the Settlement by the Minister for Indigenous Affairs, a Statement of Claim styled *Victor Bird and Leona Paul v. The Attorney General of Canada* (Court File No. T-1811-17) (the "**Bird Federal Court Action**") was filed in the Federal Court by DD West LLP.[61]

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[57] Affidavit of D. Rosenfeld, at para. 114, Motion Record, Tab 6, p. 201.

[58] Affidavit of D. Rosenfeld, at paras. 117-118, Motion Record, Tab 6, p. 202.

[59] Affidavit of D. Rosenfeld, at para. 120, Motion Record, Tab 6, p. 202.

[60] Affidavit of D. Rosenfeld, at para. 121, Motion Record, Tab 6, p. 202.

[61] Affidavit of D. Rosenfeld, at para. 122, Motion Record, Tab 6, p. 202.

I. Settlement Discussions, Mediation and Settlement

66. In advance of settlement discussions in the context of the Federal Court mediation, there were ongoing settlement discussions between the parties:

(a) During the period of Spring to Fall of 2016, there were a series of meetings between counsel to Canada and counsel in the Brown Action to discuss settlement.

(b) During the period of November 30, 2016 to December 9, 2016, counsel to Canada met individually with representative counsel in all of the Sixties Scoop class proceedings that had been commenced to engage in settlement discussions.

(c) On December 16, 2016, counsel to Canada and to the plaintiffs met to engage in settlement discussions.

(d) On February 28, 2017, counsel to Canada and the plaintiffs met to engage in settlement discussions.[62]

67. On February 1, 2017, the Honourable Carolyn Bennett, then Minister of Indigenous and Northern Affairs ("**INAC**"), publically announced the federal government's interest in settling the Sixties Scoop litigation:

> The Sixties Scoop is a dark and painful chapter in Canada's history. Beginning in the 1960s, Indigenous children were removed from their homes by child welfare authorities and many were placed in foster care or adopted out to non-Indigenous families. A number of Sixties Scoop class actions are now underway.
>
> Over the last several months, I have been working with my officials and Cabinet colleagues to get this process in place to resolve these claims in a compassionate, respectful and fair manner, as a way forward towards reconciliation and healing. Several parties have already expressed their desire to participate in the discussions, and we hope all parties will participate in the efforts towards negotiating an Agreement-in-Principle to resolve Sixties Scoop litigation.[63]

68. On March 27, 2017 Canada reiterated its commitment to negotiate an expedited process for a national resolution of Sixties Scoop litigation across the country.[64]

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[62] Affidavit of D. Rosenfeld, at paras. 124-126, 128, Motion Record, Tab 6, p. 203.

[63] Affidavit of D. Rosenfeld, at para. 127, Motion Record, Tab 6, p. 203.

[64] Affidavit of D. Rosenfeld, at para. 129, Motion Record, Tab 6, p. 204.

69. By order dated May 3, 2017, Manson J. ordered that the White Action, the Riddle Action, and the Charlie Action be referred to a Dispute Resolution Conference to be conducted under the auspices of a judge or prothonotary of the Federal Court.[65]

70. On May 4, 2017, counsel to Canada, emailed Morris Cooper, counsel in the Brown Action, and Stephen Bronstein, counsel in the Vogtmann and Jones Actions and provided them with Manson J.'s order referring the Charlie, White and Riddle Actions to a dispute resolution conference pursuant to Federal Court Rules 387 to 389.[66]

71. On June 13, 2017, a case management conference before Shore J. proceeded with counsel present from the Riddle, Charlie and White Actions and to Canada. Shore J. ordered the following mediation schedule:

(a) June 27, 28, and 29 in Montreal, Quebec;

(b) July 11, 12, and 13 in Toronto, Ontario;

(c) August 28, 29 and 30 in Vancouver, British Columbia;

(d) September 25, 26, and 27 in Montreal, Quebec;

(e) October 23, 24, and 25 in Toronto, Ontario;

(f) November 30 and December 1 in Vancouver, British Columbia; and

(g) January 9, 10 and 11 in Vancouver, British Columbia.[67]

72. In addition, Shore J. advised the parties that he wanted counsel in the Brown Action to attend, and asked the parties to speak to counsel in the Brown Action and to invite them to attend. Counsel in the Brown Action agreed to attend the Federal Court mediation in June 2017 in Montreal. All counsel in the Riddle, Charlie, White and Brown Actions and to Canada agreed to maintain the strictest confidentiality undertaking with respect to the negotiations.[68]

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[65] Affidavit of D. Rosenfeld, at para. 130, Motion Record, Tab 6, p. 204.

[66] Affidavit of D. Rosenfeld, at para. 131, Motion Record, Tab 6, p. 204.

[67] Affidavit of D. Rosenfeld, at para. 134, Motion Record, Tab 6, pp. 204-205.

[68] Affidavit of D. Rosenfeld, at paras. 135, 138, Motion Record, Tab 6, p. 205.

73. At the mediation meetings, a broad range of topics were canvassed and negotiated, including:

(a) confidentiality of the process;

(b) carriage issues;

(c) class definition;

(d) class size;

(e) existing programs available to status Indians;

(f) the Foundation and healing and reconciliation issues;

(g) the mandate of the Foundation;

(h) eligibility;

(i) compensation;

(j) the claims process;

(k) the claims of the deceased;

(l) the verification process and the extent of same;

(m) administration;

(n) notice; and

(o) settlement implementation issues.[69]

74. The parties met before Shore J. on June 27 and 28, 2017 in Montreal to continue the mediation. On July 11 to 13, counsel in the Riddle, Charlie, White and Brown Actions and to Canada and Martin Reiher, Assistant Deputy Minister at Aboriginal Affairs and Northern Development and Krista Robertson of Aboriginal Affairs and Northern Development, met before Shore J. in Toronto to continue the mediation.[70]

75. During the July meetings in Toronto, Paula Isaak, Assistant Deputy Minister at Aboriginal Affairs and Northern Development, Scott Doidge, Director General in Health

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[69] Affidavit of D. Rosenfeld, at para. 139, Motion Record, Tab 6, pp. 205-206.

[70] Affidavit of D. Rosenfeld, at paras, 140, 142, Motion Record, Tab 6, p. 206.

Canada's First Nations and Inuit Health Branch and William Fizet, Director General from Heritage Canada, made presentations at the mediation concerning the social, medical and education benefits available to Indigenous people in Canada. Kenn Richard, Executive Director of Native Child and Family Services of Toronto also made a presentation at the mediation concerning the impact of the Sixties Scoop on individual survivors.[71]

76. Throughout the summer of 2017, the parties delivered class size information to counsel to Canada, who worked with an actuary to prepare a class size estimate. Owing to the complexity and sensitivity of the issues to be resolved, coupled with the large number and disparate positions of the parties, the negotiation process was arduous and protracted.[72]

77. On August 29 and 30, 2017, counsel in the Riddle, Charlie, White and Brown Actions and to Canada met before Shore J. in Vancouver to continue the mediation. An Agreement-in-Principle was signed by counsel in the Riddle, Charlie, White and Brown Actions and to Canada on August 30, 2017.[73]

78. On September 26 and 27, 2017, counsel in the Riddle, Charlie, White and Brown Actions and to Canada met before Shore J. in Montreal to continue the mediation and draft and prepare the Final Settlement Agreement. On October 6, 2017, the Agreement-in-Principle was announced by the Honourable Carolyn Bennett, then Minister of INAC, at the House of Commons in Ottawa, Ontario.[74]

79. On October 25 and 26, 2017, counsel in the Riddle, Charlie, White and Brown Actions and to Canada met before Shore J. in Toronto to finalize the Final Settlement Agreement.[75]

80. On November 24, 2017, DD West wrote a letter to Manson J. and Shore J. enclosing a motion record and seeking an order for inclusion in the dispute resolution conference. On November 29 and 30, 2017, counsel in the Riddle, Charlie, White and Brown Actions and to

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[71] Affidavit of D. Rosenfeld, at paras. 143, 144, Motion Record, Tab 6, pp. 206-207.

[72] Affidavit of D. Rosenfeld, at paras. 141, 145, Motion Record, Tab 6, pp. 206, 207.

[73] Affidavit of D. Rosenfeld, at paras. 146, 147, Motion Record, Tab 6, p. 207.

[74] Affidavit of D. Rosenfeld, at paras. 148, 149, Motion Record, Tab 6, p. 207.

[75] Affidavit of D. Rosenfeld, at para. 150, Motion Record, Tab 6, p. 207.

Canada met before Shore J. in Vancouver to continue the penultimate meeting to finalize the Final Settlement Agreement. On November 30, 2017, the final settlement agreement was concluded and executed in counterparts thereafter.[76]

81. On January 4, 2018, Shore J. granted an order consolidating the White, Riddle and Charlie Actions.[77]

J. Phase I Notice Approval and Implementation

82. On January 10, 2018, counsel in the consolidated White Action and counsel to Canada appeared before Shore J. in the Federal Court seeking approval of the form and content of the Phase I notice and the Phase I notice plan. Shore J. issued an order approving the form and content of the Phase I notice and the Phase I notice plan.[78]

83. On January 12, 2018, counsel in the Brown Action and the White Action and counsel to Canada appeared before Glustein J. in the Ontario Superior Court of Justice seeking approval of the form and content of the Phase I notice and the Phase I notice plan. Glustein J. issued an order approving the form and content of the Phase I notice and the Phase I notice plan.[79]

84. The notice has since been implemented in compliance with the court-approved notice plan (other than publication in Ha-Shilth-Sa, a First Nations Newspaper, which appeared on March 15, 2018). Collectiva Class Action Services Inc. and Trilogy Class Action Service ("**Collectiva**") has since established a website styled www.sixtiesscoopsettlement.info that contains links to the settlement agreement, a summary of the terms of the settlement agreement, the court-approved notice, the objection form, instructions about how to object to the settlement, and contact information for Collectiva.[80]

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[76] Affidavit of D. Rosenfeld, at paras. 151-154, Motion Record, Tab 6, pp. 207-208.

[77] Affidavit of D. Rosenfeld, at para. 155, Motion Record, Tab 6, p. 208.

[78] Affidavit of D. Rosenfeld, at para. 156, Motion Record, Tab 6, p. 208.

[79] Affidavit of D. Rosenfeld, at para. 157, Motion Record, Tab 6, p. 208.

[80] Affidavit of D. Rosenfeld, at para. 158, Motion Record, Tab 6, p. 208.

85. The deadline for filing objections is April 30, 2018. Once the deadline has passed, Class Counsel will compile all objections received and file same with both the Federal Court and the Ontario Superior Court of Justice in advance of the settlement approval motions in May 2018.

PART III - THE ISSUES TO BE DETERMINED

86. The following legal issues are to be determined on this application:

(i) should certification be granted on consent of the parties?

(ii) should this Court approve the Settlement as fair, reasonable and in the best interests of the class?

(iii) should this Court award honorarium payments to the representative plaintiffs?

87. The parties respectfully submit that the answer to each of the above questions ought to be "**yes**".

PART IV - THE LEGAL ARGUMENT

A. The Statutory Framework for Consent Certification & Settlement Approval of a Class Proceeding

i. The Framework for Consent Certification of a Class Proceeding

88. It is very common for parties to a settlement in a proposed class proceeding to jointly move to have the action certified on consent[81] and the agreement approved,[82] simultaneously.[83] As Justice Barnes determined in *Buote v. Canada*:

> "For the reasons given previously in *Manuge v. Canada* and, additionally, on the strength of the Defendant's consent, it is appropriate to certify this action as a class proceeding under Rule 334.16. All of the requirements of that Rule have been met. Furthermore, in the context of a motion to certify that coincides with a provisional settlement of the

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[81] *Federal Court Rules*, SOR/98-106, Rule 334.16, Plaintiffs' Memorandum of Fact and Law, Appendix "A".

[82] *Federal Court Rules*, SOR/98-106, Rule 334.29, Plaintiffs' Memorandum of Fact and Law, Appendix "A".

[83] *Estate of G. Buote & D. White v. Her Majesty the Queen*, 2014 FC 773, Book of Authorities, Tab 18. *Merlo & Davidson v. Her Majesty the Queen*, [2017] F.C.J. No. 773, Book of Authorities, Tab 32.

> proceeding a rigorous approach to certification is unnecessary and unwarranted: *Gariepy v. Shell Oil Company*, [2002] O.J. No. 4022 at para. 27."[84]

89. Precisely the same principle and reasoning ought to apply in this case. For the reasons given previously in *Brown v. Canada* by the Ontario Superior Court of Justice[85] and on the strength of the Defendant Canada's consent, it is appropriate to certify this action as a class proceeding pursuant to Rule 334.16. No more rigorous or expansive certification analysis is warranted in these circumstances.

90. Based upon the settlement reached, the national claim as framed, the orders proposed herein and the certification decision in *Brown*,[86] there is little doubt that an 'arguable case'[87] for certification is satisfied here:

(i) the pleadings disclose a reasonable cause of action that is not doomed to failure;

(ii) there is an identifiable class of person and an objective class definition;

(iii) the claims of the class raise common issues;

(iv) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact;

(v) there are representative plaintiffs capable of fairly representing the interests of the class with whom they have no conflicts.[88]

91. The class definition proposed by the parties for the purposes of consent certification and settlement is similar in kind to that certified in *Brown* but is both wider yet more objectively circumscribed, making it appropriate for certification. The proposed class is:

> All Indians (as defined in the *Indian Act*) and Inuit persons who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents excluding any members of the class action

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[84] *Estate of G. Buote & D. White v. Her Majesty the Queen*, 2014 FC 773, at para. 8, Book of Authorities, Tab 18.

[85] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, Book of Authorities, Tab 9.

[86] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, Book of Authorities, Tab 9.

[87] *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, at para. 37, Book of Authorities, Tab 49.

[88] *Federal Court Rules*, SOR/98-106, Rule 334.16(1), Plaintiffs' Memorandum of Fact and Law, Appendix "A".

> in the Ontario Superior Court of Justice styled as *Brown v. The Attorney General of Canada* (Court File Number CV-09-00372025CP).[89]

92. The temporal and geographical scope of this class definition is wider than that certified in *Brown* but arguably less subjective as it does not require a showing that a person was "not raised in accordance with the aboriginal person's customs, traditions and practices".[90] Accordingly, it satisfies the statutory requirement of being objective and rationally connected to the common issue.

93. The common issue proposed for certification is a threshold - and purely legal question – which therefore requires an answer for the determination of <u>any and all</u> class members' claims:

> "Did the Defendant have a fiduciary or common law duty of care to take reasonable steps to protect the Indigenous identity of the Class Members?"

94. The proposed common issue here is similar in kind to that which was certified in *Brown* but because these proceedings are national in scope, they are not tied specifically to a provincial-federal agreement in the manner that *Brown* was. Nevertheless, the common issue, at its essence asks the same question as the following common issues certified in *Brown*:

> When the Federal Crown entered into the Canada-Ontario Welfare Services Agreement in December 1, 1965 and at any time thereafter up to December 31, 1984:
>
> (1) Did the Federal Crown have a fiduciary or common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario who were placed in the care of non-aboriginal foster or adoptive parents from losing their aboriginal identity?
>
> (2) If so, did the Federal Crown breach such fiduciary or common law duty of care?

95. Most importantly, the overarching factor on a certification motion is whether or not it can *work* as a class proceeding.[91] The fact that this action has been settled on a national basis with a

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[89] Final Settlement Agreement, s. 5.04(3), Exhibit "112" to the Affidavit of D. Rosenfeld, Motion Record, Tab 6(112), pp. 2010-2011.

[90] "Indian children who were taken from their homes on reserves in Ontario between December 1, 1965 and December 31, 1984 and were placed in the care of non-aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions and practices": *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, at para. 71, Book of Authorities, Tab 9.

[91] *Gottfriedson v. Canada*, 2015 FC 706, at para. 25, Book of Authorities, Tab 22.

streamlined proposed claims process, in and of itself shows this form is "workable". the alternative to class litigation which would not be preferable is the following *in terrorem* reality: at least 16,000 individual trials to determine a "complex, difficult but largely legal question",[92] potentially followed by at least 16,000 individual causation/damages/limitation period determinations.

96. At the end of the day, "there is no question that a class action to determine the core common issue would significantly advance the litigation. At this point, only a class proceeding can sensibly 'test' the viability of the fiduciary duty and negligence claims."[93]

ii. The Framework for Settlement Approval of a Class Proceeding

97. If certification is provisionally granted - conditional upon the Settlement being judicially approved[94] - this Court will necessarily be guided next by Rule 334.29:

> **334.29(1) Approval** – A class proceeding may be settled only with the approval of a judge.
>
> **(2) Binding Effect** – On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding.

98. On approving a settlement, the test to be applied is "whether the settlement is fair and reasonable and in the best interests of the class as a whole".[95] Several factors have emerged from the jurisprudence, nationally, which courts are to take into consideration when evaluating any proposed settlement. These factors include, but are not limited to, the following:

(i) the likelihood of success or recovery with continued litigation;

(ii) the amount and nature of discovery evidence or investigation;

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[92] *Brown v. Canada (Attorney General*, 2010 ONSC 3095, at para. 12, Book of Authorities, Tab 7.

[93] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, at para. 79, Book of Authorities, Tab 9.

[94] The proposed draft order submitted to the Court on consent contains a typical provision which restores the parties to their original certification positions should the settlement be rejected:

> Para. 8: The certification of this action is conditional on the approval of the Settlement in Ontario and in accordance with section 12.01 of the Settlement Agreement. Should the Settlement Agreement be set aside, all materials files, submissions made or positions taken by any party are without prejudice to any future positions taken by any party on a certification motion.

[95] *Merlo v. Canada*, [2017] F.C.J. No. 773, at para. 16, Book of Authorities, Tab 32.

(iii) settlement terms and conditions;

(iv) recommendations and experience of counsel involved;

(v) future expense and likely duration of contested litigation;

(vi) the number and nature of any objections;

(vii) the presence of good faith and the absence of collusion;

(viii) the dynamics of, and positions taken during, the negotiations;

(ix) the risks of not unconditionally approving the settlement.[96]

99. Taking into account each of these factors in these actions, the settlement ought to be approved by this Honourable Court.

B. The Overarching Legal Principles Governing Settlement Approval

100. The general principles informing the Rule 334.29 test for settlement approval have been described in the jurisprudence as the following:

> "The Court with a class action settlement before it does not expect perfection, but rather that the settlement be reasonable, a good compromise between the two parties. The purpose of a settlement is to avoid the risks of a trial. Even if it is not perfect, the settlement may be in the best interests of those affected by it, particularly when the risks and the costs of a trial are considered. It is always necessary to consider that a proposed settlement represents the parties' desire to settle the matter out of court without any admission by either party regarding the facts or regarding the law."[97] [emphasis added]

101. The range of reasonableness test permits that a number of settlement possibilities may be in the best interests of the class when compared to the unpredictable alternative of continued litigation: "a less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation".[98]

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[96] *Chateauneuf v. Canada*, [2006] F.C.J. No. 363, at para. 5, Book of Authorities, Tab 12. *Parsons v. Canada Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 71, Book of Authorities, Tab 36. *Sayers v. Shaw Cablesystems Ltd*., 2011 ONSC 962, at para. 28, Book of Authorities, Tab 44.

[97] *Chateauneuf v. Canada*, [2006] F.C.J. No. 363, at para. 7, Book of Authorities, Tab 12.

[98] *Dabbs v. Sun Life Assurance Company of Canada*, [1998] O.J. No. 2811 (Gen. Div.), at para. 30, aff'd (1998), 41 O.R. (3d) 97 (C.A.), Book of Authorities, Tab 15.

102. In any complex negotiated agreement, there has inevitably been 'give and take' by all parties on a broad range of issues. For this very reason, settlement approval courts have determined that "it is inappropriate to apply a standard of perfection to the end product. Considerable deference must be shown to the process underlying the negotiated settlement."[99]

103. When considering whether to approve a settlement pursuant to Rule 334.29, it is not open to the Court to rewrite the substantive terms of the agreement nor is it permissible to place the interests of a handful of class members over the interests of the class as a whole.[100] The approving Court "has no authority to alter a settlement reached by the parties or to impose its own terms upon them. The Court is limited to either approving or rejecting a settlement in its entirety."[101]

104. Moreover, as this Court has previously opined:

> "It will always be a particular concern of the Court than an arms-length settlement negotiated in good faith not be too readily rejected. The parties are, after all best placed to assess the risks and costs (financial and human) associated with taking complex class litigation to its conclusion. The rejection of a multi-faceted settlement like the one negotiated here also carries the risk that the process of negotiation will unravel and the spirit of compromise will be lost."[102] [emphasis added]

105. In litigation such as this, where the case raises broader social or political implications, it is also important for the court to be mindful to reject any extraneous non-legal considerations in its assessment of the settlement's fairness:

> "…these matters have come before the court framed as class action lawsuits. The parties have chosen to settled the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns

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[99] *Fontaine v. Canada (Attorney General)*, 2006 NUCJ 24, at para. 38, Book of Authorities, Tab 19.

[100] *Manuge v. Canada*, 2013 FC 341 at para. 5, Book of Authorities, Tab 29. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.), at paras. 10 – 11, Book of Authorities, Tab 14.

[101] *Manuge v. Canada*, 2013 FC 341, at para. 19, Book of Authorities, Tab 29.

[102] *Manuge v. Canada*, 2013 FC 341, at para. 6, Book of Authorities, Tab 29.

> even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement."[103] [emphasis added]

106. Additionally, there is a "strong initial presumption of fairness" when the settlement is, as in this case, negotiated at arms' length and recommended by experienced counsel:

> "Where the parties are represented –as they are in this case – by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation."[104]

107. As put by one of the nine settlement approval judges during the Indian Residential Schools approval motions, the crux of the question that this Honourable Court must ask itself on this motion is the following:

> "…a Court must ask itself whether it is worth risking the unravelling of the agreement and leaving nearly 80,000 Aboriginal people and their families to pursue the remedies available to them prior to the agreement being signed."[105]

108. The same spectre is raised today on this motion involving some 16,000 Indigenous persons across Canada. The parties submit that it is not worth risking the dismantling of this agreement and putting all those individuals back in the situation of having to pursue nebulous, uncertain and untimely remedies, the position in which they were in August of 2017, prior the agreement being executed. As the evidence on this motion confirms, further delay for survivors "would be intolerable" and "bringing closure is critical"[106].

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[103] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.), at para. 9, Book of Authorities, Tab 5. *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.), at para. 77, Book of Authorities, Tab 36.

[104] *Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128, at para. 55, Book of Authorities, Tab 46.

[105] *Semple v. Canada*, 2006 MBQB 285, at para. 3, Book of Authorities, Tab 45.

[106] Affidavit of Maggie Blue Waters sworn April 9, 2018 ("**Affidavit of M. Blue Waters** "), at paras. 67, 92, Motion Record, Tab 4, pp. 101, 109.

C. This Settlement is Fair, Reasonable & In The Best Interests of the Class

i. General Considerations in Favour of the Settlement

109. The proposed settlement ought to be approved by this Honourable Court. The payment of at least $500 (five-hundred) million today (and potentially up to $800 million) represents substantial financial recovery. Plus healing or reconciliation initiatives, which are both far more certain (and expeditious) than any eventual judgment on the common issues might be rendered years from today.

110. Continued prosecution of these actions through certification, discoveries, motions and eventually a common issues trial, plus all appeals, includes the very real risk and eventuality that:

(i) a national certification order may not be granted;

(ii) a fiduciary duty may be found not to be owed, as in Ontario;

(iii) liability might not be established;

(iv) statutory limitation periods could bar many or all of could the class' claims;

(v) an aggregate award of damages could be denied by the court forcing class members through lengthy and protracted individual assessment;

(vi) proven damages could be similar to or far less than the settlement amounts;

(vii) ordering reconciliation, commemorative or healing initiatives, of the nature the Foundation is tasked with, would have been outside the jurisdiction or purview of any court to order.

111. Notably, all of the required litigation steps , including a final resolution to trial, release of judgment and all attendant appeals would have taken some six (6) to nine (9) years from now,[107] in proceedings which are already years' old and relate to events which occurred decades ago:

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[107] This estimate is based upon the following presumptions, if a settlement had not been reached: (i) decisions on carriage motions would have been released in early 2018; (ii) national certification motion by the firm granted carriage likely would have been heard by the end of 2018; (iii) reserve of certification would have been in the range of three to six months, or by mid-2019; (iv) appeals of certification would have been finally disposed of approximately one year later or by the summer of 2020; (v) productions, discoveries and pre-trial motions would have realistically taken two years or until the end of 2021; (vi) common issues trial or summary judgment motions would have then likely been heard at the end of 2022; (vii) reserves on either a lengthy trial or even summary judgment motion could have been in the range of four to twelve months, or release of

> "Based upon the eight (8) years of litigation, it would not be unreasonable to predict that years of further litigation and appeals would follow if the case continued. … Our client and class members are survivors whose hurt requires recognition and respect while alive. The lessons to be learned from this event in Canadian history need a resolution to move on to make systemic changes to prevent this from occurring again."[108] [emphasis added]

112. This eventuality cannot be acceptable or palatable for all of the ageing survivors. There is no disputing that, "in reality, many years of litigation lie ahead if this settlement is not approved"[109]. There is no question that this prospect was a weighty concern to those involved in the negotiations:

> "… I had to include this consideration [delay] when measuring the success of this settlement: the Defendant was insisting upon individual hearings for each of the thousands of claimants, and if that position were litigated, let alone that process of individual hearings for each claimant, it would mean no settlement until long after many of our survivors had passed. Canada's infinite resources and the time it takes for the appeals would mean years more of Court battles."[110]

113. In cases such as this, where historical events are at the forefront of the litigation, courts have expressly recognizes the particularly unique benefits of timely settlement:

> "There is no doubt that without a settlement, the proceedings will be protracted, the outcome uncertain and (even if successful) the class members will not receive compensation for years. There is no assurance that at the end of this process they will receive any more than they will get under these Settlement Agreements. Given the advanced age of class members and the historical nature of this litigation, the benefits of an immediate and certain settlement cannot be overstated."[111] [emphasis added]

114. Precisely the same sentiment applies to this case – immediate and certain compensation cannot be overstated when viewed against the prospect of further protracted litigation and the fact that the events giving rise to the proceedings occurred decades ago. As one of the

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decision in 2023; (viii) any and all appeals of trial or judgment would have occurred by mid-2024; (ix) a potential leave application to the SCC would have taken approximately six months to have been disposed of, or a decision on leave in at the end of 2024; (x) if leave were granted, the appeal would have been heard in 2025 or 2026, with a reserved decision to be released at earliest, 2027, or at least some nine years hence.

[108] Affidavit of J. Wilson (filed under separate cover).

[109] *Merlo v. Canada*, [2017] F.C. No. 773, at para. 38, Book of Authorities, Tab 32.

[110] Affidavit of Marcia Brown sworn March 23, 2018 ("**Affidavit of M. Brown**") at para. 45, Exhibit "113" to the Affidavit of D. Rosenfeld, at para. 252, Motion Record, Tab 6(113), p. 2108.

[111] *McKillop and Bechard v. HMQ*, 2014 ONSC 1282, at para. 28, Book of Authorities, Tab 31.

representative plaintiffs has sworn on this motion, the impact of further "delay would be crucially destructive" and "further lengthy court battles [are] a burden that I cannot describe"[112].

ii. Specific Terms & Provisions Weighing in Favour of Approval

115. This settlement of at least $500 million (and potentially $800 million) provides certain, substantial and expedient compensation to ageing class members when contrasted against the risks of contested national certification, summary judgment motion, any common issues trial, attendant appeals and/or individual assessments. The following factors augur strongly in favour of judicial approval in this case:

(i) a significant compensation fund with a simple paper based claims process;

(ii) the non-monetary benefits to the class, including reconciliation, healing and commemorative initiatives in the amount of $50 million;

(iii) the establishment of a Foundation with representation from all stakeholders to implement reconciliation and healing programmatic relief;

(iv) the litigation risks faced by the Plaintiffs at any eventual common issues trial;

(v) the statutory limitation defences available to the Crown; and

(vi) the possibility of individual assessments following any trial or motion for judgments respecting damages.

116. The features of the settlement are not only historic but decidedly multi-dimensional and tailored to these particular class members. Its terms go some distance in reflecting the sensitive nature of these proceedings and the unique circumstances of class members:

(i) there are both monetary and non-monetary benefits to the class;

(ii) the claims process is simple and paper based which avoids class members having to re-live their experiences in the same way a trial or examination would require;

(iii) the claims process does not require proof of "harm" or "loss";

(iv) certain historical and unprecedented initiatives, to be overseen and implemented by the Foundation, will form part of the settlement, initiatives for the benefit of generations of indigenous persons across Canada;

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[112] Affidavit of Jessica Riddle sworn April 16, 2018, at paras. 20, 21, Motion Record, Tab 7, p. 2196.

(v) assurances to be sought from provincial governments that there shall be no social assistance governmental claw-backs on settlement funds received; and

(vi) no class member will be required to pay counsel to assist with the claims process, meaning any compensation determination shall not be subject to a legal fee deduction.

117. All of these factors demonstrate that the settlement is well within the zone of reasonableness. Not only does the settlement provide substantial and timely compensation to an ageing and vulnerable group of persons, it also provides for significant reconciliation initiatives in a way that provides a balance between compensating for particular experiences while also ensuring a national holistic plan for future healing. The claims process further ensures there is no re-victimization of survivors by forcing them to provide oral accounts of their experiences.

118. Considering the terms of the settlement, the amount of compensation available, the non-monetary benefits which will inure to the class and the means of claiming compensation against the significant liability risks (discussed in detail *infra*), the settlement is an excellent and timely result for these class members.

iii. Compensation Without Proof of Harm & With Paper Administration

119. The parties have agreed to a claims process whereby class members do not have to prove harm or damages in order to obtain compensation, nor do they have to navigate a complex process that would otherwise necessitate the involvement of lawyers. This represents a significant achievement for the class. The words of Justice Winkler (as he then was) when considering a settlement in the tainted blood litigation are apposite:

> "This contrasts favourably with many class proceedings where, despite a global settlement, class members are still required to engage in extensive legal proceedings to obtain the benefits. The relative ease of access to compensation is an important feature. It provides some certainty as to the quantum of compensation that class members will receive at each level, but more so, it demonstrates the thoroughness of class counsel in fashioning a satisfactory settlement."[113] [emphasis added]

120. To be eligible to make a claim for compensation through the settlement, one must:

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[113] *Parson v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at para. 17, Book of Authorities, Tab 37.

(a) be a registered Indian (as defined in the *Indian Act*) or Inuit person or person eligible to be registered as an Indian or Inuit who was removed from their home in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents; and

(b) who was adopted or made a permanent ward and was alive on February 20, 2009 (the "**Eligible Class Members**").[114]

121. Eligible Class Members will be provided compensation as follows:

(a) if fewer than 20,000 Eligible Class Members submit claims, each Eligible Class Member will receive an amount equal to $500 million divided by the number of Eligible Class Members who submit claims, to a maximum for $50,000 per person.

(b) if between 20,000 and 30,000 Eligible Class Members submit claims, each Eligible Class Member will receive $25,000.

(c) if more than 30,000 Eligible Class Members submit claims, each Eligible Class Member will receive an amount equal to $750 million divided by the number of Eligible Class Members who submit claims.

122. The following scenarios provide potential examples for compensation per individual Eligible Class Member:

(a) if 5,000 Eligible Class Members submit claims, each Eligible Class Member will receive $50,000;

(b) if 10,000 Eligible Class Members submit claims, each Eligible Class Member will receive $50,000;

(c) if 15,000 Eligible Class Members submit claims, each Eligible Class Member will receive $33,333.33;

(d) if 20,000 Eligible Class Members submit claims, each Eligible Class Member will receive $25,000;

(e) if 25,000 Eligible Class Members submit claims, each Eligible Class Member will receive $25,000; and

(f) if 35,000 Eligible Class Members submit claims, each Eligible Class Member will receive $21,428.57.[115]

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[114] Final Settlement Agreement, Schedule "M", Exhibit "112" to the Affidavit of D. Rosenfeld, at para. 147, Motion Record, Tab 6(112), p. 2094.

[115] Affidavit of D. Rosenfeld, at para. 168, Motion Record, Tab 6, p. 211.

123. The evidence on the motion confirms that these sums, $25,000.00 to $50,000.00, as "meaningful amounts of money", the vast majority of Class members considering "this level of payment substantial"[116].

124. If fewer than 20,000 claims are submitted by Eligible Class Members and the total amount paid to Eligible Class Members is less than $500 million, the difference between the total amount paid to Eligible Class Members and $500 million shall be paid to the Foundation.[117]

125. The Settlement provides for a paper-based confidential claims process that does not require any claimant to testify in a court, to undergo cross-examination or any questioning by an adverse party. This is a very important part of the settlement as class members often convey that they are afraid to be involved because of retribution from the defendants and, in that context, repeatedly want assurances that they will not be exposed. Further, class members often explain that they support the action, but are very reluctant to describe their experiences, because they are embarrassed, ashamed or do not want it publicly known what happened to them.[118]

126. The paper-based claims process herein will not require class members to testify or appear in person, and it will be confidential. Claimants will be assumed to be acting honestly in completing and swearing their forms. The Administrator and the Reconsideration Officer (explained below) are instructed to draw all reasonable and favourable inferences that can be drawn with respect to the application, as well as resolving any doubt as to whether a claim has been established in favour of the claimant.[119]

127. The Settlement Agreement sets out the steps required for the Administrator to verify that claimants are entitled to compensation. To qualify as an Eligible Class Member, a Class Member must be a Registered Indian or Inuit or entitled to be a Registered Indian or Inuit, and the Class

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[116] Affidavit of M. Blue Waters, at para. 90, Motion Record, Tab 4, p. 108.

[117] Affidavit of D. Rosenfeld, at para. 169, Motion Record, Tab 6, p. 211.

[118] Affidavit of D. Rosenfeld, at paras. 170-172, Motion Record, Tab 6, p. 212.

[119] Affidavit of D. Rosenfeld, at paras. 173-174, Motion Record, Tab 6, p. 212.

Member must have been adopted or made permanent ward and placed in the care of non-Indigenous foster or adoptive parents.[120]

128. Upon receipt of an application, the Administrator will check for completeness and that the application contains information that, if confirmed, demonstrates that applicant is an Eligible Class Member. If the application is not complete, the Administrator will contact the claimant to complete the claim form.[121]

129. The Administrator will first confirm that the claimant is a Registered Indian or Inuit or entitled to be a Registered Indian or Inuit by:

(a) sending the claimants date of birth and registration number to INAC for confirmation if the claimant indicates he or she is a Registered Indian;

(b) sending the claimants date of birth and registration number to INAC for processing if the claimant indicates he or she is entitled to be a Registered Indian; or

(c) sending the claimant's name, date of birth, and land claims agreement enrolment sent to INAC if the claimant indicates that he or she is Inuit.[122]

130. Next, the Administrator will confirm that the claimant was adopted or was a permanent ward. The Administrator will check for confirming records attached to the application. If the Administrator is unable to confirm that the claimant was adopted from the records attached to the application, and the claimant has indicated that he or she is a Registered Indian, the Administrator will request confirmation of adoption or permanent wardship from INAC. For all other claimants, the Administrator will initiate a record check with the appropriate province or territory.[123]

131. The benefit of this shifted burden of proof is critically important in the context of this case. It has proven incredibly difficult, in some cases, impossible, for survivors to obtain records from either the relevant provincial or federal entities. The settlement eliminates this need as class

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[120] Affidavit of D. Rosenfeld, at paras. 175-176, Motion Record, Tab 6, pp. 212-213.

[121] Affidavit of D. Rosenfeld, at para. 177, Motion Record, Tab 6, p. 213.

[122] Affidavit of D. Rosenfeld, at para. 178, Motion Record, Tab 6, p. 213.

[123] Affidavit of D. Rosenfeld, at para. 179, Motion Record, Tab 6, p. 213.

members will not bear the burden of locating any official records to prove the fact of permanent wardship or adoption:[124]

> "I have personally experienced the plight of trying to get record proving my status from provincial and federal authorities, and I have experienced, it many, many times in my help of others. This settlement shifts the burden for securing the record onto the governments and if they have no record, creates a process that assures me no indigenous person who lost their spirit and being will be denied recognition because of no record."[125]

132. Crown-Indigenous Relations and Northern Affairs Canada ("CIRNA") is working to establish a streamlined process to assist class members in obtaining Indian status in an efficient manner.[126] In addition, CINRA has compiled a list of those who were adopted during the class period which will permit Canada to quickly verify whether an individual is a member of the class.[127] As a result, the process for verification of class members will be streamlined. An expert actuary estimates that nearly 75% of all class members who were adopted can be verified through this process.[128] For the remaining 25% of class members, Canada has reached out to the Provinces to arrange for expedited confirmation of their permanent wardship, which on average will be verified within two weeks of a request.[129]

133. If the Administrator is still not able to confirm that that the claimant was adopted or was a permanent ward, the Administrator will review other information provided with the claim form and may: (a) determine whether an applicant is an Eligible Class Member; or (b) seek additional corroborating information from the claimant.[130]

134. If the Administrator is unable to confirm that the applicant is a Registered Indian or an Inuit (or entitled to be so), and was adopted or made a permanent ward, the Administrator will

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[124] Affidavit of Dr. Raven Sinclair sworn March 15, 2018 ("**Affidavit of Dr. R. Sinclair**") at para. 12(e), Exhibit "115" to the Affidavit of D. Rosenfeld, at para. 254, Motion Record, Tab 6(115), p. 2178.

[125] Affidavit of M. Brown, at para. 40(i), Exhibit "113" to the Affidavit of D. Rosenfeld, at para. 257, Motion Record, Tab 6(113), pp. 2106-2107.

[126] Affidavit of Martin Reiher sworn April 12, 2018 ("**Affidavit of M. Reiher**"), para. 23, Motion Record, Tab 5, p. 156.

[127] Affidavit of M. Reiher, para. 24, Motion Record, Tab 5, pp. 156-157.

[128] Affidavit of M. Reiher, para. 31, Motion Record, Tab 5, p. 158.

[129] Affidavit of M. Reiher, para. 32, Motion Record, Tab 5, p. 158.

[130] Affidavit of D. Rosenfeld, at para. 180, Motion Record, Tab 6, pp. 213-214.

advise the applicant in writing why he or she was not determined to be an Eligible Class Member and that the applicant may request a reconsideration of his or her application within 30 days.[131]

135. If an applicant requests reconsideration, the Administrator will transmit the entire file to the Reconsideration Officer who may:

(a) determine whether the applicant is an Eligible Class Member;

(b) seek more information from the applicant either in writing or otherwise; or

(c) refer the matter to the Exceptions Committee along with reasons as to why the referral is being made.[132]

136. At no time, can the Defendant respond, cross-examine or contest the application.[133]

137. Lastly, in terms of eligibility for compensation, the Settlement Agreement memorializes an understanding between the parties that they are not currently able to precisely contemplate or describe exhaustively all of the criteria for qualification as an Eligible Class Member. Consequently, the Settlement Agreement establishes a procedure to avoid injustice and ensure that compensation is paid to Eligible Class Members in accordance with the underlying principle of this Agreement, specifically, compensation for long term placement with non-Indigenous families resulting in cultural loss.[134]

138. This is important because legal distinctions – albeit necessary ones – nevertheless fail to recognize that "on" or "off reserve" Indians endured the same harms:

> "…the settlement is sensitive to the nuance of child welfare law that some indigenous children, who were neither adopted nor made crown or permanent wards, still experiences long-term placement in non-indigenous homes, thereby suffering the same harm. There is an 'exceptional circumstances' provision within the settlement that answers these persons' needs."[135]

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[131] Affidavit of D. Rosenfeld, at para. 181, Motion Record, Tab 6, p. 214.

[132] Affidavit of D. Rosenfeld, at para. 183, Motion Record, Tab 6, p. 214.

[133] Affidavit of D. Rosenfeld, at para. 184, Motion Record, Tab 6, p. 214.

[134] Affidavit of D. Rosenfeld, at paras. 185-186, Motion Record, Tab 6, pp. 214-215.

[135] Affidavit of Kenneth Richard, sworn March 20, 2018, at para. 5, Exhibit "114" to the Affidavit of D. Rosenfeld, at para. 258, Motion Record, Tab 6(114), p. 2117.

139. Therefore, in order to ensure that compensation was provided for long term placement with non-Indigenous families resulting in cultural loss, the Settlement Agreement created an Exceptions Committee consisting of:

> (a) a representative of class counsel present for the discussions leading up to the Agreement;
>
> (b) a representative of Canada present for the discussions leading up to the Agreement;
>
> (c) an Indigenous representative, agreed upon by the parties; and,
>
> (d) Michel J. Shore J. or such other Federal Court Judge as the Chief Justice of the Federal Court may designate if Shore J. is unable to continue.[136]

140. In addition to determining whether certain Class Members will be deemed to be Eligible Class Members, the purposes of the Exceptions Committee is also to:

> (a) receive and consider reports from the Administrator;
>
> (b) give such directions to the Administrator as may, from time to time, be necessary; and
>
> (c) consider any disputes between the Parties in relation to the implementation of this Agreement.[137]

141. The Exceptions Committee must endeavor to arrive at a consensus and its decisions will be final. The Exceptions Committee is designed to facilitate an informal, fair and expeditious adjudication of any issues that arise with respect to the Agreement.[138]

142. These elements of the Settlement – the claims process and compensation available - are themselves "an extraordinary resolution to a complex political and cultural dispute" because at common law:

> "… it is inconceivable that a court would provide a remedy that compensates all Indian Residential School survivors with a financial benefit without proof of loss, by simply

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[136] Affidavit of D. Rosenfeld, at para. 187, Motion Record, Tab 6, p. 215.

[137] Affidavit of D. Rosenfeld, at para. 189, Motion Record, Tab 6, p. 215.

[138] Affidavit of D. Rosenfeld, at para. 190, Motion Record, Tab 6, p. 215.

> proving a survivor attended an Indian Residential School. That is not to say that survivors did not suffer loss of language and culture, but simply to acknowledge the unique aspect of the remedy which could only be granted in a political forum."[139] [emphasis added]

143. In addition to the fact that no proof of harm or loss is required by the claims process, it is also extremely significant, as a matter of law, that the compensation here is to be viewed, at least in part, as damages for loss of language and culture yet "no court has yet recognized the loss of language and culture as a recoverable tort".[140] This is a critically important advantage to the class that may not be available through contested litigation.

144. The fact that the class definition extends as far back as 1951 underscores its inclusive nature and provides compensation to class members (or their estates) who would otherwise have been barred from successfully pursuing an action on the basis of a limitation period. The settlement class definition also ensures equality of treatment as between survivors, regardless of where they reside and goes much further than the class definition certified by the Ontario Superior Court of Justice:

> "Those eligible for compensation included not only Indian adoptees, as Justice Belobaba had ordered based upon the '65 Agreement, but also crown or permanent wards. …. The period of time to be eligible as a class member is double the period in the *Brown v. Canada* class definition. It covers all survivors who were placed in non-indigenous homes from 1951 to 1991. It eliminates the hardship for the class member who has no 'record' (ie. adoption or crown wardship orders) to prove her or his eligibility, shifting that burden to the governments."[141]

145. Most importantly, "considering the very personal and painful nature of the claims, the settlement process includes a non-adversarial claims process with numerous safeguards to protect the privacy of claimants",[142] another factor in support of the settlement's 'fairness and reasonableness'.

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[139] *Fontaine et al. v. Canada et al.*, 2006 YKSC 63, at para. 48, Book of Authorities, Tab 20.

[140] *Quatell v. Attorney General of Canada*, 2006 BCSC 1840, at para. 9, Book of Authorities, Tab 38.

[141] Affidavit of J. Wilson (filed separately). Affidavit of M. Brown, at para. 40(c–e), Exhibit "113" to the Affidavit of D. Rosenfeld, at para. 252, Motion Record, Tab 6(113), p. 2106.

[142] *Merlo v. Canada*, [2017] F.C.J. No. 773, at para. 27, Book of Authorities, Tab 32.

146. During the course of the mediation, Canada retained an actuary to estimate the potential size of the class, including those individuals who would likely remain living today. Specifically, the actuary's mandate was to estimate the number of Status Indians who were adopted or who became Crown wards or permanent wards and who were placed in the care of non-Indigenous adoptive or foster parents between 1951 and 1991.[143]

147. Based on various primary source materials provided by Indigenous and Northern Affairs Canada, the actuary made the estimation that the number of children who were permanent wards and/or adopted by non-Indigenous families from 1951 to 1991 is likely to be between 20,000 and 24,000, of which about 18,800 to 22,200 were alive in October 2017 and about 1,200 to 1,800 were deceased as at October 2017.[144]

148. Lastly, yet importantly, the settlement is structured as compensation for pain and suffering, and is intended to be structured as non-taxable income. The parties have sought the agreement of the Provinces that the compensation will not impact social assistance provided to Class Members. The parties await confirmation that the Provinces shall not "claw back" any of the Class Members' compensation awards on the basis of their current social assistance status. This enhances the total value of the settlement.

iv. Non-Monetary Benefits to the Class

149. A key term of the proposed settlement is the establishment of a Foundation which Canada shall fund initially in the sum of $50 million. Essentially, the Foundation seeks to address some of the healing needs of generations through the provision of remedial programming, education and commemorative initiatives. At its core, the mandate of the Foundation is broad based reconciliation, described by a representative plaintiff as "becoming a real and respected part of Canadian culture. … part of the path with the leadership of the Canadian government towards re-

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[143] Affidavit of D. Rosenfeld, at para. 203, Motion Record, Tab 6, p. 217.

[144] Affidavit of D. Rosenfeld, at para. 206, Motion Record, Tab 6, p. 218.

inclusion of Indigenous people into Canadian culture and that benefits Indigenous people but it also benefits all Canadians".[145]

150. The evidence on this motion confirms the particular import of this term of the settlement for survivors:

> "And, most importantly for our client, we were able to secure an initial contribution of $50 million from the federal government for the creation of a healing and reconciliation Foundation, the purpose of which is to ensure that what happened to survivors will not likely ever be repeated in Canadian history. The Foundation's services and its eventual Board of Directors will be comprised of all survivors, those who may not be class members eligible for individual compensation…"[146]

151. This is what makes this particular settlement extraordinary, going far beyond a 'fair' agreement:

> "No legal victory in a courtroom could ever hope to do this. This Court is not equipped to address the holistic healing perspectives of the individual, his or her family and the community in a way that does justice to the larger Inuit and aboriginal perspective on life, on living and on conflict resolution. The settlement agreement proposes to do just that."[147] [emphasis added]

152. The Settlement Agreement specifically states that in order to attempt to achieve a comprehensive and lasting resolution of the legacy of the Sixties Scoop and to further the desire of the parties for the promotion of healing, education, reconciliation and commemoration, Canada shall establish a Foundation in accordance with the *Canada Not For Profit Corporations Act*.[148] In this way, the Foundation is an aspect of a court settlement arising from a historic event that is forward-looking in its impact, which breathes "life to the decision of the Honourable Judge in *Brown v. Canada* by creating an opportunity for reconciliation and healing involving all

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[145] Affidavit of M. Blue Waters, at paras. 72, 75, Motion Record, Tab 4, pp. 104, 105.

[146] Affidavit of J. Wilson (filed under separate cover).

[147] *Fontaine v. Canada*, 2006 NUCJ 24, at para. 61, Book of Authorities, Tab 19.

[148] Final Settlement Agreement, Preamble, s. 3.01(2), Exhibit "112" to the Affidavit of D. Rosenfeld, Motion Record, Tab 6(112), p. 2006.

affected by the displacement of indigenous children from their homes and their placement in non-indigenous homes"[149].

153. The Foundation will be initially funded with $50 million dollars and any surplus in the Designated Amount after an Adjusted Payment has been made to all of the Eligible Class Members will be paid to the Foundation (all terms as defined in the Settlement Agreement). Importantly, the Foundation is intended to continue after the other compensatory elements of the Settlement Agreement are complete in order to continue to enable change and reconciliation and that the Foundation may receive funding from other sources in order to do so. The main purpose of the Foundation is to enable change and reconciliation and, in particular, access to healing/wellness, commemoration and education activities for any and all Indigenous communities and individuals.[150]

154. The Settlement Agreement established a separate negotiation table to particularize the objects of the Foundation (the "**Foundation Table**") which consists of:

(a) Maggie Blue Waters, representative plaintiff in the Blue Waters Action (Saskatchewan);

(b) Chief Marcia Brown, representative plaintiff in the Brown Action (Ontario);

(c) Sharon Russell, representative plaintiff in the Russell Action (British Columbia);

(d) Jeffery Wilson, plaintiff's counsel in the Brown Action;

(e) Tony Merchant, plaintiffs' counsel in the Blue Waters, Thompson, Van Name, and Tanchak Actions, among others;

(f) Martin Reiher, Assistant Deputy Minister, Resolution and Individual Affairs Indian Affairs and Northern Development Canada;

(g) Krista Robertson Senior Policy Analyst and designate for the Assistant Deputy Minister Indian Affairs and Northern Development Canada;

(h) Catharine Moore, General Counsel, Department of Justice Canada; and

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[149] Affidavit of Dr. R. Sinclair, at para. 9, sworn March 15, 2018, Exhibit "115" to the Affidavit of D. Rosenfeld, para. 254 Motion Record, Tab 6(115), p. 2177.

[150] Final Settlement Agreement, s. 3.01(3), Exhibit "112" to the Affidavit of D. Rosenfeld, Motion Record, Tab 6(112), p. 2006.

(i) The Honourable Michel M.J. Shore, Justice of the Federal Court of Canada.[151]

155. Maggie Blue Waters and Jeffery Wilson are the co-chairs of the Foundation Table.[152]

156. The Foundation Table's mission is eventually to turn the Foundation over to an independent, autonomous non-governmental Indigenous Board of Directors and Indigenous executive director. The Foundation is open to all survivors of the Sixties Scoop, including Métis and non-status Indians.

157. In addition, Settlement Agreement states that:

(a) the Foundation shall be governed by a board of not fewer than six and not more than ten members, one of which shall be appointed by Canada;

(b) the Foundation is a living entity and it is intended to be responsive to the challenges of current and future needs; and

(c) the Foundation is intended to benefit the Class Members and to complement and not duplicate government programs.[153]

158. Lastly, since the Agreement in Principle was executed on August 30, 2017, the Foundation Table has held six meetings. At these meetings, a variety of topics have been discussed, including, among other things: (a) the purpose of the Foundation; (b) governance; (c) management of funds; (d) fundraising; (e) how to practically respond to the notion of "healing"; (f) the involvement of survivors' children; (g) the Foundation's mandate; (h) retaining counsel for the Foundation; and (i) hearing from experts, in addition to much more.[154]

159. Not only do non-monetary benefits arising from a settlement work towards fulfilment of a central policy goal of class proceedings – the promotion of behaviour modification – it cannot be overstated how significant this piece of the settlement is to future healing, reconciliation, education and rebuilding a nation-to-nation relationship. None of these initiatives would be

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[151] Affidavit of Maggie Blue Waters, at para. 61, Motion Record, Tab 4, p. 100.

[152] Affidavit of Maggie Blue Waters, at para. 63, Motion Record, Tab 4, p. 100.

[153] Final Settlement Agreement, s. 3.01(3), Exhibit "112" to the Affidavit of D. Rosenfeld, Motion Record, Tab 6(112), p. 2006.

[154] Affidavit of Maggie Blue Waters, at paras. 68-84, Motion Record, Tab 4, pp. 102-107.

available through contested litigation: "if the matter proceeded to trial, the non-monetary issues would be outside the jurisdiction of the Court" to award.[155]

160. As this Court recently opined in *Merlo v. Canada*, these "features and benefits that extend beyond a strictly monetary compensation scheme and as a result, the Settlement Agreement goes well beyond what the Plaintiffs may have been awarded after a trial".[156] The same reasoning applies with equal force to the non-monetary benefits featured in the within settlement. It is noteworthy that the evidence before this Court describes the value of the Foundation as the following:

> "…an invaluable opportunity for Canada-at-large, and especially indigenous people, for healing and reconciliation and the kind of necessary investigation, study, funding, public awareness projects, commemoration and advocacy that may finally do justice to the harms arising from the Sixties Scoop by ensuring that those harms are not ever repeated. … I am both impressed and relieved by the [Foundation] Table's commitment to laying the groundwork for an active incorporated non-profit charitable foundation composed of an indigenous led Board of Directors and indigenous Executive Director. … I have observed the commitment of the Foundation Table to a working Foundation that is responsive to all indigenous persons, even though they may not be class members, such as Métis, sibling or parents of survivors, as well as non-indigenous persons who were, and continue to also be affected by the Sixties Scoop, such as adopting parents or non-indigenous survivor siblings. I have observed the Table's commitment to creating the Foundation as a matter of urgency so that healing and reconciliation services are available while survivors are alive."[157]

161. This particular aspect of the settlement augurs heavily in favour of judicial approval. As described in the evidence on this motion, by a class member, "the work of the Foundation, the Agreement which is only the beginning of reconciliation, is part of taking us home – to be ourselves – to reclaim our languages – to reclaim our culture – the wronged to continue to grow our essence"[158].

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[155] *Rideout v. Health Labrador Corp.*, 2007 NLTD 150, at para. 70, Book of Authorities, Tab 42.

[156] *Merlo v. Canada*, [2017 F.C.J. No. 773, at para. 2, Book of Authorities, Tab 32.

[157] Affidavit of Dr. R. Sinclair, at paras. 7–9, sworn March 15, 2018, Exhibit "115" to the Affidavit of D. Rosenfeld, Motion Record, Tab 6(115), p. 2177.

[158] Affidavit of M. Blue Waters, at para. 96, Motion Record, Tab 4, p. 110.

D. Likelihood of Success or Recovery In Context of Contested Litigation

i. Cause of Action – Fiduciary Duty & Common Law Duties of Care

162. One of the most glaring challenges associated with recovery in these actions presented itself at the very outset, the heart of any case – the cause of action. As late as 2013, the Court of Appeal for Ontario commented that "this case demonstrates, identification of a cause of action is fundamental."[159]

163. Throughout its tortured history in Ontario, the courts there largely approached the cause of action question with caution and trepidation: "[t]he question of whether the pleading discloses these causes of action will have significant ramifications for the important relationship between the Federal Crown and the Aboriginal peoples. These are serious claims being made against the Federal Crown regarding historical events, over a lengthy time, with important consequences." [160]

164. While the cause of action was ultimately resolved by 2017 in Ontario, for decades, the actionability of the cases was in grave doubt, let alone the certifiability of a disparate class or the quantification of historic damages:

> "As both Swinton J. and the Divisional Court noted, **it is not self-evident that there are viable causes of action.** The plain and obvious test sets a low threshold, but it will still be necessary for a court to determine whether the causes of action suggested by the case management judge can pass that test. The [Attorney General of Canada] is entitled to an opportunity to show that the causes of action are not viable."[161] [emphasis added]

165. There is no dispute that the claims advanced herein are 'novel', 'evolving' and unsettled and indeed, unprecedented.[162] While the fiduciary duty claim may have at first blush seemed tenable, it always held grave doubt, characterized as a cause of action with "a glimmer of actionability"[163] which ultimately did not succeed on the merits:

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[159] *Brown v. Canada (Attorney General)*, 2013 ONCA 18, at para. 44, Book of Authorities, Tab 8.

[160] *Brown v. Canada (Attorney General)*, 2014 ONSC 1583, at para. 15, Book of Authorities, Tab 10.

[161] *Brown v. Canada (Attorney General)*, 2013 ONCA 18, at para. 52, Book of Authorities, Tab 8.

[162] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, at paras. 32–34, Book of Authorities, Tab 9.

[163] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, at para. 51, Book of Authorities, Tab 9.

> "…even though it [the Federal Crown] stands in a fiduciary relationship with Canada's aboriginal peoples, a fiduciary relationship alone does not impose a generalized fiduciary duty. Not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation."[164]
>
> "There is no doubt that the obligation to consult was breached and this resulted in great harm but the degree of discretionary control that is required before a fiduciary duty can be imposed is not present on the evidence before the court. Fiduciary duty has a meaning as a legal term and should not be used 'as a conclusion to justify a result'. I therefore find on the applicable law that a fiduciary duty of care has not been established."[165] [emphasis added]

166. In fact, the claims were so unique and novel that the flagship action in Ontario was described in 2013 as the following: "[t]his is not a situation where there are many other actions waiting to proceed and where a test case would either open or close this potential pipeline of cases, Here, there are no other actions."[166]

167. While the fiduciary duty claim was ultimately permitted to proceed on the basis of the 'plain and obvious' test for the sustainability of pleadings at certification, judgment on fiduciary duty would be a different matter altogether. The Supreme Court of Canada has confirmed that proving breach of fiduciary duty against a government will be harder that proving such a breach against a private actor because the: “Crown would be unable to meet its obligations to the public at large it we were to hold it to a fiduciary standards of conduct for one group among so many others”.[167]

168. To succeed at trial or summary judgment motion, the Plaintiffs would have had to show that a fiduciary duty arose as between Canada and the class members in one of the two following ways:

> (a) the duty arose as a result of Canada's assumption of discretionary control over a specific Aboriginal interest; or

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[164] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, at para. 36, Book of Authorities, Tab 9.

[165] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, at paras. 70–71, Book of Authorities, Tab 11.

[166] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, at para. 79, Book of Authorities, Tab 9.

[167] *Alberta v. Elder Advocates of the Alberta Society et al.*, 2011 SCC 24, at para. 62, Book of Authorities, Tab 1.

(b) there had been an undertaking by Canada to act in the best interests of the class members.[168]

169. This was a novel argument to be sure without any judicial authority directly on point. While the boundaries of Aboriginal law are ever-changing, the Supreme Court of Canada decision in *Wewaykum* certainly posed a legal obstacle where that court found:

> "'fiduciary duty' as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship … overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests."[169]

170. With respect to the first branch – assumption of discretionary control over an interest – the Plaintiffs would have had to have shown that the interest in question was a communal aboriginal interest in land, one that is integral to the nature of the aboriginal community and its relationship to the land, predicated on historic use and occupation.[170]

171. On this tenet of fiduciary duty, the court in *Brown v. Canada* rejected any such claim and there is little reason to believe other courts such as this one or other superior courts would not find in the same fashion:

> "In my view, a fiduciary duty under the first category cannot be established in this case. The aboriginal interest in question is not an interest in land and the action herein is not being advanced as a communal claim but as a class action seeking individualized redress."[171]

172. The other route available to the Plaintiffs to establish a fiduciary duty was to assert that Canada undertook to act in the best interests of the class members or consult. The foundation of the undertaking was arguably based upon Canada's execution of the 1965 Agreement with Ontario pursuant to Federal spending, to fund the provincial extension of certain welfare programs to Indian reserves. By entering into the Agreement with Ontario – or any other

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[168] *Wewaykum Indian Band v. Canada*, 2002 SCC 79, at paras. 80, 85, Book of Authorities, Tab 50. *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, at para. 27, Book of Authorities, Tab 1.

[169] *Wewaykum Indian Band v. Canada*, 2002 SCC 79, at para. 81**,** Book of Authorities, Tab 50.

[170] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, at para. 53, Book of Authorities, Tab 28.

[171] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, at para. 68, Book of Authorities, Tab 11.

Province – Canada arguably obtained sufficient discretionary control to adversely affect the class beneficiaries' legal or practical interest.

173. The vulnerability and novelty of this argument at law is starkly revealed by the prevailing authority that, where the Crown does not administer land, location of a fiduciary duty requires:

> "…that the proposed fiduciary undertook to act in the interests of the beneficiary, to the extent that it would subordinate its own self-interest and that of any other group, to those of the beneficiary".[172] [emphasis added]

174. In the end, this was also rejected during the Ontario summary judgment proceedings:

> "The attempt to establish a fiduciary duty under the second category also does not succeed on the evidence herein. Even if I were to agree with the plaintiff that the first two elements are satisfied – that the obligation to consult was an undertaking to act in the Indian Band's best interests and there existed a vulnerable group, namely children in need or protection – I would still have difficulty with the third element.
>
> I cannot find on the evidence before me that when Canada undertook the obligation to consult under s. 2(2) of the 1965 Agreement that it assumed such a degree of discretionary control over the protection and preservation of aboriginal identity that it amounted to a "direct administration of that interest." There is no doubt that the obligation to consult was breached and this resulted in great harm but the degree of discretionary control that is required before a fiduciary duty can be imposed is not present on the evidence before the court."[173] [emphasis added]

175. In striking the claim for fiduciary duty, the Ontario Superior Court of Justice nevertheless found that a common law duty existed (albeit a novel one) and was breached:

> "Even in the absence of section 2(2) and the obligation to consult, Canadian law, during the time period in question, "accepted" that Canada's care and welfare of the aboriginal peoples was a "political trust of the highest obligation." … The content of the 1965 Agreement and Canada's clear obligation to consult and secure the signified concurrence of the affected Indian Band before the child welfare regime was extended to that reserve reinforces the conclusion that the proximity criterion is easily satisfied on the evidence herein and that it is indeed just and fair to impose a duty of care upon the defendant. All the more so when the focus of the extended child welfare regime was a highly vulnerable group, namely children in need of protection. I therefore find that a *prima facie* duty of care has been established."[174]

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[172] *Nunavut Tunngavik Incorporated v. Canada (Attorney General)*, 2014 NUCA 2, at para. 36, Book of Authorities, Tab 35.

[173] *Brown v. Canada (Attorney General)*, 2017 ONSC 251 at paras. 69-70, Book of Authorities, Tab 11.

[174] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, at paras. 80-81, Book of Authorities, Tab 11.

176. In determining that a common law duty of care had been established and breached, the Ontario Superior Court of Justice found that "Canada ha[d] not advanced any credible policy consideration that would negate the common law duty of care".[175] However, that decision was never tested by an appellate court on appeal so there remains no definitive or highly persuasive judicial pronouncement on whether a policy defence/Stage Two *Anns* defence, on a different evidentiary record, might succeed in other provincial superior courts or this Court.

177. One of the primary considerations engaged in the analysis of whether to negate the duty of care is whether the decisions at issue are "core policy" decisions of the government which are protected and immune from suit. These types of decisions can be characterized as those which are "based on public policy considerations such as economic, social and political factors, provided they are neither irrational nor taken in bad faith".[176]

178. The Crown specifically relied on the "policy characterization" as a defence to any existence of a duty of care. The Crown continued to advance this defence throughout the litigation and specifically pleaded that:

> Parliament has, however, approved the use of the federal spending power to provide Ontario with the capacity to extend provincially regulated and supported child welfare services to Indian children. […]
>
> Canada's use of the federal spending power to contribute to the capacity of Ontario child welfare authorities to deliver child welfare services to Indian children represents an exercise in cooperative federalism and is not a delegation of its constitutional authority under s. 91(24) of the *Constitution Act, 1867*. […]
>
> Canada, as a matter of policy, has used the federal spending power to contribute to the provincial capacity to deliver child welfare services to Indian children on reserves under provincial legislation….
>
> A duty of care, if one is found to exist, would be negated by policy considerations in this case, including but not limited to the need to respond to the individual circumstances of the plaintiff and class members as children at risk and in need of protection. Further, the Crown's decision to enter into the 1965 *Indian Welfare Agreement* was grounded in policies to make provincial welfare services accessible and available to Indian children

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[175] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, at para. 82, Book of Authorities, Tab 11.

[176] *R. v. Imperial Tobacco Ltd.*, [2011] 3 S.C.R. 51, at para. 90, Plaintiffs' Book of Authorities, Tab 39.

> on reserves and on a basis and standard that were commensurate with such services in other Ontario communities.[177]

179. In *Just v. British Columbia*, the Supreme Court of Canada expressly defined policy decisions as those which engage funding or budgetary demands and concerns:

> "…such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions [...]."[178] [emphasis added]

180. There is no doubt that another judge could have concluded that, even if the Plaintiffs established a *prima facie* duty of care, residual policy considerations justified the denial of liability because government actors are not liable for policy decisions, absent exceptional circumstances. Based on the authority of *Mitchell v. Ontario*, Canada had a reasonable chance of being successful in negating any duty of care "because of overriding policy considerations, there should be no private law duty of care with respect to decisions affecting health care funding"[179] and the like.

181. Given the novelty of the duty and the law surrounding immunity for policy decisions, a hefty degree of certainty remained for the rest of the country surrounding the viability of the common law duty of care, the last standing cause of action.

ii. Aggregate Damages Award

182. Perhaps the next greatest obstacle which the Plaintiffs would have difficulty overcoming was the condition in class proceedings legislation (in both Federal Court and provincial statutes) that requires that a court may only make an aggregate damages award if "the aggregate or a part of the Defendant's liability to some or all class members can reasonably be determined without

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[177] Amended Statement of Defence, dated September 29, 2015, at paras. 14, 15, 43(d), 43(f), Exhibit "12", to the Affidavit of D. Rosenfeld, Motion Record, Tab 6(12), pp. 429, 436-437.

[178] *Just v. British Columbia*, [1989] 2 S.C.R. 1228, at paras. 18, 29, Book of Authorities, Tab 26.

[179] *Mitchell (Litigation Administrator of) v. Ontario* (2004), 71 O.R. (3d) 571 (Div. Ct.), at paras. 32, 33, Book of Authorities, Tab 33.

proof by individual class members"[180]. Similarly, Rule 334.27 of the Federal Court Rules states that:

> **334.27 Defendant's Liability** – In the case of an action, if, after determining common questions of law or fact in favour of a class or subclass, a judge determines that the defendant's liability to individual class members cannot be determined without proof by those individual class members, rule 334.26 applies to the determination of the defendant's liability to those class members.[181]

183. Given the similarities in the statutory language of provincial class proceedings legislation regarding the availability of aggregate damages and the provision of Rule 334.27 of the *Federal Court Rules*, there is no reason to believe that the Federal Court would apply different principles or precedents than the breadth of aggregate damages jurisprudence developed by Superior Courts. Accordingly, the prevailing case law in Ontario applies with the same force here.

184. Therefore, at any trial or motion for judgment, the Plaintiffs would have sought to tender expert evidence that harm could be reasonably calculated on the basis of an individual's average monetary benefit to which Indian Status provides. The Plaintiff then would have asked the court to project an average or sample figure as against the whole class.

185. There may have also been damages evidence of personal injury harm to each person who taken from the biological family and what type of damage each such person might experience from that circumstance. However, given that this type of damages theory raises significant causation issues and often idiosyncratic harms, there is no question that this means of assessing aggregate damages would have been a challenge in light of the *Fulawka v. Bank of Nova Scotia* decision.[182]

186. Significantly, in that case the Court of Appeal for Ontario has determined that section 24(1) damages are inappropriate where evidence is required from <u>any</u> members of the class. In that case, the Court of Appeal rejected the argument that aggregate damages may be available so

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[180] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 24(1)(c), Plaintiffs' Memorandum of Fact and Law, Appendix "A".

[181] *Federal Court Rules*, SOR/98-106, s. 334.27, Plaintiffs' Memorandum of Fact and Law, Appendix "A".

[182] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, Book of Authorities, Tab 21.

long as those damages can be determined without proof by all of the class members.[183] Rather, an aggregate award may only be made where they are determinable through the defendant's evidence alone, and without evidence from any class members:

> "The Court [in *Fulawka*] concluded that the random sampling of class members was not permitted under section 24(1)(c). … Meanwhile, I am bound by *Fulawka* because is it the more considered and most recent pronouncement on this point. I must therefore conclude that it is not reasonably likely that the preconditions set out in section 24(1), in particular section 24(1)(c), can be satisfied. I therefore decline to certify the proposed 'partial damages' issues because the suggested random sampling of even a handful of class members is (currently) not permitted."[184]

187. In other decisions, the Court of Appeal for Ontario has confirmed that section 24(1) may not be invoked in cases where individual proof is required:

> "Given the nature of the claim advanced here [personal injury], it seems to me apparent that the assessment of damages requires proof of the harm suffered by the individual class members. … Some class members will have suffered no compensable harm and some will have suffered more stress and anxiety than others. The claims are inherently individual in nature…"[185]

188. By all accounts, this was a wholly novel approach to the quantification of damages and was could have ultimately been rejected by the trial judge as lacking in scientific or precedential underpinning.[186] In any event, any court would have been mindful of the following direction from the Court of Appeal for Ontario to trial judges respecting aggregate damages:

> "in cases where the Defendant does not concede liability for a wrong that gives rise to monetary relief, the question of whether section 24(1)(b) [aggregate damages provision] could be satisfied requires parsing out the elements of the cause of action that must be proven to establish the Defendant's monetary liability to some of all members of the class. If it is possible for these elements to be established through the resolution of the common issues, then the requirements of section 24(1)(b) are capable of being met."[187] [emphasis added]

189. With this in mind, as Canada did not concede liability, the court would have had to parse out the elements of the cause of action – a common law duty of care – including causation. To

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[183] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, at paras. 135–139, Book of Authorities, Tab 21.

[184] *Nolevaux v. King and John Festival Corp.*, [2013] O.J. No. 4454 (S.C.J.), at paras. 14–19, Book of Authorities, Tab 34.

[185] *Healey v. Lakeridge Health Corp. et al.*, 2011 ONCA 55, at paras. 70, 71, Book of Authorities, Tab 23.

[186] *eg. Anderson v. Canada (Attorney General)* 2015 NLTD(G) 186, Book of Authorities, Tab 2.

[187] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, at para. 125, Book of Authorities, Tab 21.

"complete" that tort, the Plaintiffs would have had to show causation in common, otherwise, the pre-conditions for an aggregate award could not be satisfied and section 24(1)/Rule 334.27 could not be invoked.

190. As a section 24(1)/Rule 334.27 damages award could have been rejected by a trial judge, if the Plaintiffs had still succeeded on the common issue concerning duty of care, the trial judge would have had to fashion an appropriate individual assessment process. As described by the Ontario Superior Court of Justice, this eventuality would have required:

> "… individual trials to determine whether or not any individual class member can prove identification as an aboriginal, causation, damages and the quantum of compensation. Both the common issue and the individual issues trials will be difficult, particularly the matter of causation. …."[188]

191. The consequences of this possibility for the Plaintiffs were grave, procedurally and in terms of the gross delays associated with an individual assessment process. For instance, if judgment pursuant to section 24/Rule 334.27 had been denied, the court would have had to devise an individual assessment process to adjudicate upon causation, damages and the application of limitation periods to each class member or some 16,000 persons. The types of issues which would have remained to be determined by referees, experts, assessor, the administrator and counsel, therefore would have been of extreme complexity, both legally and factually.

192. Based on other individual claims processes approved by courts in Canada,[189] these types of individual assessment procedures are challenging, take many years to conclude, consume further judicial resources, make it difficult for individuals to claim and increase the spectre that many more individual would perish before receiving any compensation at all.

193. Here, the Plaintiffs and the class could have faced a similar outcome if an aggregate damage award had been rejected. This alone became an unacceptable and deal-breaking risk.

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[188] *Brown v. Canada (Attorney General)*, 2010 ONSC 3095, at para. 13, Book of Authorities, Tab 7.

[189] For example, the Woodlands class proceeding in British Columbia was settled in 2009 but three substantial extensions were sought to the claims period process from the original 2012 deadline to 2016 given how slowly the process unfolded. While the class was made up of approximately 1,000 individuals, five years after settlement approval, less than half of the claims had been processed and a total of only $2.3 million had been paid out: *Richard v. British Columbia*, 2012 BCSC 1464, Book of Authorities, Tab 40. *Richard v. British Columbia*, 2015 BCSC 265, Book of Authorities, Tab 41.

Such a process, in and of itself, would have been prejudicial by definition given its protracted nature, let alone all of the virtually insurmountable obstacles associated with having 16,000 people come forward to prove causation, damage and the inapplicability of statutory limitation periods.

iii. Ultimate Limitations Periods

194. Even if the Plaintiffs had been successful on showing that a duty of care existed at law and it was in fact breached sometime between 1951 or 1965 and 1984 or 2009 (depending on the province), they then would still have to show the court why any applicable limitation period had not already expired, in most cases for events that occurred decades ago.[190]

195. In this respect, the Plaintiffs would face two primary limitation periods issues: (a) the substantive application of the statutory limitation regime to persons who were likely minors at the time the events occurred; and/or (b) whether the court could make a common declaration regarding the applicability of the limitations period to the entire class (without which would have meant no aggregate award of damages could have been made as the tort could not be said to be 'complete' and individual assessments would be a certainty).

196. In Ontario, the Crown relied on the *Limitations Act* and took the position that all claims were statute-barred. It also invoked a laches defence, asserting that the Plaintiffs were estopped from bringing the action at all. The Amended Statement of Defence specifically pleaded:

> The plaintiff's claims are out of time and statute-barred. The defendant pleads and relies on s. 7 of Ontario's *Public Authorities Protections Act*, R.S.O. 1990, Chap. P.38 as amended, ss. 45(1)(g) and (h) of the *Limitations Act*, R.S.O. 1990, Chap. L. 16, as amended. The defendant also relies upon the equitable doctrines of laches and

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[190] The *Federal Court Act*, R.S.C. 1985, c. F-7, s. 39(1) expressly provides that "the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province", Plaintiffs' Memorandum of Fact and Law, Appendix "A".

Similarly, the *Crown Liability & Proceedings Act*, R.S., 1985, c. C-50, s. 32 states that: "the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose", Plaintiffs' Memorandum of Fact and Law, Appendix "A".

acquiescence and upon the *Crown Liability and Proceedings Act*, R.S.C. 1985, Chap. C-50 and the *Crown Liability Act*, S.C. 1952-53, c. 30.[191]

197. While Canada had not filed a Statement of Defence in any other jurisdiction, it would belie common sense to assume that it would not maintain the same defence across the country. In that case, the "ultimate limitation" period in each province could very well have barred all of these claims. This legal fact alone demonstrates how truly exceptional the negotiated class definition is given that it includes events which occurred between 1951 and 1991, the overwhelming majority of which potentially would have been statute-barred by any ultimate limitation period.[192]

198. The same could of course been true for all of the estate claims for individuals who have already passed away, given that the vast majority of provincial estate's legislation bars claims which were not commenced within two years of a person's death.[193] Instead, the Settlement's Eligible Class Member includes all persons who were alive as of February 20, 2009, permitting

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[191] Amended Statement of Defence, dated September 29, 2015, at para. 68, Exhibit "12" to the Affidavit of D. Rosenfeld, Motion Record, Tab 6(12), p. 441.

[192] For example, the ultimate statutory limitation period in the following sample of provinces is:

British Columbia: 15 years, *Limitation Act*, S.B.C. 2012, c. 13, s. 21(1).

Alberta: 10 years, *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1)(b).

Saskatchewan: 15 years, *Limitations Act*, S.S. 2004, c. L-16.1, s. 7(1).

Manitoba: 30 years, *Limitation of Actions Act*, C.C.S.M., c. L150, s. 14(4).

Ontario: 15 years, *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B., s. 15(2).

Quebec: 10 years, *Civil Code of Quebec*, CQLR-1991, art. 2922.

Newfoundland & Labrador: 30 years, *Limitations Act*, S.N.L. c. L-16.1, s. 17, 22.

Northwest Territories: 6 years, *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8, s.2(1)(j).

See Appendix "B".

[193] For example, the following statutory schemes generally bar claims of deceased persons unless made within two years of death:

Manitoba: *Trustee Act*, C.S.S.M. c. T-1, s. 53(2).

Ontario: *Trustee Act*, R.S.O. 1990, c. T.23, s. 38(2).

New Brunswick: *Survival of Actions Act*, R.S.N.B. 2011, c. 227, s. 10.

Nova Scotia: *Survival of Actions Act*, R.S.N.S. 1989, c. 453, s. 5.

Northwest Territories: *Trustee Act*, R.S.N.W.T. 1988, c. T-8, s. 31.

Yukon: *Survival of Actions Act*, R.S.Y. 2002, c. 212, s. 9.

See Appendix "C".

many estates of individuals who have since passed away to make claims who could have been otherwise barred by the application of provincial estate/trustee legislation.

199. As in many provinces, the Ontario *Limitations Act* has two-year bar subject to discoverability, and an ultimate fifteen (15) year bar running from the time of the incident. Limitations legislation similarly typically provides exceptions to both periods where persons are minors or otherwise not of 'capacity'. There is however a general presumption that an individual is capable of commencing a claim and of course all of the representative plaintiffs across Canada are adults and have not been minors for decades.[194]

200. Canada's substantive limitations defence was of heightened concern and risk to the Plaintiffs in light of the decision in *WP v. Alberta (No. 1)*.[195] *WP* was a class proceeding commenced on behalf of all former residents of the Alberta School for the Deaf for physical and emotional abuses perpetrated against residents between 1955 and 1996. Alberta brought a summary judgment motion to have the action dismissed on the basis that the claims were barred pursuant to Alberta's *Limitations Act*. In particular, Alberta relied upon that province's ultimate ten (10) year limitation period to argue that all claims were statute-barred.

201. While the plaintiffs in *WP* advanced the same arguments as the Plaintiffs intended to assert here, as a matter of law, they were rejected by the court in *WP*. Even though suspension of limitations period could occur while the plaintiffs were minors, the court nevertheless found on the evidence before it that the plaintiffs had reached the age of majority more than ten (10) years (the ultimate limitation period) prior to commencing the action.

202. The result could have been similar here: the Plaintiffs reached the age of majority in the 1980's or nearly 30 years prior to the commencement of the action. In this case, the incidents giving rise to the claim occurred between 1968 and 1983, or some forty-nine (49) to thirty-four (34) years prior to commencement of this action. Therefore, on its face, the claims were arguably barred by virtue of the ultimate limitation period.

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[194] The three representative plaintiffs in this very action rely on events which occurred in 1968 (Charlie), 1974 (White) and 1983 (Riddle). Even assuming they each reached the age of majority, respectively in, 1984, 1988 and/or 1999, the ultimate limitation period in their home provinces could have nevertheless barred their claims.

[195] *WP v. Alberta (No. 1)*, 2013 ABQB 295, Book of Authorities, Tab 51.

203. Even if the Plaintiffs succeeded in arguing that the limitation period had not expired for themselves, it certainly might have for others in the class. This would have meant that each class member would have had to go on to prove discoverability or some incapacity/disability at an individual phase following determination of common issues. Even more importantly, the lack of any common limitation period determination would have meant no aggregate damages award: no court would have been able to make an aggregate order for damages without also having found that the limitation period had not expired for the whole class.

204. The ability of a court to make such a common declaration concerning a limitation period is in grave doubt in the jurisprudence. On the basis the authority of *Smith v. Inco* decided by the Court of Appeal for Ontario, the trial judge would have properly rejected this argument in favour of a common declaration that the limitation period had not expired for the whole class:

> "A class action is a procedural vehicle. Its use does not have the effect of changing the substantive law applicable to individual actions: see *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9 (CanLII), [2011] 1 S.C.R. 214, at para. 52; *Hislop v. Canada (Attorney General)* 2009 ONCA 354 (CanLII), (2009), 95 O.R. (3d) 81, at para. 57. If, as the trial judge found in this case, the evidence does not establish that all class members were not aware of and ought not to have been aware of the material facts, then the application of the *Limitations Act* to the claims is an individual and not a common issue. It is an error to treat the limitation period as running from the date when a majority, even an overwhelming majority, of the class members knew or ought to have known the material facts in issue.
>
> Other certification decisions have recognized that discoverability is often an individual issue that will require individual adjudication after the common issues are determined. Indeed, when this court certified this action, Rosenberg J.A. referred to the possibility of individual limitation defences: see *Pearson v. Inco Limited* 2006, CanLII 913 (ON CA), (2005), 78 O.R. (3d) 641, at para. 63. On the trial judge's findings, the applicability of the *Limitations Act* as he characterized its applicability was not a common issue."[196] [emphasis added]

205. The spectre of the limitation period therefore loomed large as a factor in favour of settlement as the success of such a defence would have had catastrophic consequences for all of the class.

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[196] *Smith v. Inco Limited*, 2011 ONCA 628, paras. 164-165 leave to the S.C.C. ref'd, Book of Authorities, Tab 48.

iv. Risks of Continued Litigation & Prosecution Of the Actions

206. Where significant risks present themselves to the class in establishing liability or common damages, and continued litigation would therefore prove protracted and complex, courts had determined that it is preferable and "in the interests of the class members to have timely and prompt payment."[197] The reality of class litigation is that no one class member can be paid any compensation until the entire litigation process has come to a conclusive and final end.

207. Therefore, a critically important consideration with respect to this settlement "includes the potential that a case such as this one would take considerable expense and many more years to …. exhaust all appeals"[198] (and/or any individual assessment damages process), making sure and swift recovery today, a weighty factor in favour of settlement approval.

208. Settlement approval courts have found, in historical types of cases, that "inherent delays would result in additional prejudice to the aging class members, and accordingly, a denial of access to justice". [199]

209. Moreover, in addition to all of the substantive legal challenges and risks identified *supra* above, the protracted and lengthy negotiations that occurred throughout much of 2017 were in and of themselves a risk to the class. This fact has specifically been identified as such by this Court and Superior Courts in Ontario:

> "Thus, class counsel may find themselves in the position of having committed time and resources to the negotiation of a settlement, that they believe is in the best interests of the class, only to find that the court will not approve the settlement achieved. While this creates a risk *simpliciter*, it also creates an advantage for a defendant who can successfully extend the negotiations to the point that class counsel's resources are exhausted before making a 'final settlement offer' that may not ultimately receive court approval. … it is apparent that the time and resources committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued. As the parties moved toward a settlement, the negotiations became more difficult as the issues narrowed with the result that the risk of an

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[197] *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.J.), at para. 18, Book of Authorities, Tab 30.

[198] *Dabbs v. Sun Life Assurance Company of Canada*, [1998] O.J. No. 2811 (Gen. Div.), at para. 33, aff'd (1998), 41 O.R. (3d) 97 (C.A.) Book of Authorities, Tab 15.

[199] *Anderson et al. v. Canada*, 2016 NLTD(G) 179, at para. 53, Book of Authorities, Tab 3.

> insurmountable impasse increased rather than diminished. This made the negotiations more perilous as they progressed…."[200] [emphasis added]

210. The ongoing passing of class members, given their generally advanced ages, augur in favour of expedient resolution and a very high premium ought to be placed on this particular factor under the circumstances.[201]

E. Counsel Recommendations

211. As described *supra*, the jurisprudence supports a strong initial "presumption of fairness" when the settlement is, as in this case, negotiated at arms' length and recommended by experienced counsel, particularly when the settlement was reached only after months and months of negotiations.

212. In this case, Class Counsel are very experienced class actions counsel and have been appointed class counsel in dozens and dozens of class actions across Canada.[202] As a result of their involvement in other cases, Koskie Minsky LLP, Klein Lawyers and Merchant Law Group have gained considerable experience in the settlement mechanics and imperatives, damages methodologies, and risks associated with this type of complex and historic litigation.[203]

213. While that is certainly the starting point, in this case, the sentiment applies with even greater force. This settlement comes nearly ten (10) years after the first action was filed in Ontario and following summary judgment on one of the common law duty issues in 2017 by Justice Belobaba.[204]

214. At such a stage of litigation, the knowledge base of counsel is as high as it will ever be: "the closer that class counsel is to trial, the more credible are their assertions about risk and reward. The closer the trial, the more likely that the class action settlement is fair and reasonable

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[200] *Parsons et al. v. Canadian Red Cross Society et al*, [2000] O.J. No. 2374 (S.C.J.), at paras. 37–38, Book of Authorities, Tab 37, relied upon in *Manuge v. Canada*, 2013 FC 341, at para. 37, Book of Authorities, Tab 29.

[201] *McKillop and Bechard v. HMQ*, 2014 ONSC 1282 at para. 28, Book of Authorities, Tab 31.

[202] Affidavit of D. Rosenfeld, at paras. 242-243, 248, 250, Motion Record, Tab 6, pp. 225-226, 227.

[203] Affidavit of D. Rosenfeld, at paras. 147-254, Motion Record, Tab 6, pp. 207-228.

[204] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, Book of Authorities, Tab 11.

and in the best interests of the class".[205] Class Counsel in *Brown v. Canada* has recommended the settlement in the strongest possible terms, describing it in the following way:

> "…no court could order a payment of fifty million dollars for the creation of a healing and reconciliation Foundation, and the eligible class members would be significantly much more limited in definition… Our client and Class members are survivors whose hurt requires recognition and respect while alive. The lessons to be learned from this event in Canadian history need a resolution to move on to make systemic changes to prevent this from occurring again. No apology from the federal government can follow on-going litigation, as it can, from the work of the Foundation that already has a 'Foundation Table' (ie. working committee) as provided for in the settlement. … there existed no precedent or guidance upon which a Court could properly assess damages for loss of culture, language and identity. … The risks of on-going litigation easily exceed the benefits of resolution, as I recommended to the representative Plaintiff, and as she approved in her instructions to proceed with the settlement. … The priority of concern for the representative Plaintiff Marcia Brown was that of access to justice for her constituents, and justice to mean a legal result process that contributes to a better future for all of Canada, not only indigenous peoples. I am of the view, having regard to all set out above, that this Settlement fully responds to that priority of concern."[206]

215. The Ontario Superior Court's reasoning on settlement approval in *Clegg v. HMQ Ontario* could not be more apposite than to the particular facts of the actions on these motions:

> "Their [the parties] knowledge based going into the mediation was as high as it ever would be, short of completing the trial and reading the reasons of the trial judge. In short, the mediation that led to this settlement was based on layers and layers of actual, and not just imagined, information about the risks and rewards of further litigation."[207]

216. The risks, challenges and problems known to the Plaintiffs' case – politically, factually and substantively - could not have been any more developed or knowable to Class Counsel at the time the Settlement was executed in November 2017.

F. Objections

217. As a matter of first principles, where a settlement is reached prior to the expiry of an opt out period – as is the case here – class members are afforded a greater element of control:

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[205] *Clegg v. HMQ Ontario*, 2016 ONSC 2662, at paras. 34–35, Book of Authorities, Tab 13.

[206] Affidavit of J. Wilson (filed under separate cover).

[207] *Clegg v. HMQ Ontario*, 2016 ONSC 2662, at para. 34, Book of Authorities, Tab 13.

> "The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The CPA [the *Class Proceedings Act, 1992*] mandates that class members retain for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with view to obtaining settlement or judgment that is tailored more to the individual's circumstances."[208]

218. The significance of the right to opt-out cannot be ignored or understated. Objections to a settlement are the norm not the exception because all settlements are, by definition, compromises which give no party exactly all they wish. The right to opt-out however alleviates an objector's concerns: "objectors need not be bound by the perceived failings of the Settlement Agreement. They may opt out and pursue in the normal fashion the claims they assert, bearing in mind the obstacles alluded to above."[209]

219. It will always be the case in litigation which seeks to address historical wrongs affecting thousands of persons that there will be objections and objectors. However, it is critically important for the Court to recognize the impact of those weighed against the 'whole': "[t]he settlement associated with this class action [Indian Residential Schools] provides greater access to 'justice' than that associated with a particular individual's legal victory in a courtroom."[210]

220. As Brenner C.J. (as he then was) put in on the settlement approval motion of the 2006 Pan-Canadian Indian Residential Schools settlement:

> "In this court the hearing proceeded for five days. In addition to the submissions of counsel, in excess of eighty objectors spoke directly to the court. Many others filed written submissions either at the hearing or subsequently.
>
> Many of the objectors had concerns with the proposed settlement. Others supported it. Yet others spoke of being torn between the advantage of accepting the proposed settlement and their concerns with a number of the provisions of the Settlement Agreement.
>
> This settlement represents a compromise of disputed claims. For that reason it is undoubtedly the case that claimants will not be happy with every provision of the settlement. Some might well choose to reject it. However, those members of the class

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[208] *Dabbs v. Sun Life Assurance Co. of Canada* [1998] O.J. No. 2811 (Gen. Div.), at para. 11, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to the S.C.C. ref'd, [1998] S.C.C.A. No. 372, Book of Authorities, Tab 15.

[209] *Bosum v. Canada*, 2006 QCCS 5794, at para. 13, Book of Authorities, Tab 6.

[210] *Fontaine v. Canada*, 2006 NUCJ 24, at para. 60, Book of Authorities, Tab 19.

> who decide that the disadvantages of the Settlement Agreement outweigh its advantages are free to opt out of the provisions of the *Class Proceedings Act* and pursue their individual claims against the defendants. If they choose to opt out, nothing in this class proceeding will affect them or any actions they may choose to bring. In my view, the opt out right supports approval of the agreement."[211] [emphasis added]

221. *A fortiori* in cases like the within action where the settlement agreement is so broad in scope and complexity, touching upon the lives of thousands of class members. Dissent in such cases is inevitable – but not fatal by any means: "[a]ny potential claimants who are not prepared to accept the proposed settlement in full satisfaction of their claim, do not have to do so. … They have the ability to opt out of the provisions of this settlement … [and] if they do so, they must then accept all of the risks and disadvantages associated with pursuit of this litigation in the courts."[212]

222. Therefore, even if an objection is valid, the "role [of the court] is not to require the parties to renegotiate the terms of the settlement agreement. My role [as the settlement approval judge] is to assess the settlement agreement that has been reached between the parties and determine whether it falls within the zone of reasonableness"[213]. As a matter of law and principle, the settlement approval court "does not have the jurisdiction to amend the existing terms of the settlement, to add additional terms to the settlement, to compel the parties to resume negotiating to produce a new settlement, or to compel Class Counsel to engaged in specified courses of conduct, as some of the objectors request".[214]

223. The reality is that those persons who prefer the court process may opt out, hopefully after careful consideration and advice about the risks and challenges with doing so. In this way, "no one who objects [opts outs] to it will lose anything by this agreement"[215], and all their individual rights to pursue their claims remain unaffected. The Court of Appeal for Ontario has underscored that the right to opt out is itself the remedy to those who object to an otherwise reasonable settlement:

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[211] *Quatell v. Attorney General of Canada*, 2006 BCSC 1840, at paras. 5–7, Book of Authorities, Tab 38.

[212] *Fontaine v. Canada*, 2006 NUCJ 24, at para. 59, Book of Authorities, Tab 19.

[213] *Anderson et al. v. Manitoba & Canada*, 2017 Man QB, (CI12-01-77146), p. 10, Book of Authorities, Tab 4.

[214] *Hunt v. Mezentco Solutions Inc*., 2017 ONSC 2140, at para. 162, Book of Authorities, Tab 24.

[215] *Kuptana v. Canada*, 2007 NWTSC 01, at paras. 16, 30, Book of Authorities, Tab 27.

> "Importantly, if Maclean [a class member] is dissatisfied with this settlement, he has the opportunity under the terms of Sharpe J.'s judgment and s. 9 of the Act [the *Class Proceedings Act, 1992*] to opt out of the class and pursue his claim against Sun Life in his personal capacity."[216]

224. As recently determined in *Hunt v. Mezentco Solutions Inc*., upon considering the impact of various objections, the court found that opting out was the solution for such individuals rather than rejecting the terms of settlement:

> "Again, for those objectors who differentiate their circumstances from the balance of the Class Members, and perhaps for those objectors who express a lack of confidence in Class counsel or their recommendations, the more preferable course may have been to opt-out, so as not to be bound by the settlement, if approved."[217] [emphasis added]

225. Precisely the same analysis ought to be applied to the objections levied on this motion.

226. Pursuant to the order of this Court dated January 10, 2018, the deadline for filing objections of class members is April 30, 2018. Following the passage of that date, the parties shall provide the Court with a record containing all written objections received and file same prior to the return of the settlement approval motion on May 10, 2018.

G. The Honorarium Payments To The Representative Plaintiffs Are Appropriate

227. On a settlement approval motion, the court has jurisdiction to grant a request for honorarium payments to the representative plaintiffs, paid over any above any individual compensation they might be awarded from the settlement fund itself.[218] The parties seek court approval of honorarium payments of $10,000.00 for each of the representative plaintiffs in the Federal Court proceedings, and for each of the representative plaintiffs in the provincial Superior Court proceedings who will ultimately be bound by this settlement.

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[216] *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 41 O.R. (3d) 97 (C.A.), at pp. 9–10, Book of Authorities, Tab 16.

[217] *Hunt v. Mezentco Solutions Inc*., 2017 ONSC 2140, at para. 164, Book of Authorities, Tab 24.

[218] *Anderson v. Canada*, 2016 NLTD(G) 179, at para. 79, Book of Authorities, Tab 3. *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, at paras. 133 – 136, Book of Authorities, Tab 47. *Dolmage v. Ontario*, 2013 ONSC 6686, Book of Authorities, Tab 17. *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528, at para. 43, Book of Authorities, Tab 25.

228. Awards of this nature were recently granted by this Court in *Merlo v. Canada*[219] where McDonald J. canvassed the prevailing test and jurisprudence, identifying the following factors to assess whether a representative plaintiff ought to receive an honorarium:

(a) active involvement in the initiation of the litigation and the retention of counsel;

(b) exposures to a risk of costs;

(c) personal hardship or inconvenience in connection with the prosecution of the litigation;

(d) time spent and activities undertaken in advancing the litigation;

(e) communication and interaction with other class members; and

(f) participation at various stages in the litigation, including discovery, settlement negotiations and/or trial.[220]

229. Where representative plaintiffs publicize their own personal accounts that require the public re-living of painful events by giving their name and face to high profile class action litigation, representative plaintiffs have been awarded honorariums: "[b]eing prepared to spearhead such a cause comes at a personal cost and a deprivation of privacy."[221]

230. In *Johnston v. The Sheila Morrison Schools*, Perell J. approved $5,000.00 honorarium payments to the two representative plaintiffs in an institutional abuse action, reasoning that "the honorarium is not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice".[222] Similarly, in *Dolmage v. Ontario*[223] and *McKillop & Bechard v. Ontario*[224], the settlement approval judges made honorarium awards of $15,000.00 and $5,000.00, respectively, to the representative plaintiffs.

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[219] *Merlo v. Canada*, [2017] F.C.J. No, 773, at paras. 68–74, Book of Authorities, Tab 32.

[220] *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911, at para. 43, Book of Authorities, Tab 43.

[221] *Merlo v. Canada*, [2017] F.C.J. No, 773, at para. 70, Book of Authorities, Tab 32.

[222] *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528, at para. 43, Book of Authorities, Tab 25.

[223] *Dolmage v. Ontario*, 2013 ONSC 6686, at para. 51, Book of Authorities, Tab 17.

[224] *McKillop & Bechard v. Ontario*, 2014 ONSC 1282, at para. 43, Book of Authorities, Tab 31.

231. In the circumstances of this case, honorarium payments are also appropriate, deserving and fair. Such payments would go some distance in recognizing the significant and difficulty for these individuals who experienced the 60s' Scoop and separation from family to come forward on behalf of other survivors, tell their stories and confront a painful past.

232. Representative plaintiffs in such cases are exposed in a way that other class members are not: their very personal experiences become matters of public record, in pleadings, affidavits, court transcripts and Reasons for Decision. All the more so is the exposure to these persons when they are participants in high profile litigation such as this:

> "With every media interview, I relive the hurt … I am determined to fulfill my duties as a representative of the class, but this has not been an easy role for me. … Also, by lending my name to this litigation, I gave up a degree of privacy. I did not want to be defined by my experiences to the Sixties Scoop. I did, however, want to educate Canadians about the Sixties Scoop and the effects that it has had on its survivors and on the children and grandchildren of the survivors. I ultimately decided to provide numerous media interviews, at the cost of my own privacy, because I felt that helping my fellow class members was of primary importance."[225] [emphasis added]

233. As the settlement approval court described in *Anderson v. Canada*:

> "The Plaintiffs and other witnesses have provided access to justice for hundreds of vulnerable individuals in a historic case. The largely symbolic honoraria are appropriate small tokens of recognition for that effort and are approved."[226] [emphasis added]

234. *A fortiori* in this case, especially with respect to the representative plaintiffs in Ontario whose profound role in this historic litigation has been described by an Ontario court in the following way:

> "In a sense, the litigation of Ms. Brown's and Mr. Commanda's **story will be the test case** for determining whether the Federal Crown committed a civil harm. If Ms. Brown or Mr. Commanda successfully prove or fail to prove that the Federal Crown owed them respectively a fiduciary or common law duty, **then a precedent will be established** and other class members will be bound by that result."[227] [emphasis added]

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[225] Affidavit of Catriona Charlie sworn March 29, 2018, at paras. 59, 60, Motion Record, Tab 2, p. 18.

[226] *Anderson v. Canada*, 2016 NLTD(G) 179, at para. 84, Book of Authorities, Tab 3.

[227] *Brown v. Canada (Attorney General)*, 2010 ONSC 3095, at para. 185, Book of Authorities, Tab 7.

235. The proposed honoraria payments are appropriate, consistent with the quantum awarded in other cases and unquestionably deserved.

PART V - ORDER SOUGHT

236. The parties respectfully request that this Honourable Court certify this action as a class proceeding, approve the settlement, without modification, and dismiss the action against Canada on a without costs basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19th day of April, 2018.

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PART VI - AUTHORITIES

1. *Alberta v. Elder Advocates of the Alberta Society et al.*, [2011] 2 S.C.R. 261
2. *Anderson v. Canada (Attorney General)* 2015 NLTD(G) 186
3. *Anderson et al. v. Canada*, 2016 NLTD(G) 179
4. *Anderson et al. v. Manitoba & Canada*, 2017 Man QB, (CI12-01-77146)
5. *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.)
6. *Bosum v. Canada*, 2006 QCCS 5794
7. *Brown v. Canada (Attorney General)*, 2010 ONSC 3095
8. *Brown v. Canada (Attorney General)*, 2013 ONCA 18
9. *Brown v. Canada (Attorney General)*, 2013 ONSC 5637
10. *Brown v. Canada (Attorney General)*, 2014 ONSC 1583
11. *Brown v. Canada (Attorney General)*, 2017 ONSC 251
12. *Chateauneuf v. Canada*, [2006] F.C.J. No. 363
13. *Clegg v. HMQ Ontario*, 2016 ONSC 2662
14. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.)
15. *Dabbs v. Sun Life Assurance Company of Canada*, [1998] O.J. No. 2811 (Gen. Div.)
16. *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 41 O.R. (3d) 97 (C.A.)
17. *Dolmage v. Ontario*, 2013 ONSC 6686
18. *Estate of G. Buote & D. White v. Her Majesty the Queen*, 2014 FC 773
19. *Fontaine v. Canada (Attorney General)*, 2006 NUCJ 24
20. *Fontaine et al. v. Canada et al.*, 2006 YKSC 63
21. *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443
22. *Gottfriedson v. Canada*, 2015 FC 706
23. *Healey v. Lakeridge Health Corp. et al.*, 2011 ONCA 55
24. *Hunt v. Mezentco Solutions Inc.*, 2017 ONSC 2140
25. *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528
26. *Just v. British Columbia*, [1989] 2 S.C.R. 1228
27. *Kuptana v. Canada*, 2007 NWTSC 01
28. *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14
29. *Manuge v. Canada*, 2013 FC 341
30. *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.J.)
31. *McKillop and Bechard v. HMQ*, 2014 ONSC 1282

32. *Merlo & Davidson v. Her Majesty the Queen*, [2017] F.C.J. No. 773
33. *Mitchell (Litigation Administrator of) v. Ontario* (2004), 71 O.R. (3d) 571 (Div. Ct.)
34. *Nolevaux v. King and John Festival Corp.*, [2013] O.J. No. 4454 (S.C.J.)
35. *Nunavut Tunngavik Incorporated v. Canada (Attorney General)*, 2014 NUCA 2
36. *Parsons v. Canada Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.)
37. *Parson v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.)
38. *Quatell v. Attorney General of Canada*, 2006 BCSC 1840
39. *R. v. Imperial Tobacco Ltd.*, [2011] 3 S.C.R. 51
40. *Richard v. British Columbia*, 2012 BCSC 1464
41. *Richard v. British Columbia*, 2015 BCSC 265
42. *Rideout v. Health Labrador Corp.*, 2007 NLTD 150
43. *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911
44. *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962
45. *Semple v. Canada*, 2006 MBQB 285
46. *Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128
47. *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233
48. *Smith v. Inco Limited*, 2011 ONCA 628
49. *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1
50. *Wewaykum Indian Band v. Canada*, 2002 SCC 79
51. *WP v. Alberta (No. 1)*, 2013 ABQB 295

APPENDIX "A"

1. *Federal Court Rules,* SOR/98-106

Certification

Conditions

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(e) there is a representative plaintiff or applicant who

(i) would fairly and adequately represent the interests of the class,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

Matters to be considered

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Subclasses

(3) If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact that are not shared by all of the class members so that the protection of the interests of the subclass members requires that they be separately represented, the judge shall not certify the proceeding as a class proceeding unless there is a representative plaintiff or applicant who

(a) would fairly and adequately represent the interests of the subclass;

(b) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members as to how the proceeding is progressing;

(c) does not have, on the common questions of law or fact for the subclass, an interest that is in conflict with the interests of other subclass members; and

(d) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

Opting Out and Exclusion

Voluntary

334.21 (1) A class member involved in a class proceeding may opt out of the proceeding within the time and in the manner specified in the order certifying the proceeding as a class proceeding.

Marginal note:

(2) A class member shall be excluded from the class proceeding if the member does not, before the expiry of the time for opting out specified in the certifying order, discontinue a proceeding brought by the member that raises the common questions of law or fact set out in that order.

Defendant's liability

334.27 In the case of an action, if, after determining common questions of law or fact in favour of a class or subclass, a judge determines that the defendant's liability to individual class members cannot be determined without proof by those individual class members, rule 334.26 applies to the determination of the defendant's liability to those class members.

Settlements

Approval

334.29 (1) A class proceeding may be settled only with the approval of a judge.

Binding effect

(2) On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding.

Who gives notice

334.32 (1) Notice that a proceeding has been certified as a class proceeding shall be given by the representative plaintiff or applicant to the class members.

Dispensation

(2) A judge may dispense with the giving of notice after considering the factors set out in subsection (3).

Factors

(3) A judge shall order when and by what means notice is to be given after considering the following factors:

(a) the cost of giving notice;

(b) the nature of the relief sought;

(c) the size of the individual claims of the class members;

(d) the number of class members;

(e) the presence of subclasses;

(f) the likelihood that some or all of the class members will opt out of the class proceeding; and

(g) the places of residence of class members.

How given

(4) The order may provide that notice be given by

(a) personal delivery;

(b) mail;

(c) posting, publishing, advertising or the distribution of leaflets;

(d) individually notifying a sample group within the class; or

(e) any other appropriate means or combination of appropriate means.

Content of notice

(5) The notice shall

(a) describe the proceeding, including the names and addresses of the representative plaintiff or applicant, and the relief sought;

(b) state the time and manner for a class member to opt out of the proceeding;

(c) describe the possible financial consequences of the proceeding to the class and subclass members;

(d) summarize any agreements respecting fees and disbursements

(i) between the representative plaintiff or applicant and that representative's solicitor, and

(ii) if the recipient of the notice is a member of a subclass, between the representative plaintiff or applicant for that subclass and that representative's solicitor;

(e) in the case of an action, describe any counterclaim being asserted by or against the class or any subclass, including the relief sought in the counterclaim;

(f) state that the judgment on the common questions of law or fact for the class or subclass, whether favourable or not, will bind all of the class members or subclass members who do not opt out of the proceeding;

(g) describe the right, if any, of the class or subclass members to participate in the proceeding; and

(h) give an address to which class members may direct inquiries about the proceeding.

2. *Federal Courts Act*, R.S.C., 1985, c. F-7

Prescription and limitation on proceedings

39 (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

3. *Class Proceedings Act*, 1992, S.O. 1992, c. 6

Aggregate assessment of monetary relief

24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. 1992, c. 6, s. 24 (1).

4. ***Crown Liability and Proceedings Act,*** **R.S.C., 1985, c. C-50**

Provincial laws applicable

32 Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

APPENDIX "B"

Province	**Statutory Citation**	**Limitation Period**	**Section**
British Columbia	*Limitation Act*, S.B.C. 2012, c. 13, s. 21(1).	15 years	21 (1) Subject to Parts 4 and 5, even if the limitation period established by any other section of this Act in respect of a claim has not expired, a court proceeding must not be commenced with respect to the claim more than 15 years after the day on which the act or omission on which the claim is based took place. (2) For the purposes of this section and subject to section 24 and subsection (3) of this section, for any of the following claims, the day an act or omission on which the claim is based takes place is as follows: (a) in the case of a claim arising out of a conversion, the day on which the property was first converted by any person; (b) in the case of a claim referred to in section 12, 13, 14 or 15, the day on which the claim is discovered in accordance with that section; (c) in the case of a claim for contribution or indemnity, the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based; (d) in the case of a claim of a minor, on the earlier of the following: (i) the day on which the minor attains the age of 19 years; (ii) the day on which the claim is discovered under section 18 (b); (e) in the case of a claim of a person who is under a disability at the time at which the act or omission on which the claim is based takes place, on the earlier of the following: (i) the day on which the person ceases to be a person under a disability; (ii) the day on which the claim is discovered under section 19 (b). (3) If a person against whom a claim is or may be made (a) wilfully conceals from the claimant the fact that (i) injury, loss or damage has occurred, (ii) the injury, loss or damage was caused by or contributed to by an act or omission, or (iii) the act or omission was that of the person against whom the claim is or may be made, or

Province	**Statutory Citation**	**Limitation Period**	**Section**
			(b) wilfully misleads the claimant as to the appropriateness of a court proceeding as a means of remedying the injury, loss or damage, the act or omission on which the claim is based is deemed to have taken place on the day on which the claim is discovered under Part 2.
Alberta	*Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1)(b)	10 years	3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known, (i) that the injury for which the claimant seeks a remedial order had occurred, (ii) that the injury was attributable to conduct of the defendant, and (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding, or (b)10 years after the claim arose, whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.
Saskatchewan	*Limitations Act*, S.S. 2004, c. L-16.1, s. 7(1).	15 years	7(1) Subject to subsections (2) to (4), with respect to any claim to which a limitation period applies, no proceeding shall be commenced after 15 years from the day on which the act or omission on which the claim is based took place. (2) With respect to any claim against a purchaser of property for value acting in good faith to which a limitation period applies, no proceeding shall be commenced with respect to conversion of the property after two years from the day on which the property was converted, whether or not the limitation period has expired. (3) Repealed. 2007, c.28, s.3. (4) With respect to a claim based on an act or omission that causes or contribute to the death of an individual, no proceeding shall be commenced after two years from the earlier of: (a) the day on which the death of the individual is discovered; and (b) the day on which, by a decision of a court of competent jurisdiction, the individual is presumed to have died.

Province	**Statutory Citation**	**Limitation Period**	**Section**
Manitoba	*Limitation of Actions Act*, C.C.S.M., c. L150, s. 14(4)	30 years	14(4) The court shall not grant leave (a) to begin an action; or (b) to continue an action that has been begun; more than 30 years after the occurrence of the acts or omissions that gave rise to the cause of action.
Ontario	*Limitations Act, 2002*, S.O. 2002, c.24, Sched. B., s. 15(2)	15 Years	15 (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section. 2002, c. 24, Sched. B, s. 15 (1). (2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.
Québec	*Civil Code of Québec*, CQLR c CCQ-1991, art. 2922.	10 years	Note: Quebec does not have a limitation statute rather s. 3131 of the *Civil Code of Quebec* states that "prescription" (ie. limitations) is governed by the law applicable to the merits of a dispute. Therefore, either the *Civil Code of Quebec* or another statute which deals with the actual merits of the dispute will lay out the limitation period. Nevertheless, where rights or actions are not regulated by law, the *Civil Code of Quebec* provides for "extinctive prescription" where a right or action is extinguished which is 10 years: 2922. The period for extinctive prescription is 10 years, except as otherwise determined by law.

APPENDIX "C"

Province	**Statutory Citation**	**Time Limit**	**Section**
Ontario	*Trustee Act*, R.S.O. 1990, c. T.23, s. 38(3)	Two years	38(3) An action under this section shall not be brought after the expiration of two years from the death of the deceased.
Manitoba	*The Trustee Act*, C.C.S.M., c. T-1, 53(2).	Two years	53(2) No action shall be commenced under authority of this section after the expiration of two years from the death of the deceased.
New Brunswick	*Survival of Actions Act*, R.S.N.B. 2011, c. 227, s. 10	Two years	10(4) Subject to subsection (5), proceedings on a cause of action that survives under section 4 or 5 shall not be brought after two years from the later of (a) the day of the death of the person against whom the cause of action subsisted or was deemed to have been subsisting before death, and (b) the day the cause of action is discovered by the person who has the cause of action
Northwest Territories	*Trustee Act*, R.S.N.W.T. 1988, c. T-8, s. 31	Two years	31(3) (3) An action referred to in subsection (1) may not be commenced after two years from the death of the deceased.
Nunavut	*Trustee Act*, R.S.N.W.T. (Nu.) 1988, c. T-8, s. 31	Two years	31(3) (3) An action referred to in subsection (1) may not be commenced after two years from the death of the deceased.