SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Marcia Brown / Representative Plaintiff

AND:

The Attorney General of Canada / Defendant

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Jeffery Wilson* and *Morris Cooper* for the Plaintiff

Catharine Moore, Travis Henderson and *Gail Sinclair* for the Defendant

HEARD: May 29 and 30, 2018 and subsequent written submissions

The "Sixties Scoop"

Motion to Approve the National Settlement

[1] The Sixties Scoop, nationally acknowledged as a "dark and painful chapter in Canada's history,"[1] generated some 23 actions in superior and federal courts across the country. The Ontario action that is before me, *Brown v. Canada*, is the most advanced. In litigation for almost nine years, it was *Brown* that established Canada's liability in tort to the Sixties Scoop survivors in Ontario.[2] The other actions remain at the starting gate.

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[1] The Hon. Carolyn Bennett, Minister of Indigenous and Northern Affairs, Press Release (February 1, 2017).

[2] The certification decision is *Brown v. Canada (Attorney General)*, 2013 ONSC 5637. The summary judgment decision establishing Canada's legal liability in tort is *Brown v. Canada (Attorney General)*, 2017 ONSC 251.

[2] Canada agreed to settle *Brown* but only if the other actions were included in one nation-wide settlement.

[3] Justice Michel Shore of the Federal Court mediated the national settlement. The parties reached an agreement in principle on August 30, 2017. The national settlement agreement ("the Settlement Agreement" or "Agreement") was formally executed on November 30, 2017. As part of the national settlement, the other actions were consolidated into an omnibus Federal Court action,[3] which I will refer to as the *Riddle* action.

[4] On May 11, 2018 after two days of hearings in Saskatoon, Justice Shore approved the Settlement Agreement for the purposes of the *Riddle* action. He was satisfied that the national settlement was fair and reasonable and in the best interests of the class members.[4] The approval order has been signed but the reasons for decision have not yet been released.

[5] The Settlement Agreement is now before me for a similar approval in the context of the *Brown* action. It is clear from the language in the Agreement that the approval of both courts is required. If I decline to approve any part of this Agreement, then the Agreement will not take effect and Justice Shore's approval order in *Riddle* will be rendered null and void.[5]

Overview of the settlement agreement

[6] A copy of the "agreement in principle" is attached in the Appendix.

[7] The cornerstones of the Agreement are the payment of individual compensation without proof of harm and the establishment of a national foundation that will be devoted to memorializing the stories of the Sixties Scoop survivors and dedicated to the goals of reconciliation and healing.

[8] Canada has agreed to pay a minimum of $500 million and a maximum of $750 million to cover the individual payments to Sixties Scoop survivors. The individual payments are capped at $50,000 per person. Canada has also agreed to pay a further $50 million to fund the foundation and $75 million in legal fees to class counsel.

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[3] *Riddle, White and Charlie v. Her Majesty the Queen*, (Fed. Ct. Docket T-2212-16).

[4] *Dabbs v. Sun Life Assurance* (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, October 22, 1998.

[5] Settlement Agreement (November 30, 2017), at ss. 2.02, 12.01; and Approval Order of Justice Shore in the *Riddle* action (May 11, 2018), at s. 31.

[9] The most likely overall value of the Settlement Agreement is about $550 million – $50 million for the foundation and a minimum of $500 million for the individual payments. The potential overall value is $800 million – $50 million for the foundation and a maximum of $750 million for the individual payments.[6]

[10] There is much in the design and content of the Settlement Agreement that is impressive and reflects well on the parties and their legal counsel and, of course, on Justice Shore as mediator. For example, the decision to resolve all of the Sixties Scoop class actions in one national settlement; the expansion of the class definition and the operable time period so that many more Sixties Scoop survivors can be included; Canada's commitment to pay a fixed damages amount to every eligible claimant without requiring proof of harm; the use of a simplified one-page application form; the provision of an "exceptions" mechanism to deal with unusual or difficult cases; the payment of a separate and all-inclusive legal fee to class counsel to cover both work done to date and any future assistance that claimants may require; and, of course, the establishment of a national foundation to address reconciliation and healing.

The applicable law

[11] Section 29(2) of the *Class Proceedings Act* ("CPA")[7] provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[8]

[12] The supervising court must compare the settlement with what would probably be achieved at trial, discounting for any defences, legal or evidentiary hurdles or other risks that would have to be confronted and overcome if the matter were to proceed to trial.[9] A settlement does not have to be perfect. The question for the court is whether the settlement falls within a zone of reasonableness.[10]

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[6] If one adds the costs of the notice program and the legal fees payment, the potential value of the settlement is close to $880 million.

[7] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[8] *Dabbs, supra* note 4. Most recently discussed in *Welsh v. Ontario*, 2018 ONSC 3217.

[9] Discussed in more detail in *Welsh, supra* note 8, at para. 68.

[10] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.); and *Dabbs, supra* note 4.

Initial impression

[13] On balance, I was favourably impressed when I first reviewed the Settlement Agreement. The establishment of a national foundation for reconciliation and healing was clearly of over-arching importance. The agreement to pay individual compensation based on a one-page application form and without requiring proof of harm was admirable. I was also aware that Chief Marcia Brown Martel, the representative plaintiff in the *Brown* action who was deeply involved in every aspect of both the litigation and the settlement discussions, was satisfied overall that the Settlement Agreement was fair and reasonable and in the best interests of the class.[11]

Two concerns

[14] I had only two concerns when I concluded my review of the Agreement. First, whether a $25,000 to $50,000 payment as damages for the loss of one's Indigenous cultural identity was indeed a fair and reasonable amount given the harm that was sustained by the class members. Second, the $75 million payment to class counsel for legal fees.

[15] I am now satisfied that given the risks of further litigation, a $25,000 to $50,000 payment for the loss of one's Indigenous cultural identity is fair and reasonable and should be approved. But not the payment of $75,000,000 for legal fees. I am not satisfied that $75 million for legal fees is anywhere close to reasonable.

[16] I will explain each of these conclusions in turn.

The size of the individual payment

[17] The parties' best estimate is that 22,400 Indigenous children nation-wide were "scooped" from their homes and placed with non-Indigenous foster or adoptive parents over the applicable 40-year time-period. The best estimate of a take-up rate is that just under half of the eligible claimants – or about 10,000 claimants – will apply for compensation. If this take-up estimate proves correct, then each claimant will receive the maximum of $50,000. If there are 15,000 claimants, the individual payment will fall to $33,333. If there are 20,000 to 30,000 claimants, the individual payment will be $25,000. Class counsel believe that the individual payment will most likely be in the range of $25,000 to $50,000.

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[11] Given Chief Brown Martel's extraordinary level of involvement in this class proceeding, I have no difficulty approving the requested $20,000 honorarium.

[18] Only a tiny percentage of the class members in *Brown* submitted written objections or attended in court to tell their stories and voice their concerns in person. The primary concern was that the $25,000 to $50,000 payment was not enough.

[19] I can certainly understand this objection. Even though the *Brown* action is limited to the loss of cultural identity, the harm that was done to the "scooped" children on this point alone was lasting and profound. The stories told by the Sixties Scoop survivors are deeply disturbing. But equally poignant is the realization of these very survivors that "no amount of money can ever fix the damage [that was done] ... no amount of money can give me a family ... no amount of money can give people back their sense of belonging."

[20] On the Sixties Scoop Website, one finds an exchange that goes to the very heart of the matter. The key question is posed as follows: *"What about $25,000 - $50,000? That doesn't seem very much for someone who lost their cultural identity?"* The answer, provided by lead class counsel Jeffery Wilson, was astute and unassailable:

> *You're right. It isn't very much. There is no amount of money that could replace what you have lost or that could make up for what you suffered ... There is no "enough". I know someone wrote in and said, "It should be a hundred thousand dollars." Maybe, it should be more. But, no court would have ever ordered anything close to $100,000. We negotiated against the backdrop of what we could realistically get from the court, applying western law. Like any other case, this one is the beginning, the first step.*
>
> *And while this settlement cannot give you back what you deserve or what you have lost, it can make a very big difference. It is symbolic and shows that cultural identity will now be something that courts have to consider, and measure in all cases from this point forward. Because of you, the law must now recognize that "saving the child" means keeping him or her with family, or extended family or her or his community.*
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> *Loss of cultural identity is a collective loss. That means we have to consider the total of what we have achieved, and not simply the amount per claimant.*

[21] There is little doubt that a $25,000 to $50,000 payment to the Sixties Scoop survivors for the loss of their cultural identity is a modest amount of money. However, after reviewing all the evidence before me and after considering the many pitfalls that await the class members if the lawsuit were to continue, I conclude that a payment in this range is indeed fair and reasonable and in the best interests of the class. I say this for the following reasons:

- The claim itself (damages for loss of cultural identity) is a novel claim in Canadian law. It is true that some Australian courts have recognized a "loss of cultural

fulfilment" tort claim in the aboriginal context but most of the damage awards in these cases are in the $10,000 to $40,000 range;[12]

- In her statement of claim, the representative plaintiff claimed "at least $50,000" in general damages for the loss of cultural identity, thus signalling that a $50,000 payment would be acceptable;

- The $50,000 damages award should be discounted substantially to reflect the risks that await the class members if they continue with the litigation – the limitation defences, causation issues,[13] the likely unavailability of an aggregate damages approach and the need for literally thousands of individual trials, and the inevitable and time-consuming appeal process. In short, years of further litigation with no guarantee of success and a very real risk of getting nothing. When one considers the risks of continued litigation, an immediate payment in the range of $25,000 to $50,000 without having to show any proof of harm is not unreasonable;

- Most importantly, the Settlement Agreement provides for the establishment of a federally-funded national foundation that will be dedicated to the memorialization of the survivors' stories and to the ongoing process of reconciliation and healing. This is an important institutional benefit that could not have been attained with continued litigation.

[22] Class counsel in *Brown* submit that the settlement, including the $25,000 to $50,000 individual payment, "exceeds our best day in court." I do not disagree.

[23] I am satisfied that the payment of $25,000 to $50,000 falls within a zone of reasonableness and should be approved. In sum, I am satisfied that the core settlement provisions that provide from $550 million to $800 million in cash and non-cash benefits are fair and reasonable and in the best interests of the class.

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[12] The case law is discussed in Orr, "Damages for Loss of Cultural Fulfilment in Indigenous Community Life" (1997), online: Indigenous Law Bulletin <classic.austlii.edu.au/au/journals/IndigLawB/1997/90.html>.

[13] Here is an example of a causation issue. My finding of Canada's legal liability was based on a relatively narrow point – the federal government's failure to provide printed information to the provincial child care authorities for delivery to the affected foster and adoptive parents who, in turn, would share this information with the Indigenous children under their care. But as I noted in my summary judgment decision, "[o]ne does not know how many of the foster and adoptive parents, having received this information, would have shared the information with the aboriginal child that had been placed in their home. Probably most, but this is an issue that will have to be determined on evidence that will be presented at the damages stage." See *Brown* (2017), *supra* note 2, at fn. 23.

[24] The same cannot be said about the legal fees provision.

The $75 million for legal fees

[25] Under section 11.01 of the Settlement Agreement, Canada agreed to pay $75 million in legal fees to class counsel, separate and apart from the $550 million-plus settlement. The $75 million amount, plus applicable taxes, will be paid to four firms: Wilson-Christen, who worked with Morris Cooper in the *Brown* action, and the three firms who have carriage of the consolidated *Riddle* action, namely Klein Lawyers, Koskie Minsky and the Merchant Law Group. The $75 million is intended to cover both work done to date and any future legal assistance that claimants may require when filing claims or pursuing appeals to the exceptions committee.

[26] The four firms have agreed among themselves that half of the $75 million or $37.5 million will be paid to Wilson-Christen for its work in *Brown* and the other half will be divided among the other three firms with each getting $12.5 million for their work in the *Riddle* action. In his approval order in *Riddle*, Justice Shore approved the payment of the $37.5 million to Klein, Koskie Minsky, and Merchant Law in equal $12.5 million shares.[14]

[27] It is important to note that my focus as the supervising judge in the *Brown* action is the global payment of $75 million in legal fees and not the internal divisions agreed to by class counsel.

[28] The $75 million for legal fees was described by some objectors as "outrageous." I do not disagree. In my view, the payment of $75 million to class counsel for legal fees on the facts of this mega-fund settlement is excessive and unreasonable and cannot be approved.

[29] My reasoning is as follows.

(i) Jurisdiction to review the legal fees provision

[30] I begin by noting that my jurisdiction to review a legal fees payment provision that is contained in a settlement agreement is rooted in s. 29(2) of the CPA, which provides that "a settlement of a class proceeding is not binding unless approved by the court." This means I must approve every provision in the Settlement Agreement including the legal fees provision. And this is so even where the payment of the legal fees amount is separate and apart from the compensation fund and the defendant government has obviously

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[14] Order of Justice Shore in the *Riddle* action (May 11, 2018), at para. 23.

agreed to the quantum.[15] This court is still entitled to review for reasonableness for at least two reasons: one, because the law requires this review, and two, because whatever is approved in this case will become precedent and will no doubt be relied on by class counsel in future cases, whether the defendant is in the public or private sector.

[31] Because I am not being asked to review a contingent fee arrangement under ss. 32 or 33 of the CPA, I cannot fix what, in my view, is a reasonable fee.[16] I can only approve or disapprove the $75 million legal fees provision in its entirety.

[32] Does the fact that Justice Shore approved the Settlement Agreement and then issued an approval order endorsing the $37.5 million in legal fees payable to the three *Riddle* firms prevent or preclude my review of the global $75 million payment provision? Class counsel in *Riddle* say it does.[17] In my view, it does not. Sections 2.02 and 12.01 of the Settlement Agreement make clear that both courts (*Riddle* and *Brown*) must be satisfied with every provision in the Settlement Agreement, including section 11 that deals with legal fees, before the Settlement can take effect:

> 2.02 None of the provisions of this Agreement will become effective unless and until the Courts approve all the provisions of this Agreement.
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> 12.01 This Agreement will not be effective unless and until it is approved by the Courts ... and if such approval is not granted by the Courts on substantially the same terms and conditions ... this Agreement will thereupon be terminated ...

[33] The requirement that both the *Riddle* and *Brown* courts must approve all the provisions of the Settlement Agreement before it can take effect is also made clear in the draft approval orders that are attached to the Agreement – in Schedule I for *Riddle* and Schedule J for *Brown*. Both draft orders provide that "the Order will be rendered null and void in the event that the Settlement Agreement is not approved in substantially the same terms by [the other court]".

[34] It is true that both draft orders also contain a provision that "the legal fees, disbursements and applicable taxes owing to Class Counsel shall be determined by

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[15] In *Killough v. The Canadian Red Cross*, 2007 BCSC 941 (the Hepatitis C settlement), the agreement with the federal government contained a similar legal fee provision. Justice Pitfield asked whether it was appropriate for the court to be concerned "with the manner in which the Government of Canada chooses to spend taxpayers' money" but then concluded that judicial review was statutorily required and otherwise proper.

[16] CPA, *supra* note 7, at ss. 32(4), 33(8).

[17] On my invitation, class counsel in *Riddle* provided a written submission on the legal fees issue.

further order of this Court." All this means is that *after* the supervising court has approved the Settlement Agreement in its entirety, including the $75 million legal fees provision, it can issue the scheduled approval order and defer to a later order the legal fees owing *to class counsel in the action that is before that court.* This does not mean, however, that the *Brown* court cannot review the global legal fee provision as set out in section 11.01 of the Agreement. The court must do so before it can approve the actual allocation of the $75 million legal fee as agreed to by class counsel (if such approval is even required).

[35] As it happened, Justice Shore did not defer his order about the legal fees owing to class counsel in *Riddle*. In his approval order, Justice Shore approved the entire Agreement and, also, added his approval of the payment of the $37.5 million, in equal shares, to the class counsel in *Riddle*. It was, of course, his right to do so. But his approval of the $37.5 million to class counsel in *Riddle* does not prevent or preclude me from reviewing the reasonableness of the global amount of $75 million as set out in section 11.01 of the Settlement Agreement.

[36] In a further attempt to discourage my review of the legal fees provision, class counsel in *Riddle* also advanced the "comity" argument – that the decision of one court approving counsel fees in its jurisdiction should be respected by the other court.[18] In my view, this comity principle does not apply on the facts herein. This is not a case like *Frohlinger*[19] or *Jeffery*[20] where a multi-jurisdictional settlement had been achieved and class counsel were seeking approval of their respective contingent fee agreements in their respective jurisdictions. Nor is it a case like *Adrian*[21] where the settlement agreement explicitly provided that each group of class counsel were to seek approval of its share of legal fees from the court in its jurisdiction.[22]

[37] In none of these "comity" cases was the approval of the settlement made expressly contingent on the approval of the legal fees payment. Here it is clear that the Settlement Agreement is "conditional"[23] and if one of its provisions, such as the global $75 million

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[18] *Frohlinger v. Nortel Networks Corporation*, 2007 CanLII 696 (ONSC), at para. 32.

[19] *Ibid.*

[20] *Jeffery v. Nortel Networks Corporation*, 2007 BCSC 69.

[21] *Adrian v. Canada (Minister of Health)*, 2007 ABQB 377.

[22] *Ibid*, at para. 7.

[23] The heading for section 12.01 of the Agreement reads "Agreement is Conditional".

legal fees provision, is not approved, the Settlement Agreement, as a whole, cannot take effect and is terminated.[24]

[38] Again, as already noted, my focus is the global $75 million legal fees provision and not the internal division of this amount or Justice Shore's order that $37.5 million be paid to the three *Riddle* firms in equal shares.

(ii) The applicable law

[39] The applicable test when the legal fees are paid by the defendant pursuant to a provision in the settlement agreement is the same as in a motion by class counsel for the approval of a contingency fee arrangement under ss. 32 or 33 of the CPA, namely whether the legal fees are fair and reasonable.[25]

[40] The list of factors that judges may consider when assessing whether the legal fees request is fair and reasonable are lengthy and include (a) the time spent and work done; (b) the factual and legal complexities; (c) the risk undertaken; (d) the degree of responsibility assumed by class counsel; (e) the monetary value of the matters in issue; (f) the importance of the matter to the class; (g) the degree of skill and competence demonstrated by class counsel; (h) the results achieved; (i) the ability of the class to pay; (j) the expectations of the class as to the amount of the fees; and (k) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[26]

[41] The two most important factors are risk incurred and results achieved.[27] As between the two, it is the risk incurred that "most justifies" a premium in class proceedings.[28] The nature of the risk incurred is primarily the risk of non-payment. As

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[24] Recall sections 2.02 and 12.01 of the Settlement Agreement above at paragraph 32.

[25] *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92, at paras. 23-25, 27.

[26] *Smith v. National Money Mart*, 2010 ONSC 1334, rev'd 2011 ONCA 233; and *Fischer v. I.G. Investment Management Ltd.*, 2010 ONSC 7147. Also see *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2009] O.J. No. 4271 (S.C.), aff'd 2009 ONCA 690; and *Gariepy v. Shell Oil Co.*, [2003] O.J. No. 2490 (S.C.). See also the discussion in Winkler, Perell, Kalajdzic and Warner, *The Law of Class Actions in Canada* (2014), at pp. 398-400; and Kalajdzic, *Class Actions in Canada* (2018), at pp. 145-47.

[27] *Lavier*, *supra* note 25, at para. 27.

[28] *Ibid*, at para. 58. Also see Winkler J., as he then was, in *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.), at para. 18: the premium on fees in class action litigation is "for undertaking risk". The same point is made in the CPA in the context of the multiplier approach. Section 33(7) of the CPA makes clear that the multiplier is intended to reflect "the risk incurred in undertaking and continuing the proceeding." American courts have also concluded that the risk incurred is the most important factor in determining whether class counsel deserve an enhancement above the base fee/lodestar amount. See the broad-ranging survey in Casey, "Reforming Securities

noted by the Ontario Law Reform Commission in its seminal *Report on Class Actions*, "the class lawyer will be assuming a risk that after the expenditure of time and effort no remuneration may be received ... [that is] the risk of non-payment."[29]

[42] A British Columbia judge put it this way in *Jeffery v. Nortel Networks*:

> It is well-recognized that when counsel assume a significant risk of not being paid, they are entitled to fees that exceed what would otherwise be reasonable when they succeed. The real risk of failure with personal consequences to counsel cannot be ignored. An enhanced fee is appropriate.[30]

[43] The greater the risk of failure and non-payment – that is, the greater the resulting financial impact on class counsel and their firm – the larger the premium. In a case where a class action has been settled with a minimal investment of time or effort, the risk of non-payment causing "personal consequences" to class counsel is relatively insignificant.

[44] In a case where the settlement has been achieved after many years of effort with an enormous investment of time and money, the risk of non-payment causing "personal consequences" to class counsel can be significant. Although few Canadian judges use this phrase, the key question in my view is the extent to which class counsel has "bet the firm" – the more this is shown to be the case, the larger the premium.

[45] In Canada and the U.S., premiums on legal fees are determined in two ways: a percentage of the fund approach or the multiplier approach. The latter requires the court to first determine a reasonable base fee (or what Americans call the "lodestar"[31]) which may then be increased by an appropriate multiplier that in "the most deserving case", according to the Court of Appeal, can be up to four times the base fee.[32]

Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging" (2003) 4 BYU L. Rev. 1239, at p. 1293; and *Goldberger v. Integrated Res. Inc.*, 209 F. (3d) 43 (2d Cir. 2000), at p. 54.

[29] Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. III, at p. 737.

[30] *Jeffery, supra* note 20, at para. 73.

[31] The lodestar is the number of hours reasonably worked multiplied by a reasonable hourly rate.

[32] See the Court of Appeal's direction in *Gagne v. Silcorp* (1998), 41 O.R. (3d) 417 (C.A.), at p. 425: the range of the appropriate multiplier is "slightly greater than one to three or four in the most deserving case."

(iii) Percentage of the fund or multiplier

[46] In *Cannon*,[33] I embraced the percentage of the fund approach and accorded presumptive validity to the percentage that was agreed to in the contingent fee retainer agreement (up to one third) if certain conditions were satisfied. I wasn't overly concerned about "risk incurred" because the risk incurred by class action lawyers, like personal injury lawyers, was best measured by the wins and losses in many cases over many years and not just by the specific case that was before the court. I was comfortable doing this because almost all of the settlements were under $40 million (i.e. they were not mega-fund cases) and there was rarely, if ever, any direct evidence in the record that the straight-forward application of the percentage approach resulted in legal fees that were excessive or otherwise unreasonable.

[47] When I decided *Cannon* and later *Rosen*,[34] I noted in *obiter* that the percentage of the fund approach should not be used where the resulting legal fees award would be "so large as to be unseemly or otherwise unreasonable."[35] I was thinking at that time of the mega-fund case where the judgment or settlement amount was very large, that is, more than $100 million.[36]

[48] However, there may well be cases where the application of the percentage of the fund approach can result in an unseemly or unreasonable award even in the context of a lower-end settlement. In other words, even in settlements under $50 million, if there is evidence in the record that a legal fees award based directly or indirectly on the percentage in the retainer agreement would be excessive or otherwise unreasonable, the court should not presume the validity of the percentage approach as set out in *Cannon*. The supervising judge should examine the actual risk incurred to determine whether the requested legal fee is reasonable.

[49] In the mega-fund case the supervising judge should also examine the actual risk incurred to determine whether the requested legal fee is reasonable. It is one thing to adopt a percentage of the fund approach when dealing with lower-end settlements. It is

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[33] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

[34] *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752.

[35] *Cannon, supra* note 33, at para. 9.

[36] *Rosen, supra* note 34, at para. 23.

quite another when the settlement or judgment is in the hundreds of millions of dollars. As the Federal Court noted in *Manuge v. Canada*[37]:

> Cases that generate a recovery of a few million dollars may well justify a 25% to 30% award. It is more difficult to support such an approach where the award is in the hundreds of millions of dollars.[38]

[50] It is of course important to incentivize class action lawyers to take on risky actions on a contingent fee basis and do them well.[39] However it is also important that the court's approval of class counsel's legal fees not result in windfalls. There are "too many cases" in which "windfall recoveries for lawyers far exceed a reasonable return or the incentive necessary to bring socially useful lawsuits."[40]

[51] Mega-fund cases are rare and when they settle, and almost all of them settle, the size of the settlement fund can be in the hundreds of millions of dollars. A percentage of the fund approach, given economies of scale, will result in windfalls.[41] Windfalls should be avoided because class action litigation is not a lottery and the CPA was not enacted to make lawyers wealthy.

[52] In a mega-fund settlement, it is not enough for class counsel to say, "We could have asked for 30 per cent based on our retainer agreement, but we're only asking for 10 per cent – aren't we reasonable." Even a reduced percentage can still be excessive and unreasonable. In the VW diesel "defeat device" litigation which was settled in Canada for $2.1 billion,[42] no judge would ever have approved class counsel legal fees of 10 per cent ($200 million) or even 5 per cent ($100 million) especially when the Canadian settlement piggy-backed to a large extent on the American settlement and the level of risk incurred by Canadian class counsel was fairly modest.[43] As it turned out, class counsel agreed to a

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[37] *Manuge v. Canada*, 2013 FC 341.

[38] *Ibid*, at para. 50.

[39] *Gagne*, *supra* note 32, at p. 425.

[40] Rhode, *Access to Justice* (2004), at p. 35, quoted in Kalajdzic, *supra* note 26, at p. 145.

[41] American class action judges understand that "economies of scale can cause windfalls in common fund cases with large funds" and that "windfalls should be avoided": *In re Citigroup Inc.*, 965 F. Supp. (2d), at p. 388; and Prout and Boyd, "Current Topics in Attorneys' Fees in Class Actions" (August 2015), online, at p. 8: <www.bmelaw.com>.

[42] *Quenneville v. Volkswagen*, 2017 ONSC 2448.

[43] It was highly unlikely that Volkswagen would have settled the litigation in the U.S. but not in Canada or that the Canadian settlement would have differed fundamentally from that in the U.S.

legal fees payment of $26 million, plus disbursements and taxes, which was paid directly by Volkswagen.[44]

[53] The Court of Appeal noted in *Lavier* that class action judges generally should apply the principle of proportionality so that fees are not "clearly excessive or unduly high in the sense of having little relation to the risk undertaken or the result achieved."[45] This admonition is particularly important in the context of the mega-fund settlement. The percentage of the fund approach that bears no relation to the significance of the risk incurred should not be used in a mega-fund settlement.

[54] In *Rosen*,[46] I commented that "exceptionally large class action settlements (for me, anything over $100 million) will require more thought about the calculation of the appropriate contingency fee."[47]

[55] I have now given this more thought.

[56] My view today is that the *Cannon* / percentage of the fund approach remains viable but should be limited to settlement amounts that are common-place, that is, under $50 million. *Cannon* should never be used in the mega-fund case where the settlement or judgment is more than $100 million. And if there is evidence before the court that the requested legal fees are excessive, unseemly or otherwise unreasonable – *whatever the amount of the judgment or settlement* – the class action judge should roll up her sleeves and examine the risk incurred to help her decide whether the amount being requested by class counsel is indeed fair and reasonable.

[57] To demonstrate the risks incurred, class counsel will be required to produce evidence of the time and money invested - with the court making appropriate adjustments in the docketed time for over-lawyering, higher than reasonable hourly rates, duplication, and docket-padding. The court should also consider the degree of responsibility assumed - how far along was the litigation when the action was settled? Was the action still at the pleadings stage or was it certified as a class proceeding? Were there any appeals? Any motions for summary judgment? How close was class counsel to "betting the firm?"

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[44] *Quenneville v. Volkswagen*, 2017 ONSC 3594.

[45] *Lavier*, *supra* note 25, at para. 32.

[46] *Rosen*, *supra* note 34.

[47] *Ibid*, at fn. 18.

[58] A reasonable base or lodestar amount must first be determined because, as noted in the Hepatitis C settlement, "class actions must not represent an open-ended invitation to accumulate time without regard to productivity."[48] Once the reasonable base fee has been determined, the appropriate multiplier can then be applied ranging from just over one in the lowest-risk case to four in the highest-risk and most deserving case. The court can consider but would not be bound by whatever was said in the retainer agreement about the level of multiplier.

[59] I know that the multiplier approach has fallen out of favour, at least in the context of lower-end settlements.[49] But I also know that the percentage of the fund approach that bears no relation to risk incurred in the mega-fund context will always or almost always result in a windfall.

[60] It is interesting to note that in mega-fund cases in the U.S., American judges who have generally preferred the percentage approach over the lodestar/multiplier method have returned in recent years to using the lodestar as a cross-check to "pressure test the propriety of the percentage against the time spent by counsel."[50]

[61] But if there is value in using the lodestar as a cross-check, why not use it more directly. By using the lodestar directly, the immediate focus will be on the risks incurred and the legal fees determination will be in dollars rather than percentages. Judges think in dollars not percentages. In my view, the question "What is the reasonable fee?" at least in mega-fund cases must be answered "not as a percentage but in dollars."[51]

[62] I have no reason to believe, based on the evidence to date, that the maximum four-times multiplier will discourage mega-fund litigation. If it does, the Court of Appeal can revise its remarks in *Gagne*,[52] and allow higher multipliers. In any event, the base fee/multiplier method provides the most workable safeguard against windfall legal fees.

(iv) Incentivizing class counsel

[63] If the percentage approach is not available in the mega-fund context, will class action lawyers still take on risky litigation on a contingent fee basis? Or will they be

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[48] *Killough, supra* note 15, at para. 45.

[49] See for example my rant in *Cannon, supra* note 33, at fn. 10.

[50] Prout and Boyd, *supra* note 41, at p. 5.

[51] *Richardson v. Low* (1996), 23 B.C.L.R. (3d) 268 (S.C.), at para. 35.

[52] *Gagne, supra* note 32.

discouraged from doing so? Two comments. First, as already noted, class proceedings are not intended to be vehicles for windfall legal fees or even overly generous fee awards. As the Court of Appeal observed in *Lavier*, "the viability of the class action regime does not depend on an overly generous award being approved in every case."[53]

[64] Second, consider the empirical evidence to date. For more than 25 years since the enactment of the CPA in 1992, class counsel in Ontario have been sufficiently incentivized to bring a wide variety of risky class actions, including mega-fund actions, on a contingent basis knowing full well that any request for a premium on their legal fees would require court approval. They accepted the uncertainty; they understood that contingent fee approvals involved more art than science, and by and large they still prospered. Professor Kalajdzic puts it best:

> [I]t bears repeating that class counsel agree to act despite the risk of non-payment altogether and with the expectation that their fee will ultimately have to be approved by the court. The only certainty that ought to be promoted is the certainty that a fair and reasonable fee will be determined by a judge [...].[54]

[65] I can now turn to the $75 million legal fees provision. Given the risks incurred by the class counsel in *Brown* and *Riddle*, is the $75 million legal fees provision fair and reasonable?

[66] I will first consider *Brown,* then *Riddle.*

(v) The risks incurred in *Brown*

[67] It is not my intention, nor is it my place, on this motion for settlement approval to fix a reasonable legal fee for class counsel in *Brown.* I can, however, indicate how I would go about making this determination. By assessing the risk incurred and estimating the appropriate multiplier, I will have a better understanding of the overall reasonableness of the global $75 million legal fee provision which remains my focus.

[68] The risk incurred by class counsel in *Brown* was, in a word, enormous. More than eight years of contested certification motions and appeals, a risky summary judgment motion on liability, an uncertain pathway on the remaining damages claim and more than $7 million in docketed time.

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[53] *Lavier, supra* note 25, at para. 63.

[54] Kalajdzic, *supra* note 26, at p. 145.

[69] The full cost of lead counsel Jeffery Wilson's single-minded dedication to the best interests of his Sixties Scoop clients is best measured not only in docketed time or lost opportunity costs but also in terms of the overall impact on his small family law firm. As partner Brenda Christen explained in her affidavit, the firm's involvement in *Brown* was so profound and so public that many people, including clients, thought that the law firm would not survive. This in turn made it difficult to attract new clients or staff or do any forward planning. Meanwhile, the investment of time and money in *Brown* was in the millions of dollars and continued to grow. Bluntly put, this is as close a case of class counsel "betting the firm" as I have seen.

[70] The overall result achieved, a nation-wide settlement with the federal government for some 23 actions, fuelled in large part by what was achieved in the *Brown* action, was not just reasonable, but remarkable, and very much in the best interests of the class. As I told counsel at the hearing in Toronto, if we had a "Class Counsel Hall of Fame" Jeffery Wilson, Morris Cooper and their exceptional associate Jessica Braude would be distinguished members. The risks undertaken, the responsibility assumed and the results achieved in *Brown* were extraordinary.

[71] It is therefore beyond dispute that class counsel in *Brown* deserve a significant premium in the calculation of their legal fees. In my view, this is that "most deserving case" that justifies a four-times multiplier. Accepting $6 million as the reasonably adjusted base amount and using the four-times multiplier, the resulting legal fee would be $24 million.[55] This should be increased by another $1 million to include an amount for future costs and disbursements. The overall total would therefore be $25 million.[56]

[72] Again, I am not fixing a reasonable legal fee. I am only applying a methodology that results in a reasonable legal fee. The real point of this exercise is to demonstrate that a fair and reasonable legal fee in the range of $25 million is well under the $37.5 million that has been allocated to class counsel in *Brown* and is a long way from the $75 million amount that is set out in the Settlement Agreement.

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[55] Here is my calculation of the reasonable base amount. Class counsel say they billed about $7.5 million in fees and disbursements. Subtract the $525,000 in disbursements leaving $6.975 million in fees. Adjust the billed hourly rates of $700 to $800 to a more reasonable $500. The adjusted fees amount is now close to $6 million. Multiply this base fee by four and you get $24 million. Counsel ask for another $1 million for future legal expenses assisting class members with their claims. Given the simplified one-page application procedure and the fact that much if not most of this ongoing legal assistance, including the "exception" appeals, can be provided by properly briefed younger lawyers billing at say $200 an hour, it is reasonable to reduce the future costs component to $500,000 at most. Add this to the $24 million and the tally is $24.5 million. Add back the $525,000 for disbursements and the final total is just over $25 million.

[56] *Ibid.*

(vi) The risks incurred in *Riddle*

[73] Compared to *Brown*, the risks incurred by class counsel in *Riddle* are at the opposite end of the spectrum. The risks incurred in *Riddle* were not significant. Even if a very generous multiplier is applied to a reasonable base amount, the resulting fee amount cannot make up the gap between the $25 million estimate for *Brown* and the $75 million provided for in the Settlement Agreement. At best, the risks incurred by class counsel in *Brown* and *Riddle* together justify about one-half of the $75 million set out in section 11.01 of the Settlement Agreement.

[74] The *Riddle* action is a consolidation of some 22 actions that were commenced in numerous provinces by three or more law firms that were all acting independently. Counsel in *Riddle* tried to apply my decision in *Cannon* and argue that a "stacked fees approach based on an equal allocation between provinces and using the retainer percentages" would have resulted in legal fees for the three firms totalling $124 million[57] – an amount that on its face exceeds the $75 million legal fees provision and by comparison appears to make the $75 million amount look reasonable.

[75] However, as I have already noted, the approach in *Cannon* should not be used where there is evidence before the court that the legal fee request is excessive or unreasonable even where the request is based on separate tranches that are each under $100 million. The evidence that strongly suggests that the risks incurred by the *Riddle* class counsel in their respective actions were relatively insignificant and do not justify a *Cannon*-type percentage of the fund approach is the following:

- At the time of settlement, all 22 of the *Riddle* actions were still at the statement of claim stage. In two cases, class counsel had filed certification material but none of these cases had yet been certified as class proceedings. Because none of the cases were certified, they could be discontinued on a dime;[58]

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[57] The "stacked fees approach based on an equal allocation between provinces and using the retainer percentages" can be summarized as follows. Assume the overall compensation is at the minimum $500 million. Allocate the $500 million across the provinces with the majority of the survivors – British Columbia, Alberta, Saskatchewan, Manitoba and Ontario. Apply the retainer agreement percentage of the *Riddle* class counsel that are leading the actions in B.C., Alberta, Saskatchewan and Manitoba – such percentages ranging from 25 to 33 per cent – to the first $100 million in each of these four provinces as per *Cannon* and *Rosen*. The legal fees award to class counsel in *Riddle* based on their retainer agreements would be $124 million in total. This is more than the $75 million legal fees provision and much more than the $37.5 million that class counsel in *Riddle* have agreed to accept.

[58] Once an action is certified as a class proceeding, "counsel [are] committed to bringing it to a final conclusion on behalf of all of the members of the class." See *Manuge, supra* note 37, at para. 31, citing *Slater Vecchio LLP v. Cashman*, 2013 BCSC 134. Once an action is certified, it can only be discontinued with the approval of the court: s. 29(1) of the CPA.

- By my count, 9 of the 22 actions were filed by class counsel in *Riddle* last year, *after* the release of my summary judgment decision or Canada's announcement that it intended to settle all of the Sixties Scoop actions. Two of the nine were filed after the agreement in principle was signed on August 30, 2017. This strongly suggests opportunistic filings – that is, filing "place holder" actions and then sitting in the bleachers pretty much risk-free, waiting to see what happens in *Brown* or in the ensuing settlement discussions;

- At least one of the lawyers in *Riddle* seems to accept this characterization. In one of the carriage motion skirmishes, the senior class counsel from Koskie Minsky described the work of Klein Lawyers and Merchant Law as "years of wasted time and resources." He criticized their "inaction" in their provincially-filed proposed class actions and described their lawsuits in British Columbia, Alberta, Saskatchewan and Manitoba as "opportunistic filings."

- I was also surprised ("stunned" might be a better word) by class counsel's straight-faced submission that collectively they had docketed more than $10 million in fees for lawsuits that were still at the starting gate. I repeat, ten million dollars.

[76] In sum, the evidence before me suggests that the risks incurred and responsibility assumed by class counsel in *Riddle* were modest at best – none of the actions were certified and many of the filings were "opportunistic." The percentage of the fund approach applied in *Cannon* should yield for the reasons just stated to a risks-incurred analysis. Whether a premium is owing in the consolidated *Riddle* action should be determined by the base fee/multiplier method.

[77] A reasonable base fee in *Riddle* is about $5.25 million.[59] The appropriate multiplier, given the very good results achieved, is probably in the range of 1.4 or 1.5.

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[59] Class counsel in *Riddle* say they docketed just over $10.6 million in fees and disbursements. Take out the $447,290 in disbursements and the fees amount is around $10.1 million. Reduce this to $9.4 million to reflect reasonable hourly rates of say $500 for senior lawyers and not $700 or $800. Eliminate the $1.4 million attributed to carriage fights (because these were only in the interests of the two equally capable firms doing battle and not in the interests of any potential class members) and the tally is now $8.0 million. The $3.3 million charge for "communication" with potential class members should be reduced by at least half because much of this could have been done by more junior lawyers or even law clerks. The fees amount is now down to around $6.35 million. The $2.3 million charge for research and pleadings (drafting and filing the various statements of claim and in two cases filing certification material) – which I have isolated by unbundling the Klein data and attributing $638,134 to this category – should be reduced by half because of the reality of piggy-backing on *Brown*, and if not, the reality of duplicate or almost duplicate statements of claim. The running tally for fees is now down to $5.2 million. Given the positive results achieved, the highest possible multiplier is two and the resulting fee is $10.4 million. Counsel ask for another $3 million to $5 million for future legal expenses assisting class members with their claims. Even $3 million

[78] Even if one were to apply a two-times multiplier, in my view the absolute maximum,[60] this would result in a fee of $10.5 million. Add another $1.5 million for future legal costs and $447,290 for disbursements and the total is just under $12.5 million.[61]

[79] It is interesting to note that when "risks incurred" are properly assessed class counsel in *Brown* would be awarded something in the range of $25 million and class counsel in *Riddle* would be awarded half that or $12.5 million. This accords with my sense of overall fairness. Most of the heavy lifting was done in *Brown* – it is only right that class counsel in *Brown* receive at least twice the fees that are paid to class counsel in *Riddle*.

[80] In any event, the estimated reasonable fee of $12.5 million for class counsel in *Riddle* (as determined above) is one-third of the allocated $37.5 million amount and together with the $25 million for class counsel in *Brown* amounts to one-half of the $75 million legal fee provision. In other words, using a well-deserved four-times multiplier in *Brown* and an extraordinarily generous two-times multiplier in *Riddle*, the resulting tally is at most $37.5 million. The $75 million legal fee provision (twice this amount) is therefore excessive and unreasonable and is not approved.

(vii) De-linking the legal fees provision

[81] Because the $75 million legal fees provision is not approved, the rest of the Settlement Agreement cannot take effect – unless the legal fees provision is de-linked from the other settlement provisions that have been approved.

[82] To their credit, class counsel in *Brown* have consented to such de-linking. In an email to the court, Jeffery Wilson advised, "In the interests of survivors across the country, we agree to de-linking." Class counsel in *Riddle* took the position that their consent was not needed because the proposed draft orders in schedules I and J to the

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is unreasonable. Given the simplified one-page application procedure and the fact that much if not most of this legal assistance can be provided by properly briefed younger lawyers billing at say $200 an hour, it is reasonable to reduce the future costs component by half to $1.5 million at most. Add this to the $10.4 million and the tally is $11.9 million. Add back the $525,000 for disbursements and the final total is $12.425 million, at most $12.5 million.

[60] It is important to recall that in the Indian Residential Schools Settlement of 2006, a $1.9 billion national settlement that was a complicated and demanding case for all counsel involved, the legal fees approved for the "national consortium" of class counsel resulted in a 2.73 multiplier. See *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.), at para. 57.

[61] *Supra* note 59.

Settlement Agreement make clear that settlement approval and the approval of legal fees were never linked to begin with.

[83] As I have already explained,[62] the provision at issue in these draft orders deals only with the portion of the $75 million in legal fees that is allocated to class counsel in *Riddle* and *Brown* respectively and does not deal with the global $75 million legal fees provision in s. 11.01 of the Settlement Agreement. To repeat, neither the *Riddle* court nor the *Brown* court is precluded from reviewing the $75 million legal fees provision which is a provision in the Settlement Agreement.

[84] What flows from all of this is the following. Class counsel in *Brown* have agreed to de-link the $75 million fees provision from the rest of the Settlement Agreement. They have done so in the interests of their class members. They obviously do not want to see an otherwise admirable Settlement Agreement derailed or delayed by a lawyers' squabble over legal fees. Class counsel in *Riddle* have not yet agreed to any such de-linking.

[85] In the Indian Residential Schools Settlement of 2006, the supervising judges in Alberta and British Columbia, in very similar circumstances, concluded that the legal fees provision setting out the payment to class counsel should be de-linked from the rest of the settlement even if class counsel did not agree.[63] In *Northwest v. Canada*,[64] Justice McMahon described the "underlying problem" as follows:

> When the settlement for the class members is made conditional upon approval of the agreed legal fees, the class members cannot and do not receive independent legal advice as to the merits of their settlement alone. The opinion of Plaintiffs' counsel in respect of the fairness of the class settlement can be perceived to be influenced by counsel's view on the adequacy of their fees ... To ensure the independence of the advice the class members receive as to their settlement, the class settlement must be resolved first and not be made conditional upon the lawyers' fees being approved.

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[62] See discussion above at paras. 34-35.

[63] See *Northwest v. Canada (Attorney General)*, 2006 ABQB 902; and *Quatell v. Attorney General of Canada*, 2006 BCSC 1840.

[64] *Northwest, supra* note 63, at paras. 65-66.

[86] In *Quatell v. Attorney General of Canada*,[65] Chief Justice Brenner agreed and added this before going on to approve the legal fees provision:

> While I appreciate that in this case the legal fees ... are being paid by Canada and not the members of the class, it is nonetheless my view that the settlement of a class action should not be made conditional on the approval by the court of class counsel's fees. Even where the fees are to be paid by a defendant, the court retains a statutory obligation to ensure that the settlement of a class proceeding is fair, reasonable and in the best interests of the class. In order to make that determination, the court must conduct a review of the legal fees independent of the terms of the substantive settlement to ensure that both of these components meet the statutory fairness test. To do that, court approval of class counsel's fees should not be made a term of a class proceeding settlement.
>
> In this case, while I am prepared to grant the approvals as outlined earlier, I do so only after de-linking the legal fees application from the substantive settlement and after separately reviewing the extensive evidence filed in support. That evidence demonstrates the risks assumed and the amount of time and work expended by class counsel in this lengthy and difficult case. Hence I conclude that the fees ... are fair, reasonable and in the best interests of the class members.[66]

[87] My jurisdiction on this approval motion, as I have already noted, is to review the Settlement Agreement in the context of *Brown*. Given that class counsel in *Brown* have consented to de-linkage, there is no need to adopt the approach that was suggested in *Northwest* and *Quatell*. Here it is enough that the Settlement Agreement is going back to the negotiating table with the focus being the $75 million legal fees provision, at least for class counsel in *Brown*.

[88] I remain hopeful that class counsel in *Riddle* will also do the right thing and focus only on the section 11.01 legal fees provision. It would be beyond tragic if the Sixties Scoop Settlement Agreement was derailed or delayed because of an unseemly squabble among class counsel over legal fees.

Disposition

[89] The Settlement Agreement, other than the $75 million legal fees provision, is approved.

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[65] *Quatell*, *supra* note 63.

[66] *Ibid*, at paras. 17-18.

[90] The $75 million legal fees provision is excessive and unreasonable and is not approved.

[91] Class counsel in *Brown* have agreed to de-link the legal fees provision from the rest of the Settlement Agreement. I am confident that class counsel in *Riddle* will agree to do likewise and will not jeopardize the entire Agreement because a reasonable legal fees provision remains to be negotiated.

[92] The court should be advised when a revised section 11.01 has been agreed to by the parties.

Justice Edward P. Belobaba

Date: June 20, 2018

Appendix

AGREEMENT IN PRINCIPLE

THE FOUNDATION

1. Canada shall establish a Foundation in accordance with the guidelines in the *Canada Not for Profit Corporations Act.* Canada shall fund the Foundation to the extent of $50M (the "Initial Funding"); however, the Initial Funding may be augmented from other sources. The Parties agree that they will convene a separate negotiation table to particularize the objects of the Foundation (the "Foundation Table"); however, the Parties agree that the main purpose of the Foundation is to enable change and reconciliation and, in particular, access to education, healing/wellness and commemoration activities for communities and individuals. The Parties also acknowledge that the Foundation is a living entity' and may be amended from time to time to respond to the challenges of current and future needs. The Foundation is intended to complement and not duplicate government programs.

2. The Foundation Table shall consist of three (3) representative plaintiffs; two (2) plaintiffs' counsel, the Assistant Deputy Minister, Resolution and Individual Affairs for INAC or his agreed-upon designate Krista Robertson, one (1) counsel from Canada, and Justice Shore.

CLASS DEFINITION

3. All "Indians" (as per the *Indian Act* – registered or entitled to be registered) and "Inuit" who were removed from their homes in Canada from 1951 to1991 and placed in the care of non-Indigenous foster or adoptive parents.

APPROVED CLAIMANTS

4. All "Indians" (as per: the *Indian Act* – registered or entitled to be registered) and "Inuit" who were removed from their homes in Canada from 1951 to 1991 and who were adopted or made Crown wards or permanent wards and placed in the care of non- Indigenous foster or adoptive parents.

5. Individual Payments shall be made to Approved Claimants as follows:

   - Canada shall pay $500M to the Administrator (the "Designated Amount");

   - The Administrator shall pay $25,000 to each Approved Claimant (the "Base Payment");

   - Any residue after the Base Payments are made shall be distributed equally among the Approved Claimants to a maximum total payment of $50,000 to each Approved Claimant (the "Augmented Payment");

   - After payment of the Augmented Payments, any further residue shall be applied to the Foundation described in paragraphs 1 and 2.

UNLESS

The Designated Amount is insufficient to make a Base Payment to each Approved Claimant THEN Canada shall pay an amount sufficient to make a Base Payment to each Approved Claimant (the "Enhanced Amount")

HOWEVER

In no circumstances shall Canada be required to pay any amount in excess of a total of $750M for individual payments to Approved Claimants; and,

If the Enhanced Amount is not sufficient to make a Base Payment to each Approved Claimant, then the Enhanced Amount shall be divided equally among the Approved Claimants.

For greater certainty; if the number of Approved Claimants is:

- 10,000, each individual will receive $50,000;
- 15,000, each individual will receive [$33,333] ...
- 20,000, each individual will receive $25,000;
- 25,000, each individual will receive $$25,000 ...

...

NOTICE AND ADMINISTRATION

6. The Parties shall jointly agree on a notice program and administration process to be paid for by Canada to an agreed-upon maximum amount.

RELEASES

7. The class members agree to release Canada from any and all claims that have been pleaded or could have been pleaded with respect to their placement in foster care, Crown wardship or permanent wardship, and/or adoption. Such release shall include, but not be limited to, claims for: loss of language, culture, and identity, claims for sexual and physical abuse, Charter or constitutional claims, etc.

SETTLEMENT APPROVAL

8. The Parties agree that the settlement agreement shall be approved:

   a) In *Brown v. Canada* in the Ontario Superior Court of Justice; and,

   b) In an action constituted in the Federal Court consistent with the terms of the settlement agreement.

9. Furthermore, the Parties agree that class counsel shall amend all other actions to eliminate claims which will be settled in this action and seek bar orders with respect to any actions that have or may be brought against any other party where Canada may be added as a third party.

EXCEPTIONAL CIRCUMSTANCES

10. The Parties agree to establish a mechanism to consider class members who are not Approved Claimants but whose circumstances are such that they should be considered for individual payment or other relief.

OPT-OUTS

11. For each opt out who is eligible to receive an individual payment, Canada shall deduct $25,000 from the Enhanced Amount.

12. Should 2,000 class members opt out, Canada, in its sole discretion, may decide not to proceed with the settlement agreement and shall have no further obligations in this regard.

13. The Parties agree to work to minimize the number of optouts.

SOCIAL BENEFITS AND TAXATION

14. Canada shall make best efforts ensure that any Approved Claimant's entitlement to federal social benefits or social assistance benefits will not be negatively affected by receipt of an individual payment and that individual payments will not be considered taxable income within the meaning of the *Income Tax Act.*

15. Canada will use its best efforts to obtain agreement with provincial and territorial governments to the effect that the receipt of any individual payments will not affect the amount, nature, or duration of any social benefits or social assistance benefit; available or payable to any class member.

LEGAL FEES

16. Canada shall pay to class counsel 15% of the Designated Amount plus applicable GST/PST/HST as legal fees. Class counsel agree that no amount shall be taken from any payments made to Approved Claimants on account of fees. Class counsel further agree to perform any additional work required on behalf of class members at no additional charge.

Signed at Vancouver this 30th day of August 2017.

CANADA as represented by the Attorney General of Canada

BY: _____

ATTORNEY GENERAL OF CANADA

For the Defendant

BY: _____

ATTORNEY GENERAL FOR CANADA

For the Defendant

BY: _____

ATTORNEY GENERAL OF CANADA

For the Defendant

THE PLAINTIFFS, as represented by Class Counsel

BY: _____

KLEIN LAWYERS

For the Plaintiff Catriona Charlie

BY: _____

MERCHANT LAW GROUP LLP

For the Plaintiff Jessica Riddle

BY: _____

KOSKIE MISKY LLP

For the Plaintiff Wendy Lee White

BY: _____

WILSON-CHRISTEN LLP

For the Plaintiff Marcia Brown

BY: _____

MORRIS COOPER

For the Plaintiff Marcia Brown

Mediated, authorized and approved by Justice Michel M.J. Shore of the Federal Court Mediator of the matter, known as the Sixties Scoop, 1951-1991.

Michael M. J. Shore

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