Federal Court  Cour fédérale

Date: 20180621

Docket: T-2212-16

Citation: 2018 FC 641

Ottawa, Ontario, June 21, 2018

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JESSICA RIDDLE, WENDY LEE WHITE AND CATRIONA CHARLIE

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Overview

[1] This litigation is "historically unique" and was "inherently fraught with risk". This Court must take into account the fact that the claims in this class action refer to a loss of cultural identity, as it is the first time that this issue has been brought forward in *Brown v Canada (Attorney General)* in Ontario in 2009 and acknowledged as such by Justice Edward Belobaba.

> [T]his is the first case in the Western world to hold government responsible for consultation (compensation) when what is at stake is a people's children's cultural identity. [T]his is the largest award ever to answer the grievance of a people's children's loss of cultural identity.
>
> (Affidavit of M. Brown, at paras 43-44, Exhibit "113" to the Settlement Approval Affidavit of D. Rosenfeld, at para 252, Motion Record (Settlement Approval), Tab 6(113), p 2107.)

The precedents in *Brown v Canada* of Justice Belobaba are historically exemplary in their understanding of cultural identity as essential to the human personality. (The certificate 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.)

II. Introduction

[2] Subsequent to the conclusion of Settlement discussions and the proposed Foundation, in principle respectively, Prime Minister Justin Trudeau addressed the United Nations General Assembly at the United Nations headquarters on September 21, 2017. In a historic first, the Prime Minister apologized for Canada's most shameful abuse perpetrated. The Prime Minister specified the devastating legacy of the treatment of the Indigenous population.

[3] On October 6, 2017, Crown-Indigenous Relations and Northern Affairs Minister, Carolyn Bennett, made the announcement as to the Agreement-in-Principle reached on the Settlement and proposed Foundation.

[4] The travesty of Indigenous children “scooped” from their homes, communities and families was already identified and specified in Patrick Johnson’s 1983, Canadian Council on Social Development Report and also, in Justice Edwin Kimelman’s 1985 report, No Quiet Place.

[5] The loss of cultural identity of children taken from their traditional homes led to a loss of belonging. Loss of culture, language and identity led to a loss of personal and collective essence for vulnerable children who were “scooped” from 1951 to 1991. The loss of belonging took away the reason and purpose for life of individuals who lost the direction for a life journey before it could even begin. It also led to a sense of not being able to identify, thus, a loss of persona. The attempt to commit “cultural genocide” of entire Indigenous nations, as stated by former Chief Justice Beverley McLachlin, is that which she defined as “the worst stain in Canada’s human rights record”.

[6] “The most glaring blemish on the Canadian historic record related to our treatment of the First Nations that lived here at the time of colonization”. These words were spoken by the former Chief Justice of Canada at the fourth annual Pluralism Lecture of the Global Centre for Pluralism in 2006 (all of which took place under the auspices of the Aga Khan, spiritual leader of Ismaili Muslims, who founded the Centre together with the Federal Government). The Chief Justice continued by categorically stating that Canada had developed an “ethos of exclusion and cultural annihilation”.

[7] Let us not forget that which was said by the First Prime Minister of Canada, John A. Macdonald, that it was important to solve the "Indian" problem by having "to take the Indian out of the child".

[8] The aim was to remove aboriginal, religious and social traditions; forbid children to speak their native languages, not allow them to dress traditionally and subject them, thus, to a loss of a sense of belonging.

[9] Most significant when one loses one's roots, one loses the potential for wings, to soar and fulfill dreams, hopes and aspirations.

[10] A Foundation is proposed in the Settlement Agreement reached by the class representatives and the Federal Government. On the Development Board of the Foundation, the undersigned judge is simply there to implement the terms of the Agreement for the Foundation to be transferred entirely into Indigenous hands. As the Chief Justice of the Supreme Court of Canada, Beverly McLachlin, specified a judge is not only to render a judgment but to ensure that it is implemented. A judge is seized to ensure that a judgment is put into effect. The Foundation is to ensure the claim of cultural identity brings about a living entity for all Indigenous peoples in Canada, including the Métis, by which to claim a return to Indigenous languages, cultures, spiritual traditions, in addition to changing the paradigm in Canada in respect of all Indigenous peoples. To ensure that the suffering of the past will not be forgotten; that, every story, that can be told, will be told, to be remembered. That, all be done, for tears recalled of individuals not to be lost to the annals of history, but to be recorded to be remembered. This, for such an aberration

never to take place again in that which we call, civilized Canada! Every history text book from primary, secondary, college and university must include this sordid chapter of Canadian history. It is important to recall that justice cannot exist without truth; and, truth cannot exist without compassion.

[11] Reconciliation is proposed by the creation and establishment of the proposed Foundation. Thereby, to build bridges between the generations in Indigenous families and communities; thereby, to ensure that divided generations understand what had happened. The bridges, to be constructed, between the generations in Indigenous families and communities, will then produce a climate by which to understand hidden pain and suffering that caused hurt in subsequent generations. Also, a dialogue is proposed to take place between the children of victims and the children of perpetrators to ensure truth and reconciliation are brought about for a healing of our nation. (This will include the work of health professionals.)

[12] The general population, when aware of abuse, lost its humanity. A loss of conscience was thus perpetrated in the general population aware of the perpetration. Individuals of the Indigenous nations lost their cultural identity which must be made available for a homecoming for those who lost their internal and external homes.

III. Factual Background

[13] A summary of class actions in respect of the Sixties Scoop appears below:

A. *The Class Actions*

[14] Twenty-three class proceedings across Canada are at different stages in respect of the Sixties Scoop. The Federal Court and provincial Court jurisdictions are seized of the subject matter. As stated clearly and categorically by Justice Belobaba, these actions "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" (*Brown v Canada (Attorney General)*, 2013 ONSC 5637 at para 10). The proceedings, summarized below, reflect the basis of both jurisdictions, federal and provincial, thereon:

(1) The Ontario Proceedings

[15] A proposed class action was initiated on February 9, 2009, in *Brown v Canada (Attorney General)*. Damages were sought against the Federal Crown and the plaintiffs' motion for certification was conditionally approved by Justice Belobaba of the Ontario Superior Court of Justice, on May 26, 2010. Leave to appeal the certification was granted and the Ontario Divisional Court allowed the appeal in December 2011.On July 15 and 16, 2013, the parties appeared before Justice Belobaba for the purpose of rehearing the motion to certify the action as a class proceeding and the Court certified that action. On February 14, 2017, the Ontario Superior Court granted a summary judgment to the plaintiff and the class. As part of the 1965 Agreement, Canada had a common law duty of care to act reasonably in order to prevent "Indian" children in Ontario from losing their aboriginal identity.

(2) The Manitoba Proceedings

[16] A proposed class action was initiated on April 20, 2009, in *Thompson et al v Manitoba et al* by the Merchant Law Group. A second proposed class action was initiated on March 13, 2015, also by the Merchant Law Group. A proposed class action was initiated on April 20, 2016, in *Meeches et al v Canada* with Koskie Minsky LLP and Troniak Law. According to the Court, "[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*" (Affidavit of D. Rosenfeld, at paras 44-45, Motion Record, Tab 6, pp 190-191). On July 21, 2017, the Manitoba Court of Appeal dismissed the appeal of the carriage order. On October 10, 2017, a National Settlement Agreement-in-Principle had been reached under the auspices of the Federal Court of Canada and the representative class parties; thus, the certification motion return dates were no longer required.

(3) The Saskatchewan Proceedings

[17] A proposed class action was then initiated on August 22, 2011, in *Thompson v Canada* by the Merchant Law Group. Another proposed class action was initiated on December 17, 2014, in *Blue Waters v Saskatchewan et al* in Regina also by the Merchant Law Group. A proposed class action on October 7, 2016, in *Ash v Attorney General of Canada* by Koskie Minsky LLP and Sunchild Law, was also initiated. In respect of a May 18, 2017 Blue Waters Action, notice of motion was filed to quash the Ash Action appeal. On September 14, 2017, Koskie Minsky LLP informed Justice Keene that the motion for carriage should be adjourned on a *sine die* basis because an Agreement-in-Principle had by then been reached with Canada on August 30, 2017.

(4) The Alberta Proceedings

[18] On August 18, 2011, an action was initiated in the Court of Queen's Bench of Alberta in *Van Name v Alberta et al* by the Merchant Law Group. On October 6, 2016, the Koskie Minsky LLP and Ahlstrom Wright Oliver & Cooper initiated in *Glenn v Canada*. On September 5, 2017, due to the National Agreement-in-Principle, Koskie Minsky LLP specified to the Court that the decision under reserve was no longer needed.

(5) The British Columbia Proceedings

[19] On May 30, 2011, a proposed class action was initiated in *Russell v Her Majesty the Queen* by the Klein Law Firm. Furthermore, on December 16, 2016, another class action proceeding, *Tanchak v HMQ*, was initiated by the Merchant Law Group; and on March 24, 2017, a proposed class proceeding, *Jones v HMQ*, was also brought forward by the Stephen Bronstein Professional Corporation; and, on May 19, 2017, the Klein Law Firm initiated an application in the British Columbia Supreme Court to have the Tanchak and Jones Actions stayed.

B. *The Mediation*

[20] On February 1, 2017, the Federal Government announced its intention to initiate mediation in regard to the Sixties Scoop litigation across the country (Affidavit of D. Rosenfeld, at paras 124-126, 128, Motion Record, Tab 6, p 203). The Federal Court Dispute Resolution mediation took place by order of Justice Michael Manson of the Federal Court, as dated on May 3, 2017; and then, further, by consent of all plaintiff parties, and the Defendant party, the

Canadian Federal Government, Justice Michel M.J. Shore, by order of Justice Manson dated May 3, 2018, presided over the motion for settlement approval in the White Action, the Riddle Action and the Charlie Action pursuant to Rule 391 of the *Federal Courts Rules*, SOR/98-106, wherein all parties to the action consented to such with Court approval. During the mediation, a wide, all-encompassing range of comprehensive topics were discussed and negotiated:

a) confidentiality of the process;

b) carriage issues;

c) class definition;

d) class size;

e) existing programs available to status Indians;

f) the comprehensive Foundation and healing, truth-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.

(Affidavit of D. Rosenfeld, at para 139, Motion Record, Tab 6, pp 205-206.)

[21] By an order dated January 4, 2018, Justice Michel M.J. Shore consolidated the White, Riddle and Charlie Actions.

C. *The Settlement Agreement*

[22] Class Counsel and the Representative Plaintiffs have recommended that the Settlement and the Foundation be approved by this Court as fair, reasonable and in the best interests of the Class Members. The entire Settlement is found in Appendix A and the Foundation in Appendix B at the end of the Reasons for Judgment. The essential terms of the Settlement are as follows:

(1) The Foundation

[23] The purpose of the Foundation is to enable change and reconciliation as well as access to healing/wellness, commemoration and education activities for communities and individuals so as to ensure that the events giving rise to the Sixties Scoop are not repeated anywhere in Canada. The Foundation will provide funding for activities and services such as:

- (Reconciliation) assisting Sixties Scoop survivors to reunite with their families and communities;
- (Healing and Wellness) providing them opportunities to gather to participate in sharing and healing activities;
- (Commemoration) organizing conferences and expositions in order to raise awareness about the Sixties Scoop;
- (Education) and establishing scholarships to enable research, publication, learning and teaching in relation to the history of the Sixties Scoop.

(2) Eligible Class Members

[24] To be eligible to make a claim for compensation through the Settlement, one must:

- be a registered Indian (as defined in the *Indian Act*, RSC 1985, c I-5) 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
    - who was adopted or made a permanent ward and was alive on February 20, 2009.

(3) The Compensation Scheme

[25] At the outset, Canada shall transfer $500M for payment of claims to the Administrator. Depending on the number of Eligible Class Members, the Administrator will make Individual Payments to each approved claimant in the amount of either a Base Payment or an Adjusted Payment; however, Canada will not be required to pay more than seven hundred and fifty million dollars ($750,000,000.00). Depending on the number of Approved Claimants, each Eligible Class Member who submits a claim shall receive a compensation of maximum $50,000.

(4) The Claims Process

[26] The Claims Process is intended to be simple, paper-based, cost effective, user-friendly and to minimize the burden on the applicant by a one page form. Each Eligible Class Member will receive an Individual Payment by simply submitting an Individual Payment Application to the Administrator.

(5) Releases

[27] 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.

(6) Opt-outs

[28] 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.

(7) Legal Fees

[29] Canada had agreed to compensate the counsel representative parties to this Agreement in respect of their legal fees and disbursements to significantly lower fees than originally put forward by counsel, through a payment equal to fifteen percent (15%) of the Designated amount plus applicable taxes. Class counsel further agrees to perform any additional work required on behalf of class members at no additional charge. The payment of Class Counsel is from a separate Fund, created by the Federal Government, not from the Class Members.

(8) Settlement Approval

[30] The Parties agree that the Settlement per approval in *Brown v Canada* in the Ontario Superior Court of Justice and in the action constituted in the Federal Court be consistent with the terms of the Settlement Agreement.

IV. Analysis

A. *Law on Settlement Approval and Analysis*

[31] In this present application, the Court must determine whether the Settlement should be approved in accordance with Rule 334.29 of the *Federal Courts Rules*. The legal test to be applied for the approval of the Settlement "is whether the settlement is fair and reasonable and in the best interests of the class as a whole" (*Merlo v Canada*, 2017 FC 533, [2017] FCJ No. 773 at para 16 [*Merlo*]). In order to approve the Settlement, this Court acknowledges that it is guided by the following factors in the evaluation of the proposed Settlement (*Châteauneuf v Canada*, [2006] FCJ No. 363 at para 5 [*Châteauneuf*]):

a) the likelihood of success or recovery with continued litigation;

b) the amount and nature of discovery evidence or investigation;

c) settlement terms and conditions;

d) recommendations and experience of counsel involved;

e) future expense and likely duration of contested litigation;

f) the number and nature of any objections;

g) the presence of good faith and the absence of collusion;

h) the dynamics of, and positions taken during, the negotiations;

i) the risks of not unconditionally approving the settlement.

[32] The parties argue that the Settlement is fair, reasonable and in the best interests of those affected by it. The parties submit that "[t]he 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" (*Châteauneuf*, above, at para 7). "[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" (*Dabbs v Sun Life Assurance Company of Canada*, [1998] OJ No. 2811 at para 30). The parties remind the approving Court that it is not its role to differ from the terms of the Agreement "or to impose its own terms upon them" (*Manuge v Canada*, 2013 FC 341 at para 19 [*Manuge*]). The Court must also refrain from considering the interests of certain class members over the comprehensive interests of the whole class (*Manuge*, above, at para 5).

[33] It is recognized that the Settlement is presumed to be fair as it is recommended by reputable counsel with expertise *(Serhan (Trustee of) v Johnson & Johnson*, 2011 ONSC 128 at para 55). In cases such as this, "[…] 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" (*Semple v Canada*, 2006 MBQB 285 at para 3). According to the evidence, it is undeniable that "bringing closure is critical" for the survivors of the Sixties Scoop (Affidavit of Maggie Blue Waters, at paras 67, 92, Motion Record, Tab 4, pp 101, 109). Other risks may also be involved in cases such as this, where this type of settlement agreement would not be at the heart of this process:

> (a) a national certification order may not be granted;
>
> (b) a fiduciary duty may be found not to be owed, as in Ontario;
>
> (c) liability might not be established;
>
> (d) statutory limitation periods could bar many or all of the class' claims;
>
> (e) an aggregate award of damages could be denied by the court forcing class members through lengthy and protracted individual assessment;

> (f) proven damages could be similar to or far less than the settlement amounts;
>
> (g) 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.
>
> (Memorandum of Fact and Law of the Plaintiffs (Settlement Approval), at para 110.)

[34] Consequently, the Court acknowledges that without a settlement agreement, there lies the uncertainty of "further litigation and appeals" (Affidavit of J. Wilson [filed under separate cover]). "There is no assurance that at the end of this process [class members] will receive any more than they will get under these Settlement Agreements" (*McKillop and Bechard v HMQ*, 2014 ONSC 1282 at para 28 [*McKillop*]).

[35] The parties also submit that the features of the Settlement are reasonable and "multi-dimensional" as they reflect the historical and sensitive nature of these proceedings, as well as the unique circumstances of class members:

> (a) there are both monetary and non-monetary benefits to the class;
>
> (b) 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;
>
> (c) the claims process does not require proof of "harm" or "loss";
>
> (d) 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;
>
> (e) assurances to be sought from provincial governments that there shall be no social assistance governmental claw-backs on settlement funds received; and

> (f) 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.
>
> (Memorandum of Fact and Law of the Plaintiffs (Settlement Approval), at para 116.)

[36] As mentioned above, the Settlement presents a paper-based claims process. The most important feature of the Settlement allows class members to complete their forms confidentially without fear of having to testify or appear in a court in lengthy procedures. The evidence reveals that class members are often disinclined to share their tragic experiences publicly to avoid any embarrassment and humiliation (Affidavit of D. Rosenfeld, at paras 170-172, Motion Record, Tab 6, p 212).

[37] Another particular aspect of the Settlement concerns the eligibility of class members for compensation. The Settlement Agreement established an Exceptions Committee to ensure payment in compensation to Eligible Class Members, particularly, for long-term placement with non-Indigenous families resulting in cultural loss identity (Affidavit of D. Rosenfeld, at paras 185-186, Motion Record, Tab 6, pp 214-215). Evidence on this motion further explains why the provision in the Settlement solves an important issue in respect of the harm experienced by class members:

> [T]he 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 experience 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.
>
> (Affidavit of Kenneth Richard, at para 5, Exhibit “114” to the Affidavit of D. Rosenfeld, at para 258, Motion Record, Tab 6(114), p 2117.)

[38] The parties submit that although "no court has yet recognized the loss of language and culture as a recoverable tort" (*Quatell v Attorney General of Canada*, 2006 BCSC 1840 at para 9 [*Quatell*]), compensation should also involve damages for loss of language and culture due to identity loss. It is noteworthy that class members may not, however, obtain a similar benefit through contested litigation. On the basis of a limitations period, the Settlement also intends to avoid injustice by including class members, who were alive as of February 20, 2009; and, their estates can submit claims for compensation in the event that individuals have since passed away. In fact, the parties submit that there is a possibility that the "ultimate limitation" period in each province would legally forbid claims from being heard. For instance, the ultimate statutory limitation period in Alberta is 10 years pursuant to its *Limitations Act*, RSA 2000, c L-12, s 3(1)(b). The parties, therefore, reiterate the unprecedented element of this negotiated class definition that claims include events, experiences which occurred between 1951 and 1991. Lastly, the parties submit that class members will receive compensation for their pain and suffering in respect of the culture identity loss; and, it is important to mention that the payment will be considered as non-taxable income.

[39] As previously stated, the Settlement Agreement provides non-monetary benefits that will allow survivors to heal, to obtain education, to reconcile and to commemorate. In order to do so, a Foundation will be implemented in accordance with the *Canada not-for-profit Corporations Act*, SC 2009, c 23 (Final Settlement Agreement, Preamble s 3.01(2)). The Foundation shall ensure that all survivors of the Sixties Scoop will benefit from it, including Métis and non-status Indians. The purpose of the Foundation is to continue to assist survivors, as well as all Indigenous communities and individuals, on their journey of change, healing and reconciliation

(Final Settlement Agreement, Preamble s 3.01(3)). "[I]f the matter proceeds to trial, the non-monetary issues would be outside the jurisdiction of the Court" to grant (*Rideout v Health Labrador Corp.*, 2007 NLTD 150 at para 70). The Foundation provides "an invaluable opportunity for Canada-at-large, and especially indigenous people, […] by ensuring that those harms are not ever repeated" (Affidavit of Dr. R. Sinclair, at paras 7-9, Exhibit "115" to the Affidavit of D. Rosenfeld, Motion Record, Tab 6(115), p 2177).

[40] With regard to the fiduciary duty and common-law duties of care of Canada, the Supreme Court of Canada has held that it is more difficult to prove breach of fiduciary duty against a government than it is against a private actor (*Alberta v Elder Advocates of the Alberta Society et al*, 2011 SCC 24 at para 62). In fact, in a trial context, the Plaintiffs would have had to demonstrate that either (i) the fiduciary duty arose as a result of Canada's assumption of discretionary control over a specific Aboriginal interest, or (ii) that there had been an undertaking by Canada to act in the best interests of the class members (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 80 and 85). Bearing this in mind, in *Brown v Canada (Attorney General)*, 2017 ONSC 251 at para 68, Justice Belobaba concluded in the same vein on the notion of fiduciary duty:

> 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.

[41] Finally, the parties address the risks that are involved with future delays. Given the survivors' advanced ages, it becomes highly substantial to carefully consider this factor under the circumstances (*McKillop*, above, at para 28). "[I]t 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" (*Parsons et al v Canadian Red Cross Society et al*, [2000] OJ No. 2374 (SCJ) at paras 37-38). The parties submit that their recommendations ought to be approved, because "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 and in the best interests of the class" (*Clegg v HMQ Ontario*, 2016 ONSC 2662 at paras 34-35).

B. *Legal Framework on the Fees and Analysis*

[42] In order for this Court to determine whether the legal fees sought are fair and reasonable, in accordance with Rule 334.4 of the *Federal Courts Rules* (*Manuge*, above, at para 28), the following factors are to be taken into account by the Court (*Smith Estate v National Money Mart Co.*, 2011 ONCA 233 at para 80):

(a) the legal and factual complexities of the action;

(b) the risks undertaken, including that the action might not be certified;

(c) the degree of responsibility assumed by Class Counsel;

(d) the monetary value of the matters at issue;

(e) skill and competence demonstrated by Class Counsel;

(f) the results achieved;

(g) ability of the class to pay and the class expectations of fees;

(h) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation.

[43] The Court has considered the fact that the fees were discussed during a judicial mediation and that "[t]here is a prima facie presumption of fairness when a proposed settlement is negotiated at arms-length" (*CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman*, [2002] OJ No. 1855 (SCJ) at para 19).

[44] Firstly, the parties submit the total legal fee amount represents less than ten percent (10%) of the overall global payment of the Defendant (Affidavit of J. Wilson, at para 79, p 15 [filed under separate cover]). The fees sought represent approximately eight percent (8%) (Equivalent to $75 million) of the total value of the global Settlement Agreement, whereas evidence shows that the applicable Retainer Agreements mention percentage rates of 20% to 33% of the total payment (Affidavit of D. Rosenfeld, at para 107, Motion Record (Fee Approval), Tab 6, p 114). The "use of a percentage [for Class Counsel Fees] appears to be preferred because it tends to reward success and to promote early settlement" (*Manuge*, above, at para 47). This Court did consider previously approved percentages by different Courts in other cases, namely in *Dolmage, McKillop and Bechard v HMQ*, 2014 ONSC 1283 with an approval of 20.68% and in *Stanway v Wyeth Canada Inc.*, 2015 BCSC 983 with 33.33%.

[45] Secondly, the Court acknowledges the parties' insistence on the importance of providing free legal assistance to any claimant in need of assistance throughout the claims process. The parties have agreed to respect the provision (section 11.02) contained in the Settlement Agreement in this regard. Without the prior approval of the Federal Court, this provision is intended to ensure "that individual class members will get to keep the full amount of the compensation awarded to them under the settlement" (Affidavit of C. Charlie, at para 12, Motion

Record (Fee Approval), Tab 2, p 11). By providing claimants with an assistance of counsel at no charge, Counsel will need to be at their disposal for the next twelve to eighteen months until the enactment of the Settlement in order to assist class members with claim forms and to communicate with them in case they have questions (Fee Approval Affidavit of D. Rosenfeld, at para 59, Motion Record (Fee Approval), Tab 6, pp 103-104).

[46] Thirdly, this litigation is "historically unique" and was "inherently fraught with risk". This Court must take into account the fact that the claims in this class action refer to a loss of cultural identity, as it is the first time that this issue has been brought forward in *Brown v Canada (Attorney General)* in Ontario in 2009 and acknowledged as such by Justice Belobaba.

> [T]his is the first case in the Western world to hold government responsible for consultation when what is at stake is a people's children's cultural identity. [T]his is the largest award ever to answer the grievance of a people's children's loss of cultural identity.
>
> (Affidavit of M. Brown, at paras 43-44, Exhibit "113" to the Settlement Approval Affidavit of D. Rosenfeld, at para 252, Motion Record (Settlement Approval), Tab 6(113), p 2107.)

[47] The Court accepts that these cases, never presented in front of a Court before, undoubtedly pose a significant litigation risk to be assumed by Class counsel (*Manuge v Canada*, 2014 FC 341 at para 34).

[48] The Court also accepts the "risk of continued and perpetual delay in obtaining relief". Class members can benefit from the proposed settlement on which Class Counsel had worked. "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" (*McKillop*, above, at para 28). This

class action implicates a historical event that began in 1951 and "inherent delays would result in additional prejudice to the aging class members, and accordingly, a denial of access to justice" (*Anderson et al v Canada*, 2016 NLTD(G) 179 at para 53). The Court accepts that this class proceeding has given rise to specific risks with regard to the timing and the uncertainty of potential individual hearings, as well as uncertain results at trial. Class Counsel and the Federal Government's commitment in the inauguration of this Settlement, as well as its incessant efforts in negotiating the Settlement, is one of the reasons why the result achieved was successful. Class Counsel and the Federal Government were able to avoid delays and expensive costs associated with individual hearings by which to compensate class members.

[49] Class Counsel provided proof to this Court in order to demonstrate that the results achieved are in fact exemplary. These factors include a significant compensation fund with a simple one-page claims process, as well as non-monetary benefits to the class, including reconciliation, healing and commemorative activities and services in the amount of $50 million by which to begin such work. The parties protected the privacy of the claimants throughout the settlement process (*Merlo*, above, at para 27). The terms of the Settlement Agreement, the compensation fund, the simple paper-based claims process, as well as the non-monetary benefits are all compelling factors which prove that the legal fees are fair and reasonable in the case at bar:

> [N]o 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.
>
> (*Fontaine v Canada*, 2006 NUCJ 24 at para 61 [*Fontaine*].)

[50] Lastly, the legal fees are intended to "[…] encourage counsel to take on difficult and risky class action litigation" (*Abdulrahim v Air France*, 2011 ONSC 512 at para 9). It was also concluded in *Griffin v Dell Canada Inc.*, [2011] OJ No. 2487 (SCJ) at para 53 that "[…] class actions simply will not be undertaken by first rate lawyers […] unless they are assured of receiving fair – and […] "generous" – compensation in appropriate cases".

C. *Opposition to the Settlement*

(1) The right to opt-out

[51] Class members, as individuals, may opt out assuming that they are not in agreement with the proposed Settlement. "[If] they do so, they must then accept all of the risks and advantages associated with pursuit of this litigation in the courts" (*Fontaine*, above, at para 59). Bearing in mind that settlements are compromises that intend to resolve contested claims, it is not uncommon that the parties involved will not be satisfied with every element inherent in the settlement (*Quatell*, above, at paras 5-7). Class members may therefore become objectors if they oppose to the Settlement. The parties reminded this Court that it must determine whether the Settlement is fair, reasonable, and in the best interests of the class as a whole. It is therefore important that this Court carefully analyzes the benefits that the proposed Settlement will bring to the class as a whole.

(2) Individual compensation range of $25,000 to $50,000

[52] Some object to the individual damages ranging between $25,000 and $50,000. The parties submit that the quantum of compensation is fair and reasonable. As per the evidence on

this motion, even with the approval of the Settlement by Justice Belobaba in the Brown action in Ontario, "Justice Belobaba was indicating amounts in the $10,000 to $25,000 range […] and that the average paid on the common experience payment regarding Indian Residential Schools was $22,000" (Affidavit of M. Blue Waters, at para 112, Motion Record (Settlement Approval), Tab 4, p 112). Considering that the claimants would not be required to prove harm or loss in order to receive compensation, the proposed sums are "meaningful amounts of money", as per the evidence.

(3) Capped Settlement Fund at $750 Million

[53] Certain objectors disagree with the capped Settlement Fund. The parties submit that it is appropriate to cap the Settlement fund at such a high amount of $750 million as it will allow every eligible class member to receive no less than $25,000. In fact, caps on settlement funds offer benefits (i.e. interests accruing from the capped settlement fund) to class members in such a way that they receive a sum of money in excess of $25,000, and up to $50,000. The parties also submit that it is reasonable to cap the Settlement fund in this case as the feature has allowed them to establish a simple, non-complex, claims process which would otherwise not have been available in uncapped settlements. It is recognized by this Court that no amount of money whatsoever can compensate for a loss of cultural identity. This is a symbolic payment and, not one that could, with any sum, recompense suffering for the loss of persona, family, nation and thus identity.

(4) Exclusion of Métis and Non-Status Individuals

[54] Certain individuals have raised the objection that the Métis and non-status Indians are not included in the Settlement. The Settlement Agreement only applies to status Indians, according to the *Indian Act*, and the Inuit. The parties submit that the Settlement Agreement is fair for the following reasons with which the Court agrees due to that reflected below:

i. The Settlement contains a Foundation that has been implemented in Canada to serve for the benefit of every survivor of the Sixties Scoop, including Métis and non-status Indians. As per the evidence states, the purpose of the Foundation is to allow healing and reconciliation for all survivors of the Sixties Scoop;

ii. Some federal-provincial child welfare agreements do not apply to Métis and non-status Indians since the provinces do not provide child welfare services to Indians without reserve status. In *Brown v Canada (Attorney General)*, Justice Belobaba also concluded that the Ontario agreed to fund the development of the provincial welfare services only to "Indians with reserve status" (*Brown v Canada (Attorney General)*, 2013 ONSC 5637 at paras 63-71);

iii. Currently, there is no way of determining whether Métis and non-status Indians would be allowed to receive compensation;

iv. The Settlement Agreement does not affect the claims of Métis and non-status Indians against Canada. The evidence clearly states that "[n]othing in this Settlement bars a claim by Métis against the federal government, or a claim against the provincial authorities by those physically or sexually abused when adopted in

state wardship" (Affidavit of M. Brown, at para 42, Exhibit "113" to the Affidavit of D. Rosenfeld, at para 257, Motion Record, Tab 6(113), pp 2106-2107).

(5) Release of Claims for Physical and Sexual Abuse While in Care

[55] Some objectors have criticized Canada for the release of the physical and sexual abuse claims. The Court agrees that "the compensation offered by Canada in exchange for the release of all claims is fair and reasonable" (Responding Memorandum of Fact and Law of the Plaintiffs, at para 35). It is explained that Canada is not to be held liable for the physical and sexual assault experienced by the Sixties Scoop survivors as it would not be in accordance with the federal-provincial agreements. The arrangements that were set forth between the federal Crown and the provinces require only that the provinces inaugurate welfare programs available to all Indians (*Brown v Canada (Attorney General)*, 2010 ONSC 3095 at para 31). Canada, on the other hand, is responsible to provide the provinces with the necessary funding and is not to be held accountable for breach of common law duty of care.

[56] The first Sixties Scoop class action in Ontario, *Brown v Canada*, also did not implicate allegations of physical and sexual abuse while class members were in care. Evidence shows that "[Class Counsel] chose not to expand it to include a law suit for damages for abuse. […] Our claim in Ontario was limited to a loss of cultural identity and did not include the element of abuse as part of the assertion of federal liability" (Affidavit of M. Brown, at paras 31 and 42, Exhibit "113" to the Affidavit of D. Rosenfeld, Motion Record (Settlement Approval), Tab 6(113), pp 2103 and 2107). Consequently, class members can still present such claims against

the provinces, not Canada, in order to receive compensation for the physical and sexual abuse suffered.

(6) Claimants' Choice of Counsel through Claims Process

[57] Certain individuals have raised the objection that they are entitled to choose their own lawyers for these class proceedings, and that these lawyers should be paid from the compensation granted to claimants. According to section 11.03 of the Settlement Agreement, "[n]o fee may be charged to Class Members in relation to claims under this Agreement by counsel not listed on Schedule "K" without prior approval of the Federal Court". As a result, pursuant to Rule 369 of the *Federal Court Rules*, leave from the Court is required if legal fees are to be paid from claimants' individual compensation. The parties submit that the purpose of section 11.03 is to protect the claimants from lawyers' misconduct and to prevent the overcharging of legal fees which had arisen from the Indian Residential Schools Settlement claims process. The evidence on this motion clearly indicates that "[t]he structure of the proposed settlement is such that an amount for legal fees will be paid up front by Canada, with no counsel being permitted to charge further legal fees against individual payments, without prior authorization from the court" (Affidavit of M. Reiher, at para 33, Motion Record (Settlement Approval), Tab 5, p 156).

[58] According to the evidence on this motion, "the court will be called on to approve fees that are proposed to be charged so that amounts are reasonable and claimants are not surprised by dramatically reduced pay outs" (Affidavit of M. Reiher, at para 35, Motion Record (Settlement Approval), Tab 5, p 156). Class counsel from all across Canada made a commitment to assist,

free of charge, every class member in the understanding of the Settlement Agreement, as well as in the completion of the claim forms. Class members will also have access to free legal services provided by twelve Indigenous Liaison Officers in each province and territory (Plan of Administration, Exhibit "A" to the Affidavit of L. Seto, Supplemental Motion Record (Settlement Approval), Tab 6(A), p 53).

(7) Legal Fees to Class Counsel

[59] Some object to the quantum of legal fees. The Court agrees that the fees sought are fair and reasonable, mainly because class counsel will remain available to the claimants following the approval of the Settlement and because the requested fees are less than 10% of the overall global payment. All of which the Court accepted, recognizing that no legal fees whatsoever would be permitted against individual payments without prior authorization of this Court.

(8) Class Definition and Cut-Off Date for the Deceased

[60] Some individuals object to the cut-off date of February 20, 2009, because they claim that persons (or their estates) who were deceased prior to this date should also be considered as eligible claimants. It is accepted by the Court that one of the reasons why the parties chose the cut-off date to be February 20, 2009 is due to the Brown action which was commenced on that same date in Ontario. Moreover, in *Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481 (SCJ) at paras 82-84, Justice Winkler addressed a similar objection such as the one at bar:

> […] The proposed settlement would exclude the estates of such persons from making claims under the CEP program or the IAP. […] While it is not uncommon, or necessarily objectionable, to draw distinctions between class members for the purposes of

> distributing compensation from a global fund, in those cases where a distinction is drawn, compensation is usually paid to claimants on both sides of the divide albeit in reduced amounts on one side.

[61] Therefore, the Definition of "Eligible Class Member", as found in the Settlement, allows estates to make claims, whereas, without the inclusion of such date, they would not have been eligible to receive any funds.

(9) Claimants' Ability to Retrieve Personal Records

[62] Certain objectors are concerned about the difficulty and the complexity in retrieving personal records in order to make their claim for compensation. These records are held with Canada, the provinces and the provincial Children's Aid Society. The parties did acknowledge this hardship and took the necessary actions in order to accommodate the class members. "[W]ith the Settlement's provision [the] burden to obtain records is not upon the Class member, rather, it is upon the governments" (Affidavit of K. Richard, at para 7, Exhibit "A" to the Affidavit of J. Riddle, Motion Record (Settlement Approval), Tab 7(A), p 2198). Said otherwise, the evidence clearly states that survivors of the Sixties Scoop will not be encumbered by the task of requesting their official records in order to establish the fact of permanent wardship or adoption (Affidavit of Dr. Raven Sinclair, at para 12(e), Exhibit "115" to the Affidavit of D. Rosenfeld, at para 254, Motion Record (Settlement Approval), Tab 6(115), p 2178). Further steps, it is agreed by the Court, have also been taken in such a way that the process for verification of class members will be streamlined. By shifting the burden of proof onto the governments, it is recognized that "if [class members] have no record, [it] creates a process that assures me no indigenous person who lost their spirit and being will be denied recognition because of no record" (Affidavit of M.

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

(10) Maintaining a Historical Archive of Stories and Experiences

[63] Certain individuals are concerned with the loss of personal stories and experiences present in the historical record. One of the main and key, primary objectives of the Foundation is to encourage survivors of the Sixties Scoop to share their stories for the purposes of commemoration and healing. Past jurisprudence demonstrates that none of the Foundation's initiatives would have been available to class members through contested litigation (*Rideau v Health Labrador Corp.*, 2007 NLTD 150 at para 70). The importance and value of the Foundation were also described by a class member, stating that "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 wrongs (sic) to continue to grow our essence" (Affidavit of M. Blue Waters, at para 96, Motion Record (Settlement Approval), Tab 4, p 110).

(11) Mediator as Settlement Approval Judge

[64] Certain individuals were dissatisfied that the undersigned, Justice Michel M.J. Shore, was not only the mediator for the proposed Settlement, but was also the presiding judge at the Settlement approval hearing. With respect to Rule 391 of the *Federal Court Rules*, all parties (Class Counsel and the Respondents) to the action had given their consent prior to the hearing for Settlement approval. An order, confirming the parties' consent, had been signed and approved by

Justice Manson. The evidence also demonstrates that Justice Shore, through an order of the Court, on May 3, 2017, was designated to conduct the Dispute Resolution Conference by Justice Manson prior to sitting on the approval of the Settlement by order of May 3, 2018, exactly one year later.

(12) Consultation

[65] Certain objectors stated their discontent for not being formally consulted about the Settlement Agreement. According to jurisprudence in class actions, such legal duty is non-existent for such proceedings (*Sondhi v Deloitte Management Services LP*, 2018 ONSC 271 at para 78); however, class members were given the opportunity to be heard by the Court, as solely to objections to the Settlement. Moreover, survivors of the Sixties Scoop will continue to be consulted for the inauguration of the Foundation as some of them are also members of the Development Board. The Foundation intends to "provid[e] survivors of the Sixties Scoop and their families with "Telling Our Stories" platforms that promote their own healing and that serve as a gift to future generations". This is to ensure that each and every story that can be told, will be told; and, kept in the annals of Canadian history. By the recounting of the stories, suffering will, at least, have meaning, by a duty to keep the stories alive for those whose stories can be told, as voices of witnesses to history that will thereby remain alive, through narratives to be kept; and, suffering never to be forgotten.

[66] For all the reasons specified above, this Court certifies this action as a class proceeding, approves the Settlement with modification as per the order of the undersigned of May 11, 2018, in respect of dissemination of information of the Settlement to every part of Canada where

Indigenous individuals reside, or can be found, in addition to meticulous oversight in respect of funds to be distributed, to ensure that each and every eligible person as per the Settlement receives the payment allotted for such. The Court also dismisses the action against Canada on a without costs basis.

ORDER in T-2212-16 rendered on May 11, 2018

WHEREAS by Order of Justice Michael D. Manson of this Court, dated May 3, 2018 and by consent of the parties before the Court, the mediator, Justice Michel M.J. Shore, shall preside over the motion for settlement approval in this action in accordance with section 391 of the *Federal Courts Rules*;

AND WHEREAS the Plaintiffs and the Defendant have entered into the Settlement Agreement in respect of the Plaintiffs' claims against the Defendant;

AND WHEREAS this Court approved the form of notice and plan for distribution of the notice of this motion by Order dated January 11, 2018 (the "**Notice Order**");

UPON HEARING the motion made by the Plaintiffs, on consent, for an order: (a) certifying this action as a class proceeding for settlement purposes; (b) approving the settlement agreement dated November 30, 2017 between the parties (the "**Settlement Agreement**" or "**Settlement**"); and (c) approving the notice of this settlement, the opt out and claims period and other ancillary orders to facilitate the Settlement;

AND UPON READING the joint motion records of the parties and the facta of the parties;

AND UPON BEING ADVISED of the Defendant's consent to the form of this Order;

AND WITHOUT ADMISSION OF LIABILITY on the part of the Defendant;

AND UPON HEARING the oral submissions of counsel for the Plaintiffs, counsel for the Defendant, all interested parties, including objections, written and oral.

IT IS ADJUDGED THAT:

1) For the purposes of this Order, the following definitions shall apply:

(i) "**Approval Date**" means the date that this Court approved the Settlement Agreement;

(ii) "**Approval Orders**" means this order and the order approving the Settlement Agreement in *Brown v Canada* (Court File No. CV09-00372025-00CP);

(iii) "**Brown Class Members**" means members of the class proceeding in the Ontario Superior Court of Justice, *Brown v Canada* (Court File No. CV-09-00372025-00CP) who did not opt out of that proceeding;

(iv) "**Canada**" means the Defendant, the Government of Canada, as represented in this proceeding by Her Majesty the Queen;

(v) "**Class Actions**" mean:

(a) *Wendy Lee White v The Attorney General of Canada* (Court File No. T-294-17);

(b) *Jessica Riddle v Her Majesty the Queen* (Court File No. T-2212-16);

(c) *Catriona Charlie v Her Majesty the Queen* (Court File No. T-421-17);

(d) *Meeches et al v The Attorney General of Canada* (Court File No. CI 16-01-01540);

(e) *Maggie Blue Waters v Her Majesty the Queen in Right of Canada et a.* (Court File No. QBG 2635/14);

(f) *David Chartrand, Lynn Thompson, and Laurie-Anne O'Cheek v Her Majesty the Queen et al* (Court File No. CI 15-01-94427);

(g) *Pelletier v Attorney General of Canada* (Court File No. QGB 631/17);

(h) *Simon Ash v Attorney General of Canada* (Court File No. QBC 2487/16);

(i) *Ashlyne Hunt v Her Majesty the Queen in Right of Alberta* (Court File No. 1101-11452);

(j) *Sarah Glenn v Attorney General of Canada* (Court File No. 1601-13286);

(k) *Skogamhallait also known as Sharon Russell v The Attorney General of Canada* (Court File No. VLC-S-S113566);

(l) *Linda Lou Flewin v Attorney General of Canada e al* (Court File No. Hfx 458720);

(m) *Sarah Tanchak v Attorney General of Canada et al* (Court File No. 186178 Victoria);

(n) *Mary-Ann Ward v The Attorney General of Canada et al* (Court File No. 500-08-000829-164 Montreal); and

(o) *Catherine Morriseau v Her Majesty the Queen in Right of Ontario and Attorney General of Canada* (Court File No. CV-16-565598-00CP).

(vi) "**Class**" or "**Class Members**" means all Indian (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 in the Ontario Superior Court of Justice styled as *Brown v The Attorney General of Canada* (Court File Number CV-09-00372025CP);

(vii) "**Implementation Date**" means the latest of:

(a) thirty (30) days following the expiry of the Opt Out Period;

(b) the date following the last day on which a Class Member may appeal or seek leave to appeal either of the Approval Orders;

(c) the date of a final determination of any appeal brought in relation to the Approval Orders.

(viii) "**Opt Out Period**" or "**Opt Out Deadline**" means the period commencing on the Approval Date and ending ninety days after the Approval Date, during which a Class Member may opt out of this class proceeding, without leave of this Court;

(ix) "**Releasees**" means individually and collectively, Canada, and each of the past, present and future Ministers of the federal government, its Departments and Agencies, employees, agents, officers, officials, subrogees, representatives, volunteers, administrators and assigns;

(x) "**Settlement Agreement**" means the Settlement Agreement dated November 30, 2017, attached as **Schedule "A"** to this Order; and

(xi) "**Settlement Fund**" means the settlement fund established pursuant to section 4.01 of the Settlement Agreement.

2) All applicable parties have adhered to and acted in accordance with the Notice Order and the procedures provided in the Notice Order have constituted good and sufficient notice of the hearing of this motion.

CERTIFICATION

3) This action is hereby certified as a class proceeding for the purposes of settlement pursuant to section 334.16(1) of the *Federal Courts Rules*.

4) The Class is defined as:

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

5) The representative plaintiffs hereby appointed are Wendy White, Jessica Riddle, and Catriona Charlie who constitute adequate representative plaintiffs of the Class.

6) Klein Lawyers LLP, Koskie Minsky LLP and Merchant Law Group LLP are appointed as Class Counsel.

7) The claims asserted on behalf of the Class against the Defendant are: (a) negligence; and (b) breach of fiduciary duty.

8) For the purposes of settlement, this proceeding is certified on the basis of the following common issue:

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?

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

SETTLEMENT APPROVAL

10) The Settlement Agreement is fair, reasonable and in the best interests of the Plaintiffs and the Class Members.

11) The Settlement Agreement, which is expressly incorporated by reference into this Order, shall be and hereby is approved and shall be implemented in accordance with this Order and further orders of this Court.

12) The claims of the Class Members and the Class as a whole, shall be discontinued against the Defendant and are released against the Releasees in accordance with section 10.01 of the Settlement Agreement, in particular as follows:

(i) Each Class Member and his/her Estate Executor and heirs (hereinafter "**Releasors**") has fully, finally and forever released Canada, her servants, agents, officers and employees, from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including for damages, contribution, indemnity, costs, expenses and interest which any such Releasor ever had, now has, or may hereafter have, directly or indirectly arising from or in any way relating to or by way of any subrogated or assigned right or otherwise in relation to the Sixties Scoop and this release includes any such claim made or that could have been made in any proceeding including the Class Actions whether asserted directly by the Releasor or by any other person, group or legal entity on behalf of or as representative for the Releasor.

(ii) This Agreement does not preclude claims against any third party that are restricted to whatever such third party may be directly liable for, and that do not include whatever such third party can be jointly liable for together with Canada, such that the third party has no basis to seek contribution, indemnity or relief over by way of equitable subrogation, declaratory relief or otherwise against Canada.

(iii) For greater certainty, the Releasors are deemed to agree that if they make any claim or demand or take any actions or proceedings against another person or persons in which any claim could arise against Canada for damages or contribution or indemnity and/or other relief over under the provisions of the *Negligence Act*, RSO 1990, c N-3, or its counterpart in other jurisdictions, the

common law, Quebec civil law or any other statute of Ontario or any other jurisdiction in relation to the Sixties Scoop, including any claim against provinces or territories or other entities for abuse while in care; then, the Releasors will expressly limit their claims to exclude any portion of Canada's responsibility.

(iv) Canada's obligations and liabilities under this Agreement constitute the consideration for the releases and other matters referred to in this Agreement and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Releasors are limited to the benefits provided and compensation payable pursuant to this Agreement, in whole or in part, as their only recourse on account of any and all such actions, causes of actions, liabilities, claims and demands.

13) This Settlement Agreement does not compromise any claims that Class Members have against any Province, Territory or any other entity, other than as expressly stated herein.

14) This Agreement does not affect the rights of:

(i) Class Members who opt out of any class action that is certified pursuant to this Settlement Agreement; or

(ii) Individuals who are not Class Members.

15) This Order, including the releases referred to in paragraph 12 above, and the Settlement Agreement are binding upon all Class Members, including those persons who are under a disability.

16) The claims of the Class Members are dismissed against the Defendant, without costs and with prejudice and such dismissal shall be a defence to any subsequent action in respect of the subject matter hereof.

17) This Court, without in any way affecting the finality of this Order, reserves exclusive and continuing jurisdiction over this action, the Plaintiffs, all of the Class Members, and the Defendant for the limited purposes of implementing the Settlement Agreement and enforcing and administering the Settlement Agreement and this Order.

18) Save as set out above, leave is granted to discontinue this action against the Defendant without costs and with prejudice, and that such discontinuance shall be an absolute bar to any subsequent actions against the Defendant in respect of the subject matter hereof.

19) Collectiva Class Action Services Inc. shall be and hereby is appointed as Claims Administrator pursuant to the Settlement Agreement. A complete, significant, and detailed review must take place in regard to the Administrator for all eventual work pertaining to the Administrator's responsibilities, to ensure accurate and effective, wide dissemination of meaningful and pertinent information to the attention of all those who have gone through the "Sixties Scoop" and heirs to those who have been subjected to the "Sixties Scoop" as specified in the Settlement; and, in addition, to supervise and monitor all future work that must be carried out by the Administrator as it pertains to individual payments to Class Members, heirs and others as respectfully specified in the Settlement who will be part of the Exceptions category. The fees, disbursements and applicable taxes of the Claims Administrator shall be paid by the Defendant in accordance with section 6.06 of the Settlement Agreement.

20) No person may bring any action or take any proceeding against the Administrator, the Foundation Table, the Exceptions Committee or the members of such bodies, the adjudicators, or any employees, agents, partners, associates, representatives, successors or assigns, for any matter in any way relating to the Settlement Agreement, the administration of the Settlement Agreement or the implementation of this judgment, except with leave of this Court on notice to all affected parties.

21) In the event that the number of persons who appear to be eligible for compensation under the Settlement Agreement who opt out of this class proceeding and the Ontario Action exceeds two thousand (2,000), the Settlement Agreement will be void and this judgment will be set aside in its entirety, subject only to the right of Canada, at its sole discretion, to waive compliance with section 5.09 of the Settlement Agreement.

22) Rule 334.21(2) does not apply to the plaintiffs in the Class Actions, and those plaintiffs are not excluded from this proceeding despite not having discontinued their parallel Class Actions prior to the Opt Out Deadline.

23) The fees payable to Class Counsel are hereby set at $37,500,000.00 ($37.5 million) in respect of legal fees plus applicable taxes, inclusive of disbursements, payable as follows:

(i) $12,500,000.00 to Klein Lawyers LLP;

(ii) $12,500,000.00 to Koskie Minsky LLP; and

(iii) $12,500,000.00 to Merchant Law Group LLP.

24) The amounts set out in paragraph 23 shall be paid by the Defendant to Class Counsel on the Implementation Date in accordance with the Settlement Agreement. The amounts set out in paragraph 23 shall be in addition to the funding in section 4.01 of the Settlement Agreement.

25) No counsel or law firm listed in **Schedule "K"** to the Settlement Agreement or who accepts a payment for legal fees from Canada will charge any Class Member any fees or disbursements in respect of an Individual Payment. Each counsel listed in **Schedule "K"** to the Settlement Agreement undertakes to make no further charge for legal work for any Class Member with respect to claims under this Agreement.

26) Notice in the manner attached hereto as **Schedule "B"** shall be given of this judgment, the approval of the Settlement Agreement, the opt out period and the claims period by the commencement of the Notice Plan attached here to **Schedule "C"**, at the expense of Canada.

27) This Court may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Settlement Agreement and this Order.

28) Class Counsel shall report back to the Court on the administration of the Settlement Agreement at reasonable intervals not less than semi-annually, as requested by the Court and upon the completion of the administration of the Settlement Agreement.

29) The representative Plaintiffs Wendy White, Jessica Riddle, and Catriona Charlie shall each receive the sum of $10,000 as an honorarium to be paid by the Defendant out of the settlement fund.

30) The proposed representative plaintiffs in the Provincial Class Actions shall each receive the sum of $10,000 as an honorarium to be paid by the Defendant out of the settlement fund.

31) This Order will be rendered null and void in the event that the Settlement Agreement is not approved in substantially the same terms by way of order of the Ontario Superior Court of Justice.

32) The statutory provisions of the *Federal Courts Act*, RSC 1985, c F-7 and the *Federal Courts Rules*, SOR/98-106 shall apply in their entirety to the supervision, operation, and implementation of the Settlement Agreement and this Order.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2212-16
STYLE OF CAUSE:	JESSICA RIDDLE, WENDY LEE WHITE AND CATRIONA CHARLIE v HER MAJESTY THE QUEEN
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	MAY 10 AND 11, 2018
ORDER AND REASONS:	SHORE J.
DATED:	JUNE 21, 2018

APPEARANCES:

E. F. Anthony Merchant Evatt Merchant	FOR THE PLAINTIFF (JESSICA RIDDLE)
Celeste Poltak Garth F. Myers Kirk M. Baert	FOR THE PLAINTIFF (WENDY LEE WHITE)
David A. Klein Angela Bespflug	FOR THE PLAINTIFF (CATRIONA CHARLIE)
Catharine Moore Travis Henderson	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Merchant Law Group Saskatoon, Saskatchewan	FOR THE PLAINTIFF (JESSICA RIDDLE)
Koskie Minsky Barrister and Solicitor Saskatoon, Saskatchewan	FOR THE PLAINTIFF (WENDY LEE WHITE)
Klein Lawyers Barristers and Solicitors Saskatoon, Saskatchewan	FOR THE PLAINTIFF (CATRIONA CHARLIE)
Attorney General of Canada Saskatoon, Saskatchewan	FOR THE DEFENDANT