Federal Court  Cour fédérale

Date: 20190819

Docket: T-2169-16

Citation: 2019 FC 1075

CLASS PROCEEDING

BETWEEN:

GARRY LESLIE MCLEAN,
ROGER AUGUSTINE,
CLAUDETTE COMMANDA,
ANGELA ELIZABETH SIMONE SAMPSON,
MARGARET ANNE SWAN and
MARIETTE LUCILLE BUCKSHOT

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR APPROVAL ORDER

PHELAN J.

I. Introduction

[1] This settlement agreement is the culmination of litigation concerning tragic, scarring events in the lives of those who attended Indian Day Schools. These events include mockery, belittlement, and physical, sexual, cultural and emotional abuse, which are soul damaging. Healing will be a long-term process at best.

[2] This case involves allegations of assault, abuse and mistreatment of children who are our most precious gift.

[3] It is not possible to take the pain and suffering away and heal the bodies and spirits, certainly not in this proceeding. The best that can be done is to have a fair and reasonable settlement of the litigation.

[4] This proceeding is a motion to approve a settlement agreement [Settlement Agreement or Settlement] pursuant to Rule 334.29(1) of the *Federal Courts Rules*, SOR/98-106, dismiss the claims of Class Members against the Defendant without costs and with prejudice, and other procedural steps that flow from the approval of the Settlement.

[5] The Settlement Agreement to be approved is the agreement of March 12, 2019, as amended by the Amending Agreement dated May 13, 2019.

Since the conclusion of the hearing, the parties have worked to finalize the text of certain schedules, most particularly Schedule K, the final version of which, as well as others, form part of the Court's Approval Order.

II. Overview

[6] For over 50 years, many Indigenous children were compelled to attend day schools [Indian Day Schools] operated by the Defendant. The principal difference between Indian Day School students and Residential School students is that Day School students went home at night.

[7] Although the Defendant does not admit liability in the Settlement Agreement, the Settlement acknowledges that children were divided from their families and culture and were denied their heritage. Many were physically, emotionally and sexually abused.

[8] The proposed settlement represents access to justice for a class of approximately 120,000 aging people [Survivor Class Members] and their spouses, children, and grandchildren [Family Class Members]. Indian Day School students were not included in the now famous Indian Residential School Settlement [IRSS]. However, many of the same abuses recognized in the IRSS were inflicted on those attending Indian Day Schools.

[9] The lessons learned from some of the well-recognized problems of the concept and operation of the IRSS were reflected in this Indian Day Schools Settlement Agreement. While there is criticism of the Settlement Agreement, no agreement can be perfect and the law recognizes that reality in the legal standard set for approval. The law also recognizes that the

Settlement Agreement is a compromise of competing interests and that it is not the role of the Court to meddle in or tinker with the agreed terms (*Châteauneuf v R*, 2006 FC 286 at para 7, [2006] FCJ No 363 [*Châteauneuf*]). The Court must either accept or reject the settlement as a whole, except for its approval of counsel fees, which are severable from the rest of this Settlement.

[10] In summary, this Settlement will make over $1.47 billion available to compensate survivors and their families. The compensation process is designed to be a relatively simple, paper-based process administered by a Court-approved Claims Administrator and supported by Class Counsel, a highly regarded large national law firm who, through their involvement in the creation of the Settlement, has in-depth knowledge and appreciation of the issues to be addressed and the resources needed to carry out their obligations.

[11] As explained to the Court, the process is designed to be expeditious and to avoid the re-traumatization and hardship experienced by many who made claims through the IRSS.

[12] A critical feature of this Settlement is a Legacy Fund which will provide $200 million in funding for healing/wellness support and language and cultural initiatives as part of an overall approach to recognition, compensation and personal resolution.

[13] This Court has concluded in these Reasons that the provisions of the Settlement other than the counsel fees provisions are fair, reasonable and in the best interests of the Class. A separate Order and Reasons will issue with respect to the approval of counsel fees.

III. Background

A. *Indian Day Schools*

[14] Beginning in 1920, Canada established, funded, controlled and maintained a system of day schools for the compulsory education of Indigenous children across the country - the Indian Day Schools. These schools were called “Federal Indian Day Schools” in the southern part of the country, while in the North (the Territories and Northern Quebec) they were generally referred to as “Federal Day Schools”.

[15] Attendance at these schools was, as expected, compulsory. However, truancy resulted in punishment for not only the student but also for the family including the cancellation of the “allowance” to which parents were entitled.

[16] Approximately 190,000 children attended these schools and approximately 127,000 of those children were living as of October 2017. The sad fact is that with the passage of time approximately 1,800 such survivors die each year; this number will steadily increase annually with time.

[17] Canada funded the schools, paying for such matters as teachers’ salaries and bonuses, compensation for administration personnel, and the construction and maintenance of schools. Although many schools were associated with churches of various denominations, almost all schools were ultimately supervised and administered by Indian Agents who were required to

conduct monthly inspections and prepare associated reports for the federal department responsible.

[18] Beginning in the 1960s and continuing for the following two decades, Canada transferred the funding and control of these schools to the provinces, territories, and Indigenous governments.

[19] These schools had profoundly negative effects on many of their students. The representative plaintiffs were exposed to a program of denigration, psychological abuse and physical violence often for such simple things as speaking their own language to others of their community at the schools. This experience had a deep and lasting impact on the representative plaintiffs, impairing their sense of self-worth and impeding their relationships with others and leading to personal issues with substance abuse among the many ills that resulted from that abuse.

[20] In the course of the approval hearing process and at the hearing itself, the Court heard brief narratives of a similar nature, both from supporters and objectors to the Settlement. While it was not the function of the settlement hearing to delve into the personal “truths” of Class Members, their submissions were entirely consistent with the experience of the representative plaintiffs.

[21] The time for exploring the individual experiences of Survivor Class Members is both through the claims process and under the auspices of the Legacy Fund. The settlement approval process has a different objective.

B. *History of the Action*

[22] The history of the action gives context to the Settlement.

[23] The harms experienced by Indian Day School survivors were much the same as those outlined in the IRSS; however, the Indian Day School survivors were largely left out of this earlier settlement.

[24] As a result, Garry McLean, Ray Mason and Margaret Swan decided to initiate a class proceeding in Manitoba. Mr. Mason and Ms. Swan testified in these settlement proceedings. Sadly, Mr. McLean passed away this February.

[25] For almost seven years the action lay fallow; the then counsel had considerable difficulty marshalling the resources to carry on the litigation and no other firms were prepared to assist or take it on.

[26] As a result, the plaintiffs retained new Class Counsel, Gowling WLG [Gowling].

[27] Under Gowling's guidance, the action in this Court was commenced on December 15, 2016.

[28] While information gathering meetings were conducted between Class Counsel and Canada's counsel, a certification hearing was scheduled for October 2018. This action was certified on consent on June 21, 2018.

C. *Nature of the Claim/Damages*

[29] The Statement of Claim at first review pleaded very broad causes of action. This led to some confusion as to the scope of the litigation, the breadth of the remedies and the nature of any release which would be required.

[30] There was particular concern for the impact of this litigation on Aboriginal and treaty rights.

[31] However, as became clear through the Settlement Agreement, this litigation and the Settlement became essentially a tort-based claim in the nature of assault, systemic negligence and breach of fiduciary duties resulting in physical and psychological abuse specific to each class member.

[32] Canada made it clear that in respect of settlement, only individual rights were at issue. There was no impact on any collectively-held Aboriginal or treaty rights.

[33] This position was reaffirmed to the Federal Court of Appeal and referred to in its judgments in *Cree Nation of Eeyou Istchee (General Council) v McLean*, 2019 FCA 185;

Nunavut Tunngavik Incorporated v McLean, 2019 FCA 186; and *Whapmagoostui First Nation v McLean*, 2019 FCA 187, issued June 20, 2019.

D. *Settlement Negotiations*

[34] Settlement negotiations commenced in August 2018 and consumed seventeen (17) days over the period from August 2018 to December 2018, after which an agreement in principle was concluded.

[35] I am satisfied, based on the record before the Court, that issues which ranged from quantum to implementation were complex and difficult. As difficult as it may be for those who lived through the harmful aspect of the Indian Day School system, compromise was necessary to reach this settlement.

E. *Settlement Agreement—Key Provisions and Amendments*

(1) Basics

[36] Compensation is available to Survivor Class Members who experienced harm associated with attending a Federal Indian Day School listed in Schedule K of the Settlement during the Class Period. Compensation is based on a grid or levels of harm - the range having been established having regard to damage awards for somewhat similar harms. The range is from $10,000 for Level 1 to $200,000 for Level 5.

[37] Canada will provide $1.27 billion initially, and up to $1.4 billion if required, for Level 1 claims and an unlimited amount for Level 2-5 claims.

[38] The “Class Period” runs from January 1, 1920 until the date of closure or relinquishment of control by Canada of any particular day school or, if not transferred from Canada, the date on which the written offer of transfer by Canada was not accepted by the First Nation or Indigenous government.

[39] If a Survivor Class Member dies on or after July 31, 2007, their Estate Executor is still eligible to be paid the compensation to which the Survivor Class Member would have been entitled.

[40] Schedule K to the Settlement lists the Federal Indian Day Schools and the Class Period associated with each school. While concern was expressed by those opposing approval that some schools had been omitted from Schedule K, that list has continued to be updated. The list will close as of the issuance of this Court’s Approval Order in order to give certainty to the definition for Class Members. Those survivors whose schools are not included in Schedule K or did not attend a listed school during the defined Class Period are not defined as Survivor Class Members under the Settlement and therefore will not receive compensation and will not be bound by the Settlement Agreement. Following approval, there is a mechanism for the Exceptions Committee to refer applications to the parties that have been rejected because a claimant’s school or attendance period was not included in Schedule K. The parties can then agree to amend Schedule K with approval of the Court.

(2) Claims Process

[41] The claims process "is intended to be expeditious, cost effective, user-friendly and culturally sensitive" according to the Settlement Agreement. All reasonable and favourable inferences that can be drawn in favour of a claimant are to be drawn and doubt is to be resolved in favour of a claimant.

[42] The Claims Deadline was initially one (1) year after the "Implementation Date". This provision attracted considerable opposition and was amended to two and a half (2.5) years after the Implementation Date.

[43] The claims process is based on a simple claim form on which claimants self identify a single level of compensation. There is a requirement to provide supporting evidence that increases with the level of compensation claimed.

[44] After submission to the Claims Administrator, the claim proceeds to processing including a determination of the appropriate level of compensation. In my view, the process is relatively straightforward and mechanisms will be in place to handle issues such as necessary documentation and potential disagreement with the compensation level.

[45] A review process is contemplated for such cases permitting reconsideration by the Claims Administrator, a first tier review by a Third Party Assessor, and a second tier appeal to an

Exceptions Committee, which has one Survivor Class member, one member of Class Counsel, one member of Canada's counsel, and a fourth agreed upon individual.

(3) Counsel Fees

[46] Based at least in part on some of the difficulties with various counsel and with legal fees arising from the IRSS, the parties set up a somewhat unique regime for counsel fees for individual claims following settlement approval. It was the subject of objections to which further comment will be directed.

[47] Class Counsel will, after settlement approval, be available to Class Members if they require assistance at no cost. In addition to the Class Counsel legal fees of $55 million in fees and disbursements, a further $7 million will be paid in trust to Class Counsel for post-implementation services for four (4) years following the Implementation Date. These counsel fee provisions are severable from the rest of the Settlement, meaning the Court could approve the rest of Settlement separate from the approval of counsel fees.

[48] No legal fees or disbursements are to be charged to Class Members (Survivors and Family) other than the fees provided to Class Counsel without prior approval of this Court. The provision attracted much opposition from various legal counsel and their supporters.

(4) Opt-Out Provision

[49] An important right enshrined in this Court's class action rules is the right of any class member to opt out of the Settlement after which they may pursue their own claim independent of the Settlement.

[50] The original opt-out period was amended from 60 days after Court approval of the Settlement to 90 days.

[51] If the number of Survivor Class Members opting out exceeds 10,000, the Settlement is void and the Court's approval order is set aside, unless Canada waives compliance with this provision within 30 days of the opt-out period. The threshold is high but at less than 10% of potential claimants, it is a reasonable threshold.

(5) Legacy Fund

[52] Similar to the situation in the Sixties Scoop settlement approval in *Riddle v Canada*, 2018 FC 641, 296 ACWS (3d) 36 [*Riddle*], Canada will provide a $200 million Legacy Fund to the McLean Day Schools Settlement Corporation (a not for profit corporation) to support (1) commemoration events; (2) wellness/healing projects; and (3) the restoration of Indigenous languages and culture. The directors of the corporation will appoint an Advisory Committee comprised of Indigenous survivors and their families to provide guidance on grant applications and support with legacy projects.

[53] The Legacy Fund is the vehicle through which Class Members will be able to tell their story and hopefully start some element of long-term healing.

(6) Statements of Support and Objections

[54] As part of the approval process, Class Members were invited to file Statements of Support and Objection Forms. The Court approved the Statement of Support form and Objection Form in its order of March 13, 2019, which approved the notice of certification and settlement approval hearing.

[55] The forms were available in English, French and certain Indigenous languages including Cree, Ojibwe, Dene, Inuktitut and Mi'kmaq.

[56] Approximately 3,360 Statements of Support and 2,485 Objection Forms were received, the bulk of which were postmarked before the deadline set by the Court of May 3, 2019.

[57] Of the 1,247 objection forms received in the 24 hours prior to the deadline, 903 listed their legal representation. Of those listing legal representation, 810 were sent by or listed their legal counsel as Sunchild Law or Kirkby Fourie Coertze Law.

[58] The majority of objectors adopted a variation of 15 concerns set out by Sunchild Law or through a notice which they distributed.

[59] Of the approximately 2,485 objections, 1,844 objected to the terms of the Settlement and 1,016 objected to the counsel fees.

[60] To understand the nature of these objections, the following is a summary - some of which will be addressed in the Court's discussion of the fairness and reasonableness of the Settlement:

- shortness of period to claim;
- inability to choose counsel;
- absence of emotional support;
- difficulties with document collection;
- absence of money for future care;
- no appeal for Level 1 decision;
- inability to add schools to list;
- absence of confidentiality;
- lack of disclosure by Canada;
- exclusion of Day Scholars;
- lack of procedural fairness;
- lack of Court oversight;
- absence of Common Experience Payment (as in IRSS);
- payments less than IRSS;
- re-traumatization through claims process;
- complexity of written process;
- absence of payment for loss of language and culture;
- predeceased not compensated;

- potential language issue;
- time frame too narrow for the Class Period;
- same payment regardless of time at schools;
- absence of consultation;
- Legacy Fund money should be paid to claimants; and
- lack of computer resources to apply for compensation.

[61] Some of the objectors, appearing in person or through counsel, touched on at least some of the above points. In addition to that list were arguments about the Court's jurisdiction, the extent of the Release and issues said to be unique to the Quebec Civil Code.

[62] Few, if any, of the objectors wanted the whole settlement vitiated. They generally wanted the Court to add or subtract provisions or direct the parties to do so. In the rare case of a total rejection of the Settlement, the objector seemed to believe that rejection would simply result in a new agreement with all of the present benefits and none of the burdens (the objected points) as a replacement.

IV. Issues

[63] The issues in the motion to approve the Settlement are:

1. Is the Settlement fair and reasonable and in the best interests of the Class?
2. Should the Class Counsel fees be approved?

This second issue is the subject of a separate set of reasons.

V. Analysis

A. *Legal Framework*

[64] The test for approving a class action settlement is well-established and described in such Federal Court decisions as *Merlo v Canada*, 2017 FC 533 at paras 16-19, 281 ACWS (3d) 702 [*Merlo*], and *Toth v Canada*, 2019 FC 125 at paras 37-39, 302 ACWS (3d) 634 [*Toth*].

[65] It is whether, in all the circumstances, the Settlement is "fair, reasonable and in the best interests of the class as a whole".

[66] The following non-exhaustive factors summarized in *Condon v Canada*, 2018 FC 522 at para 19, 293 ACWS (3d) 697, are to be considered:

a. The likelihood of recovery or likelihood of success;

b. The amount and nature of discovery, evidence or investigation;

c. Terms and conditions of the proposed settlement;

d. The future expense and likely duration of litigation;

e. The recommendation of neutral parties, if any;

f. The number of objectors and nature of objections;

g. The presence of arm's length bargaining and the absence of collusion;

h. The information conveying to the Court the dynamics of, and the positions taken, by the parties during the negotiations;

i. The degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and

j. The recommendation and experience of counsel.

[67] These factors are not only non-exhaustive but are to be given varying weight depending on the circumstances.

[68] Recent case law in this Court and in other superior courts (see *Manuge v R*, 2013 FC 341 at paras 5-6, 227 ACWS (3d) 637; *Hunt v Mezentco Solutions Inc*, 2017 ONSC 2140 at paras 162-163, 278 ACWS (3d) 482) have emphasized that the settlement must be looked at as a whole and particularly it is not open to the Court to rewrite the substantive terms of the settlement or assess the interests of individual class members in isolation from the whole class.

[69] This principle addresses many of the points of opposition where the objector wishes the Court to impose an important term or delete a particular provision.

[70] Associated with this admonition against “tinkering” with the settlement is the question of ongoing Court supervision of the Settlement. It is established that the settlement approval process is a “take it or leave it” proposition and there are instances in other courts where settlement agreements have been rejected. On the other hand, there are many instances, including numerous cases in this Court, where the courts have maintained an ongoing supervisory role whether contemplated in the settlement or not.

[71] While there could be a fine line between inappropriately modifying a settlement and requiring further court supervision, *Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481, 2006 CarswellOnt 7879 (Sup Ct J), speaks to the ability and desirability of courts to continue and, if necessary, add judicial supervision over the implementation, interpretation and enforcement of a settlement. This is particularly the case, in my view, when dealing with complex, intricate settlements covering vast areas of this country and touching upon a wide diversity of its people - as in the present case.

[72] The supervisory role of the court and its benefits were reiterated by the Supreme Court of Canada in *JW v Canada (Attorney General)*, 2019 SCC 20, 431 DLR (4th) 579. In the context of the IRSS Agreement, which is in many ways analogous to this Indian Day Schools Settlement, the Court addressed the role of the court in ensuring that claimants receive the benefits they were promised. Justice Coté at paragraph 120 in concurring reasons emphasized that the terms of a Settlement Agreement can shape and limit a court's supervisory authority, but a court cannot approve a settlement that ousts the court's supervisory authority completely.

[73] Therefore the Court will retain jurisdiction and ensure that the Settlement is implemented as contemplated. That ongoing supervision addresses another of the objection topics.

[74] I would add that the parties contemplated this ongoing supervision in paragraphs 7, 18 and 19 of the draft Approval Order attached in Schedule G to the Settlement Agreement.

[75] The Court's supervisory role in implementation can ensure that not only actions planned are taken but that decisions and procedures are consistent with the implementation of the Settlement. This does not mean that the Court can supplant the review processes in the Settlement, but rather it can help fill gaps or remedy a failure to apply the terms of the Settlement as negotiated between the parties.

[76] Consistent with the prohibition against Court modification or alteration of the Settlement is the principle that a class action settlement is not required to be perfect (*Châteauneuf* at para 7). It must fall within a "zone or range of reasonableness" (*Ontario New Home Warranty Program v Chevron Chemical Co*, 46 OR (3d) 130 at para 89, [1999] OJ No 2245 (Sup Ct J)).

[77] Reasonableness does not dictate a single possible outcome so long as the settlement falls within the zone. Not every provision must meet the test of reasonableness - some will, some will not. This result is inherent in the negotiation and compromises of a settlement. As discussed by Justice Shore in *Riddle* at paragraph 33, the settlement must be looked at as a whole and the alternatives of no agreement must also be factored into the analysis:

> …. 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". According to the evidence, it is undeniable that "bringing closure is critical" for the survivors of the Sixties Scoop. 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.
>
> [Citations omitted].

B. *Factors*

(1) Likelihood of recovery/success

[78] In a settlement situation, the parties cannot easily put their frank assessment of the merits of their case to the Court - the approval might not be given and the parties would then have to proceed with the action.

[79] However, it is obvious that this is a complex case, that there would be significant evidentiary problems dealing with long past events and many legal issues and defences with which to contend. While there may be some assurance of some success, its nature and breadth is clearly uncertain. It is a case which cries out for settlement.

[80] As in any litigation there are risks, even where clients have difficulty understanding or accepting this - as said earlier, particularly where events are so soul-scarring. One of the risks is

that of limitation periods. Even if the current policy of Canada is to not necessarily enforce limitation periods in litigation involving Indigenous peoples, some ultimate provincial and territorial limitations may be applicable to Survivor and Family Class claims. There is always the risk that a current government policy, over the life of the litigation, may change. Although most limitation statutes now exempt childhood sexual abuse claims from limitation periods, other claims involving non-sexual abuse may be barred depending on the applicable limitations statute.

[81] If applicable, a six-year limitation period would catch virtually all of the claimants. Even a 30-year ultimate limitation period could operate to bar claims of any Survivor Class member who reached majority before December 1976. Given that most Indian Day Schools were closed or no longer operated by Canada as of that date, the number of Class Members eligible for compensation would be substantially reduced.

[82] On a less technical but more painful note related to limitation periods, there is a substantial risk of delay and re-traumatizing in respect of limitation periods which had not expired or been suspended. Because limitation periods may be personal, it may not be possible to make a common finding on limitations issues (see e.g. *Smith v Inco Ltd,* 2011 ONCA 628 at paras 164-165, 107 OR (3d) 321).

[83] Further and separately, absent a settlement, the prospect of re-traumatization to deal with the merits of the class action seems to be a near certainty.

[84] The Settlement provides certainty on limitation risk and on a class period that starts from 1920 - a result which might never be achieved in litigation.

[85] To the risk of limitation periods must be added the uncertainty surrounding the law of Canada's fiduciary duty to persons similarly situated to class members.

[86] The law is still unsettled regarding whether Canada owes a fiduciary duty to Class Members as part of its fiduciary obligations to Aboriginal peoples. While there is little doubt that there is a fiduciary relationship between the Crown and Aboriginal peoples, the Supreme Court of Canada in *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 81, [2002] 4 SCR 245, circumscribed fiduciary duty holding that the Crown does not owe fiduciary duties "at large but in relation to specific Indian interests". Issues of control over the "interest" or acts in the best interests of the class would loom large in the litigation.

[87] In *Brown v Canada (Attorney General),* 2017 ONSC 251 at paras 70-71, 136 OR (3d) 497 [*Brown*], Justice Belobaba concluded that Canada had no fiduciary duty to protect and preserve the Aboriginal identity of children, in a summary judgment decision on the common issues of a Sixties Scoop case. Comments in cases such as *Brown,* even said in respect of a summary judgment, feed the fire of uncertainty regarding Canada's fiduciary duties.

[88] I note, however, that there are two bases of fiduciary duty within this claim. The first could be the broader fiduciary duty of Canada owed to Aboriginal children to protect and preserve their connections to their communities, culture, and support systems. Advancing this

duty would have some risk given the finding in the *Brown* summary judgment. The second basis is a more narrow duty that Canada may have owed to students in day schools to protect them from abuse after mandating their attendance in the day schools. In *Blackwater v Plint*, 2005 SCC 58 at paras 59-63, [2005] 3 SCR 3 [*Blackwater*], the Supreme Court of Canada found that this type of fiduciary duty may exist regarding residential school students but accepted that breach of that duty would require proof of dishonesty or intentional disloyalty by Canada. Therefore, establishing either type of fiduciary duty carried with it some risk.

[89] In terms of a claim of negligence by Canada, although establishing a duty of care might not be that difficult, there would still be risk in establishing that the standard of care at the time had been breached (see *Blackwater* at paras 13-15).

[90] This uncertainty is magnified in the case of Family Class Members as Canada has yet to be found to owe a duty of care to persons like the Family Class. That aspect of the litigation faced issues of foreseeability, proximity and changes in policy not yet settled in law.

[91] Lastly, there would be a significant issue with establishing the required causal link between harm suffered and duty of care. This is particularly the case for Family Class Members.

[92] There is a risk that aggregated damages could not be awarded but would have to be assessed individually. Not only delay and difficulty of proof would be involved, but the requirement to re-live the events could be overwhelming in some cases.

[93] The Settlement reduces the risks, simplifies the compensation process, and allows Family Class Members (who do not receive direct compensation) to at least participate in the healing process through the Legacy Fund.

[94] While the above discusses risks to the Class Members, Canada is not free from risk - they have just been careful not to flesh these risks out.

[95] Each of the risks faced by the Class Members could also be turned on Canada. Courts could well find in favour of the Class on all or significant portions of the claim. Given the settlement in the IRSS, it is difficult to see how equity - at least in the eyes of the public - would flow to the government.

[96] The risks are real to both sides; the case would be long and complex. Recovery, at least at these levels, is uncertain. The parties faced a real and present risk of failure for their respective sides.

(2) The amount and nature of discovery, evidence and investigation

[97] The type of investigation necessary to take this case to trial appears to require much further work. The parties had turned to settlement discussions early thus avoiding discovery and production of documents requirements. However, the Court was presented with sufficient evidence to make an objective assessment of the fairness of the proposed Settlement.

[98] The hurdles faced by the Plaintiffs and the work to deal with the individual claims and amass a case were outlined in the evidence of former counsel Joan Jack (on the issue of counsel fees). It was backbreaking, financially ruinous work even at a preliminary stage. Some sense of the magnitude of the work can be garnered from the decision in *Brown*—the Ontario Sixties Scoop case paralleling *Riddle*.

[99] I am satisfied that Gowling, from the time it assumed the mandate for this litigation, have put in reasonable and arguably extensive effort to gather relevant facts, assess liability and damages, and to meet with Class Members and communities to assess what might be on the horizon not only to settle the case but to assess the negative possibilities of trial. Gowling has submitted affidavits from a historian and from an actuary, as well as from the named plaintiffs, Class Counsel, and others, which aid the Court in assessing the appropriateness of the Settlement.

(3) Terms and Conditions of the Settlement

[100] In the context of this case, this is a critical, if not the critical, factor in this assessment. A summary of its critical terms is outlined earlier in these reasons.

[101] The Settlement addresses a historic wrong—fair societies pay for their mistakes at one time or another. The Settlement provides up to $1.4 billion in compensation to be shared by those who attended the over 700 Federal Indian Day Schools and experienced Level 1 harm. An unlimited amount is available to those who suffered greater levels of harm. The Settlement is not limited to compensation for Class Members who are Aboriginal peoples as defined in the

Constitution, but they are the overwhelming beneficiaries of the Settlement (having been overwhelmingly the survivors of Indian Day Schools). The amount does not include legal costs of counsel, which is the subject of a separate payment scheme.

[102] Not all settlements are good and settlement will not always be better than litigation (see Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018)), but this is a case where settlement generally and this Settlement are vastly preferable to the risky litigation, delays, costs, trauma and uncertainty inherent in this litigation.

[103] The Settlement includes such a feature as the Legacy Fund. There is uncertainty that a court could order such a creation but, no doubt for another day, if Aboriginal issues and litigation are *sui generis*, remedies available might likewise be *sui generis*.

[104] That issue need not be faced here. The Legacy Fund is a substantial benefit which might not otherwise be achievable.

[105] The Court has previously discussed the simple, expedient paper-based compensation process. Criticism of it is unwarranted. In addition, the non-monetary compensation through Legacy Fund projects and its healing and cultural aspect are significant and address one arc of the objections filed and/or heard in this proceeding.

[106] The parties have made reasonable efforts to avoid the negative aspects of the IRSS - it would have been folly to ignore those lessons learned.

[107] Some of the salient features of the Settlement which underpin its "fairness, reasonableness and best interests of the Class" are:

- significant compensation to the broadest class of affected people;
- the simplicity of the process based upon a "Harms Grid" developed through analysis of relevant cases;
- process oversight by an experienced and renowned claims administrator;
- a claims process founded on the assumptions of truth and good faith with a requirement to draw all reasonable favourable inferences for the Class claimants;
- efforts to avoid re-traumatization and avoidance of individual hearings, a benefit recognized in *Riddle* at para 36;
- efforts to reduce the need for and the costs of paying third party lawyers subject always to the Court's jurisdiction to permit such retainers or the ability to opt out entirely;
- expedient and certain compensation for an aging class;
- the previously addressed benefits to the Family Class for reconciliation, healing and education purposes; and
- the tax-free nature of compensation and non-impairment of benefits already received.

(4) Future Expense and Duration of Litigation

[108] It is reasonable to expect that if this litigation did not settle it would be long and involved over an extensive period of time. This is particularly meaningful with an aging class of whom approximately 1,800 pass away each year.

[109] In *Riddle* at paragraph 41 and in the affidavit of the named Plaintiff Margaret Swan, the factor of age and the certainty that justice is attempting to be done are important considerations for the Court.

[110] If this matter went to individual damages hearings, the Plaintiffs estimate that those hearings would not begin until after 2024. In my view, this is an optimistic assumption that the Defendant will admit all liability, waive all defences and that otherwise the scheduling "stars would align" to facilitate this.

(5) Class Counsel Recommendation

[111] Both counsel recommend the Settlement. While emphasis may be placed on Class Counsel, the Court cannot ignore the Crown counsel who have extensive experience and reputation in this type of litigation and who also unequivocally support the Settlement.

[112] Class Counsel are highly experienced. They have practices in the pertinent areas of this action. They apparently have fostered and have had previous connections with Indigenous communities in Canada.

[113] As was evident throughout this litigation, Class Counsel has been "alert and alive" to the needs of claimants, the risk-reward balance, the lessons learned from other similar cases and the understanding of, and the required commitment to put in place, the necessary infrastructure and personnel to carry out the Settlement.

[114] While the parties did not specifically make arguments regarding the factors of arm's length bargaining, the dynamics of negotiations and the recommendation of neutral parties, there is nothing in the record in this case or in the Court's observations that suggest that this was anything other than an arm's length, good faith negotiation completely devoid of collusion or

less than honourable conduct - despite some suggestions raised by some objectors' counsel. The affidavit of Mr. Bouchard of Gowling described the iterative process of negotiations with Canada's counsel over several months which required compromises between the parties to end up with the Settlement.

(6) Communication with Class Members

[115] Despite criticism from some objectors that Class Counsel had not visited all of the more than 600 First Nation communities as well as all Inuit and Metis communities to consult, the record established that teams of Class Counsel made extensive efforts to communicate with Class Members. The affidavits of Messrs. Bouchard and Shoemaker of Gowling speak to those efforts.

[116] Those efforts appear to have been largely successful as evidenced by the expressions of support and even some of the objections.

C. *Expressions of Support and Objections*

(1) Support

[117] The details of support have already been discussed. It is quantitatively and qualitatively significant. It comes from individuals and Indigenous organizations, both at the national, regional and local levels. It is the support of these individual Class Members that is most important to consider.

[118] Individuals, both in written form and orally before this Court, spoke of the needs, the benefits, the certainty and the healing of the Settlement.

[119] The Court was assisted by the meaningful expressions of support. The heartfelt expression “get it done” permeated that support.

(2) Objections

[120] The meaningful expressions of objection also were of great assistance to the Court. The Court recognizes that it is not easy to come forward and express sentiments respectfully when sometimes fueled by the very injustice the Settlement is designed to address.

[121] It should be of considerable comfort to many objectors that the process of objection worked - it made meaningful change possible. The time for claiming, while well intended, was extended from one year to two and a half years through an amendment to the Settlement, unquestionably as a result of objection.

[122] Some objectors felt strongly about their position - some may have been willing to take the risk of a failed settlement. That is their right but they cannot impose their will on the Class. They have the right to opt out and take their own risks, but they cannot impose that risk on the Class as a whole if the Settlement is otherwise fair, reasonable and in the best interests of the Class.

[123] As reiterated in *Toth* at para 80:

> … The Court's role is to determine whether the proposed Settlement is "fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member" [citation omitted].

[124] As recognized in the case law, the opt-out right is the relief valve for individual concerns. If the threshold of opt-out is met, this Settlement is terminated and the Approval Order is vacated unless Canada waives this condition. As stated in *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932 at para 79, 91 ACWS (3d) 351 (Sup Ct J):

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

[125] In a case involving so many over such a long period, over such a vast area, objection is to be expected. Settlements are not perfect; compromise is not easy. Objections may be reasonable but may be reasonably counterbalanced by other elements of the Settlement.

[126] As often said, it is not for the Court to send the parties back to fashion the agreement that the Court thinks best. What is required is that the Settlement taken as a whole in its context falls within that zone of reasonableness previously discussed.

[127] To round out this section, the Court comments on some of the areas of objection earlier identified. The fact that an issue is not discussed here is not an indication that it was ignored or misunderstood.

[128] Timing of claims process: This objection to the one-year claim filing requirement was one of the most consistent issues of objection. It was a major impediment to be addressed. As seen by the amendments to the Settlement, it was revised in a reasonable fashion to two and a half years.

[129] Release: There was concern expressed that the proposed release affected collective Aboriginal, treaty or other rights. The Release, as admitted publicly by both parties, does not touch any such rights. It is a tort based claim related to the release of individual claims arising from Survivor Class Members' experiences in Indian Day Schools.

[130] Jurisdiction/Quebec Code: These issues were raised by a counsel on behalf of one or two objectors. The question of this Court's jurisdiction is well-settled as seen in this Court's approval of a number of settlements of tort-based claims against the Crown in cases such as *Ross, Roy, and Satalic v Her Majesty the Queen*, Federal Court Action Number T-370-17, *Merlo* and *Riddle*. The objection starts from a fundamental misapprehension of this case. The Court's role is to approve a settlement between the parties, not to impose terms. It is the parties' agreement. The argument made that the Settlement somehow infringes Quebec law was not briefed or made out. For those who do not or cannot accept the Settlement, they have the right to opt out.

[131] Language: This is in reality a multi-language case; two of the representative plaintiffs are trilingual. Translation services have been available and documents were available in the official languages and some of the Indigenous languages. Translation is an ongoing exercise as documents are approved. Any errors in translation have been corrected if possible. Gowling has available at the very least bilingual personnel in the official languages.

[132] Claims complexity: The process is intended to be easy and, as detailed earlier, claimants are to benefit from all reasonable and favourable inferences and doubt is to be resolved in favour of the claimants. If the complexity of the claim form proves to be a meaningful problem, Class Counsel advised the Court that it can come back to the Court to address any issues. The Court, by retaining jurisdiction, is in a position to assist.

[133] Differences from the IRSS: Several objectors wished that the Settlement more closely followed the IRSS model in a number of respects. However, this Settlement attempted a new model learning from the negative experiences of the IRSS. What some have seen as the benefits of the IRSS are seen in a negative light by others.

[134] The departures from the IRSS model cannot be said to be unreasonable. It would have been unreasonable to perpetuate some of its acknowledged abuses and difficulties. Even such organizations as the Assembly of First Nations have recognized a number of issues with the IRSS model. The Indian Day School model takes a different approach.

[135] Legal Counsel: This issue was a recurring theme particularly from objectors who supported or were inspired by legal counsel and who argued that they should be able to choose their own counsel. The role of Class Counsel (indeed counsel generally) is not to provide psychological help. This is left to other health and cultural resources identified in the affidavits of Chief Roger Augustine and Chief Norman Yakelaya.

[136] The Settlement attempted to avoid the problems of the Independent Assessment Process in IRSS and its trial-like proceeding. This is intended to avoid over lawyering of the claims process.

[137] Again, what is seen as a problem in having Class Counsel assume the post-settlement role is seen by many as a benefit. Free legal assistance is on balance a positive thing. Class Counsel will be able to help with document collection and other processing which was of concern to some objectors.

[138] Gowling is a large multi-jurisdictional firm. The Settlement can be said to put under one firm that which would have been done under the consortium model of several smaller firms usually present in this type of litigation. Gowling also has contacted and developed a list of six firms that can act as allied counsel in other parts of the country where it may need assistance. The plea by some of the law firms who are themselves excluded from the settlement process that they should be paid to help individuals apply for compensation or otherwise be Gowling's representative is untenable and not within the Court's jurisdiction.

[139] In the course of the hearing and the pleadings filed, issues arose with respect to some of the "excluded law firms" and their efforts to have Class Members sign retainers. There were issues as well as to whether some of the misinformation which seemed present for some Class Members may have emanated by erroneous communications from these firms.

[140] The Court record (Canada's motion record) contains correspondence with the profession's provincial regulators. It is not for this Court to deal with these issues but the Court file is public and is available to the regulators if deemed by them necessary.

[141] Relevant to this Court's function is that, contrary to some opposition, Class Members can have their own counsel. However, they are likely to have to pay for that which is free from Gowling. The necessity of Court approval before retaining other counsel is designed not to limit choice but to ensure that some of the past problems with such retainers do not occur again.

[142] Emotional and other support: There seemed to be some misunderstanding as to these issues. Long-term emotional support and the ability for Class Members to "truth-tell" are matters intended to be dealt with under the Legacy Fund. The Fund and the operation of the corporation will be directed by Indigenous survivors and family members for Class Members. In addition, the affidavits of Chief Augustine and Chief Yakelaya spoke to the immediate health and wellness support available to Class Members through helplines, counselling services through the Non-Insured Health Benefits Program, friendship centres in urban settings, and health workers in many Indigenous communities.

[143] Many of the points raised in the objections have been addressed - many of the points made were because of a lack of understanding of the operation of the Settlement. This is hardly surprising given its complexity.

[144] Moreover, not all objectors will be satisfied and it will be for them to decide whether to participate in the process or opt out.

VI. Conclusion

[145] For all these reasons, this Settlement, which is fair and reasonable and in the best interests of the Class as a whole, will be approved in the form of Order issued with these Reasons.

[146] The Court retains jurisdiction over this case and specifically over the Order and Settlement. The Order specifies the retention of jurisdiction, the initial reporting requirements and may be amended as circumstances dictate.

"Michael L. Phelan"
Judge

Ottawa, Ontario
August 19, 2019

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	MAY 13, 14 AND 15, 2019
REASONS FOR APPROVAL ORDER:	PHELAN J.
DATED:	AUGUST 19, 2019

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