Federal Court  Cour fédérale

Date: 20241227

Docket: T-1417-18

Citation: 2024 FC 2098

Ottawa, Ontario, December 27, 2024

PRESENT: The Honourable Mr. Justice Pamel

CERTIFIED CLASS PROCEEDING

BETWEEN:

**REGINALD PERCIVAL,
ALLAN MEDRICK MCKAY,
IONA TEENA MCKAY AND
LORNA WATTS**

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

I. Overview

[1] On May 30, 2024, I issued my reasons for approving the settlement agreement [Settlement Agreement] regarding the underlying class proceeding [the underlying action] in relation to the Indian Boarding Home Program [the Program]. Section 11.01 of the Settlement

Agreement provides that an amount determined by the Court, independent of the settlement fund, will be paid to Class Counsel and Quebec Subclass Counsel [collectively Counsel]. The provision states:

> A. Class Counsel and Quebec Subclass Counsel Fees
>
> (1) Canada agrees to pay Class Counsel and Quebec Subclass Counsel collectively the amount the Court determines is fair and reasonable in respect of legal fees and disbursements for their past and future work on behalf of the class as a whole ("Class Counsel Fees"). Canada will pay this amount as directed in writing by Klein Lawyers LLP and Dionne Schulze SENC within the latest of: a) the Implementation Date; b) thirty (30) days after the date on which the Court makes its order as to Class Counsel Fees; c) thirty (30) days after the date of the final determination of any appeal brought in relation to the Class Counsel Fee order.
>
> (2) No part of the Class Counsel Fee will be paid by Class Members and there will be no reduction in any amount payable to a Class Member to pay for Class Counsel Fees.
>
> (3) Class Counsel and Quebec Subclass Counsel will jointly bring a motion for approval of a Class Counsel Fee. Canada will have the right to make responding submissions.
>
> (4) If the Court approves this Agreement, the provisions of this Agreement will come into effect on the Implementation Date regardless of the date on which an order is made or appeal determined regarding Class Counsel Fees.
>
> (5) Class Counsel and Quebec Subclass Counsel will continue to provide services for the benefit of the class after the Implementation Date on all matters related to the implementation and administration of this Settlement Agreement, including providing information and advice to class members, persons or organizations that serve class members, the media, and members of the public. No further or other Class Counsel Fee will be paid for those services. Individual fees, as provided for in Section 11.02, may be paid to Class Counsel or Quebec Subclass Counsel for assisting Claimants with the preparation of their individual claims.
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> [Emphasis added.]

[2] The applicants now make a motion under Rule 334.4 of the *Federal Courts Rules*, SOR/98-106 [Rules], for an order approving Class Counsel Fees in the amount of $50 million plus applicable taxes, and for $174,818.39 in disbursements; the motion also seeks an award of honoraria of $10,000 to each of the Representative Plaintiffs Reginald Percival, Allan Medrick McKay, Iona Teena McKay and Lorna Watts, and the Quebec Subclass Representative Annie Irene Trapper Weistche, payable from Class Counsel Fees.

[3] Prior to the hearing, the Attorney General of Canada [AGC] advised that his instructions were to take no position on the amount of legal fees sought by Counsel and to defer to this Court as to whether the amount being sought is fair and reasonable. As a result, I appointed Ms. Donnaree Nygard of Vancouver, B.C. as *amicus curiae* [the *amicus*] to assist me and to provide such written and oral submissions as were, in her opinion, objective, appropriate, and helpful to the Court, save for the issue of the payment of the honoraria, which I determined not to be necessary for her to address. The AGC made no representations during the hearing, save as to commenting on one of the aspects of the applicants' submissions regarding the element of risk undertaken by Counsel—more on this issue below.

[4] Having considered the matter, and for the reasons that follow, I find the amount of $32.5 million to be fair and reasonable as Class Counsel Fees, along with the disbursements requested, and approve that an honorarium in the amount of $10,000 to be paid to the Representative Plaintiffs and Quebec Subclass Representative from Class Counsel Fees.

II. Background

[5] My reasons for approving the Settlement Agreement included an overview of the Program, the history of the litigation, which culminated with the settlement that I had approved, and echoed the lived experiences of boarding home survivors reflected in the stories of those who were courageous enough to come forward in these proceedings to tell their stories. Consequently, I need not go into detail with respect to the nature of the matter, and will limit my comments to what is essential for the disposition of the present motion.

[6] At the commencement of the hearing on the present motion, I had the benefit of hearing again from Dr. Matthew Coon Come, who reminded us of the devastating impact of Canada's misguided child welfare policies targeting indigenous children, and how it took years of litigation for Canada to acknowledge such an impact and find a way forward through the various settlements agreements and initiatives that followed on the path to reconciliation. He also wished to honour and express gratitude to Reginald Percival, a Representative Plaintiff and to Kenneth Weistche, who acted as Quebec Subclass Representative—to be subsequently replaced by his wife Annie Irene Trapper Weistche following his passing—for their tireless advocacy in seeking a just and fair settlement for the aboriginal children who were placed in the Program yet who were not included under the earlier Indian Residential Schools Settlement Agreement [IRSSA] in respect of Indigenous children who attend church-run residential schools [Indian Residential Schools] (*Baxter v Canada*, 2006 CanLII 41673 (ON SC); *Quatell v Attorney General of Canada*, 2006 BCSC 1840; *Northwest v Canada* (Attorney General), 2006 ABQB 902).

[7] Boarding home survivors would also not be included in the subsequent settlement agreements regarding Indigenous children taken from their homes, families and communities throughout the 1960s, and subsequently adopted by predominantly non-Indigenous, middle-class families across the United States and Canada [Sixties Scoop] (*Riddle v Canada*, 2018 FC 641 [*Riddle*]); or forced to attend an Indian Day School run by the federal government [Day Schools] (*McLean v Canada*, 2019 FC 1075 [*McLean*]) or children who attended residential schools during the day but were able to go home at night [Day Scholars] (*Tk'emlúps te Secwépemc First Nation v Canada*, 2021 FC 988; *Tk'emlúps te Secwépemc First Nation v Canada*, 2023 FC 327 [*Gottfriedson*]. In fact, children who were part of the Program were described as the "marginalized group within a marginalized group" (*Fontaine v Canada (Attorney General)*, 2014 BCSC 941 at para 61).

III. Analysis

[8] This case appears to be the first time that Canada has agreed to pay counsel fees without affecting compensation, where the amount was not negotiated—either in part, within a certain range, or up to a cap—as part of a settlement agreement. Instead, Canada has agreed to pay Class Counsel Fees that the Court determines are fair and reasonable, but takes no position on what that amount should be.

[9] As the parties have agreed that Class Counsel Fees are to be paid independently from any recovery by the Class members, the issue was raised regarding the application of Rule 334.4 and the jurisdiction of the Court in the assessment of counsel fees. Clearly, the Settlement Agreement calls for this Court to determine counsel fees. Although generally parties cannot by agreement

grant to this Court jurisdiction which it does not otherwise have by statute (*Canada v Peigan*, 2016 FCA 133 at para 85), and that this Court has tended to apply Rule 334.4 even where counsel fees have not been payable from the proceeds of the settlement award (*Moushoom v Canada (Attorney General)*, 2023 FC 1739 [*Moushoom*] at paras 78–80; *Tk'emlúps te Secwépemc First Nation v Canada*, 2023 FC 357 at paras 13 and 21; *McLean v Canada*, 2019 FC 1077 at para 2), I find that the Court's authority to approve counsel fees in this context nonetheless emanate from its inherent jurisdiction to approve settlement agreements expressed in Rule 334.29 (*McLean v Canada (Attorney General)*, 2023 FC 1093 at para 39; *Canada (Attorney General) v Fontaine*, 2017 SCC 47 at para 32; *Lavier v My Travel Canada Holidays Inc*, 2013 ONCA 92 at paras 23–25; *Northwest v Canada (Attorney General)*, 2006 ABQB 902 at paras 49–59).

[10] Also, the fact that the Settlement Agreement calls for Class Counsel Fees to be paid independently of any recovery by the Class members does not, in my view, diminish the robustness of the analysis to be undertaken by the Court in the determination of what is fair and reasonable under the circumstances. Here, the fact that Class Counsel Fees have not been negotiated—a factor to be considered by the Court (*Moushoom* at para 109)—and that funds for the payment of Class Counsel Fees are coming from the public purse, weigh in favour of the Court not taking a hands-off approach in its analysis.

[11] With that in mind, and as stated by Justice Aylen in *Moushoom*, at paragraph 82, "[t]he overarching test applicable to class counsel fees is that they have to be "fair and reasonable in all of the circumstances". To determine what is "fair and reasonable", the Federal Court will look at

a host of non-exhaustive factors (*Manuge v Canada*, 2013 FC 341 at para 28; *Merlo v Canada*, 2017 FC 533 at paras 78–98; *Condon v Canada*, 2018 FC 522 [*Condon*] at paras 81–82; *Moushoom* at para 83) including:

i. The risk undertaken;

ii. Results achieved by counsel;

iii. Time expended;

iv. Complexity of the issue;

v. Importance of the litigation to the plaintiffs;

vi. The degree of responsibility assumed by counsel;

vii. The quality and skill of counsel;

vii. The ability of the class to pay;

ix. The expectation of the class; and

x. Fees in similar cases.

[12] Although the weight given to each factor will vary according to the particular circumstances of the class action, this Court has noted that the risk assumed by Counsel and the results achieved are the two most important factors to consider in these motions (*Condon* at para 83; *Moushoom* at para 84). I would also echo the words of Justice Aylen when she stated that, in addition, mega-fund settlements, as is the case here, raise unique considerations, and in assessing what is fair and reasonable in the context of a mega-fund settlement, "the traditional approach used by the Court to assess counsel fees proves somewhat unsatisfactory" (*Moushoom* at para 95). The applicants assert that this Court, in *Moushoom*, highlighted different factors specific to the circumstances of that case, where there was a confluence of the highest settlement amount on a pure dollar value basis for mega-fund settlements, alongside a relatively low risk

given the relevant Canada Human Rights Tribunal [the Tribunal] decision that had been issued. From my perspective, those factors are just as much relevant in this case.

[13] Also, in considering what is fair and reasonable in circumstances where the counsel fee is not paid out of the class recovery, the Court should consider the issue from the perspective of Counsel, the class members, the defendants and the public interest (*McCrea v Canada*, 2019 FC 122 at para 108).

A. *The Application of the Law to this Case*

(1) Risks Undertaken

[14] The element of risk is often intertwined with the element of complexity; in fact here, the applicants have tethered the element of risk to the element of complexity. In addition, there is no issue that Counsel were incurring risk when agreeing to take on the underlying action; rather, the issue is the level of risk, in particular as that element of risk plays into my determination of what is fair and reasonable in respect of Class Counsel Fees.

[15] When addressing the element of risk, courts generally look to all the risks faced by class counsel, such as the liability risk, recovery risk, and the risk that the action will not be certified as a class action, measured from the commencement of the action and as the litigation evolves, but not with the benefit of hindsight when the result looks inevitable (*Moushoom* at para 85). The litigation risk assumed by class counsel is a function of the probability of success, the complexity

of the proceedings and the time and resources expended to pursue the litigation. Here, the applicants have raised the following risks that Counsel faced when taking on this matter:

a) The risk the action would not be certified due to the number of individual issues;

b The risk the action would not be certified due the factual matrix that extends back 70 years, and a class definition that covers four decades and includes individuals in every province and territory;

c) The risk the action would not be certified because establishing Canada's vicarious liability for abuse carried out by private parties in private homes could be viewed as very far-fetched;

d) If the case had gone to litigation, the burden would have been on the individual claimants to establish that the program was still under Canada's control at the time that the abuse occurred, and for many class members, that would have been near impossible due to lack of documentation.

e) The risk the trial would be unmanageable because of the extensive class period and geographically diverse class membership;

f) Challenges at trial in dealing with shifting standards and evolving government priorities over a long class period;

g) Challenges at trial at dealing with novel claims. The claim for loss of culture was and remains novel;

h) Canada would have defences available to it at trial, including expiry of limitation periods which might drastically reduce the size of the class;

i) There was political uncertainty, particularly since it was a minority government, there was a risk of change in government;

j) Even if the case was successful at the common issues stage, individual class members may not have been successful in proving causation and damages at the individual issues stage. Risks include potential limitations issues, the loss of evidence and the lack of reporting generally associated with the abuse suffered by class members.

[16] I appreciate that there are a number of issues that counsel often assess when considering whether to take on a case such as this one, however in the end, the risk that the Court is assessing is generally considered to be the risk of non-payment that such counsel is taking on in carrying the file; that risk is very much tied to the claim that is being made and the legal arguments counsel are looking to make, and whether those arguments will win the day. To appreciate the level of risk, we must view the matter in context.

[17] As I set out in my reasons for approving the Settlement Agreement, litigation on behalf of boarding home survivors began in Quebec when Indian Residential School survivors seeking compensation under the IRSSA were being denied on the basis that they did not actually attend a residential school but rather a public school while billeted with private families. In September 2016, Quebec Subclass Counsel filed an application for a class action in Quebec on behalf of a person now known as Anne Smith, and other boarding school survivors (the Quebec Class Action) for compensation for having suffered sexual, physical or psychological abuse in connection with or arising from being placed in boarding homes.

[18] One of the major obstacles facing Quebec Subclass Counsel was how to establish the vicarious liability of Canada in the context where the abuse, if any, was perpetrated in private homes by private individuals who were not employees or agents of Canada. Until then, the principle of vicarious liability under article 1463 of the *Civil Code of Québec* had never been applied to a federal program such as boarding homes. While Canada had accepted it was vicariously liable for the Indian Residential Schools (see *Blackwater v Plint*, 2003 BCCA 671 at para 56), they operated under a clearer statutory framework and their staff were directly

employed by Canada for at least part of their history; the boarding home families, on the other hand, appeared to be independent contractors, thus evidence of direct negligence in Canada's placement and supervision may well have been required to establish liability, or of a relationship between those families and Canada sufficiently close in order to establish vicarious liability.

[19] The other issue was that of time bar or prescription. As such, and although there continued to exist concerns as regards whether the cause of action pleaded was viable, Quebec Subclass Counsel nonetheless instituted the Quebec Class Action in order to preserve prescription. Also, with the expansiveness of the Program not well known at the time, the Quebec Class Action was initially filed only in respect of one community in Quebec. As information became available, the proceedings were amended in May 2017 to include a second community.

[20] In the meantime, Reginald Percival, one of the Representative Plaintiffs in this matter, had also been advocating for boarding home survivors since 2006, when the IRSSA was announced, and was looking for counsel in British Columbia to take on the cause. Initially Mr. Percival had difficulty retaining counsel, likely because, as suggested by Class Counsel during the settlement approval hearing, neither the plight of boarding home survivors nor the size of potential class membership were widely known within the greater legal community, and because the nature of the claim was still being viewed by the legal community through the prism of vicarious liability of Canada for the faults of the boarding home families (similar to how Quebec Subclass Counsel was asserting the Quebec Class Action at the time).

[21] This all changed when Mr. Percival walked into the office of Class Counsel in February 2018; however, the years leading up to that fateful day were significant.

[22] Implementation of the IRSSA began in 2007, however, as stated, not all students who attended residential schools were included. The Day Scholars class action was instituted in 2012, the same year Anne Smith filed her claim within the IRSSA, eventually, as already mentioned, to be rejected as outside the scope of IRSSA because the abuse she suffered occurred at the boarding home where she was staying, and not at her residential school. Meanwhile, one of the elements of the IRSSA was the establishment of the Truth and Reconciliation Commission [TRC] to facilitate reconciliation among the students, families and communities affected by the terrible legacy of Indian Residential Schools and all Canadians. The TRC released its final report in December 2015, with Canada already on the path to reconciliation.

[23] In 2016, the Day Schools and Sixties Scoop legal proceedings were instituted. Initially, the actions in Day Scholars, Day Schools and Sixties Scoop were vigorously defended by Canada. The Day Scholars litigation stretched over almost 10 years, with contested certification; the claims asserted were novel, the evidence historic and voluminous, and there were a number of interlocutory motion including stay applications and appeals. As stated by Justice McDonald:

> This was risky litigation and success was far from certain as it involved novel legal claims in seeking damages for loss of language and culture. Canada vigorously defended this class proceeding and raised a number of defences including limitation defences, the IRSSA releases, and denying any duty of care on the part of Canada.
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> (*Tk'emlúps te Secwepemc First Nation v Canada*, 2021 FC 1020 at para 19).

In fact, the individual class litigation was settled only a few months prior to a scheduled 74-day common issues trial, and the Band reparation matter had its common issues trial adjourned on the first day of a scheduled 10-week trial.

[24] The initial class counsel in the Day Schools litigation went bankrupt in 2012 under the weight of three years of litigation, and no other firm was prepared to undertake the case due to the complexity and risk. However, four years later, in 2016, after the involvement of new counsel, Canada agreed to consent certification and the matter moved to settlement discussions soon thereafter.

[25] The Sixties Scoop litigation involved more than eight years of contested certification within 23 separate class proceedings across the country, motions and appeals, as well as a risky summary judgment motion on liability before the posture of Canada shifted with its announcement in February 2017 to proceed with mediation regarding all actions across the country. I should mention that the summary judgment application on the merits determined that that Canada indeed had a duty, which it had breached, to take reasonable steps to ensure that the children did not lose their indigenous identity (*Brown v Canada (Attorney General),* 2017 ONSC 251 [*Brown*] at para 85).

[26] On September 21, 2017, Prime Minister Justin Trudeau addressed the 72th Session of the United Nations General Assembly; in what Justice Shore in *Riddle* described as “a historic first”, the Prime Minister apologized for “Canada’s most shameful abuse perpetrated”, and specified

the devastating legacy of the treatment of the Indigenous population by Canada. Less than a month later, the settlement-in-principle in the Sixties Scoop was announced.

[27] At the hearing on the present motion, Mr. Percival spoke; among many things, he mentioned that it was only when he met with Class Counsel did he finally believe that he and the boarding home survivors were being heard. I can certainly see why. By the time Class Counsel agreed, in April 2018, to accept the retainer from Mr. Percival on behalf of boarding home survivors and their families, Class Counsel was just concluding the settlement approval in the Sixties Scoop—what Justice Shore described in the very first paragraph as "historically unique" litigation which was "inherently fraught with risk" as counsel were advancing claims which, for the first time, addressed the issue of "loss of cultural identity". Class Counsel were also, at that time, in the final stages of having the settlement in Day Schools approved (*McLean v Canada*, 2019 FC 1077); as Justice Phelan stated in that case, at paragraph 28: "This was always a risky case."

[28] Here, the cause of action of loss of language, culture, and identity was no longer novel when Mr. Percival walked into the offices of Class Counsel. I accept that there was no formal case that explicitly recognized this cause of action on the merits, however the decision in *Brown* had been issued, and the cause of action was at that point being accepted by Canada as a basis for a settlement, as confirmed by the settlement in Sixties Scoop. As I stated in my reasons for approving the Settlement Agreement, my sense from hearing Counsel during the settlement approval hearing was that by the time the underlying action was instituted in July 2018, the

winds favoured settlement by Canada of Indigenous child education policy—related litigation, as long as the evidence showed there to be a case to be made.

[29] As I mention in paragraphs 11 to 15 of my said reasons, following the institution of the underlying action, Canada requested time to investigate the allegations being made; a pause in the litigation was ordered within months thereafter, with further research, dialogue and exchanges of information going both ways. After the institution of the underlying action, Class Counsel trained staff on how to handle claim member inquiries, established a webpage, prepared questionnaires, retained and worked with experts, and continued to work on the certification record which was delivered to Canada in October 2018; the court ordered pause in the proceedings followed shortly thereafter. In December 2018, document discovery from Canada began, mostly with archival records from government libraries on the Program over time and across regions. The parties met in Vancouver in February 2019 to seek to narrow issues. The meeting was successful and two months later, in April 2019, Canada advised that it was prepared to consent to class certification and on which terms. Thereafter, the consent certification record was prepared and the consent certification order was obtained in June 2019.

[30] The applicants argue that the level of risk facing Class Counsel at the commencement of the underlying class proceeding was similar to the level of risk taken on by class counsel in Residential Schools, Day Scholars, Day Schools and Sixties Scoop; I cannot agree. As stated, by the time they accepted to represent boarding home survivors in April 2018, with the retainer agreement executed a month later, Class Counsel appreciated the newly developing cause of action of loss of language, culture, heritage and identity, and felt that a class action on the basis

of the history of the boarding home survivors might be viable, although admittedly challenges remained.

[31] For its part, although Quebec Subclass Counsel were initially concerned, as early as 2016, with not being able to establish vicarious liability of Canada for the actions of the boarding homes families, it seems to me that concerns over establishing that cause of action took a backseat to the newly developing cause of action of loss of language, culture, heritage and identity when Class Counsel and Quebec Subclass Counsel spoke in September 2018 leading up to the second amendment to the Quebec Class Action and the delivery by Class Counsel of certification record to Canada the next month; as stated, it is evident from the decisions in Day Schools, Day Scholars, and the Sixties Scoop that this issue was no longer considered novel and had become a basis for settlements in which Canada was willing to provide compensation. The $25,000 payment in Sixties Scoop was specifically to compensate for loss of language and culture, so that cause of action was not novel as regards what Canada was willing to compensate.

[32] As regards the risky nature of the cause of action of vicarious liability, for the purposes of the present motion, the applicants framed it in the context of the fault of the boarding home families, i.e., that Canada's vicarious liability would flow from the abuse undertaken by the families towards the boarding home survivors. I appreciate that this may have been the way the issue was framed in the Quebec Class Action. However, after the applicants had completed their oral submissions, counsel for the AGC stood to address that issue; the AGC asserted very clearly that despite the seeming emphasis by the applicants of the risks inherent in moving forward with litigation driven by an argument of vicarious liability within this context, Canada had always

understood that the underlying claim was actually being advanced and driven to settlement on the basis of negligence on the part of Canada in running the Program.

[33] In fact, the Statement of Claims alleges Canada having breached its "duty to protect and preserve the culture and identity of the Indigenous children" and its "duty to prevent injury to Indigenous children and to ensure their mental and physical health and well-being." In addition, the Statement of Claim states, at paragraph 8: "Canada's conduct and the conduct of its servants in establishing, implementing, administering and managing the Boarding Home Program for Indian Students caused extreme and ongoing harm to the Plaintiffs and other class members." [Emphasis added.]

[34] Clearly, as confirmed by the AGC, the vicarious liability that is being asserted in the pleadings relates not to the fault of the boarding home parents, but to the alleged negligence of Canada's staff in conducting the Program; Canada had never understood the claim to relate to its possible liability for the conduct of the boarding home families. The only paragraph where the vicarious liability of Canada is alleged in the Statement of Claim is paragraph 20, but it is certainly not clear that the plaintiffs are referring to the boarding home families as being the source of Canada's vicariously liable. In fact nowhere does the Statement of Claim specifically assert that that Canada was vicariously liable for the individuals operating the boarding homes. In fact, nothing in the certified questions relates specifically to the possible vicarious liability of Canada for the faults of the boarding home families. As such, it seems to me that although the notion of vicarious liability was a driver in the advancement of the claims, the notion of vicarious liability related to the role Canada and its staff played in the running of the Program,

not the more precarious notion of vicarious liability for the faults committed by the boarding home families.

[35] I accept that the underlying action—distinct from the early stages of the Quebec Class Action and prior to Counsel agreeing to working together—had always been about the abuse suffered by the Indigenous children, as seen from the Category 2 settlement grid; however, I do not think it fair to say that the road towards establishing the liability of Canada ever seriously went through the gates of vicarious liability for the fault of boarding home families, despite the emphasis put on this cause of action by the applicants during the hearing before me. It may be that such emphasis was for reasons specific to the motion now before me.

[36] In any event, by April 2018, the direction Canada was taking indicated that the issue of loss of language and culture was likely sufficient, subject, of course, to the parties better understanding the history of the Program and the involvement of Canada in the administration of the Program, as the plight of the boarding home survivors was still not widely known. In fact, as mentioned by Class Counsel during the settlement approval hearing before me, a big part of the underlying class proceeding was about the separation from the community, the loss of language, culture, identity, and until the Sixties Scoop case—which was largely about loss of language, culture and heritage—that cause of action was not generally viewed as a viable claim.

[37] The evidence lays out the work undertaken by Class Counsel in meeting with boarding home survivors and continuing to work with experts—with the pandemic disrupting work on the file, in particular the completion of documentary production—however, what seems clear is that

at no time was a vigorous adversarial posture taken by Canada. Within seven months of the institution of the underlying class proceedings, in February 2019, the parties met to seek to narrow the issues. The meeting was successful and in April 2019, Canada advised that it was prepared to consent to certification. That is not to say that, by the time the parties proceeded with consent certification in June 2019, Canada was ready to settle—far from it—but the concerns at the time revolved around more fully understanding the contours of the Program which eventually allowed the parties to come to a common position on defining the issues. Coming out of the pandemic—which, of course, slowed down research efforts—I think it fair to say that the parties understood the nature and scope of the damage that had been done under the Program, and in August 2022, counsel for Canada announced that they had received instructions to negotiate a settlement of the underlying class proceeding; from there, things moved quickly.

[38] Following judicial mediation sessions in November and December 2022, the parties signed an agreement in principle. The parties worked at negotiating the full terms of a settlement, and met three times, in February, March and April 2023. From the evidence, I note there were extensive negotiations on the Category 2 Compensation Grid which builds on the compensation categories Canada had agreed to in Day Schools, but with the focus being on events rather than proof of harm. In the end, the final version of the Settlement Agreement was concluded in June 2023.

[39] I appreciate the efforts undertaken by Class Counsel and Quebec Subclass Counsel, and acknowledge the amount of time and work that went into this class action and settlement discussions. Having said that, it seems to me that the liability risk, recovery risk, and the risk that

the action might not be certified as a class action, even measured from the commencement of the underlying class proceeding, was far from the risks taken on by class counsel in Residential Schools, Day Scholars, Day Schools and Sixties Scoop. I thus take issue with Class Counsel's portrayal of the risk profile of this particular class action. Canada's policy decisions and how the government considered reputational risk had changed. Mr. Percival walking into Class Counsel's office in early 2018 was serendipitous—both he and Class Counsel were at the right place, at the right time, with Class Counsel being, admittedly, in the unique position to appreciate the potential of what Mr. Percival was setting out for them at the time that he did because of their involvement in Sixties Scoop and Day Schools.

[40] I suspect the situation may have been very different had that meeting taken place even five years earlier, however, it did not; although there is never a guarantee of settlement at the commencement of any class action, by 2018, Class Counsel was likely aware that Canada was looking towards reconciliation, and where the research confirmed evidence of hardship occasioned by the misguided Indigenous children educational policies of the past, it was more likely than not that Canada would be willing to sit, listen and discuss a way forward, without aggressive posturing or a vigorous defence of the claims. To a great extent, by 2018, Canada had moved beyond being an adversary in litigation of this type to, in essence, being a willing partner in seeking a resolution and reconciliation for the harms that had been committed. The landscape and context that existed at the time the underlying action was instituted are what differentiate the risk matrix facing Class Counsel from that faced by class counsel in Residential Schools, Day Scholars, Day Schools and Sixties Scoop at the time those actions were instituted.

[41] I accept, as argue the applicants, that there also exists an element of political risk in that the particular government policy favouring settlement may be swept away with a changing government; how one quantifies such risk is difficult given that a policy change in government is not always linked to a change in government and as matter turned out in this case, the election in September 2021 did not bring with it a change of government. However, it seems to me that the path of reconciliation on which Canada was proceeding in 2017 and 2018 did not seem to be at serious risk of coming to an end. Although the settlements in Day Scholars, Day Schools and Sixties Scoop took place on the watch of one of the traditional ruling political parties in Canada, the IRSSA, and with it the establishment of the TRC, took place on the watch of the other.

[42] Indeed, instructions from Canada to settle only came in August 2022 and there had been an election only a few months earlier, however, and although there was always an element of risk prior to the AGC signaling his mandate to settle, everything in the record showed that the issue of liability was not being seriously challenged by Canada; by then, draft reports as to potential class size had been exchanged and a potential compensation grid had also been shared between the parties—the actual grid finalized in Day Schools was not appropriate in the present case—and there had been further exchanges on what Counsel would be willing to recommend; it seems to me from the evidence that by the time mandate was given to the AGC to seek a settlement, enough information had been uncovered to convince Canada that a serious risk of liability existed. In any event, the case law at the time which recognized the viability of a claim for loss of language, culture, heritage and identity, as well as the previous abuse cases dealing with the vicarious liability of Canada for the fault of their staff and employees would, it seems to me, have been difficult to ignore by any government. In fact, as Class Counsel stated at the

settlement approval hearing, they had just come off the Sixties Scoop case and when Mr. Percival walked into their office, they "saw something there that other firms [other than Quebec Subclass Counsel] hadn't seen".

[43] I also accept that when Quebec Subclass Counsel filed the class action on behalf of Anne Smith and others in 2016, the risk profile was a much closer to that in Day Schools. However, the evidence shows, and as conceded by counsel, the Quebec class action was instituted primarily to preserve time bar for those individuals who attended boarding schools and were not included in the IRSSA. In addition, from the evidence, the Quebec class action started small and evolved over time, reducing the risk assumed by counsel when they took on the file. As stated, Quebec class action was initially only filed in respect of one community, which later expanded to another, but it was only after the underlying action was filed in July 2018 that the Quebec class action expanded to cover all the communities in Quebec. Whatever the risks at the time of filing, Quebec Subclass Counsel were prepared to move forward with the litigation without a retainer agreement until August 2021. While I cannot fault Quebec Subclass Counsel for agreeing to move a case forward without a retainer agreement, the lack of any such agreement is relevant to the financial risk which counsel was willing to take on at the time.

[44] Class Counsel had indicated during the settlement approval hearing that one of the initial risks to the viability of the underlying class action was the unknown size of the class and the expansiveness of the Program; however, given that they were just coming off Sixties Scoop—a case which mitigated the risks inherent in claims of loss of culture, language and heritage given the determination by the Court on the summary judgment application—Class Counsel was

willing to take the risk of class size, i.e., that the class was limited to the Nisga'a community where Mr. Percival was from.

[45] In February 2018, Mr. Percival had provided Class Counsel with a box of documents allowing Class Counsel to undertake its initial research into the scope of the issue, and by April 2018, Class Counsel had decided to take on the case. The initial search they undertook suggested there were other communities involved, but as things "got going", it became clear that the issue was national in scope. With the early pause in the proceedings and the research undertaken by Canada to better understand the scope of the Program, it did not take long for the national scope of the Program to come to light. While risk is typically calculated from the outset, emerging jurisprudence on class actions also looks to the progression of the risk as the litigation continues (*Moushoom* at paras 82–85). Here, it seems to me that the level of risk at the time the underlying action was instituted was considerably less than in previous cases dealing with the abuse to Indigenous children, and the progression of the risk was for the better from the early stages of the litigation in this matter.

[46] As mentioned, I think the risk profile around what ended up representing about 1/5 of the overall compensation under the Settlement Agreement—for loss of language, culture, heritage and identity compensated as part of Category 1 of the settlement grid—was informed by the litigation in Sixties Scoop, with the risk profile around what ended up representing about 4/5 of the overall compensation under the Settlement Agreement—for actual harm suffered by the claimants compensated as part of Category 2 of the settlement grid—was informed by the

previous abuse cases dealing with the vicarious liability of Canada for the fault of their staff and employees that were at various stages when the underlying action was filed.

[47] I understand the risks raised by Class Counsel both in their written submissions and at the hearing; however, while those risks did exist, the overall risk profile of Indigenous child policy-based class actions shifted considerably in the period between 2016 and 2018, and even more so with the recognition by the Courts of the cause of action of loss of language, culture, heritage and identity, thus lowering the overall risk of exposure to Class Counsel as compared with the previous class proceedings in Residential Schools, Day Scholars, Day Schools and Sixties Scoop. The shifting of Canada's policy decisions and how the government considered reputational risk informed the process which led to the eventual settlement. This snapshot of the lay of the land as it was upon the filing of the underlying class proceedings was confirmed from the outset, when Canada took a collaborative approach and where much of the work that needed to get done—understanding the history of the Program and the scope and size of the class with the archival research and expert reports—was done by the parties in tandem which eventually led to an agreement; there were two judicial mediations and settlement conferences, but in the end, what we see from the objective evidence are parties looking to find solutions rather than looking for procedural victories along the way in a long legal battle, as was the case with Residential Schools, Day Scholars, Day Schools and Sixties Scoop.

[48] In addition, I accept that the settlement in this matter may be the first class action settlement to actually compensate for harm perpetrated in private homes by individuals who are not employees of the federal government, however the applicants are overstating their case when

they say that the claim was about the vicarious liability of Canada for the faults of those running the private homes; the Statement of Claim certainly does not support that assertion and the evidence does not support the assertion that this form of vicarious liability was the basis upon which Canada agreed to the settlement; from what I gathered from the settlement approval hearing, although the claim for loss of language, culture, heritage and identity was the driver for the Category 1 claim, as was made clear by the AGC during the hearing, the cause of action driving the underlying proceedings generally, and which manifested more in the Category 2 claims for abuse, was the alleged negligence of Canada's staff and employees in administering the Program.

[49] I also note that the issue is raised, as regards the risks inherent in the Quebec class action, that time bar or prescription was of concern with respect to the Quebec class action as regards any claim for loss of culture and identity. I appreciate that prescription may have been an issue, but the pleadings show that the concern related to the cause of action of sexual, physical and psychological abuse; the cause of action of loss of culture and identity was not pleaded at the time the Quebec class action was initiated in 2016.

[50] In fact, I am advised by Counsel that the Settlement Agreement is modelled significantly on the settlement agreement in Day Schools, with improvements informed by the experiences in the implementation of that agreement. No doubt there were improvements which lead to the Settlement Agreement, however, where the trail has been blazed and the guideposts set, courts often take this into consideration when assessing risk and result (*Killough v The Canadian Red Cross Society*, 2007 BCSC 941 at para 44; *Tiller v Canada*, 2020 FC 323 at paras 16–17).

(2) Results Achieved

[51] As stated by the applicants, the settlement in Day Schools is the closest comparator to this case. However, there are elements of that settlement, as compared to the Settlement Agreement, which bear noting. First, the form and structure of the Settlement Agreement is based heavily on Day Schools and while that settlement also drew from lessons learned in previous settlements, such as the IRSSA and the Sixties Scoop, it did so to a lesser extent. While improvements were made, and there are differences, particularly in relation to the less complicated claims process in the present case and the different ways of funding the work of assisting class members to file claims, it is clear that the settlement in Day Schools was the basis for the Settlement Agreement.

[52] That said, the results achieved by Class Counsel in this class action are undeniably successful. Although based on the Day Schools model, with a similar level of compensation of $10,000, Category 1 eligibility for compensation is events-based rather than harm-based, thus available to all Class Members. Because of the difficulty in determining the date upon which the transfer of responsibility for Indigenous education from Canada to the Indigenous groups took place, the deeming provision—a novel improvement over Day Schools—is vital as it avoids most Class Members having to prove what may be difficult if not impossible to establish, i.e., that their placement in boarding homes predates such transfer of responsibility. Such an approach was a significant improvement over the more complex system of Class Member inclusion under Day Schools. Also, to avoid the progressive disclosure problems in Day Schools, the Settlement Agreement provided for the untethering of Category 1 and Category 2 claims, allowing for

immediate compensation for Category 1 claims, with further time allowed for the Class Members to complete the more arduous and emotionally difficult submissions under Category 2.

[53] The inclusion of resolution health support workers, to be paid by Canada, was also a significant improvement to avoid the difficulties Class members had with coming forward and filing their claims in previous settlements, including Day Schools. Here, not only was the experience of Counsel important, but the experience of the Representative Plaintiffs, many of whom were support workers themselves and experienced firsthand the difficulties that Class members experienced with telephone hotline services as was made available in Day Schools to help them deal with the traumatizing experience of presenting a claim and thus reliving the horrors of the physically, emotionally and psychologically trauma they had suffered.

[54] In addition, Class members may retain counsel of their choice to assist them with the preparation of Category 2 claims, with legal fees, up to a set limit, being paid by Canada. The latest estimate of class size is 33,000 members, and the overall settlement package is expected to be around $1.9 billion, which includes $50 million for the establishment of the foundation and an estimated $73 million for legal fees to be paid by Canada with respect to individual legal assistance for Class members filing Category 2 claims. In both Sixties Scoop and Day Schools, the individual Class members paid for independent legal counsel to assist them in preparing and filing their claims, where legal counsel was used, with litigation still ongoing.

[55] There is no doubt that the Settlement Agreement is a better settlement than that found in Day Schools, but I must also factor in, as stated, the fact that the template of Day Schools that

informed the final result, and that the betterment was assisted by the efforts of the willing partner from the outset. In addition, and although there is no doubt that the weight attributable to each of the factors and, in particular, the predominant factors of risk and result, will depend upon the facts of each case, I agree that, in the case of mega-fund settlements, "there will come a point where the weight attributed to the result achieved (and the resulting adjustment) must plateau no matter how high the financial settlement achieved" (*Moushoom* at paras 110 and 112).

(3) Complexity of the Issue

[56] As stated earlier, complexity is often addressed in the context of risk. In addition to the legal issues at play, the applicants assert that the heart of the complexity of this case was the uncertainty surrounding the expansive nature of the Program and the number of victims involved, and how little available information existed at the time the underlying class proceeding was filed. I agree. It did take thousands of documents—mostly from archival records disclosed by Canada during documentary disclosure—and a myriad of expert reports retained to grasp the magnitude of the Program thus allowing Canada to appreciate its involvement and risk exposure, and also allowing for the parties to agree to the deeming provision to overcome the uncertainty surrounding the transfer of responsibility from Canada to Indigenous groups.

(4) The Quality and Skill of Counsel

[57] Both Counsel have a wealth of experience in the area of Indigenous-based class actions, with a developed understanding of the nature of the claims, the particularities of Indigenous communities in terms of both history and geography, and the legal issues that surround them.

Clearly, Counsel were uniquely placed to secure the results obtained. It was the specific experience of Counsel, in particular Quebec Subclass Counsel who represented a number of the objectors in Day Schools, which was drawn upon to avoid the many of the difficulties in implementation that were experienced in Day Schools. Also, as I mentioned, what reduced the risk element for Counsel was in fact what made Class Counsel somewhat unique in Canada to take on the fight for boarding home survivors; not only was Class Counsel fully prepared to take on the cause of action of loss of language, culture, heritage and identity, but their experience in the Sixties Scoop and Day Schools litigation gave them particular insight on the elements of that settlement agreement that needed improvement, leading to significant gains in the modelling of the Settlement Agreement. However, what I also consider is that the value of Counsel had less to do with their litigation and advocacy skills in court—because of the reconciliatory posture of Canada which was no longer fighting for every yard on the gridiron—and more to do with their particular experience, ingenuity and ability to look outside the box to find solutions to settlement implementation problems in the past, and to tailor those solutions to the reality of the boarding home survivors; for example, the wisdom of the deeming provision.

(5) The Ability of the Class to Pay

[58] There is little doubt that the class would not have been able to financially support the legal fees in this case.

(6) The Expectation of the Class

[59] I have the retainer agreements setting out what the Class members were expecting which, in practice, would only be relevant in the event the matter did not settle but rather proceeded to trial, with the individual claims being granted, thus allowing Counsel to seek their fees. I therefore am less inclined to consider the retainer agreements as having much weight. In any event, the evidence from the Representative Plaintiffs is that they support the request of Counsel as to fees and disbursement requested; Mr. Percival was very clear about that, after having discussed the matter with the communities. The Settlement Agreement provided that fees were to be paid by Canada, again consistent with the expectation of the class.

(7) Fees in Similar Cases

[60] The applicants are requesting counsel fees of $50 million, inclusive of post-settlement work—on the strength of a total estimated settlement package of $1.9 billion, actual fees billed to-date of $7.7 million plus and estimate of $2.5 million for post-settlement work—plus disbursements; this represents counsel fees of 2.6% of recovery, and a multiplier of 5.4 based on actual fees incurred. The estimate for post-settlement work seems to be lower than previous similar cases, in particular Day Schools, because of the network of local support envisaged by the Settlement Agreement, for example the engagement of the resolution health support workers and the allowance for class member-selected counsel for claims preparation, thus reducing the amount of time that Counsel will need to devote to post-settlement issues for Class members. In this regard, the role of Counsel will be, as expressed during the settlement approval hearing, “to

teach the teachers", thus reducing the level of continued post-implementation involvement as may have been seen by class counsel in previous cases.

[61] I have considered the spreadsheets prepared by both the applicants and *amicus* in relation to fees in similar cases, with corresponding values of overall settlements, percentage of fees requested to settlements values, and the multiplier factor in relation to fees actually incurred and to be incurred. However, it is difficult to simply look at the numbers without also undertaking an analysis of the all the other factors that the courts in those cases have assessed in determining what are fair and reasonable legal fees; it is therefore important to not simply compare the size of the settlement fund and the fees requested, nor to simply look at the other tools such as percentages of settlement value or multipliers of docketed fees. For example, although the overall settlement amount in this case and fees requested are in the range of what is seen in Day Schools—overall settlement over $2 billion/counsel fees set at $55 million plus an additional $7 million for post-settlement work/percentage of fees in the 3% range and a multiplier of 5 over actual fees incurred—the risk factor in Day Schools was significantly greater at the time of the institution of the action and during the earlier stage of the litigation than the risk element in this case; as mentioned, the vicarious liability aspect of the claim as framed by the applicants before me is being somewhat overplayed in this motion.

[62] As a further example, in the most recent case of *Moushoom*, the settlement value was over 23 billion, nearly $14 billion in addition to the Tribunal award, and over 10 times greater than the settlement value in this case. Initially, counsel fees were contested, with class counsel seeking $80 million, and Canada arguing that between $40 million and $50 million was more

appropriate. Following the hearing of the motion to determine counsel fees, but before the decision of this Court was issued, the parties agreed to a negotiated amount $50 million in fees for all work up until a certain date, with class counsel being paid commercial hourly rates for work after that cut-off date, up to a maximum of $5 million. In the end, Justice Aylen felt that even that amount was too high, and determined that $40 million for work done up to the cut-off date was more reflective of what was fair and reasonable for work done up to the date set, with commercial rates applying thereafter. This amount in legal fees equates to 0.17% of settlement value and a multiplier of 2.27 in relation to legal fees actually incurred. As stated, one of the important factors in *Moushoom*, which does not exist in this case, is that legal fees were in fact negotiated. I also accept that given the earlier liability decision of the Tribunal, the risk factor may not have been as high at the commencement of the litigation as in the underlying action.

[63] The difficulty, of course—and I agree with Justice Aylen—is that often in mega-settlement cases, the final settlement value is a matter of happenstance as it very much depends on class size (*Moushoom* at paras 144–146). Although Justice Aylen made her comments in the context of assessing the results achieved by class counsel, the statement is equally relevant to other factors; in this case, to the assessment of risk taken on by Counsel—the applicants stressed the uncertainty of the class size as a key consideration in the assessment of risk—, as well as to the review of legal fees awarded in similar circumstances which, again, depends on the settlement value which is a function of class size. Class size has little to do with the advocacy skills or talent of class counsel.

[64] Also, in cases such as this where we have an uncapped settlement and Canada is paying the fees as a lump sum, independently of the settlement value and not as a percentage of actual claims paid out, the tool of percentages is itself only an estimate, as we do not know at the time of payment of counsel fees what the actual settlement value will be; we do not know how many Class members will come forward at the end of the day.

[65] To echo the sentiments of some of the judges in previous class actions, regardless of which tool one is using to assess counsel fees, whether the percentage approach or the multiplier approach, at the end of the day, the approval of fees is more subjective than objective (*Manuge v Canada*, 2013 FC 341 at para 48), is more an art than a science (*Parsons v Canadian Red Cross Society*, 2000 CanLII 22386 (ON SC) at para 25), and the use of either approach often is completely arbitrary (*Killough v Canadian Red Cross Society*, 2007 BCSC 941 at para 47).

[66] As such, and given the multiplicity of variables that go into the determination of what is fair and reasonable in relation to counsel fees, while a straight comparison with fees awarded in similar class actions is a consideration, it is of limited utility in mega-fund cases, and the weight given to such a straight comparison should be on the lower end of the scale (*Moushoom* at para 108). Comparisons of this type are best used simply to gauge whether one is in the ballpark, and the Court's focus should, rather, be on the actual dollar amount to be approved by the Court. As stated by Justice Belobaba in *MacDonald et al v BMO Trust Company et al*, 2021 ONSC 3726 [*MacDonald*] at para 32:

> The lesson from legal fee approvals in the billion-dollar settlements—one that also applies to this $100 million settlement—is two-fold: (i) keep an eye on the actual dollar

> amount; and (ii) explain and justify the approved legal fee in a principled fashion that is consistent with comparable caselaw.

I would add that moving from $100 million settlements (as in *MacDonald*) to billion-dollar settlements does bring with it lower levels of percentages and additional considerations, and that although arbitrariness in the determination of counsel fees is to be avoided, so is inappropriate windfalls for counsel occasioned by too strict an adherence to the tools of percentages and multipliers (see *Moushoom* at para 87, citing Justice Belobaba in *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at para 50 and para 112).

[67] In addition, the differing structures of counsel fees in the different cases being compared also adds to the difficulty in the comparison. In any event, because these tools have both pitfalls and advantages in the assessment process, suffice it to say that I have noted the comparisons outlined by both the applicants and *amicus* and will keep the pitfalls and advantages in mind as a reasonable check on my assessment.

(8) Time Expended

[68] The value of the docketed time by Counsel, to the time of submissions in relation to the present motion, was just under $7.7 million, with about $2 to $3 million estimated as post-settlement work.

[69] As stated by Justice Aylen, in considering actual legal fees incurred, the exercise begins with consideration of whether those fees are reasonable, on a holistic basis, This is not meant to be forensic analysis of the dockets, but rather “a holistic consideration of the reasonableness of the docketed fees based on a description of the work undertaken and the time attributed thereto.”

The actual fees incurred may then also be considered, as a checking exercise, in relation to the actual amount of fees sought by class counsel, with multipliers as low as 1.5 to as high as 8 having been approved in recent class action proceedings (*Moushoom* at paras 100 and 104).

[70] Here, the *amicus* was able to review the docketed time Counsel which included a brief description of the work conducted. Quebec Subclass Counsel confirmed to the *amicus* that as they only do contingency work, they do not have regular hourly rates that they charge to any clients. In reviewing what was submitted, the *amicus* found that with the exception of Mr. Schultze, the regular hourly rates for Quebec Subclass Counsel over the years in question generally ranged from $150-$200 during work on the Quebec Class Action, and from $160-$285 during work on the underlying action. For Mr. Schultze, his regular hourly rate ranged from $295 in 2016 to $380 in 2023. According to the dockets, the average hourly rate used to calculate the value of Mr. Schultze's work on the underlying action was $599.88, and the average rate for other lawyers who spent significant time on the file (more than 15 hours) ranged from $232-$274 while the maximum regular hourly rate for those same lawyers during that time ranged from $160-$240. As to the distribution of the work, Mr. Schulze's work represented 37% of the docketed time (with 58% from other lawyers and articling students) and 61% of the value of the docketed fees in relation to the underlying action. As regards the Quebec Class Action, Mr. Schulze's work represented 24% of the docketed time (with 69% from other lawyers and paralegals) and 40% of the value of the docketed fees.

[71] As regards Class Counsel, they advised the *amicus* when she enquired that their business is nearly exclusively class actions, and thus they cannot show what hourly rates they normally

charge their clients, or whether their clients actually pay legal fees on the basis of docketed time. In her review, the *amicus* advised that the dockets of Class Counsel indicated an hourly rate for each lawyer, which was used to calculate the value of the work done. Between 2018 and 2023, the indicated hourly rates for lawyers ranged from $300-$475 for junior and mid-range lawyers, and from $850-$1200 for senior lawyers (Mr. Klein and Mr. Lennox). At first blush, although I may have expected such an hourly rate for senior lawyers within larger, national law firms, the rates do seem rather high in the context of a small, boutique firm with significantly lower overhead. As to the distribution of the work, Mr. Klein and Mr. Lennox represented 56% of the docketed time (with 43% from junior lawyers and paralegals) and 80% of the value of the docketed fees in relation to the underlying action.

[72] In my experience, time sheets are notoriously unreliable in assessing value. They are based on the premise that each hour worked has the same value; this is a misconception. An hour spent devising an innovative, ground breaking legal argument for a contested motion may not be worth, at least to the client, the same as an hour spent inputting time charges onto an electronic docket sheet. However on the docket, an hour is an hour. The same can be said about hourly rates; a lawyer who charges $1000 per hour and, given her expertise and innovative skills, in that hour is able to come up with a solution to a perplexing problem, is usually a better deal for the client than other lawyers charging $300 per hour who are unable, because of insufficient experience, to find a solution even after 10 hours of consideration. It has always been my view that the determination of value of legal fees is not a binary equation of freely docketed time multiplied by a pre-set and static hourly rate; these are regular parameters that have their limited use. Putting aside for the moment the old adage that the sharpness of the docketing pencil is

inversely proportional to the client's level of tolerance for legal fees, in the assessment of docketed time, one must consider what is being accomplished during each task, and whether and to what extent such task moves the success needle forward.

[73] Here, there is no assessment as to whether the dockets reflect what would be the most efficient use of time. In fact, a holistic consideration of the reasonableness of the docketed fees may be challenging. As indicated by the *amicus*, with the brief descriptions of the work conducted which are included in the dockets, it is often not possible to understand the true nature of the work being accounted for, and that it may be that the descriptions do not always fully describe the work performed. However she continued by saying that it did appear nonetheless that there were a number of activities docketed by Class Counsel, including by senior counsel, that were administrative in nature, such as arrangements for travel, dinner, and meetings. I should add that, in fairness, the applicants conceded before me that no one expected the Class members to pay legal fees based on docketed time, and that given the retainer agreements, dockets were only being kept for the purposes of the present motion.

[74] Under the circumstances, I am not convinced that I should give full value to the time expended by Counsel as reflected in docket sheets.

[75] As for the disbursement, although I am concerned with the amount of over $14,700 charged for photocopying and have some reservations regarding other charges, I am comfortable in finding that the disbursements are acceptable.

(9) The Importance of the Litigation to the Plaintiffs

[76] The affidavits of the Representative Plaintiffs describe the importance and significance of this Settlement Agreement to them, their families, and their communities. The importance of this matter to the Class members is unquestionable. This is more than a lawsuit for them; it is an official recognition of the harm they suffered as children, and the wounds they carried with them throughout their lives. It also represents a healing path forward for the plaintiffs and their families.

(10) The degree of responsibility assumed by counsel

[77] Both Class Counsel and Quebec Subclass Counsel assumed complete responsibility for this case. As stated, prior to Canada signalling their willingness to proceed with settlement discussion, their involvement was taken up more in assessing the extent of the devastation of the Program, and less with legal skirmishes along the way.

B. *Determining the Quantum*

[78] I have tried to consider each of the factors noted above in a principled way and the appropriate weight to be attributed thereto, keeping in mind the perspectives of Class Counsel, Class members, Canada and the public interest.

[79] In the end, it seems to me that the message of Justice Aylen in *Moushoom*, with which I agree, is that, in dealing with mega-settlements, after considering each of the elements outlined by the case law—which by the way are non-exhaustive—a court must step back and look at the

overall evidence and public factors, from beginning to end, and determine in a holistic way, what is fair and reasonable under the circumstances. Although tools such as the percentage of recovery and multipliers are interested as checkpoints, they are not the best way of assessing the fairness and reasonableness of a proposed class counsel fee in billion-dollar settlements (*Moushoom* at paras 95–112).

[80] Having considered all the factors, in particular the risk undertaken by Counsel and the results achieved, I find that an amount of $32.5 million is fair and reasonable, and will reasonably compensate Counsel with respect to their efforts and skills in handling the underlying action. To the extent that it is a checkpoint, this amount represents an estimated 1.7% of the expected settlement value and a multiplier of about 3.2, both at the lower end of the scale for both tools as regards the cases that have been put before me to consider.

[81] My decision, although a reflection of all the factors that I have considered, is informed to a considerable extent by the significant reduction in the risk element of this case as compared with the risks inherent at the time of the institution of Day Schools and Sixties Scoop, as well as the nature of the work undertaken by Counsel leading up to the Settlement Agreement, being more of a collaborative exercise in finding a solution rather than an exercise of significant procedural skirmishes and having to deal with roadblocks put up by defence counsel.

C. *Honoraria*

[82] From everything I have heard, I have little doubt that an honorarium of $10,000 for the Representative Plaintiffs and Quebec Subclass Representative, to come out of Class Counsel Fees is appropriate and just.

ORDER in T-1417-18

THIS COURT ORDERS that:

1. Counsel fees in the amount of $32,500,000.00 (thirty-two million five hundred thousand dollars) together with applicable taxes, plus $174,818.39 in disbursements, are hereby approved as being fair and reasonable Class Counsel Fees in respect of legal fees and disbursements for their past and future work on behalf of the class as a whole.

2. The Defendant shall pay the approved Class Counsel Fee in accordance with the terms of the Settlement Agreement.

3. The Representative Plaintiffs Reginal Percival, Allan Medrick McKay, Iona Teena McKay and Lorna Watts, and Quebec Subclass Representative Plaintiff Annie Irene Trapper Weistche, shall each be awarded an honorarium of $10,000 payable out of the Class Counsel Fees awarded to Class Counsel and Quebec Subclass Counsel.

4. There shall be no costs on this motion.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1417-18
STYLE OF CAUSE:	REGINALD PERCIVAL, ALLAN MEDRICK MCKAY, IONA TEENA MCKAY AND LORNA WATTS v HIS MAJESTY THE KING

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO

ORDER AND REASONS:	PAMEL J.
DATED:	DECEMBER 27, 2024

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