Court File No.: T-2212-16

FEDERAL COURT

PROPOSED CLASS ACTION

B E T W E E N :

JESSICA RIDDLE, WENDY LEE WHITE AND CATRIONA CHARLIE

Plaintiffs

- and -

HER MAJESTY THE QUEEN

Defendant

MEMORANDUM OF FACT AND LAW OF THE PLAINTIFFS & CLASS COUNSEL (FEE APPROVAL RETURNABLE MAY 11, 2018)

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PART I - OVERVIEW OF THE MOTION

1. The claims forming part of this settlement are perhaps some of most important to ever come before a court in this country for determination, let alone resolution. These actions sought to establish novel, unique and untested duties never before recognized by Canadian law.

2. The case was extraordinary in terms of its historic significance and the novelty of the causes of action advanced. Its subject matter touched upon the lives of thousands of Indigenous persons in Canada. This case's arduous path to resolution itself evidences its complexity, importance and risk.

3. Following the motion for settlement approval of this national settlement, Class Counsel now comes before this court for approval of their legal fees in connection with these matters. Class Counsel undertook these cases years ago without any guarantee of payment. They shouldered the financial burden throughout. They achieved significant monetary relief for victims of the Sixties Scoop across the country and meaningful reconciliation for all Canadians, a legacy that will endure for years to come.

PART II - THE FACTS GIVING RISE TO THIS MOTION

4. The settlement for which the parties seek judicial approval provides for legal fees in the amount of $75 million. These amounts are over and above the compensation and Foundation amounts the Defendant is obliged to pay pursuant to the agreement. The potential total value of the settlement is $880 million. This global fee amount represents far less that what could have been properly sought pursuant to the applicable Retainer Agreements. Moreover, the law firms who will receive these funds[1] have agreed to provide ongoing future legal assistance at no further or ancillary charge to any claimants who require assistance throughout the claims process.

5. The fees sought represent less than ten percent (10%) of the overall global payment of the Defendant.[2] At this percentage, the fees sought are at the lowest end of all judicially-approved percentages, generally accepted in the range of 25% to 33%. Class Counsel have provided a

[1] Wilson Christen LLP; Cooper Law; Koskie Minsky LLP; Klein Lawyers LLP; Merchant Law Group; Troniak Law; Cooper Regal; and Sunchild Law.

[2] Affidavit of J. Wilson sworn April 17, 2018 ("**Affidavit of J. Wilson**"), at para. 79, p. 15 [filed under separate cover].

specific breakdown of the actual amounts payable to the Class Counsel law firms to whom the global fee amount is payable by Canada.[3]

6. In particular, the Settlement provides for a compensation fund of up to $750 million, plus $50 million for the Foundation, up to $5 million for notice and administration, and $75 million for fees, meaning the value of the settlement is $880 million. The applicable Retainer Agreements provide for fees in the ranges of 20% to 33% of total recovery. Therefore, the fee sought by all of the lawyers representing the plaintiffs in this action is $75 million, or about 8.5% of the gross value/total recovery of the settlement.[4] The parties contend that the results achieved in this historic litigation are excellent, in terms of the monetary compensation available, the non-monetary benefits of the Foundation which are expected to accrue for years to come, and the simplified claims process designed to expedite the processing of compensation.

7. Any class member who makes a claim through the compensation process will have available to them if necessary or desired, each of these law firms which are located across Canada, to assist them with submitting their respective claim free of charge. No class member will pay any portion of their compensation claim to any lawyer, both a beneficial (and unusual) feature of the settlement and legal fees structure.

8. The substantive legal, practical and political risks, described in great detail *infra*, only increased the risk assumed by Class Counsel throughout the life of these actions. Generally speaking, some of those risks included:

(a) the multiplicity of proceedings across the country, in various jurisdictions;

(b) the possibility that certification might be denied generally or a national class might not be certified;

(c) the possibility of losing on liability and having the actions dismissed at trial;

(d) the potential for individual assessments of damages even if successful on liability;

(e) the real possibility that any actual recovery at trial would be much smaller than the settlement and/or not ordered in an aggregate amount;

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[3] Appendix "B", Chart of Quantum Payable to Class Counsel.

[4] Affidavit of D. Rosenfeld sworn April 29, 2018 ("**Fee Affidavit of D. Rosenfeld**"), at para. 107, sworn April 20, 2018, Motion Record (Fee Approval), Tab 6, p. 114.

(f) gross delay in complex multi-jurisdictional litigation, postponing recovery for a significant period of time;

(g) potential that counsel's time expended might be disproportionate to any amount ultimately recovered; and

(h) potential that objectors might persuade the court not to approve the Settlement or that the opt out threshold would be exceeded, providing the Defendant with the right to terminate the Agreement, returning all parties back to their 2016 litigation positions.

9. Moreover, even on its face, without regard for the complexity or difficulty surrounding this litigation, the percentage set aside for legal fees is unassailably fair and reasonable. The Ontario Law Reform Commission's *Report on Class Actions*, itself "widely acknowledged to be the most sophisticated and extensive analysis of class actions undertaken in the world" did not consider counsel fees representing 25% of the total global recovery to be 'inherently unreasonable'.[5]

10. In cases like this, otherwise coined 'common-fund' cases, this Honourable Court has already determined that the "use of a percentage [for Class Counsel fees] appears to be preferred because it tends to reward success and to promote early settlement."[6] Given the percentage sought herein is less than half of the clearly acceptable 25% of recovery or a third of the presumptively approvable 33% in the jurisprudence, there can be no doubt that the quantum of these fees are both fair and reasonable.

11. In all other respects, Class Counsel repeats, relies upon and adopts the facts as set out in the factum of the parties dated April 19, 2018, filed with this Court in support of the settlement approval motion. In the same way, the settlement itself requires the approval of both this Honourable Court and the Ontario Superior Court of Justice, as do the requested legal fees.

PART III - THE ISSUES TO BE DETERMINED

12. The one issue to be determined on this motion is whether Class Counsel's legal fee request sought to be approved is fair and reasonable in all of the circumstances.

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[5] *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at para. 57, Plaintiffs' Book of Authorities (Fee Approval), Tab 22.

[6] *Manuge v. Canada*, 2013 FC 341 at para. 47, Plaintiffs' Book of Authorities (Fee Approval), Tab 19.

13. The Plaintiffs and Class Counsel respectfully submit that the answer to this question is "**yes**".

PART IV - THE LEGAL ARGUMENT

A. Statutory Framework and Test for Approving Legal Fees

14. On an application for legal fee approval, the Court is to be guided by the terms of, and jurisprudence informing, Rule 334.4 which provides:

> **334.4 Approval of Payments** – No payments, including indirect payments, shall be made to a solicitor from the proceeds recovered in a class proceeding unless the payments are approved by a judge.[7]

15. As this Honourable Court found in *Manuge v. Canada*, "at the heart of the application of Rule 334.4 is the requirement that legal fees payable to Class Counsel be fair and reasonable".[8] In determining whether those fees are fair and reasonable in all the circumstances, the requisite factors to be taken into account are well known and include, but are not limited to, the following:

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

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

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

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

(e) skill and competence demonstrated by Class Counsel;

(f) the results achieved;

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

(h) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation.[9]

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[7] *Federal Courts Rules*, SOR/98-106, Rule 334.4, Appendix "A".

[8] *Manuge v. Canada*, 2013 FC 341, at para. 28, Plaintiffs' Book of Authorities (Fee Approval), Tab 19.

[9] *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, at para. 80, Plaintiffs' Book of Authorities (Fee Approval), Tab 24.

16. In this case, Class Counsel seeks a straight percentage of the total global fund available to the class. This means of calculating legal fees that is both commonplace and judicially well-accepted, having become the preferred manner by which to order the payment of legal fees:

> "…the rationale for using percentage fees in 'common fund' cases in the United States is relevant. Class actions differ from conventional actions in that the beneficiaries of the action do not participate actively in it, leaving the instruction of counsel to the representative plaintiff. As was observed in *Swedish Hosp. Corp. v. Shalala, supra* at p. 1265, fees in these cases must be shared by the beneficiaries of the fund in order to avoid their unjust enrichment. … this approach shifts the emphasis from the fair value of the time expended by counsel, or what we would refer to as a *quantum meruit* fee, to a fair percentage of the recovery [citation omitted]"[10]. [emphasis added]

17. The risk undertaken, the legal complexity of the action, the importance of the case and the results achieved are the four (4) primary factors upon which this Court ought to rely in arriving at the conclusion that the fees sought are fair and reasonable in all of the circumstances.

18. Lastly, a weighty reality in this case in favour of finding the legal fees are reasonable, is the fact that fees were negotiated at arms' length, within the confines of a judicial mediation, itself providing an imprimatur of fairness:

> "There is a *prima facie* presumption of fairness when a proposed settlement is negotiated at arms-length: Manual for Complex Litigation, 3rd ed. (Federal Judicial Centre: West Publishing, 1995) at 30.42. This is particularly so when the settlement negotiations have taken place through the auspices of the court."[11] [emphasis added]

19. This Court may rely on each of these factors to arrive at the conclusion that in all of the circumstances of these proceedings, the fees sought are reasonable and fair.

B. The Legal Fees to be Approved on This Motion

20. On this motion, this Court is being asked to review and approve the legal fees payable to counsel in the within Federal Court action. This is consistent with well-settled law, which states

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[10] *Endean v. CRCS; Mitchell v. CRCS*, 2000 BCSC 971, at para. 38, Plaintiffs' Book of Authorities (Fee Approval), Tab 12.

[11] *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2002] O.J. No. 1855 (S.C.J.), at para. 19, Plaintiffs' Book of Authorities (Fee Approval), Tab 8.

that as a matter of comity, each reviewing court ought to defer to courts in other jurisdictions to rule on the appropriateness of the fees of their local counsel.[12]

C. The General Principles Which Ought to Guide This Court's Analysis

21. The issue of compensation for Class Counsel is a vitally important subject, and the final analysis of whether class proceedings legislation, in each province and the regime established by the *Federal Court Rules*, will achieve its objectives (access to justice, behaviour modification and judicial economy) will largely depend on whether or not there are sophisticated and hard-working Class Counsel who are prepared to act for the class and hence bring these actions and do them well.[13]

22. A fee award that not only compensates Class Counsel for the amount of time actually incurred, but also rewards Class Counsel for the risk assumed on behalf of the class (usually over the course of many years) is key to ensuring that counsel remain motivated and willing to assume the necessary risks to act as Class Counsel. Class Counsel will inevitably take on worthy cases that they will nevertheless lose, visiting upon them significant financial consequences. If Class Counsel are not adequately compensated, they will not have an economic incentive to prosecute class actions, members of the public who have been wronged will be denied access to justice, and inappropriate behavior on the part of defendants will go unmodified.[14]

23. This is the lens through which risk evaluation at the fee approval stage must be viewed. As a result, it is paramount that the court carefully consider not only all of the risks incurred by Class Counsel in prosecuting class proceedings, but also the ultimate risk concerning the fulfillment of the objectives of the legislation. Although the risks incurred in undertaking and continuing a class proceeding are varied and complex, the purpose of assessing the risks incurred by Class Counsel is clear: the issue of compensation will ultimately determine whether or not the class proceedings regime in Canada generally will be successful in fulfilling its legislative objectives.

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[12] *Jeffery v. Nortel Networks*, 2007 BCSC 69, paras. 76-79, Plaintiffs' Book of Authorities (Fee Approval), Tab 17.

[13] Garry D. Watson, Q.C., "Class Actions: Uncharted Procedural Issues" (Address to the Canadian Institute Seminar in Class Actions, 4 October 1996) at 3-4 cited by Cumming J. in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd*., [2005] O.J. No. 1117 (S.C.J.), at para. 59, Plaintiffs' Book of Authorities (Fee Approval), Tab 25.

[14] Fee Affidavit of D. Rosenfeld, at para. 114, Motion Record (Fee Approval), Tab 6, p. 115.

24. The risks and high costs of litigation associated with pursuing complicated yet worthy cases has been eloquently described as follows:

> "There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of a plaintiff. If the consequence of an order for costs would be to destroy such a claim, no order should be made. Injustice would be even more manifest if the impoverishment of plaintiff were caused by the very acts of which plaintiff complains in the action."[15] [emphasis added]

25. This is precisely the mischief that class proceedings legislation was designed to prevent – the injustice of the non-pursuit of meritorious claims. Such claims cannot be prosecuted diligently, or at all, without class counsel being willing and able to assume all of the attendant financial risks.

26. The three (3) main goals of class proceedings are their potential to provide enhanced access to justice for aggrieved persons who would otherwise be denied the benefit of existing remedies, judicial economy, and their ability to modify inappropriate behaviour on the part of defendants.[16]

27. Where Class Counsel achieve a successful result, they render a service not just to the class but to the legal system itself by providing access to justice, achieving judicial economy and contributing to behaviour modification. However, the fulfilment of these objectives is in large measure, dependent on the willingness of counsel to undertake litigation on the understanding that there is always the risk that the expenses incurred in time and disbursements may never be recovered at all.[17]

28. Simply put, if Class Counsel are not adequately and consistently compensated in an amount that fairly reflects the seriousness of risks undertaken over the course of many years, the purpose of the legislation will not be achieved: "...class actions simply will not be undertaken by

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[15] *John Wink Ltd. v. Sico Inc.*, [1987] O.J. No. 5 (H.C.), at para. 8, Plaintiffs' Book of Authorities (Fee Approval), Tab 18.

[16] Ontario Law Reform Commission, *Report on Class Actions*, vol. 1, (Toronto: Ministry of the Attorney General, 1982), pp. 121 and 140, Plaintiffs' Book of Authorities (Fee Approval), Tab 26.

[17] *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at para. 13, Plaintiffs' Book of Authorities (Fee Approval), Tab 22.

first rate lawyers... unless they are assured of receiving fair - and I would add "generous" - compensation in appropriate cases".[18]

29. In conducting litigation on a contingent basis, the position of Class Counsel compares unfavorably with that of a lawyer who performs non-contingent work compensable on a certain or hourly basis. Given the enormous amount of money required to prosecute class actions in Canada, the length of time typically required, and the roadblocks and delays affected by defendants, the risks incurred by Class Counsel in agreeing to payment on a contingent basis are increased dramatically.

30. If Class Counsel were not compensated in a manner that reflected the risk of failure, in addition to being reimbursed for their investment of time and resources, lawyers would always prefer to undertake other kinds of less risky work for which payment is certain:[19]

> "It is essential that the successful lawyer be compensated for accepting the risk of non-payment. Otherwise, lawyers very likely will refuse to act for classes on this basis and will insist on the usual solicitor and client cost arrangements, in which case potential representatives may be unable or unwilling to retain them".[20]

31. Compensation in the context of contingency work in class proceedings must therefore be sufficiently appealing to justify "capable and effective" counsel's lost opportunity to take on paying clients and the carrying costs of a case without pay for years, or at all.[21]

32. As a result of the tremendous risk for Class Counsel associated with the prosecution of class proceedings in Canada, there is a dearth of counsel who are actually prepared to commence and prosecute these actions, seeing them through to their conclusion, one way or another. This consideration bears directly on the access to justice goal of the class proceedings regime.

33. In order to bear all of these risks identified, Class Counsel need to be well-funded and well-financed. The model that has developed for prosecuting class actions is simply not available

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[18] *Griffin v. Dell Canada Inc.*, [2011] O.J. No. 2487 (S.C.J.), at para. 53 (S.C.J.), Plaintiffs' Book of Authorities (Fee Approval), Tab 16.

[19] Fee Affidavit of D. Rosenfeld, at para. 133, Motion Record (Fee Approval), Tab 6, p. 119.

[20] Ontario Law Reform Commission, *Report on Class Actions*, vol. 3, (Toronto: Ministry of the Attorney General, 1982), pp. 677 and 737, Plaintiffs' Book of Authorities (Fee Approval), Tab 26.

[21] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.), at para. 61, Plaintiffs' Book of Authorities (Fee Approval), Tab 25.

to counsel who are not prepared to bear these enormous risks. As a result, the prosecution of class proceedings has been confined to a very small group of specialized firms, and as a result, access to justice may be denied in many risky, albeit worthy and important, cases.[22]

34. All of these factors and realities have been taken into account by various courts across the country on motions to approve legal fees and this Honourable Court ought to be similarly guided in this circumstance.

D. Uniqueness of this Litigation & the Risk Involved

(i) Historically Unique Litigation Is Inherently Fraught with Risk

35. When *Brown v. Canada* was commenced in Ontario in 2009, it was true pioneer litigation, the first of its kind anywhere in the country. The claims in the action generally related to loss of cultural identity. No court in Canada has ever awarded damages for loss of cultural identity. In consequence, these claims were novel, and therefore there was significant risk with respect to the monetary value that a court may place on such loss.[23]

36. As such, these cases were matters of first impression and therefore, by definition, uncertain and inherently risky:

> "The litigation risk that Class Counsel assumed is also illustrated by the fact that the grievance that was at the centre of the case had been well-known for more than 30 years and had attracted no litigation either individually or as a class proceeding…"[24]

37. This fact is a compelling starting point for this court's assessment of the degree of risk, skill, competence and dedication assumed by Class Counsel, coupled by the fact that this was the very first Sixties Scoop litigation of its kind in Canada:

> "[p]remium fees are awarded in respect of class actions in recognition of the risk undertaken and result obtained for the class. The risk in this case was self-evident given the complexity of the action, the uncertainty of success because of the novel causes of

[22] Fee Affidavit of D. Rosenfeld at paras. 127, 133-135 Motion Record (Fee Approval), Tab 6, p. 127.

[23] Fee Affidavit of D. Rosenfeld, at para. 94, Motion Record (Fee Approval), Tab 6, p. 110.

[24] *Manuge v. Canada*, 2013 FC 341, at para. 34, Plaintiffs' Book of Authorities (Fee Approval), Tab 19.

> action asserted, the difficulties relating to damages assessments and the protracted litigation."[25] [emphasis added]

38. As stated by one of the courts during the settlement approval process of the pan-Canadian residential schools settlement, the same sentiment applies to the Sixties Scoop litigation across Canada:

> "The superior courts of this country have been dealing with Indian Residential School claims for about ten years depending on the specific jurisdiction. **…. However, the number of cases that have actually proceeded to trial is not significant.** There are a variety of reasons for that. The document discovery in these cases is massive and time-consuming. In many cases, the delay is for months and years as the government and churches review ancient files and records in a large number of departments and locations across the country."[26] [emphasis added]

39. In these ways, these actions starkly reveal both the risk, and the need, for class proceedings. These proceedings might represent the quintessential access to justice cases, where the consideration of risk to Class Counsel ought to be one of the court's guiding considerations in its reasonableness assessment:

> "Another fundamental objective [of class proceedings] is to provide **enhanced access to justice to those with claims that would not otherwise be brought** because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first places and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope."[27] [emphasis added]

40. The quantum of a Class Counsel fee is "not only to reward counsel for meritorious efforts, **but it should also encourage counsel to take on difficult and risky class action litigation**".[28] These actions were on the high end of difficult and risky litigation – Class Counsel took on substantial risk of putting time into these matters over a very long time, which included a complicated series of events, on a contingent basis, with highly uncertain results throughout:

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[25] *Baxter et al. v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.), at para. 61, Plaintiffs' Book of Authorities (Fee Approval), Tab 4.

[26] *Fontaine et al. v. Canada et al.*, 2006 YKSC 63, at para. 46, Plaintiffs' Book of Authorities (Fee Approval), Tab 13.

[27] *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.) at para 14, Plaintiffs' Book of Authorities (Fee Approval), Tab 15.

[28] *Abdulrahim v. Air France*, 2011 ONSC 512, at para. 9, Plaintiffs' Book of Authorities (Fee Approval), Tab 1. [emphasis added]

> "the chance of success in a given lawsuit and the risks to be run by an individual lawyer in taking it involve a myriad of objective factors and many quintessentially subjective considerations. These chances and risks are incapable of scientific calculation."[29]

41. Initiating this type of class action was inherently risky at its very commencement: legally, politically and financially. This factor has been judicially relied upon as incredibly significant in determining what is a 'fair and reasonable' fee. In doing so, it is important for the court not to look back and judge risk in light of the ultimate result before the court now, but to stand in the shoes of counsel at the time of commencement of the litigation and all the risks which were faced at that time:

> "There can be no doubt that legal counsel for the class exposed themselves to a significant level of risk in taking on this case. … In the ordinary course of this type of litigation, counsel could expect to be engaged for many years. … When Class Counsel accepted the retainer there was no expectation that the determinative legal issue would be resolved in a summary way and that no appeal would be taken from that decision. Given the Defendant's adversarial approval to the motion to certify, counsel would have assumed that they were exposing themselves to a financial risk measured in the potential loss of professional time and disbursements of probably tens of millions of dollars. This was also not a case where the Defendant's liability approached a level of certainty."[30] [emphasis added]

42. The risk of no recovery at all for the class in this case was substantial. In such circumstances, courts have described similar global fund settlements with streamlined claims processes, such as the one in the Settlement at bar, as an "excellent" result:

> "The class members will recover full and generous benefits as a result of the settlement and they will do so through a simple, administrative procedure without the necessity of engaging lawyers. Moreover, their costs of claiming compensation are to be covered by the settlement fund. The results achieved can only be described as excellent."[31] [emphasis added]

43. These substantial risks and barriers presented themselves to Class Counsel at the time of commencement of the actions, throughout the litigation, the negotiations and remain today if litigation to judgment were necessary.

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[29] *Endean v. CRCS; Mitchell v. CRCS*, 2000 BCSC 971, at para. 25, Plaintiffs' Book of Authorities (Fee Approval), Tab 12.

[30] *Manuge v. Canada*, 2013 FC 341, at paras. 31 – 32, Plaintiffs' Book of Authorities (Fee Approval), Tab 19.

[31] *Endean v. CRCS; Mitchell v. CRCS*, 2000 BCSC 971, at para. 57, Plaintiffs' Book of Authorities (Fee Approval), Tab 12.

(ii) Risk of Continued & Perpetual Delay In Obtaining Relief

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

> "There is no doubt that without a settlement, the proceedings will be protracted, the outcome uncertain and (even if successful) the class members will not receive compensation for years. There is no assurance that at the end of this process they will receive any more than they will get under these Settlement Agreements. Given the advanced age of class members and the historical nature of this litigation, the benefits of an immediate and certain settlement cannot be overstated."[32] [emphasis added]

45. Precisely the same sentiment applies to this case – immediate and certain compensation cannot be overstated when viewed against the prospect of further protracted litigation and the fact that the events giving rise to the proceedings occurred decades ago. As one of the representative plaintiffs has sworn on this motion, the impact of further "delay would be crucially destructive" and "further lengthy court battles [are] a burden that I cannot describe".[33]

46. The Settlement will bring an end to the litigation and will provide compensation to class members far more expeditiously than if the claims were litigated to judgment. The actioned styled *Brown v. Canada (Attorney General)* (Court File No. CV-09-372025-CP) (the "***Brown* Action**") is illustrative in this respect. From its commencement to the first hearing on liability, eight (8) years elapsed, and the hearing to determine whether aggregate damages were available had not even been held yet, or even scheduled.

47. In particular, the following are realistic timeline estimates for this action:

Motion for certification:	June 15, 2019
Decision on the motion for certification:	October 15, 2019
Hearing of motion for leave to appeal order certifying the action as a class proceeding:	March 15, 2020
Decision on motion for leave to appeal:	June 15, 2020
Documentary production to conclude by:	June 15, 2021
Discoveries to conclude by;	November 15, 2021
Trial of the common issues:	November 15, 2022
Decision on the common issues trial:	May 15, 2023

[32] *McKillop and Bechard v. HMQ*, 2014 ONSC 1282, at para. 28, Plaintiffs' Book of Authorities (Fee Approval), Tab 20.

[33] Affidavit of Jessica Riddle sworn April 16, 2018 ("**Affidavit of J. Riddle**"), at paras. 20, 21, Motion Record (Settlement Approval), Tab 7, p. 2196.

Appeal of the common issues judgment:	November 15, 2023
Decision from the Court of Appeal:	April 15, 2024
Leave to appeal to the Supreme Court of Canada:	December 15, 2024
Aggregate damages assessment hearing:	June 15, 2025
Aggregate damages assessment reasons:	October 15, 2025
Individual damages hearings (if necessary)	January 15, 2026 onward

48. Instead, if the Settlement is approved, Eligible Class Members will be entitled to compensation within a much shorter timeframe, estimated to be approximately 18 months from today.

49. Any further delays associated with contested litigation would result in specific and additional prejudice to the aging class members, and accordingly, a denial of access to justice. The impact of further "delay would be crucially destructive" and "further lengthy court battles [are] a burden that I cannot describe".[34]

50. This class action involved allegations and facts that occurred between 27 and 67 years ago. There are thousands of class members over that time period now of advanced age. Sadly, there are also thousands of class members who have already passed away, and many more would pass away during each year that the within litigation continued. In such historical types of cases, "inherent delays would result in additional prejudice to the aging class members, and accordingly, a denial of access to justice".[35]

51. Class Counsel's ability to negotiate the Settlement that they did, obviates any and all concerns about further prejudice to class members by delay and the passage of time. Instead, class members have available to them an expedited, simple and timely claims process for which all of their claims shall be processed and determined within the next 18 months instead of waiting years to judgment, through all attendant appeals, for the possibility of no compensation at all.

[34] Affidavit of J. Riddle, at paras. 20, 21, Motion Record (Settlement Approval), Tab 7, p. 2196.

[35] *Anderson et al. v. Canada*, 2016 NLTD(G) 179, at para. 53, Plaintiffs' Book of Authorities (Fee Approval), Tab 2.

(iii) Weighty Liability Risks To Achieving A Judgment

52. Class Counsel repeats, relies upon and adopts the detailed examination of the liability hurdles faced in this proceeding, described in paragraphs 162 through 206 of the factum filed in support of the settlement approval motion dated April 19, 2018.

53. Generally speaking, those risks included the following eventualities:

(a) **Uncertain results at trial:** The following could affect Class Counsel's ability to recover its fees or the time over which that might occur:

(i) the Plaintiffs would be unsuccessful in proving negligence or breach of fiduciary duty;

(ii) the Plaintiffs establish all other elements of negligence, or makes out a case on fiduciary duty, but the Defendant's duty of care is negated by the Defendant's "policy" defence;

(iii) the Plaintiffs succeed in negligence and/or fiduciary duty, but are not awarded aggregate damages and the court orders individual assessment hearings; or

(iv) the Plaintiff succeeds in negligence and/or fiduciary duty, but some or all class members' claims are barred by virtue of the application of the relevant limitation periods.

(b) **Timing and uncertainty of potential individual hearings:** If individual assessment hearings were ordered instead of aggregate damages, such hearings:

(i) would likely be adversarial in nature, which would lead to a need for legal representation of and increased expenses for class members, including the need to tender expert reports;

(ii) would likely require significant time to complete, especially considering the size of the class, leading to prejudice for the aging class and a denial of timely access to justice;

(iii) would likely require class members to testify, forcing a traumatic recounting of what they suffered.

54. Moreover, in addition to the significant liability risks faced on the merits, even if the plaintiffs in the within action were successful in proving that the Crown owed a duty to the class and that the duty was breached, as was the case in the *Brown* Action, they are nevertheless not relieved of their burden of establishing causation.

55. No causation common issue was certified in the *Brown* Action. While this does not preclude the common issues judge from granting judgment on a causation common issue at the common issues trial, the plaintiffs in the *Brown* Action would nevertheless have been required first to prove that causation could be determined in common.

56. Inevitably, the Crown would have argued that causation could not be established on a class-wide basis, based on differences within the class, including:

(i) foster care, where the connection to the biological family may be retained, versus adoption, where the biological tie is severed;

(ii) length of time in care – short- versus long-term care; and

(iii) age at adoption.

57. In consequence, there was a very real risk that a court would find that causation could not be determined in common, leading the court to the conclusion that aggregate damages were not available. This would have led to individual assessment hearings.

58. In particular, at the first motion for certification in the *Brown* Action, Justice Perell specifically referenced the requirement for individual issues hearings to assess damages since each class member will have an individual history and story to tell about consequences of their placement in non-aboriginal homes:

> [13] […] If this question were answered in the positive, then there would have to be individual trials to determine whether or not any individual class member can prove identification as an aboriginal, causation, damages and the quantum of compensation. Both the common issue and the individual issues trials will be difficult, particularly the matter of causation, but Ms. Brown and Mr. Commanda and any others like them should have their day in court to attempt to prove an entitlement to compensation, as should the federal Crown have its day in court to refute the allegations made against it.
>
> […]
>
> [185] In a sense, the litigation of Ms. Brown's and Mr. Commanda's story will be the test case for determining whether the federal Crown committed a civil harm. If Ms. Brown or Mr. Commanda successfully prove or fail to prove that the federal Crown owed them respectively a fiduciary or common law duty, then a precedent will be established and other class members will be bound by that result. If Ms. Brown and Mr. Commanda are successful, then other class members, if they are inclined to do so, can come forward in

> individual issues trials to prove class identification, causation, damages and quantum of damages.
>
> [186] It remains to be seen how many members of the class, said to be 16,000 persons, would proceed to individual issues trials because each class member will have an individual history and story to tell about the consequences of their placement in non-aboriginal homes. That said, in my opinion, the common issues trial and any individual issues trial will be manageable and provide access to justice, and they are the preferable and perhaps the only procedure for resolving the claims of those allegedly injured by the Sixties Scoop.

59. Similarly, in his certification reasons, Justice Belobaba specifically raised the question of "how many of the class members would actually proceed to individual damage trials if the common issue is decided in their favour."[36]

60. In addition, in the *Brown* Action, no common issue was certified with respect to aggregate damages. The plaintiffs in the *Brown* Action sought the certification of an aggregate damages common issue before Justice Perell who declined to certify it. Before Justice Belobaba the aggregate damages common issue was not pursued.

61. If individual assessment hearings were ordered instead of aggregate damages, such hearings:

(a) would likely be adversarial in nature, which could lead to a need for representation of and increased expenses for class members;

(b) would likely require significant time to complete, leading to prejudice to the aging class and a denial of timely access to justice;

(c) would likely require class members to testify, forcing a traumatic recounting of the harm they suffered;

(d) would likely require significant travel by elderly class members, causing barriers to participation for some; and

(e) would likely limit recovery to those class members who are willing to come forward and be cross-examined about their difficult childhood experiences.

[36] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, at para. 79, Plaintiffs' Book of Authorities (Fee Approval), Tab 5.

62. Such hearings for thousands of class members scattered across the country would have been expensive, lengthy and burdensome, taking years to complete, with no guarantee whatsoever that at the end of the day, class members would obtain compensation.

63. Class Counsel's ability to negotiate the settlement and avoid all of the dangers and delay associated with individual hearings is one of the most compelling facts on why the result achieved is an excellent one.

(iv) Protracted National Negotiation Process Was Itself Risky

64. Any suggestion that the risks to Class Counsel diminished once Canada announced a general intention to settle in January 2017, or when negotiations commenced in June 2017, ought to be rejected. These types of events have been dismissed by courts as "risk-reducing" in nature:

> "I cannot accept that these events reduced the risk of failure of the negotiations in any real or measurable way. The risk of failure continued to hinge on a multitude of factors any one of which could have aborted the negotiations, a danger that continued even after the settlement had received court approval."[37] [emphasis added]

65. In fact, settlement approval courts have continuously maintained that "the fact that the parties engage in negotiations does not necessarily diminish the risk faced by Class Counsel. The elimination of risk is only achieved once the court has approved the settlement."[38]

66. The evidence tendered demonstrates that intensive, thorough and hard adversarial negotiations occurred between these parties at an expedited rate across Canada between June 2017 and January 2018.[39] Throughout that time, the risk of failure hinged on a variety of substantive issues, any one of which could have ended the negotiations. Even in advance of settlement discussions in the context of the Federal Court mediation through the latter half of 2017, there were a series of settlement discussions between the parties, between December 2016

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[37] *Endean v. CRCS; Mitchell v. CRCS*, 2000 BCSC 971, at para. 27, Plaintiffs' Book of Authorities (Fee Approval), Tab 12.

[38] *Baxter et al. v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.) at para. 61, Plaintiffs' Book of Authorities (Fee Approval), Tab 4.

[39] Fee Affidavit of D. Rosenfeld, at para. 53, Motion Record (Fee Approval), Tab 6, p. 102.

and March 2017, all of which were unsuccessful.[40]

67. It was not until May 3, 2017, that the three Federal Court proceedings, the *White* Action, the *Riddle* Action, and the *Charlie* Action, were formally referred to a Dispute Resolution Conference to be conducted under the auspices of a judge or prothonotary of the Federal Court.[41]

68. On June 13, 2017, the following mediation schedule was ordered by the Federal Court: On June 13, 2017, the following mediation schedule was ordered by the Federal Court:

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

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

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

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

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

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

(g) January 9, 10 and 11 in Vancouver, British Columbia.[42]

69. At that time, counsel in the *Brown* Action were also invited to attend. Counsel in the *Brown* Action agreed to attend the Federal Court mediation in June 2017 in Montreal. All counsel in the *Riddle*, *Charlie*, *White* and *Brown* Actions and to Canada agreed to maintain the strictest confidentiality undertaking with respect to the negotiations.[43]

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

(a) confidentiality of the process;

(b) carriage issues;

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[40] Fee Affidavit of D. Rosenfeld, at paras. 124-126, 128, Motion Record (Fee Approval), Tab 6, p. 117.

[41] Fee Affidavit of D. Rosenfeld, at para. 52, Motion Record (Fee Approval), Tab 6, p. 102.

[42] Settlement Approval Affidavit of D. Rosenfeld, at para. 134, Exhibit "A" to the Fee Affidavit of D. Rosenfeld, Motion Record (Fee Approval), Tab 6, pp. 143-144.

[43] Settlement Approval Affidavit of D. Rosenfeld, at para. 131, Exhibit "A" to the Fee Affidavit of D. Rosenfeld, Motion Record (Fee Approval), Tab 6, p. 143.

(c) class definition;

(d) class size;

(e) existing programs available to status Indians;

(f) the Foundation and healing and reconciliation issues;

(g) the mandate of the Foundation;

(h) eligibility;

(i) compensation;

(j) the claims process;

(k) the claims of the deceased;

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

(m) administration;

(n) notice; and

(o) settlement implementation issues.[44]

71. The parties met before Shore J. on June 27 and 28, 2017 in Montreal to continue the mediation. On July 11 to 13, counsel in the *Riddle*, *Charlie*, *White* and *Brown* Actions and to Canada and Martin Reiher, Assistant Deputy Minister at Aboriginal Affairs and Northern Development and Krista Robertson of Aboriginal Affairs and Northern Development, met before Shore J. in Toronto to continue the mediation.[45]

72. During the July meetings in Toronto, Paula Isaak, Assistant Deputy Minister at Aboriginal Affairs and Northern Development, Scott Doidge, Director General in Health Canada's First Nations and Inuit Health Branch and William Fizet, Director General from Heritage Canada, made presentations at the mediation concerning the social, medical and education benefits available to Indigenous people in Canada. Kenn Richard, Executive Director

[44] Settlement Approval Affidavit of D. Rosenfeld, at para. 139, Exhibit "A" to the Fee Affidavit of D. Rosenfeld, Motion Record (Fee Approval), Tab 6, pp. 144-145.

[45] Settlement Approval Affidavit of D. Rosenfeld, at paras, 140, 142, Exhibit "A" to the Fee Affidavit of D. Rosenfeld, Motion Record (Fee Approval), Tab 6, p. 145.

of Native Child and Family Services of Toronto also made a presentation at the mediation concerning the impact of the Sixties Scoop on individual survivors.[46]

73. Throughout the summer of 2017, the parties delivered class size information to counsel to Canada, who worked with an actuary to prepare a class size estimate. Owing to the complexity and sensitivity of the issues to be resolved, coupled with the large number and disparate positions of the parties, the negotiation process was arduous and protracted.[47]

74. On August 29 and 30, 2017, counsel in the *Riddle*, *Charlie*, *White* and *Brown* Actions and to Canada met before Shore J. in Vancouver to continue the mediation. An Agreement-in-Principle was signed by counsel in the *Riddle*, *Charlie*, *White* and *Brown* Actions and to Canada on August 30, 2017.[48]

75. On September 26 and 27, 2017, counsel in the *Riddle*, *Charlie*, *Whit*e and *Brown* Actions and to Canada met before Shore J. in Montreal to continue the mediation and draft and prepare the Final Settlement Agreement. On October 6, 2017, the Agreement-in-Principle was announced by the Honourable Carolyn Bennett, then Minister of INAC, at the House of Commons in Ottawa, Ontario.[49]

76. On October 25 and 26, 2017, counsel in the *Riddle*, *Charlie*, *White* and *Brown* Actions and to Canada met before Shore J. in Toronto to finalize the Final Settlement Agreement.[50] On November 29 and 30, 2017, counsel in the *Riddle*, *Charlie*, *White* and *Brown* Actions and to Canada met before Shore J. in Vancouver to continue the penultimate meeting to finalize the Final Settlement Agreement. On November 30, 2017, the final settlement agreement was

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[46] Settlement Approval Affidavit of D. Rosenfeld, at paras. 143, 144, Exhibit "A" to the Fee Affidavit of D. Rosenfeld, Motion Record (Fee Approval), Tab 6, pp. 145, 146.

[47] Settlement Approval Affidavit of D. Rosenfeld, at paras. 141, 145, Exhibit "A" to the Fee Affidavit of D. Rosenfeld, Motion Record (Fee Approval), Tab 6, pp. 145, 146.

[48] Settlement Approval Affidavit of D. Rosenfeld, at paras. 146, 147, Exhibit "A" to the Fee Affidavit of D. Rosenfeld, Motion Record (Fee Approval), Tab 6, p. 146.

[49] Settlement Approval Affidavit of D. Rosenfeld, at paras. 148, 149, Exhibit "A" to the Fee Affidavit of D. Rosenfeld, Motion Record (Fee Approval), Tab 6, p. 146.

[50] Settlement Approval Affidavit of D. Rosenfeld, at para. 150, Exhibit "A" to the Fee Affidavit of D. Rosenfeld, Motion Record (Fee Approval), Tab 6, p. 146.

concluded and executed in counterparts thereafter.[51] On January 4, 2018, the *White*, *Riddle* and *Charlie* Actions were formally consolidated by order of the Federal Court.[52]

77. The length, nature and substance of these national negotiations which occurred throughout much of 2017 presented, in and of themselves, risk to the class and Class Counsel. This reality has specifically been identified as such by this Court and Superior Courts in Ontario:

> "Thus, Class Counsel may find themselves in the position of having committed time and resources to the negotiation of a settlement, that they believe is in the best interests of the class, only to find that the court will not approve the settlement achieved. While this creates a risk *simpliciter*, it also creates an advantage for a defendant who can successfully extend the negotiations to the point that Class Counsel's resources are exhausted before making a 'final settlement offer' that may not ultimately receive court approval. … it is apparent that the time and resources committed to the negotiations by the Class Counsel meant that the risk was increasing rather than decreasing as the negotiations continued. As the parties moved toward a settlement, the negotiations became more difficult as the issues narrowed with the result that the risk of an insurmountable impasse increased rather than diminished. This made the negotiations more perilous as they progressed…."[53] [emphasis added]

78. Justice Winkler (as he then was) recognized that complex negotiations are a factor to be judicially considered in the analysis of what is a fair and reasonable fee:

> "Outright capitulation from either side of the table is not a realistic expectation. There were arguable defences and a legitimate question as to the ultimate liability of the governments. While recognizing that the victims had suffered a tragedy, the governments, as litigants, always had to bear in mind that they were the representatives of all of the people and the keeper of the public purse. The tension created by these two concerns obviously complicated matters for the FTP governments and for the Class Counsel groups. Despite these complexities, the parties persevered through arduous negotiations and reached an agreement to settle the outstanding litigation within a legal framework."[54]

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[51] Settlement Approval Affidavit of D. Rosenfeld, at paras. 151-154, Exhibit "A" to the Fee Affidavit of D. Rosenfeld, Motion Record (Fee Approval), Tab 6, pp. 146-147.

[52] Settlement Approval Affidavit of D. Rosenfeld, at para. 155, Exhibit "A" to the Fee Affidavit of D. Rosenfeld, Motion Record (Fee Approval), Tab 6, p. 147.

[53] *Parsons et al. v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at paras. 37–38, Plaintiffs' Book of Authorities (Fee Approval), Tab 22, relied upon in *Manuge v. Canada*, 2013 FC 341, at para. 37, Plaintiffs' Book of Authorities (Fee Approval), Tab 19.

[54] *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.) at para. 51, Plaintiffs' Book of Authorities (Fee Approval), Tab 22.

79. Courts have also treated opt-out threshold provisions (like the one in this case at Article 5.09 of the Final Settlement Agreement) and multi-jurisdictional approvals as inherently risky, even after settlement approval motions, as a continued threat to the viability of the agreement:

> "Risks continue even if the settlements are approved in all three Courts. The 'blow out' [opt-out threshold] provision in s. 14.4 of the Agreement puts the settlements at risk if the Opt Out Threshold is exceeded."[55] [emphasis added]

80. Accordingly, this Honorable Court ought to treat the risk to Class Counsel as continuing and ongoing, a risk which continues to the date of the hearing of this motion and the May 29 motion in Toronto, Ontario.

E. Extraordinary Results Achieved For the Class & Skill Of Class Counsel

81. There is no dispute that the plaintiffs faced serious limitation period defences to their claims. They faced substantive defences to the location of duties of care and arguments against any aggregate assessments of damages. They faced these defences all against a factual backdrop from decades ago, posing all the exigencies of lost witnesses, fading memories and a lack of documentary evidence.

82. In contrast, the settlement provides streamlined compensation to survivors who were "scooped" but most importantly, it goes beyond any one individual to provide programs to enable change and reconciliation and to enable healing, healing, commemoration and education to the wider Indigenous community across Canada.

83. The total recovery of at least $630 million (and potentially $880 million) provides certain, substantial and expedient compensation to ageing class members when contrasted against the risks of contested national certification, summary judgment motion, any common issues trial, attendant appeals or individual assessments. The following factors augur strongly in favour of proving why the results achieved by Class Counsel are exemplary:

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

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[55] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.), at para. 75, Plaintiffs' Book of Authorities (Fee Approval), Tab 25.

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

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

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

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

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

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

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

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

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

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

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

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

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

> "This contrasts favourably with many class proceedings where, despite a global settlement, class members are still required to engage in extensive legal proceedings to obtain the benefits. The relative ease of access to compensation is an important feature. It provides some certainty as to the quantum of compensation that class members will

> receive at each level, but more so, it demonstrates the thoroughness of Class Counsel in fashioning a satisfactory settlement."[56] [emphasis added]

86. Most importantly, "considering the very personal and painful nature of the claims, the settlement process includes a non-adversarial claims process with numerous safeguards to protect the privacy of claimants",[57] another factor in support of finding the results achieved are at the highest end of what is reasonable.

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

> "Those eligible for compensation included not only Indian adoptees, as Justice Belobaba had ordered based upon the '65 Agreement, but also crown or permanent wards. …. The period of time to be eligible as a class member is double the period in the *Brown v. Canada* class definition. It covers all survivors who were placed in non-indigenous homes from 1951 to 1991. It eliminates the hardship for the class member who has no 'record' (ie. adoption or crown wardship orders) to prove her or his eligibility, shifting that burden to the governments."[58]

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

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[56] *Parson v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at para. 17, Plaintiffs' Book of Authorities (Fee Approval), Tab 22.

[57] *Merlo v. Canada*, 2017 FC 533, at para. 27, Plaintiffs' Book of Authorities (Fee Approval), Tab 21.

[58] Affidavit of J. Wilson, para. 76, p. 17 [filed under separate cover]. Affidavit of M. Brown, at para. 40(c–e), Exhibit "113" to the Affidavit of D. Rosenfeld, at para. 252, Motion Record (Settlement Approval), Tab 6(113), p. 2106.

Canadian government towards re-inclusion of Indigenous people into Canadian culture and that benefits Indigenous people but it also benefits all Canadians".[59]

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

> "And, most importantly for our client, we were able to secure an initial contribution of $50 million from the federal government for the creation of a healing and reconciliation Foundation, the purpose of which is to ensure that what happened to survivors will not likely ever be repeated in Canadian history. The Foundation's services and its eventual Board of Directors will be comprised of all survivors, those who may not be class members eligible for individual compensation…"[60]

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

> "No legal victory in a courtroom could ever hope to do this. This Court is not equipped to address the holistic healing perspectives of the individual, his or her family and the community in a way that does justice to the larger Inuit and aboriginal perspective on life, on living and on conflict resolution. The settlement agreement proposes to do just that."[61] [emphasis added]

91. Not only do non-monetary benefits arising from a settlement work towards fulfilment of a central policy goal of class proceedings – the promotion of behaviour modification – it cannot be overstated how significant this piece of the settlement is to future healing, reconciliation, education and rebuilding a nation-to-nation relationship. None of these initiatives would be available through contested litigation: "if the matter proceeded to trial, the non-monetary issues would be outside the jurisdiction of the Court" to award.[62]

92. As this Court recently opined in *Merlo v. Canada*, these "features and benefits that extend beyond a strictly monetary compensation scheme and as a result, the Settlement Agreement goes well beyond what the Plaintiffs may have been awarded after a trial".[63] The

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[59] Affidavit of M. Blue Waters, at paras. 72, 75, Motion Record (Fee Approval), Tab 4, pp. 104, 105.

[60] Affidavit of J. Wilson, para. 77, pp. 14-15 [filed under separate cover].

[61] *Fontaine v. Canada*, 2006 NUCJ 24, at para. 61, Plaintiffs' Book of Authorities (Fee Approval), Tab 14.

[62] *Rideout v. Health Labrador Corp.*, 2007 NLTD 150, at para. 70, Plaintiffs' Book of Authorities (Fee Approval), Tab 23.

[63] *Merlo v. Canada*, 2017 FC 533, at para. 2, Plaintiffs' Book of Authorities (Fee Approval), Tab 21.

same reasoning applies with equal force to the non-monetary benefits featured in the within settlement. It is noteworthy that the evidence before this Court describes the value of the Foundation as the following:

> "…an invaluable opportunity for Canada-at-large, and especially indigenous people, for healing and reconciliation and the kind of necessary investigation, study, funding, public awareness projects, commemoration and advocacy that may finally do justice to the harms arising from the Sixties Scoop by ensuring that those harms are not ever repeated. … I am both impressed and relieved by the [Foundation] Table's commitment to laying the groundwork for an active incorporated non-profit charitable foundation composed of an indigenous led Board of Directors and indigenous Executive Director. … I have observed the commitment of the Foundation Table to a working Foundation that is responsive to all indigenous persons, even though they may not be class members, such as Métis, sibling or parents of survivors, as well as non-indigenous persons who were, and continue to also be affected by the Sixties Scoop, such as adopting parents or non-indigenous survivor siblings. I have observed the Table's commitment to creating the Foundation as a matter of urgency so that healing and reconciliation services are available while survivors are alive."[64] [emphasis added]

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

94. Considering the terms of the settlement, the amount of compensation available, the non-monetary benefits which will inure to the class and the means of claiming compensation against the significant liability risks, Class Counsel negotiated a historic, multi-faceted and timely result for these class members.

95. Measured against the uncertainty and delay associated with pursuing national certification and even any remotely possible judgment on aggregate damages in Ontario, the quantum guaranteed by the settlement, along with its streamlined, paper-based claims process, is

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

the best evidence for why the results achieved are one of the most compelling factors giving rise to a finding that the legal fees sought are both fair and reasonable in this case.

F. Any Further Fees Prohibited – Class Members Pay Nothing For Legal Assistance With Claims Process And No Fees Deducted From Compensation

96. A critically important and unique feature of the settlement, one that will protect class members going forward through the claims process, is that any Individual Payments made are not subject to any reduction – or deduction – to the class member for legal fees. In particular, the Settlement Agreement contains the following provision and Class Counsel undertaking:

> 11.02 The parties agree that it is their intention that the Individual Payments be made to the Eligible Class Members without any reduction on account of fees; and, accordingly,
>
> a) No counsel or law firm listed in Schedule "K" or who accepts a payment for legal fees from Canada will charge any Class Members any fees or disbursements in respect of an Individual Payment; and
>
> b) Each counsel listed in Schedule "K" undertakes to make no further charge for legal work for any Class members with respect to claims under this Agreement.[65]

97. In this way, not only are the fees for Class Counsel fixed and certain from the class' and Canada's perspective, but the prohibition against lawyers charging fees for assistance through the claims process resolves some of the lingering complaints and issues which arose from the Indian Residential Schools Settlement: "this Settlement answers that course of complaint by providing no-charge legal services for claimants and a simple application requiring no assessment process, as occurred in the residential schools settlement."[66]

98. Not only does this provision ensure that Eligible Class Members retain the full amount of compensation awarded and have available to them the assistance of counsel at no charge, but it goes some distance to preserving the integrity of the claims process going forward:

> "…other lawyers are not entitled to charge class members any legal fees for assisting those class members with their individual claims to the settlement, unless those lawyers obtain the prior approval of the Federal Court. This is of great benefit to class members.

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[65] Article 11.02, Final Settlement Agreement, Exhibit "B" to the Fee Affidavit of D. Rosenfeld, Motion Record, Tab 6(B), p. 206.

[66] Affidavit of K. Richard, at para. 8, Exhibit "114" to the Settlement Approval Affidavit of D. Rosenfeld, at para. 253, Motion Record (Settlement Approval), Tab 6(114), p. 2118. Affidavit of J. Wilson, at para. 77, pp. 14-15.

> It means that individual class members will get to keep the full amount of the compensation awarded to them under the settlement."[67]

99. The monetary value of this provision is extraordinary. For example, should the Settlement be approved, Class Counsel will have to devote significant hours for months to come, and the next 12-18 months to the implementation of the Settlement:

(a) review, revise and approve notice materials;

(b) monitor notice to ensure it has been disseminated in accordance with the approved notice plan;

(c) communicate with class members who contact Class Counsel with questions;

(d) assist class members with claim forms, if necessary;

(e) communicate with third parties such as caregivers, family members, community organizations, and others who contact Class Counsel about the claims process;

(f) communicate with the representative plaintiffs;

(g) monitor settlement implementation to ensure the processes are be followed;

(h) address any questions or issues raised by the Claims Administrator in the administration of claims;

(i) review updates from the Claims Administrator;

(j) reviewing final distribution of compensation; and

(k) attend to any other matter that may be raised during settlement implementation that requires Class Counsel's attention.[68]

100. In other settlements with similar claims processes like *Slark v. Ontario*, *McKillop v. Ontario*, and *Bechard v Ontario* settlements, Class Counsel devoted over 2,500 hours of lawyer, student and clerk time towards the administration and implementation of the settlements agreements, with a value approaching $1,000,000.00 (not including taxes), after the hearing of the settlement approval motions.[69] This amount incurred was on behalf of just one law firm and in respect of approximately one fifth the class size of that in this action, where all persons were resident in Ontario as opposed to the national class here.

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[67] Affidavit of C. Charlie, at para. 12, Motion Record (Fee Approval), Tab 2, p. 11.

[68] Fee Approval Affidavit of D. Rosenfeld, at para. 59, Motion Record (Fee Approval), Tab 6, pp. 103-104.

[69] Fee Approval Affidavit of D. Rosenfeld, at para. 55, Motion Record (Fee Approval), Tab 6, p. 102.

101. This type of limit on future legal fees payable by the class has been recognized to be an important feature in any "fair and reasonable" fee analysis by approval courts:

> "In recognition of the legal framework within which the settlement was negotiated, the Agreement crafted speaks directly to the question of Class Counsel fees in that it stipulates a limit on those fees. All counsel agreed that the fees sought would not exceed $52,500,000 in total. … The government elicited an agreement from the Class Counsel groups that they would not seek fees on the basis of a percentage of the total settlement and further, that the counsel group would agree to a cap on the total amount of fees. In addition to the other concessions extracted by the governments, counsel were required to surrender any fee agreements that they may have executed with individual class members."[70] [emphasis added]

102. This future value of work at no further charge or cost only works to diminish the value of percentage fee sought by Class Counsel.

G. Expectations of the Class, Ability To Pay And Importance of the Issues

103. The importance of the issues raised by this litigation is on the highest end of the scale, both personally for class members but also publicly for Canada as a whole: "this is the first case in the Western world to hold government responsible for consultation when what is at stake is a people's children's cultural identity. … this is the largest award ever to answer the grievance of a people's children's loss of cultural identity".[71]

104. Personally, the subject matter of the case could not be more intimate to an individual: "the effect of child welfare programs, practices or policies was the loss of our children through what appeared to be an attempt to assimilate our children into mainstream culture, for many us constituted a betrayal of the uniqueness of aboriginals in Canadian society".[72]

105. This is no different in terms of a national historic tragedy than that described by the British Columbia Supreme Court in the notorious tainted blood litigation, in terms of its import:

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[70] *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at para. 52, Plaintiffs' Book of Authorities (Fee Approval), Tab 22.

[71] Affidavit of M. Brown, at paras. 43, 44, Exhibit "113" to the Settlement Approval Affidavit of D. Rosenfeld, at para. 252, Motion Record (Settlement Approval), Tab 6(113), p. 2107.

[72] Affidavit of K. Richard, at para. 8, Exhibit "114" to the Affidavit of D. Rosenfeld, at para. 253, Exhibit "114" to the Affidavit of D. Rosenfeld, Motion Record (Settlement Approval), Tab 6(114), p. 2118.

> "The events that precipitated this lawsuit constituted a national public-health disaster. **This case was therefore of immense importance to the class plaintiffs and was important, as well, to the Canadian public for the light that it shed** on the problems that gave rise to this national tragedy."[73] [emphasis added]

106. Given the lack of precedent for their claims and their substantive uncertainty at the start, it is highly unlikely that any of the plaintiffs could have afforded to pay for individual legal representation on an ongoing basis.[74] Like the overwhelming majority of class proceedings, these cases were only able to go forward because they were carried by counsel pursuant to contingent fee agreements. All of the representative Plaintiffs executed the Retainer Agreements[75]. All such agreements have very similar provisions with respect to the fees of Class Counsel. One example is reproduced below:

> 9. The provisions of this Agreement regarding legal fees and disbursements are subject to court approval as provided in the *Federal Courts Rules*.
>
> …
>
> 11. Legal fees shall be paid only in the event the Class Action is successful in obtaining judgment on the Common Issues in favour of some or all Class Members or in obtaining a settlement that benefits one or more Class Members. The legal fees shall be paid by a lump sum payment or payments out of the proceeds of such judgment or settlement under the *Federal Court Rules*.
>
> 12. The Firm and the Client recognize that the Firm is incurring significant risks including the risk that the action will be unsuccessful, the risk that the action will not be certified, and the risk that the litigation will not be finally resolved for a period of many years. The Firm shall therefore be entitled to 33% of any damages or monies paid or payable to the Class and the Class Members arising from the settlement of, or resolution of, the claims in any manner, plus disbursements and taxes.
>
> 13. The Client acknowledges that the amount of a reasonable settlement or judgment in this case will depend on a number of factors, including liability, expert evidence, etc. A precise estimate is not possible at this time. However, by way of example, if the Defendant pays, by way of settlement, $10,000,000, it is understood that the contingency fee requested will be 33% of $10,000,000, or $3,300,000, plus disbursements and taxes.
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> …

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[73] *Endean v. CRCS; Mitchell v. CRCS* 2000, BCSC 971 at para. 52, Plaintiffs' Book of Authorities (Fee Approval), Tab 12.

[74] *Endean v. CRCS; Mitchell v. CRCS* 2000, BCSC 971 at para. 56, Plaintiffs' Book of Authorities (Fee Approval), Tab 12.

[75] Catriona Charlie Retainer Agreement, Exhibit "A" to the Affidavit of C. Charlie, Motion Record (Fee Approval), Tab 2(A). Wendy White Retainer Agreement, Exhibit "A" to the Affidavit of W. White, Motion Record (Fee Approval), Tab 3(A).

> 15. Class Counsel may make a motion(s) for the approval of their fees. The amount to be paid for Class Counsel fees is in the sole discretion of the Court considering fee approval but will not exceed any percentage provided for in this Agreement, nor will Class Counsel recover more in fees than the Class recovers as damages or receives by way of settlement.
>
> 16. The Client acknowledges and agrees that Class Counsel fees and disbursements owing under this agreement are a first charge on any recovery in the Class Action, which includes any amount actually recovered by an award, judgment, settlement, or otherwise, including any amounts awarded or paid in any assessment of damages or other process ordered by the Court, excluding any amounts separately identified or specified as costs and/or disbursements.[76]

107. Each of the representative Plaintiffs have also sworn evidence on these applications that they:

> (a) were aware of the percentage of compensation Class Counsel would seek if successful;
>
> (b) knew that Class Counsel spent millions of dollars in fees and disbursements prosecuting the case without promise of payment unless they were successful;
>
> (c) believe the fees sought are fair in all the circumstances, especially given the risks and the length of time the actions took to conclusion; and
>
> (b) believe that had Class Counsel not started these actions, these class members would never have the received the recognition, compensation, commemoration and healing that the proposed settlement permits.[77]

108. The class members are some of the most disadvantaged and vulnerable people in society, most of whom attended the various at very young ages. To date, these class members have lived for decades with their experiences without compensation or acknowledgement of the wrongs done to them, many of which involve the most serious of allegations or harms endured.

109. These class members have never sought redress for the wrongs committed against them often: (a) for fear for reprisal from the Crown, being the very same entity who might provide social assistance to them; (b) being unaware that wrongs were perpetrated against them; (c) being

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[76] W. White Retainer Agreement, Exhibit "A" to the Affidavit of W. White, Motion Record (Fee Approval), Tab 3(A), pp. 23, 24.

[77] Affidavit of M. Brown, at paras. 23–33, Exhibit "113" to the Affidavit of D. Rosenfeld, at para. 252, Motion Record (Settlement Approval), Tab 6(113), pp. 2103-2104. Affidavit of C. Charlie, at paras. 6-15, Motion Record (Fee Approval), Tab 2, pp. 10-11. Affidavit of W. White, paras. 22-28, Motion Record (Fee Approval), Tab 3, pp. 19-20. Affidavit of J. Riddle, para. 117, Motion Record (Settlement Approval), Tab 7, p. 2195.

unable to communicate in a traditional fashion to raise and articulate the concerns necessary; and (d) were unable to navigate the legal system for a host of other reasons.

110. As such historic cases involving vulnerable persons who have experienced serious, profound and lasting harms, there is no doubt that:

> "… these were important cases. To the class members the issues were enormous and immensely personal. These class actions provided a means for them to bring their claims before the court and to create public awareness of the history of these institutions and the alleged experiences of the residents there."[78]

111. This finding applies with full and equal force to this action and the largely untold history of the Sixties Scoop until these cases were brought.

112. This class of persons is also composed of some of the most vulnerable members of Canadian society. Many live in poverty or close to it, many of whom are unemployed or out of the labour force:

> "There are certainly some significant exceptions, but the Class is generally older, retired and of limited financial means. Many are on fixed incomes. … There are few amongst the Class Members with which could have afforded a lawyer and the nature of the claims were not such that unless they were aggregated it would not have been worthwhile for any lawyer to take them on contingency. The nature of the unique and untested legal theories and the historical nature and possible limitation barriers created a case of high risk and a potentially very low reward on an individual basis."[79]

113. In particular, the evidence on this motion confirms that none of the achievements codified in the settlement could have been possible without contingency fee arrangements at the outset:

> "…without a doubt, trauma was experienced by many survivors of the 60's Scoop. That trauma compromised their capacity to fully function within society and, for many, limited their ability to participate in a competitive market economy. Our work tells us that a disproportionate number of survivors are people who are poor by any objective measure."[80]

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[78] *Dolmage, McKillop and Bechard v. HMQ*, 2014 ONSC 1283, at para. 10, Plaintiffs' Book of Authorities (Fee Approval), Tab 11.

[79] Affidavit of W. White, at para. 28, Motion Record (Fee Approval), Tab 3, p. 20.

[80] Affidavit of K. Richard, at para. 10, Exhibit "114" to the Affidavit of D. Rosenfeld, at para. 253, Motion Record (Settlement Approval), Tab 6(114), p. 2118.

114. These class members could not have financially supported this action. Without a class proceeding, these individuals would have had no prospect of accessing the justice system for redress. This is self-evident from the very fact that not one proceeding existed in the court system across Canada until 2009, on behalf of any Sixties Scoop survivors, despite the fact that the events giving rise to these claims occurred some fifty (50) odd years ago.

H. Fees Sought Are Far Less Than Those Provided For In The Retainer Agreements

115. Each of the representative plaintiffs executed retainer agreements with Class Counsel, agreements which provide in the range of 20% to 33% percent fee arrangements as calculable against the total recovery achieved. Class Counsel does not however seek to enforce those percentages but instead seek fees in the range of approximately 8% valued against the total value of the global settlement.

116. Pursuant to most provincial class proceedings legislation, an agreement respecting fees and disbursements between a solicitor and representative plaintiff is required to be in writing and must be approved by the court.[81] While not a technical or statutory requirement pursuant to the Federal Court class proceedings regime, in the interests of transparency and because the legal fees (globally) will also be reviewed by the Ontario Superior Court, Class Counsel has filed the retainer agreements on this application with the court,[82] along with evidence of their own internal consortium agreement outlining how the fees shall be split amongst them.[83]

117. Moreover, while not a technical requirement in the Federal Court, this Honourable Court has nevertheless acknowledged that any contingency fee agreement is relevant and "sometimes, a compelling consideration in the final assessment of legal fees".[84] In this case, examples of the relevant terms of the retainer agreements respecting the contingency percentage have been

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[81] *eg. Class Proceedings Act, 1992*, SO 1992, c 6, s. 32(2).

[82] Catriona Charlie Retainer Agreement, Exhibit "A" to the Affidavit of C. Charlie, Motion Record (Fee Approval), Tab 2(A), pp. 14-15. Wendy White Retainer Agreement, Exhibit "A" to the Affidavit of W. White, Motion Record (Fee Approval), Tab 3(A), pp. 22-29.

[83] Fee Affidavit of D. Rosenfeld, paras. 104, 109, Motion Record (Fee Approval), Tab 6, pp. 113, 114.

[84] *Manuge v. Her Majesty the Queen*, 2013 FC 341 at para. 43, Plaintiffs' Book of Authorities (Fee Approval), Tab 19.

tendered as evidence.[85]

118. The terms of these Retainer Agreement are consistent with other retainer agreements that have been approved in class proceedings. [86] Retainer agreements in class actions are generally on a contingency basis and generally provide for a contingent fee in the range of one-fifth to one-third of recovery.

119. In *Cassano v. Toronto-Dominion Bank,* Justice Cullity approved the terms of the contingency fee retainer finding:

> "They had accepted their retainers on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. The percentage of recovery to be applied was not unreasonable, the risks were considerable, the degree of success was substantial."[87] [emphasis added]

120. In Justice Cullity's view, contingency fee agreements ought to be *prima facie* accepted as appropriate and reasonable, unless there was something "in the manner in which the proceeding was conducted to justify a refusal to approve the fee determined in accordance with the terms of which the fees were accepted".[88] There is no reason to justify disregarding the terms of the Retainer Agreement in these actions as Class Counsel vigorously prosecuted these actions and achieved substantial success. *A fortiori* here because Class Counsel seeks a fee which is so much less, percentage-wise, than that which would have been permitted pursuant to the retainers.

121. Where the representative plaintiff has demonstrated that he or she has a vested and active interest in the case, the court ought to start from the *prima facie* assumption that the retainer agreement reflects a fair bargain and the fees payable under such an agreement have been deemed to be fair and reasonable compensation. If the percentages described (ranging from 20% to 33%) in this case are therefore deemed to be a fair bargain, it necessarily follows that Class

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[85] 20% (twenty percent) Affidavit of M. Brown, at para. 23, Exhibit"113" to the Affidavit of D. Rosenfeld, at para. 252, Motion Record (Settlement Approval), Tab 6(113), p. 2102. 33% (thirty-three percent), Affidavit of W. White, at para. 24, Motion Record (Fee Approval), Tab 3, p. 19. 25% (twenty-five percent) Affidavit of C. Charlie, at para. 8, Motion Record (Fee Approval), Tab 2, p. 10.

[86] Fee Affidavit of D. Rosenfeld, paras. 102, Motion Record (Fee Approval), Tab 6, p. 113.

[87] *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.) at para. 63, Plaintiffs' Book of Authorities (Fee Approval), Tab 7.

[88] *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.) at para. 63, Plaintiffs' Book of Authorities (Fee Approval), Tab 7.

Counsel fees in the range of roughly 8% to 10% of the overall global recovery are, by definition, more than fair and reasonable.

122. The Retainer Agreements are consistent with other retainer agreements in other class actions.[89] Retainer agreements in class proceedings are all done on a contingency basis and generally provide for a contingent fee in range of 20% to 33% of recovery. In fact, courts have increasingly moved away from the multiplier approach to assessing legal fees and found that the "contingency fee approach to Class Counsel compensation is much more principled than the 'multiplier' approach and should be the preferred method for Class Counsel compensation".[90]

123. Personal injury litigation has been conducted across Canada for years allowing counsel to work on a contingent basis, and counsel receive a premium on fees based on contingency agreements up to 33%. In such litigation, awarding counsel a premium on his fees in exchange for a contingency agreement is generally considered to reflect a fair allocation of risk and reward as between lawyer and client.[91] As Justice Strathy (as he then was) determined in *Sony BMG Music*:

> "There should be nothing shocking about a fee in this range…It serves as an inducement to the lawyer to maximize the recovery for the client and it is regarded as fair to the client because it is based upon the 'no cure, no pay' principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings."[92]

124. Lawyers practicing in personal injury litigation consistently have retainer agreements for individual litigation that provide for a contingent fee in the range of 20% to 35% of recovery. In a fairly recent decision on Class Counsel fees, Justice Belobaba approved a fee award of 33% of the settlement amount, coining such a percentage 'presumptively valid' pursuant to the terms of the retainer agreement:

> "I have also been persuaded that a one-third contingency fee agreement, if fully understood and accepted, should be accorded presumptive validity…According

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[89] Fee Affidavit of D. Rosenfeld, paras. 102, Motion Record (Fee Approval), Tab 6, p. 113.

[90] *Clegg v. HMQ Ontario*, 2016 ONSC 2662 at para. 42, Plaintiffs' Book of Authorities (Fee Approval), Tab 9.

[91] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss. 33(2).

[92] *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105 (S.C.J.), at para. 64, Plaintiffs' Book of Authorities (Fee Approval), Tab 3.

> presumptive validity to a one-third contingency fee, and thus making Class Counsel's compensation more certain would take the pressure off certification-motion costs awards as a method for forward-financing the class action lawsuit."[93]

125. Justice Strathy (as he then was) also considered the propriety of 'one-third' contingency fees in *Abdulrahim v. Air France* and determined that:

> "A contingency fee of one-third is standard in class action litigation and has been common place in personal injury litigation in this province for many years. It has come to be regarded by lawyers, clients and the courts as a fair arrangement between lawyers and their clients, taking into account the risks and rewards of such litigation. Fees have been awarded based on such a percentage in a number of class action cases."[94]

126. With respect to percentage fees themselves as a means to pay class counsel for services provided, percentage contingent fee awards have been judicially deemed to "desirable to promote the policy objective of judicial economy in that they encourage efficiency in the litigation and discourage unnecessary work that might otherwise be done by the lawyer simply in order to increase the base fee."[95]

I. Percentage Sought Is Well Below Percentages Approved in Comparable Cases

127. One last factor that this Court ought to consider in its analysis on this motion is that the percentage of fees sought here, roughly 10% and shrinking, is at the very low end of class action jurisprudence given the risks, substantive legal hurdles and import of the proceedings. Examples of percentages judicially approved in other cases includes:

Case:	Percentage:
Dolmage, McKillop and Bechard v. HMQ, 2014 ONSC 1283	20.68%
Robertson v. Thomson Canada Ltd., [2009] O.J. No. 2650 (S.C.J.)	36%
Omrod v. Toronto Hydro-Electric Systems Ltd., [2002] O.J. No. 4925 (S.C.J.)	35%
Walker v. Union Gas Ltd, [2009] O.J. No. 536 (S.C.J.)	29.8%

[93] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 at paras. 3, 10, Plaintiffs' Book of Authorities (Fee Approval), Tab 6.

[94] *Abdulrahim v. Air France*, 2011 ONSC 512 at para. 13, Plaintiffs' Book of Authorities (Fee Approval), Tab 1.

[95] *Endean v. CRCS; Mitchell v. CRCS*, 2000 BCSC 971 at para. 11, relying also upon *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada*, [1998] O.J. No. 1891 (Gen. Div.), Plaintiffs' Book of Authorities (Fee Approval), Tab 12.

Case:	Percentage:
Martin v. Barrett, [2008] O.J. No. 2105 (S.C.J.)	29%
Pichette v. Toronto Hydro, [2010] O.J. No. 3185 (S.C.J.)	28.5%
Garland v. Enbridge Gas Distribution Inc., [2006] O.J. No. 4907 (S.C.J.)	26.7%
799376 Ontario Inc. (c.o.b. Lonsdale Printing Services) (Trustee of) v. Cascades Fine Papers Group Inc., [2008] O.J. No. 5280 (S.C.J.)	25%
Pysznyj v. Orsu Metals Corp., [2010] O.J. No. 1994 (S.C.J.)	25%
Osmun v. Cadbury Adams Canada Inc., [2010] O.J. No. 2093 (S.C.J.)	25%
405341 Ontario Ltd. v. Midas Canada Inc., [2013] O.J. No. 4107 (S.C.J.)	25%
Robertson v. ProQuest LLC, [2011] O.J. No. 2013 (S.C.J.)	24%
Zaniewicz v. Zungui Haixi, [2013] O.J. No. 3894 (S.C.J.)	20.75%
Cassano v. Toronto-Dominion Bank, [2009] O.J. No. 2922 (S.C.J.)	20%
Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2005] O.J. No. 1117 (S.C.J.)	15%
Labourers' Pension Fund of Central Eastern Canada v. Sino-Forest Corporation, 2014 ONSC 62	18.9%
Pro-Sys Consultations Ltd. v. Infineon Technologies AG, 2016 BCSC 964	30%
Merlo v. Canada, 2017 FC 533	12% + 15% of compensation awarded to each class member
Urlin Rent-A-Car Ltd. v. Champion Laboratories Inc., 2016 ONSC 5736	25%
Dow v. 407 ETR Concession Co., 2016 ONSC 7086	30%
Stanway v. Wyeth Canada Inc., 2015 BCSC 983	33.33%
Lam v. University of British Columbia, 2015 BCSC 1379	27%
Krajewski v. TNow Entertainment Group, Inc., 2012 ONSC 3908	25%
Smith v. Vancouver City Savings Credit Union, 2012 BCSC 990	30%
Anderson v. Canada (Attorney General), 2016 CanLII 76817	33.3%
Seed v Ontario, 2017 ONSC 3534	31.5%

128. Measured against this jurisprudence, it is clear the legal fees sought here are at the very low end of acceptable "fair and reasonable" percentages.

PART V - ORDER REQUESTED

129. The Plaintiffs and Class Counsel respectfully request that this Honourable Court approve the request for legal fees and declare that the legal fees sought are fair and reasonable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of April, 2018.

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PART VI - LIST OF AUTHORITIES

1. *Abdulrahim v. Air France*, 2011 ONSC 512
2. *Anderson et al. v. Canada,* 2016 NLTD(G) 179
3. *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105 (S.C.J.)
4. *Baxter et al. v. Canada (Attorney General),* [2006] O.J. No. 4968 (S.C.J.)
5. *Brown v. Canada (Attorney General),* 2013 ONSC 5637
6. *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686
7. *Cassano v. Toronto-Dominion Bank,* [2009] O.J. No. 2922 (S.C.J.)
8. *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman,* [2002] O.J. No. 1855 (S.C.J.)
9. *Clegg v. HMQ Ontario*, 2016 ONSC 2662
10. *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada,* [1998] O.J. No. 1891 (Gen. Div.)
11. *Dolmage, McKillop and Bechard v. HMQ*, 2014 ONSC 1283
12. *Endean v. CRCS; Mitchell v. CRCS,* 2000 BCSC 971
13. *Fontaine et al. v. Canada et al.*, 2006 YKSC 63
14. *Fontaine v. Canada*, 2006 NUCJ 24
15. *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.)
16. *Griffin v. Dell Canada Inc.,* [2011] O.J. No. 2487 (S.C.J.)
17. *Jeffery v. Nortel Networks*, 2007 BCSC 69
18. *John Wink Ltd. v. Sico Inc.,* [1987] O.J. No. 5 (H.C.)
19. *Manuge v. Canada*, 2013 FC 341
20. *McKillop and Bechard v. HMQ,* 2014 ONSC 1282
21. *Merlo v. Canada*, 2017 FC 533
22. *Parsons v. Canadian Red Cross Society,* [2000] O.J. No. 2374 (S.C.J.)
23. *Rideout v. Health Labrador Corp.*, 2007 NLTD 150
24. *Smith Estate v. National Money Mart Co.,* 2011 ONCA 233
25. *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd*., [2005] O.J. No. 1117 (S.C.J.)
26. Ontario Law Reform Commission, *Report on Class Actions*, (Toronto: Ministry of the Attorney General, 1982)

APPENDIX "A" - RELEVANT STATUTES

1. *Class Proceedings Act, 1992*, SO 1992, c 6

Court to approve agreements

32 (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).

2. *Federal Courts Rules*, SOR/98-106, Rule 334.4

Approval of payments

334.4 No payments, including indirect payments, shall be made to a solicitor from the proceeds recovered in a class proceeding unless the payments are approved by a judge.

APPENDIX "B"

CHART OF QUANTUM PAYABLE TO CLASS COUNSEL

Wilson Christen LLP and Morris Cooper	$37.5 million
Koskie Minsky LLP (and its consortium partners)	$12.5 million
Merchant Law Group	$12.5 million
Klein Lawyers	$12.5 million
Total:	**$75 million**

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