

**FEDERAL COURT
PROPOSED CLASS PROCEEDING**

BETWEEN:

**JESSICA RIDDLE, WENDY LEE WHITE
AND CATRIONA CHARLIE**

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

**MOTION RECORD OF THE PLAINTIFFS
(SETTLEMENT APPROVAL)**

VOLUME 1 OF 6

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FEDERAL COURT
PROPOSED CLASS PROCEEDING

BETWEEN:

**JESSICA RIDDLE, WENDY LEE WHITE
AND CATRIONA CHARLIE**

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

NOTICE OF MOTION
(Motion for Settlement Approval returnable Thursday May 10th, 2018)

The Plaintiffs will make a motion to the Federal Court, on Thursday May 10th, 2018 at the Federal Courthouse, located at the Court House, 520 Spadina Crescent East, Saskatoon, Saskatchewan, S7K 3G7.

PROPOSED METHOD OF HEARING: orally.

THE MOTION IS FOR:

- (a) an order certifying this action as a class proceeding for the purposes of settlement;
- (b) an order defining the class as:

All Indian (as defined in the *Indian Act*) and Inuit persons who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents excluding any members of the class action in the Ontario Superior Court of Justice styled as *Brown v. The Attorney General of Canada* (Court File Number CV-09-00372025CP)

(the "**Class**" and the "**Class Members**")

- (c) an order appoint Wendy White, Jessica Riddle and Catriona Charlie as representative plaintiffs of the Class;
- (d) an order that the claims asserted on behalf of the class are: (a) negligence; and (b) breach of fiduciary duty;
- (e) an order that the certified common issue is:

Did the Defendant have a fiduciary or common law duty of care to take reasonable steps to protect the Indigenous identity of the Class Members?
- (f) a declaration that the settlement agreement executed by the Plaintiffs and the Defendant on November 30, 2017 (the "**Settlement**") is fair, reasonable and in the best interests of the Class;
- (g) an order approving the Settlement pursuant to Rule 334.29(1) of the *Federal Court Rules*;
- (h) a declaration that the Settlement is binding on the representative Plaintiffs, on all Class Members and on the Defendant;
- (i) an order dismissing the claims of Class Members against the Defendant, without costs and with prejudice;
- (j) an order approving the form, content and manner of distribution of the proposed notice of settlement approval and opt of forms;
- (k) an order approving the opt out deadline;
- (l) an order approving the form of the proposed settlement claims compensation form;
- (m) an order appointing Collectiva Inc. as the claims administrator of the claims process pursuant to the Settlement;

- (n) an order approving a \$10,000 honorarium payment to each of the representative plaintiffs in the within action and in the provincial actions;
- (o) an order that if the Settlement is not approved, the parties are all restored, without prejudice, to their respective positions as such existed in May 2017 prior to commencement of the negotiations; and
- (p) such further or other order as this Honourable Court deems just and appropriate.

THE GROUNDS FOR THE MOTION ARE:

- (a) the Sixties Scoop refers to a practice between 1951 and 1991 whereby Indian and Inuit children were taken into care and placed with non-Indigenous parents where they were not raised in accordance with their cultural traditions, nor taught their languages;
- (b) the proposed Settlement brings to a conclusion more than nine (9) years of litigation and provides certain monetary compensation to survivors of the Sixties Scoop across Canada;
- (c) at the same time, the Settlement goes beyond individual compensation and promises to help survivors of the Sixties Scoop and Canada to turn the page on this damaging legacy through healing, education, reconciliation and commemoration measures;
- (d) the first action filed with respect to this historical practice was in Ontario in 2009, styled as *Brown v. Canada (Attorney General)* (Court File No. 09-CV-00372025CP) (the "**Brown Action**") which alleged that the federal Crown wrongfully delegated its exclusive responsibility for Indigenous persons by entering into an agreement with Ontario that authorized a child welfare program that systemically eradicated the Indigenous culture, society, language, customs, traditions and spirituality of the children;
- (e) in September 2013, the Brown Action was certified by the Ontario Superior Court of Justice as a class proceeding on behalf of the following class:

Indian children who were taken from their homes on reserves in Ontario between December 1, 1965 and December 31, 1984 and were placed in the care of non-

aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions, and practices.

- (f) in February 2017, the Ontario Superior Court of Justice granted judgment to the plaintiff and the class, finding that the Federal Crown breached its common law duty to take reasonable steps to prevent on-reserve Indian children in Ontario who were placed in the care of non-aboriginal families from losing their aboriginal identities;
- (g) between 2009 and 2017, various other claims concerning the same subject matter were commenced in the superior courts of Quebec, Manitoba, Saskatchewan, Alberta, British Columbia, Nova Scotia, Yukon and the Northwest Territories;
- (h) in late 2016 and early 2017, the following actions were commenced in this Court, which once amalgamated, became the within proceeding: *Riddle v. HMQ* (Court File No. T-2216-16) (the "**Riddle Action**"), *Wendy White v. Attorney General of Canada* (Court File No. T-294-17) (the "**White Action**") and *Charlie v. HMQ* (Court File No. T-421-17) (the "**Charlie Action**");
- (i) in March 2017, Justice Manson of the Federal Court was appointed as the case management judge;
- (j) by order dated May 3, 2017, Justice Manson ordered that the White Action, the Riddle Action, and the Charlie Action be referred to a Dispute Resolution Conference to be conducted under the auspices of a judge or prothonotary of the Federal Court, ultimately being Justice Shore;
- (k) following the direction of Justice Manson and the appointment of Justice Shore as the mediator, the parties conducted negotiations in various cities across Canada, on numerous occasions, on a plethora of legal and factual issues, between June 2017 and November 2017;
- (l) on August 30, 2017 the parties reached an Agreement-in-Principle to settle the within actions, including the Brown Action;

- (m) on November 30, 2017 the parties executed the Final Settlement Agreement;
- (n) the proposed settlement requires approval of this court pursuant to Rule 334.29 of the *Federal Court Rules* and of the Ontario Superior Court of Justice pursuant to section 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6;
- (o) the Settlement provides, amongst other things, the following terms:
 - (i) a settlement fund of at least \$500 million and a maximum of \$750 million (the "**Fund**");
 - (ii) a Foundation, established in accordance with the *Canada Not For Profit Corporations Act*, to attempt to achieve a comprehensive and lasting resolution of the legacy of the sixties scoop and to further the desire of the parties for the promotion of healing, education, reconciliation and commemoration, initially funded with \$50 million;
 - (iii) a paper-based claims process that does not require class members to testify;
 - (iv) an expansive definition of an "**Eligible Class Member**" which includes all registered Indians (as defined in the *Indian Act*) and Inuit persons or persons eligible to be registered Indians or Inuit who were removed from their homes in Canada between January 1, 1951 and December 31, 1991, and were adopted or made wards in the care of non-indigenous families, who were alive on February 20, 2009;
- (p) the Settlement is fair, reasonable and in the best interests of the Class;
- (q) the Settlement is supported by the representative Plaintiffs and recommended by experienced class counsel;
- (r) the Settlement, as any negotiated resolution, reflects various compromises made by the parties while recognizing the following:
 - (i) the risks associated with litigation concerning historical events, with class periods spanning decades;

- (ii) the case-specific risks in this case concerning the novel causes of action advanced, the unlikelihood of an aggregate award of damages and the strength of the Defendant's statutory limitation defences;
 - (iii) the risks of delays associated with complex national litigation, including all attendant appeals and preliminary 'milestone' motions;
 - (iv) the difficulty that class members would face with individual assessment hearings and the protracted nature of pursuing same; and
 - (v) the advanced ages and vulnerability of this class;
-
- (s) the Settlement provides timely recovery for class members in contrast to the gross uncertainty of continued and expansive litigation that would take years to finally resolve nationally;
 - (t) the proposed claims process is designed to fairly allocate the Fund amongst class members;
 - (u) the plan to disseminate notice of settlement approval and the form and content of such notice are fair and reasonable given the stage of the proceedings and the circumstances of this class;
 - (v) this motion is made on consent and by agreement of the Plaintiffs and the Defendant;
 - (w) the parties have agreed that an identical motion for settlement approval shall be made within the confines of the Brown Action to the Ontario Superior Court of Justice on May 29, 2018;
 - (x) the Settlement is conditional upon both this Court and the Ontario Superior Court of Justice both approving the agreement in its current form and without modification;
 - (y) Rule 334.29 of the *Federal Court Rules* and section 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6;

- (z) such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) the Affidavit of Jeffrey Wilson, filed separately;
- (b) the Affidavit of Catriona Charlie sworn March 29, 2018;
- (c) the Affidavit of Wendy White sworn April 5, 2018;
- (d) the Affidavit of Maggie Blue Waters, sworn April 9, 2018;
- (e) the Affidavit of Martin Reiher sworn April 12, 2018;
- (f) the Affidavit of David Rosenfeld, sworn April 18, 2018; and
- (g) such further and other material as counsel may advise and this Honourable Court permit.

April 18, 2018

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Lawyers for the Plaintiff
(*Brown v. Canada*, Court File CV-09-00372025-00CP)

FEDERAL COURT

BETWEEN:

JESSICA RIDDLE, WENDY LEE WHITE
AND CATRIONA CHARLIE

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

Brought pursuant to the *Federal Courts Rules*, SOR/98-106

AFFIDAVIT OF CATRIONA CHARLIE

I, Catriona Charlie, of Port Alberni, in the Province of British Columbia, MAKE OATH AND SAY THAT:

1. I make this affidavit in support of an application to certify this action as a class proceeding for settlement purposes and to obtain approval of the settlement. I am a proposed representative plaintiff in this action and therefore have personal knowledge of the facts and matters deposed to in this affidavit. Where facts are not within my personal knowledge, I have stated the source of that information, and I believe those facts to be true.

2. I have reviewed the Statement of Claim in this consolidated Federal Court action, which was filed on January 9, 2018. This consolidated action is meant to facilitate a national settlement of litigation that relates to what is now known as the Sixties Scoop. In the Claim, the other plaintiffs and I allege that the defendant delegated Indian child welfare services to the provinces and territories, largely through bilateral agreements entered into between the defendant and each province and territory, and that pursuant to these agreements large numbers of Indian children were removed from their families and communities and placed in the care of non-Indigenous foster or adoptive families (the "Sixties Scoop"). We allege that Indian children who were

victims of the Sixties Scoop lost their cultural identity and suffered psychologically, emotionally, spiritually and physically. We also allege that these Indian children were deprived of their status, their aboriginal and treaty rights, and monetary benefits to which they were entitled pursuant to the *Indian Act* and related legislation and policies.

My Story

3. I am a descendant of the Namgis people and a member of the Namgis First Nation, which is one of the Kwakawaka'wakw Nations. I am an Indian as defined by the *Indian Act* and an aboriginal within the meaning of section 35 of the *Constitution Act, 1982*.
4. My birth mother, Francis Provost, lived on reserve land in Alert Bay, British Columbia. She moved to Campbell River, British Columbia, when she learned that she was pregnant with me. I was born on July 26, 1968.
5. I do not know the identity of my birth father.
6. When I was born, my birth mother – just a teenager – consented to putting me up for adoption. My grandparents, however, refused to sign consents for my adoption.
7. British Columbia child welfare workers were initially unable to find an adoptive home for me, so I spent the first 16 months of my life in a non-Indigenous foster home.
8. In November of 1969, I was provisionally adopted. The adoption was finalized in February of 1972. My adoptive parents and their four daughters were non-Indigenous.
9. I initially lived with my adoptive family in Argenta, a small settlement located on the west side of the Purcell Mountains on the northeast shore of Kootney Lake, British Columbia. However, my adoptive parents struggled financially and, at times, we had nowhere to live.
10. In the spring of 1978, my adoptive parents separated, and my adoptive father was left to care for me and my adoptive sisters.
11. When I was approximately 10 years old, I moved with my adoptive father and adoptive sisters to Edinburgh, Scotland, as my adoptive father had extended family there that could help

him raise me and my adoptive sisters. I was thousands of kilometres away from my Namgis community.

12. While living in foster care and with my adoptive family throughout my childhood and teenage years, I was denied the opportunity to maintain contact with my Namgis family and community. I was denied any reasonable opportunity to maintain any connection with the traditions, language, customs, religion, heritage and culture of my Namgis community, and was denied any reasonable opportunity to exercise my aboriginal rights as a Namgis.

13. I entered adulthood with a significantly impaired knowledge and experience of what it meant to be a Namgis.

14. Throughout my childhood and into adulthood, I had a longing to learn my Namgis culture, language and religion and to be part of my ancestral community. On June 24, 1994, I moved from Scotland to the reserve land of my Namgis people in Alert Bay. I had hoped to connect with my birth family and to learn the Namgis language, religion and culture.

15. Unfortunately, my birthmother died in 1978. While I was able to meet my stepfather and half-brother, I generally felt awkward, alienated and alone in Alert Bay. I had opened up old wounds and was a shock to my community. Of my 10 uncles and 2 aunts, only 2 knew of my existence.

16. I left Alert Bay after 2 years.

The History of the Proceedings

17. I first contacted Klein Lawyers LLP in November of 2013.

18. I travelled to Vancouver to meet with David Klein and Angela Bospflug, both lawyers at Klein Lawyers, and to share with them my story of surviving the Sixties Scoop. I told them how deeply the Sixties Scoop had affected my life and the lives of other Indigenous people.

19. I became actively involved in the Sixties Scoop litigation in British Columbia that had been commenced by Klein Lawyers in May of 2011 on behalf of Skogamhallait, also known as

Sharon Russell (*Skogamhallait v. The Attorney General of Canada*, Supreme Court of British Columbia Action No. VLC-S-S-113566).

20. I was regularly updated and informed about the BC action by Mr. Klein and Ms. Bospflug. I agreed to act as a representative plaintiff in the BC action. I provided information for and swore an affidavit in support of the plaintiff's motion for certification.

21. In early March of 2017, I was informed by Mr. Klein that two Sixties Scoop class actions had been filed in the Federal Court:

a) *Jessica Riddle v. Her Majesty the Queen*, Federal Court Action No. T-2216-16, issued December 20, 2016; and

b) *Wendy White v. Her Majesty the Queen*, Federal Court Action No. T-294-17, issued March 1, 2017.

22. I was informed by Mr. Klein that the proposed class in the White action overlapped with the proposed class in the BC Sixties Scoop action. Mr. Klein suggested that, in order to encourage settlement, we could file a Sixties Scoop claim in Federal Court. I accepted his recommendation and instructed him to commence my Federal Court action.

23. On March 22, 2017, my Statement of Claim was filed in *Catriona Charlie v. Her Majesty the Queen*, Federal Court Action No. T-421-17.

24. Eventually, the plaintiffs in the White and Riddle actions and I decided that consolidating the three Federal Court actions would facilitate a national settlement of the Sixties Scoop litigation.

25. On January 4, 2018, the Honourable Mr. Justice Shore of the Federal Court ordered that my action and the White action be consolidated into the Riddle action. Justice Shore appointed Jessica Riddle, Wendy White and me as the plaintiffs in the consolidated action.

Representative Plaintiff

26. I understand that this case is a proposed class proceeding. In the settlement agreement, which I have read, the proposed class in this Federal Court action is defined as:

All Indian (as defined in the *Indian Act*) and Inuit persons who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents excluding any members of the class action in the Ontario Superior Court of Justice styled as *Brown v. AGC* with court file number CV-09-00372025CP.

27. I have no personal knowledge of the number of members in the proposed class. However, since becoming involved in the British Columbia action and the Federal Court actions, and throughout my travels in support of the settlement, I have been in contact with many Sixties Scoop survivors from across Canada who have shared their experiences with me.

28. My lawyers have always kept me informed of the progress being made in the actions. I was in regular communication with my lawyers, via telephone and email, to discuss the actions.

29. Based on my discussions with Mr. Klein and Ms. Bespflug, I understand the role and duties of a representative plaintiff in a class proceeding, and I consent to acting as a representative plaintiff in this action.

30. To date, I have: retained Klein Lawyers and understand that Mr. Klein, Ms. Bespflug and Douglas Lennox at the firm are acting as class counsel in this action along with counsel from other firms; provided instructions to my lawyers – including with respect to the settlement; reviewed the Notice of Civil Claim in the BC action; provided necessary information to my lawyers for my affidavit in support of certification in the BC action and reviewed my affidavit; reviewed the Federal Court Statement of Claim in my action and the consolidated Statement of Claim; discussed settlement proposals and counter-proposals with my lawyers; and reviewed draft materials that were later filed in support of our application to have this action certified for settlement purposes and the settlement approved.

31. Moving forward, I will continue to be involved in the case as necessary and will continue to speak with class members. I will ensure, through my lawyers, that the class is kept informed of any developments in this litigation.

32. I am not aware of any conflict between my interests and the interests of other proposed class members. I believe that I can fairly and adequately represent the interests of the proposed class, and I will do my best to fulfill my responsibilities as a representative plaintiff.

33. My 2013 retainer agreement with Klein Lawyers states that the firm will receive 33.33% of the settlement or judgment awarded. I signed a second retainer agreement with Klein Lawyers on June 12, 2017. The new retainer supersedes my prior agreement and states that Klein Lawyers will receive 25% of the amount awarded, plus disbursements, interest on disbursements and applicable taxes. Attached as Exhibit A is a copy of my 2017 retainer agreement.

The Settlement

34. Since first retaining Klein Lawyers in 2013, I have been extensively involved in the Sixties Scoop litigation as well as the efforts to settle the litigation on behalf of the class.

35. In or around December of 2016, Mr. Klein informed me that the government wanted to meet with him and Ms. Bessflug, along with counsel for the plaintiffs in the other Canadian Sixties Scoop actions, to discuss the possibility of settling the Sixties Scoop litigation. I instructed Mr. Klein to participate in these discussions with the objective of negotiating a national settlement. In doing so, I stressed to both Mr. Klein and Ms. Bessflug that it was important to resolve this matter so that survivors of the Sixties Scoop could begin the process of healing.

36. My lawyers have always kept me informed of the status of the settlement negotiations. We regularly discussed the negotiations and strategy by phone and by email.

37. On February 1, 2017, the Honourable Carolyn Bennett, the Minister of Indigenous and Northern Affairs, publicly announced that the defendant intended to launch negotiations towards a national resolution of the Sixties Scoop litigation. A copy of the Minister's statement is available online at <https://www.newswire.ca/news-releases/statement---minister-bennett->

announces-launch-of-negotiations-towards-national-resolution-to-sixties-scoop-litigation-612472033.html and is attached as Exhibit B to my affidavit. The Minister stated:

As the Prime Minister has said, no relationship is more important to him and to Canada than the one with Indigenous peoples. We are deeply committed to advancing reconciliation and renewing, on a nation-to-nation, Crown-to-Inuit and government-to-government basis, the relationship with Indigenous peoples based on recognition of rights, respect, co-operation and partnership.

38. On December 16, 2016 and February 28, 2017, Mr. Klein and Ms. Bespflug attended settlement meetings in Toronto on my behalf and on behalf of Ms. Russell. Throughout those negotiations, I was in frequent communication with Mr. Klein and Ms. Bespflug to discuss the progress of the negotiations and strategy. Unfortunately, those settlement talks proved to be unsuccessful.

39. In or around May of 2017, the Honourable Justice Manson of the Federal Court ordered that the parties to my Federal Court action and the Riddle and White actions participate in judicial dispute resolution. I am informed by Ms. Bespflug that counsel for the plaintiff in the Ontario action *Brown v. The Attorney General of Canada* was invited to participate in the mediation.

40. I am informed by Ms. Bespflug that counsel attended six in-person mediation sessions before Justice Shore: June 2017 in Montreal, July 2017 in Toronto, August 2017 in Vancouver, September 2017 in Montreal, October 2017 in Toronto and November 2017 in Vancouver.

41. Throughout these settlement negotiations, I was in frequent communication with Mr. Klein and Ms. Bespflug to discuss the progress of the negotiations, strategy, and the various draft settlement proposals and counter-proposals.

42. On August 30, 2017, I entered into an Agreement in Principle with the defendant and the plaintiffs in the White, Riddle and Brown actions to settle the Sixties Scoop litigation on a national basis.

43. On October 5, 2017, I met with Minister Bennett in Ottawa. Other plaintiffs involved in the Sixties Scoop litigation also attended this meeting. We discussed our experiences and our stories; we discussed surviving the Sixties Scoop, but how it had forever scarred us. That

evening, the other plaintiffs and I went for dinner with Mr. Klein and Ms. Bessflug. We again shared our stories and got to know each other. Surrounded by other Sixties Scoop survivors, I finally felt like I was not alone.

44. On October 6, 2017, Minister Bennett held a press conference in Ottawa to announce that an Agreement in Principle had been reached to settle the Sixties Scoop litigation on a national basis. I attended the press conference and stood beside the Minister as she spoke. It was a very emotional experience; it gave me hope that the settlement would be a significant step in my healing process and in the healing processes of other survivors. Indigenous and Northern Affairs Canada issued a news release about the Minister's announcement. A copy of the news release is available online at <https://www.canada.ca/en/indigenous-northern-affairs/news/2017/10/agreement-in-principlereachedtoresolvethesixtiesscooplitigation.html> and is attached as Exhibit C to my affidavit. Following the press conference, I gave media interviews and answered questions from reporters.

45. At the end of November 2017, I discussed the final draft of the settlement agreement with Ms. Bessflug. I instructed Klein Lawyers to sign the agreement on my behalf. The settlement agreement was executed on November 30, 2017.

The Benefits of the Settlement

46. I believe that the settlement agreement is reasonable and fair and that class members will be generally satisfied with the agreement since it includes, in addition to financial compensation, non-monetary benefits that are of great importance to us. Attached as Exhibit D is a copy of the executed Settlement Agreement, excluding its appendices.

47. For me, it was important that any settlement to the Sixties Scoop litigation contain benefits beyond financial compensation. I wanted the settlement to include benefits that would positively impact the lives of survivors and help them, and future generations, to heal.

48. I believe that the Foundation that is being established pursuant to the settlement agreement will be an important resource for survivors of the Sixties Scoop, and the Indigenous community generally, for years to come. I understand that the main purpose of the Foundation is

to enable change and reconciliation and, in particular, to enable access to healing, commemoration and educational activities for Indigenous communities and individuals.

49. I understand from reviewing the settlement agreement and from my discussions with Ms. Bespflug that the defendant will initially fund the Foundation with fifty million dollars. I also understand that three of the plaintiffs from the Sixties Scoop actions across Canada, including Ms. Russell, are members of the Foundation Table.

50. I understand from reviewing the settlement agreement and from my discussions with Ms. Bespflug that the claims process will be very simple and that the onus will be on the claims administrator, rather than on individual claimants, to obtain from the provinces and territories any necessary documentation to prove that a claimant was adopted or in foster care. I believe that, because of the simple claims process, many eligible class members will participate in the settlement claims process and make claims for compensation.

51. I believe that the settlement claims process will be much less traumatizing for class members than a trial would be, since class members would be subjected to cross examination and other adversarial processes during the individual issues stage of the class proceeding.

52. The non-financial benefits of this settlement would not be available to class members through litigation; the settlement achieves outcomes that litigation cannot.

53. The settlement also provides a guaranteed outcome for class members, and therefore avoids the risk of being unsuccessful at trial.

54. In addition to the non-monetary settlement benefits, eligible class members whose claims are approved will be granted an individual compensation payment. I understand from reviewing the settlement agreement and from my discussions with Ms. Bespflug that the amount of the individual payments will most likely be between \$25,000 and \$50,000.

55. I further understand from reviewing the settlement agreement and from my discussions with Ms. Bespflug that the defendant has committed to using its best efforts to obtain the agreement of the provinces and territories and various Federal government departments that

receipt of any payments to a class member made pursuant to the agreement will not affect the quantity, nature and duration of any social benefits or social assistance benefits payable to them.

56. The settlement is broad in scope. It covers the period between 1951 and 1991, and class members who were removed from their homes both on and off reserve are eligible for compensation, assuming they meet the other requirements for compensation set out in the agreement.

Honourarium

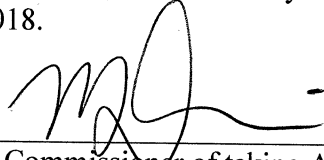
57. Ms. Bessflug has advised me that class counsel will be seeking Court approval for the payment of honoraria to me and the other Sixties Scoop plaintiffs for our service to the class. She has asked that I address some of the factors that the Court might consider in making such an award.

58. I actively sought out Mr. Klein in 2013 and made it known that I wanted to participate in the Sixties Scoop litigation. I was concerned about what had happened to me and what had happened to other Indigenous children. I wanted to encourage reconciliation between Canada and survivors of the Sixties Scoop so that survivors can begin the process of healing.

59. As noted above, in October of 2017, I travelled from Port Alberni to Ottawa to attend the press conference during which the settlement was announced. This attendance – and generally litigating the case – required me to recount and relive the pain that I experienced as a consequence of being removed from my Namgis family and community. With every media interview, I relive the hurt, and I feel once again that I don't really belong anywhere. I am determined to fulfill my duties as a representative of the class, but this has not been an easy role for me.

60. My responsibilities as a representative plaintiff imposed certain costs on me which I would have preferred to have avoided, and which other class members who do not come forward as representative plaintiffs are able to avoid. There was a financial cost to my attendance in Ottawa and my trip to Vancouver, both of which I had to take time off work for. Also, by lending my name to this litigation, I gave up a degree of privacy. I did not want to be defined by my experiences relating to the Sixties Scoop. I did, however, want to educate Canadians about the

This is Exhibit "A" referred to in the Affidavit of Catriona Charlie sworn before me, this 29th day of March 2018.

A handwritten signature in black ink, consisting of stylized initials and a long horizontal stroke.

A Commissioner of taking Affidavits
in the Province of British Columbia

RETAINER AND CONTINGENCY FEE AGREEMENT

To: Klein Lawyers LLP

I, Catriona Charlie, retain Klein Lawyers LLP to act on my behalf with respect to a class action claim for damages arising from my removal from my family and community and placement with non-Aboriginal foster and/or adoptive parents. If appointed by the court, I agree to act as a representative plaintiff in this case and to fulfil the responsibilities described in Schedule A to this agreement. I authorize you to take all necessary steps, incur all reasonable expenses, and employ such agents and counsel as you consider necessary.

The legal fee paid to Klein Lawyers will be 25% of the amount awarded to the class in settlement or judgment, plus disbursements, interest on disbursements and applicable taxes.

If I terminate the services of Klein Lawyers before a settlement or judgement, they will have the right to a reasonable fee based on services rendered and time spent by the lawyers and paralegals.

Under the Rules of the Law Society of British Columbia, a lawyer may charge a maximum of 40% of the total amount recovered in a claim for personal injury or wrongful death. The percentage limit applies to all matters related to the trial of a lawsuit, but does not include any appeal. A lawyer and a client may make a separate agreement for legal fees for an appeal. Fees charged by different lawyers vary.

I understand, that pursuant to the *Legal Professions Act* and the Law Society Rules, I have the right within 3 months of the date of this Agreement, or of the date this Agreement is terminated by either party, to apply to a district registrar of the Supreme Court of British Columbia to have this Agreement examined whether or not I have paid your fees.

Rule 334.4 of the *Federal Courts Rules* provides that "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."

While it is difficult to estimate what the expected fees will be, I understand that the fee in this case will depend on the amounts recovered for the class. By way of example only, I understand that if the class as a whole recovers \$10 million then the fee will be \$2.5 million, plus applicable taxes and disbursements. As set out above, the legal fees of counsel must be approved by the Court.

I acknowledge receiving a copy of this retainer and contingency fee agreement.

Dated at Port Alberni, British Columbia on June 12, 2017.



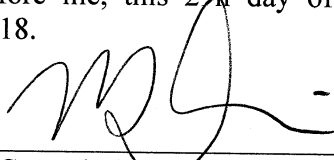
Catriona Charlie

Schedule A

Responsibilities of a Representative Plaintiff

- review the Statement of Claim and any amendments;
- fairly and adequately represent the interests of the class;
- communicate with and instruct your lawyer, who will act as counsel for the class;
- in consultation with counsel, produce a plan setting out a workable method for advancing the proceeding on behalf of the class and for notifying class members of the proceeding;
- assist in the preparation of an affidavit and other materials in support of the motion for certification;
- swearing affidavits as required;
- attend if necessary, with a lawyer, for cross-examination on your affidavit(s);
- become familiar with the issues to be decided by the Court;
- attend, if necessary, with a lawyer at case planning conferences;
- attend, if necessary, with a lawyer for an examination for discovery where you will be asked questions relevant to the claim;
- attend if necessary, with a lawyer, at trial to give evidence;
- receive regular updates on the lawsuit and express your opinions about the lawsuit;
- provide your opinions to your lawyer and to the Court if offers to settle the lawsuit are made.

This is Exhibit "B" referred to in the Affidavit of Catriona Charlie sworn before me, this 29th day of March 2018.

A handwritten signature in black ink, appearing to be 'M. J.', written over a horizontal line.

A Commissioner of taking Affidavits
in the Province of British Columbia

Statement - Minister Bennett Announces Launch of Negotiations Towards National Resolution to Sixties Scoop Litigation

OTTAWA, Feb. 1, 2017 /CNW/ - Today, the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs, made the following statement:

"I am pleased to announce an important step in Canada's journey of reconciliation with Indigenous peoples: Our government will launch negotiations towards a national resolution to Sixties Scoop litigation.

The Sixties Scoop is a dark and painful chapter in Canada's history. Beginning in the 1960s, Indigenous children were removed from their homes by child welfare authorities and many were placed in foster care or adopted out to non-Indigenous families. A number of Sixties Scoop class actions are now underway.

Over the last several months, I have been working with my officials and Cabinet colleagues to get this process in place to resolve these claims in a compassionate, respectful and fair manner, as a way forward towards reconciliation and healing. Several parties have already expressed their desire to participate in the discussions, and we hope all parties will participate in the efforts towards negotiating an Agreement-in-Principle to resolve Sixties Scoop litigation.

Negotiation, rather than litigation is our government's preferred route to settle differences, and right historical wrongs. This commitment is demonstrated by the settlement of the *Anderson* class actions and the recent appointment of Tom Isaac to lead the exploratory discussions in the *Gottfriedson* class action.

As the Prime Minister has said, no relationship is more important to him and to Canada than the one with Indigenous peoples. We are deeply committed to advancing reconciliation and renewing, on a nation-to-nation, Crown-to-Inuit and government-to-government basis, the relationship with Indigenous peoples based on recognition of rights, respect, co-operation and partnership.

As we renew this most important relationship, we are committed to furthering the vital work of reconciliation as outlined in the Calls to Action of the Truth and Reconciliation Commission, which contained specific references to the claims of individuals left out of the Indian Residential Schools Settlement Agreement. This work of reconciliation is not just for government, but for all Canadians. The Government of Canada can confirm that as of this month, progress is underway on 41 of the Calls to Action that are under federal purview. As work continues, this number will continue to grow.

True and lasting reconciliation cannot be achieved through any one single settlement. The federal government's relationship with Indigenous people has been filled with too much tragedy, especially related to the treatment of children. We look forward to working together to arrive at a constructive, national resolution to the painful legacy of the Sixties Scoop, outside the court process."

This statement is also available on the Internet at www.aandc.gc.ca.

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SOURCE Government of Canada

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For further information: Sabrina Williams, Press Secretary, Office of the Honourable Carolyn Bennett, 613-697-8316; Media Relations, Indigenous and Northern Affairs Canada, 819-953-1160

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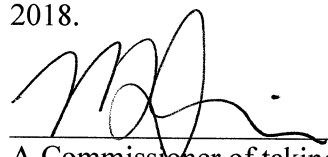
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This is Exhibit "C" referred to in the Affidavit of Catriona Charlie sworn before me, this 29th day of March 2018.

A handwritten signature in black ink, consisting of stylized, cursive letters, positioned above a horizontal line.

A Commissioner of taking Affidavits
in the Province of British Columbia



[Home](#) → [Indigenous and Northern Affairs Canada](#)

Agreement-in-Principle reached to resolve the Sixties Scoop Litigation

News Release

From [Indigenous and Northern Affairs Canada](#)

October 6, 2017 Ottawa, ON Indigenous and Northern Affairs Canada

The Sixties Scoop is a dark and painful chapter in Canada's history. Working together to resolve class actions and bring a meaningful resolution to its painful legacy is an important step in our journey of reconciliation with Indigenous peoples.

Today, the Honourable Carolyn Bennett, Minister of Crown-Indigenous Relations and Northern Affairs, together with Marcia Brown Martel, Stewart Garnett, Priscilla Meeches Catriona Charlie, Peter Van Name, Sarah Tanchak, and Jessica Riddle announced that an Agreement-in-Principle aimed at resolving Sixties Scoop litigation has been reached.

Over the past several months, the Government of Canada and counsel for the plaintiffs have been engaged in negotiations to resolve this litigation in a fair, compassionate, and respectful manner that promotes reconciliation and healing.

The Agreement-in-Principle includes the establishment of a Foundation that will focus on healing, wellness, language, culture and commemoration. The structure of the Foundation will be negotiated directly with representatives from the plaintiffs, their counsel, and representatives from the Government of Canada. The Agreement-in-Principle also includes individual compensation.

This Agreement-in-Principle is the first step in resolving the Sixties Scoop litigation. Canada is committed to working with other Indigenous people affected by the Sixties Scoop, and the provinces and territories who have already shown leadership in this area, to resolve the remaining litigation.

The government has committed to seeing all of the Calls to Action put forward by the Truth and Reconciliation Commission – this agreement is a concrete demonstration of that commitment.

In particular, this responds to Call to Action number 29, which calls on the government to resolve 20 disputes – whenever possible – expeditiously and outside of the confrontational court setting.

Quotes

“The Sixties Scoop was a dark painful chapter in Canada’s history. The survivors have identified the loss of language and culture, and therefore their identity, as the greatest harm. The creation of a foundation will directly address the need for survivors to claim a secure personal cultural identity.”

*The Honourable Carolyn Bennett, M.D., P.C., M.P.
Minister of Crown-Indigenous Relations and Northern Affairs*

Quick Facts

- The Agreement-in-Principle represents a major milestone. Parties are working to finalize the agreement by the end of 2017, and will seek court approval through a fairness hearing targeted for Spring 2018.
- The Foundation for healing, wellness, language, culture and commemoration will be accessible to all Indigenous people.
- The Foundation will be designed in full partnership with Indigenous peoples and administered independently of the federal government.

Related Products

- [Sixties Scoop Agreement in Principle](#)

Associated Links

- [Minister Bennett Announces Launch of Negotiations Towards National Resolution to Sixties Scoop Litigation](#)

Contacts

Sabrina Williams
Press Secretary
Office of the Honourable Carolyn Bennett
613-697-8316

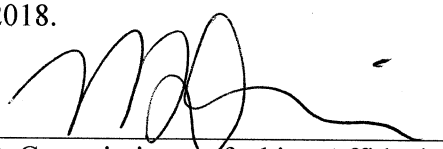
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Date modified:

2017-11-07

This is Exhibit "D" referred to in the Affidavit of Catriona Charlie sworn before me, this 29th day of March 2018.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

A Commissioner of taking Affidavits
in the Province of British Columbia

PRIVILEGED AND CONFIDENTIAL

November 2017

Sixties Scoop Settlement Agreement

WHEREAS:

A. Between 1951 and 1991, Indian and Inuit children were taken into care and placed with non-Indigenous parents where they were not raised in accordance with their cultural traditions nor taught their traditional languages (the “Sixties Scoop”);

B. Various class proceedings were commenced against Canada in provincial superior courts and the Federal Court in connection with the Sixties Scoop;

C. The Parties desire a fair, comprehensive and lasting resolution of the legacy of the Sixties Scoop;

D. The Parties further desire the promotion of healing, education, reconciliation and commemoration;

E. The Parties entered into an Agreement in Principle on August 30, 2017 for the resolution of the legacy of the Sixties Scoop:

- (i) to settle the Class Actions in accordance with and as provided for in this Agreement;
- (ii) to provide for payment by Canada in accordance with the Funding Provisions;
- (iii) to provide Individual Payments to Eligible Class Members; and,

PRIVILEGED AND CONFIDENTIAL

- (iv) to establish a Foundation to enable change and reconciliation and, in particular, access to education, healing/wellness and commemoration activities for communities and individuals.

F. The Foundation is intended to bridge the generations and give meaning to suffering as well as to provide healing and reconciliation for the whole of Canada, now and for the future.

G. The Parties, subject to the Approval Orders, have agreed to amend or discontinue and consolidate all of the existing Proposed Class Actions to assert two Class Actions for the purposes of settlement;

H. The Parties, subject to the Approval Orders and the expiration of the Opt Out Period without the Opt Out Threshold being met, have agreed to settle the Class Actions upon the terms contained in this Agreement;

I. This Agreement is not to be construed as an admission of liability by Canada;

NOW THEREFORE, in consideration of the mutual agreements, covenants and undertakings set out herein, the Parties agree with each other as follows:

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SECTION ONE INTERPRETATION

1.01 Definitions

In this Agreement, the following terms will have the following meanings:

“Adjusted Payment” means:

- a) if there are fewer than 20,000 Eligible Class Members, the amount calculated by dividing the Designated Amount by the number of Eligible Class Members, up to a maximum of fifty thousand dollars (\$50,000.00); or,
- b) if there are more than 30,000 Eligible Class Members, the amount calculated by dividing seven hundred and fifty million dollars (\$750,000,000.00) by the number of Eligible Class Members.

“Administrator” means the entity appointed by the Court to carry out the duties assigned to in Section Eight (8);

“Adopted” means a child adopted pursuant to applicable provincial or territorial legislation;

“Agreement in Principle” means the Agreement signed in Vancouver, British Columbia, on August 30, 2017 and attached hereto as Schedule “A”;

“Approval Date” means the date the last Court issues its Approval Order;

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“Approval Orders” means:

- a) the judgment of the Federal Court certifying the Omnibus Federal Court Class Action and approving this Agreement as fair, reasonable and in the best interests of the Class Members for the purposes of settlement of the Class Actions pursuant to the applicable class proceedings legislation and the common law; and,
- b) the judgement of the Ontario Superior Court of Justice in the Brown Class Action approving this Agreement as fair, reasonable and in the best interests of the Class Members for the purposes of settlement of the Class Actions pursuant to the applicable class proceedings legislation and the common law.

“Base Payment” means twenty-five thousand dollars (\$25,000.00);

“Brown Class Action” means the litigation in the Ontario Superior Court of Justice styled as *Brown v. AGC* with court file number CV-09-00372025CP;

“Business Day” means a day other than a Saturday or a Sunday or a day observed as a holiday under the laws of the Province or Territory in which the person who needs to take action pursuant to this Agreement is situated or a holiday under the federal laws of Canada applicable in the said Province or Territory;

“Canada” means Her Majesty the Queen in Right of Canada, the Attorney General of Canada, Her and their legal respective representatives, employees, agents, servants, predecessors, successors, executors, administrators, heirs and assigns;

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“Class Actions” means the Omnibus Federal Court Class Action referred to in Section 5.01 and 5.02 and the Brown Class Action;

“Class Members” means all individuals including Persons Under Disability

(a) who are included in the Omnibus Federal Court Class Action and who have not opted out and who are not deemed to have opted out of the Omnibus Federal Court Class Action on or before the expiry of the Opt Out Period; or,

(b) who are included in the Brown Class Action;

“Court” means either:

- a) the Ontario Superior Court of Justice; or,
- b) the Federal Court;

“Designated Amount” means five hundred million dollars (\$500,000,000.00);

“Determination Date” means the day the Administrator determines the number of Eligible Class Members in accordance with Section 6.04(3);

“Eligible Class Member” means a Class Member who was alive on February 20, 2009 and whose application for an Individual Payment is approved in accordance with the provisions of this Agreement:

“Enhanced Amount” means the amount required to make a Base Payment to each Eligible Class Member in the event that the Designated Amount is

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insufficient to do so; however, in no circumstances will the Enhanced Amount exceed seven hundred and fifty million dollars (\$750,000,000.00);

“Estate Executor” means the estate executor, administrator, trustee or liquidator of the deceased Class Member’s or Eligible Class Member’s estate or the personal representative of the Class Member or Eligible Class Member who is under a disability in accordance with applicable provincial and territorial legislation;

“Exceptions Committee” means the committee established in Section Nine (9) to carry out the duties assigned to it in this Agreement;

“Foundation” means the Foundation established by Canada in accordance with this Agreement and initially funded by Canada to the extent of fifty million dollars (\$50,000,000.00);

“Implementation Date” means the latest of:

- a) thirty (30) days after the expiry of the Opt-Out Period; and
- b) the day following the last day on which a Class Member in any jurisdiction may appeal or seek leave to appeal any of the Approval Orders; and
- c) the date of a final determination of any appeal brought in relation to the Approval Orders;

“Indian” has the meaning ascribed to it in the *Indian Act*;

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“Indian Affairs and Northern Development” or “INAC” means the department of the federal government tasked to perform the duties in relation to processing the Individual Payment Application described in Schedule “B”.

“Individual Payment” means a lump sum payment made to an Eligible Class Member in the manner set out in Section Six (6); and, for greater certainty, means either the Base Payment or the Adjusted Payment and, in no circumstances, will any Eligible Class Member receive a payment from this settlement which exceeds fifty thousand dollars (\$50,000.00);

“Individual Payment Application” means an application for an Individual Payment completed substantially in the form attached hereto as Schedule “B” and signed by an Eligible Class Member or his or her Estate Executor along with any supporting documentation;

“Individual Payment Application Deadline” means the nine (9) month anniversary of the Implementation Date;

“Inuit” means individuals who are currently enrolled in the:

1. Nunavut Inuit Enrolment List as specified in article 3.1 of the Nunavut Land Claims Agreement;
2. Nunavik Land Claims Agreement;
3. Labrador Inuit Land Claims Agreement; and,
4. Inuvialuit Land Claims Agreement;

or individuals whom the Exceptions Committee deems to be Inuit.

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“Omnibus Federal Court Class Action” means the class action referred to in Sections 5.01 and 5.02;

“Opt Out Period” means the ninety (90) day period commencing on the date the Federal Court approves this settlement;

“Opt Out Threshold” means the Opt Out Threshold set out in Section 5.09;

“Parties” means collectively and individually the signatories to this Agreement;

“Permanent Ward” means a child who was committed permanently to the custody or guardianship of a province or territory or provincial or territorial child welfare authority pursuant the applicable provincial or territorial legislation;

“Person Under Disability” means

- a) a minor as defined by that person’s province or territory of residence;
- or
- b) a person who is unable to manage or make reasonable judgments or decisions in respect of their affairs by reason of mental incapacity and for whom a Estate Executor has been appointed;

“Proposed Class Actions” means the proceedings listed in Schedule “D”;

“Reconsideration Officer” means the individual appointed by the Court to

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carry out the duties assigned to him or her in Section 6.07 and Section 9.03;

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1.02 Headings

The division of this Agreement into Sections and Schedules and the insertion of a table of contents and headings are for convenience of reference only and do not affect the construction or interpretation of this Agreement. The terms “herein”, “hereof”, “hereunder” and similar expressions refer to this Agreement and not to any particular Section or other portion hereof. Unless something in the subject matter or context is inconsistent therewith, references herein to Sections and Schedules are to Sections and Schedules of this Agreement.

1.03 Extended Meanings

In this Agreement, words importing the singular number include the plural and *vice versa*, words importing any gender include all genders and words importing persons include individuals, partnerships, associations, trusts, unincorporated organizations, corporations and governmental authorities. The term “including” means “including without limiting the generality of the foregoing”.

1.04 No *Contra Proferentem*

The Parties acknowledge that they have reviewed and participated in settling the terms of this Agreement and they agree that any rule of construction to the effect that any ambiguity is to be resolved against the drafting parties is not applicable in interpreting this Agreement.

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1.05 Statutory References

In this Agreement, unless something in the subject matter or context is inconsistent therewith or unless otherwise herein provided, a reference to any statute is to that statute as enacted on the date thereof or as the same may from time to time have been amended, re-enacted or replaced and includes any regulations made thereunder.

1.06 Day For Any Action

Where the time on or by which any action required to be taken hereunder expires or falls on a day that is not a Business Day, such action may be done on the next succeeding day that is a Business Day.

1.07 When Order Final

For the purposes of this Agreement a judgment or order becomes final when the time for appealing or seeking leave to appeal the judgment or order has expired without an appeal being taken or leave to appeal being sought or, in the event that an appeal is taken or leave to appeal is sought, when such appeal or leave to appeal and such further appeals as may be taken have been disposed of and the time for further appeal, if any, has expired.

1.08 Currency

All references to currency herein are to lawful money of Canada.

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1.09 Schedules

The following Schedules to this Agreement are incorporated into and form part of it by this reference as fully as if contained in the body of this Agreement:

Schedule A – Agreement in Principle

Schedule B – Individual Payment Application Form

Schedule C – Proposed Class Actions

Schedule D – Foundation Table

Schedule E – Omnibus Federal Court Statement of Claim

Schedule F – Federal Court Consolidation Order

Schedule G – Language Restricting Claims to Several Liability

Schedule H – Amendments to Each Proposed Class Action

Schedule I – Federal Court Approval Order

Schedule J – Brown Approval Order

Schedule K – Contact Information for Counsel

Schedule L – Opt Out Form

Schedule M - Individual Payment Application Process

Schedule N– Claimant Address Search Plan

1.10 No Other Obligations

All actions, causes of actions, liabilities, claims and demands whatsoever of every nature or kind for damages, contribution, indemnity, costs, expenses and interest which any Class Member ever had, now has or may hereafter have arising in relation to the Sixties Scoop against Canada, whether such

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claims were made or could have been made in any proceeding including the Class Actions, will be finally settled based on the terms and conditions set out in this Agreement upon the Implementation Date, and Canada will have no further liability except as set out in this Agreement.

**SECTION TWO
EFFECTIVE DATE OF AGREEMENT**

2.01 Date when Binding and Effective

This Agreement will become effective and be binding on and after the Implementation Date on all the Parties and the Class Members. The Approval Orders will constitute approval of this Agreement in respect of all Class Members.

2.02 Effective in Entirety

None of the provisions of this Agreement will become effective unless and until the Courts approve all the provisions of this Agreement.

**SECTION THREE
THE FOUNDATION**

3.01 The Foundation

(1) Canada will establish the Foundation in accordance with the the *Canada Not For Profit Corporations Act*.

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- (2) The Parties specifically agree that their intention is for the Foundation to continue after the other elements of this Agreement are complete in order to continue to enable change and reconciliation and that the Foundation may receive funding from other sources in order to do so.
- (3) The Parties agree that they will convene a separate negotiation table to particularize the objects of the Foundation (the "Foundation Table"); however, the Parties agree that:
- a. the main purpose of the Foundation is to enable change and reconciliation and, in particular, access to healing/wellness, commemoration and education activities for communities and individuals;
 - b. the Foundation shall be governed by a board of not fewer than six and not more than ten members, one of which shall be appointed by Canada;
 - c. the Foundation is a living entity and it is intended to be responsive to the challenges of current and future needs; and,
 - d. the Foundation is intended to benefit the Class Members and to complement and not duplicate government programs.
- (4) The Foundation Table shall consist of the representatives set out in Schedule "D". The Parties agree that there may be circumstances under which the representatives identified in Schedule "D" will not be able to participate; however, no substitutions will be permitted except by consensus of the Foundation Table.

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(5) Canada will initially fund the Foundation with fifty million dollars (\$50,000,000.00);

(6) Any surplus in the Designated Amount after an Adjusted Payment has been made to all of the Eligible Class Members will be paid to the Foundation.

**SECTION FOUR
FUNDING**

4.01 Individual Payment Funding

(1) On or before the thirtieth (30th) day after the Determination Date, Canada will pay to the Administrator for the benefit of the Class Members either the Designated Amount or the Enhanced Amount as follows:

- I. If the Administrator determines that there are twenty thousand (20,000) or fewer Eligible Class Members, Canada will pay the Designated Amount; or
- II. If the Administrator determines that there are more than twenty thousand Eligible Class Members, Canada will pay the Enhanced Amount.

(2) In no circumstances, will Canada be required to pay more than the Enhanced Amount or will the Enhanced Amount exceed seven hundred and fifty million dollars (\$750,000,000.00).

(3) The Administrator shall hold the moneys in an interest-bearing

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account; however, any interest earned thereon will be held in trust for the Foundation and, upon payment of all the Eligible Class Members, the interest shall be paid out to the Foundation.

4.02 Foundation Funding

On the later of

- a. the date the Foundation comes into existence; or,
- b. the Implementation Date,

Canada will transfer fifty million dollars (\$50,000,000.00) to the Foundation in accordance with Section 3.01(5).

4.03 Legal Fees, Notice and Administration Fees

Canada will pay amounts for legal fees, notice and administration fees and all applicable taxes in accordance with this Agreement.

4.04 Social Benefits

- (1) Canada will make its best efforts to obtain the agreement of the provinces and territories that the receipt of any payments pursuant to this Agreement will not affect the quantity, nature or duration of any social benefits or social assistance benefits payable to a Class Member pursuant to any legislation of any province or territory of Canada.
- (2) Canada will make its best efforts to obtain the agreement of the necessary Federal Government Departments that the receipt of any

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payments pursuant to this Agreement will not affect the quantity, nature or duration of any social benefits or social assistance benefits payable to a Class Member pursuant to any social benefit programs of Canada such as Old Age Security and Canada Pension Plan.

SECTION FIVE IMPLEMENTATION OF THIS AGREEMENT

5.01 Class Actions

The Parties agree that *Riddle v. HMQ* (T-2212-16), *White v. AGC* (T-294-17), and *Charlie v. HMQ* (T-421-17) (the “Federal Court Class Actions”) will be consolidated into the uniform Omnibus Federal Court Class Action.

5.02 Content of the Omnibus Federal Court Class Action

The Omnibus Federal Court Class Action will assert common causes of action encompassing and incorporating all claims and causes of action asserted in the Federal Court Class Actions. The Statement of Claim in the Omnibus Federal Court Class Action will be in the form attached as Schedule “E”.

5.03 Consent Order

- (1) The Parties will consent to an order in the Federal Court in the form attached as Schedule “F” consolidating the Federal Court Class Actions into the Omnibus Federal Court Class Action as set out in

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Section 5.01 and 5.02.

- (2) For greater certainty, the order consented to in the Federal Court will not amend nor merge nor have any other impact on the Brown Class Action.

5.04 Class Definitions

- (1) The Parties agree that it is their intent to resolve the claims of all Indian (as defined by the *Indian Act*) and Inuit persons who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents.
- (2) The class in the Brown Class Action is defined pursuant to the Order of Justice Belobaba dated September 27, 2013 as follows:

Indian children who were taken from their homes on reserves in Ontario between December 1, 1965 and December 31, 1984 and were placed in the care of non-aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions and practices.

- (3) The class in the Omnibus Federal Court Class Action will be defined as the following:

All Indian (as defined in the *Indian Act*) and Inuit persons who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents excluding any members of the class action in the Ontario Superior Court of Justice styled as *Brown v. AGC* with court file number CV-

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09-00372025CP.

- (4) The Parties agree to either amend the class definitions in the Proposed Class Actions listed in Schedule "C" or any other action commenced or continued by any of the counsel listed in Schedule "K" to specifically exclude the Class Members and to preclude claims by other parties against Canada in relation to the Class Members' claims, or to discontinue the Proposed Class Actions. For greater certainty, the nature of the amendments for each of the Proposed Class Actions is described in Schedule "H". Furthermore, should any Proposed Class Action listed in Schedule "C" that names Canada as the only defendant be amended to include any other defendant, then that claim shall also be amended to include language substantially in the form set out in Schedule "G".
- (5) *The Parties agree that it is their intent that only the claims of the Class Members be compromised by this Agreement and that nothing in this Agreement will be construed to preclude or otherwise diminish any causes of action that members of the Proposed Class Actions listed in Schedule "C" who are not Class Members as defined herein may have against Canada or other entities.*

5.05 Consent Certification

The Parties agree that concurrent with the application for the Order referred to in Section 5.03, an application will be made to the Federal Court for the consent certification of the Omnibus Federal Court Class Action for the

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purposes of settlement in accordance with the terms of the Agreement.

5.06 Omnibus Federal Court Approval Order

An Approval Order will be sought in the form attached as Schedule "I".

5.07 Brown Class Action Approval Order

There will be a separate Approval Order in relation to the Brown Class Action which will be, in all respects save as to class membership, in the same terms and conditions as the approval order issued in the Federal Court. For greater certainty, the Brown Class Action Approval Order will be sought in the form attached as Schedule "J".

5.08 Notice

- (1) The parties will agree to notice plans to provide notice of the approval hearing and of the settlement's approval and the process to apply for an Individual Payment.
- (2) Canada agrees to fund the notice plans.
- (3) The Parties agree that contact information as set out in Schedule "K" for counsel to the Brown Class Action and the Omnibus Federal Court Class Action will be referenced in the written materials and website information of the notice program.

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- (4) The legal notice will include an opt out form generally in the form attached as Schedule "L".
- (5) There will be a "1-800" number funded by Canada which will provide scripted information concerning the settlement.

5.09 Opt Out Threshold

- (1) If the number of Class Members who would have been Eligible Class Members opting out or deemed to have opted out under the Approval Orders exceeds two thousand (2,000), this Agreement will be rendered void and the Approval Orders set aside in their entirety subject only to the right of Canada, in its sole discretion, to waive compliance with this Section. Canada has the right to waive compliance with this provision within thirty (30) days after the end of the Opt Out Period.
- (2) In any event, for each Class Member who opts out and the Parties agree is likely to have received an Individual Payment if he or she had applied, Canada shall deduct twenty-five thousand dollars (\$25,000) from the Enhanced Amount. A copy of any opt out form received will be provided to counsel for the Parties.

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SECTION SIX

INDIVIDUAL PAYMENTS

6.01 Individual Payments

Subject to Section 6.03(4), the Administrator will make an Individual Payment to every Eligible Class Member provided that:

- a) the Individual Payment Application is submitted to the Administrator in accordance with the provisions of this Agreement;
- b) the Individual Payment Application is received prior to the Individual Payment Application Deadline;
- c) the Individual Payment Application is validated in accordance with the provisions of this Agreement; and
- d) the Eligible Class Member was alive on February 20, 2009.

6.02 Amount of the Individual Payment

(1) Depending on number of Eligible Class Members, the Administrator will make Individual Payment in the amount of either:

- a. a Base Payment; or,
- b. an Adjusted Payment.

(2) In no circumstances will an Individual Payment exceed fifty thousand dollars (\$50,000.00).

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6.03 Individual Application Process

- (1) The claims process is intended to be expeditious, cost effective, user-friendly and to minimize the burden on the applicant. The Administrator and the Reconsideration Officer shall, in the absence of reasonable grounds to the contrary, assume the applicant to be acting honestly and in good faith. The Administrator and the Reconsideration Officer are instructed to draw all reasonable and favourable inferences that can be drawn with respect to the application, as well as resolving any doubt as to whether a claim has been established in favour of the applicant.
- (2) No Eligible Class Member will receive an Individual Payment without submitting an Individual Payment Application to the Administrator.
- (3) The Administrator will not accept an Individual Payment Application prior to the Implementation Date or after the Individual Payment Application Deadline.
- (4) Notwithstanding Sections 6.03(2) and 6.03(3), where the Reconsideration Officer is satisfied that an Eligible Class Member is a Person Under Disability on the Individual Payment Application Deadline or was delayed from delivering an Individual Payment Application on or before the Individual Payment Application Deadline as a result of undue hardship or exceptional circumstances, the Reconsideration Officer will direct the Administrator to consider the

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Individual Payment Application received after the Individual Payment Application Deadline, but in no case will the Administrator consider an Individual Payment Application submitted more than ninety (90) days after the Individual Payment Application Deadline.

- (5) No person may submit more than one (1) Individual Payment Application on his or her own behalf.
- (6) Where a Class Member does not submit an Individual Payment Application as prescribed by this Agreement that Class Member will not be entitled to receive an Individual Payment and any such entitlement will be forever extinguished.
- (7) The Administrator will process all Individual Payment Applications substantially in accordance with Schedule "M" attached hereto.
- (8) Where a claim form contains minor omissions or errors, the Administrator shall correct such omissions or errors if the information necessary to correct the error or omission is readily available or obvious to the Administrator.
- (9) The Administrator will give notice to an applicant of its decision in respect of his or her Individual Payment Application within thirty (30) days of the decision being made.
- (10) A decision of the Administrator is final and binding upon the

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claimant and the Administrator, subject only to the Individual Payment Reconsideration Procedure set out in Section 6.07.

- (11) The Administrator agrees to make all Individual Payments as soon as practicable after the number of Eligible Class Members has been determined.

6.04 Determination of the Amount Payable by Canada

- (1) On the ninety-first (91st) day after the Individual Payment Application Deadline, the Administrator will forward any Individual Payment Applications for which no final determination has been made to the Exceptions Committee;
- (2) If there are Individual Payment Applications which have not been finally determined on the Determination Date, the Exceptions Committee may direct the Administrator to calculate the amount owing by Canada as if the applicants or some of them had been finally determined to be Eligible Class Members. If, in fact, the applicants or some of them are finally determined not to be Eligible Class Members, an amount equal to the total of what their Individual Payments would have been if they had been determined to be Eligible Class Members will be provided to the Foundation.
- (3) Within one hundred and twenty (120) days of the Individual Payment Application Deadline (the "Determination Date"), the Administrator will determine the number of Eligible Class Members and advise

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Canada whether it will pay the Designated Amount or the Enhanced Amount as set out in Section 4.01;

- (4) If Canada is required to pay the Enhanced Amount, the Administrator will forthwith advise as to the precise amount Canada will be required to pay; however, in no circumstance will Canada be required to pay more than seven hundred and fifty million dollars (\$750,000,000.00);
- (5) For greater certainty, if Canada is required to pay the Enhanced Amount, the precise amount which Canada will be required to pay is equal to twenty-five thousand dollars (\$25,000.00) multiplied by the number of Eligible Class Members; however, in no circumstance will Canada be required to pay more than seven hundred and fifty million dollars (\$750,000,000.00);
- (6) Within thirty (30) days of the Administrator's advice to Canada of the required amount, Canada will pay that amount to the Administrator.

6.05 Excess Designated Amount

If the total amount of the Individual Payments is less than the Designated Amount, the Administrator will pay the balance to the Foundation along with any accrued interest.

6.06 Individual Payment Administrative Costs

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The Parties agree that Canada will pay the costs of the Administrator relating to the Individual Payments and their distribution as recommended in writing by the Exceptions Committee.

6.07 Individual Payment Reconsideration Procedure

- (1) The Parties agree the decision of the Administrator as to whether an Individual Payment will be made is intended to be final.
- (2) The claims process is intended to prevent fraud and abuse. If the Administrator believes that the claim is fraudulent or contains intentional misstatements, the claim may be rejected.
- (3) Where the Administrator intends to reject a claim in whole or in part, the applicant shall be contacted by phone or in writing to advise of the intent and reason for rejection and to invite the applicant to provide additional information to support the claim. The process is meant to be informative, informal and to promote, where reasonably possible, payment for the claims of removal from Indigenous families.
- (4) If no information or documents pursuant to section 6.07(3) can remedy the intent to reject and the Claims Administrator rejects a claim, or if the claim is deficient and the Administrator is unable to contact the applicant in accordance with section 6.07(3), the Administrator shall send to the applicant's last known postal address a notice advising the applicant of the Administrator's decision, which shall be accompanied by a form permitting the Applicant to request

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reconsideration of the claim by the Reconsideration Officer.

- (5) Within thirty (30) days after the rejection notice has been sent to the applicant by the Administrator, the applicant may request reconsideration by the Reconsideration Officer by mailing to the Administrator a copy of the reconsideration form.
- (6) The Reconsideration Officer may request documents or other evidence where appropriate to better clarify or validate a claim made, but such requests shall not be extensive or put the applicant to unreasonable efforts in view of the nature of the claim made, the credibility and reliability of the applicant and the spirit and intent of the settlement, including the need for a system that is respectful, reconciliatory and simple. The reconsideration decision shall be provided within thirty (30) days of receipt of the applicant's request.
- (7) The decision of the Reconsideration Officer is final without any recourse or appeal to the court or any other tribunal.
- (8) In the exceptional circumstance that the Reconsideration Officer cannot make a decision on a Reconsideration application, the Reconsideration Officer may refer the matter to the Exceptions Committee, as constituted herein in section 9.02, for final and binding determination.

6.08 Eligible Class Members Address Search Plan

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Where after six months have elapsed from the distribution of Individual Payments the Administrator will identify all Eligible Class Members to whom settlement cheques have been mailed but who have not deposited their settlement cheques and conduct searches substantially in accordance with the Eligible Class Member Address Search Plan attached as Schedule "N". If, after conducting the searches in Schedule "N", the Eligible Class Member still cannot be located, the amount of his or her Individual Payment shall be paid to the Foundation.

SECTION SEVEN

INDIVIDUAL PAYMENTS TO APPROVED ESTATE EXECUTORS

7.01 Compensation if Deceased

If a Class Member or Eligible Class Member dies or died on or after February 20, 2009 and the Individual Payment Application required under Section Six (6) has been submitted to the Administrator by him or her prior to his or her death or by his or her Estate Executor after his or her death, the Estate Executor shall be paid the amount payable under Section Six (6) to which the deceased Eligible Class Member would have been entitled if he or she had not died.

7.02 Person Under Disability

If an Eligible Class Member is or becomes a Person Under Disability prior to receipt of an Individual Payment and the Individual Payment Application required under Section Six (6) has been submitted to the Administrator by

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him or her prior to becoming a Person Under Disability or by his or her Estate Executor after he or she becomes a Person Under Disability within the period set out in Section Six (6), the Estate Executor will be paid the amount payable under Section Six (6) to which the Eligible Class Member who has become a Person Under Disability would have been entitled if he or she had not become a Person Under Disability.

SECTION EIGHT

Duties of the Administrator

8.01 Administrator

The Administrator's duties and responsibilities will be the following:

- a) developing, installing and implementing systems and procedures for processing, evaluating and making decisions respecting Individual Payment Applications which reflect the need for simplicity in form, including processing the Individual Payment Applications substantially in accordance with Schedule "M";
- b) developing, installing and implementing systems and procedures for making Individual Payments;
- c) reporting to the Exceptions Committee on a monthly basis respecting Individual Payment Applications received and being administered and determined;

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- d) providing personnel in such reasonable numbers as are required for the performance of its duties, and training and instructing them;
- e) keeping or causing to be kept accurate accounts of its activities and its administration of the Individual Payments, including payment, preparing such financial statements, reports and records as are required by the Courts, in form and content as directed by the Courts and submitting them to the Courts so often as the Courts direct;
- f) receiving and responding to all enquiries and correspondence respecting the validation of Individual Payment Applications, reviewing and evaluating all Individual Payment Applications, making decisions in respect of Individual Payment Applications, giving notice of its decisions in accordance with the provisions this Agreement and communicating with Class Members and Eligible Class Members, in either English or French, as the Class Member or Eligible Class Member elects;
- g) receiving and responding to all enquiries and correspondence respecting payment of compensation for valid Individual Payment Applications, and forwarding the compensation in accordance with the provisions of this Agreement and communicating with Class Members and Eligible Class Members in either English or French, as the Class Member or Eligible Class Member elects;

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- h) If a Class Member or Eligible Class Member contacts the Administrator and expresses the desire to communicate in a language other than English or French, the Administrator will make best efforts to accommodate him or her;
- i) maintaining a database with all information necessary to permit a determination and making a determination whether Canada must pay the Designated Amount or the Enhanced Amount and, if Canada is required to pay the Enhanced Amount, what the precise amount of that payment should be on the Determination Date; and,
- j) such other duties and responsibilities as either of the Courts may from time to time by order direct.

SECTION NINE

EXCEPTIONAL CIRCUMSTANCES

9.01 General Principle

The Parties agree that they are not currently able to precisely contemplate or describe exhaustively all of the criteria for qualification as an Eligible Class Member. The Parties desire to establish a procedure to avoid injustice and ensure that Individual Payments are paid to Eligible Class Members in accordance with the underlying principle of this Agreement; specifically, compensation for long term placement with non-Indigenous families resulting in cultural loss.

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9.02 The Exceptions Committee

- (1) The Parties agree that there will be an Exceptions Committee consisting of four members; specifically,
 - a. A representative of class counsel present for the discussions leading up to this Agreement;
 - b. A representative of Canada present for the discussions leading up to this Agreement;
 - c. An Indigenous representative, agreed upon by the Parties; and,
 - d. Justice Michel M.J. Shore or such other Federal Court Judge as the Chief Justice of the Federal Court may designate if Justice Shore is unable to continue.

- (2) The purposes of the Exceptions Committee will be to:
 - a. consider and decide whether certain Class Members will be determined to be Eligible Class Members;
 - b. receive and consider reports from the Administrator;
 - c. give such directions to the Administrator as may, from time to time, be necessary;
 - d. consider any disputes between the Parties in relation to the implementation of this Agreement; and,
 - e. any other matters assigned to it pursuant to this Agreement.

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- (3) The Exceptions Committee will specifically take into consideration the discussions leading up to this Agreement having regard to the general principle set out in Section 9.01 in making its decisions.
- (4) The Exceptions Committee will endeavour to arrive at a consensus; however, in the event that consensus cannot be achieved, Justice Shore, or another Judge designated by the Chief Justice of the Federal Court if Justice Shore is unable to continue, will decide the matter.
- (5) The decision of the Exceptions Committee will be final.

9.03 Duty on Reconsideration

If, in the course of reconsidering the Individual Payment Application of a Class Member, the Reconsideration Officer determines that he or she is unable to conclude that the Class Member is an Eligible Class Member but, having regard to the objects, intentions and spirit of the settlement, that the Class Member's circumstances are such that he or she should be considered to receive an Individual Payment, the Reconsideration Officer shall refer the Individual Payment Application and any related documents to the Exceptions Committee for consideration along with a report from the Reconsideration Officer indicating:

- a) why the Class Member was not determined to be an Eligible Class Member; and,
- b) why the Exceptions Committee should consider circumstances of the

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Class Member to be sufficiently similar to those of an Eligible Class Member to warrant an Individual Payment.

SECTION TEN

RELEASES

10.01 Class Member Releases

The Approval Orders will declare that:

- a) Each Class Member and his/her Estate Executor and heirs (hereinafter "Releasers") has fully, finally and forever released Canada, her servants, agents, officers and employees, from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including for damages, contribution, indemnity, costs, expenses and interest which any such Releaser ever had, now has, or may hereafter have, directly or indirectly arising from or in any way relating to or by way of any subrogated or assigned right or otherwise in relation to the Sixties Scoop and this release includes any such claim made or that could have been made in any proceeding including the Class Actions whether asserted directly by the Releaser or by any other person, group or legal entity on behalf of or as representative for the Releaser.
- b) This Agreement does not preclude claims against any third party that are restricted to whatever such third party may be directly

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liable for, and that do not include whatever such third party can be jointly liable for together with Canada, such that the third party has no basis to seek contribution, indemnity or relief over by way of equitable subrogation, declaratory relief or otherwise against Canada.

- c) For greater certainty, the Releasors are deemed to agree that if they make any claim or demand or take any actions or proceedings against another person or persons in which any claim could arise against Canada for damages or contribution or indemnity and/or other relief over under the provisions of the *Negligence Act*, R.S.O. 1990, c. N-3, or its counterpart in other jurisdictions, the common law, Quebec civil law or any other statute of Ontario or any other jurisdiction in relation to the Sixties Scoop, including any claim against provinces or territories or other entities for abuse while in care; then, the Releasors will expressly limit their claims to exclude any portion of Canada's responsibility;
- d) Canada's obligations and liabilities under this Agreement constitute the consideration for the releases and other matters referred to in this Agreement and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Releasors are limited to the benefits provided and compensation payable pursuant to this Agreement, in whole or in part, as their only recourse on account of any and all such actions, causes of actions, liabilities, claims and demands.

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- e) For greater certainty, the Parties agree this Settlement Agreement does compromise any claims that Class Members have against any Province, Territory or any other entity, other than as expressly stated herein;

- f) For greater certainty, the Parties agree that this Agreement does not affect the rights of:
 - a. Class Members who opt out of any class action that is certified pursuant to this Settlement Agreement; or,
 - b. Individuals who are not Class Members.

10.02 Cessation of litigation

- (1) Upon execution of this Agreement, the representative plaintiffs named in the Class Actions and their counsel will cooperate with Canada and make best efforts to obtain approval of this Agreement and general participation by Class Members in all aspects of the Agreement.

- (2) Each counsel listed in Schedule "K" undertakes not to commence or assist or advise on the commencement or continuation of any actions or proceedings against Canada calculated to or having the effect of undermining this Agreement;

PRIVILEGED AND CONFIDENTIAL

- (3) Each counsel listed in Schedule "K" who commences or continues litigation against any person or persons who may claim contribution or indemnity from Canada in any way relating to or arising from any claim which is released by this Agreement, agrees that they will limit such claims to exclude any portion of Canada's responsibility.

SECTION ELEVEN

LEGAL FEES

11.01 Legal Fees

Canada agrees to compensate the counsel representing parties to this Agreement in respect of their legal fees and disbursements through a payment equal to fifteen percent (15%) of the Designated Amount plus applicable taxes. Canada will pay this amount as directed in writing by all of the counsel listed on Schedule "K" on the Implementation Date for distribution in agreed-upon shares.

11.02 No Other Fees to be Charged

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

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payment for legal fees from Canada will charge any Class Member 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 Member with respect to claims under this Agreement.

11.03 Pre-Approval of Fees Required

No fee may be charged to Class Members in relation to claims under this Agreement by counsel not listed on Schedule "K" without prior approval of the Federal Court.

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SECTION TWELVE CONDITIONS AND TERMINATION

12.01 Agreement is Conditional

This Agreement will not be effective unless and until it is approved by the Courts or confirmed on appeal, and if such approvals are not granted by each of the Courts on substantially the same terms and conditions save and except for the variations in class membership contemplated in Section 5.04, this Agreement will thereupon be terminated and none of the Parties will be liable to any of the other Parties hereunder.

12.02 Termination of Agreement

This Agreement will continue in full force and effect until all obligations under this Agreement are fulfilled.

12.03 Amendments

Except as expressly provided in this Agreement, no amendment or supplement may be made to the provisions of this Agreement and no restatement of this Agreement may be made unless agreed to by the Parties in writing and any such amendment, supplement or restatement is approved by the Courts without any material differences.

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SECTION THIRTEEN

GENERAL

13.01 No Assignment

- (1) No amount payable under this Agreement can be assigned and such assignment is null and void except as expressly provided for in this Agreement.

- (2) An Individual Payment will be made to each Eligible Class Member by direct deposit or by cheque mailed to his or her home. Where the Eligible Class Member is deceased or under a disability, the Individual Payment will be made to his or her Estate Executor by direct deposit or by cheque.

13.02 Compensation Inclusive

For greater certainty, the amounts payable to Eligible Class Members under this Agreement are inclusive of any prejudgment or postjudgment interest or other amounts that may be claimed by Eligible Class Members against Canada for claims arising from the Sixties Scoop.

13.03 Applicable Law

This Agreement will be governed by and construed in accordance with the laws of the province or territory where the Class Member resides and the laws of Canada applicable therein.

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13.04 Entire Agreement

This Agreement constitutes the entire agreement among the Parties with respect to the subject matter hereof and cancels and supersedes any prior or other understandings and agreements between or among the Parties with respect thereto. There are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or statutory between or among the Parties with respect to the subject matter hereof other than as expressly set forth or referred to in this Agreement.

13.05 Benefit of the Agreement

This Agreement will enure to the benefit of and be binding upon the Parties and their respective heirs and Estate Executors.

13.06 Counterparts

This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same Agreement.

13.07 Official Languages

Canada will prepare a French translation of this Agreement for use at the Approval Hearings. As soon as practicable after the execution of this Agreement, Canada will arrange for the preparation of an authoritative

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French version. The French version shall be of equal weight and force at law.

13.08 Dispute Resolution

The Parties agree that any dispute in relation to the implementation of this Agreement will be finally determined by the Exceptions Committee.

SECTION FOURTEEN CONFIDENTIALITY

14.01 Confidentiality

Any information provided, created or obtained in the course of this settlement, whether written or oral, will be kept confidential by the Parties and their counsel, all Class Members and the Administrator and will not be used for any purpose other than this settlement unless otherwise agreed by the Parties.

14.02 Destruction of Class Member Information and Records

Within two years of completing the Individual Payments, the Administrator will destroy all Class Member information and documentation in its possession.

14.03 Confidentiality of Negotiations

Save as may otherwise be agreed between the Parties, the undertaking of

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confidentiality as to the discussions and all communications, whether written or oral, made in and surrounding the negotiations leading to the Agreement in Principle and this Agreement continues in force.

**SECTION FIFTEEN
COMMUNICATIONS**

15.01 Public Communications

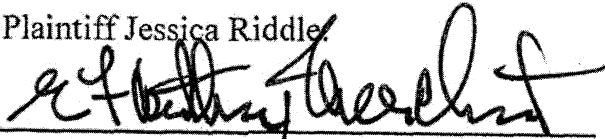
Save as may otherwise be agreed upon, the Parties will not engage in any media or public communications or disclosure of or about this Agreement until a date and manner agreed to by the Parties.

15.02 Public Announcements

At the time agreed upon, the Parties will make public announcements in support of this Agreement and continue to speak publicly in favour of the Agreement.

IN WITNESS WHEREOF the Parties have executed this Agreement at Vancouver as of this 30th day of November, 2017.


For the Plaintiff Jessica Riddle



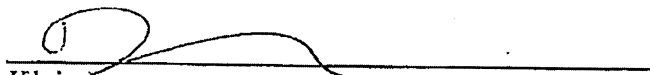
Merchant Law Group LLP

PRIVILEGED AND CONFIDENTIAL

For the Plaintiff Wendy Lee White:


Koskie Minsky LLP

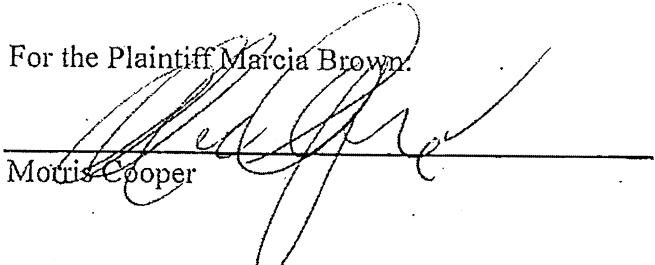
For the Plaintiff Catriona Charlie:


Klein Lawyers

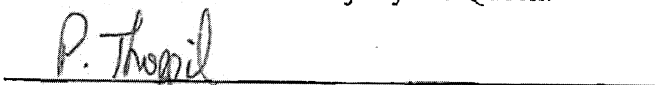
For the Plaintiff Marcia Brown:

Wilson Christen LLP

For the Plaintiff Marcia Brown:


Morris Cooper

For the Defendant Her Majesty the Queen:



Indian Affairs and Northern Development Canada
Paul Thoppil
Chief Finances, Results and Delivery Officer

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For the Plaintiff Wendy Lee White:


Koskie Minsky LLP

For the Plaintiff Catriona Charlie:


Klein Lawyers

For the Plaintiff Marcia Brown:


Wilson Christen LLP

For the Plaintiff Marcia Brown:

Morris Cooper

For the Defendant Her Majesty the Queen:

Indian Affairs and Northern Development Canada
Paul Thoppil
Chief Finances, Results and Delivery Officer

FEDERAL COURT

BETWEEN:

JESSICA RIDDLE, WENDY LEE
WHITE AND CATRIONA CHARLIE

Plaintiffs

HER MAJESTY THE QUEEN

Defendant

AFFIDAVIT OF WENDY WHITE
(sworn April 5, 2018)

I, WENDY WHITE, of the City of St. John's in the Province of Newfoundland and Labrador, SWEAR:

1. I am a survivor of the Sixties Scoop and one of the proposed representative plaintiffs in the within action, and I have knowledge of the matters herein deposed. Where I make statements in this affidavit that are not within my personal knowledge, I have been informed by Garth Myers of Koskie Minsky LLP, counsel in this proposed class action, and I believe that such information is true.

A. Background

2. I was born Pauline Nuna on July 3, 1972 to an Innu mother in North West River, Labrador.

3. I was taken from my birth mother in or around late 1973, was placed in foster care with non-Aboriginal parents, and then adopted to non-Aboriginal parents on or about May 3, 1974.

4. I am a Registered Indian and a class member as defined in the proposed settlement agreement in this action.

Handwritten initials: WW and JK

B. My Efforts In This Class Action

5. This class action was commenced on March 1, 2017 against Canada.
6. I have received regular reports from Koskie Minsky LLP since the commencement of this action. I have always felt that I had current and relevant information from the law firm.
7. From the commencement of this class action, I knew that the claim was difficult and that Koskie Minsky LLP was working diligently on my behalf. I am very pleased with the representation that I received from Koskie Minsky LLP.
8. Throughout the course of this case I have:
 - (a) signed on with Koskie Minsky LLP and signed a retainer agreement with them;
 - (b) agreed to be a representative plaintiff on behalf of the other class members;
 - (c) spoken Koskie Minsky LLP to discuss this case and my experience with the Sixties Scoop;
 - (d) provided instructions to Koskie Minsky LLP; and
 - (e) reviewed and approved the settlement terms in this case.
9. I have been kept informed and provided input on various aspects of the lawsuit including settlement discussions that took place over the course of the lawsuit including at the court ordered mediation which I understand the court ordered to occur between the parties.

C. The Settlement Agreement is Fair and Reasonable

10. I have talked to Garth Myers of Koskie Minsky LLP on multiple occasions about the settlement agreement.

NW
PR

11. Although I do not understand all of the legal arguments in this case, I understand that there are defences to certain aspects of the claims advanced in this class action.

12. I also understand that if there was no settlement, it could take a long time for class members go to trial. The settlement provides compensation for certain survivors of the Sixties Scoop now, at an early stage in this litigation, rather than following what Mr. Myers has informed me and I believe would be a long litigation process, even before a trial of the proposed common issues and any award of damages.

13. Further, I am informed by Mr. Myers and I believe that it is possible that each survivor of the Sixties Scoop would have to come forward to prove his or her damages individually.

14. I also understand that the settlement agreement creates a Foundation to continue after the other elements of the settlement agreement are complete with the stated purpose of continuing to enable change and reconciliation. I understand that if this class action was argued in court until the end and we were successful, the court could not order the creation of a Foundation.

15. The settlement makes sense to me and I support it. I appreciate that the process to get compensation appears to be simple and direct.

16. I understand that the settlement includes all registered Indians (as defined in the *Indian Act*) and Inuit persons or people eligible to be registered Indians or Inuit who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents.

17. I understand that the settlement agreement does not include non-Status Indians or Métis, but I also understand that they are free to pursue their claims against Canada.

WW
B

18. I also understand that class members are releasing all claims against Canada in relation to the Sixties Scoop, including claims for sexual abuse, but I also understand that survivors are free to pursue those claims against the Provinces.

19. I understand that class members who were adopted or made permanent wards and who were alive on February 20, 2009 whose applications are approved in accordance with the settlement agreement will be entitled to compensation.

20. I understand that the settlement provides for a paper-based confidential claims process that does not require any claimant to testify in a court, to undergo cross-examination or any questioning by an adverse party.

21. I like the fact that this process, from what I understand from Mr. Myers, will be much quicker, simpler and easier than if I had to testify in court.

D. Legal Fees

22. When I signed on with Koskie Minsky LLP I was aware that they agreed to take this case on without getting paid unless we won or settled.

23. I signed a retainer agreement with Koskie Minsky LLP on February 28, 2017. Attached as **Exhibit "A"** is a copy the retainer agreement I signed.

24. I have been aware of the percentage of the compensation that the lawyers would be seeking (being 33.3% of the settlement funds) before I signed the retainer agreement and before the settlement was negotiated.

25. I understand that Koskie Minsky LLP is asking for fees in the amount of \$12.5 million, plus tax, inclusive of disbursements. I understand that this fee request is less than one third of the settlement fund, and that these fees are not being paid out of the compensation that will be paid to eligible class members.

26. I also understand that a portion of these fees are being paid to Sunchild Law in Saskatchewan, Troniak Law in Manitoba, and Cooper Regel in Alberta.

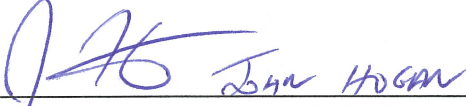
WV
MB

27. I think this is fair based on the work that they were required to do and the risk that they took in representing us. I believe, based on my discussions with Mr. Myers and his staff that, but for their diligent work, we would have received far less or possibly nothing. I know that they took on a very risky case and myself and my fellow survivors are thankful that they did. In my view they are entitled to what they are asking for.

28. There are certainly some significant exceptions, but I believe that the class is generally older or 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, lack of precedent for such duties of care and the historical nature and possible limitation barriers created a case of high risk and a potentially very low reward on an individual basis.

29. I swear this affidavit in support of the application to approve the settlement and class counsel's fees.

SWORN BEFORE ME at the City of Saint John on April 5, 2018.

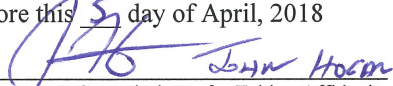


 Commissioner for taking affidavits
 KM-3142294v1 *Barrister, NL*



 WENDY WHITE

This is **Exhibit "A"** referred to in the affidavit of Wendy White, sworn before this 5 day of April, 2018


A Commissioner for Taking Affidavits
Barnstable, MA

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**CONTINGENCY RETAINER AGREEMENT
FEDERAL COURT NATIONAL 'SIXTIES SCOOP' CLASS ACTION**

**To: KOSKIE MINSKY LLP
900 - 20 Queen Street West
Toronto ON M5H 3R3**

Re: National 'Sixties Scoop' Class Action in Federal Court

1. I, Wendy White (the "Client") hereby retains and employs Koskie Minsky LLP ("the Firm" or "Class Counsel") as his/her solicitors with respect to a class action on behalf of the Client and other members of the relevant class (collectively "the Class") against The Government of Canada and any other necessary and proper parties (collectively "the Defendant(s)") with respect to the damages suffered by the class as a result of actions of The Government of Canada and others (the "Class Action").

Legal Opinion

2. The Client acknowledges that the Firm has conducted preliminary legal research and has provided a preliminary opinion concerning the Class Action on behalf of the Client and other members of the Class against The Government of Canada with respect to the Class Action. The Firm may, if they consider it worthwhile, conduct further legal research and prepare preliminary drafts of documents for possible use regarding the Class Action in the event it is decided to institute the Class Action. The Firm may conduct such further legal or other research as may be required from time to time.

Retainer of Counsel

3. The Client has retained and authorized the Firm to:
- a. act as counsel for the Client and for the Class, in the prosecution of the Class Action and trial of the Common Issues, including any and all appeals, and in the assessment of and recovery of damages except that, after settlement or the resolution of the Common Issues, if it is necessary for a Class Member(s) to retain counsel to resolve individual issues, the Class Member(s) may retain Class Counsel but that retainer may be subject to different terms and conditions from those set out herein;
 - b. take all steps in and in relation to the Class Action which they consider necessary, including adding any other defendants;
 - c. use such persons and resources from their Firm or any other firms as they consider necessary and their services shall be deemed to be provided as members of Class Counsel's law firm; and
 - d. consult, retain and engage all experts, consultants and other persons they consider necessary.

Negotiations

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4. The Client hereby authorizes the Firm, in their discretion, to enter into negotiations with the Defendant(s) for the purpose of reaching a settlement. The Client understands that any settlement affecting the Class is subject to approval of the Court. The Client agrees and acknowledges that any negotiations are for the purpose of reaching a settlement of the claims of the Class, not simply the individual claims of the Client.
5. In the event the Client chooses to settle his or her respective individual claim without settling the claims of the Class, the Client expressly agrees and acknowledges that the Firm is permitted to be retained by another member of the Class to assert the claims on behalf of the Class. In such event privileged communications between the Firm and the Client made for the purpose of advancing the claims of the Class and the Firm's work product created for the purpose of advancing the claims of the Class shall be disclosed to the new plaintiff and may be used on behalf of and for the benefit of the Class.

Institution of Class Action under the *Federal Courts Rules*

6. The Firm shall institute a class proceeding pursuant to the *Federal Courts Rules*, SOR/98-106 and, subject to instructions from the Client from time to time, take such actions and conduct such proceedings as they may consider necessary and proper.
7. If (a) one or all of the Clients wishes to withdraw, (b) another class member or class members wishes to act as a representative plaintiff, (c) such class member is acceptable to the Firm then, (d) this Agreement shall be amended to substitute such person or persons as the representative plaintiff and as a "Client" under this Agreement. The Class Action shall not be commenced until a written arrangement making any necessary modifications to this Agreement is prepared and executed by the Client, the Firm and the new representative plaintiff.

Usual hourly rates

8. The usual hourly rates of Class Counsel are the current usual hourly rates charged by Class Counsel on other class action matters. Class Counsel and all other persons providing professional services may, from time to time, increase their usual hourly rates for the purposes of this Agreement if done in the usual and ordinary course of their businesses.

Terms of Payment of Fees and Disbursements under the *Federal Courts Rules*

9. The provisions of this Agreement regarding legal fees and disbursements are subject to court approval as provided in the *Federal Courts Rules*.
10. Whether or not success is achieved in the Class Action, Class Counsel shall be paid all costs recovered in the Class Action from the Defendant, any third party financier or any other adverse party, including any disbursements, applicable taxes and any interest payable thereon, and any other amount paid by the Defendant or any other adverse party as costs. Class Counsel are authorized to settle the amount of costs awarded on any motion, appeals or the trial of the Common Issues.
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*.

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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.
14. The Client acknowledges that time spent by the Firm to the date of execution of this Agreement, including the initial meetings with class members, reviewing documents, etc., is to be included in the legal fees.
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.
17. In the event of a settlement by which a claims process is established, the Firm shall be required to enter into individual retainer agreements to be paid for additional work done under the claims process to validate individual claims and to determine claimants' entitlement to and quantum of damages.
18. The Client shall not be obliged to fund any disbursements. Ultimately, if the Class Action is successful, the Firm's disbursements will be paid out of the proceeds of judgment or settlement. The Client understands that Class Counsel may charge interest on disbursements incurred, as totaled at the end of each six-month period following the date of this Agreement.

Costs under the *Federal Courts Rules* and Funding

19. The Client acknowledges that Rule 334.39(1) of the *Federal Court Rules* provides that no costs shall be awarded against any party to a motion for certification, to a class proceeding, or to an appeal arising from a class proceeding, unless (a) the conduct of the party unnecessarily lengthened the duration of the proceeding; (b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or (c) exceptional circumstances make it unjust to deprive the successful party of costs.
20. The Client acknowledges and agrees that Class Counsel has not and is not providing the Client with an indemnity for any costs that may be awarded against the Client in the Class Action, if applicable.
21. The Client acknowledges that in the event of a favourable costs award (i.e., if the Court orders that a

-4-

defendant is required to pay some or all of the costs incurred by the Client in this proceeding), Class Counsel can retain such costs awards to finance already incurred disbursements, ongoing disbursements incurred for the benefit of the Class and/or any future adverse costs award(s). The Client understands that, in the event that Class Counsel retains a costs award for these purposes, Class Counsel will account to the Court for this on any subsequent request for fee approval. In the event that some or all of the costs award is not retained by Class Counsel in accordance with this provision, the costs award will be held in trust for the benefit of the Class, pending the direction of the Court.

22. The Client acknowledges that Class Counsel, on the Client's behalf, may apply for financial support and an indemnity for the Client and other plaintiffs for adverse cost awards from a third party financier. In the event a third party financier provides financial support and/or an indemnity to Client or other plaintiffs for adverse cost awards, it is highly likely that the third party financier would seek entitlement to a percentage of the amount of the award or settlement funds, if any, to which one or more persons in the Class is entitled and possibly the repayment of any financial support received, and that such percentage could range from five to ten percent (5% to 10%) of recovery.
23. The Client authorizes Class Counsel to negotiate and accept the terms and conditions of any agreement with a third party financier for financial support and indemnity for the Client or other plaintiffs for adverse cost awards on the Client and Class members' behalves.
24. The Client acknowledges and agrees that Class Counsel may seek direct reimbursement for disbursements or the payment of adverse cost awards from a third party financier.

Change of Solicitors and Termination of Agreement

25. The Client acknowledges that the Firm is incurring financial risk in agreeing to be paid only in the event the Class Action is successful and that the Firm is doing so on the basis that they will have carriage of the Class Action.
26. If the Client changes solicitors (or otherwise terminates the Firm's retainer) the Client agrees that in the event the Class Action is successful, the Firm shall be entitled to be paid the usual hourly rates of those lawyers and staff assigned to work on the file as well as all reasonable and proper disbursements to the date of such termination, and such amounts shall be a first charge on the proceeds of any judgment or settlement. The hourly rates may change from time to time and the Client shall be provided with a list of the applicable hourly rates at any time on request. If this Agreement is not approved, payment will be made in such manner as the Court directs.
27. If the Client or Class Counsel wishes to terminate their relationship, the Client or Class Counsel will forthwith move to the Court for directions.

Disagreement regarding Settlement under the *Federal Court Rules*

28. If (a) the Defendant(s) make an offer to settle the claims of the Class, (b) the Firm considers the proposed settlement to be in the best interests of the Class, (c) the Firm recommends acceptance of such offer to the Client, and (d) the Client does not consider the proposed settlement to be acceptable, then a counter-offer to settle shall be made to the Defendant(s) upon such terms as the Client considers to be appropriate. If, within 14 days, such counter-offer is not accepted by the Defendant(s) and no improved offer is made by the Defendant(s) which is acceptable to the Client, then the Firm is hereby irrevocably authorized to conditionally accept the Defendant(s)' offer or the improved offer, as the case may be. The Firm shall then

-5-

immediately seek a ruling by the Court that the proposed settlement is in the best interests of the Class. On the motion for such court approval an affidavit fully disclosing the Client's concerns about the proposed settlement shall be filed with the Court.

Consortium for Common Issues and Class Wide Issues under the *Federal Court Rules*

29. The Client acknowledges that, in view of the nature of the Class Action, the Firm may require the assistance of additional lawyers or law firms to work on the common issues and class wide issues in the contemplated Class Action. The Client hereby authorizes the Firm to assemble and maintain a consortium of lawyers or law firms to conduct the Class Action. The Firm shall have overall responsibility for the conduct of the Class Action. The Firm may change the composition of the consortium and assign tasks among consortium members, as they consider advisable from time to time. The fees for the consortium shall be treated as part of the Firm's fees and shall be determined as set out above.

Confidentiality

30. The Client acknowledges being advised that the communications between Class Counsel and the Client relating to the claims of the Class are privileged but that such privilege may be lost if the Client was to disclose such information to third persons and that the interests of the Class could thereby be adversely affected. The Client agrees to protect the confidentiality of such information and not to disclose such information to any third person.
31. The Client agrees that the Class Counsel's files and documents, compiled in connection with their investigation and prosecution of this matter, constitute the work product and property of Class Counsel, over which Class Counsel have complete control with respect to its use and/or disclosure.

Client's Obligation to the Bests Interests of the Class

32. The Client retains the right to make all critical decisions regarding the conduct of the Class Action, but acknowledges the obligation to act solely in the best interests of the Class. The Client agrees that Class Counsel is not obliged to follow instructions from the Client which are not in the best interests of the Class. In the event of a disagreement between the Client and Class Counsel concerning whether certain instructions are in the best interests of the Class, the matter shall be submitted to the Court, or for arbitration.
33. The Client understands the major steps of class actions to include:
- a. preparing and serving a statement of claim;
 - b. a motion for certification, which the Client understands involves the court's consideration of whether this action is appropriate to proceed as a class action. The Client also understands there will be cross-examinations for this motion and that the Client's ability to fairly and adequately represent the Class will be in issue;
 - c. if the action is certified, there would be notice to the Class of the certification and the right to opt-out (i.e. a chance for Class members not to participate in the Class Action);
 - d. the disclosure and exchange of relevant documents;
 - e. examinations for discovery, where the Defendant(s) can examine the Client about the Client's

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claims and those of the Class and Counsel can examine the Defendant's representatives;

- f. a pre-trial conference where a judge can help the parties towards a settlement of the case;
- g. a trial of the common issues (i.e. a trial that only deals with the certified common issues as opposed to the issues individual to the Client and other Class Members);
- h. notice to the Class if individual hearings or participation is required;
- i. the determination of individual issues, if required;
- j. the distribution of proceeds (if any) of a money award by judgment or settlement;
- k. appeals, which might include appeals from the certification motion, other motions, or the trial of the common issues; and
- l. settlement discussions, which could happen at any time.

34. The Client understand that as representative plaintiff the Client would have, among others, the following responsibilities:

- a. review and keep herself informed of the steps in this litigation;
- b. familiarize herself with the issues to be decided at the common issues stage and other issues in the action;
- c. help prepare the affidavits and other materials in support of certification, other motions and the materials that would be used at a common issues trial;
- d. attend any cross-examination on the Client's affidavit or otherwise;
- e. attend the examinations for discovery;
- f. assist in preparing and executing an affidavit of documents, which will list the relevant documents that the Client has in her possession, power or control;
- g. attend at the common issues trial, providing any direction or assistance to class counsel and give evidence regarding the case;
- h. express her views on any settlement offers that the Client receives or that the Client makes on behalf of Class Members; and
- i. assist in preparing materials in support of a court approving any settlement.

35. The Client will cooperate in the prosecution of this Class Action, including the swearing of any affidavits and attending for any oral examinations, if required. In the event of a disagreement between the Client and the Firm concerning whether certain instructions are in the best interests of the Class, the matter shall be submitted for arbitration to a retired judge of the Federal Court of Canada. The arbitrator shall resolve the

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matter summarily with as little formality as possible.

36. The Client will ensure that any relevant document relating to subject matter of this Class Action will be set aside and protected from destruction.

Interim Distributions

37. The Court may authorize interim payments to Class Counsel and/or to the Class.

Remuneration of the Client

38. The Client acknowledges that they are not entitled to receive any payment or fee out of the recovery for acting as a representative plaintiff in the Class Action unless ordered by the Court.

Court Approval

39. Subject to this Agreement being approved by the Court, it shall bind Class Counsel, the Client, and all members of the Class who do not opt out of the Class Action as well as their respective heirs, executors, administrators, successors and assigns.

No Indemnity

40. The Client acknowledges that Class Counsel is not providing an indemnity.

Payment of Monies

41. The Client agrees and directs that all funds claimed by Class Counsel for legal fees, cost, taxes and disbursements shall be paid to Class Counsel in trust.

Entire Agreement and Amendments

42. It is agreed that there is no oral representation, warranty, collateral agreement, or condition that affects this Agreement. Amendments to this agreement may be made in writing duly executed by all the parties. This Agreement may be signed in counterparts.

43. The Client understands that she may apply to the Federal Court of Canada for determination of whether this contingency retainer Agreement is fair and reasonable.

Severability

44. In the event that any particular provision or provisions or a part of one is found to be void, violable, or unenforceable for any reason whatever, then the particular provision or provisions or part of the provision shall be deemed severed from the remainder of this Agreement and all other provisions shall remain in force.

Identity

45. The Client has produced for review government issued identification to the Firm, confirming his/her identity, at the time of executing this agreement.

Independent Legal Advice

46. The Client acknowledge that before signing this Agreement they were advised of and had the opportunity to obtain independent legal advice with respect to the meaning and effect of this Agreement.

Effective

47. This Agreement shall be effective as of the date it has been executed by all parties.

Date at Goose Bay this 28 day of February, 2017.
NL

Bob White

Witness

Wendy White

Client

Print name: Bob White

Scott Robinson

Witness

J. Minsky
KOSKIE MINSKY LLP

Print name: SCOTT ROBINSON

I, Wendy White, hereby acknowledge that I have received a copy of the Contingency Retainer Agreement between myself and Koskie Minsky LLP.

Wendy White
CLIENT

March 1 / 17

DATE

Scott Robinson

LAWYER

FEDERAL COURT**PROPOSED CLASS PROCEEDING**

Between:

JESSICA RIDDLE, WENDY LEE WHITE
AND CATRIONA CHARLIE

Plaintiffs

- and -

HER MAJESTY THE QUEEN

Defendant

Brought pursuant to the *Federal Courts Rules*, SOR/98-106**AFFIDAVIT OF MAGGIE BLUE WATERS**

I, Maggie Blue Waters, of Viscount, Saskatchewan MAKE OATH AND SAY AS FOLLOWS:

1. I am the proposed representative plaintiff in related proceedings which are underway in the Court of Queen's Bench of Saskatchewan and I am one of the Table Board Members of the Foundation Board which is to be established pursuant to the Settlement described in other affidavits, and as such I have personal knowledge of the matters and facts deposed to in this my affidavit except where stated to be on information and belief and where so stated the source of my information is stated and I verily believe the same to be true.

MY JOURNEY AND GROWTH

2. I was born on August 19, 1957. I am 60 years old.

3. I reside in Viscount, Saskatchewan which is 50 miles east of Saskatoon.

4. My mother is Caroline Hunt (Smith). I believe that she has died however I do not have valid information to that effect. My father is Peter Smith. He died in approximately 1984. My mother and father were both treaty "Indians" in William Charles Band at Montreal Lake Cree Nation which is 60 miles north of Prince Albert, Saskatchewan.

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5. My brothers and sisters and I were staying at my grandparent's home when we were scooped. My parents were working and we stayed with my grandparents because that was our culture, our tradition. The home of my grandparent's was located near La Ronge, Saskatchewan, about 90 miles north of Prince Albert.

6. I remember what I think of as two homes. I not only remember but I have also been informed by others and do verily believe regarding my parents and grandparents. My grandfather and uncle were trappers. My mother and father worked cutting timber for posts and were away in part in the summer and they also went onto an island to cut hay for horses and were away in part for the summer. When my parents were away I lived with my grandparents. My parents and grandparents both provided good homes.

7. All of my memories of living with my grandparents are loving, kind, and safe. I was a happy child. We were well taken care of. The lake near my grandparents home was a big part of our lives. I remember fishing. I remember my grandparents' garden. They kept small animals, chickens, cows, and horses. They were respected people. My grandfather was referred to as a two bit lawyer, in a positive way, not formally educated, but he had a knowledge of what was going on around him and spoke the truth. Everyone to this day speaks highly of my grandparents. My grandparents were obedient well behaved people. In part I remember and in large part I was informed by Edna Nelson and do verily believe the same to be true.

8. I was 5 years old when I was scooped. It was in the hot summer when I was taken from my grandparents. In later years, after questioning my adoptive mother numerous times, she finally started to tell me the truth about my grandparents when I was 12 years old. She told me with more details over time, that there was a meeting of a group of adults called by the missionaries with the intent to tell any grandparents who were raising children that they could not look after them because they were too old and too poor. They also said they did not know Jesus and were heathens. I remember on that day when the missionaries came, with what I was told was Province of Saskatchewan Social Services officials. They had a discussion with my grandparents and then the atmosphere changed and I was suddenly taken and put in the back seat of a car along with 4 or 5 other children.

9. My adoptive mother, Edna Nelson, did not really care about the way she spoke about my grandparents, and just pelted the information at me saying that she believed they were heathens.

10. I remember her saying to me often that I was not Indian any longer but that I was Scandinavian, like them.

ABUSE AND LOSS OF IDENTITY

11. I was a resident of Montreal Lake, Saskatchewan from the time of my birth until five years of age when the Province of Saskatchewan permanently removed me from the care of my parents without reason. I was removed by Saskatchewan Social Services and the missionaries of the Timber Bay Day School without my parents' permission. I was born on August 19, 1957 and I originate from the William Charles Indian Band which is part of the Cree Nation. I was placed in the Timber Bay School. I understand the permission of the Government of Canada was required because I was a Status Indian.

12. As soon as I arrived at the Timber Bay Day School, my picture was taken and the picture was placed in various Saskatchewan Newspapers for adoption purpose by the Department of Social Services of Saskatchewan. It was hoped that I would be placed in a Christian family. My adoptive mother saved the dress that I was wearing the day the picture was taken and I still have that dress to this day.

13. I was adopted at age 5, sometime in June of 1962, by the family of Gordon and Edna Nelson of Viscount, Saskatchewan. This adoption was done with the aid of Social Services workers from Prince Albert, Saskatchewan. My name was changed at that time and I became known as Joanne Pearl Nelson.

14. I lived with the Nelson family for approximately 12 years. I was raised in a Christian family environment without any exposure to my Cree heritage. I left the home when I was 17. Not only was I not exposed to my culture but my culture was diminished and criticized during that time. I was continually being called a savage and that where I came from was horrible by these supposedly Christian parents.

15. I would ask my adoptive family for moose meat and if anyone was going hunting. I did not like any of their food. And by age 13, I was diagnosed with stomach ulcers and doctors told Mrs. Nelson that I was anemic.

16. During the time that I was a resident with my adoptive family, I suffered severe sexual abuse and I was treated as inferior given my aboriginal status.

17. As soon as I arrived in the Nelson Home, at age 5, Mr. Nelson began fondling me. He would do a lap dance scenario when I was age 5 and 6. He would pump me up and down on his lap and would rub his penis against my back side until his sexual gratification.

18. As he did these things he would sing a Scandinavian song. Upon introducing his penis to me, he named it "Stanley" and my vagina he named "Susie". He would make a game of Stanley visiting Susie.

19. Mr. Nelson would tell me that my mother was a woman who laid down for men and men gave her money.

20. I was forced to perform oral sex on Mr. Nelson regularly up to the time I reached the age of 10 years old. He would have me rub his penis and he would ejaculate. He would also often rub himself against my body. He did these things and started as soon as I got there and continued until I was 10 when he started vaginal sexual relations with me.

21. These things usually happened in the barn. They had a dairy farm and I was sent to the barn to work with him. But these things and later sexual relations also occurred at the cemetery, in the church, and in the house. Part of my chores was to clean the church which was located on Mr. Nelson's property. Mr. Nelson would come to the church and assisted in cleaning. During that time he would take me into the porch area and have sex with me there. One time he was walking in the cemetery area and was showing me who his family members were. It was at this time when he informed me about my mother, which I later learned he was informing me she was a prostitute. He was implying that he had a communication and an arrangement with God and that it was God's will that I have sex with him. As he was explaining this to me, he had sex with me. He would say that he had the right to do this because of his arrangement with God. One time I remember sexual

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relations right in the living room when his wife was not at home. He used to tell his wife that he was going into my bedroom to pray with me.

22. Starting at 10 I became his sexual partner as he then performed full sexual intercourse with me on a regular basis. There were some occasions when he would still have me perform oral sex but mostly direct vaginal sexual relations.

23. I was raped regularly in the dairy barn, in the church, then in a graveyard, and elsewhere, and then when I turned 13 my adoptive father began worrying about getting me pregnant. He began taking precautions to prevent a pregnancy. He would pull out his penis and not ejaculate inside me but would ejaculate on my body.

24. My adoptive father used to tell me that having sex with him was God's will and that is what girls like you are for.

25. In my younger years, approximately 7 and 8 years old, he would present me with gifts of chocolate bars and this presentation was always done in secret after a sexual encounter. Then later at approximately age 13, he gave me a gift, he presented it to me as a gift. It was a razor and he told me to start shaving my pubic hair, I now think it was so he could continue to use me in his mind as a child.

26. I believe my adoptive mother may have known or ought to have known that Mr. Nelson was having sexual relations with me because we did not have a mother / daughter relationship. I was not a daughter but just another woman living in the house. She never taught me things like cooking or treated me in any way like a daughter.

27. The Nelsons kept me isolated from activities such as a school dance because they would say that "dancing leads to sex". Meanwhile, Mr. Nelson was having sex with me, his adopted daughter.

28. I was sexually abused by my adoptive father almost from the time that I arrived in the care of him and my adoptive mother.

29. I was psychologically abused.

30. My adopting father, who was pastor of a fundamentalist Christian church and who had sexual relations of one kind or another with me almost every day including in his little church, constantly ran down everything indigenous including saying to me repeatedly that my mother was a person 'who laid down with men and men would give her money' and have sex was "what girls like you are for" because in his bigoted perversion seemingly believed that all Indian women were prostitutes and in some way this could justify his conduct towards me.

31. Age 13 was when I began to realize that the sex that Mr. Gordon was having with me was wrong and I started to question everything that I was told. He had always told me that this was what I was to do for him and so I was obedient. But from age 13 on, I started to rebel and began to smoke cigarettes and drink alcohol. My plan was to get in enough trouble that they would send me back home to my parents.

32. I was eventually sent to a bible school to help control my lifestyle after being suspended from Viscount High School for numerous infractions of bad behaviour.

33. After being suspended from Viscount Central School, and transferred from the Nelson home, I was placed in the Outlook Lutheran Collegiate Bible Institute where I stayed until I graduated at age 17. I was treated as a Christian with no cultural education.

34. When I went back to the Nelsons on breaks from the Bible Institute, Mr. Nelson had regular sexual intercourse with me until I escaped when I was 17.

35. I use the word, I escaped when I was 17 years old, because it was both a physical and emotional escape. I somehow managed to collect myself.

36. The Nelson family were religious people. They were considered evangelists, missionaries, always condemning people, and yet I suffered severe abuse in their home.

37. He met me later and he tried again to have sex with me, even when I was in my twenties but he had lost his fear based power over me and the last time we had sex was when I was about 17.

38. I graduated from Grade 12. I then enrolled in Native Studies at the Saskatchewan Indian Federated College in 1985. I went for three years and transferred to the University of Saskatchewan and I am in the process of completing an Arts Therapy Degree. I have a good memory. It is for others to say but I believe I am intelligent and I care about the issues involved in this action, both on my own behalf and on behalf of others.

MY LOST CULTURE

39. I spoke Cree when scooped. I lost my ability to speak my Cree dialect and lost my Cree culture because of being adopted by a white family in Saskatchewan. From what I was told by my adoptive mother and verily believe, which is consistent with everything I have read, the plan and purpose of the two jurisdictions was that I and others in the class would lose our culture, language, and *heathen* ways, as my adoptive mother put it. The work heathen was repeated often.

40. While I was living at the Nelson home, I was not permitted to engage in First Nations cultural or religious activities. I was not permitted to engage in First Nations games, communicate with family members, or speak my First Nation language.

41. In 1963 the Nelsons took me to Pion-Era in Saskatoon and I went over to the Indian site. I remember Mrs. Nelson grabbing me and saying 'Don't you ever go near those people. Can't you see they are heathens by their drums'. I was 7 and I remember I was so happy I had found my family and she yanked me back.

42. I suffered severe physical and mental trauma and experienced a loss of culture and a loss of sense of self-worth as a result of the physical, psychological, and sexual abuse that occurred when I was resident with the Nelson adoptive family.

43. I also suffered severe psychological harm as a result of the sexual and verbal abuse that occurred and being fear controlled.

44. The abuse and fear, sexual and the abuse overall, and control, made it impossible for me to trust authority figures, which has impacted my employability, although with counselling I am improving, but now I am 60.

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45. The sexual abuse that occurred at the hands of my adoptive father Mr. Nelson, affected my ability to have normal sexual relations with men and my trust of both men and women.

46. I began using cocaine in Parksville, British Columbia at age 30 to numb the pain and suffering that I was going through because of the physical, mental, and sexual abuse I suffered at the hands of my adoptive father. But I began to search for a path back from my past and my problems.

47. I began counselling with Dr. Noreen Nichol in Nanaimo, British Columbia and that was my first step towards healing for the physical and sexual abuse I suffered at the hands of my adoptive father and continue to attend counselling to this day.

48. I am informed by Dr. Noreen Nichol and do verily believe that I was not only physically raped but spiritually raped with brainwashing to in essence convince me that this was God's intention and in some way appropriate.

49. I recovered back my Registered Indian Rights when I was 32 years old.

50. I was sexually abused almost from the first day of moving in with the Nelson adoptive family.

51. The Nelsons are no longer alive.

52. I returned to Viscount, Saskatchewan on July 8, 2000 and live approximately 8 miles from the farm where the abuse took place. The reason I returned was to recover the land that the Nelsons told me I would inherit. I was about to become a grandmother and I wanted the land back. I knew that was inherently mine from the adoption. And Gordon Nelson had always told me that the quarter section of land would be mine. He had four quarters of land and one of the quarters had a church building on it which still stands to this day. He would often say "Have sex with me at the church".

53. That is the quarter section of land that he had promised to me many times.

54. I am still in the community of Viscount in the process of reconciliation because of my loss of culture and identity and still have not received the land.

COMMON EXPERIENCES

55. It is difficult for me to discuss the details of my abuse. I have suffered including, but not limited to, sexual abuse, physical abuse, psychological abuse, verbal abuse, loss of cultural identity, and financial loss.

56. I have spoken with many Merchant Law Group LLP ("MLG") lawyers. In significant part, most of the information and belief that I have acquired is from E.F. Anthony Merchant, Q.C., but I do not always remember which lawyer told me what.

57. I am informed by Tony Merchant and do verily believe that MLG has 4,546 sign ups by which they mean contact names and information on their computerized system of contacts from across Canada whose stories are similar to my own.

58. I have suffered financial, emotional, psychological, cultural, and financial damages at the hands of the Defendants and participating in the within action is important for me. It is important to me that the Defendants be held accountable.

59. The sexual, physical, psychological, verbal, and cultural abuse that was inflicted upon me as a minor continues to cause me severe anxiety and I require therapy.

THE FOUNDATION TABLE AND ITS WORK

60. The Foundation is described in both the Agreement in Principle and the proposed Final Settlement Agreement in similar terms and very briefly. This is due in part to early agreement on the importance of the Foundation and early recognition of the importance of Indigenous peoples developing and controlling the Foundation and determining what activities it would undertake. Accordingly, the proposed agreements provide for the establishment and initial funding for the Foundation. A "Foundation Table" was created to work through the process of incorporation and the establishment of the initial board of directors.

61. As contemplated by agreements, the Foundation Table has eight members:

- Three Indigenous representatives - myself, Chief Marcia Mattel Brown and Sharon Russell
- Three lawyers-Jeffery Wilson (counsel on Brown), Tony Merchant and Catharine Moore (counsel for Canada)
- One representative from Canada - Martin Reiher, Assistant Deputy Minister, INAC
- Mr. Justice Michel M.J. Shore

62. In addition, meetings have frequently been attended by Jessica Braude, a lawyer working with Jeff and Krista Robertson, a senior policy analyst who works with Martin. The Foundation Table has become a close-knit group that enjoys its time working together despite having somewhat differing views. The attitude of all the members of the Foundation Table, including the government members, has been reconciliation and service-centred. I am proud of what the Foundation Table will accomplish and confident that it will meet the aims and goals primarily centered on reconciliation.

63. Along with Jeffery Wilson, I am the co-chair of the Foundation Table.

64. Since October, the Foundation Table has had six meetings. We try very hard to have everyone attend in person even though this means a great deal of travel for some of our members and we always make provision for telephone attendance.

65. Although Canada covers the cost of our travel and the meetings, we receive no compensation for our time and both Tony Merchant and Jeffery Wilson are similarly working without compensation for the time they spend on Foundation business and both are absorbing the cost of their own travel. This is a significant personal contribution on their parts.

66. I am informed by Jeffery Wilson and do verily believe that he has received hundreds of emails and other correspondence in support of the Foundation. Many individuals have offered their services and asked for ways that they could participate; for example:

- ... I have some land, I am interested in setting up a building where "lost 60's scooped" can come and heal, connect. Back to their roots. I would come back home, to build and help other humans who are feeling lost, disconnected. As I was. Coming back to culture, traditions have helped me tremendously, and I know it would help others.
- ... I know I have a lot to offer to help others who are going through the same as I have done. It is a horrible, lonely and sad existence to feel like you do not belong to a family that is not our own ... and even more horrific when to also experience neglect and/or abuse and if I can provide that mutual understanding to someone and let them know they are no longer alone nor misunderstood I really want to opportunity to do so. I want to be able to help others feel safe and cares for so they can work on their recovery and to taking the next steps to healing and forming a trust for others who want to help them.
- I would like to work with the foundation so I can help others which in turn will help me.
- I was adopted in 1961 and I believe that I have the empathy and compassion to relate to others who suffered the same racism and disconnect that I did; and the ability to help. My greatest wish is that I can connect to the community I belong to and have lost. I will wait to hear from you and hope that there is something I can do to be a part of the great healing that I believe we all need and deserve.
- I would love to give 200 percent to this Foundation.

67. In addition to this spontaneous support, the application process provides a venue for claimants, if they wish, to share their story with the Foundation.

68. The first meeting of the Foundation Table was on Friday October 27, 2017 at Native Child and Family Services in Toronto and the agenda was as follows:

1. Introduction: what is the Foundation? What is the "Foundation Table"?
2. Who are we? How do we feel about being members of the "Foundation Table"?
3. How do we connect the Foundation to those that matter, those intended to be helped by the Foundation?
4. How will the Foundation be governed? How are decisions made? What is its name?
5. Will the Foundation have a chief executive officer or managing director?
6. How do we manage the very significant sum of money we will soon receive from the federal government for the Foundation?

69. At that first meeting, some tasking was assigned to members in anticipation of the next meeting's theme: the task of reducing or transforming our ambitions, aspirations or "wish list" for the Foundation's mandate to practical considerations and application. The question we set for ourselves was: how can the idea be delivered in a way that works, in a way that effects change in the way we have done things?

1. Tony was to investigate how to increase our funding base from \$50 million;
2. Sharon and I were to consider and report back to the group about how we to practically respond to the notion of "healing", the fact of its inter-generational impact, and what a healing process or forum would actually look like, so that it embraces, rather than polarizes, or unfortunately causes fear or harm for those who want comfort and care.
3. Martin and Krista were to arrange for an overview of the "medicine chest of benefits under the Indian Act", and suggest how getting this information out could be a practical application or project to be delivered by the Foundation.

4. Michel was tasked to particularize his idea about the opportunity or need for children of victims to meet with children of perpetrators. What does this mean? What would it look like? Who are the "victims", the "perpetrators", and why would a perpetrator or victim permit their respective children to participate in any such meeting, and how would the Foundation enable this to occur without imposing itself on the protected privacy of families? The remarkable exacting insight of thought like this predictably attracts challenges in terms of application or delivery.
5. Marcia and Tony were to confer about the notion or idea of "historical determination" and speak to practical ways to address this concept for change.
6. Catharine and Jeffery were to report what we need to do in order to incorporate the "livingness" of our Foundation Table into a living legal Foundation.
7. Tony and Jeffery were to confer about the investment/management of the funds.
8. Jeffery was to report back on the concept of an "advocacy" wing associated to the work of the Foundation.

70. On November 27 and 28, the second Foundation Table meeting was held at the Vancouver Aboriginal Friendship Centre. The agenda' was as follows:

Day 1:

1. Welcoming chant: Marcia
2. Greeting: Martin
3. Kenn Richard and Wayne K Spear: new voices
4. Update on the final settlement agreement process: Tony and Michel
5. Update on the number of Foundation inquiries
6. Legal incorporation of what and why, and questions of governance: Catharine
7. It's all in the name: Tony
8. Healing: What does that mean for our constituents? Sharon and I
9. Talking "historical determination" and turning words into action, is that possible? Marcia and Tony

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10. Identification and Reconciliation: Michel
11. A medicine (treasure) chest of benefits: what is that? For whom? How to access? Martin and Krista
12. Foundation Advocacy: one possible vision: Jeff
13. Raising our funding base: Tony

Day 2:

14. How do we feel about all of this? What is our vision? What is the timing for all that we envision? Are there lessons to be learned from other comparable projects?
15. What are the next steps? Next meeting?
16. Closing thoughts and chant.

71. Wayne K. Spear and Kenn Richard were invited to attend the November meeting in Vancouver. The purpose of their attendance was to introduce them to the Foundation Table and, in particular, the indigenous representatives, to determine if they should be retained to assist in the development of the Foundation. At the conclusion of the meeting, there was general agreement that arrangements should be made to engage Kenn. Kenn was appointed as technical advisor to the Foundation Table by Order of the Federal Court.

72. In addition, Jeffery and Catharine had spoken with Terrance Carter from Carters Professional Corporation in connection with the process of Incorporation and tax status for the Foundation. Foundation Table decided to retain Carters to provide it with advice. Terrance Carter will be working with us along with his associate Esther Shainblum. Carters was appointed as counsel to the Foundation Table by Order of the Federal Court.

73. Other members reported on their assigned items and agenda items were developed for the next meeting, ultimately scheduled for January 12 by teleconference. In particular:

- Martin was to develop a draft Mandate for the Foundation taking into considerations the discussions at the two prior meetings;
- Catharine and Tony were to consider the correspondence provided to Jeffery Wilson and others in connection with the Foundation and identify any individuals who would be well-placed to assist the Foundation Table with its work.

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74. The agenda for the January call was as follows:

1. Update on Notice Approval
2. Update on Kenn and Wayne
3. Discussion of Mandate (circulated yesterday)
4. Update on Carters (including who will be their contact)
5. Next Meeting
 - a. Current proposal is in Ottawa on Feb 5 and 6
 - b. How to structure input from others
6. Chair Going Forward
7. (1:30– Mr.Gauthier)

75. The last item was a reference to Michael Gauthier, a class member, who holds four university degrees including a PhD from Queen's University which explored the connections between Residential Schools, child welfare and Indigenous offenders. He has a strong background in criminal justice which is one area the Foundation Table had touched on but not really explored so we were glad to have his assistance. Michael works with Correctional Services Canada and discussions are underway to permit him to spend a portion of his time supporting and assisting the Foundation Table.

76. The January teleconference was largely devoted to discussion of the draft Mandate which Martin had prepared. The Mandate was also discussed subsequent to the meeting by email and, ultimately, finalized.

77. The next meeting was scheduled for February 5 and 6 at the Wabano Centre in Ottawa. The agenda was the following:

Monday

- Chair
- Draft Agenda
- Discussion with Kenn and Wayne
- Draft Mandate
- Discussion with Carters (2:00)

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Tuesday

- Discussion with Michael (10:00)
- Proposals for funding from organizations

78. The meeting concluded on the basis that it was time to start engaging with individuals and groups who had expertise we could draw on and moving ahead with the legal documentation for incorporation and tax status.

79. The next meeting took place in Edmonton on March 7 and the Foundation Table heard from Dr. Raven Sinclair and the Sixties Scoop Indigenous Society of Alberta. Dr. Sinclair is an Associate Professor at the University of Regina's Faculty of Social Work and currently working on a project entitled: A Genealogy of indigenous Child Welfare in Canada. The Sixties Scoop indigenous Society of Alberta (SSISA) is a non-profit society formed to represent survivors in Alberta, create dialogue and engagement and develop true reconciliation. Board members include representatives from Treaty 6, Treaty 1, Treaty 8, as well as Inuit and Metis representatives.

80. At the conclusion of the meeting, the Foundation Table decided to:

- Retain Dr. Sinclair and she was appointed as technical advisor to the Foundation Table by Order of the Federal Court.
- work independently on a list of "activities" required for the corporate filings;
- Meet in whole or in part with Carters to finalize the corporate filings; and,
- Engage with SSISA to provide accurate information about the proposed settlement.

81. The next meeting now taking place is at the Wabano Centre in Ottawa on April 9, 11 and 12.

82. On April 9, Jeffery, Tony, and Catharine met with Terrance Carter to finalize documentation for incorporation and tax status. Essentially, the plan is to incorporate the Foundation pursuant to the *Not For Profit Corporations Act* (as contemplated by the proposed settlement agreement) which I understand generally brings it into legal existence and exempts it from paying tax and to concurrently pursue charitable status pursuant to the *Income Tax Act* which will permit it to issue tax receipts and, therefore, be more attractive to private sector investment. While incorporation is expected to be in place very shortly, the charitable status process is more time-consuming and unlikely to be obtained prior to the approval hearing.

83. On April 11 we welcomed the National indigenous Survivors of Child Welfare, a coalition of Indigenous people (Metis, First Nation and Inuit) and organizations which provide leadership, support and advocacy for Indigenous people affected by Indigenous Child Removal Systems in Canada - regardless of where they reside.

84. On April 12, the agenda is as follows:

1. Welcoming moments
2. Formalizing a role for Raven Sinclair and Kenn Richard (30 minutes)
3. How the Foundation Table makes decisions (90 minutes)
4. Composition and selection of the Board (90 minutes)
5. Funding for prior work of Kenn Richard and Wayne K. Spear (20 minutes)
6. Funding for the attendances of Jeff and Tony (20 minutes)
7. The matter of engagement on a go-forward and post-judicial approval, including the matter of considering the need of a website for the Foundation Table (90 minutes)
8. The matter of an "Apology"(30 minutes)
9. The matter of a name for the Foundation (20 minutes)
10. Closing moments

BENEFITS OF THE SETTLEMENT

85. There are four areas of benefit to this Settlement which I list in order of significance.

1. Resolution - Conclusion - Peace
2. Reconciliation
3. Foundation
4. Financial Compensation

86. The benefits should be considered from the perspective of Sixties Scoop Survivors which involves this Honourable Court in attempting to appreciate the loss which I and other Sixties Scoop Survivors have endured but benefit 2 - Reconciliation is for all Canadians.

87. I have spoken with a great many Sixties Scoop Survivors about the Settlement. I have read the newspaper and on-line stories about the Settlement. I have observed television coverage, including coverage on the Aboriginal People's Network. I have talked with many non survivor Indigenous and non Indigenous people about the Settlement.

88. A non-survivor, people who have not suffered as I have suffered, people who are fortunate not to have the negative memories that I have, the memories of loss and harm that I share with other Survivors, will have difficulty understanding the importance of resolution and internal peace that flows from this Settlement. Respectfully, even the lawyers with whom I have spoken who act for the Plaintiffs, but not Mr. Merchant, would probably think the greatest benefit is 4 - Financial Compensation and the least benefit is 1 - Resolution - Conclusion - Peace. The real order of importance is reversed.

89. Instead, what is most important about the Settlement, is most important for Sixties Scoop Survivors and the larger indigenous community, is the benefit that I place as number one. This is the greatest benefit to me and in reality the greatest benefit to all the Sixties Scoop Survivors with whom I have spoken.

90. The first and greatest benefit, Resolution, Conclusion, and Peace, the greatest benefit to me and others.

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91. The first and greatest benefit, calm and peace, the benefit to me and to others, is that the Government of Canada on behalf of Canadians, acknowledges the wrong and is prepared to provide meaningful compensation as a part of that acknowledged wrong. The amount of compensation is important. But what is crucial is the fact of meaningful compensation at all. What is crucial is that we who were wronged know that the Government of Canada, the Prime Minister of Canada, Justin Trudeau, the Minister, Dr. Carolyn Bennett, the Minister who is herself indigenous, Jody Wilson-Raybould, that the Cabinet of Canada, the Parliament of Canada, the people of Canada, are sorry and the recognition of that wrong is the meaningful compensation that comes with this Settlement.

92. The process of the courts, has for me and others, been like tearing a bandage off an emotional wound. The court process went slowly and the pain of the tearing continued and was enhanced. The end is a part of closure. The class and I will put this behind us. I say to those do not appreciate the importance of early finality that it is peace, calm, a conclusion, that is the most important thing for most of the people with whom I have spoken. There is a minority who say there should be more money individually. There is an indigenous organization that sees this as an opportunity to get funding. There are law firms who emerged in 2017 who seek to be a part of its resolution and say they could have done better. For all of them I say that the law firm I selected began fighting this case in Saskatchewan in 2009. For those few who say there should be more or something better, I ask that they understand that this only increases our pain and delay would be intolerable.

93. This Settlement, the success, and everything could always be better, allows me and the people I know and the class I understand from knowing so many who are part of it, to accept that Canada acknowledges its wrong. The weight is lifted from my soul. The Settlement and acknowledgment of wrong by the Government of Canada says to me that I was not wrong to feel resentment and be angry. I was not wrong to live my life from the age of five trying to understand why the agents of a nation did these things to me.

94. The most important part of this Settlement is *the fact of the Settlement*.

95. Through this Settlement I am told I was right to be resentful and now I can put that resentment behind me.

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96. The second most important benefit is Reconciliation. I hear this word bandied as a catch phrase. The commonality of its repetition masks its significance.

97. For Sixties Scoop Survivors and for Indigenous Canadians, reconciliation means becoming a real and respected part of Canadian culture. Every Indigenous feels the racial slurs and the depreciation of who we are by a huge percentage of Canadians.

98. Reconciliation is important to Sixties Scoop Survivors and for all Indigenous.

99. Reconciliation is important to all Canadians! This is not to say that I believe Indigenous Canadians are hated by many non Indigenous but by way of example, a hater hurts just as the hated hurts. A bigot hurts others but a bigot also hurts himself or herself.

100. Reconciliation is the second most important benefit of this settlement because it is a part of the path with the leadership of the Canadian government towards re-inclusion of Indigenous people into Canadian culture and that benefits Indigenous people but it also benefits all Canadians.

101. The third most significant benefit of the settlement is the Foundation. It is one of the vehicles towards reconciliation and one of the vehicles of service to Sixties Scoop Survivors, Indigenous, and all Canadians.

102. The Foundation is as yet unnamed. I favour names like Indigenous Spirit, Roots and Wings, names that are limitless, but the Foundation is as yet unnamed.

103. I began expressing why this is important through names because names embody how we seek to help Sixties Scoop Survivors, help indigenous, and also others; help indigenous who will not qualify for funds directly, as well as those who do, and we seek to be a part of reconciliation, but more than that, a part of the making of a better Canada. Our intention with the Foundation is to help all Canadians as well as in particular help indigenous people and Sixties Scoop Survivors.

104. The Foundation Board is made up of one representative plaintiff, two proposed representative plaintiffs, because I am a proposed representative plaintiff in an action before the Court of Queen's Bench of Saskatchewan and Sharon Russell is a proposed representative plaintiff in an action before the Supreme Court of British Columbia, two plaintiffs' lawyers, a lawyer for the government, and an Assistant Deputy Minister.

105. Mr. Justice Shore does not press views as the rest of us have, but, on some occasions assists in the mediation role in appropriate circumstances.

106. There are in a sense three groups, two plaintiffs' lawyers, two government representatives, and the three representative plaintiffs, and the three of us are all indigenous and all Sixties Scoop Survivors. The Foundation Board has worked effectively and non confrontationally. We have spent a great deal of time together, often meeting for more than one day. We have somewhat differing views. These differences of view are not a matter of the government representatives taking a mean-spirited approach to the aims of the Foundation that we are establishing. To the contrary, the attitude of all the members of the Foundation Board, including the two (and in a sense three) members of the government have been reconciliation and service centered. As deposed, I am proud of what the Foundation Board will accomplish and confident that the Foundation Board will meet the aims and goals primarily centered on reconciliation.

107. I have a fear of flying that comes from the abuse to which I was subjected. I wonder how as a university educated, modern, and Indigenous woman I can still harbour fear of flying but that is part of my reality. My work on the founding board and my fear of flying strangely work to my advantage.

108. We have had many board meetings, more than one in some cities, and I have travelled on a number of occasions in this past year and during a number of seasons - twice to Ottawa, once to Toronto, once in Vancouver, and once to Edmonton. I have travelled by train and bus.

109. I have seen the trees, the leaves, the rivers, the streams, the rocks, the beauty, the small towns, the people coming and going, the kindness of people travelling with me, taking time gently to reflect with the rhythmic repetition of the miles, bouncing or clicking below me, on the changing scenes of the parts of Canada, the big cities, the tiny enclaves. In all of this I have reflected on the importance of the role that Indigenous Spirit will fulfill.

110. Everyone with whom I have spoken, all the people with whom the Foundation Board has met, are confident and enthusiastic about the work that Indigenous Spirit will be doing and what we can add to Canada, not just in 2018 but in 2028 and 2058.

111. Financial Compensation is number four but it is still important. It is a part of saying I am sorry. Those who committed the wrong, the nation of Canada, acknowledge the wrong through this payment.

112. I have listened to discussions by plaintiffs' lawyers with others in meetings of the Foundation Board about the level of compensation. I have listened to Tony Merchant and Jeffrey Wilson discuss that when Klein, Koskie Minsky, and MLG looked for case authority on what they would demand from Canada, the most the plaintiffs' lawyers thought could be supported by judicial precedent was \$87,000 per Eligible Class Members. I have listened to Jeffery Wilson indicate that when Wilson & Cooper, counsel on Brown, determined the maximum they thought they could achieve, it was, based on precedent, \$85,000. I understood from listening that these two amounts of \$87,500 and \$85,000, based on judicial precedent, were determined separately a year apart based on differing research. I am informed second hand that blueskying about the level of damages, Mr. Justice Belobaba, was indicating amounts in the \$10,000 to \$25,000 range. I am informed and do verily believe that the average paid on the common experience payment regarding Indian Residential Schools was \$22,000.

113. I am amazed that my loss of culture only has a value of \$85,000. But I accept that what I understand to be very little in the way of jurisprudence on the issue, does not place a high value of loss of culture.

114. \$25,000 to \$50,000 is a meaningful amount of money. The vast majority of Class Members with whom I have spoken are happy with the Settlement and consider this level of payment to be substantial. Anyone, everyone, would like more but the Settlement total will probably be \$875,000,000 with \$50,000,000 for the Foundation, and we are talking about how to raise more money. \$875,000,000 is a great deal of money.

115. When the Government of Canada agreed to settle and members of the class were told that they were going to receive \$25,000 to \$50,000 each, overwhelmingly everyone was grateful. The government had done the right thing was the way people thought about it. Then over time it is almost as though some people, some groups with their own self-interest in my view, including some lawyers, who became interested in this issue in 2017, turned the genuine sense that this was appropriate if not as much as was hoped, into for some this is not enough and the lawyers should fight another nine year battle to get more.

116. For me, for almost all the Class Members, getting the money that we will get soon is important instead of maybe getting more some day. Fighting to potentially get more money some day, is not a choice that I would make for Class Members both because getting the money now is important but more importantly bringing closure now is crucial.

117. Is the financial compensation enough? It could never be enough. Do I and the vast majority of the Sixties Scoop Survivors with whom I have communicated accept that this is an appropriate, fair, and reasonable level of compensation in relation to the overall cost? Yes they do. And I do.

118. First, this is a sizable amount of money for each of us as individuals. For a millionaire, another \$25,000 may seem insignificant. I have not met any Sixties Scoop Survivor who appears to me to be anything close to being a millionaire.

119. Second, financial compensation, large in its significance for me and my life and for others, is appropriately large enough to constitute the acceptance and recognition of wrongdoing which is fundamental to the two most important benefits of this settlement that I have discussed above.

120. To me, this Settlement, the work of the Foundation, the Agreement which is only the beginning of reconciliation, is part of taking us home – to be ourselves – to reclaim our languages – to reclaim our culture – the wronged to continue to grow us essence.

121. For all of these reasons, and I stress the importance of ending the delay allowing Resolution, Conclusion, Peace, and Reconciliation to move forward, I urge this Honourable Court to approve the settlement and allow the establishment of the Foundation and allow its work to occur.

MY INVOLVEMENT AND MLG'S EXPERIENCE

122. In addition to being in contact with MLG, I have also been in regular contact with other putative Class Members. I am interested on behalf of all Class Members and not just about myself. I think because I was an older scoop from a happy home, I knew I had to get back home and later I wanted to help others.

123. I am aware generally of MLG's experience in the class action field from reading newspapers, and hearing or seeing numerous news broadcasts regarding the very active work by MLG in the class action field and the related focused fields of abuse and rights and MLG Lawyers have informed me, and I verily believe, the following about MLG's class action practice.

124. MLG has a significant number of lawyers who, to varying degrees, work in the class actions field. MLG lawyers who devote most, and for the majority of the lawyers listed below, almost all of their time to MLG's class action practice, include (with year of call to their first Bar, and current law society memberships):

- (a) E. F. Anthony Merchant, Q.C. (1968, Saskatchewan, Alberta, British Columbia, and Arizona)
- (b) Evatt F.A. Merchant, Q.C. (1998, Saskatchewan, Alberta, and Ontario)
- (c) Roch Dupont (1999, Ontario, Saskatchewan, Quebec)
- (d) Casey Churko (2005, Saskatchewan)
- (e) Anthony Tibbs (2012, Saskatchewan)
- (f) Iqbal Brar (2013, Saskatchewan, British Columbia)
- (g) Erik Lowe (2013, Quebec)
- (h) Linh Pham (2014, Saskatchewan)

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- (i) Steve Roxborough (2015, Saskatchewan, British Columbia)
- (j) Chris Simoes (2015, Saskatchewan, Ontario)
- (k) Venessa Vuia (2016, Saskatchewan, Ontario)

125. MLG lawyers who devote part of their time to MLG's class action practice, include (with year of call to their first Bar, and current law society memberships):

- (a) Norman Rosenbaum (1982, Manitoba)
- (b) Graham K. Neil (1999, Alberta)
- (c) William Slater (2002, Saskatchewan, British Columbia)
- (d) Joshua Merchant (2002, Alberta)
- (e) Michael Troy (2002, Saskatchewan, British Columbia)
- (f) Shaun P. Flannigan (2008, Alberta)
- (g) Mickey Amery (2012, Alberta)
- (h) Kristen Bates (2017, Saskatchewan)

126. MLG lawyers who have been actively involved with the within action include, Iqbal Brar, Casey Churko, Roch Dupont, Erik Lowe, Tony Merchant, Evatt Merchant, Joshua Merchant, Graham Neill, Linh Pham, Steve Roxborough, Norman Rosenbaum, Chris Simoes, Anthony Tibbs, and Venessa Vuia:

- (a) Iqbal Brar has five years of experience almost exclusively in class action litigation of all varieties including working on Social Services cases recently which are related to Sixties Scoop.
- (b) Casey Churko has ten years of experience almost exclusively in class action litigation, of all varieties, including taking an extensive role in drug litigation, leading on recently certified and settled Alysena 28, leading on Yaz and Yasmin, leading on Paxil Pregnancy and Celexa, each of which are scheduled for certification hearings, taking a major role in Vioxx, with others taking a major role in Bextra and Celebrex, with a half dozen other drug cases in process within MLG and Mr. Churko has been directly involved in cases regarding similar wrongdoing to this case. I am informed by Tony Merchant and do verily believe that Mr. Churko attended settlement negotiations and court attendances regarding related Sixties Scoop court proceedings in the provinces regarding these matters

- (c) Roch Dupont has many years of experience in the Department of Justice's commercial law and criminal prosecution divisions (including cartel enforcement, price-fixing, fraud, gangs, and fraudulent bankruptcy prosecutions), and has significant experience conducting large-scale, complex litigation. For the past few years, Mr. Dupont has been working with MLG largely on class action matters and has been heavily involved in the within litigation and has taken the lead in Aeroplan, authorized in Quebec, and a number of the product liability cases.
- (d) Erik Lowe works almost exclusively in the area of class actions. I am informed by Tony Merchant and do verily believe that he attended settlement negotiations.
- (e) E. F. Anthony Merchant, Q.C. is one of Canada's most experienced class action lawyers, and has argued class action issues or has participated in class action arguments in 6 provinces at the trial level and 4 provinces at the Court of Appeal level and many trial matters in 5 provinces. I am informed by Tony Merchant and do verily believe that he has attended all the settlement meetings and court attendances regarding related Sixties Scoop court proceedings in the provinces. I know of my personal knowledge that he has attended all of the Foundation meetings.
- (f) Evatt F.A. Merchant, Q.C. works almost exclusively in the area of class actions. He has acted as lead counsel for MLG clients on arguments involving a number of certifications and settlement negotiations, particularly in Ontario, Nova Scotia, and Alberta. I am informed by Tony Merchant and do verily believe that Evatt Merchant attended settlement negotiations.
- (g) John Eric Joshua Merchant works almost exclusively on Indigenous matters which involves him significantly in some class actions. I am informed by Tony Merchant and do verily believe that Joshua Merchant attended settlement negotiations and has attended court proceedings regarding these matters.
- (h) Linh Pham works primarily in the area of class actions, has been directly involved in the research and preparation of several certification records and has appeared before courts in Saskatchewan, Ontario, and Alberta. He is currently involved in further work regarding Yaz & Yasmin, Risperdal, Ford Navistar, Home Depot Data Breach, amongst others and has extensive certification experience.

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- (i) Steve Roxborough works significantly in class actions. I am informed by Tony Merchant and do verily believe that Mr. Roxborough attended settlement negotiations.
- (j) Norm Rosenbaum has worked on many class actions and has been involved in the preparation of pleadings, affidavits, and certification records and court attendances regarding related Sixties Scoop court proceedings in Manitoba.
- (k) Chris Simoes works almost entirely on class actions. He has prepared pleadings, affidavits, and certification records in several class actions. He has appeared before the courts of Saskatchewan and Ontario in connection with these matters. I am informed by Tony Merchant and do verily believe that Mr. Simoes attended settlement negotiations.
- (l) Anthony Tibbs works almost exclusively in the area of class actions, has been involved in the preparation of pleadings, affidavits, and certification records in dozens of class actions, including drug cases, abuse cases like this one, automobile class actions, and has appeared before the courts of British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario in connection with these matters. I am informed by Tony Merchant and do verily believe that Mr. Tibbs attended settlement negotiations and court attendances regarding related Sixties Scoop court proceedings in the provinces.
- (m) Venessa Vuia works exclusively in the area of class actions. I am informed by Tony Merchant and do verily believe that Ms. Vuia attended settlement negotiations.

127. On the basis of information provided to me by Tony Merchant, MLG has been working extensively on various class actions in which members of Indigenous communities across Canada will likely form a significant proportion of the proposed classes. Some of these matters include the following actions which are being pursued by MLG:

Lillian Emily Ross et al. v. The Government of Saskatchewan and The Attorney General of Canada
Q.B. No. 1767 of 2001 - Saskatoon, Saskatchewan
(Government Liability for Indian Residential Schools)

Cori Pederson and Bernice Rita McInnes v. Her Majesty the Queen in Right of Saskatchewan as represented by the Minister of Social Services and The Public Guardian and Trustee of Saskatchewan

Q.B.G. No. 884 of 2012 - Regina, Saskatchewan
(Government liability for children in their care)

Stacie Vanessa Strohmaier and Dawn Sam v. Her Majesty the Queen in Right of British Columbia, as represented by the Attorney General and Public Guardian and Trustee of the British Columbia

Vancouver Registry No. S-12741 - Vancouver, British Columbia
(Government liability for children in their care)

Jeffrey Ross and the Government of Manitoba and the Public Trustee of Manitoba, Winnipeg Registry File No. CI-14-01-88140 - Winnipeg, Manitoba
(Government liability for children in their care)

Alex Nicotine v. The Attorney General of Canada and The Government of Saskatchewan

Q.B.G. No. 1578 of 2013 - Regina, Saskatchewan
(Government liability for Day Schools)

Terrance Wuttunee v. Her Majesty the Queen in right of Alberta
Action Number 1403 10920 - Edmonton, Alberta
(Taxation of Indigenous Canadians)

Lisa Ealey v. Her Majesty the Queen in right of Canada, as represented by the Minister of Indian and Northern Affairs of Canada, Her Majesty the Queen in right of Canada, as represented by the Minister of National Revenue, Her Majesty the Queen in right of Canada, as represented by the Minister of Health, Her Majesty the Queen in right of Alberta, as represented by the Minister of Sustainable Resource Development, and Her Majesty the Queen in right of Alberta, as represented by the Minister of Finance and Enterprise

Action Number 1101 01276 - Calgary, Alberta
(Government liability for loss of status under the *Indian Act*)

Heather Loch v. Her Majesty the Queen in right of Canada, as represented by the Minister of Indian and Northern Affairs of Canada, Her Majesty the Queen in right of Canada, as represented by the Minister of National Revenue, Her Majesty the Queen in right of Canada, as represented by the Minister of Health, Her Majesty the Queen in right of Saskatchewan, as represented by the Minister of the Environment, and Her Majesty the Queen in right of Saskatchewan, as represented by the Minister of the Finance

Q.B. No. 57 of 2011 - Regina, Saskatchewan

(Government liability for loss of status under the *Indian Act*)

Denis Sarrazin v. Attorney General of Canada and Attorney General of Quebec
No. 500-06-0006000-128 C.S.M - Montreal, Quebec

(Government liability for loss of status under the *Indian Act*)

Angela Dasilva-Mepham v. Her Majesty the Queen in right of Canada, as represented by the Minister of Indian and Northern Affairs of Canada, Her Majesty the Queen in right of Canada, as represented by the Minister of National Revenue, Her Majesty the Queen in right of Canada, as represented by the Minister of Health, Her Majesty the Queen in right of Ontario, as represented by the Minister of Natural Resources, and, Her Majesty the Queen in right of Ontario, as represented by the Minister of the Finance

CV-11-430328-00CP - Toronto, Ontario

(Government liability for loss of status under the *Indian Act*)

Karen Mowatt v. Her Majesty the Queen in right of Canada, as represented by the Minister of Indian and Northern Affairs of Canada, Her Majesty the Queen in right of Canada, as represented by the Minister of National Revenue, Her Majesty the Queen in right of Canada, as represented by the Minister of Health, Her Majesty the Queen in right of Manitoba, as represented by the Minister of Conservation, and Her Majesty the Queen in right of Manitoba, as represented by the Minister of Finance
C111-01-69971 - Winnipeg, Manitoba

(Government liability for loss of status under the *Indian Act*)

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Aaron Sinclair v. Her Majesty the Queen in right of Canada, as represented by the Minister of Indian and Northern Affairs of Canada, Her Majesty the Queen in right of Canada, as represented by the Minister of National Revenue, Her Majesty the Queen in right of Canada, as represented by the Minister of Health, Her Majesty the Queen in right of British Columbia, as represented by the Minister of Natural Resources, and Her Majesty the Queen in right of British Columbia, as represented by the Minister of Finance

Action No. 11 0303 - Victoria, British Columbia

(Government liability for loss of status under the *Indian Act*)

Jean John Baptiste Pambrun v. Attorney General of Canada

Q.B.G. No. 1234 of 2018 - Regina, Saskatchewan

(Government liability regarding Tuberculosis care of Indigenous)

128. In addition to the many related cases, on behalf of Indigenous Canadians, most specifically, MLG has legal actions underway concerning Sixties Scoop which are extant in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, with proposed plaintiffs and representative plaintiffs arranged and an intention of issuance in New Brunswick and Newfoundland and Labrador, with a view to pursuing Sixties Scoop litigation against the provinces.

129. In these various cases, proposed representative plaintiffs with MLG as counsel seek damages for loss of culture. If the award for loss of culture exceeds the amount received by Eligible Class Members under this Settlement, then, depending upon apportionment of harm, members of this Class as proposed for settlement will be eligible to receive additional payment. Additionally, Class Members who are not Eligible Class Members in this proposed Settlement, like non Registered Indians (to use the word in the legislation) and other Indigenous, seek to receive compensation for loss of culture. Finally, and of importance to me and many who were subject to Sixties Scoop, compensation for sexual and serious physical abuse will be sought in circumstances where it was the provinces who were responsible for my being scooped, sending Social Services representatives to my grandparents home, and in this regard, as to provincial responsibility, the process of taking children and placing them for adoption was within the responsibility of the provinces.

130. These proceedings in the provinces are important in considering the Settlement, not only in relation to the contribution being made by MLG and the contribution that will be made by MLG but important for Class Members that this Settlement is not the end of potential recovery and entitlement.

131. Attached hereto and marked as Exhibit "A" to this my affidavit is a list, which I am informed by Tony Merchant and do verily believe, shows the hundreds of occasions when MLG's team of class action lawyers have appeared in courts from St. John's to Victoria on various class action matters. Exhibit "A" identifies the lawyers who appeared on various matters as having been present in court, but I am informed that many others would have been involved in the preparation of matters.

132. On the basis of information provided to me by Tony Merchant, I believe MLG has been involved in numerous class action cases covering many different types of litigation for which settlements have been achieved. I am informed that listed below are some of the class actions that MLG was involved in for which a settlement was achieved:

- (a) Celebrex/Bextra (pharmaceuticals);
- (b) Chocolate Price Fixing;
- (c) CIBC/Talvest Mutual Funds, September 22, 2010;
- (d) Cover-All Building Systems Employees Class Action (wherein a downsizing employer terminated, with minimal notice, hundreds of employees), December 21, 2012;
- (e) Fleet Phospho-Soda Class Action, December 23, 2010;
- (f) Free Bee Gas/Ashley Furniture Class Action, June 24, 2010;
- (g) GM Manifold Gasket Class Action;
- (h) Hollinger Shareholders Class Action;
- (i) Indian Residential Schools Class Action November 20, 2005, March 6, 2006;
- (j) Maple Leaf Foods Class Action (relating to the 2008 listeriosis outbreak) December 17, 2008;
- (k) Molson Inc. Shareholders Class Action;
- (l) Pennwest Securities Class Action.
- (m) PlayStation Class Action (relating to the 2011 data breach of privacy that shut down Sony's PlayStation Network);
- (n) Skechers Toning Shoes Class Action; and

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- (o) Sony BMG Class Action (relating to Sony's inclusion of copy protection technologies on audio CDs that were alleged to have breached privacy rights and compromise computer security);
- (p) Thomas the Tank;
- (q) Toyota Class Action;
- (r) Winners/HomeSense Class Action (relating to a privacy data breach);
- (s) Yogurt Products Class Action; April 2, 2018
- (t) Zonolite Asbestos Insulation Class Action.

133. MLG is also counsel of record regarding a number of recent Saskatchewan successes. Two of which are abuse cases which have a close relationship to Sixties Scoop. A case regarding the Moose Jaw Training School with abuse similar to the abuse I suffered: *Safioles v. Saskatchewan*, 2015 SKCA 122, a case regarding Social Services and abuse similar to the abuse I suffered: *Pederson et al v. Saskatchewan*, 2016 SKCA 142, and a case regarding the Saskatchewan Medical Association: *Anstead v. Saskatchewan Medical Association*, 2016 SKCA 143, and a case regarding the drug Yaz and Yasmin; *Dembrowski et al v. Bayer Inc. et al*, 2016 SKQB 324.

134. MLG have acted on behalf of First Nations People for many years, and the lawyers in MLG were heavily involved in the Indian Residential Schools litigation. MLG was counsel of record in *H.L. v. Canada (Attorney General)*, [2005] 1 SCR 401, overruling the Saskatchewan Court of Appeal, which was an individual Indian Residential Schools claim that was a successful Judgment from the Supreme Court of Canada. I understand that MLG successfully sued the Federal Government for abuse that one of its clients suffered while attending Residential School as a child. The damages awarded to Mr. L. are the highest court awarded compensation to a Residential School survivor in Canadian history, and the decision of H.L. was a success for Indigenous Rights in Canada.

135. MLG was part of a lawyer team who were instrumental in negotiating the Indian Residential Schools settlement that provided approximately \$1.9 Billion in compensation for Common Experience payments, and \$3 billion in IAP payments. MLG was responsible for representing approximately half of all known individuals in Canada in 2005, pursuing class action lawsuits against the Federal Government for Residential School compensation. Since 1996, lawyers in MLG have represented more than 15,000 clients

respecting their experience at Indian Residential Schools, including approximately 4,000 claims in the post-2006 Independent Assessment Process.

136. In addition, and of significance in relation to the history of service of indigenous peoples, I am informed by Tony Merchant, and do verily believe that MLG has served and continued to serve indigenous peoples in the following ways:

(1) In the 70's and 80's, Mr. Merchant, before he founded Merchant Law, and lawyers in MLG and Mr. Merchant after MLG was founded, appeared in courts regarding Ochapowace children in all four Western provinces and were part of the legal and political impetus that has resulted in Saskatchewan legislation now requiring the courts to consult with bands where one of the children of a First Nations band is the subject of seizure, and effect placement with a band member where possible. Ochapowace is a First Nation in Saskatchewan.

(2) Mr. Merchant served Indigenous interests through his speeches and work behind the scenes as a Member of the Legislature and as an important public figure working within the Liberal Party and working throughout Saskatchewan and western Canada regarding Indigenous interests.

(3) Before 1985, legislation deemed that a person was an "Indian", to use the word in the legislation, if their Indian father married a non Indian but they were not Indian if their Indian mother married a non Indian. In 1985 Bill C-31 was passed and addressed this prejudicial unfairness in the law but nothing was done to compensate those who were wronged by this discriminatory law. The impact on tens of thousands of now First Nations people is significant. These people became "Indian" in 1985, but nothing was done to compensate them for being deprived of the benefits to which they were previously entitled: taxes, health benefits, hunting and fishing rights, educational benefits to go through university and gain other advantages, employment status for band positions, treaty rights, all of which are very significant. In 2011, legislation was again passed (Bill C-3) bestowing "Indian" status on another 45,000 individuals across the country who had, prior to that time, been denied their First Nations heritage. Regarding this wrong of non compensation, MLG commenced proceedings in various jurisdictions across Canada including Saskatchewan and this case has been authorized (the Quebec

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equivalent of certified), in Quebec but, while the wrong seems to be self evident, none the less the government seeks to appeal that authorization.

(4) MLG has been pursuing cases regarding schools left out of the Indian Residential School process. Large Northern Saskatchewan schools like Île-à-la-Crosse and Timber Bay / Montreal Lake, and similar schools in other provinces, had First Nations people but also non status and Métis people in the schools. They suffered all the same losses and indignities and abuses that existed in Residential Schools, and that I suffered, but were left out of that settlement. The case regarding Timber Bay awaits the decision of the Saskatchewan Court of Appeal. This fight has been ongoing for years regarding these schools and the battle continues, involving significant contact with indigenous people in northern Saskatchewan, and to a lesser extent with people in similar schools in other provinces.

(5) In Alberta, First Nations people, including people like me from Saskatchewan, are not allowed to purchase tax free unless we have a special card issued by the Alberta government which, in practical terms means, no one obtains this card and MLG is pursuing legal action in Alberta on behalf of First Nations people over this issue. There are two concerns regarding the actions of the Alberta Government. First, these are *Canadian Treaty Rights* and the issue is important and makes a financial difference for First Nations people. Second, we know that if we allow rights to be impacted, tarnished, ignored, those rights get lost and protecting Treaty Rights which were undertaken between the Crown and Canada's First Nations can not be diminished by the actions of a province, or even the actions of the Federal Government.

(6) MLG is pursuing Day School claims which is part of the next battle. Often children would be in an Indian Residential School for a few years and then be in an on reserve day schools where the same wrongs occurred to which I was subjected occurred. The recognition of wrongs is important as the struggle continues. This is very important to indigenous peoples and our sense of fairness for the wrongs of the last century.

(7) MLG just launched an action in the Court of Queen's Bench of Saskatchewan regarding tuberculosis issues regarding Indigenous children.

137. MLG is, by a considerable margin, the best known law firm among indigenous peoples and this is particularly true in western Canada. MLG's contribution regarding indigenous peoples claims and rights is recognized and appreciated.

138. In recognition of MLG's contribution in 2008, Tony Merchant was made an honorary member of the Blood in Alberta, an honorary Chief by the name of Aah-pha su-oy which means Flanking Warrior and on two occasions in Saskatchewan in recognition of MLG's work Mr. Merchant was presented with an eagle feather. This is the highest honour our people can bestow. On one occasion the eagle feather was presented on behalf of two Saskatchewan First Nations who came together in a ceremony to recognize the work of MLG and on the other occasion the eagle feather was presented by the leadership of one Saskatchewan First Nation.

139. Attached hereto and marked as Exhibit "B" to this my Affidavit is a true copy of a picture of E.F.A. Merchant Q.C. at the powwow with one of the elders who were involved with the presentation ceremony. In the background people who were in the facility and the bleachers can be seen.

140. Attached hereto and marked as Exhibit "C" to this my affidavit is a true copy of the wall mounting of the two eagle feathers presented to Mr. Merchant.

141. MLG has two offices in British Columbia, two offices in Alberta, three offices in Saskatchewan, an office in Manitoba, an office in Ontario, and an office in Quebec, as well as an office in New York State. I am informed by Tony Merchant and do verily believe that thousands of Indigenous people have been in these offices of MLG since 1997 and before, in connection with the work being done by MLG lawyers on behalf of Indigenous people.

142. I am informed by Tony Merchant and do verily believe that his relationship with First Nations leadership goes back to the days of David Ahenakew and Sol Sanderson in the Saskatchewan leadership and later Phil Fontaine, and the days when he was a Member of the Saskatchewan legislature and that he has continued that relationship with the Saskatchewan and National leaderships of First Nations and Metis peoples over the years and with the leadership of various First Nations for which MLG has acted over the years.

143. This case is similar to other cases launched in other jurisdictions by MLG regarding what in the indigenous community, we call Sixties Scoop or Lost Boys. These proceedings are against both the Federal and Provincial Governments and involve the program in the last century called Adopt Indian Métis.

144. MLG is also representing a proposed class of Foster Care children from Saskatchewan who experienced neglect, abuse, and harm after being placed by Saskatchewan government authorities. Recent success regarding Social Services by way of the previously deposed to Saskatchewan Court of Appeal decision issued earlier this month may be found at *Cori Pederson and Bernice Rita McInnes v Her Majesty the Queen in Right of Saskatchewan, as represented by the Minister of Social Services and The Public Guardian and Trustee*, 2016 SKCA 142.

145. MLG is pursuing a class action on behalf of members of the Beaver Band of Danezaa people near Fort Vermilion, Alberta.

146. MLG is also counsel of record for the previously deposed to Moose Jaw Training School Action, representing individuals who attended the Saskatchewan Training School in Moose Jaw where they were victims of sexual and physical assaults by employees of the school and other students: *Safioles v Saskatchewan*, 2015 SKCA 122.

147. MLG is representing individuals who attended the Saskatchewan government-run R.J.D. Williams Provincial School for the Deaf in Saskatoon, concerning victims of sexual and physical assaults, similar to my assaults, by employees of the school and other students was recently filed for certification. MLG is representing individuals who attended the Alberta run School for the Deaf again concerning victims of sexual and physical assaults, which is similar to my assaults.

148. The above cases and successes demonstrate that MLG has been committed to acting for the best interests of indigenous people, and those impacted by the influence of governmental child welfare authorities, for many years, was well experienced in Canada and Saskatchewan to negotiate this Settlement and to understand the issues and represent the best interests of the class.

149. Lawyers of MLG negotiated in a determined manner to achieve settlement which I believe is fair and reasonable. I have confidence in their ability to negotiate and to have obtained the best possible settlement that could be achieved, in all of the circumstances, for me and for Class Members.

150. The work of Indigenous Spirit, the very fact of its purpose and its causes, this is more important for most Class Members and for most Canadians than the new half-ton that the compensation can buy. The benefit for Class Members of Indigenous Spirit, and the benefit for Class Members of accomplishment number one, the Settlement itself; these benefits transcend the importance of financial compensation that each of us will receive.

MY OPINION ON THE SETTLEMENT AND CLASS COUNSEL LEGAL FEES

I Support the Settlement Agreement

151. Tony Merchant explained the proposed terms of the Settlement Agreement to me. He was in contact with me as the case moved closer to a settlement and informed me of terms and the difficulties that the Plaintiffs' lawyers were experiencing as those terms were being negotiated.

152. I was invited to attend in Ottawa for the announcement of the Settlement by Dr. Carolyn Bennett. I came to know that Jessica Riddle, the Plaintiff in this action launched by MLG, Peter Van Name, the then Plaintiff in the Alberta action launched by MLG, Sarah Tanchak, the Plaintiff in the British Columbia launched by MLG, had all been invited to attend in Ottawa for the announcement. The terms of the Settlement were explained to me and I am informed by Tony Merchant and do verily believe were similarly explained to other Plaintiffs and in particular the Plaintiffs attending in Ottawa

153. I could not attend in Ottawa although arrangements had been made for me, and I had to cancel more or less at the last minute. Amongst other things, I am informed by Tony Merchant and do verily believe that he met with the other three attendees named above in Ottawa and that the attendees also met with Dr. Bennet and others regarding the Settlement the night before the public announcement.

154. I believe that the terms of the Settlement Agreement are fair, reasonable, and in the best interest of the Class. I recommend the Settlement Agreement for Court approval.

I Support Class Counsel's Fee Request

155. I understand that this litigation was undertaken on a contingency basis and that MLG and others would not be paid for fees or disbursements unless successful.

156. I understand that in addition to being paid for the work done by MLG to date, and other lawyers receiving a share of the \$75 million fee to be paid separately by the federal government, lawyers including MLG have agreed to perform legal services for Class Members without charge to assist Class Members to receive money that will be paid to them pursuant to the Settlement.

157. I know that this will involve a significant amount of work for MLG and the other lawyers sharing the \$75 million fee.

158. In the case of MLG, I am informed by Tony Merchant and do verily believe that to date the number of *sign ups*, contacts made with MLG and registered in their system regarding Sixties Scoop totals 4,546. I know from talking to many people that there is interest understandably in receiving the money that each of us hope to receive and my expectation is that a great many additional people will also make contact with MLG if and after this Settlement is approved as people seek the available compensation. My expectation is that many thousands of additional people will make contact and require assistance, all of which will be time consuming over the future and some people will require a great deal of assistance.

159. In my particular case, although this may not apply to everyone, I also understand from Tony Merchant and do verily believe and it is significant to me that MLG intends to pursue further litigation against the provinces and I hope to receive further compensation for having been sexually and psychologically abused and on behalf of other Class Members who are not receiving compensation for loss of culture, non registered Indians, to use the word in the legislation, and Métis may also recover against the provinces including against the Province of Saskatchewan where I am the proposed representative plaintiff and intend to continue in that role.

160. Moreover, MLG work in a variety of ways will be significant.

161. Tony Merchant's continued work on the Board of Indigenous Spirit.

162. Mr. Merchant's continued work on the Exceptions Committee.

163. As indicated, Tony Merchant's and the work of others pursuing the proceedings in each of the provinces where a great deal of work will be necessary because each have provincial proceedings and MLG will proceed in Newfoundland and Labrador, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia, with the intention of proceedings in the North. This should be considered in two ways.

164. For certain on fee approval in this action, there is a great deal of follow-up work that will be necessary by MLG lawyers including travel and disbursements, *even if* MLG were simply ending those proceedings in all of the provinces.

165. But instead MLG intends to pursue the proceedings in the provinces, this ought to be considered as a part of the approval. All of the settling Plaintiffs view it as a benefit to the class that MLG intends to seek further recovery from the provinces.

166. I consider the fee arrangement with MLG and others to be fair and favourable to me and my fellow Class Members. I would not have been in a position to prosecute this litigation had MLG not been prepared to act on a contingency basis.

SWORN BEFORE ME at :
Saskatoon, Saskatchewan, this :
9th day of April, 2018 :
Murchev :
A COMMISSIONER FOR OATHS in :
and for the Province of Saskatchewan. :
~~My Commission Expires.~~ :
Or Being a Solicitor :

Maggie-Blue Waters :
MAGGIE BLUE WATERS :

Exhibit A

This is Exhibit "A" as referred to in
the affidavit of Maggie Blue Waters
sworn before me this 9th day of
April A.D. 2018

Meredith

A Commissioner for Oaths

in and for

the Province of Saskatchewan

My Commission expires

Being a Solicitor

	Case Name	Citation	Lawyers Involved
1.	A. (M.) v. Canada (Attorney General)	2001 SKQB 504	E.F. Anthony Merchant, Q.C., Patrick G. Alberts, Michael D. Nolin
2.	A. (M.) v. Canada (Attorney General)	2003 SKCA 2	E.F. Anthony Merchant, Q.C., Patrick Alberts
3.	Adam v. Canada (Indian Affairs)	2000 ABQB 1017	Tom Stepper, Jane Ann Summers, Graham Neill
4.	Adams v. Canadian Tobacco Manufacturer's Council	2009 SKQB 387	Merchant Law Group LLP
5.	Adams v. Canadian Tobacco Manufacturers' Council	2010 SKQB 308	E.F. Anthony Merchant, Q.C.
6.	Ahlquist v Glaxosmithkline Consumer Healthcare Inc.	2015 SKQB 192	Anthony Tibbs
7.	Albilta c. Kimberly Clark inc.	2011 QCCS 14	David Assor
8.	Albilta c. Kimberly Clark inc.	2011 QCCS 897	David Assor
9.	Albilta c. Kimberly-Clark Inc.	2010 QCCS 5196	David Assor
10.	Alves c. My Travel Affiliates Inc.	2005 CanLII 40694 (QC CS)	Owen Falquero
11.	Alves v Frist Choice Canada Inc	2010 SKQB 104	E.F. Anthony Merchant, Q.C., Casey Churko
12.	Alves v Frist Choice Canada Inc	2011 SKCA 118	E.F. Anthony Merchant, Q.C., Casey Churko
13.	Alves v Red Seal Vacations Inc.	2012 CanLII 22165	Merchant Law Group LLP
14.	Alves v. Mytravel Canada Holidays Inc.	2007 CanLII 46238 (ONSC)	Patrick Alberts
15.	Alves v. Mytravel Canada Holidays Inc.	2009 SKQB 517	E.F. Anthony Merchant, Q.C.
16.	Alves v. Mytravel Canada Holidays Inc.	2009 SKQB 518	E.F. Anthony Merchant, Q.C.
17.	Alves v. Mytravel Canada Holidays Inc.	2009 SKQB 77	E.F. Anthony Merchant, Q.C.
18.	Ammazzini v Anglo American PLC	2013 SKQB 350	E.F. Anthony Merchant, Q.C.
19.	Ammazzini v Anglo American PLC	2013 SKQB 350	E.F. Anthony Merchant, Q.C.
20.	Ammazzini v Anglo American PLC	2016 SKCA 141	E.F. Anthony Merchant, Q.C.
21.	Ammazzini v Anglo American PLC	2016 SKCA 164	E.F. Anthony Merchant, Q.C., Iqbal Brar
22.	Ammazzini v Anglo American PLC	2016 SKCA 73	E.F. Anthony Merchant, Q.C., Iqbal Brar
23.	Ammazzini v Anglo American PLC	2016 SKQB 53	E.F. Anthony Merchant, Q.C., Casey Churko, Anthony Tibbs, Iqbal Brar, J. Orenstein
24.	Anstead v Saskatchewan Medical Association	2013 SKQB 185	E.F. Anthony Merchant, Q.C.
25.	Anstead v Saskatchewan Medical Association	2013 SKQB 185	E.F. Anthony Merchant, Q.C.

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	Case Name	Citation	Lawyers Involved
26.	Anstead v Saskatchewan Medical Association	2014 SKQB 205	E.F. Anthony Merchant, Q.C.
27.	Anstead v Saskatchewan Medical Association	2014 SKQB 406	E.F. Anthony Merchant, Q.C., Casey Churko
28.	Anstead v Saskatchewan Medical Association	2015 SKCA 19	E.F. Anthony Merchant, Q.C.
29.	Anstead v Saskatchewan Medical Association	2016 SKCA 143	E.F. Anthony Merchant, Q.C., Jonathan Martin
30.	Attorney General of Canada v. Sarrazin	2017 QCCA 1485	Erik Lowe
31.	Aubichon v. Canada (Attorney General)	2007 SKQB 406	E.F. Anthony Merchant, Q.C.
32.	Aussant v. Canada (Minister of Health and Welfare)	2002 FCT 1308	Richard Yaholnitsky
33.	Banadyga v Wal-Mart Canada Corp	2016 SKCA 405	E.F. Anthony Merchant, Q.C.
34.	Bancroft-Snell v. Visa Canada Corporation	2016 ONCA 896	Anthony Tibbs, Venessa Vuia
35.	Batten v Boehringer Ingelheim (Canada) Ltd.	2017 ONSC 53	Venessa Vuia, Bryan C. McPhadden, Karol Pawlina
36.	Baumung v Bayer Inc	2016 SKQB 63	E.F. Anthony Merchant, Q.C., Linh Pham
37.	Baumung v Bayer Inc.	2016 SKQB 221	E.F. Anthony Merchant, Q.C., Linh Pham
38.	Baxter v. Canada (Attorney General)	2006 CanLII 41673 (ON SC)	Anthony F. Merchant, Q.C., Evatt Merchant, Jane Ann Summers
39.	Bear v. Merck Frosst Canada & Co.	2010 SKQB 284	E.F. Anthony Merchant, Q.C., Casey Churko
40.	Bear v. Merck Frosst Canada & Co.	2011 SKCA 152	E.F. Anthony Merchant, Q.C., Casey Churko
41.	Bélair c. Bayer Inc.	2012 QCCS 5497	Owen Falquero, Federico Tyrawskyj
42.	Bell Aliant Regional Communications Limited Partnership v. Frey	2010 SKCA 33	E.F. Anthony Merchant, Q.C., Casey Churko, Nicholas Robinson
43.	Bell Aliant Regional Communications Limited Partnership v. Frey	2010 SKCA 37	E.F. Anthony Merchant, Q.C., Casey Churko, Nicholas Robinson
44.	Bell Mobility Inc. v Chatfield	2017 SKCA 10	E.F. Anthony Merchant, Q.C. and Anthony Tibbs
45.	Bethel v. Black	2006 SKQB 92	Richard S. Yaholnitsky Casey R. Churko (student-at-law)
46.	Bishay Estate v. Maple Leaf Foods Inc.	2009 SKQB 326	E.F. Anthony Merchant, Q.C.

	Case Name	Citation	Lawyers Involved
47.	Boehringer Ingelheim (Canada) Ltd. v. Englund	2007 SKCA 62	E.F. Anthony Merchant, Q.C., Casey Churko
48.	Bordoff c. Gestion d'actifs CIBC inc./CIBC Asset Management Inc.	2010 QCCS 4841	David Assor, Owen Falquero
49.	Bosum c. Canada (Attorney General)	2006 QCCS 1370	Owen Falquero
50.	Bosum c. Canada (Attorney General)	2006 QCCS 3158	Owen Falquero
51.	Bosum c. Canada (Attorney General)	2006 QCCS 5794	Owen Falquero
52.	Bosum c. Canada (Attorney General)	2006 QCCS 7304	Merchant Law Group LLP
53.	Brittin v Canada (Human Resources and Skills Development)	2013 SKQB 214	E.F. Anthony Merchant, Q.C.,
54.	Brittin v Canada (Human Resources and Skills Development)	2013 SKQB 318	E.F. Anthony Merchant, David Clarke
55.	Brooks v. Canada (Attorney General)	2008 SKQB 433	E.F. Anthony Merchant, Q.C., Patrick G. Alberts, Casey Churko
56.	Brooks v. Canadian Pacific Railway Ltd.	2007 SKQB 247	E.F. Anthony Merchant, Q.C.
57.	Brown v. Canadian Imperial Bank of Commerce	2012 ONSC 482	Eli Karp
58.	Brown v. Canadian Imperial Bank of Commerce	2013 ONSC 1284	Eli Karp
59.	Brunet c. Zimmer of Canada Ltd.	2012 QCCA 2143	Federico Tyrawskyj, Owen Falquero
60.	Brunet c. Zimmer of Canada Ltd.	2012 QCCS 1461	Federico Tyrawskyj
61.	Bull v Canadian National Railway Company	2013 SKQB 141	E.F. Anthony Merchant, Q.C.
62.	Bulmer v Nissan Motor Co	2015 SKCA 16	E.F. Anthony Merchant, Q.C.
63.	Campbell v. Canada (Attorney General)	2008 FC 353	E.F. Anthony Merchant, Q.C., Casey Churko, Owen Falquero
64.	Campbell v. Canada (Attorney General)	2009 FC 30	E.F. Anthony Merchant, Q.C., Casey Churko
65.	Campbell v. Canada (Attorney General)	2010 FC 279	E.F. Anthony Merchant, Q.C., Casey Churko
66.	Campbell v. Canada (Attorney General)	2012 FCA 45	E.F. Anthony Merchant, Q.C.
67.	Canada (Attorney General) v. H. L.	2002 SKCA 131	E.F. Anthony Merchant, Q.C.
68.	Canada (Attorney General) v. R. J. G.	2002 SKCA 132	E.F. Anthony Merchant, Q.C.
69.	Canada v Scheuer	2016 FCA 7	E.F. Anthony Merchant, Q.C., Casey Churko
70.	Chapman v. Canada (Health and Welfare Canada)	2007 SKQB 151	Richard Yaholnitsky

	Case Name	Citation	Lawyers Involved
71.	Charlton v. Abbott Laboratories, Ltd.	2013 BCSC 1712	E.F. Anthony Merchant, Q.C., Aroosha Sadaghianloo, Casey Churko
72.	Charlton v. Abbott Laboratories, Ltd.	2013 BCSC 21	E.F. Anthony Merchant, Q.C., Darren Williams, Aroosha Sadaghianloo
73.	Chatfield v Bell Mobility Inc	2013 SKCA 117	E.F. Anthony Merchant, Q.C.
74.	Chatfield v Bell Mobility Inc	2013 SKCA 117	E.F. Anthony Merchant, Q.C.
75.	Chatfield v Bell Mobility Inc	2013 SKQB 293	E.F. Anthony Merchant, Q.C.
76.	Chatfield v Bell Mobility Inc	2013 SKQB 317	E.F. Anthony Merchant, Q.C.
77.	Chatfield v Bell Mobility Inc	2013 SKQB 372	E.F. Anthony Merchant, Q.C.
78.	Chatfield v Bell Mobility Inc	2013 SKQB 386	E.F. Anthony Merchant, Q.C.
79.	Chatfield v Bell Mobility Inc	2017 SKCA 10	E.F. Anthony Merchant, Q.C., Anthony Tibbs
80.	Chatfield v Saskatchewan Telecommunication	2014 SKCA 29	E.F. Anthony Merchant, Q.C., Linh Pham
81.	Cole v. Prairie Centre Credit Union Ltd.	2007 SKQB 171	Patrick G. Alberts
82.	Cole v. Prairie Centre Credit Union Ltd.	2007 SKQB 184	Patrick G. Alberts
83.	Cole v. Prairie Centre Credit Union Ltd.	2007 SKQB 330	E.F. Anthony Merchant, Q.C., Patrick G. Alberts
84.	Collins v. Bce Inc.	2010 SKQB 74	E.F. Anthony Merchant, Q.C., C.R. Churko, D. DeMaria
85.	CP v Saskatchewan	2014 SKQB 416	E.F. Anthony Merchant, Q.C., Anthony Tibbs, Iqbal Brar, Jonathan Martin
86.	Crown & Hand Pub Ltd. v. Bank of America	2013 SKQB 348	Merchant Law Group LLP
87.	Currie v Merck Canada Inc	2013 SKQB 349	E.F. Anthony Merchant, Q.C.
88.	Dembrowski v Bayer Inc	2015 SKQB 286	E.F. Anthony Merchant, Q.C., Casey Churko
89.	Dembrowski v Bayer Inc	2016 SKQB 324	E.F. Anthony Merchant, Q.C., Shane Gardner
90.	Demers c. Yahoo! Inc.,	2017 QCCS 4154	Erik Lowe
91.	Des Côteaux c. Menu Foods Genpar Ltd.	2008 QCCS 6561	Owen Falquero
92.	Dieudonné c. Apple	2012 QCCS 6248	Owen Falquero, Federico Tyrawskyj
93.	Dinsdal v CR Bard Inc.	2014 SKQB 361	E.F. Anthony Merchant, Q.C.
94.	Dixon v. Stork Craft Manufacturing Inc.	2013 BCSC 1117	Darren Williams, Aroosha Sadaghianloo
95.	Dobbie v. Canada (Attorney General)	2006 FC 552	E.F. Anthony Merchant, Q.C., Casey Churko
96.	Dow Chemical Company v. Ring, Sr.	2010 NLCA 20	John Legge, Casey Churko

	Case Name	Citation	Lawyers Involved
97.	Dow Chemical Company v. Ring, Sr.	2010 NLCA 30	John Legge, Casey Churko
98.	Drew v Walmart Canada Inc.	2016 ONSC 8067	Venessa Vuia
99.	Driediger v. Ashley Furniture Industries Inc.	2010 SKQB 437	E.F. Anthony Merchant, Q.C., Nicholas Robinson
100.	Drover v BCE Inc	2013 BCSC 1341	E.F.A. Merchant, Q.C.
101.	Drover v BCE Inc	2013 BCSC 50	E.F. Anthony Merchant, Q.C.
102.	Drover v BCE Inc	2013 BCSC 50	E.F.A. Merchant, Q.C.
103.	Drover v BCE Inc.	2015 BCCA 132	E.F. Anthony Merchant, Q.C.
104.	Dunlop c. Stryker Canada, l.p.	2012 QCCS 1777	Owen Falquero, Federico Tyrawskij
105.	Dunlop c. Stryker Canada, l.p.	2013 QCCS 3837	Owen Falquero, Federico Tyrawskij
106.	Duong v. Stork Craft Manufacturing Inc.	2011 ONSC 2534	Nicholas Robinson
107.	Duong v. Stork Craft Manufacturing Inc.	2011 ONSC 3563	Nicholas Robinson
108.	Duong v. Stork Craft Manufacturing Inc.	2011 ONSC 5618	Nicholas P. Robinson
109.	Duong v. Stork Craft Manufacturing Inc.	2011 ONSC 6420	Nicholas P. Robinson
110.	Duzan v. Glaxosmithkline, Inc	2009 SKQB 230	E.F. Anthony Merchant, Q.C.
111.	Duzan v. Glaxosmithkline, Inc	2011 SKQB 118	E.F. Anthony Merchant, Q.C., Casey Churko
112.	Duzan v. Glaxosmithkline, Inc	2010 SKQB 264	E.F. Anthony Merchant, Q.C., Casey Churko
113.	Duzan v. Glaxosmithkline, Inc.	2009 SKQB 336	E.F. Anthony Merchant, Q.C.
114.	Eagle Speaker v. Canada	2000 ABQB 1016	Tom Stepper, Jane-Ann Summers
115.	Englund v. Pfizer Canada Inc.	2006 SKQB 6	E.F. Anthony Merchant, Q.C.
116.	Field v Glaxosmithkline Inc	2011 SKQB 16	E.F. Anthony Merchant, Q.C., Casey Churko
117.	Field v Glaxosmithkline Inc	2011 SKQB 17	E.F. Anthony Merchant, Q.C., Casey Churko
118.	Field v Glaxosmithkline Inc	2011 SKQB 83	E.F. Anthony Merchant, Q.C., Casey Churko
119.	Field v Glaxosmithkline Inc	2011 SKQB 84	E.F. Anthony Merchant, Q.C., Casey Churko
120.	Field v Glaxosmithkline Inc	2013 SKQB 113	E.F. Anthony Merchant, Q.C.
121.	Field v Glaxosmithkline Inc.	2013 SKQB 113	E.F. Anthony Merchant, Q.C.
122.	Filson v Canada (Attorney General)	2015 SKCA 80	E.F. Anthony Merchant, Q.C.
123.	Fontaine et al v Canada (Attorney General)	2010 BCSC 1208	E.F. Anthony Merchant, Q.C.
124.	Fontaine et al v Canada (Attorney General)	2012 BCSC 1671	J. Summers
125.	Fontaine et al v Canada (Attorney General)	2012 BCSC 839	J. Summers

	Case Name	Citation	Lawyers Involved
126.	Fontaine et al v Canada (Attorney General)	2014 MBQB 113	Evatt F.A. Merchant
127.	Fontaine v. Duboff Edwards Haight & Schachter	2012 ONCA 471	E.F. Anthony Merchant Q.C.
128.	Frey v Bell Mobility Inc	2010 SKCA 30	E.F. Anthony Merchant, Q.C., Casey Churko, Nicholas Robinson
129.	Frey v Bell Mobility Inc	2010 SKCA 36	E.F. Anthony Merchant, Q.C., Casey Churko, Nicholas Robinson
130.	Frey v Bell Mobility Inc	2012 CarswellSask 52	E.F. Anthony Merchant, Q.C.
131.	Frey v Bell Mobility Inc	2012 SKQB 407	E.F. Anthony Merchant, Q.C.
132.	Frey v Bell Mobility Inc	2013 SKCA 26	E.F. Anthony Merchant, Q.C.
133.	Frey v Bell Mobility Inc.	2006 SKQB 328	E.F. Anthony Merchant, Q.C., Evatt F.A. Merchant
134.	Frey v Bell Mobility Inc.	2006 SKQB 329	E.F. Anthony Merchant, Q.C., Evatt F.A. Merchant, J.D. Roberts
135.	Frey v Bell Mobility Inc.	2006 SKQB 330	E.F. Anthony Merchant, Q.C., Evatt F.A. Merchant, J.D. Roberts
136.	Frey v Bell Mobility Inc.	2006 SKQB 331	E.F. Anthony Merchant, Q.C., Evatt F.A. Merchant
137.	Frey v Bell Mobility Inc.	2007 SKQB 328	E.F. Anthony Merchant, Q.C., Casey Churko
138.	Frey v Bell Mobility Inc.	2008 SKQB 79	E.F. Anthony Merchant, Q.C., Casey Churko
139.	Frey v Bell Mobility Inc.	2009 SKQB 165	E.F.A. Merchant, Q.C., C.R. Churko, D. Demaria
140.	Frey v Bell Mobility Inc.	2010 SKCA 38	E.F. Anthony Merchant, Q.C., Casey Churko, Nicholas Robinson
141.	Frey v Bell Mobility Inc.	2013 SKCA 26	E.F. Anthony Merchant
142.	Frey v Telus Corporation	2010 SKCA 32	E.F. Anthony Merchant, Q.C., Casey Churko, Nicholas Robinson
143.	Frey v. Saskatchewan Telecommunications	2010 SKCA 35	E.F. Anthony Merchant, Q.C., Casey Churko, Nicholas Robinson
144.	G. (R.J.) v. Canada (Attorney General)	2002 SKQB 405	E.F. Anthony Merchant, Q.C.
145.	Gardypie v. Canada (Attorney General)	2005 CarswellSask 138	Merchant Law Group LLP

	Case Name	Citation	Lawyers Involved
146.	Gaudette c. Apple Inc.	2018 QCCS 1191	Erik Lowe
147.	Gauthier c. United Parcel Service of Canada Ltd.	2013 QCCS 1212	Owen Falquero, Federico Tyravskyj
148.	Gillis v. BCE Inc.	2014 NSSC 279	Evatt Merchant, Casey
149.	Graham v Hoffman-la Roche Limited	2014 SKQB 304	E.F. Anthony Merchant, Q.C.
150.	Graham v Hoffman-la Roche Limited	2014 SKQB 326	E.F. Anthony Merchant, Q.C.
151.	Grasby et al v. Merck Frosst Canada Ltd. et al	2007 MBQB 42	Eugene Meehan, Q.C., Pradeep Chand appeared as agent for Merchant Law Group LLP
152.	Grasby et al v. Merck Frosst Canada Ltd. et al	2007 MBQB 97	Patrick Alberts, Norm Rosenbaum
153.	H.L. v. Canada (Attorney General)	2005 SCC 25	E.F. Anthony Merchant, Q.C., Graham Neill
154.	Hafichuk-Walkin et al. v. BCE Inc. et al.	2014 MBQB 175	Evatt F.A. Merchant, Casey Churko
155.	Hafichuk-Walkin et al. v. BCE Inc. et al.	2015 MBQB 30	Evatt F.A. Merchant, Casey Churko
156.	Hall v. General Motors of Canada Limited	2009 SKQB 312	E.F.A. Merchant, Q.C.
157.	Harvey v Western Canada Lottery Corporation	2015 SKQB 102	Anthony E.F. Merchant
158.	Hazan c. Microsoft Canada Co.	2010 QCCS 4212	David Assor, Christiana Paschalids
159.	Hazan c. Microsoft Canada Co.	2010 QCCS 4214	David Assor, Christiana Paschalids
160.	Helen Roussy v. Red Seal Vacations Inc.	2012 CanLII 22064	Merchant Law Group LLP
161.	Horner v. Saskatchewan	2008 SKQB 273	Patrick G. Alberts
162.	Horner v. Saskatchewan	2009 SKQB 270	Patrick G. Alberts
163.	Indian Residential Schools (Re)	2000 CanLII 28275 (AB QB)	Tom Stepper, Jane-Ann Summers, Graham Neil
164.	Indian Residential Schools (Re)	2003 ABQB 449	E.F. Anthony Merchant, Q.C., Graham Neill, Tom Stepper, Jane-Ann Summers, Michael Mantyka
165.	Jackson v Canadian National Railway	2012 ABQB 652	E.F.A. Merchant, Q.C., C.R. Churko, A. Tibbs
166.	Jackson v Canadian National Railway	2013 ABCA 440	E.F. Anthony Merchant, P.Bates, Casey Churko
167.	Joel v. Menu Foods Genpar Limited	2007 BCSC 1248	E. F. Anthony Merchant, Q.C., Darren Williams
168.	Joel v. Menu Foods Genpar Limited	2007 BCSC 1482	E. F. Anthony Merchant, Q.C., Darren Williams

	Case Name	Citation	Lawyers Involved
169.	K. M. v. Canada (Attorney General)	2004 SKQB 287	E.F. Anthony Merchant, Q.C., Jeffery W. Deagle
170.	K. M. v. Canada (Attorney General)	2006 SKQB 238	E.F. Anthony Merchant, Q.C., Jeffery W. Deagle
171.	Kaiswatum v. Canada (Attorney General)	2003 SKQB 46	E.F. Anthony Merchant, Q.C.,
172.	Knuth v Best Western International Inc.	2016 SKQB 224	E.F. Anthony Merchant, Q.C., Jonathan Martin
173.	L. (G.) v. Canada (Attorney General)	2003 SKQB 476	E.F. Anthony Merchant, Q.C.,
174.	L. (G.) v. Canada (Attorney General)	2004 SKCA 137	E.F. Anthony Merchant, Q.C.,
175.	L. (H.) v. Canada (Attorney General)	2001 SKQB 233	E.F. Anthony Merchant, Q.C., Michael R. Mantyka, Michael D. Nolan
176.	L. (H.) v. Canada (Attorney General)	2001 SKQB 395	E.F. Anthony Merchant, Q.C.,
177.	L. (H.) v. Canada (Attorney General)	2003 SKCA 78	E.F. Anthony Merchant, Q.C.
178.	Labrecque c. General Motors of Canada Ltd.	2011 QCCA 617	David Assor
179.	Labrecque c. General Motors of Canada Ltd.	2011 QCCS 266	Owen Falquero
180.	Labrecque c. General Motors of Canada Ltd.	2011 QCCS 6702	Owen Falquero
181.	Labrecque c. General Motors of Canada Ltd.	2012 QCCS 4746	Owen Falquero, Federico Tyrawskyj
182.	Larose c. National Bank of Canada	2009 QCCS 2155	David Assor
183.	Larose c. National Bank of Canada	2010 QCCS 48	David Assor, Owen Falquero
184.	Larose c. National Bank of Canada	2010 QCCS 5385	David Assor, Owen Falquero
185.	Lavoie c. Abbott Medical Optics Inc. (Advanced Medical Optics Inc.)	2012 QCCS 6147	Owen Falquero, Federico Tyrawskyj
186.	Lebrasseur c. Hoffmann-La Roche Ltd.	2011 QCCS 5457	Owen Falquero, Christianna Paschalidis
187.	Lebrasseur c. Hoffmann-La Roche Ltd.	2012 QCCS 5671	Owen Falquero, Federico Tyrawskyj
188.	Lebrasseur c. Hoffmann-La Roche Ltd.	2012 QCCS 6262	Owen Falquero, Federico Tyrawskyj
189.	Lebrasseur c. Hoffmann-La Roche Ltd.	2013 QCCS 3024	Owen Falquero, Federico Tyrawskyj
190.	Leclerc c. Merck Canada Inc.	2012 QCCS 7100	Owen Falquero, Federico Edgardo Tyrawskyj
191.	Letarte c. Bayer Inc.	2018 QCCS 873	Erik Lowe
192.	Magill v. Expedia, Inc.	2013 ONSC 683	Eli Karp
193.	Mazzonna c. DaimlerChrysler Financial Services Canada Inc./Services financiers DaimlerChrysler inc.	2009 QCCS 1929	Owen Falquero, David Assor (Spiegel Sohmer Inc.)

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	Case Name	Citation	Lawyers Involved
194.	Mazzonna c. DaimlerChrysler Financial Services Canada Inc./Services financiers DaimlerChrysler inc.	2010 QCCS 5225	Owen Falquero, Christianna Paschalidis
195.	McCallum-Boxe v Sony	2015 ONSC 6896	Casey Churko, Linh Pham
196.	Medvid v Alberta (Health and Wellness)	2009 SKQB 198	E.F. Anthony Merchant, Q.C.,
197.	Medvid v Alberta (Health and Wellness)	2009 SKQB 222	E.F. Anthony Merchant, Q.C.,
198.	Medvid v Alberta (Health and Wellness)	2010 SKQB 22	E.F. Anthony Merchant, Q.C., Nicholas Robinson
199.	Medvid v Alberta (Health and Wellness)	2012 SKCA 48	E.F.A. Merchant, Q.C., Nicholas Robinson
200.	Medvid v Alberta (Health and Wellness)	2012 SKCA 49	E.F. Anthony Merchant, Q.C., Nicholas Robinson
201.	Melley c. Toyota Canada Inc.	2011 CarswellQue 13342	Merchant Law Group LLP
202.	Melley c. Toyota Canada Inc.	2011 CarswellQue 8934	Owen Falquero
203.	Melley c. Toyota Canada Inc.	2011 QCCS 1229	David Assor, Owen Falquero
204.	Melvin c. Maple Leaf Foods Inc.	2009 QCCS 1378	Owen Falquero
205.	Melvin c. Maple Leaf Foods Inc.	2012 QCCS 166	Merchant Law Group LLP
206.	Merchant Law Group LLP v Slusar	2013 SKQB 204	E.F. Anthony Merchant, Q.C.
207.	Merchant Law Group v. Canada (Canada Revenue Agency)	2008 FC 1371	E.F. Anthony Merchant, Q.C., Casey Churko
208.	Merchant Law Group v. Canada (Revenue Agency)	2009 FC 755	Casey Churko
209.	Merchant Law Group v. Canada Revenue Agency	2010 FCA 184	E.F. Anthony Merchant, Q.C., Casey Churko
210.	Merck Frosst Canada Ltd. v. Wuttunee	2007 SKQB 29	E.F. Anthony Merchant, Q.C., Casey Churko
211.	Merck Frosst Canada Ltd. v. Wuttunee	2008 SKCA 125	E.F. Anthony Merchant, Q.C., Casey Churko
212.	Merck Frosst Canada Ltd. v. Wuttunee	2008 SKCA 79	E.F. Anthony Merchant, Q.C., Casey Churko
213.	Merck Frosst Canada Ltd. v. Wuttunee	2008 SKCA 80	E.F. Anthony Merchant, Q.C., Casey Churko
214.	Merck Frosst Canada Ltd. v. Wuttunee	2008 SKQB 22	E.F. Anthony Merchant, Q.C., Casey Churko
215.	Merck Frosst Canada Ltd. v. Wuttunee	2008 SKQB 229	E.F. Anthony Merchant, Q.C., Casey Churko
216.	Merck Frosst Canada Ltd. v. Wuttunee	2008 SKQB 78	E.F. Anthony Merchant, Q.C., Casey Churko
217.	Merck Frosst Canada Ltd. v. Wuttunee	2009 CanLII 57570 (SCC)	Merchant Law Group LLP

	Case Name	Citation	Lawyers Involved
218.	Merck Frosst Canada Ltd. v. Wuttunee	2009 CarswellSask 587	Merchant Law Group LLP
219.	Merck Frosst Canada Ltd. v. Wuttunee	2009 SKCA 43	E.F. Anthony Merchant, Q.C., Casey Churko
220.	Microcell Communications Inc v Frey	2011 SKCA 136	E.F. Anthony Merchant, Q.C., Casey Churko
221.	Microcell Communications Inc. et al. V. Mark Frey et al.	2012 CanLII 36260 (SCC)	Merchant Law Group LLP
222.	Microcell Communications Inc. v. Frey	2010 SKCA 31	E.F. Anthony Merchant, Q.C., Casey Churko, Nicholas Robinson
223.	Miller v Purdue Pharma Inc.	2014 SKQB 91	E.F. Anthony Merchant, Q.C., Carmen Khuu
224.	Miller v Purdue Pharma, Inc	2013 SKQB 193	E.F. Anthony Merchant, Q.C., David Clarke
225.	Mouaikel c. Facebook	2013 QCCS 4176	Owen Falquero, Federico Tyrawskyj
226.	MTS Communications Inc. v. Frey	2010 SKCA 34	E.F. Anthony Merchant, Q.C., Casey Churko, Nicholas Robinson
227.	Neale c. Groupe Aeroplan Inc	2012 QCCS 902	Owen Falquero, David Assor, Christinna Paschalidis
228.	Neale c. Groupe Aeroplan Inc	2013 QCCS 261	Merchant Law Group LLP
229.	Nelson v. Merck; Harry et al v. Merck	2006 BCSC 1549	E.F. Anthony Merchant, Q.C.
230.	Northwest v. Canada (Attorney General)	2006 ABQB 902	J.A. Summers
231.	Nova c. Appel Inc.	2012 QCCS 6410	Owen Falquero, Federico Tyrawskyj
232.	Pappas v BCE Inc	2015 ABQB 435	E.F. Anthony Merchant
233.	Pederson v Saskatchewan (Minister of Social Service)	2015 SKCA 87	E.F. Anthony Merchant, Iqbal Brar
234.	Pederson v Saskatchewan (Minister of Social Service)	2016 SKCA 142	E.F. Anthony Merchant, Q.C., Anthony Tibbs, Iqbal Brar
235.	Pederson v Saskatchewan (Minister of Social Services)	2018 SKCA 4	E.F. Anthony Merchant, Q.C. and Iqbal Brar
236.	Perdikaris v Purdue Pharma Inc.	2017 SKQB 287	E.F. Anthony Merchant, Q.C.
237.	Pfizer inc. c. Sifneos	2017 QCCA 1050	Roch Dupont
238.	Precision Contractors Ltd v Government of Saskatchewan	2011 SKQB 407	E.F. Anthony Merchant, Q.C., Casey Churko
239.	Precision Contractors Ltd v Government of Saskatchewan	2012 SKCA 57	E.F. Anthony Merchant, Q.C., Casey Churko
240.	Precision Contractors Ltd v Government of Saskatchewan	2012 SKCA 96	E.F. Anthony Merchant, Q.C.,

	Case Name	Citation	Lawyers Involved
241.	Precision Contractors Ltd v Government of Saskatchewan	2013 SKCA 57	E.F. Anthony Merchant, Q.C.
242.	Price c. Mattel Canada inc.	2011 QCCS 2903	David Assor, Owen Falquero
243.	Quatell v. Attorney General of Canada	2006 BCSC 1840	E.F. Anthony Merchant, Q.C.
244.	Quenneville v. Volkswagen	2016 ONSC 959	Anthony Tibbs, Chris Simoes
245.	R v Filson	2014 SKQB 164	E.F. Anthony Merchant, Q.C., Casey Churko, Iqbal Brar
246.	R v Horstman	2014 SKQB 114	E.F. Anthony Merchant, Q.C., Roch Dupont
247.	R. J. G. v. Canada (Attorney General)	2004 SKCA 102	E.F. Anthony Merchant, Q.C., Jeffery W. Deagle
248.	R. v. Brooks	2009 SKQB 509	E.F. Anthony Merchant, Q.C., Casey Churko
249.	R. v. Brooks	2009 SKQB 54	E.F. Anthony Merchant, Q.C., Patrick G. Alberts, Casey Churko
250.	R. v. Brooks	2009 SKQB 66	E.F. Anthony Merchant, Q.C., Patrick G. Alberts, Casey Churko
251.	R. v. Brooks	2009 SKQB 68	E.F. Anthony Merchant, Q.C., Patrick G. Alberts, Casey Churko
252.	R. v. Brooks	2009 SKQB 75	E.F. Anthony Merchant, Q.C., Patrick G. Alberts, Casey Churko
253.	R. v. Brooks	2010 SKCA 55	E.F. Anthony Merchant, Q.C., Casey Churko
254.	R. v. Churchill Spurr	2009 SKQB 478	E.F. Anthony Merchant, Q.C., Casey R. Churko, Stephen A.J. Osborne, Daniel DeMaria
255.	Re Indian Residential Schools	2002 ABQB 308	E.F. Anthony Merchant, Q.C., Graham Neill, Tom Stepper, Jane-Ann Summers
256.	Red Seal Vacations Inc v Alves	2011 SKCA 117	E.F. Anthony Merchant, Q.C., Casey Churko
257.	Renova Holdings Ltd. v. Canadian Wheat Board	2005 FC 386	E.F. Anthony Merchant, Q.C.
258.	Renova Holdings Ltd. v. Canadian Wheat Board	2006 FC 1505	Richard S. Yaholnitsky
259.	Renova Holdings Ltd. v. Canadian Wheat Board	2006 FC 71	E.F. Anthony Merchant, Q.C., Casey R. Churko, Richard S. Yaholnitsky

	Case Name	Citation	Lawyers Involved
260.	Renova Holdings Ltd. v. Canadian Wheat Board	2009 FC 129	Richard S. Yaholnitsky
261.	Residential Schools (Re)	2000 ABQB 45	Tom Stepper, Jane-Ann Summers, Graham Neil
262.	Ring v. Canada (Attorney General)	2007 NLTD 146	E.F. Anthony Merchant, Q.C.
263.	Ring v. Canada (Attorney General)	2007 NLTD 213	John Legge, Casey Churko
264.	Ring v. Canada (Attorney General)	2008 NLTD 168	John Legge, Casey Churko
265.	Ring v. Canada (Attorney General)	2009 NLCA 45	John Legge, Casey Churko
266.	Ring v. Canada (Attorney General)	2009 NLTD 39	John Legge, Casey Churko
267.	Ring v. Canada (Attorney General)	2010 CarswellNfld 171	E.F. Anthony Merchant, Q.C.
268.	Ring v. Canada (Attorney General)	2010 CarswellNfld 304	Merchant Law Group LLP
269.	Ring v. Canada (Attorney General)	Unreported Oral Decision of Barry J. re Carriage	E.F. Anthony Merchant, Q.C.
270.	Roberts Properties Inc v Saskatchewan Power Corporation	2014 SKQB 245	E.F. Anthony Merchant, Q.C.
271.	Roberts Properties Inc v Saskatchewan Power Corporation	2016 SKCA 31	E.F. Anthony Merchant, Q.C.
272.	Roberts Properties Inc. v Saskatchewan Power Corporation	2016 SKCA 31	E.F. Anthony Merchant, Q.C.
273.	Rosen v. BMO Nesbitt Burns Inc.	2013 ONSC 2144	Eli Karp
274.	Rosen v. BMO Nesbitt Burns Inc.	2013 ONSC 6356	Eli Karp
275.	Rosetim Investments Inc. v. BCE Inc.	2008 SKQB 440	E.F. Anthony Merchant, Q.C., Evatt F.A. Merchant, Casey Churko
276.	Rosetim Investments Inc. v. BCE Inc.	2008 SKQB 452	E.F. Anthony Merchant, Q.C., Daniel DeMaria
277.	Rosetim Investments Inc. v. BCE Inc.	2010 SKQB 24	E.F. Anthony Merchant, Q.C., Evatt F.A. Merchant, Casey Churko
278.	Rosetim Investments Inc. v. BCE Inc.	2011 SKCA 111	E.F. Anthony Merchant, Q.C.
279.	Rosetim Investments Inc. v. BCE Inc.	2011 SKQB 253	E.F. Anthony Merchant, Q.C., Daniel DeMaria
280.	Ross v. Government of Saskatchewan	2010 SKQB 230	E.F. Anthony Merchant, Q.C.
281.	Ross v. Government of Saskatchewan	2013 SKQB 373	E.F. Anthony Merchant, Q.C.
282.	Ross v Canada (Attorney General)	2018 SKCA 12	E.F. Anthony Merchant, Q.C.
283.	Round v. MacDonald, Dettwiler and Associates Ltd.	2011 BCSC 1416	E. F. Anthony Merchant, Q.C., Darren Williams
284.	Round v. MacDonald, Dettwiler and Associates Ltd.	2012 BCCA 456	E.F.A Merchant, Q.C., A.A. Tibbs

	Case Name	Citation	Lawyers Involved
285.	Roussy v Red Seal Vacations Inc	2011 SKCA 116	E.F. Anthony Merchant, Q.C., Casey R. Churko
286.	Safioles v Saskatchewan	2014 SKQB 260	E.F. Anthony Merchant, Q.C., Aroosha Sadaghianloo
287.	Safioles v Saskatchewan	2015 SKCA 122	E.F. Anthony Merchant, Q.C.
288.	Safioles v Saskatchewan	2015 SKQB 183	E.F. Anthony Merchant, Q.C., Aroosha Sadaghianloo
289.	Sandoff v Loblaw Companies Limited	2015 SKQB 345	E.F. Anthony Merchant, Q.C.
290.	Santella c. Stork Craft Manufacturing Inc.	2011 QCCS 5553	David Assor, Owen Falquero
291.	Sarrazin c. Canada (Attorney General)	2012 QCCS 6072	Owen Falquero, Federico Tyrawskyj
292.	Sarrazin c. Canada (Attorney General)	2013 QCCA 1776	Daniel Chung
293.	Sarrazin c. Quebec (Attorney General)	2013 QCCA 374	Owen Falquero, Federico Tyrawskyj
294.	Sarrazin c. Quebec (Attorney General)	2013 QCCA 720	Federico Tyrawskyj
295.	Schachter v Toyota Canada	2014 QCCS 802	E.F.A. Merchant
296.	Schmidt c. Depuy International Ltd.	2011 QCCA 1133	David Assor, Owen Falquero
297.	Schmidt c. Depuy International Ltd.	2011 QCCS 1533	David Assor
298.	Schmidt c. Johnson & Johnson inc.	2012 QCCA 2132	Owen Falquero, Federico Tyrawskyj
299.	Semple et al v. The Attorney General of Canada et al	2006 MBQB 285	N. Rosenbaum
300.	Settingington v. Merck Frosst Canada Ltd.	2005 CanLII 32570 (ON SC)	Casey Churko
301.	Settingington v. Merck Frosst Canada Ltd.	2006 CanLII 2623	Evatt Merchant, Casey
302.	Sifneos c. Pfizer inc.	2012 QCCS 5772	Owen Falquero, Federico Tyrawskyj
303.	Sifneos c. Pfizer Inc.	2017 QCCS 978	Daniel Chung
304.	Singer v. Schering-Plough Canada Inc	2010 ONSC 1737	Eli Karp
305.	Singer v. Schering-Plough Canada Inc.	2010 ONSC 42	Eli Karp
306.	Singer v. Schering-Plough Canada Inc.	2010 ONSC 6776	Eli Karp
307.	Sirois c. Menu Foods Income Fund	2007 QCCS 5808	Owen Falquero
308.	Sirois c. Menu Foods Income Fund	2008 QCCA 2	Owen Falquero
309.	Sirois c. Menu Foods Income Fund	2008 QCCA 612	Owen Falquero
310.	Sollen v. Boehringer Ingelheim (Canada) Ltd.	2005 CanLII 19771 (ON SC)	E.F. Anthony Merchant, Q.C.
311.	Sollen v. Boehringer Ingelheim (Canada) Ltd.	2008 ONCA 803	John Legge, Casey R. Churko
312.	Sollen v. Pfizer Canada Inc.	2008 CarswellOnt 1258	John Legge, Damon Aujla
313.	Sonego c. Danone Inc.	2012 QCCS 6176	Merchant Law Group LLP
314.	Sonego c. Laboratoire Expanscience	2010 QCCA 1026	David Assor

	Case Name	Citation	Lawyers Involved
315.	Sonego c. Laboratoire Expanscience	2011 QCCS 13	David Assor
316.	Sonego c. Laboratoire Expanscience	2011 QCCS 816	David Assor
317.	Sonego D. Danone inc.	2013 QCCS 2616	David Assor
318.	Sparvier v Lac La Ronge Indian Band	2012 SKCA 94	E.F. Anthony Merchant, Q.C.
319.	Sparvier v. Canada (Attorney General)	2006 SKQB 312	E.F. Anthony Merchant, Q.C., Casey Churko
320.	Sparvier v. Canada (Attorney General)	2006 SKQB 362	E.F. Anthony Merchant, Q.C., Casey Churko
321.	Sparvier v. Canada (Attorney General)	2006 SKQB 533	E.F. Anthony Merchant, Q.C., Casey Churko
322.	Sparvier v. Canada (Attorney General)	2007 SKCA 21	E.F. Anthony Merchant, Q.C., Casey Churko
323.	Sparvier v. Canada (Attorney General)	2007 SKCA 37	E.F. Anthony Merchant, Q.C., Evatt Merchant
324.	Sparvier v. Canada (Attorney General)	2008 SKQB 133	E.F. Anthony Merchant, Q.C., Casey Churko
325.	Sparvier v. Canada (Attorney General)	2011 SKCA 115	E.F. Anthony Merchant, Q.C.
326.	Spicer v Abbott Laboratories	2017 SKQB 271	Anthony A. Tibbs, Iqbal S. Brar and E.F. Anthony Merchant, Q.C.
327.	Spurr v. R.	2010 SKCA 99	E.F. Anthony Merchant, Q.C.
328.	St-Arnaud c. Facebook inc.	2011 QCCS 1506	David Assor
329.	Stevenson Estate v. Bank of Montreal	2009 SKCA 105	E.F. Anthony Merchant, Q.C.
330.	Stevenson Estate v. Bank of Montreal	2009 SKCA 11	E.F. Anthony Merchant, Q.C.
331.	Stevenson Estate v. Bank of Montreal	2009 SKQB 371	E.F. Anthony Merchant, Q.C.
332.	Stevenson Estate v. Bank of Montreal	2011 SKCA 51	E.F. Anthony Merchant, Q.C.
333.	St-Marseille c. GlaxoSmithKline Consumer Healthcare Inc.	2013 QCCS 4856	Daniel Chung
334.	St-Marseille c. Procter & Gamble Inc.	2012 QCCS 1527	Owen Falquero, Federico Tyrawskyj
335.	St-Marseille c. Procter & Gamble Inc.	2012 QCCS 5419	Owen Falquero, Federico Tyrawskyj
336.	St-Marseille c. Procter & Gamble Inc.	2013 QCCS 5044	Daniel Chung
337.	Stout v Bayer Inc.	2017 SKQB 329	E.F. Anthony Merchant, Q.C., and Steven Roxborough
338.	Strohmaier v British Columbia (Attorney General)	2015 BCSC 1189	R. Dupont
339.	Strohmaier v British Columbia (Attorney General)	2014 BCSC 2078	R. Dupont
340.	Strohmaier v British Columbia (Attorney General)	2017 BCSC 2079	E.F.A. Merchant, Q.C. S.J. Roxborough

	Case Name	Citation	Lawyers Involved
341.	Thorpe v. Honda Canada, Inc.	2009 SKQB 488	E.F. Anthony Merchant, Q.C., Casey Churko
342.	Thorpe v. Honda Canada, Inc.	2010 SKQB 136	E.F. Anthony Merchant, Q.C.
343.	Thorpe v. Honda Canada, Inc.	2010 SKQB 39	E.F. Anthony Merchant, Q.C., Casey Churko
344.	Thorpe v. Honda Canada, Inc.	2011 SKQB 72	E.F. Anthony Merchant, Q.C., Casey Churko
345.	T.G. v Government of Saskatchewan	2017 SKQB 146	E.F. Anthony Merchant, Q.C.
346.	Thuchak Estate v Bayer Inc	2016 SKQB 13	E.F. Anthony Merchant, Q.C., Linh Pham, Casey Churko
347.	Toyota Canada Inc.. c. Melley	2011 QCCA 829	David Assor, Owen Falquero
348.	Turner v Bell Mobility	2014 ABQB 36	E.F. Anthony Merchant
349.	Turon v. Abbott Laboratories Ltd.	2011 ONSC 4343	Aroosha Sadaghianloo
350.	Turon v. Abbott Laboratories Ltd.	2011 ONSC 4676	Aroosha Sadaghianloo
351.	Waheed v. GlaxoSmithKline Inc.	2013 ONSC 5792	Note ¶ 2
352.	Wainberg c. Zimmer inc.	2012 QCCS 4276	Owen Falquero, Federico Tyrawskij
353.	Wall Estate v. GlaxoSmithKline Inc.	2010 SKQB 351	E.F. Anthony Merchant, Q.C., Wei Wu
354.	Wall Estate v Glaxosmithkline Inc.	2017 SKQB 149	E.F. Anthony Merchant, Q.C.
355.	Ward v. Attorney General of Canada, Ministry of National Defence	2006 MBQB 212	Howard L. Tennenhouse
356.	Ward v. Canada (Attorney General) et al.	2007 MBCA 123	C.R. Churko, G. Alberts
357.	Waters v. Daimlerchrysler Financial Services Canada Inc.	2009 SKQB 263	E.F. Anthony Merchant, Q.C., Casey R. Churko
358.	Waters v. Daimlerchrysler Financial Services Canada Inc.	2011 SKCA 53	E.F.A. Merchant, Q.C., Casey Churko
359.	Western Canada Lottery Corporation v Harvey	2015 SKCA 75	E.F. Anthony Merchant, Q.C., Iqbal Brar
360.	White v. Glaxosmithkline Inc.	2010 SKQB 174	E.F. Anthony Merchant, Q.C., Casey Churko, Nicholas Robinson
361.	White v. Glaxosmithkline, Inc.	2009 SKQB 337	E.F. Anthony Merchant, Q.C.
362.	White v. Glaxosmithkline, Inc.	2010 SKQB 108	E.F. Anthony Merchant, Q.C., Nicholas Robinson
363.	White v. Glaxosmithkline, Inc.	2010 SKQB 263	E.F. Anthony Merchant, Q.C., Casey Churko
364.	Whiting v. Menu Foods Operating Ltd.	2007 CarswellOnt 6553	Jane Ann Summers, Casey Churko, Daman S. Aujla
365.	Whiting v. Menu Foods Operating Ltd.	2007 CarswellOnt 6726	Jane Ann Summers, Casey Churko, Daman S. Aujla
366.	Wiggins v. Mattel	2011 ONSC 2964	Nicholas P. Robinson

	Case Name	Citation	Lawyers Involved
367.	Wildeman v Bell Mobility Inc	2015 SKQB 125	Anthony Tibbs
368.	Wong v. TJX Companies, Inc.	2008 CanLII 3421 (ON SC)	D. Aujla
369.	WP v Alberta (No. 1)	2013 ABQB 295	E.F. Anthony Merchant, Q.C.
370.	WP v Alberta (No. 2)	2013 ABQB 296	E.F. Anthony Merchant, Q.C.
371.	Vachon c. Glaxosmithkline Inc.	2017 QCCS 2511	Daniel Chung

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z:\Adopt Indian Metis\Federal Court\Carriage\Insert\Exhibits\Exhibit 20 - MLG Class Action Case List

Exhibit B

This is Exhibit "B" as referred to in
the affidavit of Maggie Blue Waters
sworn before me this 9th day of
April A.D. 2018

Emerdent

A Commissioner for Oaths

in and for

the Province of Saskatchewan

My Commission expires _____

Being a Solicitor

E. F. Anthony Merchant Q.C.
Made an Honourary Chief in a War Bonnet Adoption
as a member of the Black Foot Confederacy, named Flanking Warrior in 2008.



Exhibit C

This is Exhibit "C" as referred to in
the affidavit of Maggie Blue Waters
sworn before me this 9th day of
April A.D. 2018

Merchant
A Commissioner for Oaths
in and for
the Province of Saskatchewan
My Commission expires _____
Being a Solicitor



Eagle Feathers presented to E.F. Anthony Merchant, Q.C. on two occasions by three different Saskatchewan First Nations in 2005 and 2006 in recognition of work on behalf of First Nations and residential school victims.

Court File No. T-2212-16

FEDERAL COURT

BETWEEN:

JESSICA RIDDLE, WENDY LEE WHITE
and CATRIONA CHARLIE

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

AFFIDAVIT OF MARTIN REIHER

I, Martin Reiher, of the City of Gatineau, in the Province of Quebec, AFFIRM THAT:

1. I am the Assistant Deputy Minister (“ADM”), of the Resolutions and Individual Affairs Sector of the Ministry of Crown-Indigenous Relations and Northern Affairs Canada (“CIRNA”). Prior to assuming the position of ADM in April 2017, I was departmental legal services counsel for 20 years. In this capacity I had responsibility for providing legal advice on a broad range of Indigenous law issues.
2. As CIRNA’s ADM of Resolution and Individual Affairs I have responsibility for:
 - Indian Residential Schools Resolution;
 - Indian Registration;
 - Secure Certificate of Indian Status;
 - Band Membership;
 - Indian Moneys, Wills and Estates.
3. Resolution and Individual Affairs has a dual mandate consisting of two distinct business areas: Residential Schools Resolution and Individual Affairs. The Residential Schools Resolution business area supports a fair and lasting resolution to the legacy of Indian

Residential Schools and promotes reconciliation with former students, their families and communities, and all other Canadians.

4. The implementation of the Indian Residential Schools Settlement Agreement (“IRSSA”), the largest class action settlement in Canadian history, began on September 19, 2007. From my intimate involvement with the IRSSA, I have developed a particular appreciation for the deep consequences of the Indian Residential Schools policy and a practical perspective on large class action settlements.
5. The First Nations Individual Affairs business area is responsible mainly for issues involving the interaction between individual First Nations people and CIRNA. The branch provides a variety of services directly to individuals pertaining to Indian Registration, First Nations Membership, Status Cards, and Indian Moneys, Estates and Treaty Annuities. Many of these services are implicated in the proposed settlement so I am well-placed to develop strategies that will ensure the effective implementation of the proposed settlement that falls to CIRNA.
6. I also have responsibility for several Indigenous Childhood Claims Litigation files. These claims fall outside the scope of the compensation provided in IRSSA and include claims related to Indian Residential School day scholars, federal day schools, provincial residential schools, and individuals involved in “the Sixties Scoop.” In this capacity I am responsible for: the strategic management of litigation; providing advice to CIRNA Minister Carolyn Bennett and the Deputy Minister on the approach to these claims; consulting my colleagues within the department and externally with other government departments to ensure consistency in the management of litigation; and providing direction to departmental staff and Department of Justice counsel.
7. As a result of my position and experience, I have knowledge of the matters herein. If I reference information from third parties, I believe that information to be true.

The mandate of CIRNA

8. Through the Mandate Letter of the Minister of CIRNA, dated October 4, 2017, the Prime Minister has tasked Minister Bennett to:

- Support the work of reconciliation, and continue the necessary process of truth-telling and healing, work with Provinces and Territories, and with First Nations, Inuit, and the Métis Nation, to drive progress on implementation of recommendations of the Truth and Reconciliation Commission, and establish a National Council for Reconciliation.
 - Work with the Minister of Justice to ensure that both in our dispute resolution mechanisms and litigation we advance positions that are consistent with the resolution of past wrongs towards Indigenous Peoples, promote co-operation over adversarial processes, and move towards a recognition of rights approach.
9. It is with this mandate letter in mind that CIRNA approaches all litigation. A copy of the mandate letter is attached to my affidavit as Exhibit “A”.

The Government of Canada’s position on settlement

10. As the Prime Minister has said, no relationship is more important to him and to Canada than the one with Indigenous peoples. We are deeply committed to advancing reconciliation and renewing, on a nation-to-nation, Crown-to-Inuit, and government-to-government basis, the relationship with Indigenous peoples. This relationship should be based on recognition of rights, respect, co-operation and partnership.
11. As we renew this most important relationship, the Government of Canada is committed to furthering the vital work of reconciliation as outlined in the Calls to Action of the Truth and Reconciliation Commission, which contained specific references to the claims of individuals left out of IRSSA. This work of reconciliation is not just for government, but for all Canadians. The Government of Canada can confirm that as of this month, progress is underway on 41 of the Calls to Action that are under federal purview. As work continues, this number will continue to grow. A copy of the Calls to Action is attached to my affidavit as Exhibit “B”.
12. True and lasting reconciliation cannot be achieved through any one single settlement. The federal government’s relationship with Indigenous people has been filled with too much tragedy, especially related to the treatment of children. We look forward to working

together to arrive at a constructive, national resolution to the painful legacy of the Sixties Scoop, outside the court process.

13. As Minister Bennett has stated, negotiation, rather than litigation, is our Government's preferred route to settle differences, and right historical wrongs. This commitment is demonstrated by the class action settlement and the Prime Minister's apology to former students of the Newfoundland and Labrador residential schools, the appointment of Ministerial Special Representatives to lead exploratory discussions and healing and commemoration activities and, most recently, the proposed settlement of the Sixties Scoop litigation.

Judicial dispute resolution and the creation of The Foundation

14. In May of 2017, the three Federal Court cases were ordered into judicial dispute resolution and Justice Michel M.J. Shore was appointed as the judicial dispute resolution judge. I attended judicial dispute resolution meetings in Montreal, Vancouver and Toronto.
15. I, along with representatives of the Attorney General of Canada and other federal government officials, attended the judicial dispute resolution meetings in this matter in good faith, and with the aim to achieve a settlement that would be amenable to all parties, and would vitiate the need for further litigation.
16. The progress of the discussions is detailed elsewhere; however, from my observation the negotiations were extensive and challenging. Many issues were raised, canvassed thoroughly, often on information obtained from external and expert sources, and ultimately resolved to the satisfaction of the parties through the arm's length negotiation process and with the assistance of Justice Shore.
17. As a result of the settlement discussions, the parties agreed to the proposed creation of a Foundation. The purpose of the Foundation is set out in the proposed settlement agreement; however, its importance to the Government of Canada goes well beyond that. In Canada's view, the Foundation is the most important element of the proposed settlement.
18. While direct compensation to individuals for harms they have suffered is important, many experts, including Mr. Kenn Richard, Executive Director of Native Child and Family Services of Toronto, have advised that the best way to support healing, wellness, education

and language, culture, and achieve lasting reconciliation is through the work and activities that have been proposed for the Foundation.

19. In Canada's view, the Foundation will provide lasting benefits not only to class members, but to all individuals and communities affected by the Sixties Scoop through culturally appropriate and trauma informed services, whether directly or through funding third party organisations. It will give control over available funding to those who know what is best for the survivors.

Métis and Non-Status Indians

20. CIRNA is cognizant of the fact that Métis and Non-Status Indians were not included as part of the proposed settlement in this matter. CIRNA is working to create a solution that will address the needs of Métis and Non-Status Indians as it relates to their fostering and adoption by non-Indigenous families during the class period.
21. As Minister Bennett has stated, the proposed settlement agreement is the first step in resolving the Sixties Scoop litigation. The Government of Canada is committed to working collaboratively and collectively with Métis and Non-Status Indian plaintiffs, their counsel, Métis and Non-Status Indians leadership, and the Provinces and Territories to resolve the remaining litigation.
22. While work continues to resolve these other issues, the parties believed that it was important that compensation for Indians and Inuit not be delayed in the interim.

Streamlined process to obtain status under the *Indian Act*

23. CIRNA recognizes that a number of class members are eligible, but currently do not hold status pursuant to the *Indian Act*. We are working to establish a streamlined process that would assist class members in obtaining their status in an efficient manner.

Verification of adoptees

24. In an attempt to avoid unnecessary delays in the verification of individuals who claim class membership, CIRNA has compiled a list of those who were adopted during the class period. This list will allow us to quickly verify whether an individual is a member of the

- class, and avoid unnecessary delays in allowing those individuals to access their settlement payments.
25. The list of persons adopted during the class period was compiled by reviewing Indian Register data on adoptions of people who are registered with the federal government as Indians, according to the terms of the *Indian Act*. This data was found on both the "Adoption List" ("A-List") and the "Adoption Stores List."
 26. The A-List is a record of registered Indian children adopted by non-Indians. It is a special protected Adoption Register kept separate from the Adoption Stores and Indian Register to ensure confidentiality. By placing the name of a child on the A-List, an active record for the child is created on that list. The child no longer has an active record in the Indian Register until such time as he or she transfers from the A-List to the Indian Register.
 27. The Adoption Stores are a record of adoptions of registered Indians. Every individual whose adoption is recorded in the Adoption Stores has an active record in the Indian Register under his or her adoptive identity. The types of adoptions which are recorded in the Adoption Stores are as follows:
 - Registered Indians adopted by Indians;
 - Registered Indians adopted by an Indian and a Non-Indian;
 - Non-Indians adopted by Indians; and,
 - Indians, not previously registered, who were adopted by Non-Indians and were within six months of their 18th birthday or older when their adoption was recorded or who were age 16 or older when their adoption was recorded, in the case of an adoption breakdown confirmed by Social Services.
 28. For the purposes of the list of persons adopted during the class period, only individuals from the Adoption Stores who fall into the last category were added to the list for verification purposes.
 29. CIRNA hired Canadian Development Consultants International ("CDCI") to work with Departmental staff to compile a single list to support and streamline the verification process. The existing lists were merged and reviewed for duplication by both CDCI and Departmental staff.

30. In testing names where adoption status was known; that is, a name already verified by class counsel as a status Indian who had been adopted, all names were verified and it took very little time (seconds) to make the verification against the merged list.
31. Peter Gorham, F.C.I.A., F.S.A, the president and actuary of JDM Actuarial Services Inc. estimates that nearly 75% of all class members were adopted and can be verified through this process.
32. For the remaining 25% of class members who were made permanent wards but never adopted, Canada has reached out to the Provinces to arrange for the expedited confirmation of their permanent wardship, which on average will be verified within two weeks of a request.

Legal Fees

33. Canada has agreed to pay \$75 million for legal fees. The structure of the proposed settlement is such that an amount for legal fees will be paid up front by Canada, with no counsel being permitted to charge further legal fees against individual payments without prior authorization from the court. This is an attempt to avoid the issues that arose in the IRSSA, where some individuals who were awarded compensation through the Independent Assessment Process were charged excessively high fees by legal counsel assisting them with the process.
34. Similarly, given the simplicity of the application process, most claimants will not require the assistance of counsel. I am dismayed to see that some firms not involved in the settlement are intending to charge 15% (or up to \$7500) to fill out the one-page application form with basic biographical detail.
35. In this context, Canada views the amount for legal fees as appropriate as it offers class members the advantage of being assisted – at no charge to them – by the most expert counsel in Canada. It is important to remember that class members are not precluded from retaining other counsel but the court will be called on to approve fees that are proposed to be charged so that amounts are reasonable and claimants are not surprised by dramatically reduced pay outs.

Provincial and Territorial Social Benefits and Taxes

36. Canada has commenced outreach to the Provinces and Territories to ensure that receipt of compensation will not affect any class member's entitlement to social benefits that they may be in receipt of. Given that similar arrangements have been made in other class action settlements, it is unlikely that the Provinces and Territories will not be prepared to agree.

37. I am advised by Travis Henderson, senior counsel with the Department of Justice, that Canada Revenue Agency was requested to provide a letter to confirm that class members' individual payments will not be taxable and expect to receive this letter prior to the settlement approval hearing.

I make this affidavit in support of the motion to approve the settlement and for no other or improper purpose.

AFFIRMED BEFORE ME)
at the City of Ottawa)
in the Province of Ontario)
this 12th day of April 2018)



Commissioner of oaths, etc



MARTIN REIHER

This is Exhibit " A " referred
to in the affidavit of

MARTIN REIHER

Sworn before me this 12th
day of APRIL A.D. 2018

Carhan Mc

A Commr. & etc.

Minister of Crown-Indigenous Relations and Northern Affairs Mandate Letter (October 4, 2017)

Minister of Crown-Indigenous Relations and Northern Affairs Mandate Letter (October 4, 2017)



Dear Dr. Bennett:

I am honoured that you have agreed to serve Canadians as Minister of Crown-Indigenous Relations and Northern Affairs.

We promised Canadians real change – in both what we do and how we do it. Canadians sent a clear message in the last election, and our platform offered a new, ambitious plan for a strong and growing middle class. Canadians expect us to fulfill our commitments, and it is my expectation that you will do your part in delivering on those promises to Canadians.

We made a commitment to grow our economy, strengthen the middle class, and help those working hard to join it. We committed to provide more direct help to those who need it by giving less to those who do not. We committed to public investment to spur economic growth, job creation, and broad-based prosperity. We committed to a responsible, transparent fiscal plan for challenging economic times.

I expect Canadians to hold us accountable for delivering these commitments, and I expect all ministers to do their part – individually and collectively – to improve economic opportunity and security for Canadians.

It is my expectation that we will deliver real results and professional government to Canadians. To ensure that we have a strong focus on results, I will expect Cabinet committees and individual ministers to: track and report on the progress of our commitments; assess the effectiveness of our work; and align our resources with priorities, in order to get the results we want and Canadians deserve.

If we are to tackle the real challenges we face as a country – from a struggling middle class to the threat of climate change – Canadians need to have faith in their government’s honesty and willingness to listen. I expect that our work will be informed by performance measurement, evidence, and feedback from Canadians. We will direct resources to initiatives that have the greatest, positive impact on the lives of Canadians, and that allow us to meet our commitments to them. I expect you to report regularly on your progress toward fulfilling our commitments and to help develop effective measures that assess the impact of the organizations for which you are answerable.

I made a personal commitment to bring new leadership and a new tone to Ottawa. We made a commitment to Canadians to pursue our goals with a renewed sense of collaboration. Improved partnerships with provincial, territorial, and municipal governments are essential to deliver the real, positive change that we promised Canadians. No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.

We have also committed to set a higher bar for openness and transparency in government. It is time to shine more light on government to ensure it remains focused on the people it serves. Government and its information should be open by default. If we want Canadians to trust their government, we need a government that trusts Canadians. It is important that we acknowledge mistakes when we make them. Canadians do not expect us to be perfect – they expect us to be honest, open, and sincere in our efforts to serve the public interest.

Our platform guides our government. Over the course of our four-year mandate, I expect us to deliver on our commitments. It is our collective responsibility to ensure that we fulfill our promises, while living within our fiscal plan. Other issues will arise or will be brought to our attention by Canadians, stakeholders, and the public service. It is my expectation that you will engage constructively and thoughtfully and add priorities to your agenda when appropriate.

As Minister, you will be held accountable for our commitment to bring a different style of leadership to government. This will include: close collaboration with your colleagues; meaningful engagement with Opposition Members of Parliament, Parliamentary Committees and the public service; constructive dialogue with Canadians, civil society, and stakeholders, including business, organized labour, the broader public sector, and the not-for-profit and charitable sectors; and identifying ways to find solutions and avoid escalating conflicts unnecessarily. As well, members of the Parliamentary Press

Gallery, indeed all journalists in Canada and abroad, are professionals who, by asking necessary questions, contribute in an important way to the democratic process. Your professionalism and engagement with them is essential.

Canadians expect us, in our work, to reflect the values we all embrace: inclusion, honesty, hard work, fiscal prudence, and generosity of spirit. We will be a government that governs for all Canadians, and I expect you, in your work, to bring Canadians together.

You are expected to do your part to fulfill our government's commitment to transparent, merit-based appointments, to help ensure gender parity and that Indigenous Peoples and minority groups are better reflected in positions of leadership.

As you are aware, I recently announced our government's intention to dissolve the Department of Indigenous and Northern Affairs and to replace it with two distinct, though complementary, departments, each with its own minister. I expect that you and your colleague, the Minister of Indigenous Services, will collaborate closely to advance the Government's ambitious agenda.

As Canada's first Minister of Crown-Indigenous Relations and Northern Affairs, you will accelerate the work you have already begun to renew the nation-to-nation, Inuit-Crown, and government-to-government relationship between Canada and Indigenous Peoples. You will also modernize our institutional structure and governance so that First Nations, Inuit, and Métis Peoples can build capacity that supports implementation of their vision of self-determination.

This new relationship must be based on the recognition of rights, respect, co-operation, and partnership. I expect you to build on the progress that has been made already, including the establishment of 50 rights and recognition tables across the country, the creation of bilateral mechanisms with National Indigenous Organizations to make progress on shared priorities, and the progress made across government on the Truth and Reconciliation Commission's *Calls to Action*.

In particular, I will expect you to work with your colleagues and through established legislative, regulatory, and Cabinet processes to deliver on your top priorities:

- Develop and lead consultations as we adopt machinery of government changes to renew the relationship with Indigenous Peoples. This will include the dissolution of Indigenous and Northern Affairs Canada, and the creation of two new departments. This work should increase our capacity to function on a distinctions basis, ensure we implement the spirit and intent of existing and future agreements with Indigenous Peoples, and identify those services across the Government of Canada that are best delivered by a Department of Indigenous Services. Please

provide recommendations to me, under my prerogative for the machinery of government, on the division of responsibilities between you and the Minister of Indigenous Services and your respective departments.

- Please prioritize consultations relating to the anticipated transfer of responsibility for the First Nations and Inuit Health Branch from the Minister of Health to the Minister of Indigenous Services. Special attention should be paid to engaging with Indigenous Peoples, public service leadership, public sector unions, and external experts on this specific change.
- Lead a whole-of-government approach to the renewal of a nation-to-nation, Inuit-Crown, and government-to-government relationship with Indigenous Peoples including implementation of the permanent bilateral processes, advancing distinctions-based policy, and improving our capacity as a government to consider and respond to the unique realities of Indigenous Peoples in Canada.
- Continue to develop and lead a whole-of-government strategy to include Indigenous representatives in meaningful ways in Canada's federal-provincial-territorial dialogues.
- Lead our government's work in the North. You will advance work on a shared Arctic Leadership model and a new Arctic Policy for Canada, and support northern programming, governing institutions, and scientific initiatives.
- Continue work to update and expand the Nutrition North program, in consultation with northern communities.
- Work with the Government of Nunavut and Nunavut Tunngavik Inc. to advance devolution in Nunavut.
- Work with the Minister of Environment and Climate Change on the implementation of the Pan-Canadian Framework on Clean Growth and Climate Change in the North and support northern communities confronting immediate climate adaptation challenges.
- Increase the number of comprehensive modern treaties and new self-government agreements in a manner that reflects a recognition of rights approach and reconciliation. Accelerate progress on existing rights and recognition tables to identify priorities for individual Indigenous communities.
- Deepen work with the Minister of Finance to establish a new fiscal relationship with Indigenous Peoples that moves towards sufficient, predictable, and sustained

funding for communities, a renewed economic and fiscal relationship that ensures nations have the revenue generation and fiscal capacity to govern effectively, and to provide programs and services to those for whom they are responsible.

- Continue to be a member of the Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples, chaired by the Minister of Justice. Drawing on the *Principles respecting the Government of Canada's relationship with Indigenous Peoples*, and in full partnership and consultation with First Nations, Inuit, and the Métis Nation, the Working Group is developing a recognition of rights framework and ensuring the Crown is fully executing its legal, constitutional, and international human rights obligations and commitments, including constitutionally protected treaty rights.
- Lead work required to ensure the achievement of the Working Group's objectives as follows:
 - work with Indigenous Peoples to support them in their work to rebuild and reconstitute their nations, advancing self-determination, and, for First Nations, facilitating the transition away from the *Indian Act* and toward self-government;
 - work with the Minister of Justice to ensure that both in our dispute resolution mechanisms and litigation we advance positions that are consistent with the resolution of past wrongs towards Indigenous Peoples, promote co-operation over adversarial processes, and move towards a recognition of rights approach; and
 - consider means to clarify obligations and ensure the implementation of pre-Confederation, historic, and modern treaties and agreements, including updating elements of the treaty relationship to ensure consistency with a recognition of rights approach.
- Work with the Minister of Justice to implement the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* in full partnership with Indigenous Peoples.
- Support the work of reconciliation, and continue the necessary process of truth-telling and healing, work with provinces and territories, and with First Nations, Inuit, and the Métis Nation, to drive progress on implementation of recommendations of the Truth and Reconciliation Commission, and establish a National Council for Reconciliation. I expect the full support of your ministerial colleagues in this endeavour.

- Lead further work to address the number of missing and murdered Indigenous women and girls across Canada, and be the lead Minister, in collaboration with the Minister of Justice, the Minister of Status of Women, and the Privy Council Office, supporting the National Inquiry into Missing and Murdered Indigenous Women and Girls.
- Support the work of the Minister of Indigenous Services and the Minister of Health in making systemic change to reduce the health inequities between Indigenous Peoples and non-Indigenous Canadians and to make reforms to child and family services. Specifically, I expect you to support these Ministers to develop governance models that bring control and jurisdiction back to communities.
- Work with residential school survivors, First Nations, Inuit, the Métis Nation, provinces, territories, and educators to incorporate Aboriginal and treaty rights, residential schools, and Indigenous contributions into school curricula.
- Collaborate with the Minister of Natural Resources, the Minister of the Environment and Climate Change, the Minister of Transport, and the Minister of Fisheries, Oceans and the Canadian Coast Guard to ensure that environmental assessment legislation is amended to enhance the consultation, engagement, and participatory capacity of Indigenous groups in reviewing and monitoring major resource development projects.
- Working with First Nations, Inuit, and Métis Nation leadership and local stakeholders and with the support of the Minister of Public Services and Procurement, lead the government's efforts to develop the vision for a national space for Indigenous Peoples at 100 Wellington. This space, on the ancestral land of the Algonquin people, is to be used by and for Indigenous Peoples – their voices must be heard through comprehensive consultation, and they must be involved in leading the project.

These priorities draw heavily from our election platform commitments.

I expect you to work closely with your Deputy Minister and his or her senior officials to ensure that the ongoing work of your department is undertaken in a professional manner and that decisions are made in the public interest. Your Deputy Minister will brief you on issues your department may be facing that may require decisions to be made quickly. It is my expectation that you will apply our values and principles to these decisions, so that issues facing your department are dealt with in a timely and responsible manner, and in a way that is consistent with the overall direction of our government.

Our ability, as a government, to successfully implement our platform depends on our ability to thoughtfully consider the professional, non-partisan advice of public servants. Each and every time a government employee comes to work, they do so in service to Canada, with a goal of improving our country and the lives of all Canadians. I expect you to establish a collaborative working relationship with your Deputy Minister, whose role, and the role of public servants under his or her direction, is to support you in the performance of your responsibilities.

We have committed to an open, honest government that is accountable to Canadians, lives up to the highest ethical standards, and applies the utmost care and prudence in the handling of public funds. I expect you to embody these values in your work and observe the highest ethical standards in everything you do. When dealing with our Cabinet colleagues, Parliament, stakeholders, or the public, it is important that your behaviour and decisions meet Canadians' well-founded expectations of our government. I want Canadians to look on their own government with pride and trust.

As Minister, you must ensure that you are aware of and fully compliant with the *Conflict of Interest Act* and Treasury Board policies and guidelines. *Open and Accountable Government* has been developed to assist you as you undertake your responsibilities. I ask that you carefully read it and ensure that your staff does so as well. I draw your attention in particular to the Ethical Guidelines set out in Annex A of that document, which apply to you and your staff. As noted in the Guidelines, you must uphold the highest standards of honesty and impartiality, and both the performance of your official duties and the arrangement of your private affairs should bear the closest public scrutiny. This is an obligation that is not fully discharged by simply acting within the law. Please also review the areas of *Open and Accountable Government* that we have expanded or strengthened, including the guidance on non-partisan use of departmental communications resources and the new code of conduct for exempt staff.

I know I can count on you to fulfill the important responsibilities entrusted in you. In turn, please know that you can count on me to support you every day in your role as Minister.

I am deeply grateful to have this opportunity to serve with you as we build an even greater country. Together, we will work tirelessly to honour the trust Canadians have given us.

Sincerely,



Rt. Hon. Justin Trudeau, P.C., M.P.

Prime Minister of Canada

This is Exhibit " B " referred
to in the affidavit of

MARTIN REIMER

Sworn before me this 12th
day of APRIL A.D. 2018



A Commr. & etc.



**Truth and
Reconciliation**
Commission of Canada

**Truth and Reconciliation
Commission of Canada:
Calls to Action**



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2015

Truth and Reconciliation Commission of Canada, 2012

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Calls to Action

In order to redress the legacy of residential schools and advance the process of Canadian reconciliation, the Truth and Reconciliation Commission makes the following calls to action.

Legacy

CHILD WELFARE

1. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to reducing the number of Aboriginal children in care by:
 - i. Monitoring and assessing neglect investigations.
 - ii. Providing adequate resources to enable Aboriginal communities and child-welfare organizations to keep Aboriginal families together where it is safe to do so, and to keep children in culturally appropriate environments, regardless of where they reside.
 - iii. Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the history and impacts of residential schools.
 - iv. Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the potential for Aboriginal communities and families to provide more appropriate solutions to family healing.
 - v. Requiring that all child-welfare decision makers consider the impact of the residential school experience on children and their caregivers.
2. We call upon the federal government, in collaboration with the provinces and territories, to prepare and

publish annual reports on the number of Aboriginal children (First Nations, Inuit, and Métis) who are in care, compared with non-Aboriginal children, as well as the reasons for apprehension, the total spending on preventive and care services by child-welfare agencies, and the effectiveness of various interventions.

3. We call upon all levels of government to fully implement Jordan's Principle.
4. We call upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that:
 - i. Affirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies.
 - ii. Require all child-welfare agencies and courts to take the residential school legacy into account in their decision making.
 - iii. Establish, as an important priority, a requirement that placements of Aboriginal children into temporary and permanent care be culturally appropriate.
5. We call upon the federal, provincial, territorial, and Aboriginal governments to develop culturally appropriate parenting programs for Aboriginal families.

EDUCATION

6. We call upon the Government of Canada to repeal Section 43 of the *Criminal Code of Canada*.
7. We call upon the federal government to develop with Aboriginal groups a joint strategy to eliminate

educational and employment gaps between Aboriginal and non-Aboriginal Canadians.

8. We call upon the federal government to eliminate the discrepancy in federal education funding for First Nations children being educated on reserves and those First Nations children being educated off reserves.
9. We call upon the federal government to prepare and publish annual reports comparing funding for the education of First Nations children on and off reserves, as well as educational and income attainments of Aboriginal peoples in Canada compared with non-Aboriginal people.
10. We call on the federal government to draft new Aboriginal education legislation with the full participation and informed consent of Aboriginal peoples. The new legislation would include a commitment to sufficient funding and would incorporate the following principles:
 - i. Providing sufficient funding to close identified educational achievement gaps within one generation.
 - ii. Improving education attainment levels and success rates.
 - iii. Developing culturally appropriate curricula.
 - iv. Protecting the right to Aboriginal languages, including the teaching of Aboriginal languages as credit courses.
 - v. Enabling parental and community responsibility, control, and accountability, similar to what parents enjoy in public school systems.
 - vi. Enabling parents to fully participate in the education of their children.
 - vii. Respecting and honouring Treaty relationships.
11. We call upon the federal government to provide adequate funding to end the backlog of First Nations students seeking a post-secondary education.
12. We call upon the federal, provincial, territorial, and Aboriginal governments to develop culturally appropriate early childhood education programs for Aboriginal families.

LANGUAGE AND CULTURE

13. We call upon the federal government to acknowledge that Aboriginal rights include Aboriginal language rights.

14. We call upon the federal government to enact an Aboriginal Languages Act that incorporates the following principles:
 - i. Aboriginal languages are a fundamental and valued element of Canadian culture and society, and there is an urgency to preserve them.
 - ii. Aboriginal language rights are reinforced by the Treaties.
 - iii. The federal government has a responsibility to provide sufficient funds for Aboriginal-language revitalization and preservation.
 - iv. The preservation, revitalization, and strengthening of Aboriginal languages and cultures are best managed by Aboriginal people and communities.
 - v. Funding for Aboriginal language initiatives must reflect the diversity of Aboriginal languages.
15. We call upon the federal government to appoint, in consultation with Aboriginal groups, an Aboriginal Languages Commissioner. The commissioner should help promote Aboriginal languages and report on the adequacy of federal funding of Aboriginal-languages initiatives.
16. We call upon post-secondary institutions to create university and college degree and diploma programs in Aboriginal languages.
17. We call upon all levels of government to enable residential school Survivors and their families to reclaim names changed by the residential school system by waiving administrative costs for a period of five years for the name-change process and the revision of official identity documents, such as birth certificates, passports, driver's licenses, health cards, status cards, and social insurance numbers.

HEALTH

18. We call upon the federal, provincial, territorial, and Aboriginal governments to acknowledge that the current state of Aboriginal health in Canada is a direct result of previous Canadian government policies, including residential schools, and to recognize and implement the health-care rights of Aboriginal people as identified in international law, constitutional law, and under the Treaties.
19. We call upon the federal government, in consultation with Aboriginal peoples, to establish measurable goals to identify and close the gaps in health outcomes

between Aboriginal and non-Aboriginal communities, and to publish annual progress reports and assess long-term trends. Such efforts would focus on indicators such as: infant mortality, maternal health, suicide, mental health, addictions, life expectancy, birth rates, infant and child health issues, chronic diseases, illness and injury incidence, and the availability of appropriate health services.

20. In order to address the jurisdictional disputes concerning Aboriginal people who do not reside on reserves, we call upon the federal government to recognize, respect, and address the distinct health needs of the Métis, Inuit, and off-reserve Aboriginal peoples.
21. We call upon the federal government to provide sustainable funding for existing and new Aboriginal healing centres to address the physical, mental, emotional, and spiritual harms caused by residential schools, and to ensure that the funding of healing centres in Nunavut and the Northwest Territories is a priority.
22. We call upon those who can effect change within the Canadian health-care system to recognize the value of Aboriginal healing practices and use them in the treatment of Aboriginal patients in collaboration with Aboriginal healers and Elders where requested by Aboriginal patients.
23. We call upon all levels of government to:
 - i. Increase the number of Aboriginal professionals working in the health-care field.
 - ii. Ensure the retention of Aboriginal health-care providers in Aboriginal communities.
 - iii. Provide cultural competency training for all health-care professionals.
24. We call upon medical and nursing schools in Canada to require all students to take a course dealing with Aboriginal health issues, including the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, and Indigenous teachings and practices. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

JUSTICE

25. We call upon the federal government to establish a written policy that reaffirms the independence of the

Royal Canadian Mounted Police to investigate crimes in which the government has its own interest as a potential or real party in civil litigation.

26. We call upon the federal, provincial, and territorial governments to review and amend their respective statutes of limitations to ensure that they conform to the principle that governments and other entities cannot rely on limitation defences to defend legal actions of historical abuse brought by Aboriginal people.
27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.
28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.
29. We call upon the parties and, in particular, the federal government, to work collaboratively with plaintiffs not included in the Indian Residential Schools Settlement Agreement to have disputed legal issues determined expeditiously on an agreed set of facts.
30. We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.
31. We call upon the federal, provincial, and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.
32. We call upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.

33. We call upon the federal, provincial, and territorial governments to recognize as a high priority the need to address and prevent Fetal Alcohol Spectrum Disorder (FASD), and to develop, in collaboration with Aboriginal people, FASD preventive programs that can be delivered in a culturally appropriate manner.
34. We call upon the governments of Canada, the provinces, and territories to undertake reforms to the criminal justice system to better address the needs of offenders with Fetal Alcohol Spectrum Disorder (FASD), including:
- i. Providing increased community resources and powers for courts to ensure that FASD is properly diagnosed, and that appropriate community supports are in place for those with FASD.
 - ii. Enacting statutory exemptions from mandatory minimum sentences of imprisonment for offenders affected by FASD.
 - iii. Providing community, correctional, and parole resources to maximize the ability of people with FASD to live in the community.
 - iv. Adopting appropriate evaluation mechanisms to measure the effectiveness of such programs and ensure community safety.
35. We call upon the federal government to eliminate barriers to the creation of additional Aboriginal healing lodges within the federal correctional system.
36. We call upon the federal, provincial, and territorial governments to work with Aboriginal communities to provide culturally relevant services to inmates on issues such as substance abuse, family and domestic violence, and overcoming the experience of having been sexually abused.
37. We call upon the federal government to provide more supports for Aboriginal programming in halfway houses and parole services.
38. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to eliminating the overrepresentation of Aboriginal youth in custody over the next decade.
39. We call upon the federal government to develop a national plan to collect and publish data on the criminal victimization of Aboriginal people, including data related to homicide and family violence victimization.
40. We call on all levels of government, in collaboration with Aboriginal people, to create adequately funded and accessible Aboriginal-specific victim programs and services with appropriate evaluation mechanisms.
41. We call upon the federal government, in consultation with Aboriginal organizations, to appoint a public inquiry into the causes of, and remedies for, the disproportionate victimization of Aboriginal women and girls. The inquiry's mandate would include:
- i. Investigation into missing and murdered Aboriginal women and girls.
 - ii. Links to the intergenerational legacy of residential schools.
42. We call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the *Constitution Act, 1982*, and the *United Nations Declaration on the Rights of Indigenous Peoples*, endorsed by Canada in November 2012.

Reconciliation

CANADIAN GOVERNMENTS AND THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE

43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.
44. We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*.

ROYAL PROCLAMATION AND COVENANT OF RECONCILIATION

45. We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

- i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and *terra nullius*.
 - ii. Adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.
 - iii. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.
 - iv. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.
46. We call upon the parties to the Indian Residential Schools Settlement Agreement to develop and sign a Covenant of Reconciliation that would identify principles for working collaboratively to advance reconciliation in Canadian society, and that would include, but not be limited to:
- i. Reaffirmation of the parties' commitment to reconciliation.
 - ii. Repudiation of concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of Discovery and *terra nullius*, and the reformation of laws, governance structures, and policies within their respective institutions that continue to rely on such concepts.
 - iii. Full adoption and implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.
 - iv. Support for the renewal or establishment of Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.
 - v. Enabling those excluded from the Settlement Agreement to sign onto the Covenant of Reconciliation.
 - vi. Enabling additional parties to sign onto the Covenant of Reconciliation.

47. We call upon federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and *terra nullius*, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts.

SETTLEMENT AGREEMENT PARTIES AND THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

48. We call upon the church parties to the Settlement Agreement, and all other faith groups and interfaith social justice groups in Canada who have not already done so, to formally adopt and comply with the principles, norms, and standards of the *United Nations Declaration on the Rights of Indigenous Peoples* as a framework for reconciliation. This would include, but not be limited to, the following commitments:
- i. Ensuring that their institutions, policies, programs, and practices comply with the *United Nations Declaration on the Rights of Indigenous Peoples*.
 - ii. Respecting Indigenous peoples' right to self-determination in spiritual matters, including the right to practise, develop, and teach their own spiritual and religious traditions, customs, and ceremonies, consistent with Article 12:1 of the *United Nations Declaration on the Rights of Indigenous Peoples*.
 - iii. Engaging in ongoing public dialogue and actions to support the *United Nations Declaration on the Rights of Indigenous Peoples*.
 - iv. Issuing a statement no later than March 31, 2016, from all religious denominations and faith groups, as to how they will implement the *United Nations Declaration on the Rights of Indigenous Peoples*.
49. We call upon all religious denominations and faith groups who have not already done so to repudiate concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of Discovery and *terra nullius*.

EQUITY FOR ABORIGINAL PEOPLE IN THE LEGAL SYSTEM

50. In keeping with the *United Nations Declaration on the Rights of Indigenous Peoples*, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and

understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.

51. We call upon the Government of Canada, as an obligation of its fiduciary responsibility, to develop a policy of transparency by publishing legal opinions it develops and upon which it acts or intends to act, in regard to the scope and extent of Aboriginal and Treaty rights.
52. We call upon the Government of Canada, provincial and territorial governments, and the courts to adopt the following legal principles:
- i. Aboriginal title claims are accepted once the Aboriginal claimant has established occupation over a particular territory at a particular point in time.
 - ii. Once Aboriginal title has been established, the burden of proving any limitation on any rights arising from the existence of that title shifts to the party asserting such a limitation.

NATIONAL COUNCIL FOR RECONCILIATION

53. We call upon the Parliament of Canada, in consultation and collaboration with Aboriginal peoples, to enact legislation to establish a National Council for Reconciliation. The legislation would establish the council as an independent, national, oversight body with membership jointly appointed by the Government of Canada and national Aboriginal organizations, and consisting of Aboriginal and non-Aboriginal members. Its mandate would include, but not be limited to, the following:
- i. Monitor, evaluate, and report annually to Parliament and the people of Canada on the Government of Canada's post-apology progress on reconciliation to ensure that government accountability for reconciling the relationship between Aboriginal peoples and the Crown is maintained in the coming years.
 - ii. Monitor, evaluate, and report to Parliament and the people of Canada on reconciliation progress across all levels and sectors of Canadian society, including the implementation of the Truth and Reconciliation Commission of Canada's Calls to Action.
 - iii. Develop and implement a multi-year National Action Plan for Reconciliation, which includes research and policy development, public education programs, and resources.
 - iv. Promote public dialogue, public/private partnerships, and public initiatives for reconciliation.
54. We call upon the Government of Canada to provide multi-year funding for the National Council for Reconciliation to ensure that it has the financial, human, and technical resources required to conduct its work, including the endowment of a National Reconciliation Trust to advance the cause of reconciliation.
55. We call upon all levels of government to provide annual reports or any current data requested by the National Council for Reconciliation so that it can report on the progress towards reconciliation. The reports or data would include, but not be limited to:
- i. The number of Aboriginal children—including Métis and Inuit children—in care, compared with non-Aboriginal children, the reasons for apprehension, and the total spending on preventive and care services by child-welfare agencies.
 - ii. Comparative funding for the education of First Nations children on and off reserves.
 - iii. The educational and income attainments of Aboriginal peoples in Canada compared with non-Aboriginal people.
 - iv. Progress on closing the gaps between Aboriginal and non-Aboriginal communities in a number of health indicators such as: infant mortality, maternal health, suicide, mental health, addictions, life expectancy, birth rates, infant and child health issues, chronic diseases, illness and injury incidence, and the availability of appropriate health services.
 - v. Progress on eliminating the overrepresentation of Aboriginal children in youth custody over the next decade.
 - vi. Progress on reducing the rate of criminal victimization of Aboriginal people, including data related to homicide and family violence victimization and other crimes.
 - vii. Progress on reducing the overrepresentation of Aboriginal people in the justice and correctional systems.
56. We call upon the prime minister of Canada to formally respond to the report of the National Council for Reconciliation by issuing an annual "State of Aboriginal Peoples" report, which would outline the government's plans for advancing the cause of reconciliation.

PROFESSIONAL DEVELOPMENT AND TRAINING FOR PUBLIC SERVANTS

57. We call upon federal, provincial, territorial, and municipal governments to provide education to public servants on the history of Aboriginal peoples, including the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

CHURCH APOLOGIES AND RECONCILIATION

58. We call upon the Pope to issue an apology to Survivors, their families, and communities for the Roman Catholic Church's role in the spiritual, cultural, emotional, physical, and sexual abuse of First Nations, Inuit, and Métis children in Catholic-run residential schools. We call for that apology to be similar to the 2010 apology issued to Irish victims of abuse and to occur within one year of the issuing of this Report and to be delivered by the Pope in Canada.
59. We call upon church parties to the Settlement Agreement to develop ongoing education strategies to ensure that their respective congregations learn about their church's role in colonization, the history and legacy of residential schools, and why apologies to former residential school students, their families, and communities were necessary.
60. We call upon leaders of the church parties to the Settlement Agreement and all other faiths, in collaboration with Indigenous spiritual leaders, Survivors, schools of theology, seminaries, and other religious training centres, to develop and teach curriculum for all student clergy, and all clergy and staff who work in Aboriginal communities, on the need to respect Indigenous spirituality in its own right, the history and legacy of residential schools and the roles of the church parties in that system, the history and legacy of religious conflict in Aboriginal families and communities, and the responsibility that churches have to mitigate such conflicts and prevent spiritual violence.
61. We call upon church parties to the Settlement Agreement, in collaboration with Survivors and representatives of Aboriginal organizations, to establish permanent funding to Aboriginal people for:
- i. Community-controlled healing and reconciliation projects.

- ii. Community-controlled culture- and language-revitalization projects.
- iii. Community-controlled education and relationship-building projects.
- iv. Regional dialogues for Indigenous spiritual leaders and youth to discuss Indigenous spirituality, self-determination, and reconciliation.

EDUCATION FOR RECONCILIATION

62. We call upon the federal, provincial, and territorial governments, in consultation and collaboration with Survivors, Aboriginal peoples, and educators, to:
- i. Make age-appropriate curriculum on residential schools, Treaties, and Aboriginal peoples' historical and contemporary contributions to Canada a mandatory education requirement for Kindergarten to Grade Twelve students.
 - ii. Provide the necessary funding to post-secondary institutions to educate teachers on how to integrate Indigenous knowledge and teaching methods into classrooms.
 - iii. Provide the necessary funding to Aboriginal schools to utilize Indigenous knowledge and teaching methods in classrooms.
 - iv. Establish senior-level positions in government at the assistant deputy minister level or higher dedicated to Aboriginal content in education.
63. We call upon the Council of Ministers of Education, Canada to maintain an annual commitment to Aboriginal education issues, including:
- i. Developing and implementing Kindergarten to Grade Twelve curriculum and learning resources on Aboriginal peoples in Canadian history, and the history and legacy of residential schools.
 - ii. Sharing information and best practices on teaching curriculum related to residential schools and Aboriginal history.
 - iii. Building student capacity for intercultural understanding, empathy, and mutual respect.
 - iv. Identifying teacher-training needs relating to the above.
64. We call upon all levels of government that provide public funds to denominational schools to require such schools to provide an education on comparative religious studies, which must include a segment on

Aboriginal spiritual beliefs and practices developed in collaboration with Aboriginal Elders.

65. We call upon the federal government, through the Social Sciences and Humanities Research Council, and in collaboration with Aboriginal peoples, post-secondary institutions and educators, and the National Centre for Truth and Reconciliation and its partner institutions, to establish a national research program with multi-year funding to advance understanding of reconciliation.

YOUTH PROGRAMS

66. We call upon the federal government to establish multi-year funding for community-based youth organizations to deliver programs on reconciliation, and establish a national network to share information and best practices.

MUSEUMS AND ARCHIVES

67. We call upon the federal government to provide funding to the Canadian Museums Association to undertake, in collaboration with Aboriginal peoples, a national review of museum policies and best practices to determine the level of compliance with the *United Nations Declaration on the Rights of Indigenous Peoples* and to make recommendations.
68. We call upon the federal government, in collaboration with Aboriginal peoples, and the Canadian Museums Association to mark the 150th anniversary of Canadian Confederation in 2017 by establishing a dedicated national funding program for commemoration projects on the theme of reconciliation.
69. We call upon Library and Archives Canada to:
- i. Fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* and the *United Nations Joint-Orientlicher Principles*, as related to Aboriginal peoples' inalienable right to know the truth about what happened and why, with regard to human rights violations committed against them in the residential schools.
 - ii. Ensure that its record holdings related to residential schools are accessible to the public.
 - iii. Commit more resources to its public education materials and programming on residential schools.
70. We call upon the federal government to provide funding to the Canadian Association of Archivists to undertake, in collaboration with Aboriginal peoples, a national review of archival policies and best practices to:

- i. Determine the level of compliance with the *United Nations Declaration on the Rights of Indigenous Peoples* and the *United Nations Joint-Orientlicher Principles*, as related to Aboriginal peoples' inalienable right to know the truth about what happened and why, with regard to human rights violations committed against them in the residential schools.
- ii. Produce a report with recommendations for full implementation of these international mechanisms as a reconciliation framework for Canadian archives.

MISSING CHILDREN AND BURIAL INFORMATION

71. We call upon all chief coroners and provincial vital statistics agencies that have not provided to the Truth and Reconciliation Commission of Canada their records on the deaths of Aboriginal children in the care of residential school authorities to make these documents available to the National Centre for Truth and Reconciliation.
72. We call upon the federal government to allocate sufficient resources to the National Centre for Truth and Reconciliation to allow it to develop and maintain the National Residential School Student Death Register established by the Truth and Reconciliation Commission of Canada.
73. We call upon the federal government to work with churches, Aboriginal communities, and former residential school students to establish and maintain an online registry of residential school cemeteries, including, where possible, plot maps showing the location of deceased residential school children.
74. We call upon the federal government to work with the churches and Aboriginal community leaders to inform the families of children who died at residential schools of the child's burial location, and to respond to families' wishes for appropriate commemoration ceremonies and markers, and reburial in home communities where requested.
75. We call upon the federal government to work with provincial, territorial, and municipal governments, churches, Aboriginal communities, former residential school students, and current landowners to develop and implement strategies and procedures for the ongoing identification, documentation, maintenance, commemoration, and protection of residential school cemeteries or other sites at which residential school children were buried. This is to include the provision of

appropriate memorial ceremonies and commemorative markers to honour the deceased children.

76. We call upon the parties engaged in the work of documenting, maintaining, commemorating, and protecting residential school cemeteries to adopt strategies in accordance with the following principles:
- i. The Aboriginal community most affected shall lead the development of such strategies.
 - ii. Information shall be sought from residential school Survivors and other Knowledge Keepers in the development of such strategies.
 - iii. Aboriginal protocols shall be respected before any potentially invasive technical inspection and investigation of a cemetery site.

NATIONAL CENTRE FOR TRUTH AND RECONCILIATION

77. We call upon provincial, territorial, municipal, and community archives to work collaboratively with the National Centre for Truth and Reconciliation to identify and collect copies of all records relevant to the history and legacy of the residential school system, and to provide these to the National Centre for Truth and Reconciliation.
78. We call upon the Government of Canada to commit to making a funding contribution of \$10 million over seven years to the National Centre for Truth and Reconciliation, plus an additional amount to assist communities to research and produce histories of their own residential school experience and their involvement in truth, healing, and reconciliation.

COMMEMORATION

79. We call upon the federal government, in collaboration with Survivors, Aboriginal organizations, and the arts community, to develop a reconciliation framework for Canadian heritage and commemoration. This would include, but not be limited to:
- i. Amending the Historic Sites and Monuments Act to include First Nations, Inuit, and Métis representation on the Historic Sites and Monuments Board of Canada and its Secretariat.
 - ii. Revising the policies, criteria, and practices of the National Program of Historical Commemoration to integrate Indigenous history, heritage values, and memory practices into Canada's national heritage and history.

iii. Developing and implementing a national heritage plan and strategy for commemorating residential school sites, the history and legacy of residential schools, and the contributions of Aboriginal peoples to Canada's history.

80. We call upon the federal government, in collaboration with Aboriginal peoples, to establish, as a statutory holiday, a National Day for Truth and Reconciliation to honour Survivors, their families, and communities, and ensure that public commemoration of the history and legacy of residential schools remains a vital component of the reconciliation process.
81. We call upon the federal government, in collaboration with Survivors and their organizations, and other parties to the Settlement Agreement, to commission and install a publicly accessible, highly visible, Residential Schools National Monument in the city of Ottawa to honour Survivors and all the children who were lost to their families and communities.
82. We call upon provincial and territorial governments, in collaboration with Survivors and their organizations, and other parties to the Settlement Agreement, to commission and install a publicly accessible, highly visible, Residential Schools Monument in each capital city to honour Survivors and all the children who were lost to their families and communities.
83. We call upon the Canada Council for the Arts to establish, as a funding priority, a strategy for Indigenous and non-Indigenous artists to undertake collaborative projects and produce works that contribute to the reconciliation process.

MEDIA AND RECONCILIATION

84. We call upon the federal government to restore and increase funding to the CBC/Radio-Canada, to enable Canada's national public broadcaster to support reconciliation, and be properly reflective of the diverse cultures, languages, and perspectives of Aboriginal peoples, including, but not limited to:
- i. Increasing Aboriginal programming, including Aboriginal-language speakers.
 - ii. Increasing equitable access for Aboriginal peoples to jobs, leadership positions, and professional development opportunities within the organization.
 - iii. Continuing to provide dedicated news coverage and online public information resources on issues of concern to Aboriginal peoples and all Canadians,

including the history and legacy of residential schools and the reconciliation process.

85. We call upon the Aboriginal Peoples Television Network, as an independent non-profit broadcaster with programming by, for, and about Aboriginal peoples, to support reconciliation, including but not limited to:
- i. Continuing to provide leadership in programming and organizational culture that reflects the diverse cultures, languages, and perspectives of Aboriginal peoples.
 - ii. Continuing to develop media initiatives that inform and educate the Canadian public, and connect Aboriginal and non-Aboriginal Canadians.
86. We call upon Canadian journalism programs and media schools to require education for all students on the history of Aboriginal peoples, including the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations.

SPORTS AND RECONCILIATION

87. We call upon all levels of government, in collaboration with Aboriginal peoples, sports halls of fame, and other relevant organizations, to provide public education that tells the national story of Aboriginal athletes in history.
88. We call upon all levels of government to take action to ensure long-term Aboriginal athlete development and growth, and continued support for the North American Indigenous Games, including funding to host the games and for provincial and territorial team preparation and travel.
89. We call upon the federal government to amend the Physical Activity and Sport Act to support reconciliation by ensuring that policies to promote physical activity as a fundamental element of health and well-being, reduce barriers to sports participation, increase the pursuit of excellence in sport, and build capacity in the Canadian sport system, are inclusive of Aboriginal peoples.
90. We call upon the federal government to ensure that national sports policies, programs, and initiatives are inclusive of Aboriginal peoples, including, but not limited to, establishing:
- i. In collaboration with provincial and territorial governments, stable funding for, and access to, community sports programs that reflect the diverse

cultures and traditional sporting activities of Aboriginal peoples.

- ii. An elite athlete development program for Aboriginal athletes.
 - iii. Programs for coaches, trainers, and sports officials that are culturally relevant for Aboriginal peoples.
 - iv. Anti-racism awareness and training programs.
91. We call upon the officials and host countries of international sporting events such as the Olympics, Pan Am, and Commonwealth games to ensure that Indigenous peoples' territorial protocols are respected, and local Indigenous communities are engaged in all aspects of planning and participating in such events.

BUSINESS AND RECONCILIATION

92. We call upon the corporate sector in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:
- i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.
 - ii. Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.
 - iii. Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism.

NEWCOMERS TO CANADA

93. We call upon the federal government, in collaboration with the national Aboriginal organizations, to revise the information kit for newcomers to Canada and its citizenship test to reflect a more inclusive history of the diverse Aboriginal peoples of Canada, including

information about the Treaties and the history of residential schools.

94. We call upon the Government of Canada to replace the Oath of Citizenship with the following:

I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada including Treaties with Indigenous Peoples, and fulfill my duties as a Canadian citizen.

Truth and Reconciliation Commission of Canada

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FEDERAL COURT

BETWEEN:

**JESSICA RIDDLE, WENDY LEE WHITE
AND CATRIONA CHARLIE**

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

**AFFIDAVIT OF DAVID ROSENFELD
(Sworn April 18, 2018)**I, **DAVID ROSENFELD**, of the City of Toronto, **SWEAR THAT:**

1. I am a partner in the law firm Koskie Minsky LLP, class counsel in this action, and as such have knowledge of the matters to which I hereinafter depose. Where I make statements in this affidavit that are not within my direct and personal knowledge, I state by whom I have so been informed. All of the information deposed to below I verily believe to be true.

2. This affidavit is sworn in support of an application for settlement approval and for no other or improper purpose.

I. Introduction

3. In this motion, the Federal Court is asked to approve the Sixties Scoop settlement agreement.

4. The Sixties Scoop refers to a practice between 1951 and 1991 whereby Indian and Inuit children were taken into care and placed with non-Indigenous parents where they were not raised in accordance with their cultural traditions, nor taught their languages.

5. The settlement agreement is also being presented for approval in the Ontario Superior Court of Justice.

II. Background and History of Litigation

6. Below is a general description of the major steps taken in the Sixties Scoop litigation across Canada. The settlement agreement brings to a conclusion more than nine (9) years of litigation and provides compensation to certain survivors of the Sixties Scoop across Canada.

7. At the same time, the settlement agreement goes beyond individual compensation and promises to allow survivors of the Sixties Scoop and Canada to turn the page on the Sixties Scoop legacy through healing, education, reconciliation and commemoration measures.

A. The Ontario Proceedings

8. A proposed class action was commenced in Ontario on February 9, 2009 styled *Brown v. Canada (Attorney General)* (Court File No. 09-CV-00372025CP) (the "**Brown Action**"). Attached hereto as **Exhibits "1"** and "**2"** are copies of the Statement of Claim dated February 9, 2009 and the Fresh as Amended Statement of Claim dated July 29, 2015 in the Brown Action. Counsel in the Brown Action are Jeffery Wilson, Brenda Christen and Jessica Braudie of Wilson Christen and Morris Cooper.

9. The Brown Action claimed damages against the federal Crown arising from the federal Crown's alleged systemic assimilation policy whereby welfare authorities in Ontario removed Aboriginal children from their families and communities and placed them with foster or adoptive parents that were non-aboriginals.

10. The plaintiff in the Brown Action alleged that the federal Crown wrongfully delegated its exclusive responsibility for Aboriginal persons by entering into an agreement with Ontario that authorized a child welfare program that systemically

eradicated the Indigenous culture, society, language, customs, traditions and spirituality of the children.

11. The Brown Action was commenced on behalf of the following class:

Class or class members are aboriginal persons who, as children in Ontario, were exposed to the consequences of the Defendant's breach of fiduciary obligation, duty of care and protection of aboriginal rights and identity genocide between December 1, 1965 to December 31, 1984, excluding those who were members of the class in action 00-CV-192059CP (S.C.J.) (the residential schools abuse class action).

12. By order dated May 26, 2010, Perell J. of the Ontario Superior Court of Justice conditionally certified the Brown Action as a class proceeding on behalf of the following class:

Aboriginal persons in Ontario between December 1, 1965 and December 31, 1984 who were placed in the care of non- aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions, and practices.

13. Attached hereto as **Exhibits "3"** and **"4"** are the Reasons and Order of Perell J. dated May 26, 2010.

14. By order dated February 22, 2011, Swinton J. of the Ontario Divisional Court granted the defendant leave to appeal the order of Perell. J.

15. By order dated December 28, 2011, A.C.J., Pardu and Mulligan JJ. of the Ontario Divisional Court allowed the appeal of Perell J.'s order certifying the action as a class proceeding, granted leave to the plaintiffs to amend their pleading and ordered that the certification motion be brought before another judge. Attached hereto as **Exhibit "5"** is the Reasons of Cunningham A.C.J., Pardu and Mulligan JJ. dated December 28, 2011.

16. By order dated January 17, 2013, Rosenberg, Gillese and Tulloch JJ.A. of the Ontario Court of Appeal dismissed the plaintiffs' appeal subject to a minor variation of the Divisional Court order. Attached hereto as **Exhibit "6"** is the Reasons of Rosenberg, Gillese and Tulloch JJ.A. dated January 17, 2013.

17. On July 15 and 16, 2013, the parties appeared before Belobaba J. the Ontario Superior Court of Justice for a re-hearing of the motion to certify the Brown Action as a class proceeding. On September 27, 2013, Belobaba J. certified the Brown Action as a class proceeding on behalf of the following class:

Indian children who were taken from their homes on reserves in Ontario between December 1, 1965 and December 31, 1984 and were placed in the care of non-aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions, and practices.

18. Attached hereto as **Exhibits "7"** and **"8"** are copies of the Reasons and Order of Belobaba J. dated September 27, 2013.

19. Leave to appeal the order of Belobaba J. dated September 27, 2013 was granted by Matheson J. Attached hereto as **Exhibit "9"** is a copy of the Endorsement of Matheson J. dated March 11, 2014.

20. Nordheimer J., Sachs J. and Pomerance J. of the Divisional Court dismissed the defendant's appeal by order dated December 2, 2014. Attached hereto as **Exhibits "10"** and **"11"** are copies of the Reasons and Order of Nordheimer J., Sachs J. and Pomerance J. dated December 2, 2014.

21. Canada filed an Amended Statement of Defence in the Brown Action on September 29, 2015. Attached hereto as **Exhibit "12"** is a copy of the Amended Statement of Defence.

22. I am advised by Mr. Cooper that Belobaba J. ordered that examinations for discovery were to be conducted by way of Written Questions and responses to be completed by February 15, 2016.

23. I am further advised by Mr. Cooper that productions were not made by the defendant at that time, but as late as July 2016, the defendant produced thousands of pages of productions.

24. I am advised by Mr. Cooper that Belobaba J. approved the notice the class of the class proceeding and the opt out form, and the opt out period has now expired.

25. I am advised by Mr. Cooper that the plaintiff brought a motion for summary judgment before Belobaba J. Argument on the motion began on August 23, 2016. On December 30, 2016, while his decision was under reserve, Belobaba J. directed that further evidence be heard via a mini-trial.

26. On February 14, 2017, Belobaba J. granted summary judgment to the plaintiff and the class on the two common issues:

When the Federal Crown entered into the Canada-Ontario Welfare Services Agreement in December 1, 1965 and at any time thereafter up to December 31, 1984:

- (1) Did the Federal Crown have a fiduciary or common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario who were placed in the care of non-aboriginal foster or adoptive parents from losing their aboriginal identity?
- (2) If so, did the Federal Crown breach such fiduciary or common law duty of care?

27. Belobaba J. concluded that "when Canada entered into the 1965 Agreement and over the years of the class period, Canada had a common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario, who had been placed in the care of non-aboriginal foster or adoptive parents, from losing their aboriginal identity. Canada breached this common law duty of care."

28. Belobaba J. also concluded that a fiduciary duty of care had not been established.

29. Attached hereto as **Exhibit "13"** is a copy of the Reasons of Belobaba J. dated February 14, 2017.

30. I am advised by Mr. Cooper that neither Canada nor the plaintiffs appealed the order of Belobaba J.

31. The next step following the order finding Canada liable for breaching its common law duty of care owed to the class was the damages assessment stage, which I am advised by Mr. Cooper was scheduled to be heard on October 11, 2017.

32. On April 28, 2017, counsel in the Brown Action filed its motion record in respect of the damages assessment motion. A copy of the motion record is attached hereto as **Exhibit "14"**.

33. By letter dated June 9, 2017, counsel to Canada sent a letter to Belobaba J. enclosing a summary of its concerns with the plaintiff in the Brown Action's motion material. Attached hereto as **Exhibit "15"** is a copy of the letter and attachment.

34. I am advised by Mr. Cooper that Canada did not file any responding material on the damages assessment motion since the motion was adjourned before the deadline for the filing of these materials.

B. The Manitoba Proceedings

35. A proposed class action was commenced on April 20, 2009 in Manitoba styled *Thompson et al. v. Manitoba et al.* (Court File Number CI-09-01-60921) (the "**Thompson Action #1**") by Merchant Law Group. Attached hereto as **Exhibit "16"** is a copy of the Statement of Claim in the Thompson Action #1.

36. A proposed class action was commenced on March 13, 2015 in Manitoba styled *Thompson et al. v. Manitoba et al.* (Court File Number CI-15-01-94427) (the "**Thompson Action #2**"). Attached hereto as **Exhibit "17"** is a copy of the Statement of Claim in the Thompson Action #2.

37. On March 2, 2016, Perlmutter A.C.J. appointed Edmond J. as case management judge for the Thompson #2 Action. Attached hereto as **Exhibit "18"** is a copy of Perlmutter A.C.J.'s letter.

38. On March 15, 2016, Koskie Minsky LLP and Troniak Law wrote a letter to Perlmutter A.C.J. indicating, *inter alia*, a future carriage motion would likely be necessary in Manitoba. Attached hereto as **Exhibit "19"** is a copy of this letter.

39. On March 16, 2016, Koskie Minsky LLP and Troniak Law received a response from Perlmutter A.C.J. stating that they were permitted to attend the first case management conference in the Thompson Action #2 on April 27, 2016. A copy of this letter is attached hereto as **Exhibit "20"**.

40. A proposed class action was commenced on April 20, 2016 styled *Meeches et al. v. Canada* (Court File No. CI-16-01-01540) (the "**Meeches Action**") with Koskie Minsky LLP and Troniak Law as counsel to the plaintiffs in the Meeches Action. Attached hereto as **Exhibit "21"** is a copy the Statement of Claim in the Meeches Action.

41. On April 21, 2016, Koskie Minsky LLP and Troniak Law wrote a letter to Edmond J. advising that the Thompson Action #2 and the Meeches Action were substantially similar such that a carriage motion would be necessary. A copy of this letter is attached hereto as **Exhibit "22"** (without enclosures).

42. I am advised by Celeste Poltak of Koskie Minsky LLP that on April 27, 2016, counsel in the Thompson Action #2 and the Meeches Action attended and made submissions at a case management conference before Edmond J., during which a carriage motion was scheduled to be heard on June 17, 2016.

43. I am advised by Ms. Poltak that the parties filed motion records and facta in advance of the carriage hearing. I am further advised by Ms. Poltak that on June 17, 2017, counsel in the Thompson #2 and the Meeches Action attended and made oral submissions at a carriage hearing before Edmond J.

44. On August 24, 2016, Edmond J. released reasons granting carriage to the Meeches Action with Koskie Minsky LLP and Troniak Law as counsel in the proposed class proceeding. He concluded that "[t]he selection of the Meeches action and the consortium to act as lead counsel will, in my opinion, best serve the interests of the putative class and the policy objectives of the CPA."

45. Edmond J. also ordered that "no other proposed class action may be commenced in Manitoba in respect of the facts pleaded in the Meeches action without leave of the court".

46. Attached hereto as **Exhibits "23" and "24"** are copies of the Order and Reasons of Edmond J. dated August 24, 2016.

47. On September 6, 2016, counsel in the Thompson #2 Action filed a Notice of Appeal from the order granting carriage to the Meeches Action. Attached hereto as **Exhibit "25"** is a copy of the Notice of Appeal.

48. I am advised by Ms. Poltak that on October 3, 2016, counsel in the Meeches and Thompson Action and the defendants attended a case conference before Edmond J. at which counsel to the plaintiffs in the Meeches Action proposed a timetable to proceed to a certification hearing returnable in June 2017. Edmond J. ordered that the plaintiffs in the Meeches Action first file their Amended Statement of Claim and adjourned the case conference to November 15, 2016. Attached hereto as **Exhibit "26"** is a copy of Edmond J.'s October 3, 2016 case management memorandum.

49. A copy of the Amended Statement of Claim in the Meeches Action was filed on October 27, 2016. Attached hereto as **Exhibit "27"** is a copy of the Amended Statement of Claim.

50. On November 15, 2016, counsel in the Meeches and Thompson #2 Actions and the defendants attended a case conference before Edmond J. at which time the certification motion was scheduled to proceed on December 5-7, 2017, subject to revisiting those dates depending on the decision of the Court of Appeal on carriage. Attached hereto as **Exhibit "28"** is a copy of Edmond J.'s November 15, 2016 case management memorandum.

51. I am advised by Ms. Poltak that in advance of the hearing of the appeal of the order granting carriage to the Meeches Action, counsel in the Meeches and the Thompson #2 Actions filed appeal books and their facts. The appeal was heard on January 23, 2017.

52. On July 21, 2017, Hamilton, Burnett and leMaistre JJA. of the Manitoba Court of Appeal dismissed the appeal of the order of Edmond J. Attached hereto as **Exhibit "29"** is a copy of the Reasons of the Manitoba Court of Appeal dated July 21, 2017.

53. On October 10, 2017, counsel to the plaintiffs the Meeches Action advised Edmond J. that a National Settlement Agreement in Principle had been reached and that the certification motion return dates were no longer necessary. Attached hereto as **Exhibit "30"** is a copy of the October 10, 2017 letter.

C. The Saskatchewan Proceedings

54. A proposed class action was commenced on August 22, 2011 styled *Thompson v. Canada* (Court File No. QBG 1642/11) (the "**Thompson Saskatchewan Action**") in Regina by Merchant Law Group. Attached hereto as **Exhibit "31"** is a copy of the Statement of Claim in the Thompson Saskatchewan Action.

55. A proposed class action was commenced on December 17, 2014 styled *Blue Waters v. Saskatchewan et al.* (Court File No. QBG 2635/14) (the "**Blue Waters Action**") in Regina by Merchant Law Group. Attached hereto as **Exhibit "32"** is a copy of the Statement of Claim in the Blue Waters Action.

56. On September 27, 2016 that Popescul C.J. appointed Keene J. as case management judge for the Blue Waters Action. A copy of the fiat appointing Keene J. is attached hereto as **Exhibit "33"**.

57. A proposed class action was commenced on October 7, 2016 styled *Ash v. Attorney General of Canada* (Court File No. QBG 2487/16) (the "**Ash Action**") by Koskie Minsky LLP and Sunchild Law. Attached hereto as **Exhibit "34"** is a copy of the Statement of Claim in the Ash Action.

58. By letters dated October 13, 2016 and October 31, 2016, Koskie Minsky LLP and Sunchild Law requested standing to participate in the first case management conference in the Blue Waters Action at which time the need for a carriage motion

between the Ash Action and the Blue Waters Action would be raised. Copies of this correspondence are attached hereto as **Exhibit "35"** and **Exhibit "36"**.

59. By way of email correspondence dated November 8, 2016, Bev McDonald, Registrar at the Court of Queen's Bench, scheduled a case management conference for November 16, 2016. A copy of this correspondence is attached hereto as **Exhibit "37"**.

60. On November 16, 2016, the first case management conference was held before Keene J. The carriage hearing was scheduled for March 2-3, 2017 and a timetable for exchange of motion records and briefs was ordered. A copy of the fiat of Keene J. dated November 16, 2016 is attached hereto as **Exhibit "38"**.

61. I am advised by Ms. Poltak that the parties delivered their motion records and written briefs on carriage, and one of the affiants in the Ash Action, Mr. Jonathan Ptak, was cross-examined by counsel in the Blue Waters Action.

62. By fiat dated March 1, 2017, the day before the commencement of the carriage hearing, Keene J. adjourned the hearing of the carriage motion *sine die* pending the release of the Manitoba Court of Appeal decision on carriage. Attached hereto as **Exhibit "39"** is a copy of the fiat dated March 1, 2017.

63. On March 9, 2017, the plaintiff in the Ash Action filed a Notice of Appeal appealing the fiat of Keene J. adjourning the carriage hearing. Attached hereto as **Exhibit "40"** is a copy of the Notice of Appeal dated March 9, 2017.

64. I am advised by Garth Myers, an associate at Koskie Minsky LLP that on March 21, 2017, a Statement of Claim was filed in a proposed class action in Saskatchewan styled *Gary Pelletier and Herb Schultz v. Attorney General of Canada* (Court File No. QGB 631/17) (the "**Pelletier Action**") by Bronstein & Co.

65. On May 18, 2017, the plaintiff in the Blue Waters Action filed a notice of motion to quash the Ash Action appeal. Attached hereto as **Exhibit "41"** is a copy of the notice of motion to quash dated May 18, 2017.

66. On July 24, 2017, counsel in the Ash Action sent a copy of the Manitoba Court of Appeal decision on carriage to Keene J. Attached hereto as **Exhibit "42"** is a copy of the letter dated July 24, 2017.

67. On August 17, 2017, counsel in the Ash Action served a Notice of Abandonment of their appeal. Attached hereto as **Exhibit "43"** is a copy of the Notice of Abandonment dated August 17, 2017.

68. On August 22, 2017, Keene J. issued an order for the carriage motion to be scheduled. Attached hereto as **Exhibit "44"** is a copy of the order dated August 22, 2017.

69. On August 23, 2017, the carriage hearing was scheduled for November 15 and 16, 2017. Attached hereto as **Exhibit "45"** is a copy of the email confirming these dates.

70. On September 8, 2017, Jai Singh, counsel at Bronstein & Company wrote a letter to Eleanor Sunchild asking for copies of the carriage material. Attached hereto as **Exhibit "46"** is a copy of the letter.

71. On September 14, 2017, Koskie Minsky LLP wrote to Keene J. advising that the motion for carriage may be adjourned *sine die*. Attached hereto as **Exhibit "47"** is a copy of the letter.

D. The Alberta Actions

72. On August 18, 2011 an action was commenced in the Court of Queen's Bench of Alberta styled *Van Name v. Alberta et al.* (Court File No. 1101-11452) (the "**Van Name Action**") by Merchant Law Group. A copy of the Statement of Claim in the Van Name Action is attached hereto as **Exhibit "48"**.

73. On January 14, 2016, the plaintiff in the Van Name Action filed a Certification Application form, which is attached hereto as **Exhibit "49"**.

74. On May 31, 2016, the plaintiff in the Van Name Action requested a case management judge and case management dates. A copy of this correspondence is attached hereto as **Exhibit "50"**. I am advised by Ms. Poltak that Macleod J. was appointed case management judge.

75. On October 6, 2016, the Koskie Minsky LLP and Ahlstrom Wright Oliver & Cooper commenced an action styled *Glenn v. Canada* (Court File No. 1601-13286) (the "**Glenn Action**"). The Statement of Claim in the Glenn Action is attached hereto as **Exhibit "51"**.

76. I am advised by Ms. Poltak that a case conference took place in the Van Name and the Glenn Actions on October 25, 2016 at which time the parties were directed to contact Macleod J.'s administrative staff to determine an available date for a carriage motion.

77. I am advised by Ms. Poltak that on January 19, 2017, the parties to the Glenn Action and the Van Name Action participated in a case conference before Macleod J. at which time a carriage motion was scheduled to be heard by Macleod J. on April 11, 2017 in Calgary.

78. The parties agreed to a timetable leading to the motion for carriage. A copy of an email setting out that timetable that was ultimately agreed to is attached hereto as **Exhibit "52"**.

79. I am advised by Ms. Poltak that the parties exchanged their motion records and facts in advance of the carriage hearing.

80. On March 31, 2017, a proposed class action styled *Vogtmann et al. v. Attorney General of Canada* (Court file No. 1701-04509) (the "**Vogtmann Action**") was commenced in the Court of Queen's Bench of Alberta by Stephen Bronstein Law Professional Corp. Attached hereto as **Exhibit "53"** is a copy of the Statement of Claim in the Vogtmann Action.

81. By letter dated April 6, 2017, Stephen Bronstein wrote to Macleod J. advising that his position was that he "would like to work co-operatively with the other law firms to advance the actions in court" or to otherwise seek an adjournment to prepare for the carriage motion. Attached hereto as **Exhibit "54"** is a copy of the letter dated April 6, 2017.

82. By letter dated April 7, 2017, Koskie Minsky LLP wrote to Macleod J. advising the court that it would seek a stay of the Vogtmann Action. Attached hereto as **Exhibit "55"** is a copy of this letter dated April 7, 2017.

83. I am advised by Ms. Poltak that the motion for carriage was heard before Macleod J. on April 11, 2017 and counsel in the Vogtmann Action made submissions. Macleod J. reserved his decision.

84. On June 23, 2017, a proposed class action styled *Bird v. Attorney General of Canada* (Court File No. 1701-08523) (the "**Bird Action**") was commenced by DD West LLP in the Court of Queen's Bench of Alberta. Attached hereto as **Exhibit "56"** is a copy of the Bird Action Statement of Claim.

85. On July 7, 2017 Koskie Minsky LLP sent a letter to William Klym and Brian Meronek of DD West LLP stating that, given that the carriage hearing had concluded, the Bird Action was an abuse of process. Attached hereto as **Exhibit "57"** is a copy of the letter dated July 7, 2017.

86. On July 14, 2017, Mr. Meronek wrote to Koskie Minsky LLP advising that he "remained open to a productive dialogue." Attached hereto as **Exhibit "58"** is a copy of the letter dated July 14, 2017.

87. By letter dated July 24, 2017, a copy of the Manitoba Court of Appeal decision awarding carriage to the Meeches Action was provided to Macleod J. Attached hereto as **Exhibit "59"** is a copy of the letter dated July 24, 2017.

88. On August 4, 2017, William Klym of DD West, counsel in the Bird Action, sent a letter to Macleod J. advising the court that carriage was sought "without any

input from [their clients] as to their interests and needs and have directed us to so advise the Court" and advising of an intention to bring an application for the opportunity to be heard in the carriage issue by August 18, 2017. Attached hereto as **Exhibit "60"** is a copy of the letter.

89. On August 9, 2017, Macleod J. responded to Mr. Klym stating that "[t]he only matters that I may consider with respect to my decision are those that are properly brought forward to the Court in accordance with the Court rules." Attached hereto as **Exhibit "61"** is a copy of the letter.

90. On August 14, 2017, Koskie Minsky LLP wrote to Macleod J. stating that the matter had been fully briefed, argued some time ago, and the Manitoba Court of Appeal decision has been rendered. In consequent, it "is neither fair not appropriate that this late-blooming matter be allowed to delay this matter further." Attached hereto as **Exhibit "62"** is a copy of the letter.

91. On August 18, 2017, Mr. Klym wrote to Macleod J. enclosing an application permitting the plaintiff in the Bird Action to make representations to the Court in respect of the pending carriage application, returnable September 1, 2017. Attached hereto as **Exhibit "63"** is a copy of the letter.

92. On August 21, 2017, Mr. Klym wrote to the Calgary Courts Centre seeking dates for an application for leave to be heard by Macleod J. Attached hereto as **Exhibit "64"** is a copy of the letter.

93. On August 22, 2017, Koskie Minsky LLP wrote to Sheila O'Brien of the Court of Queen's Bench of Alberta asking for a telephone case conference to determine whether Mr. Klym's application should be permitted. Attached hereto as **Exhibit "65"** is a copy of the letter.

94. On August 31, 2017, Mr. Klym wrote to Koskie Minsky LLP and Merchant Law Group advising that he intended to adjourn his motion *sine die*. Attached hereto as **Exhibit "66"** is a copy of the letter.

95. On September 5, 2017, Koskie Minsky LLP wrote to Macleod J. advising that, by agreement between Koskie Minsky LLP and Merchant Law Group, the carriage decision currently under reserve no longer needs to be released by the Court. Attached hereto as **Exhibit "67"** is a copy of the letter.

96. On September 20, 2017, Mr. Klym wrote to Koskie Minsky LLP proposing to write to Macleod J. requesting case management. Attached hereto as **Exhibit "68"** is a copy of the letter.

97. On September 20, 2017, Koskie Minsky LLP wrote to Mr. Klym advising that he could seek case management in his own action. Attached hereto as **Exhibit "69"** is a copy of the letter.

98. On March 5, 2018, the Van Name Action was amended and the proposed representative plaintiff Peter Christopher Van Name was replaced by Ashlynn Hunt. Attached hereto as **Exhibit "70"** is a copy of the Amended Statement of Claim.

E. The British Columbia Proceeding

99. A proposed class action was commenced on May 30, 2011 styled *Russell v. Her Majesty the Queen* (Court File No. S-113566) (the "**Russell Action**") by Klein Lawyers. Attached hereto as **Exhibit "71"** is a copy of the Amended Statement of Claim in the Russell Action.

100. I am advised by Doug Lennox of Klein lawyers that in July 2016, counsel in the Russell Action served its certification motion record.

101. On December 16, 2016, a proposed class proceeding styled *Tanchak v. HMQ* (Court File No. 186178) (the "**Tanchak Action**") was commenced in British Columbia by Merchant Law Group. Attached hereto as **Exhibit "72"** is a copy of the Statement of Claim in the Tanchak Action.

102. On March 24, 2017, a proposed class proceeding styled *Jones v. HMQ* (Court File No. S-172776) (the "**Jones Action**") was commenced in British Columbia by

Stephen Bronstein & Company and Watson Goepel LLP. Attached hereto as **Exhibit "73"** is a copy of the Statement of Claim in the Jones Action.

103. I am advised by Angela Befspflug, an associate at Klein Lawyers that on May 19, 2017, Klein Lawyers brought an application in the British Columbia Supreme Court to stay the Tanchak Action and the Jones Action, returnable June 21, 2017. I am further advised by Ms. Bufspflug that the hearing was held on August 16, 2017, but was adjourned following the hearing to permit the parties to file additional evidence.

F. Other Actions Commenced Across Canada

104. In addition to the aforementioned class proceedings, additional class proceedings concerning the sixties scoop were commenced as follows:

- (a) *Catherine Morrissette v Her Majesty the Queen in Right of Ontario et al* (Court File No. CV-16-565598-00CP) commenced in Ontario by Merchant Law Group on December 7, 2016;
- (b) *Darcy Longman (Hall) v Attorney General of Canada* (Court File No. QGB 1794 of 2017) commenced in Saskatchewan by Aboriginal Law Group on November 24, 2017;
- (c) *Mary-Ann Ward v The Attorney General of Canada et al* (Court File No. 500-06-000829-164) commenced in Quebec by Merchant Law Group on December 7, 2016;
- (d) *Linda Lou Flewin v Attorney General of Canada et al* (Court File No. HFX No. 458720) commenced in Nova Scotia by Merchant Law Group on December 19, 2016; and
- (e) *Charles Eshleman and Christine Mullin v. The Attorney General of Canada and the Commissioner of Yukon* (Court File No. 17-A0103) commenced in the Yukon by Shier & Jerome on October 20, 2017.

105. Copies of the Statements of Claim in these actions attached hereto as **Exhibits "74", "75", "76", "77", and "78"**, as described in the preceding paragraphs.

106. Attached hereto as **Exhibit "79"** is a chart listing all of the extant sixties scoop class actions.

G. The Federal Court Proceedings

107. On December 20, 2016, a proposed class action was commenced in the Federal Court styled *Riddle v. HMQ* (Court File No. T-2212-16) (the "**Riddle Action**") by Merchant Law Group. Attached hereto as **Exhibit "80"** is a copy of the Statement of Claim in the Riddle Action.

108. On March 1, 2017, a proposed class action was commenced in the Federal Court styled *Wendy White v. Attorney General of Canada* (Court File No. T-294-17) (the "**White Action**") by Koskie Minsky LLP. Attached hereto as **Exhibit "81"** is a copy of the Statement of Claim in the White Action.

109. Manson J. was assigned as case management judge for the White Action on March 17, 2017. Attached hereto as **Exhibit "82"** is a copy of this assignment order dated March 17, 2017.

110. On March 20, 2017, Manson J. directed that the first case management conference in the White Action occur on April 18, 2017. A copy of Manson J.'s direction dated March 20, 2017 is attached hereto as **Exhibit "83"**.

111. On March 22, 2017, a proposed class action was filed in the Federal Court styled *Charlie v. HMQ* (Court File No. T-421-17) (the "**Charlie Action**") by Klein Lawyers. Attached hereto as **Exhibit "84"** is a copy of the Statement of Claim in the Charlie Action.

112. By direction dated March 27, 2017, a copy of which is attached hereto as **Exhibit "85"**, Manson J. directed the parties to the White, Charlie and Riddle Actions, as follows:

- (a) the first case management conference in the White Action initially scheduled for April 18, 2017 was adjourned;
- (b) the White Action would now be case managed by Manson J. with the Riddle Action and the Charlie Action;

- (c) a joint case management conference for the White Action, the Riddle Action, and the Charlie Action, would occur before Manson J. on April 21, 2017; and
- (d) prior to the April 21, 2017 case management conference, the parties to the White Action, the Riddle Action, and the Charlie Action were to consult for the potential for an agreed upon schedule to move the proposed class actions forward, failing which they were to provide a status report to Manson J. by April 13, 2017.

113. I am advised by Ms. Poltak that counsel for the parties in the White Action, the Riddle Action, and the Charlie Action attended at a joint case management conference call with Manson J. on April 21, 2017.

114. At the April 21, 2017 case management conference, Manson J. made the following direction, a copy of which is attached hereto as **Exhibit "86"**:

- (a) the parties will report to the Court on or before April 28, 2017 on whether they wish to schedule a Dispute Resolution Conference under the auspices of the Federal Court;
- (b) counsel for the Plaintiff in the White Action will prepare and communicate a draft consent order pertaining to a carriage motion timetable; and
- (c) counsel for Canada was to prepare and communicate a draft consent order staying the filing of any Statement of Defence as well as any subsequent steps on these actions, pending the resolution of the carriage motion or such further order of this Court.

115. By letters to the Federal Court, counsel in the White, Riddle and Charlie Actions and counsel to Canada communicated their positions on a proposed Dispute Resolution Conference, which are attached hereto as **Exhibits "87", "88", "89" and "90"**, respectively. Merchant Law Group as counsel for the Plaintiff in the Riddle Action communicated a follow-up position on a proposed Dispute Resolution Conference and a carriage motion. A copy of this letter is attached hereto as **Exhibit "91"**.

116. By order dated May 1, 2017, Manson J. ordered the carriage motion timetable that had been directed to the parties previously on April 24, 2017 (Exhibit "84"). A copy of this entered order dated May 1, 2017 is attached hereto as **Exhibit "92"**.

117. By order dated May 1, 2017, in accordance with his previous direction on April 24, 2017, Manson J. ordered that Canada is not required to file a Statement of Defence unless and until one of the White Action, the Riddle Action, or the Charlie Action is certified, and that any subsequent steps in these actions are stayed pending resolution of the carriage motion or further order of the Court. A copy of this entered order dated May 1, 2017 is attached hereto as **Exhibit "93"**.

118. By order dated July 5, 2017, Manson J. scheduled the motion for carriage for October 17 and 18, 2017. Attached hereto as **Exhibit "94"** is a copy of the order.

119. Counsel in the Riddle Action cross-examined an affiant in the White Action on July 21, 2017 in support of the motion for carriage.

120. On September 6, 2017, counsel in the White, Riddle and Charlie Actions wrote a letter to Manson J. advising that the carriage motion return dates may be vacated as a carriage motion was no longer necessary to adjudicate amongst the three competing claims. Attached hereto as **Exhibit "95"** is a copy of the September 6, 2017 letter. By follow-up email the same day, counsel advised of their wish to adjourn the motion *sine die*. Attached hereto as **Exhibit "96"** is a copy of the email.

121. On September 19, 2017, a Statement of Claim styled *Gloria Topilikon and Theresa Doreen Stevens v. Attorney General of Canada* (Court File No. T-1412-17) (the "**Topilikon Action**") was filed in the Federal Court by Bronstein & Company. A copy of the Statement of Claim in the Topilikon Action is attached hereto as **Exhibit "97"**.

122. On November 24, 2017, a Statement of Claim styled *Victor Bird and Leona Paul v. The Attorney General of Canada* (Court File No. T-1811-17) (the "**Bird Federal Court Action**") was filed in the Federal Court by DD West LLP. A copy of the Statement of Claim in the Bird Federal Court Action is attached hereto as **Exhibit "98"**.

123. Attached hereto as **Exhibit "99"** is a copy of the order dated January 10, 2018 appointing Manson J. as Case Management Judge in the Bird Action.

H. Mediation and Settlement

124. I am advised by Travis Henderson, counsel to Canada, that during the period of Spring to Fall of 2016, there were a series of meetings between counsel to Canada and counsel in the Brown Action to discuss settlement.

125. I am further advised by Mr. Henderson that during the period of November 30, 2016 to December 9, 2016, counsel to Canada met individually with representative counsel in all of the Sixties Scoop class proceedings that had been commenced to engage in settlement discussions, and in particular, Koskie Minsky LLP, Mr. Cooper and Mr. Wilson, Klein Lawyers and Merchant Law Group.

126. I am further advised by Mr. Henderson that on December 16, 2016, counsel to Canada, Koskie Minsky, Klein Lawyers, Merchant Law Group and Morris Cooper met to engage in settlement discussions.

127. On February 1, 2017, the Honourable Carolyn Bennett, then Minister of Indigenous and Northern Affairs ("INAC"), publically announced the federal government's interest in settling the Sixties Scoop litigation. The Minister issued a statement, attached hereto as **Exhibit "100"**, which reads in part:

The Sixties Scoop is a dark and painful chapter in Canada's history. Beginning in the 1960s, Indigenous children were removed from their homes by child welfare authorities and many were placed in foster care or adopted out to non-Indigenous families. A number of Sixties Scoop class actions are now underway.

Over the last several months, I have been working with my officials and Cabinet colleagues to get this process in place to resolve these claims in a compassionate, respectful and fair manner, as a way forward towards reconciliation and healing. Several parties have already expressed their desire to participate in the discussions, and we hope all parties will participate in the efforts towards negotiating an Agreement-in-Principle to resolve Sixties Scoop litigation.

128. I am further advised by Mr. Henderson that on February 28, 2017, counsel to Canada, Koskie Minsky, Klein Lawyers, Merchant Law Group and Morris Cooper met to engage in settlement discussions.

129. On March 27, 2017 the Globe and Mail reported that on March 26, 2017, Canada made a statement that negotiation rather than litigation is the government's preferred route to resolve the Sixties Scoop litigation.

130. By order dated May 3, 2017, Manson J. ordered that the White Action, the Riddle Action, and the Charlie Action be referred to a Dispute Resolution Conference to be conducted under the auspices of a judge or prothonotary of the Federal Court. A copy of this entered order dated May 3, 2017 is attached hereto as **Exhibit "101"**.

131. On May 4, 2017, Catharine Moore, counsel to Canada, emailed Morris Cooper, counsel in the Brown Action, and Stephen Bronstein, counsel in the Vogtmann and Jones Actions and provided them with Manson J.'s order referring the Charlie, White and Riddle Actions to a dispute resolution conference pursuant to Federal Court Rules 387 to 389. Attached hereto as **Exhibit "102"** is a copy of Ms. Moore's email.

132. On June 5, 2017, Manson J. provided an oral direction to the parties to attend a case management conference on June 29, 2017, which was confirmed by letter dated June 7, 2017 from Kathy Craigie of the Federal Court Registry Office, attached hereto as **Exhibit "103"**.

133. On June 9, 2017, Shore J. issued a direction to the parties to advise them to have their availability for a June 13, 2017 call. Attached hereto as **Exhibit "104"** is a copy of the direction provided by Yanick Gagnon, Registry Officer.

134. I am advised by email of Scott Robinson, formerly an associate of Koskie Minsky LLP that on June 13, 2017, a case management conference before Shore J. proceeded with counsel present from the Riddle, Charlie and White Actions and to Canada. Shore J. ordered the following mediation schedule:

- (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.

135. In addition, Shore J. advised the parties that he wanted counsel in the Brown Action to attend, and asked the parties to speak to counsel in the Brown Action and to invite them to attend.

136. I am advised by Mr. Myers that these aforementioned dates varied from time to time to accommodate the parties and the progression of the negotiations.

137. By letter dated June 23, 2017 (incorrectly dated April 28, 2017), counsel to Canada advised Shore J. that counsel in the Brown Action had agreed to attend the Federal Court mediation in June 2017 in Montreal. Attached hereto as **Exhibit "105"** is a copy of this letter.

138. I am advised by Mr. Myers that counsel in the Riddle, Charlie, White and Brown Actions and to Canada agreed to maintain strict confidentiality undertaking with respect to the negotiations.

139. I am advised by Mr. Myers that at the mediation meetings, a broad range of topics were canvassed and negotiated, including:

- (a) confidentiality of the process;
- (b) carriage issues;
- (c) class definition;
- (d) class size;
- (e) existing programs available to status Indians, including presentations by 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, concerning the social, medical and education benefits available to Indigenous people in Canada;
- (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;
- (o) settlement implementation issues; and
- (p) counsel fees.

140. I am advised by Mr. Myers that counsel in the Riddle, Charlie, White and Brown Actions and to Canada met before Shore J. on June 27 and 28, 2017 in Montreal, Quebec, to continue the mediation.

141. I am advised by Mr. Myers that 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.

142. I am advised by Mr. Myers that 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.

143. I am advised by Mr. Myers that 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.

144. I am advised by Mr. Myers that Kenneth Richard, Executive Director of Native Child and Family Services of Toronto made a presentation at the mediation concerning the impact of the Sixties Scoop.

145. I am advised by Mr. Myers that 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.

146. I am advised by Mr. Myers that 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.

147. An Agreement-in-Principle was signed by counsel in the Riddle, Charlie, White and Brown Actions and to Canada on August 30, 2017. A copy of the Agreement-in-Principle forms Schedule "A" to the Final Settlement Agreement, which is later appended as Exhibit "112".

148. I am advised by Mr. Myers that on September 26 and 27, 2017, counsel in the Riddle, Charlie, White and Brown Actions and to Canada met before Shore J. in Montreal to continue the mediation.

149. On October 6, 2017, the Agreement-in-Principle was announced by the Honourable Carolyn Bennett, then Minister of INAC.

150. I am advised by Mr. Myers that 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 continue the mediation.

151. On November 24, 2017, Mr. Klym wrote a letter to Manson J. and Shore J. enclosing a motion record and seeking an order for inclusion in the dispute resolution conference. Attached hereto as **Exhibit "106"** is a copy of this letter with attachments.

152. On November 28, 2017, Mr. Klym sent a letter to counsel in the White, Riddle, Charlie, and Brown Actions advising of his intention to participate in any mediation process. Attached hereto as **Exhibit "107"** is a copy of this letter.

153. I am advised by Mr. Myers that 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 mediation.

154. On November 30, 2017, the Final Settlement Agreement was concluded and Merchant Law Group LLP, Koskie Minsky LLP, Klein Lawyers, Wilson Christen LLP, Morris Cooper executed the Final Settlement Agreement in counterparts thereafter.

155. On January 4, 2018, Shore J. granted an order consolidating the White, Riddle and Charlie Actions. A copy of the January 5, 2018 order is attached hereto as **Exhibit "108"**.

III. Phase I Notice Approval and Implementation

156. On January 10, 2018, counsel in the White Action and counsel to Canada appeared before Shore J. in the Federal Court seeking approval of the form and content of the Phase I notice and the Phase I notice plan to provide notice of the settlement and the settlement and fee approval hearings. Shore J. issued an order approving the form and content of the Phase I notice and the Phase I notice plan, attached hereto as **Exhibit "109"**.

157. On January 12, 2018, counsel in the Brown Action and the White Action and counsel to Canada appeared before Glustein J. in the Ontario Superior Court of Justice seeking approval of the form and content of the Phase I notice and the Phase I notice plan. Glustein J. issued an order approving the form and content of the Phase I notice and the Phase I notice plan, attached hereto as **Exhibit "110"**.

158. I am advised by Carla Peak of Kurtzman Carson Consultants, LLC ("**KCC**") that the notice was implemented in compliance with the court-approved notice plan (other than publication in Ha-Shilth-Sa, a First Nations Newspaper, on March 15, 2018).

159. I am advised by Anna Vetere of Collectiva Class Action Services Inc. and Trilogy Class Action Service ("**Collectiva**") that Collectiva established a website styled sixtiesscoopsettlement.info that contains links to the settlement agreement, a summary of the terms of the settlement agreement, the court-approved notice, the objection form, instructions about how to object to the settlement, and contact information for Collectiva.

160. I am advised by Mr. Myers that since January 10, 2018, Mr. Myers and counsel to Canada have met with KCC and Collectiva approximately every two weeks to ensure that notice was unfolding smoothly and that Collectiva was not encountering any difficulties. Attached hereto as **Exhibit "111"** are copies of emails reporting these meetings.

IV. The Settlement and Proposed Distribution Plan

161. After the Agreement-in-Principle, the parties finalized a formal Final Settlement Agreement setting out the terms of proposed settlement between the parties (the "**Settlement Agreement**" or the "**Settlement**"). A copy of the Settlement Agreement is attached hereto as **Exhibit "112"**.

162. The Settlement Agreement requires Canada to establish a Foundation to continue after the other elements of the Agreement are complete with the stated purpose of continuing to enable change and reconciliation. The Foundation is to be initially funded by Canada with fifty million dollars (\$50,000,000.00). The Settlement also provides for compensation to eligible class members.

A. Key Terms of the Settlement

163. The key terms of the Settlement include:

- (a) creation of the Foundation which is to be initially funded by Canada with fifty million dollars (\$50,000,000.00);
- (b) compensation will be paid as follows:

- i. if there are valid claims from fewer than 20,000 eligible class members, each eligible class member will receive an amount calculated by dividing \$500 million by the number of eligible class members, up to a maximum of \$50,000.00;
 - ii. if there are valid claims from between 20,000 and 30,000 eligible class members, each eligible class member will receive \$25,000; and
 - iii. if there are more than 30,000 valid claims from eligible class members, each eligible class member will receive an amount calculated by dividing \$750 million by the number of eligible class members;
- (c) Canada will make its best efforts to obtain the agreement of the provinces and territories that the receipt of any payments pursuant to the Agreement will not affect the quantity, nature or duration of any social benefits or social assistance benefits payable to a class member pursuant to any legislation of any province or territory of Canada;
- (d) Canada will make its best efforts to obtain the agreement of the necessary Federal Government departments that the receipt of any payments pursuant to the Agreement will not affect the quantity, nature or duration of any social benefits or social assistance benefits payable to a class member pursuant to any social benefit programs of Canada such as Old Age Security and Canada Pension Plan;
- (e) Canada will be released from all claims relating to the Sixties Scoop, as more fully elaborated in the Settlement Agreement; and
- (f) the Agreement does not preclude claims against any third party, including claims against any Province or Territory, but such claims will be limited to exclude any portion of Canada's responsibility.

B. The Proposed Distribution Plan

164. The Settlement Agreement provides a claims-based compensation scheme.

165. The Settlement includes all registered Indians (as defined in the *Indian Act*) and Inuit persons (as defined in the Settlement) or people eligible to be registered Indians who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents (the "**Class Members**").

166. Compensation will be available for all Class Members who were adopted or made permanent wards and who were alive on February 20, 2009 whose applications are approved in accordance with the Agreement (the "**Eligible Class Members**").

167. The Settlement Agreement provides that Eligible Class Members will be provided compensation as follows:

- (a) If fewer than 20,000 Eligible Class Members submit claims, each Eligible Class Member will receive an amount equal to \$500 million divided by the number of Eligible Class Members who submit claims, to a maximum for \$50,000 per person.
- (b) If between 20,000 and 30,000 Eligible Class Members submit claims, each Eligible Class Member will receive \$25,000.
- (c) If more than 30,000 Eligible Class Members submit claims, each Eligible Class Member will receive an amount equal to \$750 million divided by the number of Eligible Class Members who submit claims.

168. For example:

- (a) if 5,000 Eligible Class Members submit claims, each Eligible Class Member will receive \$50,000 and the Foundation will receive an additional \$250 million in funding;
- (b) if 10,000 Eligible Class Members submit claims, each Eligible Class Member will receive \$50,000;
- (c) if 15,000 Eligible Class Members submit claims, each Eligible Class Member will receive \$33,333.33;
- (d) if 20,000 Eligible Class Members submit claims, each Eligible Class Member will receive \$25,000;
- (e) if 25,000 Eligible Class Members submit claims, each Eligible Class Member will receive \$25,000; and
- (f) if 35,000 Eligible Class Members submit claims, each Eligible Class Member will receive \$21,428.57.

169. If fewer than 20,000 claims are submitted by Eligible Class Members and the total amount paid to Eligible Class Members is less than \$500 million, the difference between the total amount paid to Eligible Class Members and \$500 million shall be paid to the Foundation.

C. Paper-Based, Confidential Claims Process

170. The Settlement provides for a paper-based confidential claims process that does not require any claimant to testify in a court, to undergo cross-examination or any questioning by an adverse party.

171. We believe that this is a very important component of the Settlement. In particular, and as more fully explained below, there is a significant concern that class members may not come forward if individual assessment hearings and all attendant procedural steps were ordered by a court after a common issues trial.

172. I have acted in a number of class proceedings involving harm that are deeply personal to class members. Class members in those proceedings often convey that they are afraid to be involved because of retribution from the defendants and, in that context, repeatedly want assurances that they will not be exposed. Further, class members often explain that they support the action, but are very reluctant to describe their experiences, because they are embarrassed, ashamed or do not want it publicly known what happened to them.

173. The paper-based claims process herein will not require class members to testify or appear in person, and it will be confidential.

174. Claimants will be assumed to be acting honestly in completing their forms. The Administrator and the Reconsideration Officer (explained below) are instructed to draw all reasonable and favourable inferences that can be drawn with respect to the application, as well as resolving any doubt as to whether a claim has been established in favour of the claimant.

D. The Claims Verification Process

175. The Settlement Agreement sets out the steps required for the Administrator to verify that claimants are entitled to compensation.

176. To qualify as an Eligible Class Member, a Class Member must be a Registered Indian or Inuit or entitled to be a Registered Indian or Inuit, and the Class Member must have been adopted or made permanent ward and placed in the care of non-Indigenous foster or adoptive parents.

177. Upon receipt of an application, the Administrator will check for completeness and that the application contains information that, if confirmed, demonstrates that applicant is an Eligible Class Member. If the application is not complete, the Administrator will contact the claimant to complete the claim form.

178. The Administrator will first confirm that the claimant is a Registered Indian or Inuit or entitled to be a Registered Indian or Inuit by:

- (a) sending the claimants date of birth and registration number to INAC for confirmation if the claimant indicates he or she is a Registered Indian;
- (b) sending the claimants date of birth and registration number to INAC for processing if the claimant indicates he or she is entitled to be a Registered Indian; or
- (c) sending the claimant's name, date of birth, and land claims agreement enrolment sent to INAC if the claimant indicates that he or she is Inuit.

179. Next, the Administrator will confirm that the claimant was adopted or was a permanent ward. The Administrator will check for confirming records attached to the application. If the Administrator is unable to confirm that the claimant was adopted or was a permanent ward from the records attached to the application, and the claimant has indicated that he or she is a Registered Indian, the Administrator will request confirmation of adoption from INAC. For all other claimants, the Administrator will initiate a record check with the appropriate province or territory. In consequence, claimants are not required to obtain their own records, which I am advised by Mr. Henderson, counsel to Canada can be time consuming and burdensome.

180. If the Administrator is still not able to confirm that that the claimant was adopted or was a permanent ward, the Administrator will review other information provided with the claim form and may: (a) determine whether an applicant is an

Eligible Class Member; or (b) seek additional corroborating information from the claimant.

E. Reconsideration Process

181. If the Administrator is unable to confirm that applicant is a Registered Indian or an Inuit (or entitled to be so), and was adopted or made a permanent ward, the Administrator will advise the applicant in writing why he or she was not determined to be an Eligible Class Member and that the applicant may request a reconsideration of his or her application within 30 days.

182. If an applicant requests a reconsideration, the Administrator will transmit the entire file to the Reconsideration Officer.

183. The Reconsideration Officer may:

- (a) determine whether the applicant is an Eligible Class Member;
- (b) seek more information from the applicant either in writing or otherwise;
or
- (c) refer the matter to the Exceptions Committee along with reasons as to why the referral is being made.

184. There is no opportunity for the defendant at any time to respond, cross-examine or contest the applications.

F. The Exceptions Committee

185. The Settlement Agreement memorializes an understanding between the parties to the Settlement that they are not currently able to precisely contemplate or describe exhaustively all of the criteria for qualification as an Eligible Class Member.

186. Consequently, the Settlement Agreement establishes a procedure to avoid injustice and ensure that compensation is paid to Eligible Class Members in accordance with the underlying principle of this Agreement, specifically,

compensation for long term placement with non-Indigenous families resulting in cultural loss.

187. In order to ensure that compensation was provided for long term placement with non-Indigenous families resulting in cultural loss, the Settlement Agreement created an Exceptions Committee consisting of:

- (a) a representative of class counsel present for the discussions leading up to the Agreement;
- (b) a representative of Canada present for the discussions leading up to the Agreement;
- (c) an Indigenous representative, agreed upon by the parties; and,
- (d) Michel J. Shore J. or such other Federal Court Judge as the Chief Justice of the Federal Court may designate if Shore J. is unable to continue.

188. The Exceptions Committee must specifically take into consideration the discussions leading up to the Agreement having regard to the general principle set out above in making its decisions.

189. In addition to determining whether certain Class Members will be determined to be Eligible Class Members, the purposes of the Exceptions Committee is also to:

- (a) receive and consider reports from the Administrator;
- (b) give such directions to the Administrator as may, from time to time, be necessary; and
- (c) consider any disputes between the Parties in relation to the implementation of this Agreement.

190. The Exceptions Committee must endeavor to arrive at a consensus. However, in the event that consensus cannot be achieved, Shore J., or another Judge designated by the Chief Justice of the Federal Court if Shore J. is unable to continue, will decide the matter.

191. The decision of the Exceptions Committee will be final.

192. The Exceptions Committee is designed to facilitate an informal, fair and expeditious adjudication of any issues that arise with respect to the Agreement and will avoid motions before the courts which are expensive and time consuming.

G. The Administrator

193. I am advised by Mr. Myers that Sixties Scoop administration proposals were procured from Ricepoint, Deloitte, GCG and Collectiva.

194. I am also advised by Mr. Myers that the signatories to the Settlement Agreement collective agreed that Collectiva should be proposed as administrator for this settlement.

H. The Proposed Claim Form

195. The proposed claim form is attached as Schedule "B" to the Settlement Agreement.

196. The proposed claim form is intended to be a clear plain-language communication that will be simple and straightforward to complete. It is similar to the claim forms used in the *Anderson v. Canada* and *Seed v. Ontario* settlements. The proposed claim form will be translated into French.

I. The Proposed Notice Materials

197. The plaintiffs are seeking to provide significant notice to the class of the Settlement should it be approved, which will include, among other things, direct mailings to class members and third parties, dissemination of a short form notice in various media, and direct community outreach and meetings, among other aspects.

198. I am advised by Mr. Myers that Sixties Scoop notice proposals were procured from KCC, Deloitte, GCG and Collectiva Class Action Services Inc. and Trilogy Class Action Service.

199. I am advised by Mr. Myers that signatories to the Settlement Agreement collectively agreed that KCC should be proposed as notice provider for this settlement.

200. KCC will be proposing a notice plan in a separate affidavit setting out all the aspects of notice to be provided to the class. Mr. Myers advises that the notice plan proposed will be substantially similar to that approved in January 2018 for notice of the motion for settlement approval, with the addition of television advertisements.

V. Arm's Length Negotiations and Settlement

201. The Settlement was achieved through difficult and hard-fought arm's length negotiations.

202. The Honourable Michel J. Shore, a sitting justice of the Federal Court and an experienced mediator, mediated the parties' settlement discussions between June and November 2017.

VI. Information Supporting the Settlement

A. Class Size Estimate

203. I am advised by Mr. Myers that in the course of the mediation, counsel to Canada procured a class size estimate to estimate the number of Status Indians who were adopted or who became Crown wards or permanent wards and who were placed in the care of non-Indigenous adoptive or foster parents between 1951 and 1991.

204. The class size estimate was prepared by Peter Gorham, F.C.I.A., F.S.A. Mr. Gorham is the president and actuary of JDM Actuarial Services Inc. He regularly provides actuarial consulting services and expert testimony.

205. Mr. Gorham was provided with a spreadsheet containing information compiled by INAC from various historical documents about foster care and adoptions among Status Indians across Canada between 1951 and 1991. He was also provided with data from counsel from certain plaintiffs in the class actions.

206. Based on this data, Mr. Gorham provided the opinion that the number of children who were permanent wards and/or adopted by non-Indigenous families from 1951 to 1991 is likely to be between 20,000 and 24,000, of which about 18,800 to 22,200 were alive in October 2017 and about 1,200 to 1,800 were deceased as at October 2017.

207. In my experience, although claims rates vary from case to case, it is almost never the case in matters of this nature that all class members file claims.

208. Based on this information, class counsel believes that less than 22,200 Eligible Class Members will make claims in the settlement.

B. Discovery

209. I am advised by Mr. Cooper that thousands of pages of productions were produced in the Brown Action.

C. Input from Experts

210. In the course of litigating the Sixties Scoop class actions across Canada, class counsel had the benefit of input and opinion from a variety of experts.

211. I am advised by Mr. Lennox of Klein Lawyers that Klein Lawyers retained the following experts who provided opinions in the Sixties Scoop litigation:

- (a) Dr. T. Richard Sullivan, a professor of social work at the University of British Columbia. Dr. Sullivan provided his expert opinion on the nature and impact of the sixties scoop, and any steps Canada could have taken to prevent or minimize the loss of cultural identity for Indigenous children removed from their homes by child welfare workers.
- (b) Dr. Pamela Stanton, a research consultant on aboriginal history and government policy. Dr. Stanton provided her expert opinion on the historical events surrounding the sixties scoop in British Columbia.
- (c) Professors Vandna Sinha and Nico Trocme from McGill University who provided their opinion on class size and demographics. Professor Sinha is the principal investigator for the First Nations Incidence Study of Reported Child Abuse and Neglect, a member of the Canadian Child Welfare Research Portal, and a leading author and researcher in the field

of child welfare. Professor Trocme is the Director of the School of Social Work and the Philip Fisher Chair in Social Work at McGill University. He is the principal investigator for the Canadian Incidence Study of Reported Child Abuse and Neglect and the Director of the Canadian Child Welfare Research Portal.

212. I am advised by Anthony Tibbs of Merchant Law Group that Merchant Law Group retained Dr. Amy Bombay, a Professor at Dalhousie University in the departments of Psychiatry and the School of Nursing. Dr. Bombay provided an expert opinion on the harm sustained by survivors of the sixties scoop.

213. I am advised by Mr. Cooper that he retained the following experts:

- (a) Kenneth Denis Richard, executive director of Native and Family Child Services of Toronto who provided his opinion on the nature of harm experienced by survivors of the Sixties Scoop;
- (b) Dr. Christopher Bruce of Economica, formerly a professor in the Department of Economics at the University of Calgary, who provided his opinion on the economic harm experienced by survivors of the Sixties Scoop;
- (c) Dr. Harvey Armstrong, a psychiatrist and former director of a University of Toronto program that provided mental health services to about 15,000 Cree and Ojibway on reserves in northern Ontario, who provided his opinion on the history of the Sixties Scoop and its effects; and
- (d) Dr. Ana Bodnar, a psychologist with extensive First Nations experience, who provided an opinion on loss of culture as experienced by survivors of the Sixties Scoop.

D. Communication and Interviews with Class Members

214. I am advised by Adam Gilbert, a clerk in the Koskie Minsky LLP Communications Department, that 5,057 individuals have contacted Koskie Minsky LLP with respect to the Sixties Scoop litigation.

215. I am advised by Ms. Befspflug that approximately 2,000 interested persons contacted Klein Lawyers with respect to the Sixties Scoop litigation.

216. I am advised Anthony E.F. Merchant that 4,489 individuals have signed up with Merchant Law Group with respect to the Sixties Scoop litigation.

217. In our view, class counsel had more than adequate information available from which to make an appropriate recommendation concerning the resolution of the claims against Canada.

VII. Factors Considered in Assessing the Fairness and Reasonableness of the Settlement

218. Below is our description of the general risks of class action litigation faced by the class in this historical class action

A. Certification Risk

219. This class action sought certification of a national class of survivors of the Sixties Scoop (excluding Ontario). Although the Brown Action was certified in Ontario, it was only certified on behalf of a provincial class and the allegations related only to the *Canada-Ontario Welfare Services Agreement*.

220. In contrast, the within action is on behalf of a national class. I am advised by Mr. Myers that different agreements existed between Canada and each province with respect to the placement of Indigenous children in foster or adoptive homes. These agreements may raise distinct factual and legal issues that may impede or prevent the certification of this class action on behalf of a national class. In other words, there is risk that the Federal Court would conclude that a separate class action is necessary for each province. If that were the case, moving for certification in each Province and Territory compounds the risk that any one court might deny certification.

B. Risk of Prolonged Litigation

221. The Settlement Agreement will bring an end to the litigation and will provide compensation to class members more expeditiously than if their claims were litigated to judgment.

222. The Brown Action is illustrative in this respect. From its commencement to the hearing on liability, eight (8) years elapsed, and the hearing to determine whether aggregate damages were available had not even been heard yet.

223. In particular, we estimate the following timelines for this action if it had proceeded without a settlement:

Hearing of motion for carriage:	October 17 and 18, 2017
Decision on the motion for carriage:	January 15, 2018
Appeal of the carriage order to the Federal Court of Appeal:	June 15, 2018
Decision on the appeal of carriage:	November 15, 2018
Motion for certification:	June 15, 2019
Decision on the motion for certification:	October 15, 2019
Appeal of the order certifying the action as a class proceeding:	March 15, 2020
Decision on the 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
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
Appeal of the aggregate damages assessment order:	March 15, 2026
Individual damages hearings (if necessary)	June 15, 2026 onward

224. Instead, if the Settlement Agreement is approved, Eligible Class Members will be entitled to compensation within a much shorter timeframe, estimated to be approximately by the end of 2019.

225. Delays in proceeding with the litigation would result in certain additional prejudice to the aging class members, and accordingly, a denial of access to justice thereto.

C. Risk Associated With Historical Claims

226. The passage of time also creates risk arising from the impact of fading memories of elderly witnesses, incomplete historic document retention, and inability to adduce evidence due to lack of witnesses.

D. Risk of No Fiduciary Duty and No Breach of Fiduciary Duty

227. Belobaba J. in the Brown Action concluded that the plaintiff did not establish that the Crown owed the plaintiff and the class a fiduciary duty. While the plaintiffs in the within action would have sought to distinguish this finding, Belobaba J.'s decision represents a significant risk that this Court would find that there was no fiduciary duty owed.

228. Even if the plaintiffs successfully proved that the Crown owed a fiduciary duty to the plaintiff and the class, there was risk that they would be unable to show a breach.

E. Risk of Causation Not Capable of Being Determined in Common

229. If the plaintiffs in the within action were successful in proving that the Crown owed a duty to the class and that duty was breached, as was the case in the Brown Action, they are nevertheless not relieved of their burden of establishing causation.

230. 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.

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

- (a) foster care, where the connection to the biological family may be retained, versus adoption, where the biological tie is severed;
- (b) length of time in care – short- versus long-term care; and
- (c) age at adoption.

232. In consequence, there is risk that a court would find that causation could not be determined on a class-wide basis.

G. Risk of No Aggregate Damages

233. There was significant risk that the court would not conclude that aggregate damages are available and that instead, the court would order individual assessment hearings.

234. In particular, at the first motion for certification in the Brown Action, Perell J. 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.

235. Similarly, in his certification reasons, Belobaba J. 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."

236. 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 Perell J., who declined to certify it. Before Belobaba J., the aggregate damages common issue was not pursued.

237. 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.

F. Risk of Novel Claims

238. The claims in this action generally related to loss of cultural identity. To my knowledge, no court in Canada has awarded damages for loss of cultural identity. In consequence, these claims are novel, and therefore there is significant risk with respect to the monetary value that a court may place on such loss.

G. Risk From Limitation Periods

239. There was also risk by virtue of the application of limitation periods to the claims advanced in this case. This is always a risk in historical class actions, particular with respect to claims for loss of culture.

H. Future expense of litigation

240. Should this action have proceeded to judgment, we estimate that class counsel would have devoted additional time with a value of approximately \$5 million to \$8 million would likely have incurred an additional \$750,000 in disbursements, primarily for expert fees and travel.

VIII. Recommendation of Counsel

241. Class Counsel are experienced class actions counsel and have been appointed class counsel in dozens of class actions including pension fund and investment claims, securities fraud, environmental damage, regulatory negligence, and institutional abuse claims.

A. Koskie Minsky LLP

242. Koskie Minsky LLP was appointed as class counsel in:

- (a) *Anderson v. Canada* – a historical residential schools class action, with led to a \$50 million settlement;
- (b) *Cloud v Canada* – a historical residential schools class action, which led to the Indian Residential Schools Settlement;
- (c) *Williamson v. Sheila Morrison Schools* – a residential school class action involving abuse at a private school that was ultimately settled;
- (d) *Slark v Ontario, McKillop v Ontario, and Bechard v Ontario* – historical institutional abuse class actions involving institutions for persons with developmental disabilities that resulted in settlements in which 3,400 claimants were compensated;
- (e) *Clegg v Ontario* – an omnibus historical institutional abuse class action involving twelve (12) institutions for persons with developmental disabilities in which a settlement, similar to that in *Slark v Ontario, McKillop v Ontario, and Bechard v Ontario*, was recently approved by the Court in Ontario; and
- (f) *Seed v Ontario* – a school abuse class action for a school for blind students, the common issues trial for which is scheduled for eight (8) weeks starting in March 2017.

243. In addition, Koskie Minsky LLP has extensive experience in prosecuting class actions, including involvement six common issues trials: *Ruffolo v Sun Life*, *Smith v National Money Mart*, *Sutherland v Hudson's Bay Co*, *Smith v Inco*, *Slark v Ontario* (settled on the eve of trial), *Seed v. Ontario* (settled on the eve of trial) and now *Anderson v Canada* (settled after the plaintiffs closed). In those actions involving common issues trials, KM LLP devoted over 57,000 hours of lawyer, student and clerk time in prosecuting the class members' claims.

244. Led by Kirk Baert (partner, called to the bar in 1990), Celeste Poltak (partner, called to the bar in 2000), and Garth Myers (associate, called to the bar in 2012) have been the lawyers at Koskie Minsky LLP with primary carriage of this matter.

245. Mr. Baert's practice focuses exclusively on class proceedings. He is internationally recognized as an expert in class action litigation and is recognized by Lexpert as a leading Ontario practitioner in the field of class action litigation. Mr. Baert has appeared at all levels of court in Ontario and the before the Supreme Court of Canada in class action litigation. Mr. Baert has acted in more than 75 class proceedings that have given rise to decisions that are some of the most frequently cited authorities in class action jurisprudence.

246. Ms. Poltak's practice focuses exclusively on class proceedings litigation and is recognized by Lexpert as a leading Ontario practitioner in the field of class action litigation. She regularly appears before a variety of courts throughout the province including the Court of Appeal, and the Supreme Court of Canada. She has developed a particular expertise in class proceedings, having worked on some of the most notable Canadian cases, including a variety of common issues trials, and is well-published in the area.

247. Mr. Myers has been practicing class action litigation for six (6) years. He has acted in the prosecution of class actions including Crown liability, securities misrepresentation, institutional abuse, and product liability cases, among others.

B. Klein Lawyers

248. I am advised by Mr. Lennox of Klein Lawyers that David Klein's firm has over 22 years of experience in class proceedings. Klein Lawyers was counsel in the first class action certified in British Columbia (1995), the first class action certified in Manitoba (2005), and the first class action certified in Newfound & Labrador (2004).

249. Mr. Lennox further advises that Mr. Klein is a past-president of the Trial Lawyers' Association of British Columbia and is listed in Best Lawyers in Canada in the area of class action litigation, as Repeatedly Recommended by Lexpert in the field of class action litigation, and as a Local Litigation Star by Benchmark Canada.

C. Recommendation from Class Counsel

250. As a result of their involvement in other cases, Koskie Minsky LLP, Klein Lawyers and Merchant Law Group (collectively, "**Class Counsel**") we have gained considerable experience in the settlement mechanics and imperatives, damages methodologies, and risks associated with this type of litigation.

251. Class Counsel recommends the approval of the Settlement and believes that the Settlement is fair, reasonable and in the best interest of the class given our experience, involvement in this action since inception, and:

- (a) the risks associated with litigation generally;
- (b) the risks of proving this case at trial;
- (c) the delays associated with continuing action;
- (d) the difficulty that class members will face with individual assessment hearings, if ordered;
- (e) the compensation and paper-based claims process agreed to; and
- (f) the non-monetary compensation obtained that is not available through litigation (in particular the Foundation).

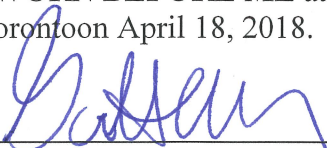
252. Attached hereto and marked as **Exhibit "113"** is a copy of the affidavit of Marcia Brown sworn March 20, 2018.

253. Attached hereto and marked as **Exhibit "114"** is a copy of the affidavit of Kenneth Denis Richard sworn March 20, 2018.

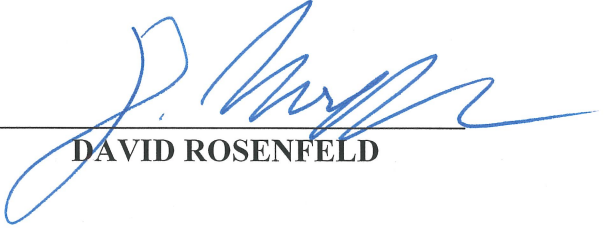
254. Attached hereto and marked as **Exhibit "115"** is a copy of the affidavit of Dr. Raven Sinclair sworn March 15, 2018.

255. This affidavit is sworn in respect of the motion for settlement approval and for no improper purpose.

SWORN BEFORE ME at the City of Toronto on April 18, 2018.



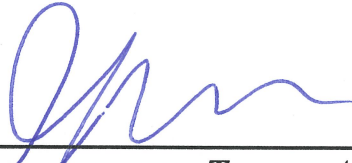
Commissioner for taking affidavits
Garth Myers.



DAVID ROSENFELD

KM-3232619v2

*THIS IS EXHIBIT "1" REFERRED TO IN THE
AFFIDAVIT OF DAVID ROSENFELD
SWORN BEFORE ME, THIS 18TH DAY OF APRIL, 2018*



A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.
GARTH MYERS

CV-09-00372025-00CP

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MARCIA BROWN and ROBERT COMMANDA

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiffs' lawyer or, where the Plaintiffs do not have a lawyer, serve it on the Plaintiffs, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

-2-

IF YOU PAY THE PLAINTIFFS' CLAIM, and \$5,000.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiffs' claim and \$400.00 for costs and have the costs assessed by the court.

Date February 9th, 2009

Issued by *A. Simelunas*
Local registrar

Address of
court office 393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E

TO: THE ATTORNEY GENERAL OF CANADA
Suite 3400, Exchange Tower
Box 36, First Canadian Place
Toronto, Ontario
M5X 1K6

CLAIM

1. The Plaintiffs claim:

- (a) An Order certifying this proceeding as a Class Proceeding pursuant to the Class Proceedings Act and appointing the Plaintiffs as Representative Plaintiffs for the Class;
- (b) A declaration that, by reason of the events described in this action, the Defendant owed and was in breach of its non-delegable fiduciary obligation, duty of care and protection of aboriginal rights, and did commit the actionable wrong of identity genocide of children;
- (c) Non-pecuniary and general damages in the amount of \$50,000.00 for each Class Member;
- (d) Pecuniary and special damages in the amount of \$25,000.00 for each Class Member;
- (e) Punitive, exemplary and aggravated damages in the amount of \$10,000.00 for each Class Member.
- (f) Prejudgment and post judgment interest pursuant to s.128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43 (as am.);
- (g) Substantial indemnity costs; and
- (g) Such further and other relief as this Honourable Court deems just.

Definitions

2. In this claim:

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- (a) "aboriginal", "aboriginal rights", "aboriginal children" are persons with rights protected by the *Constitution Act, 1982*, section 35;
- (b) "Agreement" , "the Agreement" refer to "The Canada-Ontario Welfare Services Agreement", Treasury Board Minute Dated December 1, 1965, P.C. 1965-11/2135.
- (c) "Canada" refers to the Defendant, the Government of Canada as represented by the Attorney General of Canada;
- (d) "Class" or "Class Members" refer to the approximately 16,000 aboriginal persons who, as children in Ontario, were exposed to the consequences of the Defendant's breach of fiduciary obligation, duty of care and protection of aboriginal rights and identity genocide during the Class Period, excluding those who were members of the Class in action 00-CV-192059CP in the Ontario Superior Court of Justice (i.e. Residential Schools' Abuse Class Action);
- (e) "Class Period" means December 1, 1965 to December 31, 1984.
- (f) "constitutional obligations" refer to the obligation of Canada pursuant to section 91(24) of the *Constitution Act, 1867* and the *Indian Act* and section 35 of the *Constitution Act, 1982*;
- (g) "identity" in this claim refers to the culture, social, linguistic, customs, traditions, and spirituality that a child enjoys and necessarily exercises as a member of a particular family, extended family and community which make up the child's distinguishing character or qualities;
- (h) "identity genocide of children" means the damage or harm caused by the deliberate creation and implementation of policy, program and practices that systemically attempt to eradicate the particular cultural, social, linguistic, customs, traditions, and spirituality of the child's indigenous family, extended family and community;
- (i) "Indian" has the same meaning as in the Indian Act, and "native" means a person who was a member of an aboriginal community but was not a member of an Indian band and was not a registered Indian under the Indian Act.
- (j) "Indian Act" means the Indian Act, R.S.C. 1985, c.1-5
- (k) "international convention law" includes the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights.
- (l) Ontario refers to the Province and Government of Ontario;

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3. The Plaintiffs, Marcia Brown and Robert Commanda, reside in Ontario and are aboriginal and Indian or native persons, and are proper representative plaintiffs on behalf of the Class. At all material times both resided in Ontario and, as children, suffered the consequences of the Defendant's breach of fiduciary obligation, duty of care and protection of aboriginal rights.

4. The Class is made up of approximately 16,000 aboriginal and Indian or native persons known within aboriginal communities and Bands in Ontario as children who experienced the events resulting from the Defendant's breach of fiduciary obligation, duty of care and protection of aboriginal rights during the Class Period because, as children, they were removed from their indigenous family, extended family and community and exposed to the deliberate and prolonged implementation of systemic child welfare policy, practices and programs described herein.

5. The Defendant, Attorney General of Canada, represents the federal government of Canada ("Canada").

6. On December 1, 1965, Canada entered into the "Canada-Ontario Welfare Agreement" whereby Canada delegated the provision of child welfare services to Ontario. Within Canada, the only jurisdiction willing to enter into such an agreement was Ontario. The Agreement was the culmination of prior delegation of arrangements for Indian child welfare services by Canada and Ontario beginning in the mid-1950s. The Agreement meant that authorities other than Canada became directly responsible for the delivery of child welfare services to Indian children exclusively in Ontario. As a result, Indian or native children in Ontario, who were apprehended and removed from their indigenous family and community, were placed in the care of non-Indian and non-native adoptive or foster homes where they were systemically denied the opportunity to preserve their identity.

7. The 1965 Canada-Ontario Welfare Agreement constituted an improper and unlawful delegation of Canada's constitutional obligations, the consequence of which was identity genocide of children targeted at Indian families and communities in Ontario.

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8. Indian children and their families were entitled to a special duty of care, good faith, honour, honesty and loyalty from Canada pursuant to Canada's constitutional obligations and Canada's duty to act in the best interests of Indian children who were particularly vulnerable.

9. The systemic practices, programs and policy implementation giving rise to identity genocide for the Class effectively ended on January 1, 1985 with the coming into force of the *Child and Family Services Act*, S.O. 1984, c. 55. This legislation, amongst other things, gave necessary status to the native or Indian community in all child welfare decisions concerning Indian or native children, and served as a necessary correction to Canada's breach of its duties. Ontario, having recognized the consequences of Canada's failure to protect the identity of native or Indian children, amended its legislation within its constitutional authority over child welfare.

10. The Plaintiff, Marcia Brown ("Brown"), was born on June 7, 1963 as Sally Susan Mathias, a member of the Temagami First Nation from the Beaverhouse Community, near Kirkland Lake, Ontario.

11. When Brown was 4 or 5 years old, a children's aid society removed her and an older sister from their family. The family consisted of five other siblings, a mother and father, extended maternal and paternal relatives, and an indigenous Indian community. She was later adopted at the age of 9.

12. Thereafter, and until she was 17½ years old, Brown was denied any reasonable contact with her family, relatives and community. Brown was denied any reasonable opportunity to maintain any connection with the traditions, language, customs, heritage and culture of her family of birth. She lost the use of the only language she spoke before she was removed. She lost all contact with the other sister who was removed with her. Her name was changed when she was adopted. Her child rearing was as a non-native, non-Indian person with no reference at all to her identity as an Indian.

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13. At the age of 17½ years, her adoptive mother put Brown on a plane. She was residing then in the U.S.A. Her adoptive parent caused her to be sent away to North Bay, Ontario.
14. When she was sent away, the only personal items she had, besides the clothing she wore, were the clothes she had when she had arrived at the non-Indian adoptive home years earlier.
15. Upon arrival in North Bay, Ontario, Brown had no identity as an Indian or native person. She had no legal papers that recognized her status as an Indian or native person. She had no capacity for integrating with the persons to whom she was returned; namely her Indian family, relatives and community.
16. In these circumstances, Brown found that she was unable to cope. She was an Indian but had no capacity to exercise an identity, let alone exercise membership in an Indian family and community. She formed an ambivalent, awkward and angry connection to mainstream non-native society, and as a result, Brown floundered and struggled.
17. As a child, the authorities or persons in charge or care of her gave Brown no information as to her birth name and no information enabling her to make contact with her identity and her Indian family, extended family and community. When she turned 18, Canada took no steps to provide her with any information or documentation that would enable her to have access to her adoption records, the adoption order, or any documentation that would enable her to exercise the benefits available to her under the *Indian Act*, R.S. C. c. I-5.
18. With the help of others, Brown searched for her records as an Indian person. She discovered that, according to the Registrar-General in charge of such records, Sally Susan Mathias was dead. She was not prepared in any way for the process of re-claiming her status.
19. Robert Commanda ("Commanda") was born Bruce Edward Robert Joseph Commanda on March 28, 1959 in Haileybury, Ontario.

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20. A local children's aid society removed him and three brothers from their home in or about 1961, when he was two years old.
21. Commanda was not adopted. He lived in foster homes in Ontario throughout his childhood. He was raised by non-native non-Indian persons with no reference ever made to his native or Indian culture or identity.
22. Commanda was denied any reasonable opportunity to maintain contact with his Indian family, relatives and community. Commanda was also denied any reasonable opportunity to maintain any connection with the traditions, language, customs, heritage and culture of his family of birth and community. Commanda entered adulthood with no knowledge or experience of what it meant to be an Indian.
23. In none of the places where he lived was Commanda offered any opportunity to know of or maintain his cultural identity. No one caring for him showed him pictures or related to him any information about his Indian family, extended family and community.
24. During his childhood Commanda was not registered as a member of his paternal or maternal Indian families and Bands, although there was a large extended maternal family located at the Dokis Reserve in Monetteville, Ontario and a similarly large extended paternal family located at the Garden Village Reserve in Sturgeon Falls, Ontario. His extended family exceeded 3,000 persons and both sides of his parents' families continued to practise their culture and to speak their native language.
25. At the age of 18 years, and upon contact in Toronto with the Native Friendship Centre, he first learned of information that enabled him to begin the process of securing his identity as an Indian person. He also learned then of his entitlement to benefits as an Indian. No one had prepared him for the process of Indian status and benefits. At this time, he finally obtained his birth certificate. No one had previously provided it to him.
26. Commanda was unable to successfully re-integrate into the Indian community.

27. Commanda experienced anger and ambivalence about the mainstream community that had led him to his predicament. He experienced distance and awkwardness with the Indian community with whom he had little or no connection in respect of the traditions, language, customs, heritage, spirituality and culture. He could not settle into ordinary relationships with Indian and non-Indian persons. He experienced depression and suicidal ideation.
28. The experiences of Brown and Commanda are representative of the experiences of the members of the Class.
29. Common to the Class is the fact of childhood isolation from their constitutionally protected identity. Indian or native traditions, language, customs, heritage, spirituality and culture were extinguished through foster or adoptive care by non-Indian or non-native persons and systemic practices, programs and policies that promoted, or did nothing to avoid the extinction of identity. The native or Indian child members of the Class emerged from childhood with a struggle over identity, and a further struggle in the pursuit of information in order to secure an identity. This experience of anger, disappointment and rejection as a foreigner or stranger in both mainstream (non-native/non-Indian) society and the society of the indigenous community is a result of Canada's derogation from, and breach of its duty of care and fiduciary obligation when it participated in the implementation of systemic practices, programs or policies that Canada knew or should have reasonably known would cause irreparable and enduring harm to vulnerable children.
30. The Class consists of aboriginal persons who, as children, enjoyed aboriginal rights, one of which was their right to identity, and which identity existed and was exercised at all relevant times pursuant to section 35(1) of the *Constitution Act, 1982*.
31. Identity genocide of children contravenes international convention law to which Canada is a party, and is an independent actionable wrong.
32. Special damages claimed include the costs for rehabilitative and therapeutic services responsive to the harm experienced by the Class. For some of the Class Members, special

damages include the loss to the enjoyment of a parcel of Band land where a house can be built, which is the entitlement of every Band member. The loss of enjoyment is the result of the experience described above, the effect of which led some Class Members to become so distanced or estranged from their culture that they could not reasonably choose to live within the Band.

33 Due to the egregious and deliberate conduct of the Canada, the Class Members are entitled to punitive, aggravated and exemplary damages. The systemic policy, practices and programs were deliberately targeted against Indian or native children exclusively in Ontario. The actions of Canada violated the fundamental rights of vulnerable children.

34. The Plaintiffs plead and rely upon the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

Place of Trial

35. The Plaintiffs propose that this action be heard in Toronto, Ontario.

Date: February 9, 2009

WILSON CHRISTEN LLP
Barristers
137 Church Street
Toronto, Ontario
M5B 1Y5

Jeffery Wilson
LSUC # 17649K
Tel: 416 956 5622
Fax: 416 360 7912
Email: jeffery@wilsonchristen.com

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Fax: 416 961 4000
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Counsel for the Plaintiffs

Plaintiffs - - - AL. - and - THE ATTORNEY GENERAL OF CANADA c1-09-02372025-00CP
Defendant

Court File No.

SUPERIOR COURT OF JUSTICE
Proceeding Commenced at Toronto

STATEMENT OF CLAIM

WILSON CHRISTEN

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Counsel for the Plaintiffs

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LSUC #: 15904C

Tel: (416) 961-2626
Fax: (416) 961-4000

*THIS IS EXHIBIT "2" REFERRED TO IN THE
AFFIDAVIT OF DAVID ROSENFELD
SWORN BEFORE ME, THIS 18TH DAY OF APRIL, 2018*



A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.
GARTH MYERS

Court File No. ~~09-CV-382025CPCV-09-00372025-00CP~~

ONTARIO
SUPERIOR COURT OF JUSTICE

AN ORDER OF THE SUPERIOR COURT OF JUSTICE
MODIFIÉE LE 29/11/15
POURSUANT TO CONFORMEMENT A
RÈGLE/LA RÉGLE 26.02 (B)
THE ORDER OF L'ORDONNANCE DU
DATED / FAIT LE
REGISTRAR SUPERIOR COURT OF JUSTICE
GREFFIER COUR SUPÉRIEUR DE JUSTICE

BETWEEN:

MARCIA BROWN and ROBERT COMMANDA

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under the *Class Proceedings Act, 1992*

FRESH AS AMENDED AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiffs' lawyer or, where the Plaintiffs do not have a lawyer, serve it on the Plaintiffs, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

- 2 -

IF YOU PAY THE PLAINTIFFS' CLAIM, and \$5,000.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiffs' claim and \$400.00 for costs and have the costs assessed by the court.

Date ~~July 29, 2015 February 9,~~ ^{February 9/09}
2009

(Fresh as Amended ~~Amended~~
Statement of Claim pursuant to
the ~~September 27, 2014 Order of~~
~~the Honourable Justice~~
~~Belobaba~~ ~~May 26, 2010 Order of~~
~~the Honourable Justice Perell.~~)

Issued by ^u A. Vasconcelos ¹
Local registrar

Address of court office 393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E

TO: THE ATTORNEY GENERAL OF A CANADA
Suite 3400, Exchange Tower
Box 36, First Canadian Place
Toronto, Ontario
M5X 1K6

- 3 -

CLAIM

1. The Plaintiffs claims:
 - (a) An Order certifying this proceeding as a Class Proceeding pursuant to the Class Proceedings Act and appointing ~~her~~ ~~them~~ as Representative Plaintiffs;
 - (b) A Declaration that, by reason of the events described in this action, the Defendant did breach its fiduciary obligation and duty of care to the Class Members;
 - (c) Damages to include:
 - i. Non-pecuniary and general damages in the amount of at least \$50,000.00 for each Class Member;
 - ii. Pecuniary ~~and special~~ damages in the amount of at least \$25,000.00 for each Class Member;
 - iii. Special damages of \$15,000 for each Class Member; and
 - iv. Punitive, exemplary and aggravated damages in the amount of at least \$10,000.00 for each Class Member,caused by the Defendant's breach of fiduciary duty and duty of care;
 - (d) Prejudgment and post judgment interest pursuant to s.128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43 (as am.);
 - (e) Substantial indemnity costs of this action;
 - (f) HST, as applicable, and
 - (g) Such further and other relief as this Honourable Court deems just.

Definitions

2. In this Claim:

- (a) "aboriginal" when used in reference to "aboriginal persons" or "aboriginal children" refers to Indian or native or First Nations' persons;
- (b) "Agreement", "the Agreement" refers to "The Canada-Ontario Welfare Services Agreement", Treasury Board Minute Dated December 1, 1965, P.C. 1965-11/2135.
- (c) "Canada" refers to the Defendant, the Government of Canada, the federal Crown, ("the Crown") as represented by the Attorney General of Canada;
- (d) "child welfare services" refers to the provision of state services to children following removal from their indigenous or birth homes and includes wardship and adoption placements;
- (e) "Class" or "Class Members" refer to Indian children who were taken from their homes on reserves ~~aboriginal persons~~ in Ontario between December 1, 1965 and December 31, 1984 and were placed in the care of non-aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions, and practices;
- (f) "Class Period" refers to the period of time from December 1, 1965 to December 31, 1984 in which the "Sixties Scoop", as described below, is alleged to have occurred;
- (g) "constitutional obligation" refers to the obligation of Canada pursuant to section 91(24) of the *Constitution Act, 1867*;
- (h) "cognizable aboriginal interests" include:
 - i) An indigenous language;
 - ii) The exercise of a spiritual meaning of life and holistic view of the environment that is profoundly different than that of the European or the Eurocentric model and which enables a kinship with the environment, all animate and inanimate objects. In contrast to Eurocentric thought, aboriginal people believe and rear their children to respect that the totality of relationships between individuals govern the well-being of the universe, and that no one element exists in the absence of a relationship with all others;
 - iii) The privilege and expectation of a sense of community, community rights, community inter-dependence that is different than that of the Eurocentric

- 5 -

model, communalism in distinction to individualism as an expression of aboriginal identity in contrast to Eurocentric values;

- iv) The use of one's family name, the name passed on from generation to generation;
 - v) The benefit and expectation of a large extended family or clan system, a collective of resources of great numbers and strengths where the ultimate panacea for a family under crisis is not the displacement of the child to another culture or stranger via crown wardship or property transfer *qua* adoption with one nuclear family replacing another; customary care being instead a communal responsibility for the care and rearing of the child within the extended family and clan;
 - vi) Being raised by one's family and community and in one's indigenous culture;
 - vii) Child rearing that is premised upon the child as the gift from the creator, and thus no child would be an orphan, or experience life in an orphanage, foster home or as a society or crown ward. There is no word for society ward or crown ward in any indigenous language of the members of the Class;
 - viii) Child rearing that involves a series of rites of passage within childhood from early on, with the child involved in the routines and management of the community's chores and preservation, and enjoying a sense of freedom within the community uniquely different from that of the Eurocentric concept of childhood where the child is excluded from adult activities and childhood is a period of containment and control;
 - ix) The exercise of one's indigenous culture, traditions and customs; and,
 - x) The respect for oral histories, respect for elders and the passing of beliefs from one generation to the next through such oral histories.
- (i) "cultural identity" includes the cognizable aboriginal interests, as defined above, and refers to the language, customs, traditions, and culture that an aboriginal child enjoys and

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necessarily exercises as a member of a family, extended family and aboriginal community;

(j) "Indian" has the same meaning as in the Indian Act. ~~and "native" means a person who was a member of an aboriginal community but was not a member of an Indian band and was not a registered Indian under the Indian Act;~~

(k) "Indian Act" means the Indian Act, R.S.C. 1985, c.1-5

(l) "Ontario" refers to the Province and Government of Ontario;

Parties

3. The Plaintiffs, Marcia Brown ~~and Robert Commanda~~, are is an aboriginal persons, and is a ~~are~~ proper Representative Plaintiffs on behalf of the Class. ~~Both~~ She resides in Ontario. ~~Both~~ She resided in Ontario at all relevant times. ~~Both, She~~, as a children, suffered the consequence of the Defendant's breach of fiduciary obligation and duty of care.

4. The proposed Class is made up of more than 16,000 aboriginal persons known within aboriginal communities and Bands in Ontario as those who, as children, experienced the "Sixties Scoop". During the Class Period they, as children, were placed in the care of non-aboriginal foster or adoptive parents who did not raise them in accordance with their aboriginal customs, traditions, and practices. This event, with its consequences, occurred because the Defendant breached a fiduciary duty and duty of care owed to the Class.

5. The Defendant, The Attorney General of Canada, represents the Crown.

Marcia Brown

6. The Plaintiff, Marcia Brown ("Brown"), was born on June 7, 1963 as Sally Susan Mathias, a member of the Temagami First Nation from the Beaverhouse Community, near Kirkland Lake.

7. When Brown was 4 or 5 years old, a children's aid society removed her and an older sister from their family. The family consisted of five other siblings and a mother and father, as well as extended maternal and paternal relatives, and an indigenous Indian community.

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8. Thereafter, and until she was 17½ years old, Brown was denied any reasonable contact with her family, relatives and community. Brown was denied any reasonable opportunity to maintain any connection with the traditions, language, customs, heritage and culture of her family of birth. She lost the use of the only language she spoke before she was removed. She lost all contact with the other sister who was removed with her. Her name was changed when she was adopted at age 9 years. Her child rearing was as a non-native, non-Indian person with no reference at all to her identity as an Indian.
9. At the age of 17½ years, her adoptive mother put Brown on a plane. She was residing then in the U.S.A. Her adoptive parent caused her to be sent away to North Bay, Ontario.
10. At the event of being sent away, the only other personal items she had, besides the clothing she wore, were the clothes she had when years earlier she arrived at the non-Indian adoptive home.
11. Upon arrival in North Bay, Ontario, Brown had no identity as an Indian or native person. She had no legal papers that recognized her status as an Indian or native person. She had no capacity for integrating with the persons to whom she was returned; namely her Indian family, relatives and community.
12. In these circumstances, Brown found that she was unable to cope. She was an Indian but had no capacity to exercise an identity, let alone exercise membership of an Indian family and community and she formed an ambivalent, awkward and angry connection to mainstream non-native society. As a result, Brown floundered and struggled.
13. As a child, the authorities or persons in charge or care of her gave Brown no information as to her birth name, or information enabling her to make contact with her identity and her Indian family, extended family and community. When she turned 18, the Crown took no steps to provide her with any information or documentation that would enable her to have access to her adoption records or the adoption order, or any documentation that would enable her to exercise the benefits available to her under the *Indian Act*, R.S. C. c. I-5.

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14. With the help of others, Brown searched for her records as an Indian person. She discovered that Sally Susan Mathias was dead, according to the Registrar-General in charge of such records. She was not prepared in any way for the process of re-claiming her status.

~~Robert Commanda~~

~~15. Robert Commanda ("Commanda") was born Bruce Edward Robert Joseph Commanda on March 28, 1959 in Haileybury, Ontario.~~

~~16. A children's aid society removed him and three brothers from their home in or about 1961, when he was two years old.~~

~~17. Commanda was not adopted. He lived in foster homes in Ontario throughout his childhood. The child rearing to which he was exposed was by non native non Indian persons with no reference ever made to his native or Indian culture or identity.~~

~~18. Commanda was denied any reasonable opportunity to maintain contact with his Indian family, relatives and community. Commanda was denied any reasonable opportunity to maintain any connection with the traditions, language, customs, heritage and culture of his family of birth family and community. Commanda entered adulthood with no knowledge of what it meant to be an Indian.~~

~~19. In none of the places where he lived was Commanda offered any opportunity to know of or maintain his cultural identity. No one caring for him showed him pictures or related to him any information about his Indian family, extended family and community.~~

~~20. At all relevant times during his childhood, Commanda was not registered as a member of his paternal or maternal Indian families and Bands, although there was a large extended maternal family located at the Dokis Reserve in Monetteville, Ontario and a similarly large extended paternal family located at the Garden Village Reserve in Sturgeon Falls, Ontario, and although the numbers of his family and his extended family exceeded 3,000 persons and both side of his parents' families continued to practice their culture and to speak their native language.~~

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~~21. At the age of 18 years, and upon contact in Toronto with the Native Friendship Centre, he first learned of information that enabled him to begin the process of securing his identity as an Indian person. He also learned then of his entitlement to benefits as an Indian. No one had prepared him for the process of Indian status and benefits. At this time, he finally obtained his birth certificate. No one had provided it to him before.~~

~~22. In these circumstances, Commanda was unable to successfully re-integrate into the Indian community.~~

~~23. In these circumstances, Commanda experienced anger and ambivalence about the mainstream community that had led him to his predicament. He experienced distance and awkwardness with the Indian community with whom he had no or little connection in respect of traditions, language, customs, heritage and culture. He could not settle into ordinary relationships with Indian and non-Indian persons. He experienced depression and suicidal ideation.~~

Negligence — Canada owes a duty of care

24. Canada has a duty of care to its vulnerable aboriginal children by virtue of:
- (a) its constitutional obligations;
 - (b) jurisprudence of high and binding authority;
 - (c) its special relationship with aboriginal persons referred to in jurisprudence as a “duty of honour”;
 - (d) the incorporation into common law of the traditions and customs of aboriginal societies, giving them legal force as part of the Canadian legal system, and as incorporated into the *Constitution Act, 1982*.
 - (e) the existence of an Indian Act as a statutory acknowledgment of Canada’s duty of care to aboriginal people; and
 - (f) the formal acknowledgement of responsibility by Canada and apology for past policies of assimilation of vulnerable aboriginal children which caused harm.

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Negligence — Canada breached its duty to vulnerable aboriginal children

25. The Plaintiffs states that cultural identity is a fundamental element in respect of which Canada owes vulnerable aboriginal children a duty of care.

26. In Ontario, between December 1, 1965 and December 31, 1984, Canada breached its duty of care by omitting or failing to take reasonable steps to prevent the Plaintiffs and the Class Members from losing their cultural identity.

27. The Plaintiffs states that her ~~their~~ personal circumstances as described above are representative of the Class.

28. When the Agreement was made, it was not sufficient for Canada to provide funding only. Canada's duty of care to the Class required more than the application of funding. The constitutional duty owed by Canada to vulnerable aboriginal children requires reasonable steps for the protection and exercise of aboriginal cultural identity. Canada took no reasonable steps in fulfilment of its duty of care.

29. More specifically, during the Class Period:

- a) Canada did nothing to stop Ontario from providing child welfare services in consequence of which Canada knew or ought to have known would result in the Class Members losing their cultural identity;
- b) Canada did nothing to ameliorate the harmful effects of Ontario's child welfare services;
- c) Canada did nothing to ensure ~~assure~~ that vulnerable aboriginal children were made aware of their status as aboriginal children when they were placed in non-aboriginal homes;
- d) Canada did nothing to ensure ~~assure~~ that the aboriginal children would be provided with services that could enable them to be aware of and exercise their culture, traditions, customs and identity during the period of their placement in non-aboriginal homes;

- e) Canada did nothing to ensure ~~assure~~ that aboriginal children were made aware of their status as aboriginal persons when they left their non-aboriginal homes or entered their age of majority;
- f) Canada did nothing to ensure ~~assure~~ that aboriginal children, when approaching their age of majority, or leaving their non-aboriginal homes, would be provided with services that could enable them to reclaim their cultural identity; and
- g) Canada failed to ensure that vulnerable aboriginal children had, at least, the protections in respect of their cultural identity as those which were subsequently implemented by Ontario in the 1984 provincial *Child and Family Services Act*, S.O. 1984, c. 55.

30. By failing to take any such steps, Canada turned a blind eye to the Class who it knew, or reasonably should have known would thereby individually and collectively lose their cultural identity, and suffer the psychological and other harm described herein.

Negligence — Causation

31. Canada's conduct, as pleaded herein, caused damages to the Plaintiffs and the Class, as particularized below, which harm and damages were foreseeable.

32. The provision of funding through the Agreement did not absolve Canada from the duty to take reasonable steps to prevent vulnerable aboriginal children from losing their aboriginal cultural identity as a by-product of Ontario child welfare policies.

33. Canada cannot rely upon a delegation of authority to Ontario when Canada failed to take any reasonable steps to monitor and safeguard the protection of the vulnerable aboriginal child's cultural identity.

Negligence — Damages

34. The Plaintiffs state that she ~~they~~ and members of the Class suffered damages by reason of the loss of their cultural identity. The Plaintiffs ~~rely~~ relies upon the description of damages set out below at paragraphs 52-55.

Fiduciary Duty

Canada has a fiduciary relationship with vulnerable aboriginal children

35. The Plaintiffs states that Canada stands in a fiduciary relationship to its aboriginal peoples.

36. Canada has exclusive jurisdiction in respect of aboriginal persons pursuant to section 91(24) of the *Constitution Act, 1867*, section 35(1) of the *Constitution Act, 1982*, the common law, and court rulings of high and binding authority.

The fiduciary duties arising from the fiduciary relationship

37. By virtue of its constitutional obligation, Canada's duty of honour in the treatment of aboriginal persons, including an ongoing obligation of consultation on matters relevant to aboriginal interests, and well-accepted jurisprudence of high and binding authority, there is an expressed and implied undertaking by Canada to protect the interests of vulnerable aboriginal children.

38. Canada's constitutional obligation, the Indian Act, and the common law, including the duty of honour, bestow a discretionary control requiring Canada to take steps to monitor, influence, safeguard, secure, and otherwise protect the vital interests of vulnerable aboriginal children, and, in particular, their cultural identity.

39. The nature and importance of the aboriginal cultural identity is fundamental to the security, welfare and survival of aboriginal persons.

40. Aboriginal cultural identity is entrenched within the *Constitution Act, 1867* and the *Constitution Act, 1982*, and is at the core of being an "Indian" under Canadian law.

Canada's Breach of its Fiduciary Duties

41. During the Class Period, Canada had a fiduciary duty to the Plaintiffs and the Class when they were removed from their homes and placed in non-aboriginal homes.

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42. Canada's fiduciary duty continued by virtue of its constitutional obligation notwithstanding the Agreement and Ontario's responsibility for providing child welfare services.
43. Cultural identity is critical to the healthy development of vulnerable aboriginal children which, as a fiduciary, Canada must take into account and take reasonable steps to protect.
44. Canada breached its fiduciary duty to the Plaintiffs and the Class by failing to take reasonable steps to protect the cultural identity of the Plaintiffs and the Class Members and, therefore, failed to prevent the Plaintiffs and the Class Members from losing their cultural identity.
45. More specifically, during the Class Period:
- a) Canada did nothing to stop Ontario from providing child welfare services in consequence of which the Class Members lost their cultural identity;
 - b) Canada did nothing to ameliorate the harmful effects of Ontario's child welfare services;
 - c) Canada did nothing to ensure ~~assure~~ that aboriginal children were made aware of their status as aboriginal children when they were placed in non-aboriginal homes;
 - d) Canada did nothing to ensure ~~assure~~ that the aboriginal children would be provided with services that could enable them to be aware of and exercise their culture, traditions, customs and identity during the period of their placement in non-aboriginal homes;
 - e) Canada did nothing to ensure ~~assure~~ that aboriginal children were made aware of their status as aboriginal persons or the benefits available to them when they left their non-aboriginal homes or entered their age of majority;
 - f) Canada did nothing to ensure ~~assure~~ that aboriginal children, when approaching their age of majority, or leaving their non-aboriginal homes, would be provided with services that could enable them to reclaim their cultural identity; and

g) Canada failed to ensure that vulnerable aboriginal children had, at least, the protections in respect of their cultural identity as those which were subsequently implemented by Ontario in the 1984 provincial *Child and Family Services Act*, S.O. 1984, c. 55.

46. At all relevant times, Canada had authority and an obligation to intervene. It did not. Instead, Canada merely provided funding to Ontario to ensure that the province's child welfare legislation would extend to on-reserve Indian children. As Canada knew, the Agreement did not provide protection for the cultural identity of vulnerable aboriginal children within Ontario's child welfare system.

47. As Canada knew, adoption and permanent foster care in non-aboriginal homes were events in apparent and actual conflict with the protection of aboriginal cultural identity.

48. Canada failed to consult with the Ontario Indian Bands in respect of the provision of funding for child welfare practices and policies to on-reserve Indian children that it knew were clearly in conflict with its duty to protect the cultural identity of on-reserve Indian children.

49. By failing to take any such steps to protect the aboriginal cultural identity of the Plaintiffs and the Class, Canada, in breach of its fiduciary duty, was careless, reckless, wilfully blind, or deliberately accepting or promoting a policy of cultural assimilation.

50. Canada knew or reasonably should have known that vulnerable aboriginal children, in these circumstances, would assimilate with the culture of their non-aboriginal caregivers.

51. The actions and omissions of Canada, as described herein, were acts of fundamental disloyalty, betrayal and dishonesty to the Plaintiffs and the Class Members.

Fiduciary duty— Damages

52. As a result of Canada's actions and omissions, the Plaintiffs and the Class were subject to emotional, psychological and spiritual suffering by reason of the unnecessary and destructive loss of an aboriginal cultural identity. They were left fundamentally disoriented, with a reduced

ability to lead healthy, functional and fulfilling lives, and their ability to pass on to succeeding generations the spiritual, cultural and behavioural bases of their peoples was significantly compromised.

53. The Plaintiffs and the Class became unwilling participants in what is now known in the aboriginal community as the "Sixties Scoop". This description refers to the survivors of the Class Period that were robbed of their culture, customs, traditions, language and spirituality, in consequence of which they experienced loss of self-esteem, identity crisis, trauma in trying to re-claim the culture, traditions and spirituality that comprises the identity, and they became socially dysfunctional, requiring therapy and counselling.

54. The Plaintiffs pleads that ~~she they~~ and the Class members experienced, and continue to experience the impact of the Sixties Scoop as Canada's attempt to intentionally implement a cultural assimilation and loss of their aboriginal identity. The Plaintiffs seeks punitive, aggravated and exemplary damages by reason of Canada's egregious conduct in violating the fundamental rights of children.

55. Pecuniary damages include the loss occasioned by the deprivation of various entitlements and benefits to which the class of aboriginal persons would have been entitled to receive by virtue of their Indian status but which they did not receive because they were unaware of these entitlements and benefits. These entitlements and benefits include: education grants; extended health care benefits (including but not limited to prescription and non-prescription drugs, medical transportation, and dental care); treaty annuities; entitlement to reserve land (including the loss to the enjoyment of a parcel of Band land where a house can be built, which is the entitlement of every Band member); trapping, fishing, and hunting rights; and tax benefits (including the GST exemption). The Plaintiff states that the Defendant had an obligation to notify the class members of these entitlements and benefits which were available to them notwithstanding their adoption or wardship.

56. Special damages include the costs for rehabilitative and therapeutic services responsive to the harm experienced by the Class. For some of the Class Members, special damages includes the

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~~loss to the enjoyment of a parcel of Band land where a house can be built, which is the entitlement of every Band member. The loss of enjoyment is the result of the experience described above, the effect of which led some of the Class Members to be so distanced or estranged from their culture that they would not reasonably choose to live within the Band, or exercise their statutory rights under the Indian Act.~~

57. The Plaintiffs pleads and relies ~~rely~~ upon the *Class Proceedings Act, 1992*, S.O. 1992, c.

Place of Trial

58. The Plaintiffs proposes that this action be heard in Toronto, Ontario.

Feb. 9/09
Date: July 28, 2015 ~~February 9, 2009~~

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Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA
Defendant

Court File No. CV-09-00372025-00CP

SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

FRESH AS AMENDED STATEMENT OF CLAIM

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*THIS IS EXHIBIT "3" REFERRED TO IN THE
AFFIDAVIT OF DAVID ROSENFELD
SWORN BEFORE ME, THIS 18TH DAY OF APRIL, 2018*

A handwritten signature in blue ink, consisting of a series of loops and curves, positioned above a horizontal line.

A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.
GARTH MYERS

Brown et al. v. The Attorney General of Canada

[Indexed as: Brown v. Canada (Attorney General)]

102 O.R. (3d) 493

2010 ONSC 3095

2010 ONSC 3095 (CanLII)

Ontario Superior Court of Justice,

Perell J.

May 26, 2010

Native law -- Fiduciary duties -- Plaintiffs bringing proposed class action against federal Crown on behalf of aboriginal children who were removed from their families and communities and placed with non-aboriginal foster and adoptive parents between signing of Canada-Ontario Welfare Services Agreement in 1965 and coming into force of new child welfare legislation in Ontario in 1984 -- Defendant's motion to dismiss action as disclosing no reasonable cause of action granted with leave to plaintiffs to amend statement of claim -- No independent cause of action existing based on breach of honour of Crown -- Claim of "identity genocide of children" not viable as it was based on international covenants or conventions which were not part of Ontario civil law and as defendant's action in signing agreement was not with intent to destroy identifiable group of persons -- No reasonable cause of action existing in these circumstances based on violation of aboriginal rights -- Defendant not breaching fiduciary duty by entering into agreement -- Plaintiffs given leave to amend statement of claim to assert claim for breach of fiduciary duty based on defendant's failure to take reasonable steps to prevent aboriginal children placed in non-aboriginal homes from losing their aboriginal identity -- Plaintiffs also given leave to

[page494] amend negligence claim to base it on what defendant knew or ought to have known and what it did or did not do after aboriginal children were placed in non-aboriginal homes.

In December 1965, the federal Crown signed an agreement with the Province of Ontario known as "The Canada-Ontario Welfare Services Agreement". Under that agreement, which was an exercise of the federal spending power, Ontario assumed the responsibility for providing child welfare services for certain aboriginal children with funds provided by the federal Crown. The plaintiffs brought a proposed class action on behalf of approximately 16,000 aboriginals who, they alleged, were the victims of a deliberate program of "identity genocide of children" that occurred in Ontario between the signing of the agreement and the coming into force of new child welfare legislation in Ontario in December 1984. During that period, welfare authorities in Ontario removed many aboriginal children from their families and communities and placed them with non-aboriginal foster and adoptive parents. The plaintiffs sued only the federal Crown, asserting five causes of action: (1) breach of the honour of the Crown; (2) the actionable wrong of identity genocide of children; (3) violation of aboriginal rights; (4) breach of fiduciary duty; and (5) negligence. They brought a motion to certify the action as a class proceeding. The defendant brought a motion to dismiss the action as disclosing no reasonable cause of action.

Held, the defendant's motion should be granted, with leave to the plaintiffs to amend their pleading.

It was plain and obvious that the causes of action as pleaded had no chance of success. There is no independent cause of action based on the honour of the Crown. The identity genocide claim was not viable as a tort for two reasons: it was based on international covenants or conventions which are not part of Ontario's civil law, and the action of the defendant in signing the agreement was not with intent to destroy an identifiable group of persons and was not an act of forcibly transferring children of a group to another group. It was plain and obvious that the plaintiffs' grievances could not be expressed as a

cause of action based on violation of aboriginal rights. That alleged cause of action was, at best, a disguised version of the plea of identity genocide. The actions of the defendant in entering into and implementing the agreement did not amount to a breach of fiduciary duty. For a breach of fiduciary duty, there must be an element of betrayal and not just misconduct. Entering into the agreement did not amount to a betrayal of trust or disloyalty. However, it was not plain and obvious that there was no viable cause of action for breach of fiduciary duty against the defendant based on its alleged failure to act to ameliorate any harmful effects of the child welfare scheme or to ensure that Indian children were made aware of their status as Indians when they were placed in non-aboriginal homes. The negligence claim as pleaded, based on the defendant entering into the agreement, was not viable. The plaintiff was granted leave to amend the claim to base it on what the defendant knew or ought to have known and what it did or did not do after Ontario welfare authorities began placing aboriginal children in non-aboriginal homes.

If the above causes of action were properly pleaded, the other requirements for certification were made out.

Cases referred to

B. (K.L.) v. British Columbia, [2003] 2 S.C.R. 403, [2003] S.C.J. No. 51, 2003 SCC 51, 230 D.L.R. (4th) 513, 309 N.R. 306, [2003] 11 W.W.R. 203, J.E. 2003-1874, 187 B.C.A.C. 42, 18 B.C.L.R. (4th) 1, [2003] R.R.A. 1065, 19 C.C.L.T. (3d) 66, [2004] CLLC 210-014, 38 C.P.C. (5th) 199, 44 R.F.L. (5th) 245, 125 A.C.W.S. (3d) 432, apld [page495]

Aksidan v. Canada (Attorney General), [2008] B.C.J. No. 178, 2008 BCCA 43, 164 A.C.W.S. (3d) 267, 291 D.L.R. (4th) 378, 77 B.C.L.R. (4th) 248, 251 B.C.A.C. 161, [2008] 7 W.W.R. 521;

Blackwater v. Plint, [2005] 3 S.C.R. 3, [2005] S.C.J. No. 59, 2005 SCC 58, 258 D.L.R. (4th) 275, 339 N.R. 355, [2006] 3 W.W.R. 401, J.E. 2005-1925, 216 B.C.A.C. 24, 48 B.C.L.R. (4th) 1, [2005] R.R.A. 1021, 46 C.C.E.L. (3d) 165, 35 C.C.L.T. (3d) 161; Bonaparte v. Canada (Attorney General) (2003), 64 O.R. (3d) 1, [2003] O.J. No. 1046, 169 O.A.C.

376, [2003] 2 C.N.L.R. 43, 30 C.P.C. (5th) 59, 121 A.C.W.S. (3d) 442 (C.A.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924, 247 D.L.R. (4th) 667, 192 O.A.C. 239, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 2 C.P.C. (6th) 199, 135 A.C.W.S. (3d) 567 (C.A.), *revg* (2003), 65 O.R. (3d) 492, [2003] O.J. No. 2698, 41 C.P.C. (5th) 226 (Div. Ct.), *affg* [2001] O.J. No. 4163, [2001] O.T.C. 767, 109 A.C.W.S. (3d) 22 (S.C.J.) [*Leave to appeal to S.C.C. refused* [2005] S.C.C.A. No. 50], *consd*

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MOTION to dismiss the action as disclosing no reasonable cause of action.

Jeffery Wilson and Morris Cooper, for plaintiffs.

Owen Young, Paul Evraire, Q.C., and Michael Bader, Q.C., for defendant.

PERELL J.:--

Introduction and Overview

[1] The aboriginal communities in Ontario refer to it as the "Sixties Scoop". For a time, and particularly for a 19-year period between 1965 and 1984, welfare authorities in Ontario removed many Indian and aboriginal children from their families and communities and placed them with foster or adoptive parents that were non-aboriginals. It is alleged that many of the "scooped" children lost their identity as aboriginal persons

and suffered mentally and physically. The aboriginal communities describe the effects of the Sixties Scoop as horrendous, destructive, devastating and tragic.

[2] Marcia Brown and Roberta Commanda are aboriginals of Ojibway ancestry, and they were scooped children. In this proposed class action, which was commenced on February 9, 2009, notably, they do not sue the Ontario welfare authorities. They sue only the federal Crown. They accuse the federal Crown of a systemic assimilation policy purposely designed to destroy First [page499] Nations families and communities. They bring their action on behalf of approximately 16,000 aboriginals who, they allege, were the victims of a deliberate program of "identity genocide of children" that occurred in Ontario between December 1, 1965 and December 31, 1984. Their litigation is supported by a resolution of the Chiefs of Ontario adopted on November 20, 2008.

[3] Ms. Brown and Mr. Commanda allege that during the 19 years between December 1, 1965 and December 31, 1984, when new child-welfare legislation came into force in Ontario, the federal Crown wrongfully delegated its exclusive responsibility as guardian, trustee, protector and fiduciary of aboriginal persons by entering into an agreement with Ontario that authorized a child welfare program that systemically eradicated the aboriginal culture, society, language, customs, traditions and spirituality of the children.

[4] Ms. Brown and Mr. Commanda allege that they personally suffered from Ontario's child protection program; they experienced psychological problems associated with a loss of culture, self-esteem and identity. They claim damages of \$50,000 per class member and a declaration that the federal Crown breached its non-delegable fiduciary obligation and duty of care to protect aboriginal rights and did commit the actionable wrong of "identity genocide".

[5] Ms. Brown and Mr. Commanda make a motion to have their action certified as a class action. The federal Crown makes a motion to have their action dismissed as disclosing no reasonable cause of action.

[6] On both sides, there are some very powerful emotive and rhetorical forces at work. On the side of Ms. Brown and Mr. Commanda, there is the primal emotions shared by individuals and communities to love, to cherish, to care and to protect their children, and there is the primal fear that their children will be taken away by an enemy. There is the communal fear of extinction as a community, culture and race. On the side of the federal Crown, there is the outrage, the embarrassment and the indignity of being accused of racist and colonial acts of the gravest moral turpitude and criminality and the sentiment that the accusations are slanderous, unfair and false. The dignity and pride of both sides is offended.

[7] It is necessary that these forces be acknowledged so that passion does not overcome reason. It is also necessary to acknowledge that Ms. Brown's and Mr. Commanda's action involves the implicit submission that the courts of Ontario were complicit in perpetrating a great evil and that the federal Crown's defence to the action and to the motion now before the court involves the [page500] explicit counter-submission that during the years of the Sixties Scoop, the courts were acting properly, honourably and in the best interests of the aboriginal children that were the subject of their orders.

[8] It is necessary to acknowledge these forces and to keep in mind that the argument on this motion to certify a class action must be juridical dialectic, not a political polemic or apologia, and this motion is not the time to determine the merits of Ms. Brown's and Mr. Commanda's claims. The focus of this motion is only on s. 5 of the Class Proceedings Act, S.O. 1992, c. 6, which provides five criteria that all must be satisfied before an action may be certified as a class proceeding.

[9] Keeping all this in mind, for the reasons that follow, it is my conclusion that (a) with amendments to their statement of claim; (b) with revisions to the proposed class definition and proposed common issues; and (c) subject to the preparation of an adequate litigation plan, Ms. Brown and Mr. Commanda will be able to satisfy all five criteria of the test for

certification. Therefore, conditional upon Ms. Brown and Mr. Commanda revising their proposed class action in the manner described below and conditional upon the court approving the litigation plan for the revised class action, I grant their motion to certify the action as a class proceeding.

[10] However, for the reasons set out below, I would not have certified the class action in its current form, which makes the federal Crown's signing a welfare services agreement with the Province of Ontario the crucial allegation of wrongdoing. The practical effect of my conclusions is that I grant the federal Crown's motion to strike out the current statement of claim but I grant leave to Ms. Brown and Mr. Commanda to amend their pleading in a way, which is described below, that would support a class proceeding. If they do not amend their proposed class action, then I dismiss their motion for certification and I grant the federal Crown's motion to dismiss the action.

[11] As the reasons below will reveal, with amendments, the class action that may go forward is found within the existing statement of claim, but it is a pruned or focused class action that emerges from the current pleading. The amendments can solve a variety of problems that would have precluded certification of the action based on the current pleading and the current theory of the case. The changes are necessary because Ms. Brown's and Mr. Commanda's current statement of claim is based on a variety of legal theories of liability that have fatal flaws because their theories either fall short or they overshoot the legal target of possible federal Crown liability. [page501]

[12] The legitimate target or focus of the certifiable class action that emerges is that of answering a complex, difficult but largely legal question. The question is:

In Ontario, between December 1, 1965 and December 31, 1984, when an aboriginal child was placed in the care of non-aboriginal foster or adoptive parents who did not raise the child in accordance with the child's aboriginal customs, traditions and practices, did the federal Crown have and breach a fiduciary or common law duty of care to take

reasonable steps to prevent the aboriginal child from losing his or her aboriginal identity?

[13] If this question were answered in the negative at a common issues trial, 16,000 potential claims would be dismissed. 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.

[14] The general structure of my reasons for decision is that I will examine Ms. Brown's and Mr. Commanda's statement of claim and their proposed class proceeding and I will identify the obstacles to certification based on the current formulation of their proposed class proceeding, and I will also identify those elements of their statement of claim upon which a certifiable class action may be structured.

[15] My reasons for decision will have the following parts:

- Introduction and Overview
- Evidentiary Background
- Factual and General Legal Background of the Parties and the Province of Ontario
- Factual and General Legal Background to the Plaintiffs' Claims
- The Before and After of Ontario's Child Protection Legislation
- The Criteria for Certification -- Introduction and Overview [page502]
- Disclosure of Cause of Action -- Breach of the Honour of the Crown
- Disclosure of Cause of Action -- The Actionable Wrong of Identity Genocide of Children
- Disclosure of Cause of Action -- Breach of Aboriginal Rights

- Disclosure of Cause of Action -- Breach of Fiduciary Duty
- Disclosure of Cause of Action -- Negligence
- Identifiable Class
- Common Issues
- Preferable Procedure
- Representative Plaintiff
- Conclusion

Evidentiary Background

[16] The federal Crown did not deliver any affidavit material for the certification motion. It did deliver a brief of materials about child welfare legislation in Ontario and about two other class actions known as the Cloud class action and the Bonaparte/Lafrance class action, which is also known as the Baxter class action.

[17] In support of their motion for certification, Ms. Brown and Mr. Commanda delivered the following:

- an affidavit from Ms. Brown;
- an affidavit from Mr. Commanda;
- an affidavit from Mr. Kenneth Denis Richard, a social worker, adjunct professor and executive director of the Native Child and Family Services of Toronto;
- an affidavit from Dr. Ana Bodnar, a registered psychologist;
- an affidavit from Dr. Harvey Armstrong, a psychiatrist;
- an affidavit from Urban Elder Vernon Harper.

[18] All of the affiants were cross-examined by the federal Crown, and the transcripts of the cross-examinations were filed. [page503]

Factual and General Legal Background of the Parties and of the Province of Ontario

[19] The plaintiff Robert Commanda was born in 1959 in Haileybury, Ontario. At birth, he was not a registered Indian. His birth mother had been a member of the Dokis First Nation, but in 1958, her Indian status was revoked upon her marriage to Mr. Commanda's father, a non-status Indian. Robert Commanda was registered as an Indian after 1985, when the Indian Act, R.S.C. 1985, c. I-5 was amended by Bill C-31.

[20] The plaintiff Marcia Brown was born in 1963 at Beaverhouse, a First Nations community located 35 kilometres north-east of Kirkland Lake, Ontario. Ms. Brown is registered under the Indian Act, having received her Indian status by virtue of her father's membership in the Temagami First Nation.

[21] The proposed class members are certain aboriginal children who were placed in non-aboriginal foster homes or adopted by non-aboriginal persons in the period between the signing of the Canada-Ontario Indian Welfare Services Agreement in 1965 and the coming into force of the Child and Family Services Act, 1984, S.O. 1984, c. 55 (now the Child and Family Services Act, R.S.O. 1990, c. C.11).

[22] Adoption and foster home care is not a custom of aboriginal communities. Urban Elder Vernon Harper deposed that all Canadian First Nation tribes have unique ways and traditions of family life and the rearing of children, but in aboriginal communities there is no concept of adoption or wardship because all children are regarded as a communal responsibility. Urban Elder Harper deposed that the concept of removing a child from his or her place of birth and traditions, culture and spirituality is a foreign concept to aboriginal peoples, where the tradition is a communal expression of collective responsibility for children.

[23] In a point that will be important to the discussion below of causes of action, beyond Urban Elder Harper's testimony, neither the statement or claim nor the evidence provided define any particular ancestral practice, custom or tradition of Ontario's aboriginal peoples. During his cross-examination, Mr. Harper testified that the customary law of aboriginals varies from culture to culture and that the various laws and cultures were very sophisticated.

[24] The defendant federal Crown has legislative jurisdiction in respect of aboriginal persons under s. 91(24) of the Constitution Act, 1867 ("Indians and Lands Reserved for the Indians").

[25] Under s. 35 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, the rights of the [page504] aboriginal peoples of Canada are constitutionally entrenched, which is to say that the rights cannot be infringed by government action. Section 35 states:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Mtis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[26] The relationship between the federal Crown and aboriginals individually and collectively is also governed by the common law and equity.

[27] In advancing their claims against the federal Crown, Ms. Brown and Mr. Commanda rely on the governments "constitutional obligations" under s. 91(24) of the Constitution Act, 1867 and s. 35 of the Constitution Act, 1982. They also rely on the common law and equity and

- art. 2(e) of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (the "Genocide Convention"), which was adopted by the United Nations' General Assembly in December 1948 and of which Canada was one of the contracting parties;
- the November 20, 1959 United Nations Declaration of the Rights of the Child, G.A. res. 1386 (XIV), 14 UN GAOR Supp. (No. 16) at 19, UN Doc. A/4354 (1959), which is a non-binding resolution of the General Assembly;
- the United Nations International Covenant on Civil and

Political Rights, 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, which is a treaty adopted by the UN General Assembly on May 16, 1976, which was ratified by Canada on May 16, 1976. No implementing legislation has been passed by Parliament; [and]

- the Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), of which Canada is a party and which the UN General Assembly adopted on November 20, 1989. No implementing legislation has been passed by Parliament.
- [page505]

[28] In advancing their claims against the federal Crown, Ms. Brown and Mr. Commanda do not rely on any treaty rights.

[29] Under s. 92 of the Constitution Act, 1867, the Province of Ontario has jurisdiction in Ontario to legislate with respect to child welfare in the province. Child welfare legislation applies to all residents in a province, including Indians and other aboriginal peoples: see *R. v. Dick*, [1985] 2 S.C.R. 309, [1985] S.C.J. No. 62; *Natural Parents v. British Columbia (Superintendent of Child Welfare)*, [1976] 2 S.C.R. 751, [1975] S.C.J. No. 101, 60 D.L.R. (3d) 148 at pp. 164, 172 D.L.R.; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, [1979] S.C.J. No. 138, at pp. 1046, 1050 S.C.R.; K. Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967), 45 *Can. Bar Rev.* 513 at p. 553.

Factual and General Legal Background to the Plaintiffs' Claims

[30] On December 1, 1965, the federal Crown signed an agreement with the Province of Ontario known as the "The Canada-Ontario Welfare Services Agreement". Under this agreement, which was an exercise of the federal spending power, Ontario assumed the responsibility for providing child welfare services for certain aboriginal children with funds provided by the federal Crown.

[31] Under the agreement, the federal Crown agreed to provide funding and Ontario undertook to deliver to registered Indians with reserve status all provincial welfare programs available

to the general population. The preamble of the Canada-Ontario Welfare Services Agreement states as follows:

Whereas the 1963 Federal-Provincial Conference, in charting desirable long-range objectives and policies applicable to the Indian people, determined that the principal objective was the provision of provincial services and programs to Indians on the basis that needs in Indian communities should be met according to standards applicable in other communities;

And whereas Canada and Ontario in working towards this objective desire to make available to the Indians in the Province the full range of provincial welfare programs.

[32] Under s. 2(1) of the Canada-Ontario Indian Welfare Services Agreement, Ontario undertook to extend certain welfare services to "Indians with Reserve Status" in the province. Section 1(b) of the agreement defined "Indian" to mean "a person who, pursuant to the Indian Act, is registered as an Indian, or is entitled to be registered as an Indian". Section 1(c) defined "Indians with Reserve Status" to mean ". . . Indians who are (i) resident on an Indian reserve, (ii) resident on Crown land, or in territory without municipal organization in the Province, or [page506] (iii) designated as such by the Minister of Northern Affairs and National Resources".

[33] For the purposes later of defining the class for this proposed class proceeding, it is important to note that the scope of the agreement did not comprehensively cover the aboriginal peoples of Ontario. In the agreement, Ontario acknowledged that Indians who do not have Reserve Status were to continue to be covered by provincial welfare programs on the same basis as other residents. By its terms, the agreement does not apply to the Inuit and Mtis peoples of Ontario.

[34] The welfare services to be provided were listed in Schedule A and included as item (j): "services to children, including the protection and care of neglected children, the protection of children born out of wedlock and adoption

services provided under the Child Welfare Act, R.S.O. 1960, c. 53".

[35] Section 2(2) of The Canada-Ontario Welfare Services Agreement provided that "no provincial welfare program shall be extended to any Indian Band in the Province unless that Band has been consulted by Canada or jointly by Canada and by Ontario and has signified its concurrence".

[36] The Canada-Ontario Welfare Services Agreement was amended and extended by amending agreements dated December 8, 1971; July 13, 1972; August 4, 1981; and October 21, 1998.

[37] It should be noted that although they characterize it as wrongdoing, Ms. Brown and Mr. Commanda do not allege that the federal Crown did not have the constitutional authority to enter into The Canada-Ontario Welfare Service Agreements.

[38] The provincial child welfare legislation in force at the time of the making of the federal-provincial funding agreement was the Child Welfare Act, 1965, S.O. 1965, c. 14. Below, under the heading "The Before and After of Ontario's Child Protection Legislation", I set out the text of some of the provisions of the child welfare legislation, but for the present purposes of providing the factual and legal background, the most important point to note is that the Child Welfare Act, 1965 did not direct provincial child welfare agencies or the courts to treat Indian or other aboriginal children differently from non-aboriginal children. During the period between December 1, 1965 and December 31, 1984, aboriginality was not an articulated factor in provincial child welfare practice.

[39] Ms. Brown and Mr. Commanda allege that under The Canada-Ontario Welfare Services Agreement, Ontario's child welfare authorities began the practice of removing aboriginal children who were in need of protection from their aboriginal family and community and of placing the children in the care of [page507] non-aboriginal foster parents or non-aboriginal adoptive parents. The Indian and native communities in Ontario refer to this practice as the "Sixties Scoop".

[40] A vital element of Ms. Brown's and Mr. Commanda's claim against the federal Crown is the alleged wrongfulness of the agreement with the Province of Ontario that allegedly led to the Sixties Scoop. They submit that the delegation effected by the agreement with Ontario "deprived or denied the aboriginal children in that province [Ontario] of the connection with his or her aboriginal identity and culture".

[41] In para. 4 of their factum, Ms. Brown and Mr. Commanda make clear that the federal Crown's act of entering into The Canada-Ontario Welfare Services Agreement and allowing it to operate is the wrong that is at the very heart of their action. Para. 4 states, with my emphasis added:

The delegation was consummated by the Canada-Ontario 1965 Agreement. The fact and nature of that agreement, . . . was the event that gave rise to the claims. In 1985, Ontario decided to remedy the harm and damage caused to this vulnerable class of Ontario's aboriginal children that was the result of Canada's abdication of its constitutional and fiduciary obligations. Ontario proclaimed into force on January 1, 1985 the Child and Family Services Act, 1984. Thus, this case is about a unique historical anomaly within a certain period of time. The Plaintiffs argue Canada was willfully blind when it carried out this delegation.

[42] This point, which is at the heart of Ms. Brown's and Mr. Commanda's action, is also made at para. 9 of their statement of claim, which states:

9. The systemic practices, programs and policy implementation giving rise to identity genocide for the Class effectively ended on January 1, 1985 with the coming into force of the Child and Family Services Act, S.O. 1984, c. 55. This legislation, amongst other things, gave necessary status to the native or Indian community in all child welfare decisions concerning Indian or native children, and served as a necessary correction in Canada's breach of its duties. Ontario, having recognized the consequences of Canada's failure to protect the identity of native or Indian children, amended its legislation with its constitutional authority

over child welfare.

[43] After the signing and implementation of The Canada-Ontario Welfare Services Agreement, Mr. Commanda was placed in a series of foster homes with non-aboriginal foster parents.

[44] Mr. Commanda resided in foster homes until 1977, when he left foster care, at age 18. He had originally been apprehended in 1961, at two and a half years of age, by Children's Aid Society workers, after his birth mother had deserted him and his brothers. Mr. Commanda's placement as a Crown ward and extensions of his placement were the subject of four orders of judges of the Juvenile Court made between 1962 to 1964.

[page508]

[45] As for Ms. Brown, after the signing and implementation of The Canada-Ontario Welfare Services Agreement, from approximately 1967 to 1972, she was apprehended several times by provincial child care workers as being a child in need of protection. The first apprehension was in 1967 or 1968 when, at the age of four or five, Ms. Brown and one of her sisters were apprehended by Children's Aid Society workers.

[46] Through the period to her age nine (1972), Ms. Brown was occasionally returned to her biological family at either Beaverhouse or in the Kirkland Lake area, but she was always returned to foster care.

[47] In 1972, at age nine, Ms. Brown was adopted by a non-aboriginal couple, through an order of a superior court.

[48] Both Ms. Brown and Mr. Commanda allege that they were deprived from maintaining any connection with the traditions, language, customs, heritage and culture of their extended aboriginal families and aboriginal communities. In what I regard as a significant allegation of material fact, they also allege that [the] federal Crown did not provide either of them any information or documentation that would have enabled them to obtain the benefits available to them under the Indian Act.

[49] At the age of 18, Mr. Commanda tried to reintegrate with

his aboriginal community. He failed. He could not settle into ordinary relationships with members of any community. He experienced depression and suicidal ideation.

[50] At the age of 17[cent] years, one of Ms. Brown's adoptive parents put her on a plane and sent her to North Bay, Ontario -- with the clothes on her back and the clothes she had originally arrived with when placed for adoption. It is alleged that by the time of her arrival in North Bay, Ms. Brown had lost her identity as an aboriginal person. She was unable to cope and she failed to integrate with the aboriginal community and she floundered and struggled in non-aboriginal society.

[51] It may be noted that Ms. Brown and Mr. Commanda do not challenge the appropriateness or legality of their removal from their original families or the subsequent court orders placing them in the care of foster or adoptive parents.

[52] In their statement of claim, Ms. Brown and Mr. Commanda plead that their experiences are representative of the experiences of the members of the proposed class. In para. 29 of the statement of claim, Ms. Brown and Mr. Commanda describe the common experience of class members as follows:

Common to the Class is the fact of childhood isolation from their constitutionally protected identity. Indian or native traditions, language, customs, heritage, spirituality and culture were extinguished through foster or adoptive [page509] care by non-Indian or non-native persons and systemic practices, programs, and policies were promoted, or did nothing to avoid the extinction of identity. The native or Indian child members of the Class emerged from childhood with a struggle over identity, and a further struggle in the pursuit of information in order to secure an identity. This experience of anger, disappointment, and rejection as foreigner or stranger in both mainstream (non-native/non-Indian) society and the society of the indigenous community is a result of Canada's derogation from, and breach of its duty of care and fiduciary obligation when it participated in the implementation of systemic practices, programs, or policies that Canada knew or should have

reasonably known would cause irreparable and enduring harm to vulnerable children.

[53] Social worker Mr. Richard deposed that there were a large number of aboriginal children who were removed from their families and that these removals have come to be known in the aboriginal community as the "Sixties Scoop". It was his opinion that the survivors of the Sixties Scoop had lost touch with their culture, customs, traditions, language and spirituality. In his opinion, they experienced a loss of self-esteem, identity crisis and were socially dysfunctional, requiring therapy and counselling. He stated:

In my experience, it does not matter how "attached" or "bonded" were the children to their non-native and non-Indian homes, or even how benign an environment it may have been provided that wherever they were placed, they lost touch or connection with their particular indigenous Indian or native culture, customs, traditions, language and spirituality. This is a common effect of the "Sixties Scoop." It presents problems independent of whatever particular level of care and comfort, or lack of care and comfort the Indian or native person experienced as a child.

[54] Psychologist Dr. Bodnor deposed that the loss of culture was a matter of great concern to First Nations individuals and communities. She deposed that for aboriginals, the loss of cultural identity caused low self-esteem, depression, anxiety, suicidal ideation, suicide, physical illnesses without clear causes, difficulties in parenting, difficulties in maintaining positive relationships, substance abuse and violence. She deposed that for communities, loss of culture caused loss of traditional economic viability, loss of self-government, loss of language, loss of land base and land-based teachings, loss of traditional spiritual and religious practices, loss of life-cycle teachings and rituals, and loss of integrity and self-esteem.

[55] Dr. Bodnor deposed that recovering one's culture had clinical benefits leading to increased self-esteem, reduced substance abuse, less suicide, reduced anxiety, the development

of a sense of pride and a positive sense of belonging in the world.

[56] It was Dr. Bodnor's opinion that since the individual aboriginal's suffering and loss of identity affected the whole community, the process for recovery would be more effective as a [page510] collective experience. I understand that this opinion was advanced in support of the argument that a class proceeding would be the preferable procedure for the resolution of the claims of the class.

[57] Vernon Harper, who is employed by the Aboriginal Services Program Center for Addiction and Mental Health in Toronto, is an "Urban Elder". He deposed that much of the therapeutic work that he does involved treating Indians who had a breakdown in their relationship with the non-Indians who had raised them. He deposed that the loss of identity emerged as the trauma of trying to reclaim one's identity and the culture, traditions and spirituality that comprised that identity.

[58] Psychiatrist Dr. Armstrong, who among other things was the chairperson of the Canadian Psychiatric Association Section on Native Mental Health for many years and who directed a University of Toronto program that provided mental health services to about 15,000 Cree and Ojibway people, deposed that the First Nations people of Ontario "experienced intentional and inadvertent culture/identity genocide".

[59] It was Dr. Armstrong's opinion that

- in the early part of the 20th century, Canada applied a policy of cultural extermination when officials seized thousands of native children from their homes on the reserve and committed them to residential schools that not only deprived them of the experience of living in an aboriginal family, but punished them for expressing their Indian customs, traditions and languages;
- in the 1960s, '70s and '80s, ill-informed child welfare workers in Ontario, who did not know enough about native communities and their resources to parent and protect the community's children, removed children and placed them with non-Indian caregivers with the same intention as of the

residential school experience, albeit in the context of a replacement family rather than a residential school setting;

- this was a misguided policy based on the belief that the answer to the Indian problem was to assimilate the Indian children into mainstream culture; [and]
- the effect of this policy was loss of culture, loss of language, loss of ability to parent as an aboriginal person, loss of identity, increased rate of psychopathology, confused identity formulation, psychiatric disorders, substance abuse, emotional isolation, violence, unemployment, feelings of betrayal and extreme lack of emotional attachment. [page511]

The Before and After of Ontario's Child Protection Legislation

[60] In this section, I discuss the nature of Ontario's child protection legislation as it existed at the time that the federal Crown and Ontario signed The Canada-Ontario Welfare Services Agreement, which is the proposed temporal starting point for the class definition, and how that legislation changed after December 31, 1984, which is the proposed temporal finishing point for the class definition. I also mention some subsequent amendments to the Ontario legislation.

[61] The discussion in this section is necessary because the competing arguments about the viability of any cause of action against the federal Crown and about the substance and the form of the proposed class action, including the proper definition of class membership, depend, in part, upon understanding the operation of Ontario's child protection and adoption legislation as it existed at the start of the proposed class period, i.e., December 1, 1965, and as it existed after the proposed finish of the proposed class period, i.e., December 31, 1984.

[62] As will be seen, "the before and after" of Ontario's child welfare legislation is a factor in determining whether or not Ms. Brown and Mr. Commanda can satisfy the criteria for certification under s. 5(1) of the Class Proceedings Act, 1992.

[63] In considering the significance of Ontario's legislation

to the proposed class action against the federal Crown, it is particularly important to note that

- the provincial legislation in force at the time of the making of The Canada-Ontario Welfare Services Agreement was the Child Welfare Act, 1965, S.O. 1965, c. 14 and that this statute did not expressly make aboriginality a factor in the placement of a child in a foster home or a home for adoption;
- notwithstanding the absence of aboriginality as an articulated factor in the placement of a child, it has been considered as a relevant factor as a part of the best interests standard. See, for example, *Mooswa v. Saskatchewan (Minister of Social Services)* (1976), 9 C.N.L.R. 241 (Sask. Q.B.), at para. 5; *Rabbit v. Alberta (Department of Social Services)*, 1981 CarswellAlta 360 (Q.B.), at para. 26; *H.I.R. (Re)*, [1984] A.J. No. 18, 4 D.L.R. (4th) 406 (C.A.);
- in 1985, Ontario reformed its child welfare regime and enacted the new Child and Family Services Act, 1984. The new Act expressly made aboriginality a factor in provincial child welfare practice; [page512]
- even where a provincial legislature has enacted special provisions requiring the court to consider the importance of preserving a child's cultural identity, courts have held that the aboriginal ancestry of the child is but one factor to be considered in determining the child's best interest: see *H. (D.) v. M. (H.)*, [1999] 1 S.C.R. 761, [1999] S.C.J. No. 22, at p. 764 S.C.R.; *Catholic Children's Aid Society v. C. (B.)*, [2004] O.J. No. 1748, 2004 ONCJ 27; *A. (First Nation) v. Children's Aid Society of Toronto*, 2004 CanLII 34409 (Ont. S.C.J.); *R. (C.) v. Hamilton (Children's Aid Society)*, 2004 CanLII 58384 (Ont. S.C.J.);
- on cross-examination, Ms. Brown confirmed what was obvious from the statement of claim that it is a premise of the theory of her case against the federal Crown that Ontario's 1985 Child and Family Services Act remedied the breaches and other wrongful conduct of the federal Crown.

[64] As just noted, the legislation in force at the time of the making of The Canada-Ontario Welfare Services Agreement was the Child Welfare Act, 1965, S.O. 1965, c. 14. This statute

consolidated revisions that had been made in 1954 and 1958. The 1954 Act introduced "interest and welfare of the child" as factors in the exercise of the court's powers under the Act. The 1958 Act introduced the "best interests of the child" as the criterion for consideration for adoption.

[65] Subsequently, the Child Welfare Act, 1978, S.O. 1978, c. 85 (amended by the Child Welfare Amendment Act, 1979, S.O. 1979, c. 98) enacted a set of "best interests" criteria that a court was required to have regard to when making determinations under the child protection and adoption provisions of the Act. These criteria did not include aboriginality as an articulated factor in the provincial child welfare practice.

[66] Thus, the Child Welfare Act, 1978 (amended by the Child Welfare Amendment Act, 1979, S.O. 1979, c. 98) introduced a definition of best interests of the child as follows:

1. In this Act, . . . (b) "best interests of the child" means the best interests of the child in the circumstances having regard, in addition to all other relevant considerations, to
 - (i) the mental, emotional and physical needs of the child and the appropriate care or treatment, or both, to meet such needs,
 - (ii) the child's opportunity to enjoy a parent-child relationship and to be a wanted and needed member within a family structure,
 - (iii) the child's mental, emotional and physical stages of development, [page513]
 - (iv) the effect upon the child of any disruption of the child's sense of community,
 - (v) the merits of any plan proposed by the agency that would be caring for the child, compared with the merits of the child returning or remaining with his or her parent,
 - (vi) the views and preferences of the child, where such views and preferences can reasonably be ascertained,
 - (vii) the effect upon the child of any delay in the final disposition in the proceedings,

- (viii) any risk to the child of returning the child to or allowing the child to remain in the care of his or her parent;

[67] The Child and Family Services Act, 1984, S.O. 1984, c. 55, which was proclaimed in force on January 1, 1985, expressly made aboriginality a factor in provincial child welfare practice.

[68] The 1984 Act created and empowered aboriginal child and family services agencies. The new Act recognized that child welfare services should be provided to aboriginal children "in a manner that recognizes their culture, heritage and traditions and the concept of the extended family"; and the Act revised the considerations to be applied by courts in determining the best interests of the child in aboriginal adoption cases. For present purposes, the relevant sections of the 1984 Act are ss. 1, 37(4), 53(4), (5), 57(2), 60(4), 130(3) and 134(3), which state:

1. The purposes of this Act are,
 - (a) as a paramount objective, to promote the best interests, protection and well-being of children;
 - (b) to recognize that while parents often need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on the basis of mutual consent;
 - (c) to recognize that the least restrictive or disruptive course of action that is available and is appropriate in a particular case to help a child or family should be followed;
 - (d) to recognize that children's services should be provided in a manner that,
 - (i) respects children's needs for continuity of care and for stable family relationship, and
 - (ii) takes into account physical and mental developmental differences among children;
 - (e) to recognize that, wherever possible, services to children and their families should be provided in a manner that respects cultural, religious and

regional differences; and [page514]

- (f) to recognize that Indian and native people should be entitled to provide, wherever possible, their own child and family services, and that all services should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family.

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37(4) Where a person is directed in this Part to make an order or determination in the best interests of a child and the child is an Indian or native person, the person shall take into consideration the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, or preserving the child's cultural identity.

.

53(4) Where the court decides that it is necessary to remove the child from the care of the person who had charge of him or her immediately before intervention under this Part, the court shall, before making an order for society or Crown wardship under paragraph 2 or 3 of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family under paragraph 1 of subsection (1) with the consent of the relative or other person.

53(5) Where the child referred to in subsection (4) is an Indian or native person, unless there is a substantial reason for placing the child elsewhere, the court shall place the child with,

- (a) a member of the child's extended family;
- (b) a member of the child's band or native community;
- or
- (c) another Indian or native family.

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57(2) The society having care of a child shall choose a residential placement for the child that,

- (a) represents the least restrictive alternative for the child;

- (b) where possible, respects the religious faith, if any, in which the child is being raised;
- (c) where possible, respects the child's linguistic and cultural heritage;
- (d) where the child is an Indian or native person, is with a member of the child's extended family, a member of the child's band or native community or another Indian or native family, if possible; and
- (e) takes into account the child's wishes if they can be reasonably ascertained, and the wishes of any parent who is entitled to access to the child.

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60(4) An application for review of a child's status may be made on notice to the society by,

- (a) the child, where the child is at least twelve year of age;
- (b) any parent of the child, subject to subsection (5); [page515]
- (c) the person with whom the child was placed under an order for society supervision; or
- (d) where the child is an Indian or a native person, a representative chosen by the child's band or native community.

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130(3) Where a person is directed in this Part to make an order or determination in the best interests of a child and the child is an Indian or native person, the person shall take into consideration the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child's cultural identity.

.

134(3) Where a child to be placed for adoption is an Indian or a native person, the society shall give the child's band or native community thirty days written notice of its intention to place the child for adoption.

[69] The Child and Family Services Amendment Act (Child Welfare Reform), 1999, S.O. 1999, c. 2 amended the Family

Services Act, R.S.O. 1990, c. C.11. The amendments addressed the weight to be given aboriginality as a factor in the best interests of the child test prescribed by the statute. Section 1 of the Child and Family Services Act now states:

1(1) The paramount purpose of this Act is to promote the best interests, protection and well being of children.

(2) The additional purposes of this Act, so long as they are consistent with the best interests, protection and well being of children, are:

1. To recognize that while parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on the basis of mutual consent.
2. To recognize that the least disruptive course of action that is available and is appropriate in a particular case to help a child should be considered.
3. To recognize that children's services should be provided in a manner that,
 - i. respects a child's need for continuity of care and for stable relationships within a family and cultural environment,
 - ii. takes into account physical, cultural, emotional, spiritual, mental and developmental needs and differences among children,
 - iii. provides early assessment, planning and decision-making to achieve permanent plans for children in accordance with their best interests, and
 - iv. includes the participation of a child, his or her parents and relatives and the members of the child's extended family and community, where appropriate. [page516]
4. To recognize that, wherever possible, services to children and their families should be provided in a manner that respects cultural, religious and regional differences.
5. To recognize that Indian and native people should be

entitled to provide, wherever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family.

The Criteria for Certification -- Introduction and Overview

[70] With the above general legal and factual background, the discussion may now turn to whether Ms. Brown's and Mr. Commanda's proposed class action is certifiable in accordance with the criteria of s. 5(1) of the Class Proceedings Act, 1992. In this introductory session, I will begin this discussion by setting out some general principles, and then I will describe the nature of the analysis that will follow in examining the criteria for certification in the case at bar.

[71] Pursuant to s. 5(1) of the Class Proceedings Act, 1992, the court shall certify a proceeding as a class proceeding if (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[72] For an action to be certified as a class proceeding, there must be a cause of action, shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419, 169 A.C.W.S. (3d) 27 (S.C.J.), at para. 14, leave to appeal to Div. Ct. refused [2009] O.J. No. 402, 246 O.A.C. 256 (Div. Ct.).

[73] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158,

[2001] S.C.J. No. 67, at para. 16.

[74] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Toronto (City)*, supra, at paras. 28-29.

[75] Motions for certification are procedural in nature and are not intended to provide the occasion for an exhaustive inquiry [page517] into factual questions that would be determined at a trial when the merits of the claims of class members are in issue: *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910, 72 C.P.C. (6th) 120 (S.C.J.), at para. 82.

[76] Turning now to the case at bar, by way of an overview of the discussion that will follow about whether Ms. Brown and Mr. Commanda have satisfied the criteria for certification, although there was a great deal of disagreement between the parties about what was the nature of Ms. Brown's and Mr. Commanda's various claims against the federal Crown, this motion for certification was more or less argued on the basis that Ms. Brown's and Mr. Commanda's proposed class action advanced five causes of action, namely: (1) breach of the honour of the Crown; (2) the Actionable Wrong of Identity Genocide of Children; (3) violation of aboriginal rights; (4) breach of fiduciary duty; and (5) negligence.

[77] As they were pleaded in the statement of claim, these five causes of action identified the beginning of the federal Crown's wrongdoing as the signing of The Canada-Ontario Welfare Services Agreement and the ending of the federal Crown's wrongdoing as the coming into force of Ontario's Child and Family Services Act, 1984. The beginning and end of the class period were also parts of the definition of the class.

[78] As the various causes of action were pleaded, during the interval between the signing of the agreement and the proclamation in force of the statute, the federal government is alleged to have wrongfully delegated its exclusive responsibility as guardian, trustee, protector and fiduciary of

aboriginal persons.

[79] To determine whether in Ms. Brown's and Mr. Commanda's pleading there is a certifiable class action and to decide the federal Crown's Rule 21 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] motion, it is necessary to analyze each of the five possible causes of action to determine whether they satisfy the first criterion for certification, i.e., disclosure of a cause of action.

[80] In this regard, the "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the Class Proceedings Act, 1992. Thus, a claim will be satisfactory, unless it has a radical defect or it is plain and obvious that it could not succeed: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673, [1999] O.J. No. 2494 (C.A.), at p. 679 O.R., leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 476; [page518] 1176560 *Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535, [2002] O.J. No. 4781 (S.C.J.), at para. 19, leave to appeal granted (2003), 64 O.R. (3d) 42, [2003] O.J. No. 1089 (Div. Ct.), *affd* (2004), 70 O.R. (3d) 182, [2004] O.J. No. 865 (Div. Ct.).

[81] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously and a pleading will be struck out only if it is plain, obvious and beyond a reasonable doubt that the plaintiff cannot succeed: *Hollick v. Toronto (City)*, *supra*, at para. 25; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.), at para. 41, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 50, *revg* (2003), 65 O.R. (3d) 492, [2003] O.J. No. 2698 (Div. Ct.); *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453, [1995] O.J. No. 16 (Div. Ct.), at p. 469 O.R.

[82] The following discussion of the various causes of action

will reveal that Ms. Brown's and Mr. Commanda's proposed class action, as currently pleaded, is not certifiable. Each of the proposed causes of action has a problem or a fatal flaw that would preclude certification. However, the discussion will also reveal that within the proposed class action there is a certifiable class action around the following common question:

In Ontario, between December 1, 1965 and December 31, 1984, when an aboriginal child was placed in the care of non-aboriginal foster or adoptive parents who did not raise the child in accordance with the child's aboriginal customs, traditions, and practices, did the federal Crown have and breach a fiduciary or common law duty of care to take reasonable steps to prevent the aboriginal child from losing his or her aboriginal identity?

[83] My ultimate conclusion is that subject to changes to the pleadings and to the proposed elements of the class proceeding, all the criteria for certification can be satisfied.
Disclosure of Cause of Action -- Breach of the Honour of the Crown

[84] While it is not entirely clear from the statement of claim, it appears that Ms. Brown and Mr. Commanda plead an independent cause of action based on the "honour of the Crown". This term is related to the English law principle that "the King could do no wrong". See *The King v. Garside and Mosley* (1834), 2 A.D. & E. 266, 111 E.R. 103 (K.B.), at p. 107 E.R.: "We are not to presume that any promise made by the King even to the meanest and most criminal of his subjects will not be sacredly observed." [page519]

[85] However, there is no independent cause of action based on the honour of the Crown: see *Polchies v. Canada*, [2007] F.C.J. No. 667, 2007 FC 493 (Prothonotary).

[86] Moreover, during the argument of the certification motion, Ms. Brown and Mr. Commanda indicated that they were not relying on breach of the honour of the Crown as a cause of action.

[87] Therefore, based on that concession, I will say no more about breach of the honour of the Crown other than saying that in the case at bar, it does not satisfy the first criterion for certification.

Disclosure of Cause of Action -- The Actionable Wrong of Identity Genocide of Children

[88] Once again, while it is not entirely clear from the statement of claim, it seems that Ms. Brown and Mr. Commanda allege that the federal Crown has committed the actionable wrong of "identity genocide of children".

[89] It seems that this new tort is based on the constituent elements that the federal Crown committed an act or omission with the intent to destroy, in whole or in part, an identifiable group of persons and, in particular, the federal Crown forcibly transferred aboriginal children from their aboriginal group to a non-aboriginal group.

[90] In advancing this claim, Ms. Brown and Mr. Commanda rely on (a) the United Nations Declaration of the Rights of the Child; (b) the United Nations International Covenant on Civil and Political Rights; (c) the United Nations Convention on the Rights of the Child; and (d) the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.

[91] For at least two reasons, the actionable wrong of identity genocide of children is not shown to be a viable cause of action.

[92] The first reason why the identity genocide claim is not viable as a tort is that to the extent that it relies on the various international covenants or conventions, these covenants or conventions are not a part of Ontario's civil law.

[93] While the federal executive branch has the prerogative power to enter into treaties or make resolutions, a treaty is not part of the domestic law of Canada unless it is implemented by statute: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, at para. 69; *Francis v. Canada*, [1956] S.C.R. 618, [1956] S.C.J.

No. 38, at p. 621 S.C.R.; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, [1977] S.C.J. No. 119, at pp. 172-73 S.C.R.; P.W. Hogg, *Constitutional Law of Canada*, 5th ed., vol. 1, looseleaf (Toronto: Carswell, 2007) at paras. 11-4 to 11-5. [page520]

[94] The Convention on the Rights of the Child has not been implemented by Parliament, and it has no direct application within Canada as a basis of civil liability: *Baker v. Canada (Minister of Citizenship and Immigration)*, supra, at para. 69.

[95] Similarly, the United Nations International Covenant on Civil and Political Rights has not been implemented by Parliament.

[96] The Declaration of the Rights of the Child is a non-binding resolution, and, once again, there is no implementing legislation.

[97] The United Nations Convention on the Prevention and Punishment of the Crime of Genocide confirmed that genocide is a crime under international law. The contracting parties, including Canada, undertook to prevent and punish the crime.

[98] Article 2(e) of the Convention states that "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: . . . (e) Forcibly transferring children of the group to another group".

[99] In fulfillment of its obligation under the convention, Parliament enacted the Crimes against Humanity and War Crimes Act, S.C. 2000, c. 24. Section 4(1)(a) of the Act creates the indictable offence of genocide, which is defined in s. 4(3) as follows:

4(3) "genocide" means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary

international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

[100] However, there is no legislation implementing the United Nations Convention on the Prevention and Punishment of the Crime of Genocide as a component of the civil law. An allegation of genocide will not support a civil cause of action: *Indian Residential Schools (Re)*, [2000] A.J. No. 638, 82 Alta. L.R. (3d) 99 (Q.B.), at paras. 71-72; *Raubach v. Canada (Attorney General)*, [2004] M.J. No. 254, 9 C.P.C. (6th) 69 (Q.B.), at p. 72 C.P.C.

[101] Thus, to the extent that the alleged actionable wrong of identity genocide relies on the various international covenants or conventions pleaded, these covenants or conventions are not a part of Ontario's civil law, and it is plain and obvious that there is no viable civil law cause of action based on them.

[102] The second reason that the alleged identity genocide claim is not viable is that it is plain and obvious that the federal Crown's signing of The Canada-Ontario Welfare Services Agreement, which is alleged to be the predicate wrongdoing, is [page521] not an act or omission committed by the federal Crown with the intent to destroy, in whole or in part, an identifiable group of persons and it is not an act by the federal Crown of forcibly transferring children of a group to another group. In other words, it is plain and obvious that the material fact of misconduct pleaded against the federal Crown to constitute the alleged cause of action of identity genocide does not constitute identity genocide.

[103] The theory of the cause of action based on identity genocide is that by entering into The Canada-Ontario Welfare Services Agreement, the federal Crown had the intent that Ontario would forcibly transfer children of a group to another group. However, there is no pleading that Ontario had that intent and the only intent of the federal Crown that can be

identified by signing The Canada-Ontario Welfare Services Agreement is the intent to exercise the federal spending power to provide financial support to the province providing a wide range of welfare services.

[104] There is no pleading or basis in fact that the federal Crown empowered or directed provincial child care workers or other provincial officials in exercising their authority or otherwise acting under the authority of the Child Welfare Act. Nor is there pleading or basis in fact that the federal Crown attempted to influence the operation of the provincial child welfare regime.

[105] Before or after signing The Canada-Ontario Welfare Services Agreement, the federal Crown did not control or manage how Ontario and an independent judiciary in Ontario would provide or oversee welfare services to aboriginal children who, like Ms. Brown and Mr. Commanda, were in need of protection. An after-the-fact perception and characterization of what Ontario's welfare authorities and Ontario's judges did in placing the children in non-aboriginal homes, which is not challenged to be unlawful in the doing, is no basis to attribute to the federal Crown an intent to destroy, in whole or in part, an identifiable group of persons.

[106] There is no allegation that the federal Crown had or could have any role in how Ontario would legislate in the area of child welfare, and recalling that Ms. Brown and Mr. Commanda submit that the wrongdoing ended with the Child and Family Services Act, 1984, it is plain and obvious that what child welfare workers did in the 1960s, 1970s and 1980s under the existing legislation, although perhaps ill-informed and harmful to aboriginal communities, cannot support the suggested constituent elements of an action against the federal Crown that it had the intent to destroy, in whole or in part, an identifiable group of [page522] persons or that it forcibly transferred children of a group to another group.

[107] I conclude that the alleged wrong of identity genocide does not satisfy the first criterion for certification.
Disclosure of Cause of Action -- Breach of Aboriginal Rights

[108] Section 35 of the Constitution Act, 1982 provides constitutional protection for treaty rights (not in issue in this case) and for aboriginal rights. Section 35 of the Constitution Act, 1982 protects aboriginal rights from extinguishment and from unjustifiable infringement by legislation or other government action.

[109] The doctrine of aboriginal rights recognizes and gives legal effect to the pre-contact presence of aboriginal peoples living in distinctive societies in what is now Canada. Provided that they are not inconsistent with its basic principles, the common law incorporates the traditions and customs of these societies as rights, giving them legal force as part of the Canadian legal system: *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, [2001] S.C.J. No. 33, at para. 10; also paras. 9-12; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, [1996] S.C.J. No. 77, at paras. 15-21, 28-31, 44, 46, 49, 50, 55-59.

[110] Although they may be exercised by individual members of an aboriginal or Métis community or group, aboriginal rights are collective in character. Both in practice and in law, judicial rulings as to the existence and nature of s. 35 rights bind the rights-holding aboriginal collective: *R. v. Van der Peet*, *supra*, at paras. 46, 47, 52, 55, 56, 57, 69; *Ontario v. Bear Island Foundation*, [1995] O.J. No. 1624, [1996] 1 C.N.L.R. 16 (Gen. Div.), *affd* [1999] O.J. No. 4290, [2000] 2 C.N.L.R. 13 (C.A.); *Hiawatha First Nation v. Ontario (Minister of Environment)*, [2007] O.J. No. 506, [2007] 2 C.N.L.R. 186 (Div. Ct.); at para. 60; *Perron v. Canada (Attorney General)*, [2003] O.J. No. 1348, [2003] O.T.C. 275 (S.C.J.), at paras. 28-56; *Oregon Jack Creek Indian Band v. Canadian National Railway Co.*, [1989] B.C.J. No. 211, [1990] 2 C.N.L.R. 85 (C.A.), at pp. 88-90 C.N.L.R., *affd* [1989] 2 S.C.R. 1069, [1989] S.C.J. No. 111.

[111] An aboriginal group or individual asserting an aboriginal right is required to frame its claim as a cognizable s. 35 right and to plead and support the elements of the claim, namely: (a) the existence of an ancestral practice, custom or tradition that supports the right; (b) that this practice,

custom or tradition was integral to the distinctive culture of the group's or individual's pre-contact society; and (c) reasonable continuity between the pre-contact practice, custom or tradition and the contemporary [page523] claim: *R. v. Van der Peet*, supra, at paras. 53-59, 64, 65; *Mitchell v. M.N.R.*, supra, at para. 12.

[112] Yet once again, while it is not entirely clear from the statement of claim, it seems that Ms. Brown and Mr. Commanda assert as a cause of action that the federal Crown has violated their aboriginal right to an identity as an aboriginal person. They seem to plead as a cause of action that there has been a violation of their collective or individual aboriginal rights.

[113] An action for breach of an aboriginal right obviously requires an aboriginal right as a constituent element. Section 35 focuses on those features of aboriginal cultures that made, and continue to make, the culture distinctive. Thus, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact and that were "integral to the distinctive culture" of the aboriginal peoples: *Mitchell v. M.N.R.*, supra, at paras. 9-20; *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49; *R. v. Van der Peet*, supra, at paras. 44-46, 55-59. To be integral to the distinctive culture, a practice, custom or tradition must be of central significance to the aboriginal society in question: "The court cannot look at those aspect of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society": *R. v. Van der Peet*, supra, at paras. 56, 57.

[114] By a demand for particulars, the federal Crown asked Ms. Brown and Mr. Commanda to particularize the aboriginal right that they relied upon, and they responded with the following answer:

The activity or practice that all of the Class Members rely upon as an aboriginal right is that of an exercise of an identity and which includes:

- (i) An indigenous language different than that of the European;
- (ii) The exercise of a spiritual meaning of life and holistic view of the environment that is profoundly different than that of the European or the Eurocentric model and which enables a kinship with the environment, all animate and inanimate objects. In contrast to Eurocentric thought, First Nations people believe and rear their children to believe that the totality of relationships between individuals governs the well-being of the universe, and that no one element exists in the absence of a relationship with all others;
- (iii) The privilege and expectation of a sense of community, community rights, community interdependence that is different than that of the Eurocentric model, communalism in distinction to individualism might be an expression of the First Nations' identity in contrast to Eurocentric values; [page524]
- (iv) The use of one's family name, the name passed on from generation to generation;
- (v) The benefit and expectation of a large extended family or clan system, a collective of resources of great numbers and strengths where, as but one example, the ultimate panacea for a family under crisis is not the displacement of the child to another culture or stranger via crown wardship or property transfer qua adoption with one nuclear family replacing another; rather customary care applies and there is a communal responsibility for the care and rearing of the child within the extended family and clan;
- (vi) Being raised by one's family and community and in one's indigenous culture;
- (vii) Child rearing that is premised upon the child as the gift from the creator, and thus no child would be an orphan, or experience life in an orphanage, foster home or as a society or crown ward. There is no word for society ward or crown ward in any indigenous language of the members of the Class;

- (viii) Child rearing that involves a series of rites of passage within childhood from early on, with the child involved in the routines and management of the community's chores and preservation, and enjoying a sense of freedom within the community uniquely different from that of the Eurocentric concept of childhood where the child is excluded from adult activities and childhood is a period of containment and control;
- (ix) The exercise of one's indigenous culture, traditions and customs; and
- (x) The respect for oral histories, respect for elders and the passing of beliefs from one generation to the next through such oral histories.

[115] Thus, Ms. Brown and Mr. Commanda purport to have a cause of action of breach of aboriginal rights based on the federal Crown entering into The Canada-Ontario Welfare Services Agreement and thereby allegedly unjustifiably infringing the aboriginal right to have the identity of an aboriginal.

[116] In my opinion, this so-called aboriginal right to be an aboriginal is not aptly described as a right. Without defining what are the rights of a person identified as an aboriginal, it is just an unhelpful tautology to say that the aboriginal has the right to be an aboriginal. From a legal perspective, being an aboriginal is not a matter of right, it is largely a matter of birth, status, or legal or societal characterization. Only after the characterization of aboriginality is established (only some of which characterizing is based on the Indian Act) does it then make sense to identify the rights, privileges and responsibilities associated with aboriginality. It seems to me that just as being a human or identifying oneself as a human cannot be described as a right but rather is the status from which human rights arise, being an aboriginal or [page525] identifying oneself as an aboriginal is not a right but rather the legal status from which aboriginal rights arise. Thus, Ms. Brown and Mr. Co mmanda have failed to plead the constituent elements of claim based on s. 35 of the Constitution Act.

[117] Further, although it is possible that a federal-

provincial agreement could interfere with aboriginal rights, it simply does not make legal sense to speak of being an aboriginal as being an ancestral practice, custom or tradition that was disturbed by the federal Crown entering into The Canada-Ontario Welfare Services Agreement.

[118] In *Davis v. Canada (Attorney General)*, [2004] N.J. No. 274, 2004 NLSTD 153 and [2007] N.J. No. 42, 2007 NLTD 25, affd [2008] N.J. No. 280, 2008 NLCA 49, a proposed class action against the federal Crown was brought on behalf of certain persons of Mi'kmaq ancestry who lived on the island of Newfoundland. It was alleged that when Newfoundland and Labrador joined Canada in 1949, the federal Crown failed to proclaim the Indian Act to be in force and thus deprived the putative class of the protection and benefits of that Act. The plaintiffs claimed that their identity was an aboriginal right, which right is entitled to recognition and affirmation pursuant to s. 35(1) of the Constitution Act. Justice Orsborn struck out this particular claim and subsequently, in a judgment affirmed by the Newfoundland and Labrador Court of Appeal, he dismissed the motion to certify the action as a class action on a variety of grounds. For present purposes, the point of interest is the dismissal of the claim of a breach of s. 35(1) of the Constitution Act. At paras. 90-94 of his judgment, he stated:

The decisions of the Supreme Court of Canada make it clear that the purpose of s. 35(1) is to reconcile pre-existing aboriginal rights with the sovereignty of the Crown. The determination and definition of substantive aboriginal rights is informed by this purpose. A claim to a right must be precisely delineated, and must be proven to be a particular practice, custom or tradition which was a central and significant part of the society's distinctive culture.

Section 35 is a protective provision, designed to protect proven existing rights against encroachment and diminution by the exercise of government authority. In all of the cases cited to me, an aboriginal right is set up either as a defence to that exercise of government regulatory authority, or as the basis for asserting the unconstitutionality of legislation said to infringe an aboriginal right.

The section imposes no positive obligation on government to protect and preserve any aboriginal right.

The rulings and analysis of the Supreme Court of Canada are clear and are binding on me. [page526]

Even assuming that aboriginal identity, as such, can represent an aboriginal right -- a conclusion that is extremely doubtful, given the need to classify a right as a "practice, custom or tradition" -- s. 35 as interpreted by the Supreme Court of Canada provides absolutely no basis for the imposition on government of an obligation to take any steps to preserve that right. If the right is proven to exist before European contact, and otherwise satisfies the analysis required for its acceptance, s. 35(1) operates to provide constitutional protection against its infringement by government action. That is the extent of the protection offered; it does not go so far as to oblige government to take positive measures to ensure the continued existence of the right. In my view, the claim that the plaintiffs are entitled to relief based on the assertion that government has failed to protect a s. 35(1) aboriginal right is certain to fail. Paragraphs 53 to 55 should be struck.

[119] In my opinion, it is plain and obvious that Ms. Brown's and Mr. Commanda's grievances cannot be expressed as a cause of action based on violation of aboriginal rights. Upon analysis, this alleged cause of action seems at best to be a disguised version of the plea of identity genocide, which as noted above is not a viable cause of action.

Disclosure of Cause of Action -- Breach of Fiduciary Duty

[120] Ms. Brown and Mr. Commanda allege that the federal Crown breached its fiduciary duty to the members of the proposed class. They argue that the actions and omissions of the federal Crown amounted to dishonest and disloyal conduct that violated the government's fiduciary duty to Ontario's aboriginal children. They plead that "Indian children and their families were entitled to a special duty of care, good faith, honour, honesty and loyalty from Canada pursuant to Canada's

constitutional obligations and Canada's duty to act in the best interests of Indian children who were particularly vulnerable".

[121] The federal Crown has exclusive jurisdiction in respect of aboriginal persons under s. 91(24) of the Constitution Act, 1867 ("Indians, and Lands Reserved for the Indians"); s. 35(1) of the Constitution Act, 1982; and the common law. From this jurisdiction emerges a fiduciary relationship between the federal Crown and Canada's aboriginal peoples: see *Guerin v. Canada*, [1984] 2 S.C.R. 335, [1984] S.C.J. No. 45; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, [2002] S.C.J. No. 79; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, [2004] S.C.J. No. 70.

[122] The federal Crown asked for particulars of the alleged breach of fiduciary duty, and Ms. Brown and Mr. Commanda responded that the federal Crown breached its fiduciary duty by entering and implementing The Canada-Ontario Welfare Services Agreement, and they summarized the federal Crown's dishonest and disloyal conduct as follows: [page527]

(i) Aboriginals were not included in the planning, formation and execution of the agreement between Canada and Ontario;

(ii) Canada's contravened the provisions of the Agreement by failing to enter into consultation with all relevant Indian bands before enabling provincial child welfare programs to be extended to Indian bands;

(iii) Canada operational decisions were premised upon The White paper entitled *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen's Printer, 1969) which was vehemently opposed to by Indian individuals and organizations because it was a threat to Indian culture and Indian societies and was perceived as an abdication of its responsibilities to Indian people;

(iv) Canada took no steps at all times during the implementation of the Agreement to develop a tripartite agreement for administering and funding social services to First Nations' persons, and

(v) Canada, carrying out simply a funding role, is an abdication of the federal Crown's duty to Indian persons under section 91(24) of the Constitution Act, 1867.

[123] While accepting that the federal Crown has a fiduciary relationship with aboriginal peoples, the federal Crown submits that there is no tenable cause of action for breach of fiduciary duty. Accepting that there is a fiduciary relationship, the federal Crown's main arguments are that there was no wrongdoing, and if there was wrongdoing it was not fiduciary wrongdoing, which entails an element of disloyalty and moral turpitude that the federal Crown submits was not present in the largely executive acts of the federal Crown. The federal Crown also argues that the breach of fiduciary duty claim fails for want of causality of the damages allegedly suffered by Ms. Brown and Mr. Commanda and the other members of the proposed class.

[124] I agree with the federal Crown that based upon entering and implementing The Canada-Ontario Welfare Services Agreement, Ms. Brown and Mr. Commanda have not disclosed a cause of action for breach of fiduciary duty. Assuming a fiduciary relationship, I do not see fiduciary wrongdoing by this exercise of the federal Crown's spending power. However, based on the record now before the court, in my opinion, it is not plain and obvious that there is no viable cause of action for breach of fiduciary duty against the federal Crown based on what it did or did not do as aboriginal children were being placed in non-aboriginal homes.

[125] In *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, [1973] S.C.J. No. 97, at p. 616 S.C.R., Justice Bora Laskin said that cases about alleged breaches of fiduciary duty involve four issues: (1) the determination of whether the relationship is fiduciary; (2) the determination of the particular duties that [page528] arise from the fiduciary relationship; (3) the determination of whether a duty has been breached; and (4) the determination of the extent of the liability for the breach.

[126] In the case at bar, with respect to the first issue identified by Justice Laskin, as noted above, it is well established that the federal Crown stands in a fiduciary relationship to Canada's aboriginal peoples. However, that a fiduciary relationship exists is only the first element in a claim for breach of fiduciary duty. In the case at bar, as noted above, the federal Crown submits that Ms. Brown and Mr. Commanda have not shown any breach of a fiduciary duty. Also as noted above, I agree with that submission if it is based on the material fact that the federal Crown simply entered into The Canada-Welfare Services Agreement.

[127] Not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, [1989] S.C.J. No. 83, at pp. 647, 652 S.C.R. Not every misconduct by a fiduciary is a breach of fiduciary duty: *Girardet v. Crease & Co.*, [1987] B.C.J. No. 240, 11 B.C.L.R. (2d) 361 (S.C.), at p. 362 B.C.L.R. In *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204, [1992] O.J. No. 60 (Gen. Div.), at p. 229 O.R., affd (1993), 10 O.R. (3d) 574, [1992] O.J. No. 1501 (C.A.), Justice Keenan stated: "But not every wrong done by a fiduciary is a breach of that duty. It must be a wrong which is a betrayal of that trust component of the relationship." Justice Sopinka also made this point in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, supra, at p. 596 S.C.R., where he stated that fiduciary obligation "must be reserved for situations that are truly in need of the special protection that equity affords".

[128] In *Wewaykum Indian Band v. Canada*, supra, two Indian Bands were involved in a decades-long process to establish reserves. The historical records indicated inconsistently that each band had exclusive claims to the reserve it actually occupied and also an exclusive claim to the reserve it did not occupy. The two bands sued the federal government for breach of fiduciary duty. In a judgment written by Justice Binnie, the Supreme Court upheld the lower court judgments dismissing the bands' competing claims. The court held that the government had not breached any fiduciary duty. Justice Binnie stated that there were limits to the obligations imposed on a fiduciary, and

at para. 81 of the judgment, he stated: "The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests." At para. 86, Justice Binnie stated that fiduciary duty did not provide a general indemnity and that "[t]he content of the Crown's fiduciary duty towards aboriginal peoples [page529] varies with the nature and importance of the interest sought to be protected".

[129] For a breach of fiduciary duty, there must be an element of betrayal and not just misconduct. This is shown by the Supreme Court of Canada's judgment in *B. (K.L.) v. British Columbia*, [2003] 2 S.C.R. 403, [2003] S.C.J. No. 51. In this case, four siblings were placed in foster homes by the British Columbia government. While in their foster homes, they were abused. They sued the government for damages and alleged negligence, vicarious liability (for the torts of the foster parents), liability for breach of a non-delegable duty and breach of fiduciary duty. The British Columbia government conceded that it had a fiduciary relationship with the siblings. The siblings, however, were unsuccessful in arguing that the government had a fiduciary obligation to act in the best interests of foster children. The court responded that while acting in the best interest of children was a laudable goal that rested under variety of doctrines in family law, it did not provide a workable basis for assigning liability for breach of the fiduciary duties owed children. Chief Justice McLachlin stated, at para. 48:

The traditional focus of breach of fiduciary duty is breach of trust, with the attendant emphasis on disloyalty and promotion of one's own or others' interests at the expense of the beneficiary's interests. Parents stand in a relationship of trust and owe fiduciary duties to their children. But the unique focus of the parental fiduciary duty, as distinguished from other duties imposed on them by the law, is breach of trust. Different legal and equitable duties may arise from the same relationship and circumstances. Equity does not duplicate the common law causes of action, but supplements them. Where the conduct evinces breach of trust, it may extend liability, but only on that basis.

[Emphasis in original]

[130] In *B. (K.L.) v. British Columbia*, although the government was negligent, albeit exculpated because of a limitation period defence, there was no evidence that the government was disloyal and put its own interests ahead of the children nor committed acts that harmed the children in a way that amounted to betrayal of trust or disloyalty. Similarly, in the case at bar, I do not see how the federal Crown entering into The Canada-Ontario Welfare Services Agreement can be characterized as a betrayal of trust or disloyalty.

[131] From this conclusion, however, it does not necessarily follow that it is plain and obvious that the circumstances of the case at bar do not present a viable claim against the Crown for breach of fiduciary duty. There are several precedents that suggest that within the current statement of claim, there are the [page530] elements of a breach of fiduciary duty claim that ought to be allowed to be tried on its merits.

[132] For example, there is *Blackwater v. Plint*, [2005] 3 S.C.R. 3, [2005] S.C.J. No. 59. The federal Crown relied on this Supreme Court of Canada decision to negate Ms. Brown's and Mr. Commanda's submission that the federal Crown had breached its non-delegable fiduciary obligation and duty of care to protect aboriginal rights. The federal Crown also relied on *Blackwater* to advance the argument that there had to be something more than merely entering into a financial support agreement to establish a viable cause of action for breach of fiduciary duty or negligence. The *Blackwater* case does support these submissions by the federal Crown, but the case is also favourable to Ms. Brown and Mr. Commanda's possible claim of breach of fiduciary duty.

[133] In *Blackwater*, the federal Crown was found directly liable and vicariously liable for negligence, but not for breach of fiduciary duty. *Blackwater* was an action by former students of an Indian residential school in British Columbia who had been sexually assaulted by a pedophile employed as a dormitory supervisor at the school. The trial judge had dismissed the plaintiff's claim for breach of fiduciary duty on the basis of a finding that the federal Crown did not act

dishonestly or disloyally. The Supreme Court in a judgment written by Chief Justice McLachlin agreed that based on this finding of fact, a breach of fiduciary duty claim could not be established. However, Chief Justice McLachlin declined to address an argument raised for the first time by intervenors at the Supreme Court of Canada that a finding of breach of fiduciary duty could be sustained on the basis of a breach of a fiduciary duty to aboriginal children collectively. On this submission, Chief Justice McLachlin stated, at paras. 61 and 62 of her judgment:

Beneath this specific argument, a second broader argument focusing on Aboriginal children collectively can be discerned. This is the argument that the system of residential schools robbed Indian children of their communities, culture and support and placed them in environments of abuse. This, it is argued, amounted to dishonest and disloyal conduct that violated the government's fiduciary duty to Canada's Aboriginal peoples.

This argument cannot be resolved on this appeal. It was not raised below, other than as contextual background to the circumstances and events at the school Mr. Barney attended, AIRS. It was pursued only at this level, and then mainly by intervenors. In support of their argument, they submitted studies and writings, none of which were proved in evidence in the courts below and the historic and scientific validity of which the respondents have had no opportunity to challenge. In these circumstances, it would be unfair to rely on this material and inappropriate to deal with the larger argument. [page531]

[134] I appreciate that in *Blackwater v. Plint*, the federal Crown was found to be a partner in the operation of the residential school that was operated and managed by the United Church of Canada and that, in contrast, in the case at bar, Ontario exclusively operated and managed the placement of aboriginal children in non-aboriginal homes. Nevertheless, assuming that the federal Crown did have a fiduciary relationship with the aboriginal children and assuming that the child welfare system in Ontario robbed these children of their

communities, culture, support and identity, in my opinion, it is not plain and obvious that there was no breach of fiduciary duty by the federal government when it allegedly did nothing to stop the Ontario system from operating in this way or when it allegedly did nothing to ameliorate any harmful effects of the child welfare scheme or when it did nothing to assure that Indian children were made aware of their status as Indians when they were placed in non-aboriginal homes. In this last regard, it may be noted that *Natural Parents v. British Columbia* (Superintendent of Child Welfare), *supra*, the Supreme Court held that while under British Columbia's Adoption Act, R.S.B.C. 1960, c. 4, an Indian child could validly be adopted by a non-Indian married couple, the adoption would not affect the status of the child and extinguish the child's rights as an Indian. Applying this law to Ontario's adoption legislation, it would follow that any obligations of the federal Crown to an Indian child who was adopted in Ontario, including fiduciary or common law duties, if any, would not be affected by the adoption.

[135] Pausing here, I wish to make it clear that I am not concluding that the federal Crown actually did anything wrong in the case at bar. I am only concluding that it is not plain and obvious that they did not do anything wrong.

[136] The federal Crown relies on *Aksidan v. Canada* (Attorney General), [2008] B.C.J. No. 178, 291 D.L.R. (4th) 378 (C.A.), which applied certain aspects of *Blackwater v. Plint* to argue that Ms. Brown and Mr. Commanda did not have a viable breach of fiduciary duty claim. In this case, the federal Crown entered into an omnibus agreement with the Province of British Columbia, under which the province took on the responsibility for educating aboriginal children. The plaintiffs, who were elementary school students, were sexually assaulted by a teacher, and they sued the federal Crown based on an allegation that the Crown had a residual non-delegatable duty to ensure the safety and welfare of Indian children in schools. Relying on *Blackwater v. Plint*, the trial judge and the British Columbia Court of Appeal held that the federal Crown had no residual non-delegable duty and [page532] were entitled to comprehensively delegate their responsibilities to the province to ensure the safe ty and welfare of Indian children in

schools.

[137] There are analogies between the Aksidan case and the circumstances of the case at bar, and the case may provide the federal Crown with a defence to Ms. Brown's and Mr. Commanda's breach of fiduciary duty and negligence claims. However, the case may be distinguishable. In Aksidan, there was no suggestion that the delegation was unreasonable, there was no basis for alleging that the delegation was dishonest or disloyal, there were no policy reasons why Canada should be implicated where control of all aspects of education had been reasonably delegated to provincial authorities, and there was no alleged duty of care of preserving cultural identity.

[138] Moreover, Aksidan is strongest in supporting the argument that the federal Crown did no wrong in entering into The Canada-Ontario Welfare Services Agreement; however, Aksidan is weaker in rebutting the argument that after entering into the agreement, the federal Crown breached a fiduciary duty or was negligent by not taking steps to prevent aboriginal children from losing their aboriginal identity as a byproduct of Ontario's child welfare policies that were being supported by federal funds.

[139] In any event, at this juncture, the question, of course, is not whether Aksidan is an answer to the claims of Ms. Brown and Mr. Commanda or is the question now whether the claim of breach of fiduciary duty is likely to succeed. The question is whether it is plain and obvious that the breach of fiduciary duty claim could not succeed.

[140] In *Bonaparte v. Canada (Attorney General)* (2003), 64 O.R. (3d) 1, [2003] O.J. No. 1046 (C.A.) (also reported as *Lafrance Estate v. Canada (Attorney General)* and sometimes referred to as the Baxter class action), the Ontario Court of Appeal allowed a breach of fiduciary duty claim by the children of aboriginal parents who had attended residential schools to proceed to a trial on the merits. The children claimed that the residential schools, which were operated by the federal Crown, were part of a government policy to eradicate the aboriginal culture of their parents. The motion judge had struck the

breach of fiduciary duty claim advanced by the children of the aboriginals who had been placed in the residential schools on the basis that there could not be a breach of fiduciary duty owed to persons who were not alive at the time of the alleged breach of duty. The Court of Appeal, however, reversed the summary judgment dismissing the claim and stated, at para. 32, that the nature and extent of the obligations arising out of the fiduciary relationship [page533] between the government and aboriginal peoples was largely unsettled in the jurisprudence.

[141] In *Bonaparte v. Canada (Attorney General)*, on the issue of whether the federal Crown could be in breach of a fiduciary duty to unborn aboriginals, the Court of Appeal stated, at para. 35:

In this respect, we agree with the motions judge's conclusion that, with the implementation of the "residential school policy", the federal Crown "assumed a duty to act in a fiduciary capacity with respect to the education of aboriginal peoples". However, in the factual context of this case, we do not agree with his further conclusion that it is plain and obvious that the fiduciary duty did not extend to the secondary plaintiffs simply on the basis that they were not yet in existence at the time. This ignores the essence of the secondary plaintiffs' claim. They allege that the very purpose of the Crown's assumption of control over the primary plaintiffs was to strip the Indian children of their culture and identity, thereby removing, as and when they became adults, their ability "to pass on to succeeding generations the spiritual, cultural and behavioural bases of their people". Hence, the secondary plaintiffs claim that they were specifically targeted by the governmental policy. They further allege that they were profoundly and adversely affected as a result.

[142] The federal Crown argues that the case at bar is substantially different from the *Bonaparte v. Canada (Attorney General)* case, and I would agree. One major difference is that in *Bonaparte*, the federal Crown was being sued for its actions that included taking control of education of the parents of the children who later alleged a breach of fiduciary duty owed to

them, while, in contrast, in the case at bar, it is the un-sued Province of Ontario that was the primary actor that actually caused the alleged loss of cultural identity by placing aboriginals in non-aboriginal care. In the case at bar, the only pleaded positive action of the federal Crown was its entering into an agreement to provide money to Ontario, which had agreed to provide a large range of welfare services.

[143] I would agree that *Bonaparte v. Canada* (Attorney General) cannot be used to support the argument that there is a breach of fiduciary duty claim by reason of the federal Crown entering into The Canada-Ontario Welfare Services Agreement. However, it is not plain and obvious to me that *Bonaparte v. Canada* (Attorney General) cannot be used to support the argument that the federal Crown breached a fiduciary duty or was negligent by not taking steps to prevent aboriginal children from losing their aboriginal identity as a byproduct of Ontario's actions that were being supported by federal funds.

[144] Moving on to other cases, *Cloud v. Canada* (Attorney General), [2001] O.J. No. 4163, [2001] O.T.C. 767 (S.C.J.), *affd supra*, was, in effect, a companion litigation to the *Bonaparte* case. Both cases were ultimately settled as part of the residential schools class action settlement. [page534]

[145] *Cloud* concerned a particular residential school in Brantford, Ontario. The statement of claim included a claim of breach of fiduciary duty against the federal Crown and the other defendants, and the statement of claim pleaded that the defendants implemented programs and practices aimed at destroying native language, culture and spirituality. The plaintiffs pleaded that that the efforts to repress and extinguish their languages and spiritual beliefs and to indoctrinate them into an Anglo-Christian culture was a breach of their aboriginal and treaty rights. As damages, the plaintiffs pleaded, amongst other things, a loss of their aboriginal culture and a separation from their community.

[146] The motion judge and a majority of the Divisional Court dismissed a motion to certify the *Cloud* action as a class

proceeding. In the Divisional Court, Justice Cullity dissented, and later, the Court of Appeal agreed with the dissent and certified the action.

[147] Once again, the federal Crown argues that the case at bar is substantially different from the Cloud case, and, once again, I would agree. However, the differences between the case do not go so far as to make it plain and obvious that there is no viable (and by viable all I am saying is that both the claim and the defence require a trial for a determination of their merits) action for breach of fiduciary duty.

[148] Thus, I conclude that in the case at bar, while it is, in my opinion, plain and obvious that the federal Crown's entering into The Canada-Ontario Welfare Services Agreement cannot be the basis for an action for breach of fiduciary duty, it is, however, not plain and obvious what is the answer to the question that I posed at the beginning of these reasons for decision, which is:

In Ontario, between December 1, 1965 and December 31, 1984, when an aboriginal child was placed in the care of non-aboriginal foster or adoptive parents who did not raise the child in accordance with the child's aboriginal customs, traditions, and practices, did the federal Crown have and breach a fiduciary or common law duty of care to take reasonable steps to prevent the aboriginal child from losing his or her aboriginal identity?

[149] Technically speaking, I, therefore, conclude that the current pleading fails to plead a cause of action for breach of fiduciary duty and should be struck out but with leave to amend to properly plead the material facts of a claim of breach of fiduciary duty.

Disclosure of Cause of Action -- Negligence

[150] Ms. Brown and Mr. Commanda advanced a claim in negligence. As currently pleaded, the alleged negligence is connected with the federal Crown having entered into The Canada-Ontario [page535] Welfare Services Agreement during a time in which Ontario had not articulated aboriginality as a

factor in the placement of children under its child welfare legislation. This novel claim framed in negligence is essentially a reprise of the cause of action for breach of fiduciary duty but without the element of disloyalty or other fiduciary misconduct.

[151] For the reasons expressed above with respect to the breach of fiduciary duty claim, in my opinion, as currently pleaded, it is plain and obvious that Ms. Brown and Mr. Commanda have no cause of action in negligence based on the federal Crown entering into The Canada-Ontario Welfare Services Agreement.

[152] However, more or less for the reasons already expressed above, it is not plain and obvious that there is no cause of action in negligence. The negligence claim would be based on what Canada knew or ought to have known and what it did or did not do after Ontario welfare authorities began placing aboriginal children in non-aboriginal homes.

[153] I, therefore, conclude that the current pleading fails to plead a cause of action for negligence and should be struck out but with leave to amend to properly plead the material facts of a claim of negligence.

[154] I also conclude that subject to amending their statement of claim to properly plead the action in negligence and the action for breach of fiduciary duty, Ms. Brown and Mr. Commanda have satisfied the first criterion for certification of their action as a class action. The fresh as amended claim should not include the claims for breach of the honour of the Crown, identity genocide of children or aboriginal rights.

Identifiable Class

[155] I move on to consider the second criterion for certification.

[156] The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result

of the action; (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913, 83 O.T.C. 1 (Gen. Div.). There must be a rational relationship between the class, the causes of action and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641, [2005] O.J. No. 4918 (C.A.), at para. 57, revg [2004] O.J. No. 317, 183 O.A.C. 168 (Div. Ct.), which had affd [2002] O.J. No. 2764, [2002] O.T.C. 515 (S.C.J.). Class membership identification is not commensurate with the [page536] elements of the cause of action; there simply must be a rational connection between the class member and the common issue(s): *Sauer v. Canada (Attorney General)*, supra (S.C.J.), at para. 32.

[157] Ms. Brown and Ms. Commanda propose the following class definition:

Class or class members are aboriginal persons who, as children in Ontario, were exposed to the consequences of the Defendant's breach of fiduciary obligation, duty of care and protection of aboriginal rights and identity genocide between December 1, 1965 to December 31, 1984, excluding those who were members of the class in action 00-CV-192059CP (S.C.J.) (the Residential Schools Abuse Class Action).

[158] The federal Crown asked Ms. Brown and Mr. Commanda to clarify the class description, and in their factum, they provided the following revised definition:

- present day living adults;
- who, as children, were either First Nation registered or "status" Indians, First Nation "non-status" Indians, Mtis or Inuit; and
- who, in the period from December 1, 1965 to December 31, 1984, were apprehended in Ontario by child welfare authorities and removed from their aboriginal families and communities and placed in the care of non-aboriginal adoptive or foster homes; and
- who suffered the losses as pleaded because they were thereby systematically denied the opportunity to preserve their aboriginal identity; but

-- excluding those who were members of the class Ontario Superior Court Action No. 00-CV-192059CP (the residential schools class action).

[159] As already noted above, the class closing date of December 31, 1984 refers to the day before Ontario proclaimed the Child and Family Services Act, 1984 in force, after which the former practices of removing aboriginal children from their families and communities came to an end.

[160] In their factum and during argument, the federal Crown pointed out many problems with the current definition(s) of the class. For example, there are numerous problems associated with the qualification in the current definition that would reduce the class by excluding members of the class who were members of the residential schools class actions. And, for example, there are [page537] numerous problems associated with the connection between the alleged wrongdoing of entering into The Canada-Ontario Welfare Services Agreement that covered only some of the aboriginal children who were placed in non-aboriginal homes and did not apply with respect to some Indians or any Mtis or Inuit.

[161] Given that I have already concluded that a viable cause of action cannot be based on the alleged wrongdoing of the federal Crown having entered into The Canada-Ontario Welfare Services Agreement, it makes little sense to analyze these problems and to consider whether or not they are solvable.

[162] In my opinion, the appropriate class definition is as follows:

Aboriginal persons in Ontario between December 1, 1965 and December 31, 1984 who were placed in the care of non-aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions, and practices.

[163] This class definition identifies the persons who have a potential claim against the federal Crown defendant; defines the parameters of the lawsuit so as to identify those persons

bound by the result of the action; and describes who is entitled to notice.

[164] Given my conclusions that there is no viable cause of action simply based upon the federal Crown having entered into The Canada-Ontario Welfare Services Agreement, some explanation is necessary, however, to justify the temporal parameters of the class definition. In this regard, the dates December 1, 1965 and December 31, 1984 remain significant because they mark the period in which the "Sixties Scoop" is alleged to have occurred. Although the Province of Ontario was the perpetrator of the acts described as the Sixties Scoop, Ms. Brown's and Mr. Commanda's proposed class action, as originally pleaded or as amended, alleges that the federal Crown is liable for the alleged damage caused by the province's Sixties Scoop. Thus, these dates remain useful for both the claim and the defence of the action.

[165] Persons who receive notice of the above definition will be able to self-identify and to decide whether or not they wish to opt out of the class action or to await the outcome of the common issues trial, after which, assuming success, they will have to decide whether they wish to pursue an individual issues trial where the federal Crown would have the opportunity to dispute identity as a class member, causation, damages and the quantum of compensation. Assuming failure for the representative plaintiffs after the common issues trial, the federal Crown will have obtained a binding judgment against all those with claims like Ms. Brown and Mr. Commanda. [page538]

[166] I should also address a particular objection raised by the federal Crown about defining class members and their claim. This objection concerned the fact that Ms. Brown's and Mr. Commanda's action was about the placement of children in the homes of non-aboriginals, but it was submitted that there was no useful evidence offered as to what objective criteria could be used to draw the distinction between "aboriginal" families and homes and "non-aboriginal" families and homes. This objection may be true, but it seems to me that this is an objection to raise during the individual issues trials, if the action goes that far. In many individual cases, it will be

quite obvious that the class member was an aboriginal placed in the home of non-aboriginals. In any event, I do not regard this objection as a problem that needs to be resolved for the purposes of defining the class or for deciding the common issues, as discussed below.

[167] Put shortly, I believe that the above revised definition satisfies the second criterion for certification.
Common Issues

[168] For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick v. Toronto (City)*, supra, at para. 18.

[169] The focus of the analysis of whether there is a common issue is not on how many individual issues there might be but whether there are issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims: *Cloud v. Canada (Attorney General)*, supra (C.A.), at para. 55.

[170] The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, at para. 39.

[171] For an issue to be common, it is not essential that the class members be identically situated vis--vis the opposing party or benefit from the successful prosecution of the action to the same extent: *Western Canadian Shopping Centres Inc. v. Dutton*, supra, at paras. 39-40.

[172] The comparative extent of individual issues is not a consideration in the commonality inquiry, although it is a factor in the preferability assessment: *Cloud v. Canada (Attorney General)*, supra (C.A.), at para. 65; *Rumley v. British Columbia (sub nom. R. (L.) v. British Columbia)*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, at para. 33. [page539]

[173] Ms. Brown and Mr. Commanda propose as common issues the following questions:

1. By its conduct in respect of the class during the period so identified above, did the Defendant breach any fiduciary duty?
2. By its conduct in respect of the class during the period so identified above, did the Defendant breach any duty of care?
3. By its conduct in respect of the class during the period so identified above, did the Defendant breach any duty of protection of aboriginal rights?
4. By its conduct in respect of the class during the period so identified above, did the Defendant commit any actionable wrong of identity genocide?
5. If the answer is affirmative in respect of the questions noted above, what are the damages, if any, associated with any such breach or actionable wrong, limited as they must be to that pleaded in the February 9, 2009 Statement of Claim?
6. If the answer is affirmative in respect of the questions noted above, is the Defendant's conduct such as to attract punitive, exemplary or aggravated damages?
7. If so, what amount of punitive, exemplary or aggravated damages is appropriate?

[174] Once again, there are problems, and the federal Crown objects to these common issues, but also, once again, it is not necessary to discuss the problems and objections at any length, because I would not certify the action as currently pleaded with the above list of common questions. The prime reason for rejecting the above list is that the proposed questions are tied to a statement of claim that fails to satisfy the first criterion for certification.

[175] In any event, I would not have certified questions 5, 6

and 7 because, in my opinion, in the circumstances of this case, they are not common issues and they could only be answered as an aspect of individual issue trials.

[176] However, I have already set out above a compound common issue that, in my opinion, could and should be certified as a common issue. It is a lynchpin common issue, the resolution of which will substantially advance the litigation. The suggested common issue covers legal and factual territory similar to that covered by proposed questions 1 and 2 of the original list.

[177] I therefore conclude that the third criterion for certification can be satisfied based on the above revised common issue.

Preferable Procedure

[178] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a [page540] fair, efficient and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General)*, supra (C.A.), at paras. 73-75.

[179] Preferability captures the ideas of whether a class proceeding would be an appropriate method of advancing the claim and whether it would be better than other methods such as joinder, test cases, consolidation and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321, [2007] O.J. NO. 1684 (C.A.), at para. 69, leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, supra.

[180] In considering the preferable procedure criterion, the court should consider (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the Act; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the Act; and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc.*

(2001), 54 O.R. (3d) 520, [2001] O.J. No. 1844 (Div. Ct.), at para. 16, affd (2003), 63 O.R. (3d) 22, [2003] O.J. No. 27 (C.A.), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 106.

[181] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues: *Markson v. MBNA Canada Bank*, supra (C.A.), at para. 69; *Hollick v. Toronto (City)*, supra.

[182] The federal Crown submits a two-pronged argument about the preferable procedure criterion. First, it submits that a class action would not be an appropriate way to advance Ms. Brown's and Mr. Commanda's claims on behalf of the class. Second, it submits that a preferable procedure for litigating the common complaints of the class members and Ms. Brown and Mr. Commanda would be a test case.

[183] In my opinion, with the above class definition and with the above common issue, the arguments of the federal Crown are overcome. The class action that emerges removes the idiosyncratic issues associated with identification as aboriginal, causation, damages and quantification of damages that would have made a test case meaningless unless the federal Crown were to concede some or all of those idiosyncratic issues for the purposes of being bound by the test case. [page541]

[184] What emerges instead is a proceeding in which the court will determine whether there is any legal basis for the federal Crown to be liable for a loss of cultural identity suffered by aboriginal persons in Ontario as a consequence of the so-called Sixties Scoop. The common issues trial will focus on what the federal government did or did not do after welfare authorities in Ontario placed aboriginal children in non-aboriginal homes.

[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.

[187] In my opinion, with amendments to the statement of claim and revisions to the class definition and the common issues, the preferable procedure criterion is satisfied in the case at bar.

Representative Plaintiff

[188] The fifth criterion for certification is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[189] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant: *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812, 159 A.C.W.S. (3d) 177 (S.C.J.), at paras. 36-45; [page542] *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344, [2003] O.T.C. 49 (S.C.J.), at para. 40, *affd* [2003] O.J. No. 4708, 127

A.C.W.S. (3d) 450 (C.A.).

[190] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075, [2002] O.T.C. 170 (S.C.J.), at para. 22, leave to appeal granted [2002] O.J. No. 2135, 114 A.C.W.S. (3d) 388 (S.C.J.), *vard* (2003), 64 O.R. (3d) 208, [2003] O.J. No. 1374 (Div. Ct.), at paras. 41, 48, *vard* [2003] O.J. No. 2218, 174 O.A.C. 44 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197, 163 A.C.W.S. (3d) 701 (S.C.J.), at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070, 64 C.P.C. (6th) 136 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. 1397, 56 C.P.C. (6th) 268 (S.C.J.), at para. 55.

[191] Whether the representative plaintiff can provide adequate representation depends on such factors as his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim: *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, at para. 41.

[192] The federal Crown submits that there is no evidence that Ms. Brown and Mr. Commanda have been authorized to represent the collective aboriginal interests and, as such, they lack standing to prosecute significant aspects of the claim and may be in conflict with some or all of the class members. This submission largely was based on the implications of Ms. Brown and Mr. Commanda advancing aboriginal rights claims. However, since I have struck out these claims, this submission loses its force.

[193] The federal Crown submits that there is some uncertainty about whether Ms. Brown and Mr. Commanda are actually members of the class that they would represent. For instance, Mr. Commanda was not a registered Indian during the time period of the class definition. These uncertainties, however, are removed by the new class definition set out above.

Further, in other respects, I conclude that Ms. Brown and Mr. Commanda are qualified to be representative plaintiffs and that their lawyers of record are qualified to act as class counsel.

[194] The federal Crown submits, however, that Ms. Brown and Mr. Commanda have not offered a comprehensive litigation plan which would allow the court to assess their suitability in prosecuting the proposed class action. [page543]

[195] In my opinion, based on an amended statement of claim, class definition and common issue and putting aside the matter of the litigation plan, the fifth criterion for certification is satisfied in the case at bar.

[196] As for the litigation plan, for certification, the proposed representative plaintiffs must present a suitable litigation plan. The production of a workable litigation assists the court in determining whether the class proceeding is the preferable procedure and it allows the court to determine whether the litigation itself is manageable in its constituted form: *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173, [1999] O.J. No. 1662 (S.C.J.), at p. 203 O.R., *affd* (1999), 46 O.R. (3d) 315, [1999] O.J. No. 5114 (Div. Ct.), *varied on other grounds* (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (C.A.), application for leave to appeal to the S.C.C. refused October 18, 2001.

[197] Litigation plans are something of a work in progress and may have to be amended during the course of the proceedings: *Cloud v. Canada (Attorney General)*, *supra* (C.A.), at para. 95.

[198] As discussed above, in the case at bar, the proposed litigation plan was based on the alleged predicate wrongdoing of the federal Crown entering into The Canada-Ontario Welfare Services Agreement. Ms. Brown and Mr. Commanda have not had an opportunity to submit a plan based on a revised class action. However, I do not foresee any insurmountable problems in the preparation of a suitable litigation plan and, therefore, I rule that the fifth criterion for certification has been satisfied subject to the court approving a revised litigation

plan, which may be settled at a case conference.

Conclusion

[199] In the result, the federal Crown has succeeded in having some of Ms. Brown's and Mr. Commanda's claims struck out for failure to show a reasonable cause of action; however, with amendments, there is within the current statement of claim the material facts for causes of action for breach of fiduciary duty and negligence.

[200] Conditional upon Ms. Brown and Mr. Commanda delivering a properly pleaded fresh as amended statement of claim and the court approving a litigation plan, the five criteria for certification can be satisfied in accordance with the comments above about the class definition and the common issue. An order should issue accordingly.

[201] If the parties cannot agree about the matter of costs, they may make submissions in writing, beginning with Ms. Brown and Mr. Commanda within 20 days of the release of these [page544] reasons for decision, to be followed by the federal Crown's submissions within a further 20 days.

Motion granted with leave to plaintiffs to amend statement of claim.

*THIS IS EXHIBIT "4" REFERRED TO IN THE
AFFIDAVIT OF DAVID ROSENFELD
SWORN BEFORE ME, THIS 18TH DAY OF APRIL, 2018*



A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.
GARTH MYERS

Court File: CV-09-00372025-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE.
JUSTICE PAUL M. PERELL

WEDNESDAY, MAY 26, 2010

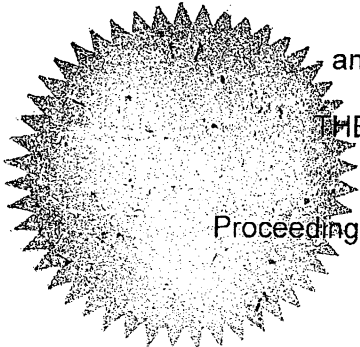
B E T W E E N :

MARCIA BROWN and ROBERT COMMANDA
Plaintiffs

and -

THE ATTORNEY GENERAL OF CANADA
Defendant

Proceeding under the *Class Proceedings Act, 1992, S.O. 1992*



ORDER

THIS MOTION made by the Plaintiffs for certification of the within action as a class proceeding, and a motion made by the Defendant to strike out the Plaintiffs' Statement of Claim and to dismiss the action pursuant to Rule 21.01(1)(b), were heard together on April 26, 27 and 28, 2010, at Toronto, Ontario.

ON READING the Statement of Claim, the Plaintiffs' Statement of Particulars, the Statement of Defence, the Motion Records filed by the Plaintiffs and by the Defendant, including the Affidavits of Marcia Brown, Robert Commanda, Ana Bodnar, Kenneth Richard, Vernon Harper and Harvey Armstrong and the transcripts of the cross-examinations thereon, together with the Facta of the Plaintiffs and the Defendant, and on hearing the submissions of counsel for the parties, including their subsequent consent with respect to the disposition of costs, the decision of the Court having been reserved to this day,

1. THIS COURT ORDERS THAT, upon the Plaintiffs delivering a Fresh as Amended Statement of Claim to plead claims in negligence and for breach of fiduciary duty in accordance with the Reasons for Decision herein, and the Court approving a revised Litigation Plan, the within action is hereby certified as a

-2-

Class Proceeding under the *Class Proceedings Act, 1992*,

a. with the Class defined as :

Aboriginal persons in Ontario between December 1, 1965 and December 31, 1984, who were placed in the care of non-aboriginal foster or adoptive parents, who did not raise the children in accordance with the aboriginal person's customs, traditions and practices.

b. and with the common issue raised by the claim of the class members being stated as :

In Ontario, between December 1, 1965 and December 31, 1984, when an aboriginal child was placed in the care of non-aboriginal foster or adoptive parents who did not raise the child in accordance with the child's aboriginal customs, traditions and practices, did the Federal Crown have and breach a fiduciary or common law duty of care to take reasonable steps to prevent the aboriginal child from losing his or her aboriginal identity?

2. THIS COURT FURTHER ORDERS THAT the Plaintiffs' Fresh as Amended Statement of Claim be delivered on or before July 30, 2010, or such other date as the Court may on motion direct, failing which the action as a whole is dismissed.
3. THIS COURT FURTHER ORDERS THAT the Plaintiffs' claim framed in aboriginal rights and for declaratory relief or other remedies in respect of aboriginal rights be struck out.
4. THIS COURT FURTHER ORDERS THAT the Plaintiffs' claim framed in genocide, including the identity genocide of children and for declaratory relief or other remedies in respect of genocide, including the identity genocide of children, be struck out.
5. THIS COURT FURTHER ORDERS THAT the Plaintiffs' claim framed in terms of

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced in Toronto, Ontario

ORDER

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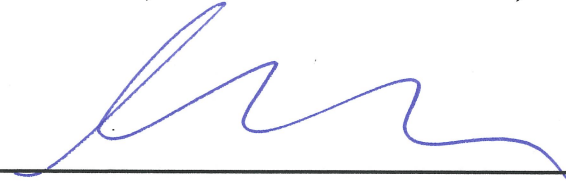
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Counsel for the Plaintiffs

*THIS IS EXHIBIT "5" REFERRED TO IN THE
AFFIDAVIT OF DAVID ROSENFELD
SWORN BEFORE ME, THIS 18TH DAY OF APRIL, 2018*



A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.
GARTH MYERS

Brown et al. v. The Attorney General of Canada

[Indexed as: Brown v. Canada (Attorney General)]

114 O.R. (3d) 352

2011 ONSC 7712

2011 ONSC 7712 (CanLII)

Ontario Superior Court of Justice,
Divisional Court,
Cunningham A.C.J., Pardu and Mulligan JJ.
December 28, 2011*

* This judgment was recently brought to the attention of the editors.

Civil procedure -- Class proceedings -- Certification -- Case management judge on certification motion finding that statement of claim did not disclose cause of action -- Judge erring in conditionally certifying claim framed in negligence and breach of fiduciary duty and permitting plaintiffs to plead fresh as amended statement of claim in accordance with his framing of new questions in respect of negligence and fiduciary duty -- Judge denying defendant opportunity to fully argue issue by predetermining that statement of claim would disclose cause of action so long as fresh pleading was prepared in accordance with his reasons -- Judge failing to conduct analysis to determine whether viable claim for negligence or breach of fiduciary duty existed.

The plaintiffs brought a proposed class proceeding seeking compensation on behalf of aboriginal people who allegedly suffered the loss of their aboriginal identity as a result of having been placed in foster care or in adoptive homes pursuant to child welfare legislation in place between 1965 and 1984. On a certification motion, the motion judge found that the

statement of claim did not disclose a cause of action. However, he conditionally certified claims framed in negligence and breach of fiduciary duty and gave the plaintiffs an opportunity to plead a fresh as amended statement of claim in accordance with his framing of a new question in respect of negligence and fiduciary duty. The defendant appealed.

Held, the appeal should be allowed. [page353]

The motion judge erred in conditionally certifying claims framed in negligence and breach of fiduciary duty. He seemed to have predetermined that a cause of action would emerge so long as the fresh pleading was prepared in accordance with his reasons. The defendant would be denied an opportunity to argue the elements of s. 5(1) of the Class Proceedings Act, 1992, S.O. 1992, c. 6. The motion judge failed to conduct a full analysis in order to determine whether a viable claim existed in either negligence or fiduciary duty. The existing statement of claim was struck, the plaintiffs were granted leave to amend their pleading and the certification motion was to be ground before another judge. The defendant was entitled to its costs of the leave motion and the appeal, fixed at \$25,000.

Cases referred to

Brown v. Canada (Attorney General) (2010), 102 O.R. (3d) 493, [2010] O.J. No. 2253, 2010 ONSC 3095, [2010] 3 C.N.L.R. 41, 94 C.P.C. (6th) 276 (S.C.J.) [Leave to appeal granted [2011] O.J. No. 940, 2011 ONSC 1193 (S.C.J.)]

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6 [as am.], s. 5(1)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 21.01(1)

(b)

APPEAL from an order conditionally certifying a class action.

Jeffery Wilson and Morris Cooper, for respondents.

Owen Young, Paul Evraire, Q.C., and Michael W. Bader, Q.C., for appellant.

[1] Endorsement BY THE COURT: -- This matter comes before us as an appeal from the decision of Perell J. in which he conditionally certified a class action under the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "CPA"). Leave was granted by Swinton J. on February 22, 2011 [[2011] O.J. No. 940, 2011 ONSC 1193 (S.C.J.)]. Her reasons are informative.

[2] For the purposes of this endorsement, it will not be necessary to recite the factual background other than to say the representative plaintiffs claim compensation on behalf of approximately 16,000 aboriginals who allege they suffered the loss of their aboriginal identity as a result of having been placed in foster care or in adoptive homes pursuant to child welfare legislation in place between 1965 and 1984. A companion motion brought by the Attorney General of Canada ("AG") pursuant to rule 21.01(1)(b) [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] was also before Perell J.

[3] The certification was opposed by the AG on the basis that the action as pleaded failed to meet the criteria set out in s. 5(1) of the CPA, principally because it failed to disclose a cause of action. [page354]

[4] In his decision dated May 26, 2010 [(2010), 102 O.R. (3d) 493, [2010] O.J. No. 2253 (S.C.J.)], the motion judge found the statement of claim did not disclose a cause of action. Although three of the claims advanced were struck, Perell J. conditionally certified claims framed in negligence and breach of fiduciary duty. Essentially, and this is where we find error, Perell J. permitted the plaintiff an opportunity to plead a fresh as amended statement of claim in accordance with his framing of a new question in respect of negligence and fiduciary duty. As Perell J. stated in his reasons [at para. 12]:

In Ontario between December 1, 1965, and December 31, 1984, when an aboriginal child was placed in the care of non-aboriginal foster or adoptive parents who did not raise the child in accordance with the child's aboriginal customs,

traditions and practices, did the Federal Crown have and breach a fiduciary or common law duty of care to take reasonable steps to prevent the aboriginal child from losing his or her aboriginal identity?

[5] In our view, the motion judge seems to have predetermined that a cause of action will emerge so long as the fresh pleading is prepared in accordance with his reasons. In other words, the AG, so it would seem, will be denied an opportunity to argue the elements of s. 5(1) of the CPA. We concur with Swinton J. when she stated [at para. 12]:

Instead of the conditional order, he [the motion judge], should have adjourned the certification motion as contemplated by s. 5(4) of the CPA which allows the court to adjourn the certification motion to permit the parties to amend their pleadings.

[6] As Swinton J. pointed out, this was not simply a case of tidying up a litigation plan or some deficiency in the pleading. Here, the motion judge concluded that the pleading before him failed to disclose a cause of action.

[7] Because we view this matter as procedural, we do not intend to discuss the merits other than to say we agree, once again, with Swinton J. concerning the motion judges' failure to conduct a full analysis in order to determine a viable claim either in negligence or fiduciary duty. The motion judge concluded that it was not plain and obvious that these duties did not exist without considering the necessary elements for there to be such duties.

[8] As to the negligence claim, clearly novel, no Cooper-Anns analysis was conducted. In the view of the motion judge, a proper negligence claim would simply be based on [at para. 152] "what Canada knew or ought to have known and what it did or did not do after Ontario welfare authorities began placing aboriginal children in non-aboriginal homes". [page355]

[9] Having said that, because the motion judge appears to have pre-approved the amendments necessary to satisfy him that

a cause of action existed, the appellants have been denied the opportunity to fully argue the issue. As counsel for the AG put it in submissions, there is no available mechanism for the AG to come back. To appear before Perell J. with these apparently pre-approved amendments would be to appeal his determination. Once a motion judge concludes pleadings do not show a cause of action, conditional certification is not available. One option, as Swinton J. pointed out, would be to simply adjourn the certification motion in order to permit an amendment. However, once it is determined that no cause of action has been pleaded, as was the case here, the pleading should have been struck with leave to amend. This was not, as suggested by the respondent in submissions, appropriate case management.

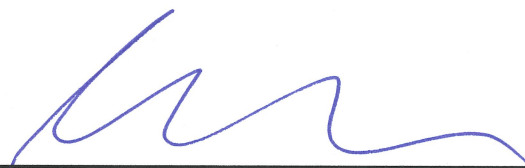
[10] We understand from the respondents that the claim has now been recast (presumably in accordance with the reasons of Perell J.) as a fresh as amended statement [of] claim. In order to enable the matter to proceed as expeditiously as possible, the appeal is allowed and the following ordered.

[11] Paragraphs 1, 2, 6 and 7 of the order dated May 26, 2010 are set aside. The existing statement of claim is struck. Leave is granted to the plaintiffs to amend their pleading and the certification motion is to be brought before another judge. Unless the parties determine it to be necessary, there will be no new affidavits.

[12] The appellant is entitled to its costs of the motion for leave and for the appeal which we fix at \$25,000, all inclusive.

Appeal allowed.

*THIS IS EXHIBIT "6" REFERRED TO IN THE
AFFIDAVIT OF DAVID ROSENFELD
SWORN BEFORE ME, THIS 18TH DAY OF APRIL, 2018*



A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.
GARTH MYERS

Brown et al. v. The Attorney General of Canada

[Indexed as: Brown v. Canada (Attorney General)]

114 O.R. (3d) 355

2013 ONCA 18

Court of Appeal for Ontario,
Rosenberg, Gillese and Tulloch JJ.A.
January 17, 2013

Civil procedure -- Class proceedings -- Certification -- Motion judge finding that statement of claim did not disclose cause of action -- Judge erring in conditionally certifying claim framed in negligence and breach of fiduciary duty and permitting plaintiffs to plead fresh as amended statement of claim in accordance with his framing of new questions in respect of negligence and fiduciary duty -- Conditional certification not open to motion judge once he concluded that statement [page356] of claim did not disclose cause of action -- Motion judge having predetermined that viable cause of action in negligence and breach of fiduciary duty existed as framed by him -- Divisional Court correctly allowing defendant's appeal and ordering that certification motion be heard by another judge.

Civil procedure -- Class proceedings -- Costs -- Plaintiffs bringing proposed class action on behalf of aboriginals who allegedly suffered loss of aboriginal identity as result of having been placed in foster care or adoptive homes pursuant to child welfare legislation -- Motion judge conditionally

certifying claims framed in negligence and breach of fiduciary duty -- Divisional Court awarding defendant its costs of successful leave application and appeal without giving reasons for its costs decision -- Plaintiffs' appeal from costs order allowed -- Divisional Court erring in failing to consider s. 31(1) of Class Proceedings Act -- Proposed class proceeding being test case and raising novel points of law and matters of public interest -- Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 31(1).

The plaintiffs brought a proposed class proceeding seeking compensation on behalf of aboriginal people who allegedly suffered the loss of their aboriginal identity as a result of having been placed in foster care or in adoptive homes between 1965, when Canada and Ontario signed an agreement under which Ontario assumed responsibility for providing child welfare services for certain aboriginal children with funds provided by the federal Crown, and 1984. The action was not brought against Ontario, but only against Canada, which the plaintiffs alleged wrongfully delegated its exclusive responsibility as guardian, trustee, protector and fiduciary of aboriginal persons by entering into the 1965 agreement. On a certification motion, the case management judge found that the statement of claim did not disclose a cause of action. However, he conditionally certified claims framed in negligence and breach of fiduciary duty and gave the plaintiffs an opportunity to plead a fresh as amended statement of claim in accordance with his framing of a new question in respect of negligence and fiduciary duty. The Divisional Court allowed the defendant's appeal and awarded the defendant its costs of the leave motion and the appeal in the amount of \$25,000. The plaintiffs appealed.

Held, the appeal should be allowed in part.

The case management judge erred in conditionally certifying the class proceeding in the absence of a statement of claim that disclosed a cause of action. It is not possible to know whether an action can be appropriately prosecuted as a class action without identifying the fundamental issue of whether or not there is a cause of action. Certifying a class action in the absence of a statement of claim that discloses viable

causes of action is not case management. Once the case management judge concluded that the statement of claim did not disclose a cause of action, it was not open to him to conditionally certify the class proceeding. He could have dismissed the motion for certification, adjourned the motion for certification under s. 5(4) of the Class Proceedings Act, 1992 (the "Act") to give the plaintiffs the opportunity to amend their statement of claim or granted the defendant's Rule 21 (of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194) motion and dismissed the action.

The case management judge had apparently predetermined that there were viable causes of action in negligence and breach of fiduciary duty. He effectively deprived the defendant of an opportunity to make submissions on whether the causes of action in breach of fiduciary duty and negligence, as framed by [page357] the case management judge, were viable. It was not self-evident that they were. The Divisional Court did not err in ordering that the certification motion be heard by another judge. Section 34(2) of the Act, which provides that the senior regional judge shall assign another judge where the case management judge "becomes unavailable for any reason", does not simply contemplate unavailability due to illness or death. The phrase "for any reason" is wide enough to include circumstances in which the principles of natural justice preclude the judge continuing with the case.

The Divisional Court did not give reasons for its costs order. It was an error in principle not to consider the factors set out in s. 31(1) of the Act. The proposed class action was in the nature of a test case and raised novel points of law. The treatment of aboriginal children in Ontario's child welfare system and Canada's responsibility for what occurred were matters of public interest. The significance of those factors and the importance of access to justice required some moderation of the normal rule that costs follow the event.

Cases referred to

Aksidan v. Henley, [2008] B.C.J. No. 178, 2008 BCCA 43, 291 D.L.R. (4th) 378, 77 B.C.L.R. (4th) 248, 251 B.C.A.C. 161, [2008] 7 W.W.R. 521; B. (K.L.) v. British Columbia, [2003] 2 S.C.R. 403, [2003] S.C.J. No. 51, 2003 SCC 51, 230 D.L.R.

(4th) 513, 309 N.R. 306, [2003] 11 W.W.R. 203, J.E. 2003-1874, 187 B.C.A.C. 42, 18 B.C.L.R. (4th) 1, [2003] R.R.A. 1065, 19 C.C.L.T. (3d) 66, [2004] CLLC 210-014, 38 C.P.C. (5th) 199, 44 R.F.L. (5th) 245, 125 A.C.W.S. (3d) 432; *Blackwater v. Plint*, [2005] 3 S.C.R. 3, [2005] S.C.J. No. 59, 2005 SCC 58, 258 D.L.R. (4th) 275, 339 N.R. 355, [2006] 3 W.W.R. 401, J.E. 2005-1925, 216 B.C.A.C. 24, 48 B.C.L.R. (4th) 1, [2005] R.R.A. 1021, 46 C.C.E.L. (3d) 165, 35 C.C.L.T. (3d) 161, 142 A.C.W.S. (3d) 1080, EYB 2005-96641; *Bonaparte v. Canada (Attorney General)* (2003), 64 O.R. (3d) 1, [2003] O.J. No. 1046, 169 O.A.C. 376, [2003] 2 C.N.L.R. 43, 30 C.P.C. (5th) 59, 121 A.C.W.S. (3d) 442 (C.A.), *consd*

Other cases referred to

Brown v. Canada (Attorney General) (2011), 114 O.R. (3d) 352, [2011] O.J. No. 6070, 2011 ONSC 7712 (Div. Ct.), *varg* (2010), 102 O.R. (3d) 493, [2010] O.J. No. 2253, 2010 ONSC 3095, [2010] 3 C.N.L.R. 41, 94 C.P.C. (6th) 276 (S.C.J.) [Leave to appeal granted [2011] O.J. No. 940, 2011 ONSC 1193 (S.C.J.)]; *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728, [2005] O.J. No. 842, 250 D.L.R. (4th) 756, [2005] O.T.C. 160, 9 C.P.C. (6th) 175, 137 A.C.W.S. (3d) 686 (S.C.J.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924, 247 D.L.R. (4th) 667, 192 O.A.C. 239, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 2 C.P.C. (6th) 199, 135 A.C.W.S. (3d) 567 (C.A.); *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, 2001 SCC 68, 205 D.L.R. (4th) 19, 277 N.R. 51, J.E. 2001-1971, 153 O.A.C. 279, 42 C.E.L.R. (N.S.) 26, 13 C.P.C. (5th) 1, 24 M.P.L.R. (3d) 9, 108 A.C.W.S. (3d) 774; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, 74 D.L.R. (4th) 321, 117 N.R. 321, [1990] 6 W.W.R. 385, J.E. 90-1436, 49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105; *Law Society of Upper Canada v. French*, [1975] 2 S.C.R. 767, [1974] S.C.J. No. 125, 49 D.L.R. (3d) 1, 3 N.R. 410; *McCracken v. Canadian National Railway Co.* (2012), 111 O.R. (3d) 745, [2012] O.J. No. 2884, 2012 ONCA 445, 293 O.A.C. 274, 100 C.C.E.L. (3d) 27, 21 C.P.C. (7th) 57, [2012] CLLC 210-041; *Pearson v. Inco Ltd.* (2006), 79 O.R. (3d) 427, [2006] O.J. No. 991, 267 D.L.R. (4th) 111, 208 O.A.C. 284, 20 C.E.L.R. (3d) 292, 25 C.P.C. (6th) 1, 146 A.C.W.S. (3d) 600 (C.A.); *Ruffolo v. Sun Life Assurance Co.*

of Canada (2009), 95 O.R. (3d) 709, [2009] O.J. No. 1322,
 2009 ONCA 274, 68 C.P.C. (6th) 322, 74 C.C.P.B. 191, 247
 O.A.C. 209, 73 C.C.L.I. (4th) 185, 177 A.C.W.S. (3d) 538
 [page358]

Statutes referred to

Child and Family Services Act, 1984, S.O. 1984, c. 55, s. 53(5)

Child Welfare Act, 1965, S.O. 1965, c. 14

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5(1), (a),
 (b), (c), (d), (e), (4), 10, 12, 31(1), 34, (1), (2)

Indian Act, R.S.C. 1985, c. I-5 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21,
 21.01(1), (b)

Authorities referred to

Canada-Ontario Welfare Services Agreement

APPEAL from the order of the Divisional Court (Cunningham
 A.C.J.S.C., Pardu and Mulligan JJ.) (2011), 114 O.R. (3d) 352,
 [2011] O.J. No. 6070, 2011 ONSC 7712 (Div. Ct.) allowing the
 appeal from the order of Perell J. (2010), 102 O.R. (3d) 493,
 [2010] O.J. No. 2253 (S.C.J.).

Jeffery Wilson and Morris Cooper, for appellants.

Owen D. Young, Paul J. Evraire, Q.C., and Michael W. Bader,
 Q.C., for respondent.

The judgment of the court was delivered by

[1] ROSENBERG J.A.: -- The appellants, plaintiffs in a
 proposed class proceeding, appeal from the order of the
 Divisional Court that set aside the conditional certification
 of the class action by Perell J. and ordered that the
 certification motion be brought before another judge. The
 appellants also appeal from the order of the Divisional Court
 awarding costs of both the motion for leave and the appeal
 before the Divisional Court in the amount of \$25,000.

[2] For the following reasons, I would allow the appeal only to the extent of quashing the costs order made by the Divisional Court.

Outline of the Proposed Class Proceeding

[3] The proposed class proceeding arises out of a practice in Ontario between 1965 and 1984 in which welfare authorities removed Aboriginal children from their families and communities and, in accordance with court orders, placed them with non-Aboriginal families. In 1965, Canada and Ontario signed the Canada-Ontario Welfare Services Agreement. Under the agreement, Ontario assumed responsibility for providing child welfare services for certain Aboriginal children with funds provided by the federal Crown. The welfare services to be provided included [page359] "the protection and care of neglected children, the protection of children born out of wedlock and adoption services provided under the Child Welfare Act, R.S.O. 1960, c. 53". At the time, the Child Welfare Act, 1965, S.O. 1965, c. 14 did not require the Crown or the courts to take into account the Aboriginal status of the children in making decisions about taking children into care and placing them for adoption. That changed in 1984 as a result of the Child and Family Services Act, 1984, S.O. 1984, c. 55, which expressly made aboriginality a factor in provincial child welfare practice and required the court to place an Aboriginal child with a member of the child's extended family, a member of the child's band or native community, or another Indian or native family, unless there was a substantial reason for placing the child elsewhere (s. 53(5)).

[4] The plaintiffs allege that during this 19-year period, some 16,000 Aboriginal children were removed from their families and communities and thus lost contact with their Aboriginal cultural identity. The plaintiffs claim that they lost their language, culture, customs and heritage, as well as any benefits they might have as status Indians under the Indian Act, R.S.C. 1985, c. I-5.

[5] In the proposed class proceeding, the appellants did not bring action against Ontario, which administered the legislation, but Canada, which they allege wrongfully delegated

its exclusive responsibility as guardian, trustee, protector and fiduciary of Aboriginal persons by entering into the 1965 agreement. As originally framed, the action alleged a deliberate program of "identity genocide".

[6] The central claim against the respondent is that it committed various actionable wrongs because it entered into the 1965 agreement with the province. This claim is fundamental to all of the pleaded causes of action, the identification of the class, the identification of the common issues, whether the appellants qualify as representative plaintiffs and whether a class proceeding would be the preferable procedure. In other words, the claim is fundamental to all of the requirements for certification in s. 5(1) of the Class Proceedings Act, 1992, S.O. 1992, c. 6.

[7] This appeal arises out of the reasons of Perell J., the case management judge, following a motion to certify the class proceeding and a motion brought by the respondent on the final day of argument of the certification motion to have the action dismissed under rule 21.01(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 as disclosing no reasonable cause of action: *Brown v. Canada (Attorney General)* (2010), 102 O.R. (3d) 493, [2010] O.J. No. 2253 (S.C.J.). [page360]
The Reasons of the Case Management Judge

Disclosure of causes of action -- Section 5(1)(a) of the Class Proceedings Act, 1992

[8] The appellants' original statement of claim, even with the particulars delivered by the appellants, was not drafted in a way that allowed for the easy identification of causes of action. In considering whether the statement of claim disclosed a cause of action as required for certification under s. 5(1)(a) of the Class Proceedings Act, 1992 and the Rule 21 motion, the case management judge identified five proposed causes of action. In doing so, he sometimes resorted to phrases such as "it is not entirely clear from the statement of claim", given the vagueness of the statement of claim. In the result, the case management judge found that none of the pleaded causes of action met the minimal "plain and obvious" test for

disclosing a cause of action from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93. Each of the proposed causes of action, as pleaded, had a problem or fatal flaw that precluded certification. The case management judge's reasons for that finding can be summarized as follows.

[9] The case management judge identified five causes of action pleaded by the appellants. First, he found that the appellants pleaded an independent cause of action based on the honour of the Crown. The case management judge held, and the appellants apparently conceded during argument, that there is no such independent cause of action.

[10] The second cause of action identified by the case management judge's interpretation of the statement of claim was the allegation that the federal Crown had committed the actionable wrong of "identity genocide". The case management judge held that identity genocide was not a viable cause of action for two reasons. First, the international instruments that may have been the basis for such a cause of action have not been implemented as part of Ontario's civil law. Second, the act of the federal Crown in signing the 1965 agreement, which, as the case management judge noted, at para. 102, "is alleged to be the predicate wrongdoing", was not an act committed by the federal Crown with the intent to destroy an identifiable group of persons or transfer children of a group to another group. As he said, at para. 103, the only intent that could be identified of the federal Crown in signing the agreement was the intent "to exercise the federal spending power to provide financial support to the province providing a wide range of welfare services". Without this intent, there could not be a cause of action of identity genocide. [page361]

[11] The third cause of action identified by the case management judge was breach of Aboriginal rights. It seemed to the case management judge that the appellants were claiming the respondent violated their Aboriginal right to an identity as an Aboriginal person. The case management judge found that this cause of action was at best "a disguised version of the plea of identity genocide", which he had found was not a viable cause of action (at para. 119).

[12] The fourth and fifth causes of action were framed in breach of fiduciary duty and negligence. These causes of action deserve some particular consideration because it is out of them that the case management judge seems to have found the kernels of viable causes of action to support certification. As with the other causes of action, these two were based on Canada entering into the 1965 agreement with Ontario. The case management judge concluded that though these causes of action were not viable, it was not obvious that they would not be viable if reframed as a different actionable wrong.

[13] The case management judge held that no viable cause of action could be founded in the act of entering into the agreement. Assuming a fiduciary relationship between Aboriginal people and Canada, the case management judge found that there could be no fiduciary wrongdoing by the exercise of the federal spending power. He noted, at para. 123, that a cause of action based on fiduciary wrongdoing entails an element of disloyalty and moral turpitude. The case management judge referred to *B. (K.L.) v. British Columbia*, [2003] 2 S.C.R. 403, [2003] S.C.J. No. 51, 2003 SCC 51, in which the Supreme Court had held that the province was not liable for breach of fiduciary duty to children abused by foster parents because, though negligent, the province was not disloyal and had not put its own interests ahead of the children. In this case, the case management judge did "not see how the federal Crown entering into The Canada-Ontario Welfare Services Agreement can be characterized as a betrayal of trust or disloyalty" (at para. 130).

[14] The case management judge then considered *Blackwater v. Plint*, [2005] 3 S.C.R. 3, [2005] S.C.J. No. 59, 2005 SCC 58, in which the Supreme Court had similarly dismissed a breach of fiduciary duty claim against the federal Crown based on abuse by a teacher of students at a residential school. The court upheld the trial judge's ruling that breach of fiduciary duty was not made out because the Crown did not act dishonestly or disloyally. The court declined to address whether a breach of fiduciary duty could be sustained on the basis of a breach of fiduciary duty to Aboriginal children collectively, which was a basis for [page362] liability raised for the first time by

intervenor at the Supreme Court of Canada. The chief justice described the argument in these terms, at para. 61 of the Blackwater decision:

This is the argument that the system of residential schools robbed Indian children of their communities, culture and support and placed them in environments of abuse. This, it is argued, amounted to dishonest and disloyal conduct that violated the government's fiduciary duty to Canada's Aboriginal peoples.

[15] She went on to hold, at para. 62, that it would be unfair to rely on material filed by the intervenors, none of which was filed in the lower courts, and "inappropriate to deal with the larger argument". Despite the fact that the Supreme Court in Blackwater had not dealt with the larger argument and had found the federal Crown to be a partner in the operation of the residential school operated by the United Church of Canada, the case management judge in the present case concluded as follows, at para. 134:

Nevertheless, assuming that the federal Crown did have a fiduciary relationship with the aboriginal children and assuming that the child welfare system in Ontario robbed these children of their communities, culture, support, and identity, in my opinion, it is not plain and obvious that there was no breach of fiduciary duty by the federal government when it allegedly did nothing to stop the Ontario system from operating in this way or when it allegedly did nothing to ameliorate any harmful effects of the child welfare scheme or when it did nothing to assure that Indian children were made aware of their status as Indians when they were placed in non-aboriginal homes.

(Emphasis added)

[16] The case management judge went on to distinguish a decision of the British Columbia Court of Appeal, *Aksidan v. Henley*, [2008] B.C.J. No. 178, 2008 BCCA 43, 291 D.L.R. (4th) 378, in which the court had found that the federal Crown was not liable for breach of fiduciary duty as a result of an agreement with British Columbia by which the province had taken

responsibility for educating Aboriginal children. The plaintiff children had been sexually abused by a teacher. The case management judge distinguished Aksidan because there was "no suggestion that the delegation was unreasonable, [and] there was no basis for alleging that the delegation was dishonest or disloyal" (at para. 137). Significantly, the case management judge also noted that "there were no policy reasons why Canada should be implicated where control of all aspects of education had been reasonably delegated to provincial authorities, and there was no alleged duty of care of preserving cultural identity" (at para. 137). Despite this, the case management judge considered that "Aksidan is weaker in rebutting the argument that [page363] after entering into the agreement, the federal Crown breached a fiduciary duty or was negligent by not taking steps to prevent aboriginal children from losing their aboriginal identity as a byproduct of Ontario's child welfare policies that were being supported by federal funds" (at para. 138).

[17] The case management judge also referred to this court's decisions in *Bonaparte v. Canada (Attorney General)* (2003), 64 O.R. (3d) 1, [2003] O.J. No. 1046 (C.A.) and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.). He agreed that these cases could not be used to support breach of fiduciary duty based upon entering into the 1965 agreement, which was the only basis for liability pleaded. But, it was not plain and obvious that these cases could not "be used to support the argument that the Federal Crown breached a fiduciary duty or was negligent by not taking steps to prevent aboriginal children from losing their aboriginal identity as a byproduct of Ontario's actions that were being supported by federal funds" (at para. 143). As he said, at para. 147, it was not plain and obvious "that there is no viable (and by viable all I am saying is that both the claim and the defence require a trial for a determination of their merits) action for breach of fiduciary duty".

[18] The critical passage in the case management judge's reasons is as follows, at paras. 148-49:

Thus, I conclude that in the case at bar, while it is, in

my opinion, plain and obvious that the federal Crown's entering into The Canada-Ontario Welfare Services Agreement cannot be the basis for an action for breach of fiduciary duty, it is, however, not plain and obvious what is the answer to the question that I posed at the beginning of these reasons for decision, which is:

In Ontario, between December 1, 1965 and December 31, 1984, when an aboriginal child was placed in the care of non-aboriginal foster or adoptive parents who did not raise the child in accordance with the child's aboriginal customs, traditions, and practices, did the federal Crown have and breach a fiduciary or common law duty of care to take reasonable steps to prevent the aboriginal child from losing his or her aboriginal identity?

Technically speaking, I, therefore, conclude that the current pleading fails to plead a cause of action for breach of fiduciary duty and should be struck out but with leave to amend to properly plead the material facts of a claim of breach of fiduciary duty.

[19] The case management judge reached a similar conclusion with respect to the fifth cause of action of negligence. It was plain and obvious that, as pleaded, there was no cause of action in negligence based on entering into the 1965 agreement. However, he found that it was not plain and obvious that there could be no cause of action in negligence: "The negligence claim [page364] would be based on what Canada knew or ought to have known and what it did or did not do after Ontario welfare authorities began placing aboriginal children in non-aboriginal homes" (at para. 152).

[20] The case management judge concluded his discussion of s. 5(1)(a) of the Class Proceedings Act, 1992 (the "Act") with the following, at para. 154:

I also conclude that subject to amending their statement of claim to properly plead the action in negligence and the action for breach of fiduciary duty, Ms. Brown and Mr. Commanda have satisfied the first criterion for certification

of their action as a class action. The fresh as amended claim should not include the claims for breach of the honour of the Crown, identity genocide of children or aboriginal rights.

Other elements of s. 5(1) of the Class Proceedings Act, 1992

[21] The case management judge went on to consider the other criteria for certification under s. 5(1) of the Act. As to the definition of the class (s. 5(1)(b)), he noted the many problems with the class as it was identified by the appellants. However, those problems, which rested on the causes of action that could not succeed, disappeared when the claim was reframed. He then defined the appropriate class, at para. 162, as follows:

Aboriginal persons in Ontario between December 1, 1965 and December 31, 1984 who were placed in the care of non-aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions, and practices.

[22] It should be noted that this class is broader, perhaps much broader, than the class defined by the appellants [at para. 157]:

Class or class members are aboriginal persons who, as children in Ontario, were exposed to the consequences of the Defendant's breach of fiduciary obligation, duty of care and protection of aboriginal rights and identity genocide between December 1, 1965 to December 31, 1984, excluding those who were members of the class in action 00-CV-192059CP (S.C.J.) (the Residential Schools Abuse Class Action).

[23] The case management judge then turned to common issues (s. 5(1)(c) of the Act). Again, he noted the problems identified by the respondent with respect to those common objects. However, those problems were tied to the statement of claim as pleaded by the appellants. The case management judge held that a suitable common issue was found in the cause of action as he had framed it [at para. 12]:

In Ontario, between December 1, 1965 and December 31, 1984, when an aboriginal child was placed in the care of non-aboriginal foster or adoptive parents who did not raise the child in accordance with the child's aboriginal customs, traditions, and practices, did the federal Crown have and breach a [page365] fiduciary or common law duty of care to take reasonable steps to prevent the aboriginal child from losing his or her aboriginal identity?

[24] The case management judge found that this definition of common issues was similar to the first and second questions that had been originally proposed by the appellants:

- (1) By its conduct in respect of the class during the period so identified above, did the defendant breach any fiduciary duty?
- (2) By its conduct in respect of the class during the period so identified above, did the defendant breach any duty of care?

[25] The case management judge then considered the question of preferable procedure (s. 5(1)(d) of the Act). He noted that the respondent argued that a class proceeding would not be an appropriate way to advance the appellants' claims on behalf of the class and that the preferable procedure would be a test case. However, he held that these arguments are overcome with the reformulated class definition and common issue. Interestingly, at para. 185, he described the appellants' litigation, as amended, in these terms:

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.

[26] Finally, the case management judge briefly considered the requirement of a suitable representative plaintiff (s. 5(1)(e) of the Act) and held, at para. 195, that "based on an amended statement of claim, class definition and common issue and putting aside the matter of the litigation plan, the fifth criterion for certification is satisfied".

[27] In the result, the case management judge ordered that,

conditional upon the appellants delivering a properly pleaded fresh as amended statement and the court approving a litigation plan, the "criteria for certification can be satisfied in accordance with the comments above about the definition and the common issue". Paragraph 1 of the formal order of the court reflects the reasons of the case management judge:

THIS COURT ORDERS THAT, upon the Plaintiffs delivering a Fresh as Amended Statement of Claim to plead claims in negligence and for breach of fiduciary duty in accordance with the Reasons for Decision herein, and the Court approving a revised Litigation Plan, the within action is hereby certified as a Class Proceeding under the Class Proceedings Act, 1992,

a. with the Class defined as:

Aboriginal persons in Ontario between December 1, 1965 and December 31, 1984, who were placed in the care of non-aboriginal foster or [page366] adoptive parents, who did not raise the children in accordance with the aboriginal person's customs, traditions and practices.

b. and with the common issue raised by the claim of the class members being stated as:

In Ontario, between December 1, 1965 and December 31, 1984, when an aboriginal child was placed in the care of non-aboriginal foster or adoptive parents who did not raise the child in accordance with the child's aboriginal customs, traditions and practices, did the Federal Crown have and breach a fiduciary or common law duty of care to take reasonable steps to prevent the aboriginal child from losing his or her aboriginal identity?

The Reasons of Swinton J.

[28] Swinton J. granted the respondent leave to appeal the case management judge's order to the Divisional Court: *Brown v. Canada (Attorney General)*, [2011] O.J. No. 940, 2011 ONSC 1193 (S.C.J.). She read the reasons of the case management judge as precluding the respondent from attacking an amended pleading because he had already determined that there was a viable cause of action if the pleading was amended in accordance with his

suggestions. She was of the view that the case management judge erred in granting certification, even on a conditional basis, without a proper pleading before him and without giving the respondent an opportunity to make submissions respecting the elements of s. 5(1) of the Class Proceedings Act, 1992. In her view, the case management judge should have adjourned the certification motion to permit the parties to amend their pleadings.

[29] Swinton J. also considered that there was good reason to doubt the correctness of the conclusion that the proposed question disclosed a cause of action. The case management judge had failed to do the legal analysis necessary to show that there was a viable claim for breach of fiduciary duty or negligence. Swinton J. described the potential frailties in the causes of action described by the case management judge. She also considered that there was good reason to doubt the correctness of the case management judge's conclusions on the common issues and the class definition. She noted, at para. 18, "In order to carry out the analysis in s. 5(1), it is necessary to have a proper pleading so that the motion judge can frame the common issues and the class definition in light of the pleading."

The Reasons of the Divisional Court

[30] The Divisional Court agreed with Swinton J. that the case management judge erred in conditionally certifying the class proceeding: [page367] *Brown v. Canada (Attorney General)* (2011), 114 O.R. (3d) 352, [2011] O.J. No. 6070, 2011 ONSC 7712 (Div. Ct.). The effect of the case management judge's order was to deprive the respondent of the opportunity to argue that the s. 5(1) elements were not satisfied. The Divisional Court also agreed with Swinton J. that the case management judge had erred in failing to conduct an analysis to determine whether a viable claim existed in either negligence or fiduciary duty. As it said, at para. 7, "The motion judge concluded that it was not plain and obvious that these duties did not exist without considering the necessary elements for there to be such duties."

[31] The Divisional Court, at para. 9, explained why it

ordered the certification motion be brought before another judge, stating:

To appear before Perell J. with these apparently pre-approved amendments would be to appeal his determination.

[32] The Divisional Court also held that the case management judge's order was not appropriate case management.

[33] Accordingly, the Divisional Court ordered that the statement of claim be struck and the appellants be granted leave to amend their pleading. It also ordered that the certification motion be brought before another judge. Finally, it ordered that the respondent was entitled to its costs of the motion for leave and for the appeal before the Divisional Court fixed at \$25,000, all inclusive.

The Positions of the Parties

The position of the appellants

[34] The appellants submit that it was open to the case management judge to certify the action as a class proceeding conditional upon approval of an amended statement of claim. They argue that the order of the case management judge did not preclude the respondent from arguing that the action should be dismissed under s. 5(1)(a) of the Act or in accordance with rule 21.01(1)(b). They note that s. 10 of the Act expressly contemplates the case management judge amending a certification order or decertifying the proceeding.

[35] The appellants argue that the order of the case management judge could be supported by s. 12 of the Act, which provides as follows:

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

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[36] The appellants submit that the case management judge has a duty to assist in the framing of the action and that is what the case management judge did in this case. They argue that a case management judge ought to be able to give directions as to the nature of the required amended pleadings.

[37] The appellants also submit that the Divisional Court erred in disqualifying the case management judge from continuing case management. They rely on the provisions of s. 34 of the Act:

34(1) The same judge shall hear all motions before the trial of the common issues.

(2) Where a judge who has heard motions under subsection (1) becomes unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

(3) Unless the parties agree otherwise, a judge who hears motions under subsection (1) or (2) shall not preside at the trial of the common issues.

[38] The appellants concede that a case management judge would be disqualified from continuing with case management if there was a reasonable apprehension of bias, but point out that the Divisional Court made no such a finding.

[39] Finally, the appellants argue that the Divisional Court erred in ordering costs of the leave motion and of the appeal before the Divisional Court to the respondent without considering the terms of s. 31(1) of the Act, which provides:

31(1) In exercising its discretion with respect to costs under subsection 131(1) of the Courts of Justice Act, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

The position of the respondent

[40] The respondent relies on the reasons of Swinton J. and the Divisional Court. It accepts that the case management judge could have adjourned the certification motion and granted the appellants leave to amend their statement of claim along lines suggested in his reasons. The respondent also accepts that it may be proper to conditionally certify a class proceeding despite some deficiencies, such as deficiencies in the definition of the class and the common issues. However, it is not open to a case management judge to conditionally certify a class proceeding in the absence of a claim that sets out a viable cause of action.

[41] The respondent also agrees with Swinton J. and the Divisional Court that the case management judge erred in failing to conduct a proper analysis of whether there were viable causes [page369] of action in breach of fiduciary duty and negligence. In that respect, the respondent reads the reasons and the order of the case management judge as precluding it from arguing anything other than whether the amended statement of claim complies with the reasons of the case management judge. The reasons and order do not contemplate the respondent arguing that there is not a viable cause of action or that the other elements of s. 5(1) have not been satisfied.

[42] The respondent supports the order of the Divisional Court that another judge hear the certification motion. The respondent notes that the court's order does not purport to remove Perell J. from any other aspect of case management. The respondent submits that the Divisional Court was entitled to exercise its discretion in this way and that the order was justified because the respondent's right to be heard had been impaired. It submits that allowing the case management judge to rehear the certification motion would have the effect of the case management judge sitting on appeal of his own order. While it does not expressly argue a reasonable apprehension of bias, the respondent does argue that the nature of the case management judge's reasons creates the impression that he had a stake in the outcome of the certification motion.

[43] Finally, the respondent supports the Divisional Court's

order on costs, which it says is consistent with this court's decision in *Pearson v. Inco Ltd.* (2006), 79 O.R. (3d) 427, [2006] O.J. No. 991 (C.A.).

Analysis

Conditional certification

[44] I agree with the Divisional Court that the case management judge erred in conditionally certifying the class proceeding in the absence of a statement of claim that disclosed a cause of action. As this case demonstrates, identification of a cause of action is fundamental. It is impossible for the defendant to meaningfully respond to an application for certification without knowing the cause of action. The definition of the class and the identification of the common issues depend upon the nature of the cause of action. As McLachlin C.J.C. wrote in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, 2001 SCC 68, at para. 16: "The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action". It is not possible to know whether an action can be appropriately prosecuted as a class action without identifying the [page370] fundamental issue of whether or not there is a cause of action. It is no answer that the defendant can bring a motion to decertify the action under s. 10 if the action should never have been certified in the first place.

[45] There is no question that class proceedings evolve as they work their way through the certification and case management process and that the case management judge plays an important role in guiding the evolution of the proceeding. But, certifying a class action in the absence of a statement of claim that discloses viable causes of action is not case management. Even the power to amend other aspects of the claim, such as the proposed common issues, should be exercised with caution and restraint: *McCracken v. Canadian National Railway Co.* (2012), 111 O.R. (3d) 745, [2012] O.J. No. 2884, 2012 ONCA 445, at para. 144. The courts have recognized that there is a distinction between the cause of action requirement for certification and the other criteria set out in s. 5(1). The

cause of action requirement is not dependent upon evidence but is determined on the basis of the pleadings and whether it is plain and obvious that the claim cannot succeed. Unless the allegations of fact are patently ridiculous or incapable of proof, the facts must be accepted as pleaded for the purpose of determining if there is a viable cause of action. The other criteria are evidence-based, with the courts applying a "some basis in fact" test: McCracken, at paras. 75-80. The defendant cannot respond to the evidence-based criteria in the abstract without knowing the cause of action.

[46] Once the case management judge concluded that the statement of claim did not disclose a cause of action, it was not open to him to conditionally certify the class proceeding. He could have dismissed the motion for certification, adjourned the motion for certification under s. 5(4) of the Act to give the appellants the opportunity to amend their statement of claim, or granted the Rule 21 motion and dismissed the action.

[47] It follows that the Divisional Court was correct to allow the appeal from the order of the case management judge conditionally certifying the action.

Whether the certification motion should be heard by the case management judge

[48] The appellants submit that even if the case management judge erred in granting conditional certification, the Divisional Court erred in directing that the new certification motion be heard by another judge. The respondent agrees that it would have been open to the case management judge to adjourn the [page371] certification motion and grant leave to amend the statement of claim. It even agrees that it would have been open to the case management judge to provide guidance to the appellants as to how deficiencies in the claim could be rectified in the amended statement of claim. However, the respondent submits that in his reasons conditionally certifying the proceeding, the case management judge predetermined whether there was a cause of action. The respondent submits that it was deprived of an opportunity to make submissions on whether there was a viable cause of action; the only issue left was whether

the amended statement of claim complied with the reasons of the case management judge.

[49] The appellants submit that, to the contrary, it would have been open to the respondent to argue before the case management judge whether the amended statement of claim disclosed a viable cause of action. The appellants also submit that, in light of s. 34 of the Act, it was not open to the Divisional Court to, in effect, order the appointment of a new case management judge absent a finding that there was a reasonable apprehension of bias.

[50] In one sense, it could be said that the case management judge had not predetermined whether there was a viable cause of action. Indeed, the case management judge never explicitly stated that there was a viable cause of action; rather, he posed a question. He wrote, at paras. 12-13:

The legitimate target or focus of the certifiable class action that emerges is that of answering a complex, difficult but largely legal question. The question is:

In Ontario, between December 1, 1965 and December 31, 1984, when an aboriginal child was placed in the care of non-aboriginal foster or adoptive parents who did not raise the child in accordance with the child's aboriginal customs, traditions, and practices, did the federal Crown have and breach a fiduciary or common law duty of care to take reasonable steps to prevent the aboriginal child from losing his or her aboriginal identity?

If this question were answered in the negative at a common issues trial, 16,000 potential claims would be dismissed. 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.

[51] However, there are many other parts of his reasons that suggest the case management judge had determined there was a [page372] viable cause of action. I have set out the trial judge's reasons above at some length. The fact that he dealt at length with and distinguished authorities suggesting there was no viable cause of action tells in favour of the position taken by the respondent. I note in particular his discussion of Blackwater, Aksidan and Bonaparte. Perhaps of even greater significance is the case management judge's manner of dealing with the other pre-requisites for certification in s. 5(1). His findings that those other requirements were met must have been based upon a finding that there were viable causes of action in negligence and breach of fiduciary duty.

[52] As both Swinton J. and the Divisional Court noted, it is not self-evident that there are viable causes of action. The plain and obvious test sets a low threshold, but it will still be necessary for a court to determine whether the causes of action suggested by the case management judge can pass that test. The respondent is entitled to an opportunity to show that the causes of action are not viable.

[53] While it was not always the case, I think it can now safely be said that judges cannot sit in appeal of their own decisions: see, e.g., *Law Society of Upper Canada v. French*, [1975] 2 S.C.R. 767, [1974] S.C.J. No. 125, at pp. 782-83 S.C.R., per Spence J., at p. 775 S.C.R., per Dickson C.J.C., dissenting. In my view, a reasonable interpretation of the reasons of the case management judge is that he had determined that viable causes of action existed as he framed them. It is obvious that the case management judge gave very careful consideration to the submissions of the parties. And, he may well have thought that the hearing afforded the parties ample opportunity to make submissions on breach of fiduciary duty and negligence generally. In some respects, it is the poor manner in which the causes of action were pleaded by the appellants that has led to this difficulty. However, the causes of action as framed by the case management judge are so radically

different from the way they were pleaded in the statement of claim that I do not think it can be safely said that the respondent had an adequate opportunity to respond. To now give the respondent that opportunity before the same judge would, as the Divisional Court found, result in the case management judge sitting in review of his own decision.

[54] The appellants effectively concede that the respondent has not had an opportunity to make submissions on whether the causes of action in breach of fiduciary duty and negligence, as framed by the case management judge, are viable. Their position is that it is still open to the respondent to make those submissions to the case management judge. As I have said, in [page373] my view, a reasonable interpretation of the case management judge's reasons is that he has already determined that issue. It is not appropriate to require the respondent to return to the same judge unless the statute requires it to do so, the issue to which I now turn.

[55] As I have indicated, the appellants rely upon s. 34(1) of the Act, which provides that the same judge shall hear all motions before the trial of the common issues. Notwithstanding s. 34(1), the appellants concede that if there was a finding of a reasonable apprehension of bias, the case management judge could not continue to hear motions in the case. Section 34(2) contemplates that a case management judge may not be able to continue to hear motions in a case. It provides that the regional senior judge shall assign another judge where the case management judge "becomes unavailable for any reason". That subsection contains the broadest possible terms and, in my view, does not simply contemplate unavailability due to illness or death. The phrase "for any reason" is wide enough to include circumstances in which the principles of natural justice preclude the judge continuing with the case. The Supreme Court of Canada in *Law Society of Upper Canada v. French*, at pp. 783-84 S.C.R., per Spence J., held that the principle of natural justice that no one should be a judge in their own cause does not apply where the legislature has implicitly accepted such a duplication of function. In my view, when s. 34(1) is read with the proviso in s. 34(2), the legislature has not sanctioned an exception to this principle of natural

justice.

[56] I would, however, slightly vary the order of the Divisional Court in order to comply with s. 34(2). Instead of ordering the motion for certification to be brought before "a judge other than the Honourable Justice Perell", the order should specify:

THIS COURT ORDERS AND DIRECTS that the plaintiffs' motion for certification of the action as a class proceeding based on the amended Statement of Claim is to be brought before and heard by another judge as assigned by the regional senior judge.

[57] Finally, as worded, it is only the further certification motion that is to be heard by another judge. While I think that order is consistent with s. 34(2), it will be for Perell J. to decide whether or not he should hear further motions if the action is certified. It may be more efficient for the new judge to hear all further motions. Having the same judge continue the case management will also provide the necessary continuity that is so important in achieving the objective of access to justice. [page374]

Costs

[58] The Divisional Court gave no reasons for its decision with respect to costs of the leave application and the appeal to the Divisional Court. Section 31(1) of the Act provides that a court, in exercising its discretion in fixing costs, may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. In addition, this court in Pearson has provided a list of principles and factors as further guidance in fixing costs of a certification motion, at para. 13:

(1) Ontario, unlike other class proceedings jurisdictions such as British Columbia, has not sought to interfere with the normal rule that costs will ordinarily follow the event.

(2) The costs must reflect what is fair and reasonable.

(3) The costs should, if possible, reflect costs awards made in closely comparable cases, recognizing that comparisons will rarely provide firm guidance.

(4) A motion for certification is a vital step in the proceeding and the parties expect to devote substantial resources to prosecuting and defending the motion.

(5) The costs expectations of the parties can be determined by the amount of costs that an unsuccessful party could reasonably expect to pay.

(6) The views of the motion judge concerning the complexity of the issues and what is fair and reasonable

(7) The case raised an issue of public importance.

(8) A fundamental object of the [Act] is to provide enhanced access to justice.

(9) The appellant's claim substantially evolved from the claim brought before the motion judge.

(Citations omitted)

[59] This case involves all three factors mentioned in s. 31(1). It is in the nature of a test case and raises novel points of law. The treatment of Aboriginal children in Ontario's child welfare system and Canada's responsibility for what occurred are matters of public interest. In my view, the significance of those factors in this case and the importance of access to justice require some moderation of the normal rule that costs follow the event. Despite the broad discretion given to courts in fixing costs, it was an error in principle not to consider the legislative factors set out in s. 31(1) of the Act. Though s. 31(1) does not replace the court's discretion, these factors, where they apply, should be given significance: *Pearson*, at para. 11; *Ruffolo v. Sun Life Assurance Co. of Canada* (2009), 95 O.R. (3d) 709, [2009] O.J. No. 1322, 2009 ONCA 274, at para. 29; [page375] *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728, [2005] O.J. No. 842 (S.C.J.), at

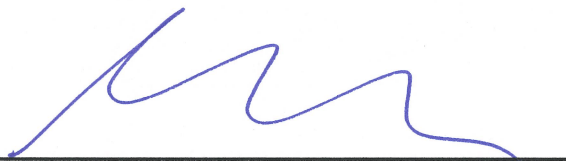
para. 32. Given those considerations, I would not make any order for costs of the motion for leave to appeal or the appeal to the Divisional Court.

Disposition

[60] Accordingly, the appeal is dismissed subject to the minor variation of the order of the Divisional Court and to quashing the Divisional Court's cost order. If the parties cannot agree on costs of the appeal and the motion for leave in this court, they may make brief written submissions.

Appeal allowed in part.

*THIS IS EXHIBIT "7" REFERRED TO IN THE
AFFIDAVIT OF DAVID ROSENFELD
SWORN BEFORE ME, THIS 18TH DAY OF APRIL, 2018*



A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.
GARTH MYERS

Brown v. Canada (Attorney General) 2013 ONSC 5637
COURT FILE NO.: CV-09-372025-CP
DATE: 20130927

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Marcia Brown and Robert Commanda / Plaintiffs

AND:

The Attorney General of Canada / Defendant

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward Belobaba

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

Owen Young, Paul Evraire and *Michael Bader* for the Defendant

HEARD: July 15 and 16, 2013

Re-Hearing of the ‘Sixties’ Scoop’ Certification Motion

DECISION ON CERTIFICATION

Introduction

[1] *The aboriginal communities in Ontario refer to it as the “Sixties’ Scoop.” For a time, and particularly for a nineteen-year period between 1965 and 1984, welfare authorities in Ontario removed many Indian and aboriginal children from their families and communities and placed them with foster or adoptive parents that were non-aboriginals. It is alleged that many of the “scooped” children lost their identity as aboriginal persons and suffered mentally and physically. The aboriginal communities describe the effects of the Sixties Scoop as horrendous, destructive, devastating, and tragic.*

[2] *Marcia Brown and Roberta Commanda are aboriginals of Ojibway ancestry, and they were scooped children. In this proposed class action, which was commenced on February 9, 2009, notably they do not sue the Ontario welfare authorities. They sue only the Federal Crown. They accuse the Federal Crown of a systemic assimilation policy purposely designed to destroy First Nations families and communities. They bring their action on behalf of approximately 16,000 aboriginals who, they allege, were the victims of a deliberate program of “identity genocide of children” that occurred in Ontario between December 1, 1965 and December 31, 1984 ...*

[3] This is how Justice Perell began his 2010 decision certifying the “Sixties’ Scoop” lawsuit as a class action.¹ The time-period in question covers almost twenty years. It begins on December 1, 1965 when the Federal Crown signed an agreement with the province of Ontario known as the *Canada-Ontario Welfare Services Agreement* (“the 1965 Agreement”) and ends on December 31, 1984, the day before the *Child and Family Services Act*² (“CFSA”) was proclaimed in force, making aboriginality an important factor in child protection and placement practices.

[4] Under the 1965 Agreement, the Federal Crown entered into a funding agreement that allowed Ontario to extend the delivery of its existing child welfare (as well as other welfare services) to Indians living on reserves. The 1965 Agreement was limited in its scope to “Indians with reserve status”. It did not apply to the Inuit or Metis peoples and some exceptions aside, it did not provide for the funding of welfare services to Indians or other aboriginal persons living in urban centres or in other places off-reserve.

[5] The welfare services were listed in a schedule and included “services to children, including the protection and care of neglected children, the protection of children born out of wedlock and adoption services provided under the [provincial child welfare law.] One section of the 1965 Agreement provided that “no provincial welfare program shall be extended to any Indian Band in the Province unless that Band has been consulted by Canada or jointly by Canada and by Ontario and has signified its concurrence.” As it turned out, no Indian Bands were consulted.

[6] At the hearing before Justice Perell, the plaintiffs made clear that it was the 1965 Agreement “that gave rise to these claims.”³ That is, it was the 1965 Agreement that allowed (or “unleashed”, depending on one’s perspective) a well-intentioned but

¹ *Brown v. Canada (Attorney General)*, 2010 ONSC 3095, 102 O.R. (3d) 493.

² S.O. 1984, c. 55. The CFSA took effect on January 1, 1985.

³ *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 41.

profoundly uninformed child protection bureaucracy to “scoop” thousands of Indian children that were found to be in need of protection off Indian reserves and place them in non-aboriginal homes. (I will return to the significance of the 1965 Agreement when I consider the class definition).

[7] The proposed class period ends at the end of 1984 when the CFSA was proclaimed in force. The CFSA did more than provide a legislative direction that aboriginality should be a factor to be considered in child protection and placement matters. The new law recognized that:

Indian and native people should be entitled to provide, whenever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family⁴

and, in essence, mandated that, whenever possible, Indian or native children needing protection should be placed in an Indian or native setting – ideally, with a member of the extended family, or with the child’s Band or native community⁵, and when the child was being placed for adoption, the child’s Band or native community had to be given thirty days written notice.⁶

[8] The CFSA provisions did not just list “aboriginality” as another factor for judicial consideration. They inscribed in law for the first time a legislative recognition that the aboriginal culture had a very different understanding of community, family and children in need of protection and that these differences had to be respected. With the enactment of the CFSA provisions, the chances of the Indian or native children being adopted-out to a non-aboriginal family and losing their culture and identity were reduced dramatically.

[9] Over the 19 years in question, however, before the CFSA took effect, on-reserve children deemed in need of protection were routinely placed in non-aboriginal homes and always with court approval. The judges that reviewed the crown ward-ship or adoption applications were undoubtedly acting in good faith and making decisions that they thought were in the best interests of the child. Some of the judges, on their own initiative,

⁴ CFSA, s. 1(f).

⁵ CFSA, s. 57(2)(d).

⁶ CFSA, s. 134(3).

may even have weighed and considered the child's aboriginal culture in coming to their decisions. But none of them were statutorily required to preserve this culture and identity by placing the child *whenever possible* with an aboriginal family or Band. That was the unequivocal message of the CFSA enacted in 1984.

[10] And that is why the Federal Crown is wrong to argue that because all of the placements were pursuant to court orders and the courts acted in the best interests of the children, that the so-called Sixties Scoop cannot now be questioned or challenged. Remember, the plaintiffs are not challenging the actual court decisions that allowed the aboriginal children to be placed in non-aboriginal homes. There is no collateral attack in this proposed class action on the judicial decisions. The plaintiffs are alleging that the Federal Crown had a duty or responsibility to protect and preserve the Indian children's culture and identity both when entering into the 1965 Agreement,⁷ and after the children were placed in the non-aboriginal homes, and failed to do so. They seek damages for the harm that was caused not by the court orders but by the alleged breaches of fiduciary and common law duty on the part of the Federal Crown.

The harm that was done

[11] On the evidence before me, the harm done was profound and included lasting psychological and emotional damage. According to Dr. Harvey Armstrong, who was the chairperson of the Canadian Psychiatric Association Section on Native Mental Health for many years and directed a University of Toronto program that provided mental health services to about 15,000 Cree and Ojibway people, the First Nations people of Ontario "experienced intentional and inadvertent culture/identity genocide."

[12] Dr. Armstrong's expert evidence was summarized by Justice Perell:

- In the early part of the 20th century, Canada applied a policy of cultural extermination when officials seized thousands of native children from their homes on the reserve and committed them to residential schools that not only deprived them of the experience of living in an aboriginal family, but punished them for expressing their Indian customs, traditions and languages.

⁷ The plaintiffs allege in para. 28 of the Statement of Claim: "When the Agreement was made, it was not sufficient for Canada to provide funding only. Canada's duty of care to the Class required more than the application of funding." The particulars of this pleading, as they came out during the course of the hearing, included the suggestion that the Federal Crown should have insisted as a term or condition of the funding arrangement that the provincial child protection system continue to protect and preserve the apprehended child's Indian and native culture and identity by ensuring whenever possible that Indian and native children in need of protection were placed in aboriginal homes.

- In the 1960s, 70s and 80s, ill-informed child welfare workers in Ontario, who did not know enough about native communities and their resources to parent and protect the community's children, removed children and placed them with non-Indian caregivers with the same intention as of the residential school experience, albeit in the context of a replacement family rather than a residential school setting.
- This was a misguided policy based on the belief that the answer to the Indian problem was to assimilate the Indian children into mainstream culture.
- The effect of this policy was loss of culture, loss of language, loss of ability to parent as an aboriginal person, loss of identity, increased rate of psychopathology, confused identity formulation, psychiatric disorders, substance abuse, emotional isolation, violence, unemployment, feelings of betrayal, and extreme lack of emotional attachment.⁸

[13] Dr. Armstrong concluded his opinion with this comment:

It is true that adolescence is a period of identity growth and confusion and thus arguably common to all persons. But nothing in my work with all persons compares with the experience of the Indian child who confronts the period identity with the discovery of a breach of trust and betrayal for himself and his people, as he experiences it.

[14] Mr. Kenn Richard, a director of Native Child and Family Services of Toronto added the following:

In our work at Native Child and Family Service of Toronto, I know first-hand the experiences of the surviving children of the "Sixties Scoop". Typically, we met them (and we are still meeting them) anywhere from their adolescent years to adulthood and we work with them in counselling or therapy. We are providing necessary counselling or therapy because, when they found themselves confronting the fact of their Indian or native culture, they then experienced quite an alarming degree of frustration and anger with feelings of distance or non-belonging from both their indigenous family and their adoptive or permanent placement non-Indian or non-native family, and entered into a crisis over their identity.

The re-claiming of their identity as an Indian or native person becomes

⁸ *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 59.

fundamental to our therapeutic work with these survivors and their capacity to achieve a sufficient sense of self-esteem in order to cope within society and make a constructive contribution to the community and live a good and non-combative life, in the sense of coming to terms with themselves and others whom they trusted ...

[A] dysfunction emerged when their indigenous identity became clear to them, as it must, and they were wholly ill-equipped to understand, appreciate, connect, or identify with their Indian or native selves, and thus the identity crisis.

[15] The evidence tendered by the plaintiffs' other two experts was similar.

Justice Perell's decision

[16] Perell J. carefully reviewed all of the claims and issues in a detailed 39-page decision and concluded that the class action could be certified if the statement of claim was amended and the class definition and proposed common issues were revised. He said this:

... it is my conclusion that: (a) with amendments to their statement of claim; (b) with revisions to the proposed class definition and proposed common issues, and (c) subject to the preparation of an adequate litigation plan, Ms. Brown and Mr. Commanda will be able to satisfy all five criteria of the test for certification. Therefore, conditional upon Ms. Brown and Mr. Commanda revising their proposed class action in the manner described below and conditional upon the court approving the litigation plan for the revised class action, I grant their motion to certify the action as a class proceeding.⁹

[17] It was obvious from Justice Perell's reasons what he was deciding and what specific changes had to be made and, not surprisingly, the plaintiffs immediately filed a Fresh as Amended Statement of Claim following Perell J.'s directions to the letter. The Federal Crown, however, instead of appealing the certification decision on the merits, chose to focus on the conditionality of the certification order and took the position that Perell J.'s suggested changes were not obvious from his reasons, that the defendants could not know what the amended claim would look like and (despite three days of hearing where all of the issues were fully argued) that they were denied the right to respond to the amended claims of fiduciary duty and negligence.

⁹ *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 9.

[18] These submissions were accepted by the Divisional Court¹⁰ who set aside the conditional certification order and directed that the matter be re-heard by another class actions judge. The Court of Appeal affirmed.¹¹

The re-hearing before me

[19] I heard the plaintiff's motion for certification under the *Class Proceedings Act, 1992* ("CPA")¹² and the Federal Crown's motion under Rule 21 of the *Rules of Civil Procedure* to strike the pleadings on July 15 and 16, 2013. At the conclusion of the hearing I advised counsel that the plaintiffs' motion for certification would be granted (unconditionally) and the Federal Crown's motion to strike would be dismissed. Written reasons would follow in September.

[20] These are my reasons.¹³

[21] I will not repeat the factual background. It was set out in detail in Justice Perell's decision and was also summarized by the Court of Appeal. I will proceed directly with the legal analysis under the CPA.

[22] Generally speaking, I agree with the analysis of Justice Perell. I particularly agree that there are two possible causes of action, breach of fiduciary duty and negligence; that the core common issue, as reworded by me below, will significantly advance the litigation; that a class action is by far the preferable procedure; and that Ms. Brown is a suitable representative plaintiff. I differ with Justice Perell in two respects, both of which stem from the fact that it was the 1965 Agreement, as the plaintiffs explained, that "gave rise to these claims." I have narrowed the class definition and re-worded the common issue to reflect this fact.

Analysis

¹⁰ 2011 ONSC 7712, 114 O.R. (3d) 352 (Div. Ct.).

¹¹ 2013 ONCA 18, (2013) 114 O.R. (3d) 355 (C.A.).

¹² S.O. 1992, c. 6.

¹³ For the purpose of any appeals, I assured counsel at the conclusion of the hearing that the formal date of this decision would be the day these reasons were released (September 30, 2013) and not July 16, 2013 when the decision was announced.

[23] Under s. 5(1) of the CPA, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[24] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim. The question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be pursued as a class proceeding. Although s. 5(1) of the CPA, as just noted, requires the plaintiff to satisfy five prerequisites, the bar for certification is actually quite low. The plaintiff only has to establish a plausible cause of action under the first prerequisite and "some basis in fact" for each of the remaining four prerequisites.¹⁴

[25] Indeed, the Supreme Court has made it clear that the CPA should be construed generously. An overly restrictive approach must be avoided in order to realize the benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause harm. The Court underlined the particular importance of keeping this principle of interpretation in mind at the certification stage.¹⁵

(1) Cause of action

[26] The first question is whether the plaintiffs have a cause of action. The test under s. 5(1)(a) of the CPA is the same as that under Rule 21, i.e. that the claim should be permitted to proceed unless it is "plain and obvious" that it cannot succeed.¹⁶ That is, that the claim has no chance of success.¹⁷ This is obviously a very low hurdle.

[27] The allegations of fact as pleaded in the statement of claim, which must be taken as true, can be summarized (in one very long sentence) as follows: The Federal Crown, having responsibility for the protection of Indian culture and identity, and knowing about

¹⁴ For a summary of the oft-repeated principles and citations, see *Arora v. Whirlpool Canada*, 2012 ONSC 4642, 24 C.P.C. (7th) 68, at paras. 120 to 124.

¹⁵ *Hollick v. City of Toronto*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 14-16 [*Hollick*].

¹⁶ *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 [*Hunt v. Carey*].

¹⁷ If there is a chance that the plaintiff might succeed, then the plaintiff should not be driven from the judgment seat: *Hunt v. Carey*, *ibid.*, at para. 36.

the importance of this culture and identity to the Indian people, funded the expansion of Ontario child welfare services to on-reserve Indian children without consulting Indian Bands, and without taking any steps to ensure that the provincial child welfare authorities would preserve and protect, whenever possible, an apprehended child's aboriginal culture and identity; and then, after the child was placed in a non-aboriginal home, the Federal Crown failed to take reasonable steps to protect this culture, advise the child of his or her Indian status, and upon reaching the age of majority, the steps he or she could take to regain this status, or the federal benefits that he or she may be entitled to. These acts or omissions, say the plaintiffs, were acts of "fundamental disloyalty, betrayal and dishonesty to the plaintiffs and the class members."

[28] The plaintiffs allege that the Federal Crown knew or should have known that the 1965 Agreement provided no protection for the cultural identity of vulnerable aboriginal children within Ontario's child welfare system. And yet it did nothing. Specifically, the plaintiffs allege that the Federal Crown:

- failed to consult with the Ontario Indian Bands in respect of the provision of funding for child welfare practices and policies to on-reserve Indian children that it knew were clearly in conflict with its duty to protect the cultural identity of on-reserve Indian children;
- did nothing to stop Ontario from providing child welfare services in consequence of which the class members lost their cultural identity;
- did nothing to ameliorate the harmful effects of Ontario's child welfare services;
- did nothing to assure that aboriginal children were made aware of their status as aboriginal children when they were placed in non-aboriginal homes;
- did nothing to assure that the aboriginal children would be provided with services that could enable them to be aware of and exercise their culture, traditions, customs and identity during the period of their placement in non-aboriginal homes;
- did nothing to assure that aboriginal children were made aware of their status as aboriginal persons or the benefits available to them when they left their non-aboriginal homes or entered their age of majority;
- did nothing to assure that aboriginal children, when approaching their age of majority, or leaving their non-aboriginal homes, would be provided with services that could enable them to reclaim their cultural identity; and
- failed to ensure that aboriginal children had, at least, the protections in respect of their cultural identity as those which were subsequently implemented by Ontario in the 1984 CFSA.

[29] By failing to take any of these steps to protect the aboriginal cultural identity of the plaintiffs and the putative class members, the plaintiffs say that the Federal Crown was careless, reckless, willfully blind, or was deliberately accepting or promoting a policy of cultural assimilation. These omissions were acts of fundamental disloyalty, betrayal and dishonesty to the plaintiffs and the putative class members. In failing to act when it should have done so, say the plaintiffs, the Federal Crown breached its fiduciary and common law duties of care.

[30] I will now turn to these alleged duties of care. I will first discuss the fiduciary duty claim and then the negligence claim.

(i) Fiduciary duty

[31] Justice Perell concluded the breach of fiduciary duty claim cleared the s. 5(1)(a) hurdle. In his view, it was not plain and obvious that there was no viable cause of action for breach of fiduciary duty against the Federal Crown based on what it did or did not do as aboriginal children were being placed in non-aboriginal homes. He put it this way:

[A]ssuming that the Federal Crown did have a fiduciary relationship with the aboriginal children and assuming that the child welfare system in Ontario robbed these children of their communities, culture, support, and identity, in my opinion, it is not plain and obvious that there was no breach of fiduciary duty by the Federal Government when it allegedly did nothing to stop the Ontario system from operating in this way or when it allegedly did nothing to ameliorate any harmful effects of the child welfare scheme or when it did nothing to assure that Indian children were made aware of their status as Indians when they were placed in non-aboriginal homes.¹⁸

[32] I agree with Justice Perell for the following reasons. I begin with the reminder that the “cause of action” hurdle under s. 5(1)(a) of the CPA is a low hurdle: the defendant must show that the impugned cause of action plainly and obviously has no chance of success and is doomed to fail. When one is dealing with the law of fiduciary duty or aboriginal claims, two “very dynamic”¹⁹ areas of law that are rapidly “evolving,”²⁰ the

¹⁸ *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 134.

¹⁹ *Bonaparte v. Canada (Attorney General)* (2003), 64 O.R. (3d) 1 (C.A.), at para. 32 [*Bonaparte*].

hurdle becomes even lower and the defendant has “a particularly heavy burden in seeking to strike a pleading.”²¹

[33] As Justice Hugessen noted in the *Shubenacadia Indian Band* decision:²²

The Statement of Claim is to be read generously and with an open mind and it is only in the very clearest of cases that the Court should strike out the Statement of Claim. This, in my view, is especially the case in this field, that is the field of aboriginal law, which in recent years in Canada has been in a state of rapid evolution and change. Claims which might have been considered outlandish or outrageous only a few years ago are now being accepted.

If there is in a pleading a glimmer of a cause of action, even though vaguely or imperfectly stated, it should, in my view, be allowed to go forward.²³

[34] This does not mean, of course, that any claim for breach of fiduciary duty arising out of the relationship between the Federal Crown and the aboriginal peoples must necessarily survive the pleading stage. What it does mean, according to the Court of Appeal is that “more claims of this nature may be, as of yet, unprecedented but nonetheless tenable at law within the meaning of Rule 21.”²⁴

[35] Turning then to the viability of a breach of fiduciary duty claim against the Federal Crown on the facts as pleaded herein, I agree with the Federal Crown that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties do not typically give rise to a fiduciary relationship.²⁵ However, it is important to note that the existence of a public law duty does not exclude the possibility that the

²⁰ *Davis v. Canada (Attorney General)*, 2004 NLSCTD 153, 240 Nfld. & P.E.I.R. 21, at para. 11.

²¹ *Ibid.*

²² *Shubenacadia Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2001 FCT 181, 104 A.C.W.S. (3d) 62 (F.C.T.D.), at para. 5.

²³ *Ibid.*, at para. 6.

²⁴ *Bonaparte*, *supra* note 19, at para. 33.

²⁵ *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 96 [*Wewaykum*]; *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325 at para. 27.

Crown undertook, in the discharge of that public law duty, obligations “in the nature of a private law duty” towards aboriginal peoples.²⁶ I will return to this point shortly.

[36] I also agree with the Federal Crown that even though it stands in a fiduciary relationship with Canada’s aboriginal peoples,²⁷ a fiduciary relationship alone does not impose a generalized fiduciary duty. Not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation.²⁸

[37] I accept the Federal Crown’s submission that fiduciary duty may arise in one of two ways:

(i) First, and unique to the aboriginal context, a duty may arise as a result of the Crown’s assumption of discretionary control over specific aboriginal interests. Typically, this first category has been limited to interests in land, specifically a communal aboriginal interest in land that is integral to the nature of the aboriginal community and their relationship to the land; and

(ii) Second, a fiduciary duty may arise if three elements are present: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; (2) a defined person or class of persons vulnerable to a fiduciary’s control; and (3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary’s exercise of discretion or control.

[38] In my view it is at least arguable, given the evolving state of the law, that both of these categories apply on the facts as pleaded herein. I will deal first with the “assumption of discretionary control over specific aboriginal interests” category.

The first category

[39] I begin with the pronouncement of the Supreme Court that over the decades, the Federal Crown has assumed a “high degree of discretionary control [...] over the lives of

²⁶ *Wewaykum, ibid.*, at para. 74.

²⁷ It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [*Guerin*]; *Bonaparte, supra* note 19, at para. 26, citing *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at p. 183.

²⁸ *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

aboriginal peoples”²⁹ and that the fiduciary duty, where it exists, is called into existence “to facilitate supervision of the high degree of discretionary control.”³⁰

[40] The Supreme Court has also made clear that in the area of aboriginal law, the fiduciary duty imposed on the Federal Crown does not exist at large but in relation to specific Indian interests.³¹ It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.³²

[41] The only interest that has been recognized “to date” as imposing a private law fiduciary duty or “in the nature of” a private law fiduciary duty is Indian lands:

Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not *to date* been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*.³³ (Emphasis added.)

The Indians’ interest in land is an independent legal interest. *It is not a creation of either the legislative or executive branches of government.* The Crown’s obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty.³⁴ (Emphasis added.)

[42] But Indian and native, indeed aboriginal, culture and identity is also “not a creation of either the legislative or executive branches of government.” As noted by the Supreme Court in *Alberta v. Elder Advocates*,³⁵ the interest affected must be a specific

²⁹ *Wewaykum*, *supra* note 25, at para. 79.

³⁰ *Ibid.*

³¹ *Wewaykum*, *supra* note 25, at para. 81.

³² *Ibid.*, at para. 83.

³³ *Ibid.*, at para. 81.

³⁴ *Guerin*, *supra* note 27, at p. 385, cited in *Wewaykum*, *supra* note 25, at para. 76.

³⁵ *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 [*Elder*].

private law interest to which the person has a pre-existing distinct and complete legal entitlement:

Examples of sufficient interests include property rights, interests akin to property rights, and *the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person.*³⁶ (Emphasis added.)

[43] In *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, the Supreme Court adopted "the accepted view" that the aboriginal peoples (and one must assume that this includes their children) "are, in effect, *wards of the state*, whose care and welfare are a political trust of the highest obligation."³⁷

[44] Given these dicta and noting again that the law in this area is "rapidly evolving," it is at least arguable that a fiduciary duty arose on the facts herein for these reasons: (i) the Federal Crown exercised or assumed discretionary control over a specific aboriginal interest (i.e. culture and identity) by entering into the 1965 Agreement; (ii) without taking any steps to protect the culture and identity of the on-reserve children; (iii) who under federal common law were "wards of the state whose care and welfare are a political trust of the highest obligation"; and (iv) who were potentially being exposed to a provincial child welfare regime that could place them in non-aboriginal homes. Remember, as Justice Hugessen noted, all the plaintiffs have to show on the facts herein is "a glimmer of a cause of action, even though vaguely or imperfectly stated."³⁸

[45] Also, if the Federal Crown's duty toward aboriginal peoples in respect of lands held in trust for them has been recognized "on a collective basis,"³⁹ is it not at least arguable that the same can be said about the Crown's duty toward aboriginal people with respect to their culture and identity?

[46] In my view, given the judicial admonition about new causes of action in the rapidly evolving area of aboriginal law, and given the case law just cited, it is not plain and obvious and beyond any doubt that the fiduciary duty alleged herein does not fall

³⁶ *Ibid.*, at para. 51.

³⁷ *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, at 219 [*St. Ann's Island*], cited in *Wewaykum*, *supra* note 25, at para. 73. Emphasis added.

³⁸ *Supra*, note 22, at para. 6.

³⁹ *Elder*, *supra* note 35, at para. 50.

within the first category, namely the Crown's assumption of discretionary control over specific aboriginal interests. There is more than the glimmer of a cause of action.

The second category

[47] I would say the same thing about the second category. Recall the three elements in the second category:

Second, in cases other than ones involving lands of historic use or occupation, a fiduciary duty may arise if three elements are present: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; (2) a defined person or class of persons vulnerable to a fiduciary's control; and (3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[48] In my view, each of the three elements are, at least arguably, present herein. First, the execution of the 1965 Agreement was (arguably) an undertaking by the Federal Crown, pursuant to the federal government's spending power, to fund the expansion of the provincial welfare system, including its child protection component, to on-reserve families. This was being done, one must assume, with the latter's best interests in mind. Second, there was (arguably) a defined person or class of persons (on-reserve Indian children) that were thus made vulnerable to the provincial child welfare system. This development depended on federal funding and thus (arguably) stemmed from the fiduciary's initial exercise of discretion or control. Third, there was (arguably) a legal or substantial practical interest of the beneficiary (i.e. the Indian child's aboriginal culture and identity) that stood to be adversely affected by the alleged fiduciary's exercise of discretion or control. As it turned out, the interests of the beneficiary were profoundly affected by the alleged failure on the part of the Federal Crown to consult with the Indian Bands and, at least, to try to negotiate a cultural protection clause as a term or condition of the federal funding.

[49] What about evidence of disloyalty? The case law is clear that misconduct alone by a fiduciary does not necessarily constitute a breach of a fiduciary duty. There must be some disloyalty or a wrong "that is a betrayal of the trust component of the relationship."⁴⁰

⁴⁰ *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204, at para. 72 (Gen. Div.).

[50] The aboriginal peoples have been described by the Supreme Court as a “specific class of persons to whom the government owes an exclusive duty of loyalty.”⁴¹ The Supreme Court has also noted that the relationship between the federal government and aboriginals is “trust-like, rather than adversarial” and that “contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.”⁴² And, recall again what was said in the *St. Ann’s Island* case: that the aboriginal people are “wards of the state whose care and welfare are a political trust of the highest obligation.”⁴³

[51] Can it not therefore be said that there is at least a glimmer of actionability in the allegation that the Federal Crown should have done more when it entered into the 1965 Agreement and in failing to do so, breached its trust with the on-reserve Indian families and thus acted disloyally? I therefore cannot agree with the Federal Crown that it is plain and obvious that no fiduciary duty arose under the second category discussed above.

[52] In sum, given the judicial admonition that the field of aboriginal law is rapidly evolving and the case law discussed above, I cannot in good conscience conclude that it is plain and obvious that the breach of fiduciary duty allegation under either the first or second categories has no chance of success. In my view, as I have already noted, there is more than a glimmer of a cause of action based on fiduciary duty under both categories as set out above.

(ii) Negligence

[53] Justice Perell found that the claim in negligence also cleared the s. 5(1)(a) / Rule 21 hurdle. Referring back to his breach of fiduciary duty analysis, he said this:

More or less for the reasons already expressed above, it is not plain and obvious that there is no cause of action in negligence. The negligence claim would be based on what Canada knew or ought to have known and

⁴¹ *Elder*, *supra* note 35, at para. 49.

⁴² *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at para. 59.

⁴³ *Supra*, note 37.

what it did or did not do after Ontario welfare authorities began placing aboriginal children in non-aboriginal homes.⁴⁴

[54] I agree with Justice Perell for the following reasons. I begin by noting that because the alleged duty of care (to preserve and protect aboriginal culture and identity) does not fall within an established category of negligence, the two-stage *Anns-Cooper* analysis is required.⁴⁵ Stage One involves an examination of foreseeability and proximity, including policy considerations relevant to the relationship between the parties; and Stage Two requires a consideration of residual policy considerations of a broader nature to determine if they negative any *prima facie* imposition of a duty of care.⁴⁶

Stage One

[55] First, foreseeability and proximity. As the Supreme Court explained in *Imperial Tobacco*:

Proximity and foreseeability are two aspects of one inquiry - the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.⁴⁷

[56] Stopping here, can it be seriously argued that the relationship between the Federal Crown and the aboriginal peoples of Canada is *not* grounded in sufficient closeness or proximity to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other? Having just completed the fiduciary relationship / fiduciary duty analysis, how could I or any judge conclude that any such proximity argument has no chance of success and plainly and obviously is doomed to fail? In my view, there is more than a glimmer of a cause of action in negligence. Let me explain.

⁴⁴ *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 152.

⁴⁵ *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 [Cooper].

⁴⁶ *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 39-66 [*Imperial Tobacco*]; *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161 (C.A.), at paras. 70-74 [*Taylor*].

⁴⁷ *Imperial Tobacco*, *ibid.*, at para. 41.

[57] First, the foreseeability of the alleged psychological and emotional injuries is explicitly pleaded and supported with relevant and material evidence in the plaintiffs' narrative. The real question under the Stage One analysis is proximity.

[58] In determining proximity, one of the factors to consider is the nature of the overall relationship existing between the plaintiff and the defendant.⁴⁸ The concept of proximity describes a relationship between a plaintiff and a defendant that is sufficiently close and direct to render it fair and reasonable to require that the defendant, in the conduct of its affairs, be mindful of the plaintiff's legitimate interests.⁴⁹

[59] This factor is not concerned with how intimate the plaintiff and defendant were, or with their physical proximity, so much as with whether the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed.⁵⁰ The court must evaluate the closeness of the relationship between the plaintiff and the defendant and determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.⁵¹

[60] Here, as I have already noted, there is a fiduciary relationship between the Federal Crown and the aboriginal people "whose care and welfare are *a political trust* of the highest obligation."⁵² The 1965 Agreement also (arguably) created proximity with the intended targets - the on-reserve children that were potentially in need of protection. Is it not at least arguable that it would be just and fair having regard to this unique and important historical relationship and the intended impact of the 1965 Agreement to impose a duty of care upon the Federal Crown?

[61] I therefore find, under Stage One of the analysis, that there is at least an arguable *prima facie* duty of care that cannot plainly and obviously be described as having no chance of success.

Stage Two

⁴⁸ *Cooper, supra* note 45, at paras. 34-35.

⁴⁹ *Taylor, supra* note 46, at para. 66 and *Cooper, supra* note 5, at paras. 32-36.

⁵⁰ *Taylor, supra* note 46 at para. 68.

⁵¹ *Cooper, supra* note 45, at para. 34.

⁵² *St. Ann's Island, supra* note 37. Emphasis added.

[62] I will now turn to the Stage Two analysis. Has the Federal Crown established a residual policy consideration of a broader nature that would negative the *prima facie* duty of care? Or, to put it more accurately, a residual policy consideration of a broader nature that would plainly and obviously negative the *prima facie* duty of care established under Stage One?

[63] The Federal Crown makes two “residual policy” arguments: one, that imposing on Canada a duty to the plaintiffs flowing from the 1965 Agreement would result in an unwarranted and constitutionally improper interference by Canada in provincial child welfare jurisdiction as well as an inappropriate interference with the judiciary’s role in authorizing the Crown ward-ships or adoptions; and two, that Canada was required to abide by the terms of court orders that sanctioned the adoption or the placement of the plaintiffs.

[64] In my view, neither policy submission succeeds. The Federal Crown could have taken a number of steps which would not have amounted to constitutional interference or resulted in the violation of any court orders. For example, the Federal Crown could have (i) consulted with the Indian bands (as it was obliged to do under the terms of the 1965 Agreement); (ii) negotiated an aboriginal cultural protection provision; or (iii) followed up the child placements, whether Crown ward-ships or adoptions, by providing the displaced children and their new non-aboriginal families with information about the child’s Indian status, his or her future options and the availability of federal benefits upon reaching the age of majority.

[65] In my view, there would have been nothing unconstitutional about the Federal Crown consulting with the Indian bands, or negotiating cultural protection as a condition precedent before the funding would flow, or taking the various steps suggested after the Indian child was placed in a non-aboriginal home.⁵³ Nor would any of these actions have been in violation of any court orders (indeed, no specific examples have been suggested). The plaintiffs prevail on the Stage Two analysis.

[66] In sum, it is not plain and obvious that the survivors of the Sixties’ Scoop cannot establish a relationship of sufficient proximity that makes it fair and just to impose a private law duty of care on the Federal Crown on the facts of this case. The plaintiffs and

⁵³ It is not disputed that the provincial welfare system, as a law of general application, could constitutionally apply to families or children living on reserves. But the province was not extending its welfare services to the reserves, perhaps thinking that this was a federal responsibility. The 1965 Agreement as a funding agreement could easily have included a term or condition that would have obliged the provincial authorities to learn about the Indian and native culture and their unique understanding of families and parenting and to act accordingly. The addition of this obligation as a condition of federal funding, in my view, would not have raised any constitutional concerns.

class members may or may not prevail in the action overall. The defendant may show at trial, for example, that the applicable standard of care in the 1960's was not breached either in entering into the 1965 Agreement without "doing more" as pleaded by the plaintiffs, or in the acts or omissions impugned thereafter. But for now the breach of fiduciary duty and negligence actions must be allowed to proceed. The courtroom door should not be closed to Ms. Brown and the other members of the class at this stage of the proceedings.

[67] The plaintiffs have cleared the s. 5(1)(a) and Rule 21 hurdle.

(2) Identifiable class

[68] Section 5(1)(b) of the CPA requires that there be an identifiable class of two or more persons that would be represented by the representative plaintiff. Class definition is important because it describes the persons entitled to relief, those who will be bound by the decision and those who are entitled to notice of certification.⁵⁴ Class membership must be determinable by stated, objective criteria.⁵⁵ And, there must be a rational relationship between the class and the common issues.⁵⁶

[69] Based on Justice Perell's analysis, the plaintiffs revised their class definition to read as follows:

Aboriginal persons in Ontario between December 1, 1965 and December 31, 1984 who were placed in the care of non-aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions, and practices.

[70] In my view, this class definition is too broad. According to the plaintiffs, it was the 1965 Agreement "that gave rise to these claims."⁵⁷ However, as already noted, the 1965 Agreement funded the expansion of the provincial welfare services to "Indians with reserve status." That is, with some minor exceptions, only to Indian families and children living on reserves. Also, recall that both causes of action, fiduciary duty and negligence,

⁵⁴ *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Gen. Div.), at para. 10.

⁵⁵ *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534.

⁵⁶ *Pearson v. Inco Ltd.*, (2006), 78 O.R. (3d) 641 (C.A.), at para. 57 [*Pearson*], rev'g (2004), 44 C.P.C. (5th) 276 (Div. Ct.), which had aff'd (2002), 33 C.P.C. (5th) 264 (S.C.J.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 1. at para. 57.

⁵⁷ *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 41.

as discussed above, depend in part on the significance of and their connection to the 1965 Agreement.

[71] It therefore makes sense to revise the class definition so that it can more rationally accord with the causes of action and the common issues. The class definition should be revised to read as follows:

Indian children who were taken from their homes on reserves in Ontario between December 1, 1965 and December 31, 1984 and were placed in the care of non-aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions, and practices.⁵⁸

[72] I am satisfied that this is the class definition that should be certified.

(3) Common issues

[73] Section 5(1)(c) of the CPA requires that the claims of class members raise common issues of fact or law that will move the litigation forward. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.⁵⁹ The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis.⁶⁰

[74] Justice Perell concluded that the core common issue should be this:

In Ontario, between December 1, 1965 and December 31, 1984, when an aboriginal child was placed in the care of non-aboriginal foster or adoptive parents who did not raise the child in accordance with the child's aboriginal customs, traditions, and practices, did the federal Crown have and breach a fiduciary or common law duty of care to take

⁵⁸ In describing the human parameters of both the class definition and the common issue discussed below, it is my intention to mirror the parameters set out in the 1965 Agreement. I recognize that strictly speaking (given the minor exceptions noted in this Agreement) the reach of the Agreement may be slightly broader than Indian children actually living on the reserves. If these slightly broader nuances are important to class counsel and potential class members, please let me know and I will revise the class definition and the common issue accordingly.

⁵⁹ *Hollick*, *supra* note 15, at para. 18; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 55, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.).

⁶⁰ *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39.

reasonable steps to prevent the aboriginal child from losing his or her aboriginal identity?⁶¹

[75] Here again, and for the reasons just stated, I believe that the common issue must be revised to reflect the significance of the 1965 Agreement. My revision reads as follows:

When the Federal Crown entered into the Canada-Ontario Welfare Services Agreement in December 1, 1965 and at any time thereafter up to December 31, 1984:

- (1) Did the Federal Crown have a fiduciary or common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario who were placed in the care of non-aboriginal foster or adoptive parents from losing their aboriginal identity?
- (2) If so, did the Federal Crown breach such fiduciary or common law duty of care?

[76] I am satisfied that this is the common issue that should be certified.

(4) Preferable procedure

[77] Section 5(1)(d) of the CPA requires that a class proceeding be the “preferable procedure for the resolution of the common issues.” The analysis must consider whether a class proceeding is a “fair, efficient and manageable method of advancing the claim” as a whole.⁶² Preferability is to be broadly construed and is meant to capture two ideas: (i) whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (ii) whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation or any other means of resolving the dispute.

[78] The Federal Crown argues that a test case would be preferable to a class proceeding. I do not understand this submission. The same amount of time and effort would be required in litigating the common issue whether as a “test case” or a class proceeding. But the advantage to both sides of the latter is that the parties would come away with a judicial decision that is binding on the entire 16,000-person class, not just the test case litigant.

⁶¹ *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 12.

⁶² *Pearson*, *supra* note 56, at para. 67.

[79] This is not a situation where there are many other actions waiting to proceed and where a test case would either open or close this potential pipeline of cases. Here, there are no other actions. There may even be a question as to how many of the class members would actually proceed to individual damage trials if the common issue is decided in their favour. But there is no question that a class action to determine the core common issue would significantly advance the litigation. At this point, only a class proceeding can sensibly “test” the viability of the fiduciary duty and negligence claims.

[80] I agree with Justice Perell’s analysis:

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.

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.⁶³

[81] In short, there is at least some basis in fact for concluding that a class action is the “preferable procedure for the resolution of the common issues.” The preferability criterion in s. 5(1)(d) has been satisfied.

(5) Representative plaintiff

[82] Finally, under s. 5(1)(e) of the CPA, the court must be satisfied that there is a representative plaintiff who (i) would fairly and adequately represent the interests of the class, (ii) has produced a workable litigation plan and (iii) does not have a conflict of interest with any of the other class members.

⁶³ *Brown v. Canada (Attorney General)*, *supra* note 1, at paras. 185-86.

[83] The proposed representative need not be 'typical' of the class, but must be 'adequate' in the sense that he or she will vigorously prosecute the claim.⁶⁴ The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented.⁶⁵

[84] The Federal Crown concedes that the plaintiff Marcia Brown was "probably" entitled to be a registered Indian at the time of her initial apprehension by child welfare authorities in 1967 or 1968. The difficulty, given the revised class definition, is with the co-plaintiff. Robert Commanda was neither a registered Indian nor entitled to be registered pursuant to the *Indian Act* at any time during the proposed class period. He did not have reserve status. Also, his interactions with the provincial child welfare system occurred before the 1965 Agreement was entered into. Therefore, he does not have a claim that is a genuine representation of the claims of the members of the class to be represented.⁶⁶

[85] I am prepared to appoint Marcia Brown as the representative plaintiff. I am satisfied that she would fairly and adequately represent the class. Although this now leaves Ms. Brown as the sole representative plaintiff, I am satisfied on the evidence before me that there are more than two members in the revised class, indeed thousands more.

[86] As for the litigation plan, I am satisfied that the plaintiff has produced a revised plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceedings. And, I find that the representative plaintiff does not have an interest in conflict with the interests of the other class members.

[87] In short, the five required prerequisites set out in s. 5(1) of the CPA have been satisfied.

⁶⁴ *Campbell v. Flexwatt* (1997), 98 B.C.A.C. 22 (C.A.), at paras. 45, 75-76, leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 13.

⁶⁵ *Drady v. Canada (Minister of Health)*, 159 A.C.W.S. (3d) 177 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, 29 C.P.C. (5th) 242 (S.C.J.) at para. 40, aff'd (2003), 127 A.C.W.S. (3d) 450 (C.A.).

⁶⁶ *Ibid.* I note that Mr. Commanda later became entitled to Indian registration because of the amendments made to the *Indian Act* in 1985.

Conclusion

[88] The action is certified as a class proceeding. I agree in general with the reasons of my colleague, Justice Perell. I have, however, made two changes: the class definition has been narrowed and the common issue has been reworded to better reflect the significance of the 1965 Agreement and for improved readability.

Disposition

[89] The plaintiffs' motion for certification is granted. The class definition and proposed common issue are revised as set out above. Marcia Brown is appointed representative plaintiff.

[90] The Federal Crown's Rule 21 motion to strike is dismissed.

[91] The Federal Crown's motion, in the alternative, to strike certain paragraphs from the Fresh as Amended Statement of Claim on the basis that they are conclusions of law, constitute argument or lack material facts is also dismissed. In my view, some of the impugned paragraphs come close to the line and possibly could be struck on the grounds just stated, but on balance, I will let them stand because they add to the overall narrative and nothing of importance turns on their presence or absence.

[92] The Notice of Certification to the Class shall be given pursuant to the revised Litigation Plan of Proceeding attached to the Notice of Motion. Class members who elect to opt out of the class proceeding must do so within 60 days of the date of the Notice of Certification. The Federal Crown shall be responsible for all costs associated with giving Notice of this action to the class.

[93] Counsel are directed to prepare an order in the form contemplated by s. 8 of the CPA. If any questions arise in this regard, please let me know.

[94] The representative plaintiff is entitled to her costs. If costs cannot be resolved by the parties, I will be pleased to receive brief written submissions within 14 days from Ms. Brown and within 10 days thereafter from the Federal Crown.

[95] I am obliged to counsel for their assistance.

Belobaba J.

Date: September 27, 2013