Court File No. T-2212-16

FEDERAL COURT

PROPOSED CLASS PROCEEDING

BETWEEN:

JESSICA RIDDLE, WENDY LEE WHITE AND CATRIONA CHARLIE

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

RESPONDING MEMORANDUM OF FACT AND LAW OF THE PLAINTIFFS (Re: Objections)

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PART I - OVERVIEW

1. Pursuant to the order of this Court dated January 10, 2018, objections to the proposed settlement agreement dated November 30, 2017 (the "**Settlement Agreement**")[1] were due to be received and collected by no later than April 30, 2018.[2]

2. That deadline having now passed, the parties have reviewed all of the objections to the Settlement and for ease of reference have categorized those objections by topic. For each category, the parties provide legal submissions concerning why such objections are either misplaced, misunderstood or of no moment to the Settlement as a whole. In any event, if the Settlement is approved, the right of any class member to opt out remains in place for a period of ninety (90) days following settlement approval in the Federal Court.

3. In the result, despite these objections, the Plaintiffs maintain, repeat, rely upon and adopt their submissions contained in the Memorandum of Fact and Law dated April 19, 2018 in support of settlement approval and the Memorandum of Fact and Law dated April 30, 2018 in support of legal fee approval. The Settlement Agreement remains deserving of approval of this Honourable Court at the return of the motion on Thursday May 10, 2018.

PART II - THE ISSUE TO BE DETERMINED

4. One factor the Court will have to consider on the motions to approve the Settlement and the legal fees is:

> Do any of the objections take the Settlement Agreement outside the judicially accepted test of a 'zone of reasonableness'?

5. The parties respectfully suggest that the answer to this question is unequivocally "No".

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[1] Final Settlement Agreement dated November 30, 2017 ("**FSA**"), Exhibit "112" to the Affidavit of D. Rosenfeld, at para. 147, Motion Record (Settlement Approval), Tab 6(112).

[2] Order of Justice Shore, dated January 10, 2018, Exhibit "109" to the Affidavit of D. Rosenfeld, at para. 156, Motion Record (Settlement Approval), Tab 6(109), pp. 1929-1930.

PART III - THE LEGAL ARGUMENT IN RESPONSE TO OBJECTIONS

A. General Principles To Inform the Court's Considerations of Objections

6. Dissent in such cases is inevitable – but never fatal, and for good reason: "[a]ny potential claimants who are not prepared to accept the proposed settlement in full satisfaction of their claim, do not have to do so. […] They have the ability to opt out of the provisions of this settlement […] [and] if they do so, they must then accept all of the risks and disadvantages associated with pursuit of this litigation in the courts."[3]

7. The right to opt-out alleviates any objector's concerns: "objectors need not be bound by the perceived failings of the Settlement Agreement. They may opt out and pursue in the normal fashion the claims they assert, bearing in mind the obstacles alluded to above."[4]

8. The legal test to guide this Court's analysis - whether the Settlement is fair, reasonable and in the best interests of the class as a whole - explains the proper judicial treatment of objections, as described below by two very experienced class actions judges:

> "The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The CPA [the *Class Proceedings Act, 1992*] mandates that class members retain for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with view to obtaining settlement or judgment that is tailored more to the individual's circumstances;"[5] and
>
> "This settlement represents a compromise of disputed claims. For that reason it is undoubtedly the case that claimants will not be happy with every provision of the settlement. Some might well choose to reject it. However, those members of the class who decide that the disadvantages of the Settlement Agreement outweigh its advantages are free to opt out of the provisions of the *Class Proceedings Act* and pursue their individual claims against the defendants. If they choose to opt out, nothing in this class proceeding will affect them or any actions they may choose to bring. In my view, the opt out right supports approval of the agreement."[6] [emphasis added]

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[3] *Fontaine v. Canada*, 2006 NUCJ 24, at para. 59, Book of Authorities (Objections), Tab 8.

[4] *Bosum v. Canada*, 2006 QCCS 5794, at para. 13, Book of Authorities (Objections), Tab 2.

[5] *Dabbs v. Sun Life Assurance Co. of Canada* [1998] O.J. No. 2811 (Gen. Div.), at para. 11, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to the S.C.C. ref'd, [1998] S.C.C.A. No. 372, Book of Authorities (Objections), Tab 5.

[6] *Quatell v. Attorney General of Canada*, 2006 BCSC 1840, at paras. 5–7, Book of Authorities (Objections), Tab 13.

9. The quantum of objections, a few hundred, in a class ranging between 18,000 to 22,000 individuals (or approximately 1%) is a miniscule percentage and this Court is charged with deciding what is fair and reasonable and in the best interests of the class as a whole. Most importantly, those objections must be balanced against the benefits afforded to the class in the Settlement, the litigation risks and the urgent "importance of ending the delay allowing resolution, conclusion, peace and reconciliation to move forward".[7]

10. None of the objections ought to have the effect of rejecting the Settlement given that many of those objections misunderstand some key elements of either the Agreement or the litigation, the Plaintiffs explain herein.

B. Quantum of Compensation

i. Individual Compensation Range of $25,000 to $50,000

11. In addition to the fact that no proof of harm or loss is required by the claims process, a result which would be impossible through contested litigation, it is also extremely significant, as a matter of law, that the compensation here is to be viewed, at least in part, as damages for loss of language and culture yet "no court has yet recognized the loss of language and culture as a recoverable tort".[8]

12. In fact, "this is the first case in the Western world to hold government responsible for consultation when what is at stake is a people's children cultural identity.[9] This is a critically important advantage to the class that would not be available through hard fought litigation.

13. The evidence on this motion further confirms that even if successful in Ontario in the *Brown v. Canada* action on damages, the case management judge "Justice Belobaba was indicating amounts in the $10,000 to $25,000 range […] and that the average paid on the common experience payment regarding Indian Residential Schools was $22,000."[10] The

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[7] Affidavit of M. Blue Waters sworn April 9, 2018 at para. 121, Motion Record (Settlement Approval), Tab 4, p. 114.

[8] *Quatell v. Attorney General of Canada*, 2006 BCSC 1840, at para. 9, Book of Authorities (Objections), Tab 13.

[9] Affidavit of M. Brown, at para. 43, Exhibit "113" to the Affidavit of D. Rosenfeld, at para. 257, Motion Record, Tab 6(113), pp. 2106-2107.

[10] Affidavit of M. Blue Waters, at para. 112, Motion Record (Settlement Approval), Tab 4, p. 112.

compensation provided by the Settlement is in excess of this range.

14. The evidence further confirms that these sums, $25,000.00 to $50,000.00, are "meaningful amounts of money", the vast majority of Class members considering "this level of payment substantial"[11]. These elements of the Settlement – the claims process and compensation available - are themselves "an extraordinary resolution to a complex political and cultural dispute" because at common law:

> "… it is inconceivable that a court would provide a remedy that compensates all Indian Residential School survivors with a financial benefit **without proof of loss**, by simply proving a survivor attended an Indian Residential School. That is not to say that survivors did not suffer loss of language and culture, but simply to acknowledge the unique aspect of the remedy which could only be granted in a political forum."[12] [emphasis added]

15. As a result, there is no question that individual damages ranges between $25,000 and $50,000 per individual, without any requirement to prove harm or loss, are well within the zone of what is fair and reasonable compensation at law.

ii. Capped Settlement Fund at $750 Million

16. Some individuals have objected to the cap on the settlement fund. It is reasonable and appropriate to cap the settlement fund at $750 million.

17. First, the unchallenged evidence is that there are approximately 18,000 to 22,000 Eligible Class Members who were alive as at October 2017. This class size estimate was calculated by Peter Gorham, an actuary. Mr. Gorham was provided with information compiled by the Ministry of Indigenous and Northern Affairs 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.[13] There is no reason to believe that his class size estimate is wrong, and no one has provided any conflicting evidence.

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[11] Affidavit of M. Blue Waters, at para. 90, Motion Record (Settlement Approval), Tab 4, p. 108.

[12] *Fontaine et al. v. Canada et al.*, 2006 YKSC 63, at para. 48, Book of Authorities (Objections), Tab 9.

[13] Affidavit of D. Rosenfeld, at paras. 205-206, Motion Record (Settlement Approval), Tab 6, pp. 217-218.

18. If every single Eligible Class Member submits a claim, a result that is virtually impossible given what is known about take up rates in class proceedings, only $550 million will be paid to Eligible Class Members, leaving a buffer of $200 million, or the ability for an extra 8,000 Eligible Class Members to be paid $25,000 each. In consequence, the cap is sufficiently high and includes a very significant buffer such that it is unlikely any Eligible Class Member will receive less than $25,000. Rather, it is expected that Eligible Class Members will, in all likelihood, receive an amount ***in excess*** of $25,000.

19. Second, caps on settlement funds are a regular feature of class proceedings settlements, and offer benefits to class members. For example, interest can accrue on capped settlement funds which, in this case, is payable to the benefit of the Foundation.[14] Likewise, capped settlements can result in a surplus that may accrue for the benefit of compensation to Eligible Class Members. In this case, because of the capped nature of the settlement fund, Eligible Class Members may receive up to $50,000 in compensation.[15]

20. Uncapped settlements also typically go hand-in-hand with much more adversarial and rigorous claims processes. For example, the notorious Independent Assessment Process part of the Indian Residential Schools Settlement required lawyers, experts, class members' evidence, adjudicators, records, documents and the like, morphing into an arduous and complex protracted claims regime, a result that has been successfully avoided in this case by the simplified claims process – a feature available only in capped settlement.

21. Lastly and practically speaking, without a capped structure, it is hard to imagine that there could have been a settlement in this case, since it is unlikely that Canada would have agreed to an uncapped settlement.

C. Exclusion of Metis and Non-Status Individuals

22. Several individuals raise the objection that Métis and non-status Indians are not included in the Settlement.

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[14] FSA, s. 4.01, Exhibit "112" to the Affidavit of D. Rosenfeld, Motion Record (Settlement Approval), Tab 6(112), p. 2007.

[15] FSA, s. 6.02, Exhibit "112" to the Affidavit of D. Rosenfeld, Motion Record (Settlement Approval), Tab 6(112), p. 2014. See also the Order of Justice Perell dated August 15, 2016, Book of Authorities (Objections), Tab 16 in *Parsons v. The Canadian Red Cross Society et al.* where over $200 million in unallocated assets were transferred to meet ongoing liabilities.

23. First, the Settlement includes a Foundation for the benefit of all survivors of the Sixties Scoop, including Métis and non-status Indians. The Foundation is designed to continue after the other elements of the Settlement Agreement are complete in order to continue to enable change and reconciliation for all survivors of the Sixties Scoop. This is a primary pillar of the Settlement Agreement. In consequence, the Settlement will offer significant and long lasting benefit to Métis and non-status Indians:[16]

> "I have observed the commitment of the Foundation Table to a working Foundation that is responsive to all indigenous person, even though they may not be class members, such as Métis, siblings or parents of survivors, as well and non-indigenous persons who were, and continue to also be affected by the Sixties Scoop, such as adopting parents or non-indigenous survivor siblings."[17] [emphasis added]

24. Second, under certain federal-provincial child welfare agreements, the provinces assumed responsibility for providing child welfare services only to Indians with reserve status.[18] The scope of the agreements did not cover all aboriginal peoples of Canada. Indians who did not have reserve status were to continue to be covered by provincial welfare programs on the same basis as other residents. By their terms, the agreements did not apply to Métis and non-status Indians.

25. This distinction is exemplified in *Brown v. Canada (Attorney General)* where Justice Belobaba declined to certify the claims on behalf of non-"Indian children" (including Métis and non-status Indians) on the basis that the Ontario agreement funded the expansion of the provincial welfare services only to "Indians with reserve status."[19]

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[16] Affidavit of Kenneth Richard, para. 6, Exhibit "114" to the Affidavit of D. Rosenfeld, Motion Record (Settlement Approval), Tab 6(114), p. 2117.

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

[18] For example, in Ontario, "Indian" is defined as "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 (iii) designated as such by the Minister of Northern Affairs and National Resources". *Brown v. Canada (Attorney General)*, 2010 ONSC 3095, at para. 32, Book of Authorities (Objections), Tab 3.

[19] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, at paras. 63-71, Book of Authorities (Objections), Tab 4.

26. Third, there are no records during the class period to identify those displaced children who were Métis and non-status Indians.[20] Therefore, there is no manner in which a settlement administrator could determine whether Métis and non-status Indians would be entitled to compensation.

27. Fourth, the Settlement Agreement does not prejudice the claims of Métis and non-status Indians against Canada. The claims on behalf of Métis and non-status Indians against Canada concerning the Sixties Scoop are not released, nor are they impacted in any other way by the Settlement. Indeed, those claims are being advanced against Canada and the provinces in provincial superior courts:[21]

> "Nothing in this Settlement bars a claim by Metis against the federal government, or a claim against the provincial authorities by those physically or sexually abused when adopted in state wardship."[22]

28. For these reasons, no unfairness arises by confining the Settlement Agreement to status Indians (as defined in the *Indian Act*) and Inuit.

D. Release of Claims for Physical and Sexual Abuse While In Care

29. Objections have been raised regarding the release for physical and sexual abuse claims. Those objectors contend that Canada should not be released for physical and sexual abuse claims. This objection fails to recognize that if anyone is liable to survivors of the Sixties Scoop for physical and sexual assault, it is the operators on the ground – the provinces and local Children's Aid Societies, not Canada.

30. Even *Brown v. Canada,* the first Sixties Scoop case in Ontario, had nothing to do with allegations of physical or sexual abuse:

> "He [Class Counsel] chose to limit the cause of action to that of loss of cultural identity. He chose not to expand it to include a law suit for damages for abuse. Most importantly,

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[20] Affidavit of K. Richard, para. 6, Motion Record (Settlement Approval), Tab 6(114), p. 2117.

[21] FSA, Schedule "H", Exhibit "112" of the Affidavit of D. Rosenfeld, Motion Record (Settlement Approval), Tab 6(112), p. 2067. See for example *Thompson et al. v. Manitoba et al.* (Court File Number CI-15-01-94427), Exhibit "17" to the Rosenfeld Affidavit, Motion Record (Settlement Approval), Tab 6(17).

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

> as it turns out, he made the right decision to focus the case not on the fact of removal of the indigenous children from their homes, nor on the fact of their placement in non-indigenous homes. He made the case about a certain Canada-Ontario 1965 Agreement and the issue was the absence of consultation between Canada and the Ontario Bands when, and after, indigenous children were placed… Our claim in Ontario was limited to a loss of cultural identity and did not include the element of abuse as part of the assertion of federal liability. "[23] [emphasis added]

31. The federal Crown entered into agreements with the provinces to provide them with funding, and the provinces undertook to deliver Indians all provincial welfare programs available to the general population.[24] The provincial welfare programs included "services to children, including the protection and care of neglected children, the protection of children born out of wedlock and adoption services".[25] Canada was not responsible for the standards of care or the day-to-day care of survivors of the Sixties Scoop.

32. This is precisely why the Ontario Superior Court of Justice in the *Brown v. Canada* action certified the following common issues and nothing more:

> 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?[26]

33. In consequence, there is no tenable claim at law against Canada for physical and sexual assault sustained by class members while they were in care as there is no causal connection between the perpetrators of abuse and Canada. The appropriate defendants for claims for damages arising from physical and sexual assault are the provinces, actions which survivors are entitled to pursue.[27] Indeed, these claims are being pursued in class proceedings across Canada.[28]

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[23] Affidavit of M. Brown, sworn March 23, 2018 at paras. 31, 42, Exhibit "113" to the Affidavit of D. Rosenfeld, Motion Record (Settlement Approval), Tab 6(113), pp. 2103, 2107.

[24] *Brown v. Canada (Attorney General)*, 2010 ONSC 3095, at para. 31, Book of Authorities (Objections), Tab 3.

[25] *Brown v. Canada (Attorney General)*, 2010 ONSC 3095, at para. 34, Book of Authorities (Objections), Tab 3.

[26] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, at para. 75, Book of Authorities (Objections), Tab 4.

[27] Affidavit of W. White, at para. 18, Motion Record (Settlement Approval), Tab 3, p. 80.

34. Such claims against the provinces will continue undisturbed by this Settlement, exemplified in one instance in Saskatchewan where such claims remain: "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 [...] and Métis may also recover against the provinces.[29]"

35. Finally, Canada would not have settled these class proceedings without a full release of all claims asserted on behalf of survivors of the Sixties Scoop. Given Canada's non-existent exposure for damages arising from physical and sexual assault, as explained below, the compensation offered by Canada in exchange for the release is fair and reasonable.

E. Claimants' Choice of Counsel Through Claims Process

36. Several persons raise the objection that they should be able to choose whatever lawyer they want to help them understand the Settlement or make claims, and those lawyers should be paid from the compensation paid to claimants.

37. This objection mischaracterizes the relevant provision of the Settlement Agreement. In particular, section 11.03 of the Agreement states that counsel may charge class members fees in relation to the claims under the settlement, but only with pre-approval of the Federal Court. In consequence, class members are permitted to choose whatever lawyer they want to help them, and those lawyers may be paid from any individual compensation award, but with leave from the court.[30]

38. There is good reason for this protection. In the context of the Indian Residential Schools settlement, there are myriad decisions addressing misconduct by lawyers representing claimants

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[28] FSA, Schedule "H", Exhibit "112" of the Affidavit of D. Rosenfeld, Motion Record (Settlement Approval), Tab 6(112), p. 2067. See for example *Thompson et al. v. Manitoba et al.* (Court File Number CI-15-01-94427), Exhibit "17" to the Rosenfeld Affidavit, Motion Record (Settlement Approval), Tab 6(17).

[29] Affidavit of M. Blue Waters, at para. 159, Motion Record (Settlement Approval), Tab 4, p. 129.

[30] *Federal Court Rules*, Rule 369 permits motions to be brought in writing, Appendix "A".

and remedial actions taken to protect those claimants, and in particular, misconduct relating to the overcharging of fees for assisting persons through the Independent Assessment Process.[31]

39. The evidence on this motion confirms that this provision seeks to prevent the abuse which occurred by certain lawyers during the Indian Residential Schools Settlement claims process:

> "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."[32]

40. An ounce of prevention is worth a pound of cure. A leave requirement – which can be made in writing – for charging legal fees is a reasonable and appropriate check in the circumstances of this case.

41. There are three additional reasons why the leave requirement is justified. First, the claim form that class members must submit to access compensation is one (1) page in length and requires limited amounts of biographical information.[33] It is difficult to imagine class members requiring assistance completing this form:

> "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 $7,500) to fill out the one-page application form with basic biographical detail. … 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."[34]

42. Second, class counsel (across the country) have undertaken to help all class members to understand the settlement and to complete claim forms, free of charge.[35] Therefore, if any

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[31] *Fontaine v. Canada (Attorney General)*, 2016 BCSC 2218, FN 2, Book of Authorities (Objections), Tab 7.

[32] Affidavit of M. Reiher, at para. 33, Motion Record (Settlement Approval), Tab 5, p. 156.

[33] FSA, Schedule "B", Exhibit "112" of the Affidavit of D. Rosenfeld, Motion Record (Settlement Approval), Tab 6(112), p. 2045.

[34] Affidavit of M. Reiher, at para. 35, Motion Record (Settlement Approval), Tab 5, p. 156.

[35] FSA, s. 11.02, Exhibit "112" of the Affidavit of D. Rosenfeld, Motion Record (Settlement Approval), Tab 6(112), p. 2031.

claimant, regardless of where he or she resides geographically, requires legal assistance with the claims process, lawyers are ready, willing and able to assist free of charge.

43. Finally, the administrator's administration proposal includes a First Nations Partnership and the appointment of twelve (12) Indigenous Liaison Officers to provide administrative support to class members in each province and territory. As a result, class members will have wide access to free legal services.[36]

F. Legal Fees to Class Counsel

44. Objections have been levelled against the quantum of legal fees to Class Counsel. In response to this objection, reference and reliance is made to paragraphs 15-128 of the Memorandum of Fact and Law of the Plaintiffs & Class Counsel, dated April 30, 2018.

45. In summary, the fees sought are fair and reasonable for the following reasons:

(a) the results achieved by class counsel are excellent given the litigation risks associated with the claims, not least of which is that there is no known claim at law respecting the loss of cultural identity or the limitations periods operative respecting these matters;

(b) in contrast to many class proceedings settlements, the fees are on top of and are not taken from the compensation payable to class members, which means that compensation payable to class members is not reduced by payment of class counsel fees;

(c) the requested fees are less than 10% of the overall global payment, which is at the lowest end of all judicially-approved percentages;

(d) the requested fees are below the amounts that were agreed to between class counsel and the representative plaintiffs in their retainer agreements; and

(e) class counsel will perform substantial additional work following the approval of the settlement, without any entitlement to additional compensation.

46. For all these reasons, the requested fees are fair and reasonable and ought to be approved.

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[36] Plan of Administration, Exhibit "A" to the Affidavit of L. Seto, Supplemental Motion Record (Settlement Approval), Tab 6(A), p. 53.

G. Class Definition and Cut-Off Date for the Deceased

47. Objections have been raised regarding the class definition for an "Eligible Class Member" and its requirement that a person must have been alive on or after February 20, 2009 in order to make a claim. The objection is that persons who passed away (or their estates) prior to February 2009 ought to be included as eligible claimants.

48. To be eligible to make a claim for compensation through the Settlement, the Agreement provides that a person must:

> (a) be a registered Indian (as defined in the *Indian Act*) or Inuit person or person eligible to be registered as an Indian or Inuit who was removed from their home in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents; and
>
> (b) who was adopted or made a permanent ward and was alive on February 20, 2009 (the "Eligible Class Members").[37]

49. The propriety of the cut-off date of February 20, 2009 can legally be explained as follows:

> (a) a class definition in a settlement must be objective in its own terms and be temporally limited;
>
> (b) the parties to the Settlement made a principled decision to choose February 20, 2009 as the date because that is the date upon which the *Brown v. Canada* action was commenced in Ontario;
>
> (c) while the Federal Court actions were commenced after 2009, Canada nevertheless agreed to give all class members the benefit of sheltering under the *Brown* date whereas if Canada had insisted upon using other actions' commencement dates, many more estates would have been barred from claiming at all as the date would have been much later in time; and
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> (d) by operation of law, limitations period across the country would have generally barred any claims by estates which were not brought within two years of a person's death.[38]

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[37] FSA, Schedule "M", Exhibit "112" to the Affidavit of D. Rosenfeld, at para. 147, Motion Record (Settlement Approval), Tab 6(112), p. 2094.

[38] For example, the following statutory schemes generally bar claims of deceased persons unless made within two years of death:

Manitoba: *Trustee Act*, C.S.S.M. c. T-1, s. 53(2).

Ontario: *Trustee Act*, R.S.O. 1990, c. T.23, s. 38(2).

New Brunswick: *Survival of Actions Act*, R.S.N.B. 2011, c. 227, s. 10.

50. Instead, the Settlement's "Eligible Class Member" definition includes all persons who were alive as of February 20, 2009, permitting many estates of individuals who have since passed away to make claims who could have been otherwise barred by the application of provincial estate/trustee legislation. Meaning, the insertion of this date is actually a ***net positive*** for class members as without it, by operation of statute, most estates would have been otherwise barred from receiving any funds whatsoever.

51. Moreover, as a matter of principle, there is nothing inherently offensive about having a cut-off date for claims of deceased class members. In the Indian Residential Schools Settlement, the same type of class definition limiter was contained and all nine (9) approval courts had to consider the propriety of same.

52. In Ontario, Justice Winkler (as he then was) squarely confronted the same type of objection and had this to say:

> "Finally, I will deal with the issue arising from the proposed class definition as it relates to those who attended a residential school but died prior to May 30, 2005. The proposed settlement would exclude the estates of such persons from making claims under the CEP program or the IAP. …
>
> A key point about this arbitrary distinction is that the estates of those persons who died prior to the May 30, 2005 deadline will not receive CEP or IAP compensation. Nonetheless, it is still the intention to have those estates bound by the settlement terms in that their claims will be extinguished by the general releases to be granted if the settlement is approved. While it is not uncommon, or necessarily objectionable, to draw distinctions between class members for the purposes of distributing compensation from a global fund, in those cases where a distinction is drawn, compensation is usually paid to claimants on both sides of the divide albeit in reduced amounts on one side.
>
> Where the intention is to bind potential class members without direct compensatory payment, the court must apply careful scrutiny to the provisions of the settlement seeking to effect that result. This analysis must be conducted on a case by case basis. Here, it was contended that the indirect benefits to the family members of the deceased class members, through the healing and commemoration initiatives, was a countervailing benefit given in exchange for the right being extinguished by the settlement. In addition, the estates of those class members whose direct claims are being extinguished may exercise their opt out rights in order to pursue their individual litigation. I agree with

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Nova Scotia: *Survival of Actions Act*, R.S.N.S. 1989, c. 453, s. 5.

Northwest Territories: *Trustee Act*, R.S.N.W.T. 1988, c. T-8, s. 31.

Yukon: *Survival of Actions Act*, R.S.Y. 2002, c. 212, s. 9.

See Appendix "B".

> these submissions, but would add that the opt out notices must be drafted in a manner to make it clear that these rights are being extinguished under this settlement.[39] [emphasis added]

53. As a matter of law, precisely the same reasoning applies in this case – not only is the cut-off date more generous that it would have otherwise been through contested litigation but the indirect benefits of the Foundation to the families of the deceased is a countervailing benefit.

H. Claimants' Ability to Retrieve Personal Records

54. Objections were received regarding how complex and protracted the retrieval process of class members' historical records held either with Canada, a Province or provincial Children's Aid Society can be. The concern raised by some objectors was the worry of having to obtain same in order to make a claim for compensation.

55. The parties acknowledged this difficulty during the negotiations. As a result the Settlement does not require class members to personally make inquiries for these records. Recognizing this as a hardship, the Settlement allays all such concerns and the evidence shows that:

> "Speaking of 'records', I am relieved with the Settlement's provision that the burden to obtain records is not upon the Class Member, rather, it is upon the governments. I am relieved because our experience with survivors is that they cannot easily, if ever, get their records from provincial governments of Children's Aid Societies."[40]

56. The benefit of this shifted burden of proof is critically important in the context of this case. There is no question that it has proven incredibly difficult, in some cases, impossible, for survivors to obtain records from either the relevant provincial or federal entities. The Settlement eliminates this need as class members will not bear the burden of locating any official records to prove the fact of permanent wardship or adoption.[41]

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[39] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.), at paras. 82–84, Book of Authorities (Objections), Tab 1.

[40] Affidavit of K. Richard, at para 7, Exhibit "A" to the Affidavit of J. Riddle, Motion Record (Settlement Approval), Tab 7(A), p. 2198.

[41] Affidavit of Dr. Raven Sinclair, at para. 12(e), Exhibit "115" to the Affidavit of D. Rosenfeld, at para. 254, Motion Record (Settlement Approval), Tab 6(115), p. 2178.

> "I have personally experienced the plight of trying to get record proving my status from provincial and federal authorities, and I have experienced, it many, many times in my help of others. This settlement shifts the burden for securing the record onto the governments..."[42]

57. Crown-Indigenous Relations and Northern Affairs Canada ("**CIRNA**") is working to establish a streamlined process to assist class members in obtaining Indian status in an efficient manner.[43] In addition, CINRA has compiled a list of those who were adopted during the class period which will permit Canada to quickly verify whether an individual is a member of the class.[44]

58. The list of persons adopted during the class period was compiled by reviewing Indian Register data on adoptions of people who are registered with Canada as "Indians" pursuant to the definition in the Indian Act. This data was found on both the "Adoption List" and "Adoption Stores List".

59. The Adoption List is a record of registered Indian children adopted by non-Indians. it is a special and protected adoptions register kept separate and apart from the Adoption Stores and Indian Register in order to ensure confidentiality. The Adoptions Stores are a record of adoptions of registered Indians and every person who 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 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."[45]

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

[43] Affidavit of M. Reiher, at para. 23, Motion Record (Settlement Approval), Tab 5, p. 156.

[44] Affidavit of M. Reiher, para. 24, Motion Record (Settlement Approval), Tab 5, pp. 156-157.

[45] Affidavit of M. Reiher, para. 27, Motion Record (Settlement Approval), Tab 5, p. 158.

60. As a result, the process for verification of class members will be streamlined. An expert actuary estimates that nearly 75% of all class members who were adopted can be verified through this process.[46] For the remaining 25% of class members, Canada has contacted the Provinces to arrange for expedited confirmation of their adoption or permanent wardship, which on average will be verified within two weeks of a request.[47]

61. As one of the representative plaintiffs swore on this motion, because the Settlement shifts the burden for securing records onto the governmental entities, "if they have no record, [it] creates a process that assures me no indigenous person who lost their spirit and being will be denied recognition because of no record."[48].

I. Maintaining a Historical Archive of Stories and Experiences

62. Concerns have been raised regarding the lack of any explicit creation of a depository of class members' stories in order to maintain a permanent historical record concerning the Sixties Scoop. However, this is precisely the type of work the Foundation has been charged with.

63. In addition to the claims application process which "provides a venue for claimants, if they wish, to share their story with the Foundation"[49], the Foundation itself has as one of its top priorities – national commemoration.

64. For example, the Canada Revenue Agency application for designated charitable status of the Foundation describes the activities under "Commemoration" as follows:

> The Foundation will serve as a platform through which the suffering of Indigenous people in Canada, including the Sixties Scoop survivors, their families and communities, can be commemorated, including by:
>
> a) providing survivors of the Sixties Scoop and the families with "Telling Our Stories" platforms that promote their own healing and that serve as a gift to future generations;
>
> b) publishing and funding the publication of historic information concerning Indigenous people in Canada;

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[46] Affidavit of M. Reiher, para. 31, Motion Record (Settlement Approval), Tab 5, p. 158.

[47] Affidavit of M. Reiher, para. 32, Motion Record (Settlement Approval), Tab 5, p. 158.

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

[49] Affidavit of M. Blue Waters, at para. 67, Motion Record (Settlement Approval), Tab 4, p. 101.

> c) promoting and disseminating artistic expositions, workshops and other exhibitions and awareness activities that commemorate the Sixties Scoop and its impact on Indigenous people;
>
> d) enabling the creation of appropriate memorials to Sixties Scoop and its impact on Indigenous and non-Indigenous people in Canada.

65. There will be adequate opportunity for any and all survivors to tell their stories, record their stories and maintain a record of same. Importantly, none of these initiatives would be available through contested litigation: "if the matter proceeded to trial, the non-monetary issues would be outside the jurisdiction of the Court" to award.[50]

66. As this Court recently opined in *Merlo v. Canada*, these "features and benefits that extend beyond a strictly monetary compensation scheme and as a result, the Settlement Agreement goes well beyond what the Plaintiffs may have been awarded after a trial".[51] The evidence before this Court describes the value of the Foundation as the following:

> "…an invaluable opportunity for Canada-at-large, and especially indigenous people, for healing and reconciliation and the kind of necessary investigation, study, funding, public awareness projects, commemoration and advocacy that may finally do justice to the harms arising from the Sixties Scoop by ensuring that those harms are not ever repeated. … I am both impressed and relieved by the [Foundation] Table's commitment to laying the groundwork for an active incorporated non-profit charitable foundation composed of an indigenous led Board of Directors and indigenous Executive Director. … I have observed the commitment of the Foundation Table to a working Foundation that is responsive to all indigenous persons, even though they may not be class members, such as Métis, sibling or parents of survivors, as well as non-indigenous persons who were, and continue to also be affected by the Sixties Scoop, such as adopting parents or non-indigenous survivor siblings. I have observed the Table's commitment to creating the Foundation as a matter of urgency so that healing and reconciliation services are available while survivors are alive."[52]

67. As described in the evidence on this motion, by a class member, "the work of the Foundation, the Agreement which is only the beginning of reconciliation, is part of taking us

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[50] *Rideout v. Health Labrador Corp.*, 2007 NLTD 150, at para. 70, Book of Authorities (Objections), Tab 14.

[51] *Merlo v. Canada*, [2017] F.C.J. No. 773, at para. 2, Book of Authorities (Objections), Tab 11.

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

home – to be ourselves – to reclaim our languages – to reclaim our culture – the wronged to continue to grow our essence"[53].

68. There is no legitimate concern to be entertained by this Court regarding the lack of preservation of stories of survivors, in fact quite the opposite – the Foundation will ensure this reality.

J. Mediator as Settlement Approval Judge

69. A concern was raised that Justice Shore, who mediated the proposed settlement, should not be the judge presiding over these motions.

70. First, counsel in the White, Riddle and Charlie Actions and to Canada were formally directed by the Federal Court (Justice Manson) to participate in a Dispute Resolution Conference, to be conducted by Justice Shore.[54] The *Federal Court Rules* specifically envision this situation and permit the case management judge who conducts a Dispute Resolution Conference to preside at the hearing where the parties consent:

> **Case management judge not to preside at hearing**
>
> 391 A case management judge who conducts a dispute resolution conference in an action, application or appeal shall not preside at the hearing thereof unless all parties consent.[55]

71. In this case, all of the parties to the settlement agreement consent to Justice Shore presiding over the hearing for settlement approval.[56] An order confirming same has been signed by Justice Manson.[57]

72. During the Dispute Resolution Conference and at the motion for settlement approval, Justice Shore only had, and will have, one interest, which is to act in the best interests of the class. Moreover, given his mediation of the arms' length negotiations between the parties, he is

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[53] Affidavit of M. Blue Waters, at para. 96, Motion Record (Settlement Approval), Tab 4, p. 110.

[54] Affidavit of D. Rosenfeld, at para. 130, Motion Record (Settlement Approval), Tab 6, p. 204.

[55] *Federal Court Rules,* s. 391, Appendix "A".

[56] Class members are not parties in class proceedings.*Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 3622 (C.A.), Book of Authorities (Objections), Tab 6.

[57] Order of Justice Manson dated May 3, 2018, Supplementary Motion Record (Settlement Approval), Tab 9.

uniquely knowledgeable about the strengths and weaknesses of the parties' cases. In consequence, there no one that is better suited to hear the motion for settlement approval.

K. Consultation

73. Some objectors state that there ought to have been a process whereby they were formally consulted about the Settlement Agreement.

74. While consultation is an important aspect of Crown-Indigenous relations, there is no legal requirement that consultation occur in the context of litigation, and in particular, class proceedings. Courts have repeatedly held that counsel and the representative plaintiff need not conduct a referendum to determine whether class members support the class action.[58] Class counsel must instead take instructions from the representative plaintiffs.

75. Nevertheless, class members in this action have been provided with the opportunity to express their views in a variety of ways. First, through objecting or providing their views on the settlement, class members are entitled to have their voices heard and considered by the court.

76. Second, the Foundation's work will be performed through extensive collaboration with survivors of the Sixties Scoop, including its very constitution of Board members:

> The Foundation will serve as a platform through which the suffering of Indigenous people in Canada, including the Sixties Scoops survivors, their families and communities, can be commemorated, including by:
>
> > a) providing survivors of the Sixties Scoop and their families with “Telling Our Stories” platforms that promote their own healing and that serve as a gift to future generations;
> >
> > b) publishing and funding the publication of historic information concerning Indigenous people in Canada;
> >
> > c) promoting and disseminating artistic expositions, workshops and other exhibitions and awareness activities that commemorate the Sixties Scoop and its impact on Indigenous people;
> >
> > d) enabling the creation of appropriate memorials to the Sixties Scoop and its impact on Indigenous people and non-Indigenous people in Canada.

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[58] See for example *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271, at para. 78, Book of Authorities (Objections), Tab 15. *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248, at para. 72, Book of Authorities (Objections), Tab 10.

77. As a result, there has been and will be substantial consultation with survivors of the Sixties Scoop, notwithstanding that this is not a requirement in class proceedings litigation. Any further or higher duty to consult in this context ought to be disregarded by this Court as a political concern which has no place on a settlement approval motion:

> "The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement."[59] [emphasis added]

78. Any larger duty to consult is therefore outside the ambit of this particular Court's jurisdiction.

PART IV - ORDER SOUGHT

79. The parties respectfully request that this Honourable Court approve the settlement agreement in its entirety, despite any objections, as fair, reasonable and in the best interests of all the class members, without modification or revision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th day of May, 2018.

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[59] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.), at para. 9, Book of Authorities (Objections), Tab 1. *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.), at para. 77, Book of Authorities (Objections), Tab 12.

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PART V - AUTHORITIES

1. *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.)
2. *Bosum v. Canada*, 2006 QCCS 5794
3. *Brown v. Canada (Attorney General)*, 2010 ONSC 3095
4. *Brown v. Canada (Attorney General)*, 2013 ONSC 5637
5. *Dabbs v. Sun Life Assurance Co. of Canada* [1998] O.J. No. 2811 (Gen. Div.)
6. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 3622 (C.A.)
7. *Fontaine v. Canada (Attorney General)*, 2016 BCSC 2218
8. *Fontaine v. Canada*, 2006 NUCJ 24
9. *Fontaine et al. v. Canada et al.*, 2006 YKSC 63
10. *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248
11. *Merlo v. Canada*, [2017] F.C.J. No. 773
12. *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.)
13. *Quatell v. Attorney General of Canada*, 2006 BCSC 1840
14. *Rideout v. Health Labrador Corp.*, 2007 NLTD 150
15. *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271
16. Order of Justice Perell dated August 15, 2016 (*Parsons v. The Canadian Red Cross Society et al.*)

APPENDIX "A" - LEGISLATION

Federal Court Rules

Motions in writing

369 (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

Case management judge not to preside at hearing

391 A case management judge who conducts a dispute resolution conference in an action, application or appeal shall not preside at the hearing thereof unless all parties consent.

APPENDIX "B" - STATUTES

Province	Statutory Citation	Time Limit	Section
Ontario	*Trustee Act,* R.S.O. 1990, c. T.23, s. 38(3)	Two years	38(3) An action under this section shall not be brought after the expiration of two years from the death of the deceased.
Manitoba	*The Trustee Act,* C.C.S.M., c. T-1, 53(2).	Two years	53(2) No action shall be commenced under authority of this section after the expiration of two years from the death of the deceased.
New Brunswick	*Survival of Actions Act,* R.S.N.B. 2011, c. 227, s. 10	Two years	10(4) Subject to subsection (5), proceedings on a cause of action that survives under section 4 or 5 shall not be brought after two years from the later of (a) the day of the death of the person against whom the cause of action subsisted or was deemed to have been subsisting before death, and (b) the day the cause of action is discovered by the person who has the cause of action
Northwest Territories	*Trustee Act,* R.S.N.W.T. 1988, c. T-8, s. 31	Two years	31(3) (3) An action referred to in subsection (1) may not be commenced after two years from the death of the deceased.
Nunavut	*Trustee Act,* R.S.N.W.T. (Nu.) 1988, c. T-8, s. 31	Two years	31(3) (3) An action referred to in subsection (1) may not be commenced after two years from the death of the deceased.