Court File No. T-2169-16

CLASS PROCEEDING

FEDERAL COURT

BETWEEN:

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

Plaintiffs

- and -

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

Defendant

MOTION RECORD
Volume 6 of 6

(Motion for Settlement Approval, returnable Monday May 13, 2019)

May 3, 2019

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I N D E X

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PLAINTIFFS' MEMORANDUM OF FACT AND LAW MOTION FOR SETTLEMENT APPROVAL
Federal Courts Rules, Rule 334.29

OVERVIEW

1. The Federal Indian Day School system is a black mark in Canada's history. For over half a century, Indigenous children were forced to attend schools specifically intended to deny them their heritage and divide them from their families. These children were mocked and belittled for their culture. Many were physically and sexually abused. The only difference between Day and Residential School students is that Day School

children went home at night.

2. This settlement represents long-awaited access to justice for an aging class of some 120,000 people. Indian Day School survivors did not receive compensation through the settlement of the Indian Residential Schools class actions, though the harms they suffered are the same. While no amount of money can redress the wrongs done, this Settlement represents the culmination of years of effort by the representative plaintiffs to seek justice and recognition through the Class Action process. It is extremely unlikely an individual plaintiff could have secured recovery for harms done on their own.

3. This settlement, which makes over $1.47 billion in compensation available to Survivors and their families, was achieved after contentious negotiations with the Defendant. Direct compensation to survivors will be accessible through a simple, paper-based process administered by a capable and well-resourced Claims Administrator and supported by a large, national law firm. The process is designed to be expeditious and avoid the re-traumatization and hardship experienced by Indigenous people navigating the Indian Residential Schools claims process. The Legacy Fund will provide $200 million in funding for commemoration events, healing wellness supports, and language and cultural initiatives. The Plaintiffs say that this settlement is fair and reasonable, and in the best interests of the class. The Plaintiffs ask that this Court approve it.

PART I: FACTS

A. Indian Day Schools

4. Beginning in 1920, Canada established, funded, controlled, and maintained a system of day schools for the compulsory education of Indigenous children across the country (the "**Indian Day Schools**"). Indian Day Schools in the southern portions of the country were referred to as "Federal Indian Day Schools." Those in the North (the Territories and Northern Quebec) were generally referred to as "Federal Day Schools." Attendance at these schools was compulsory, and families were punished for truancy.[1] An estimated 190,000 children attended these schools.[2] It is estimated that 127,000 of these children were living as of October, 2017.[3]

5. Canada funded the schools, paying for, *inter alia*, teachers' salaries and bonuses, the services of truant officers, janitors, and inspectors, the construction and maintenance of school buildings and school supplies.[4] Although many schools were associated with churches of various denominations, the schools were ultimately supervised and administered by Indian Agents who were required to conduct monthly inspections and prepare associated reports.[5]

6. Beginning in the 1960s and carrying on through the following two decades, Canada transferred the funding and control of these schools to the provinces, territories

[1]Affidavit of Dr. Betsy Baldwin, sworn April 23, 2019, Exhibit "C" ("Public History Report"), pp 11, 108, 132, 152, See also pages 27-28, citing subsections 10(2)-(3) of the *Indian Act*, RSC 1920.This policy was explained in a 1945 memorandum to school inspectors and Indian agents, issued by R.A. Hoey, the Acting Director of the Indian Affairs Branch of the Department of Mines and Resources, as follows "Where Indian Day Schools, however, have been established on the Reserve and are readily accessible, attendance of Indian pupils should be rigidly enforced and the refusal of an Indian parent to send his child to school, or the refusal of the child to attend school, should result in the immediate cancellation of the allowance." See Public History Report, pp 28-29.
[2] Affidavit of Peter Gorham, sworn May 23, 201, at para 8(b)(i) ("Gorham Affidavit").
[3] Gorham Affidavit, at para 8(b)(i)(2).
[4] Public History Report, pp 13-14.
[5] Public History Report, p 16, Note that in some cases, this responsibility was delegated to public and separate school inspectors.

and Indigenous governments.[6]

B. Impacts on Class Members

7. The Indian Day Schools had a profoundly negative effect on those who attended them. The representative plaintiffs were exposed to a program of denigration, psychological abuse and physical violence, often in response to any expression of their heritage.[7] That appalling experience has had a deep and lasting impact on the representative plaintiffs, impairing their sense of self-worth and impeding their relationships with others and leading to personal issues with substance abuse to name a few.[8]

C. History of This Action

i. The Manitoba Action

8. Though the harms they suffered were the same, survivors of Indian Day Schools were largely left out of the Indian Residential Schools Settlement ("**IRSS**"). Disappointed that Day School survivors had not received any access to justice, Garry McLean, Ray Mason and Margaret Swan decided to initiate this proceeding.[9] On July 31, 2009, Garry McLean, Margaret Swan and others commenced a class proceeding in Manitoba.[10]

9. For almost seven years, that action remained dormant. Frustrated by the lack

[6] Public History Report, pp 81-83, 102, 115, 141.
[7] Affidavit of Garry McLean, sworn May 25, 2018, at para 13, Affidavit of Margaret Swan, sworn May 1, 2019, at paras 19-28 ("Swan Affidavit"); Affidavit of Angela Elizabeth Simone Sampson, sworn May 1, 2019 at paras 17-35 ("Sampson Affidavit"); Affidavit of Chief Roger Augustine, sworn May 1, 2019, at para 7 ("Augustine Affidavit); Affidavit of Claudette Commanda, sworn May 1, 2019, at paras 7-8 ("Commanda Affidavit).
[8] McLean affidavit, at para 13; Swan Affidavit, at paras 26-38; Sampson affidavit at paras 36-50; Commanda affidavit at paras 17-18
[9] Swan Affidavit, at para 39.
[10] Affidavit of Jeremy Bouchard, sworn May 3, 2019, at para 18 ("Bouchard Affidavit"); McLean Affidavit, at para 14.

of progress, the representative plaintiffs approached Gowling WLG to help move the matter forward.[11] Notices of Change of Lawyer were served and filed with the Manitoba Court in May and June of 2016.[12]

ii. Commencement of the Federal Court Action

10. The statement of claim in this action was issued on December 15, 2016.[13] Class Counsel began work immediately, bringing themselves up to speed on the case, budgeting, gleaning key information from prior analogous litigation, contacting INAC, and meeting with the representative plaintiffs.[14] Class Counsel met in person with Canada's Counsel for the first time on February 10, 2017. Further meetings occurred on April 19, July 17, October 12, October 20, and November 3, 2017.[15] These meetings did not address settlement of the action and were, instead, devoted to fact-gathering.[16]

11. Because much of the historical information was within Canada's knowledge, information about the history of the Indian Day Schools was provided to Class Counsel through the efforts of Public History (an organization that reviewed historical documentation in Canada's possession). Information about the potential class size was furnished by Peter Gorham, an actuary retained by Canada.[17]

12. There was no indication in 2017 or early 2018 that Canada would consent to certification of this action,[18] so the Plaintiffs instructed Class Counsel to press ahead on the assumption that a contested certification hearing would be necessary, which was

[11] McLean Affidavit at para 15; Bouchard Affidavit at para 18; Swan Affidavit at paras 40-41.
[12] Bouchard Affidavit at paras 22-24.
[13] Bouchard affidavit, at para 32.
[14] Bouchard affidavit, at paras 20-34.
[15] Bouchard affidavit, at para 49.
[16] Bouchard Affidavit at para 49.
[17] Bouchard Affidavit, at paras 39-41.
[18] Bouchard affidavit, paras 49-50, 53.

scheduled for October, 2018.

13. It was not until April 26, 2018, after receiving the Plaintiffs' draft Motion for Certification, that counsel to Canada advised Class Counsel that Canada would consent to the certification of this action.[19] This action was certified on consent as a class action on June 21, 2018.[20] Between April and June, further representative plaintiffs were added and Class Counsel filed a further class action claim in Quebec.[21]

D. Consultation with Indigenous Communities

14. Garry MacLean and Ray Mason maintained that the resolution of this matter required community consultation.[22] At the direction of the representative plaintiffs, Class Counsel began a program of meeting with Indigenous organizations nation-wide.[23]

15. Since that time, Class Counsel has travelled across Canada and conducted some 52 separate meetings, the most recent of which occurred in April of this year.[24] These meetings included presenting before the Special Chiefs Assembly at the General Assembly of the Assembly of First Nations.[25]

16. In addition to providing information about this Action, those meetings allowed Class Counsel to better understand the concerns of the community, in particular with respect to the shortcomings of the IRSS. Because each claimant had to come forward to prove the harm they suffered in the IRSS, class members had felt a deep sense

[19] Bouchard affidavit, at para 67.
[20] Bouchard affidavit, at para 69.
[21] Bouchard affidavit at para 68.
[22] Bouchard affidavit, at para 26.
[23] Bouchard affidavit at para 35, 42, 45, 51-51, 73, Exhibit PP - Affidavit of Joshua Shoemaker sworn April 25, 2019, at paras 24-26
[24] Bouchard Affidavit, Exhibit PP - Affidavit of Joshua Shoemaker sworn April 25, 2019, at paras 24-26.
[25] Bouchard Affidavit, at para 73.

of traumatization and a renewed sense of exploitation and abuse.[26] This settlement is designed to avoid the pitfalls of the IRSS.

E. Settlement Negotiations

17. Settlement discussions began in earnest on August 9, 2018. These discussions were conducted at arm's length and addressed a broad range of topics including:

i. identifying the Indian Day Schools covered by the Settlement;

ii. setting out the amount of compensation available

iii. establishing levels of compensation;

iv. availability of claims for estates;

v. the establishment of a legacy fund recognizing the Family Class;

vi. the claims process, and the importance of simplicity, privacy, and avoidance of re-traumatization;

vii. settlement administration; and

viii. a notice plan.[27]

18. Class Counsel met with Canada's counsel on seventeen separate days between August and December of 2018, when an agreement in principle was announced. The issues discussed at those meetings were complex and the negotiation was difficult and demanding, with both sides accepting compromises in order to reach an agreement.[28]

[26] Bouchard affidavit at para 36.
[27] Bouchard Affidavit, at para 76.
[28] Bouchard Affidavit, at paras 77, 81-82, 99-109.

F. The Settlement and Claims Process

19. Compensation is available to those who experienced harm associated with attending a Federal Indian Day School listed in Schedule K to the Settlement Agreement, within the Class Period.[29] The Class Period runs from January 1, 1920 until the date of closure, or of relinquishment of control by Canada, of any particular day school or, if not transferred from Canada, the date on which the written offer of transfer by Canada was not accepted by the First Nation or Indigenous government.[30] Estates of persons who died on or after July 31, 2007 are also eligible to make a claim.[31]

i. The Development of Schedule K

20. Schedule K to the Settlement Agreement is a non-exhaustive list of 714 Federal Indian Day Schools and Federal Day Schools. Schedule K was developed in two steps. First, the Department of Crown-Indigenous Relations and Northern Affairs ("**CIRNA**") compiled an initial list of schools following a comprehensive review of historic documents in Canada's possession. Second, CIRNA retained five independent research firms to further research and draft reports on the history of each school on that initial list. As research progressed, this list was updated.[32]

21. Schedule K is not a closed list. The Claims Administrator is to provide the Exceptions Committee with monthly reports on, *inter alia*, applications deemed ineligible by reason of the Claimant attending a school not listed on Schedule K.[33] The Exceptions Committee considers and determines those applications. Should the

[29] Settlement Agreement, cl 1.01 "Federal Indian Day Schools" or "Indian Day Schools".
[30] Settlement Agreement, cl 1.01 "Class Period".
[31] Settlement Agreement, cl 8.01.
[32] Bouchard Affidavit, at paras. 79, 141.
[33] Settlement Agreement, cl 10.01(e)(ii).

Exceptions Committee determine that a particular school was omitted from Schedule K the amendment mechanism provided for in section 14.02 of the Settlement Agreement can be used to update Schedule K.

ii. The Claims Process

22. The Settlement Agreement specifically stipulates that the Claims Process "is intended to expeditious, cost effective, user-friendly and culturally sensitive".[34] Claimants are presumed to be acting honestly and in good faith absent any reasonable grounds to the contrary.[35] Persons reviewing a claim are required to "draw all reasonable and favourable inferences that can be drawn in favour of the Claimant" and to "resolve any doubt as to whether a Claim has been established in favour of the Claimant."[36]

23. Available compensation is categorized by level of harm suffered, ranging from levels 1 to 5 (with compensation ranging from $10,000 to $200,000). Level 5 represents the most severe harms. Canada will provide $1.27 billion (and up to $1.4 billion) for the purpose paying Level 1 compensation.[37] In addition, an unlimited amount is available for Level 2 to 5 compensation.[38]

24. The process will proceed as follows:

i. Using a simple claims form, the Claimants self-identify a single level of compensation. Claimants attach whatever documents they are able to provide to support their claim. If they cannot find those documents, the Settlement

[34] Settlement Agreement, cl 9.03(1).
[35] Settlement Agreement, cl 9.03(2).
[36] Settlement Agreement, cl 9.03(2).
[37] Settlement Agreement, cl 5.01, 5.03.
[38] Settlement Agreement, cl 5.05; Bouchard Affidavit, at para 190.

Agreement makes provision for a witnessed declaration or sworn statement in the alternative. It is not necessary for any witness to corroborate the facts themselves, or review the information the Claimant is providing. The witness need only witness the signature on a separate piece of paper; the witness will not see the contents of the sworn statement.

ii. The Claims Administrator reviews the claim. If there are issues with respect to the completeness of the claim form, the Claimant will be notified.

iii. The Claims Administrator will either approve compensation at the level identified by the claimant (and process the claim for payment) or notify them that another level (either lower or higher) is appropriate.

iv. If notified that a higher level of compensation is appropriate, the Claimant may either pursue that higher level of compensation (which may necessitate further forms of corroborating evidence) or elect to accept the level they initially identified.

v. If notified that a lower level of compensation is available, Claimants may elect to accept that lower level of compensation, or seek to pursue the review process described immediately below.[39]

25. The review process involves reconsideration of the claims by the Claims Administrator. If that decision is not favourable to the Claimant, he or she may elect to have the Claim reviewed by the Third Party Assessor.[40]

[39] Settlement Agreement, Sched B – Draft Claims Process, at ss 1-4, 13-15.
[40] Settlement Agreement, Sched B – Draft Claims Process, at 3-4.

26. In the event of another unfavourable decision, the Claimant may appeal to the Exceptions Committee, whose decision on the claim is final. The Exceptions Committee is composed of one Survivor Class member, one member of Class Counsel who participated in negotiating the Settlement Agreement, one member of Canada's counsel who also so participated, and another individual agreed to by the parties.[41]

27. Canada will have access to all Level 2-5 claims and may provide the Claims Administrator with further information regarding eligibility with respect to these claims. However, Canada is limited in the number of cases for which it can provide further information. As set out in the proposed Claims Process, the limit varies by level, ranging from 5% of claims at Level 2 to 100% at Level 5.[42]

28. Class Counsel will be available to class members if they require assistance, at no cost to them. In addition to Gowling WLG's seven offices across Canada, Class Counsel have reached out to several additional firms to complement these offices and provide access to legal assistance in jurisdictions where Gowling WLG does not have an office.[43] The Claims Process will be implemented by Class Counsel and the Claims Administrator in partnership, with information sessions to be held nation-wide.[44]

iii. The Legacy Fund

29. Importantly, in addition to monetary compensation, Canada has agreed to pay $200 million towards the creation of legacy projects for commemoration healing and the

[41] Settlement Agreement, Sched B – Draft Claims Process.
[42] Settlement Agreement, Sched B – Draft Claims Process, ss 11-12.
[43] Bouchard affidavit, at paras 3-4.
[44] Bouchard affidavit, at paras 130-135.

promotion and preservation of Indigenous languages culture.[45]

30. These will be carried out through grants made by the McLean Day Schools Settlement Corporation (the "**Legacy Fund**").[46] The Legacy Fund will also be able to host national and community commemoration events, and provide resources for public education.[47] The Legacy Fund will have an Advisory Committee comprised of Indigenous survivors and their families, who will assist the Legacy Fund's Board in assessing applications for grants and with project implementation.[48]

G. Notice

31. This Court approved the Notice Plan on March 14, 2019. Since then, Counsel has established a dedicated website that provides information and essential documents to interested class members. Class Counsel, working with Argyle PR, have taken a number of other steps to inform the class in compliance with the Notice Plan.[49] These steps have been more substantial and time consuming than expected as a result of the dissemination of misleading and incorrect information to Class Members by various groups and individuals.[50]

PART II: ISSUES

32. The issues to be decided on this motion are: (1) should this Settlement be approved as fair and reasonable; and (2) should Class Counsel's fees be approved? The

[45] Settlement Agreement, cl 3.01; Bouchard Affidavit, at para 140; Affidavit of Neil McCormick, sworn May 2, 2019, at para 6(a) "McCormick Affidavit"
[46] McCormick Affidavit, at para 6(g).
[47] McCormick Affidavit, at para 6(g).
[48] McCormick Affidavit, at para 6(h).
[49] Bouchard Affidavit, Exhibit PP, Affidavit of Joshua Shoemaker sworn April 25, 2019. These efforts have included a media campaign combined with attempts to deliver, by various means, Short and Long Form Notices to the approximately 45,000 class members registered with Gowling WLG as well as to hundreds of regional and local Indigenous offices, friendship centres, tribal councils and correctional facilities.
[50] Affidavit of Joshua Ryan Shoemaker, sworn May 3, 2019, at para. 2-3.

second issue is dealt with in a separate factum.

PART III: SUBMISSIONS

A. The Test for Settlement Approval

33. Rule 334.29 of the Federal Court Rules governs settlement approval:

> **334.29(1)** Approval – A class proceeding may be settled only with the approval of a judge.
>
> **(2)** Binding Effect – On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding

34. The test for approval is well-established: whether the settlement is fair and reasonable and in the best interests of the class as a whole.[51] This Court recently re-iterated the factors that may be taken into account when assessing the fairness and reasonableness of a class action settlement:

i. The likelihood of recovery or likelihood of success;

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

iii. Terms and conditions of the proposed settlement;

iv. The future expense and likely duration of litigation;

v. The recommendation of neutral parties, if any;

vi. The number of objectors and nature of objections;

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

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

ix. The degree and nature of communications by counsel and the representative

[51] *Merlo v Canada*, 2017 FC 533, at para 16, *Toth v Canada*, 2019 FC 125, at para 37.

plaintiffs with class members during the litigation; and

x. The recommendation and experience of counsel.[52]

35. These factors are guidelines, some may have more weight than others in a given case, and some may not be relevant.[53]

B. Principles Governing Settlement Approval

36. A class action settlement is not required to be perfect, but fall within a range of reasonableness. As this Court held in *Chateauneuf*:

> **The Court with a class action settlement before it does not expect perfection, but rather that the settlement be reasonable, a good compromise between the two parties.** The purpose of a settlement is to avoid the risks of a trial. Even if it is not perfect, the settlement may be in the best interests of those affected by it, particularly when the risks and the costs of a trial are considered. It is always necessary to consider that a proposed settlement represents the parties' desire to settle the matter out of court without any admission by either party regarding the facts or regarding the law.[54] [emphasis added]

37. Reasonableness does not dictate a single possible outcome. Rather, "reasonableness allows for a range of possible resolutions".[55] Similarly, a settlement does not have to meet the demands of particular class members in order to be reasonable.[56]

38. The Court's role is not to modify or alter a settlement. The Court "cannot tinker with its terms and conditions or direct the parties to revisit certain aspects of the

[52] *R v Toth*, 2019 FC 125, at para 38.
[53] *R v Toth*, 2019 FC 125, at para 39.
[54] *Châteauneuf v R*, 2006 FC 286, at para 7.
[55] *Dabbs v Sun Life Assurance Co of Canada*, 1998 CarswellOnt 2758 (Gen Div), at para 30; aff'd.
[56] *Condon v Canada*, 20187 FC 522, at para 18.

agreement" because:[57]

> [i]t is not open to the reviewing Court to rewrite the substantive terms of a proposed settlement nor should the interests of individual class members be assessed in isolation from the interests of the entire class.[58]

39. An arms-length settlement negotiated in good faith by experienced counsel should not be easily rejected:

> The parties are, after all, best placed to assess the risks and costs (financial and human) associated with taking complex class litigation to its conclusion. The rejection of a multi-faceted settlement like the one negotiated here also carries the risk that the process of negotiation will unravel and the spirit of compromise will be lost.[59]

40. Settlements that are recommended by reputable counsel, such as the one at issue here, are "presumed to be fair".[60] As this Court held in *Riddle v. Canada*, the Court must consider the serious impact of collapsing the settlement agreement and exposing an aging class to further uncertainty and delay:

> In cases such as this, "[...] a Court must ask itself whether it is worth risking the unravelling of the agreement and leaving nearly 80,000 Aboriginal people and their families to pursue the remedies available to them prior to the agreement being signed" According to the evidence, it is undeniable that "bringing closure is critical" for the survivors of the Sixties Scoop.[61] [citations omitted]

C. Terms and Conditions of the Proposed Settlement Agreement

41. This Settlement is fair and reasonable. It redresses serious historical wrongs

[57] *Toth v Canada*, 2019 FC 125, at para 83.
[58] *Manuge v Canada*, 2013 FC 341, at para 6.
[59] *Manuge v Canada*, 2013 FC 341, at para 6.
[60] *Riddle v Canada*, 2018 FC 641, at para 33.
[61] *Riddle v Canada*, 2018 Fc 641, at para 33.

by providing up to $1.4 billion in compensation to anyone who attended one of the 700+ Federal Indian Day Schools and experienced Level 1 harm. Unlimited compensation is available for those who suffered greater levels of harm. The settlement includes, but is not limited to, First Nations, Inuit, and Metis peoples. This amount does not include any amount paid to Class Counsel for its legal fees and disbursements.

42. This Settlement is vastly preferable to the inevitable delays, costs, inherent risks, and possibility of re-traumatization associated with continued litigation. It includes non-monetary compensation through the Legacy Fund that this Court could not order. It is unlikely that class member could have achieved this result individually due to the time and expense that would have been involved.[62]

43. Compensation will be available through a simple, expedient and paper-based claims process. Non-monetary compensation is available through Legacy Fund projects intended to promote healing, reconciliation, and language and cultural services.

44. This non-monetary compensation is significant to class members, as the representative plaintiffs make clear in their affidavits. Angela Sampson spoke in her affidavit of how the benefits offered by the non-monetary compensation in this settlement are "desperately needed" at the individual and community level.[63] As Claudette Commanda deposed, "[c]ultural supports are foundational to who we are as Indigenous peoples."[64]

45. As discussed above, this settlement builds upon, and seeks to avoid, the negative aspects

[62] Swan Affidavit, at para 58; Sampson Affidavit, at para 74.
[63] Sampson Affidavit, at para 65.
[64] Commanda Affidavit, at para 22.

of the IRSS. Margaret Swan witnessed the re-traumatization occasioned by that compensation process and spoke of it in her affidavit:

> The IAP forced Indian Residential School Survivors to relive their darkest and most painful experiences in a hostile and unfamiliar environment. The IAP treated survivors with suspicion, indifference, and intolerance. Some even saw little to no compensation having undergone IAP.[65]

46. Based on the instructions of the representative plaintiffs, and the community consultation efforts described above, the Settlement has been crafted to:

i. provide significant compensation to the broadest class of people (including the estates of those persons who died during the suspension of the limitation period);

ii. create a simple, paper-based process to make claims for compensation, based on a straightforward categorization of harms and associated compensation (the "**Harms Grid**");

iii. ensure the claims process is overseen by an experienced and well-resourced claims administrator;

iv. ensure that claims will be reviewed based on the overarching assumption that class members are telling the truth and acting in good faith;

v. avoid re-traumatization of class members through the claims process by making it unnecessary to hold individual hearings in order to receive compensation;

[65] Swan Affidavit, at para 52.

vi. ensure that the vast majority of class members can complete the claims process without paying fees to third party lawyers or consultants;

vii. provide expedient compensation to aging class members;

viii. ensure non-monetary compensation is available to Family Class members (and others) for reconciliation, healing and education purposes; and

ix. confirm that class members' compensation will not be taxable and would not impair benefits already received.

47. All of the above factors favour this Court finding the Settlement Agreement to be fair and reasonable.

48. Critically, the Settlement Agreement explicitly provides that the Claims Administrator's guiding assumption must be that Claimants are honest and acting in good faith. Wherever possible, the Claims Administrator is required to draw all reasonable and favourable inferences that can be drawn in favour of the Claimant and accord Claimants the benefit of the doubt.

49. There is no requirement that any Claimant appear at a hearing, be cross-examined, or tell their story in a public forum. This is a significant factor in favour of this settlement; as this Court recognized in *Riddle* in analogous circumstances:

> As mentioned above, the Settlement presents a paper-based claims process. The most important feature of the Settlement allows class members to complete their forms confidentially without fear of having to testify or appear in a court in lengthy procedures. The evidence reveals that class members are often

> disinclined to share their tragic experiences publicly to avoid any embarrassment and humiliation.[66]

50. The same evidence exists here. For that reason, the paper-based, confidential nature of the claims process is important; representing a "non-adversarial claims process with numerous safeguards to protect the privacy of claimants."[67] Survivors will not be put on trial to defend their story. Multiple representative plaintiffs spoke of the significance of this factor in their affidavits.[68]

51. Additionally, the compensation provided reflects damages associated with the loss of culture, identity, language, and family unity that class members experienced. No court has yet awarded damages for such harms. This Court found in *Riddle* that such a case would "undoubtedly pose a significant litigation risk".[69]

D. Likelihood of Success or Recovery with Continued Litigation

52. There existed, from the outset of this litigation, a number of risks to the potential for success and recovery for class members. This settlement avoids those risks, to the benefit of class members.

i. Limitation Period Risks

53. This class action relates to events that that began nearly a century ago. As a result, many claimants faced the risk that provincial and territorial ultimate limitation periods would bar their claim. Depending on province or territory, the statutory ultimate limitation period ranges from six to thirty years.[70] This concern also applies estate

[66] *Riddle v Canada*, 2018 FC 641, at para 36.
[67] *Merlo v Canada*, 2017 FC 533, at para 27.
[68] Commanda affidavit a para 27; Swan affidavit at paras 54-56; Sampson affidavit at paras 63-64;
[69] *Riddle v Canada*, 2018 FC 641, at para 47.
[70] see eg: Alberta: 10 years, *Limitations Act*, RSA 2000, c L-12, s 3(1)(b).
Saskatchewan: 15 years, *Limitations Act*, SS 2004, c L-16.1, s 7(1).

claims, given provincial estate limitation periods may have expired.[71]

54. Applying a six year limitation period, for example, it is possible that a court would have held that the vast majority (if not all) of the claims in this action is time-barred, given the historical nature of the events at issue. Even the application of a thirty year ultimate limitation period to this action could operate to bar the claims of any Survivor Class member who reached the age of majority before December, 1976. Given the majority of the Indian Day Schools were closed or were no longer operated by Canada by this date, this would substantially reduce the number of Class Members that could be eligible for compensation.

55. Ultimate limitation periods have previously been successfully advanced to bar claims related to historical abuse at educational institutions.[72] In *P.(W.) v. Alberta*, the Alberta Court of Appeal upheld the application of Alberta's ultimate limitation period to bar a claim for abuse suffered by Students at the Alberta School for the Deaf.[73]

56. In addition to the risks associated with the limitation period was the risk of further delay and re-traumatization, should a court have found that individual hearings would be necessary with respect to any arguments that the limitation period had not expired or had been suspended. Prior jurisprudence suggests that courts are unlikely to make common findings with respect to limitations issues.[74]

Manitoba: 30 years, *Limitation of Actions Act*, CCSM, c. L150, s 14(4).
Ontario: 15 years, *Limitations Act, 2002*, SO.2002, c. 24, Sched B, s 15(2).
Northwest Territories: 6 years, *Limitation of Actions Act*, RSNWT 1988, c L-8, s 2(1)(j).

[71] see eg Ontario's statute, the *Trustee Act*, SO 1990, c T 23, s 38(2).

[72] *P(w) v Alberta*, 2014 ABCA 404.

[73] *P(w) v Alberta*, 2014 ABCA 404.

[74] see eg *Smith v Inco Limited*, 2011 ONCA 628, at paras. 164-165 leave to the SCC ref'd: if "all class members were not aware of and ought not to have been aware of the material facts, then the application of the Limitations Act to the claims is an individual and not a common issue."

57. As against these substantial risks, this Settlement Agreement provides certainty and a class period that is as expansive as possible, beginning in 1920 and extending until the closure (or relinquishment of control by Canada) of any given Indian Day School. This allows virtually any living member of the Survivor Class to make a claim; a result that would have been in doubt should this matter have gone to trial.

ii. Cause of Action and Duty of Care

58. The law is still unsettled as to whether or not Canada owes a fiduciary duty to persons similarly situated to the class members in this action. The Crown does not owe fiduciary duties "at large but in relation to specific Indian interests."[75] To so establish, it would have been necessary to show that Canada had taken sufficient discretionary control over a particular aboriginal interest or that Canada had undertaken to act in the best interests of the class.[76]

59. However, recent jurisprudence suggests that such a duty may be a challenge to establish at trial. In *Brown v. Canada*, the class pleaded that Canada owed a fiduciary duty to Indigenous persons caught up in the "sixties scoop" – a program that removed Indigenous children from their families and placed them in non-Indigenous homes. The Court found there was no fiduciary duty on summary judgment, holding:

> Even though [the Federal Crown] stands in a fiduciary relationship with Canada's aboriginal peoples, 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.[77]

[75] *Wewaykum Indian Band v Canada*, 2002 SCC 79, at para 81.
[76] *Wewaykum Indian Band v Canada*, 2002 SCC 79, at para 83; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, at para 27.
[77] *Brown v Canada (Attorney General)*, 2013 ONSC 5637, at para 36.

60. The facts in this case are different, and the finding in *Brown* does not negate the reality, recognized by the Supreme Court, that the Crown has "an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation".[78] Nevertheless, the fiduciary duty claim was not without risk.

61. The claims of the Family Class also faced the challenge of establishing that Canada owed them a duty of care for the purposes of its negligence claim.

62. Canada has not been found to owe a duty of care to persons like the Family Class. As a result, Family Class members would have to establish (i) sufficient foreseeability and proximity to ground a *prima facie* duty and (ii) that policy concerns did not negate that *prima facie* duty.[79]

63. Because Family Class members did not attend an Indian Day School, by definition, they faced the risk that the Court would find that their relationship with Canada was insufficiently proximate for the purposes of the modified *Anns* test set out above. Even if a *prima facie* duty were found, there was a risk that a court could find that Canada's actions with respect to the Indian Day Schools were policy decisions that did not attract liability.[80]

iii. Aggregate Damages

64. Even if a duty of care were established, all class members would still need to prove that Canada caused damages that they claimed: that is, on a balance of probabilities that “but for” the defendant’s negligent act, the injury would not have occurred.[81]

[78] *Mitchell v Minister of National Revenue*, 2001 SCC 33, at para 9.
[79] *Cooper v Hobart*, 2001 SCC 79, at paras 31-39.
[80] *Cooper v Hobart*, 2001 SCC 79, at paras 52.
[81] *Clements v Clements*, 2012 SCC 32, at para 8.

Canada would no doubt argue that there was an insufficient causal link between the harms suffered by class members and any breach of a duty of care. This argument poses particular risk to Family Class members, many of whom will not have been alive during the time that the breaches of duty occurred with respect to Survivor Class members.

65. More significantly for this aging class, however, is the risk that this determination would not be possible on a class-wide basis, making an aggregate damages award impossible. Aggregate damages are not available where a judge determines that "the defendant's liability to individual class members cannot be determined without proof by those individual class members".[82] The Ontario Court of Appeal has held that personal injury claims inherently requires individual proof of harm.[83]

66. Assessing causation in common poses particular challenges. Where, as here, each individual class member may have suffered a different type of harm as a result of being forced to attend Indian Day Schools, there is a risk that a court would require each of the approximately 120,000 Class Members to individually prove their damages. Not only would this process further delay recovery, it would require class members to re-live their prior traumatic experiences in an adversarial forum. Individual hearings to establish the appropriate level of compensation were an overwhelmingly negative experience for the class members in the IRSS.

67. The Settlement Agreement attenuates this risk by creating a simple, paper-based system of claiming compensation that is intended to ensure expedient payment with minimal opportunity for re-traumatization. While Family Class members are not

[82] *Federal Court Rules*, rule 334.27.
[83] *Healey v Lakeridge Health Corp et al*, 2011 ONCA 55, at paras 70, 71.

eligible for monetary compensation, they will benefit from the Legacy Fund, which is intended to promote healing, reconciliation, and cultural education to all class members. This relief would not have otherwise been available - a court is not able to order Canada to create the Legacy Fund.

E. The future expense and likely duration of litigation

68. As already noted above, the delay occasioned by continued litigation is particularly problematic in the context of a case involving historical wrongs. The Survivor Class is of advanced age, and it is estimated that approximately 2,000 Class Members pass away each year. Indeed, Mr. McLean, whose leadership, zeal, and commitment were essential to help bring this case to this stage, unfortunately passed away in February of this year, unable to see the fruits of his work to achieve redress for survivors.

69. In such a context, the expedient resolution offered by this Settlement has particular importance, as this Court recognized in *Riddle*:

> Given the survivors' advanced ages, it becomes highly substantial to carefully consider this factor under the circumstances (McKillop, above, at para 28). "[I]t is apparent that the time and resources committed to the negotiations by the Class Counsel meant that the risk was increasing rather than decreasing as the negotiations continued" (Parsons v. Canadian Red Cross Society, [2000] O.J. No. 2374 (Ont. S.C.J.) at paras 37-38).[84]

70. As representative plaintiff Margaret Swan deposed in her affidavit:

> I am grateful that the Settlement Agreement provides for estate claims, but each Class Member who passes away before the settlement is implemented will not see justice in their

[84] *Riddle v Canada*, 2018 FC 641, at para 41.

> lifetime. I appreciate that the settlement avoids the long delays that litigation would have posed.[85]

71. If this litigation continues from the date of the last day of this hearing, it is estimated that individual damages hearings would not begin until at least after 2024.[86]

72. Such a delay would be a disastrous result for this class, which has been waiting for decades to achieve redress for the harms they suffered. By contrast, this Settlement offers an opportunity to claim and receive compensation in short order, while simultaneously making provision for long-term healing and reconciliation through the McLean Corporation. This is a factor that should be given great weight by this Court because, in circumstances like these, it is "in the interests of the class members to have timely and prompt payment".[87]

F. Class Counsel's Recommendation

73. Class Counsel recommends this Settlement. As noted above, settlements negotiated at arm's length and recommended by experienced counsel are presumed to be fair.

74. Class Counsel in this case are highly experienced. For the past two decades Gowling WLG lawyers have played a leading role in many of the most significant consumer, health, and public class action in Canada.[88] In addition, Gowling WLG has significant Indigenous Law experience and has been advancing Indigenous rights for decades.[89]

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[85] Swan Affidavit, at para 52.
[86] Bouchard Affidavit, at para 202.
[87] *McCarthy v Canadian Red Cross Society*, [2001] OJ No 2474 (SCJ), at para. 18.
[88] Bouchard Affidavit, at para 5.
[89] Bouchard Affidavit, at paras 6-9.

75. As noted above, this settlement follows significant efforts by Class Counsel to consult with Indigenous communities across the country. Class Counsel was alive not only to litigation risk but also to the needs and concerns of the class. This settlement mitigates those risks and addresses those needs to the greatest extent possible.

G. Degree and Nature of Communications with Class Members

76. As discussed above, Class Counsel has made significant efforts to consult with a variety of First Nations and Indigenous organizations with respect to this Settlement. This effort, as described in more detail in the affidavits of Jeremy Bouchard and Josh Shoemaker, involved (and was facilitated) by the representative plaintiffs.

77. This consultation process added a great deal of value to this settlement and helped create a claims process that will be culturally sensitive, expedient and as straightforward as possible. Engagement with Indigenous communities across Canada will continue if this settlement agreement is approved.

H. Third Party Support for the Settlement

78. As detailed in the Affidavit of Joshua Shoemaker sworn May 3, 2019, a variety of Indigenous organizations have expressed support for the Settlement, including:

- Assembly of First Nations
- Special Chiefs Assembly of the Assembly of First Nations
- Atlantic Policy Congress of First Nations, Chiefs Secretariat
- Enoch Tribal Administration
- Cold Lake First Nation
- Keeseekoose First Nation
- Mississaugas of the New Credit
- Mohawk Council of Kanesatake

First Nation

- Neqotkuk Maliseet First Nation
- Peguis First Nation
- Penelakut Tribe
- Peepeekisis Cree Nation No.81
- Piikani Nation Chief and Council
- Frog Lake First Nation

I. Objections

79. As of May 2, 2019, Class Counsel has received 448 objections. This represents approximately .035% of the estimated total class.[90]

80. First, when considering objections, it is important to recall that Class Counsel are not required to present a settlement that "meets the demands of a particular class member."[91] As this Court recently held in *Toth*:

> The Court's role is to determine whether the proposed Settlement is 'fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member'[92]

As noted above, Class Counsel is of the view that the settlement presents a "good compromise" between the parties.[93]

81. Further, it must be borne in mind that objectors to the settlement may opt out:

> 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 a view to

[90] Affidavit of Peter Gorham, sworn May 23, 2018, at para 8.
[91] *Condon v Canada*, 2018 FC 522, at para 17.
[92] *Toth v Canada*, 2019 FCC 125, at para 80, citing *Dabbs v Sun Life Assurance Co of Canada*, 1998 CarswellOnt 5823 (Gen Div), at para 11.
[93] *Chateauneuf v R*, 2006 FC 286, at para 7.

> obtaining settlement or judgment that is tailored more to the individual's circumstances.[94]

82. Here, the Survivor Class is large, and dissent and objection is to be expected. By definition, a compromise will always leave some parties dissatisfied with the result; this has been recognized as inherent to class action settlements:

> 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.[95]

83. However, as noted above, it is not the Court's role to send the parties back to the negotiating table to arrive at what the Court feels is the optimal agreement. Instead, the Court's role is to determine whether the settlement at issue falls within a range of reasonableness. As is evident from Brenner C.J.'s finding excerpted above, Courts recognize that opting out offers a remedy to those people who are dissatisfied with a settlement that is otherwise fair and reasonable.[96]

84. The objection that this settlement does not provide for Claimants to retain individual counsel is, in fact, the identification of a benefit. This settlement is designed so that claimants do not have to pay any lawyers to assist them with the claims process. Gowling WLG will be available to assist them free of charge. To the extent that a

[94] *Parsons v Canadian Red Cross Society*, 1999 CarswellONT 2932, at para. 79.
[95] *Quatell v Attorney General of Canada*, 2006 BCSC 1840, at para 7.
[96] *Hunt v Mezentco Solutions Inc*, 2017 ONSC 2140, at para. 164; *Dabbs v. Sun Life Assurance Co. of Canada*, 1998 CarswellOnt 3539 (CA).

claimant desires individual counsel, this is possible, but subject to court oversight to safeguard the integrity of the process. Regardless, in the event that a class member remains opposed to the settlement, the individual may opt out of the Class and pursue their own remedies.

PART IV: ORDER SOUGHT

85. The Plaintiffs request that this court make an Order:

i. an order approving the Settlement pursuant to Rule 334.29(1) of the *Federal Court Rules;* and dismissing the claims of Class Members against the Defendant, without costs and with prejudice;

ii. approving the form, content and manner of distribution of the proposed notice of settlement approval and opt of forms and the opt out deadline;

iii. approving the form of the proposed settlement claims compensation form and appointing Deloitte LLP as the claims administrator of the claims process pursuant to the Settlement; and

iv. stipulating that, if the Settlement is not approved, the parties are all restored, without prejudice, to their respective positions as such existed in July 2018 prior to commencement of the negotiations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on this 3rd day of May, 2019.

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PART V: LIST OF AUTHORITIES

1. *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24
2. *Brown v Canada (Attorney General)*, 2013 ONSC 5637
3. *Châteauneuf v R*, 2006 FC 286
4. *Clements v Clements*, 2012 SCC 32
5. *Condon v Canada*, 2018 FC 522
6. *Cooper v Hobart*, 2001 SCC 79
7. *Dabbs v Sun Life Assurance Co of Canada*, 1998 CarswellOnt 2758 (Gen Div)
8. *Healey v Lakeridge Health Corp et al*, 2011 ONCA 55
9. *Hunt v Mezentco Solutions Inc*, 2017 ONSC 2140
10. *Manuge v Canada*, 2013 FC 341
11. *McCarthy v Canadian Red Cross Society*, [2001] OJ No 2474 (SCJ)
12. *Merlo v Canada*, 2017 FC 533
13. *Mitchell v Minister of National Revenue*, 2001 SCC 33
14. *Parsons v Canadian Red Cross Society*, 1999 CarswellONT 2932
15. *P(w) v Alberta*, 2014 ABCA 404.
16. *Quatell v Attorney General of Canada*, 2006 BCSC 1840
17. *Riddle v Canada*, 2018 FC 641
18. *Smith v Inco Limited*, 2011 ONCA 628
19. *Toth v Canada*, 2019 FC 125
20. *Wewaykum Indian Band v Canada*, 2002 SCC 79

Appendix A – Provisions of Statutes or Regulations

Federal Court Rules (SOR/98-106)

Defendant's liability

334.27 In the case of an action, if, after determining common questions of law or fact in favour of a class or subclass, a judge determines that the defendant's liability to individual class members cannot be determined without proof by those individual class members, rule 334.26 applies to the determination of the defendant's liability to those class members.

Settlements

334.29(1) Approval – A class proceeding may be settled only with the approval of a judge.

Binding effect

(2) On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding