Federal Court Cour fédérale

Date: 20240530

Docket: T-1417-18

Citation: 2024 FC 824

Ottawa, Ontario, May 30, 2024

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

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

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

REASONS FOR APPROVAL OF THE SETTLEMENT IN THE MATTER OF THE INDIAN BOARDING HOME PROGRAM

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[1] On December 11, 2023, I approved the settlement [Settlement Agreement] reached in the underlying class proceeding, with reasons to follow [Approval Order]; the following are my reasons.

I. Overview

[2] Beginning in 1951, as part of its historic policies and programs related to Indigenous child education and care, the federal government [Canada] set up and administered a program in which Indigenous students as young as 5 years old were removed from their parents, families and Indigenous communities and placed with families they did not know [boarding home families], often non-Indigenous families living far from the students' Indigenous communities, for the purpose of attending mostly elementary and high school, in exchange for which the boarding

home families received compensation from Canada [Indian Boarding Home Program]. Over time, although it cannot be determined precisely when for specific bands, the responsibility for Indigenous education programs as a whole and the placement of students were transferred from Canada to Indigenous governing bodies, including local Indigenous governments; however, in the eyes of those who had already been removed from their communities [boarding home survivors], their family members and communities, the damage had already been done.

[3] Overall, it is estimated that approximately 40,000 children were taken from their communities, many of whom later reported to have endured considerable hardship in the form of physical, sexual and verbal abuse, humiliation, belittlement, starvation, discrimination and mistreatment at the hands of their boarding home families. In addition, many survivors reported being forbidden to speak their Indigenous language or practise their native culture. Since these children were removed from their homes at a young age, many lament the limited contact, if any, with their families, culture, heritage and communities. These children, now adults, recount stories of isolation, and many who returned to their family home years later report no longer being able to connect meaningfully with their community; their stories speak of an entire generation of Indigenous children being severely damaged—physically, emotionally and psychologically—and losing their culture, language and connection to family and community. For the estimated 33,000 Class Members, the underlying class action addresses the trauma to which their stories bear witness and seeks compensation for damages suffered as a result of the Indian Boarding Home Program.

[4] The Settlement Agreement provides for compensation for two classes of individuals: the Primary Class covers individuals who were placed by Canada in private homes for the purpose of attending school up to but excluding post-secondary education, and it includes any person who participated in the Indian Boarding Home Program from September 1, 1951, to June 30, 1992 [class period]. Students placed after June 30, 1992, may still be considered class members if they are able to establish that they were placed prior to the date on which responsibility was transferred from Canada to an Indigenous governing body. From what I understand, the start date of the class period is the year of the first documented payment by Canada for the room and board of a student living in a private home in order to attend school, coinciding with amendments to the *Indian Act*, SC 1951, c 29, which empowered the Minister of the Department of Indian Affairs at the time to enter into such agreements; it would seem that Canada had little involvement with student placement as part of the Indian Boarding Home Program after the 1991–92 school year.

[5] The Family Class covers individuals who have a derivative claim under family law legislation arising from a family relationship with a Primary Class member, who may receive compensation through the legacy measures.

[6] The parties settled their dispute and came before me in fall 2024 seeking approval of the Settlement Agreement pursuant to subrule 334.29(1) of the *Federal Courts Rules*, SOR/98-106 [Settlement Approval Motion]. The estimated value of the settlement is approximately $1.9 billion, and while compensation in any amount is for the most part inadequate to repair the deep wounds spoken about by boarding home survivors, recognition of the need to repair historical wounds, as symbolized by the Settlement Agreement, nonetheless represents an

important step in the healing process for those survivors, their family members and their communities, as well as for this country as a whole. The Settlement Agreement, which has received overwhelming support, is meant to provide fair and reasonable compensation for those who have suffered, while also promoting healing, education, commemoration and reconciliation.

[7] I should point out that the underlying class proceeding is about the harm suffered by Class Members in the boarding homes, not at school. To be clear, abuses that may have been suffered by these students while attending school are not the subject of the Settlement Agreement and, consequently, the release provisions set out in the Approval Order affect only the claims asserted in the underlying action against Canada and do not apply to the any of the schools that boarding home survivors attended or the school boards to which those schools belonged.

[8] In addition, I am issuing my reasons now so as to coincide with the publication of the Notice of Settlement, which was issued on May 21, 2024, as well as the completion of the documents requiring court approval under the Settlement Agreement and the claim documents that will be available to the Class Members. The rationale is that issuing the reasons now may add to the outreach efforts set out in the Notice Plan, in conjunction with the Notice of Settlement, so as to enhance publication of the settlement itself as the claims process is being carried out. In addition, as I was of the view that the Opt-Out Period should be set as a function of the publication of the Notice of Settlement, I ordered on April 29, 2024, that the Opt-Out period under the Settlement Agreement expire on Monday, July 22, 2024.

II. History of Litigation

[9] Litigation on behalf of boarding home survivors had its genesis in Quebec; in 2012, the Quebec Subclass Counsel began working with Indian residential school survivors seeking compensation under the Indian Residential Schools Settlement Agreement [IRSSA] (see *Baxter v Canada*, 2006 CanLII 41673 (ON SC)) at the time. Light was shed on the history of the Indian Boarding Home Program when claims were filed and ultimately rejected under the IRSSA on the basis that some of the claimants did not actually attend an Indian residential school but rather a public school while billeted with a private family, notwithstanding the evidence of abuse suffered by the claimants in that environment. Starting with one community and expanding to others, Quebec Subclass Counsel saw a pattern starting to develop, and in 2016 filed an application for a class action in Quebec on behalf of boarding school survivors. The extent of the Indian Boarding Home Program was not immediately recognized, and neither the applicants in that application nor counsel fully appreciated that they were dealing with a federal program that had affected communities across Canada, something that was only realized when Quebec Subclass Counsel began to receive archival documents from the Government of Canada following the institution of the Quebec application; the Quebec class members subsequently became the basis for the Quebec Subclass in the underlying class proceeding.

[10] In the meantime, Reginald Percival had been advocating for boarding home survivors since 2006 when the IRSSA was announced and was looking for counsel in British Columbia to take on the fight. At first, Mr. Percival had difficulty retaining counsel, likely because neither the plight of boarding home survivors nor the size of potential class membership was widely known. In February 2018, Mr. Percival contacted Class Counsel who, having recently been involved in

the Sixties Scoop settlement (*Riddle v Canada*, 2018 FC 641 [*Riddle*]), appreciated the newly developed cause of action of loss of language, culture, heritage and identity, and felt that a class action on the basis of the history of the boarding home survivors might be viable, although challenges remained. As was the case with developments in Quebec, one of the initial risks to the viability of a class proceeding in this case was the unknown size of the group; initially, Class Counsel also thought the issues could be local in nature, specific to the Nisga'a community, where Mr. Percival was from, or limited to a few surrounding communities. It was only later that the truly national scope of the Indian Boarding Home Program came to light. As was the case with Quebec Subclass Counsel in 2016, Class Counsel also recognized the possibility of a class proceeding, and advised Mr. Percival in April 2018 that they would be willing to represent him in a class action on behalf of boarding home survivors. More survivors then stepped forward: Allan and Iona McKay in May 2018 and Lorna Watts in June 2018. The underlying action was instituted by Mr. Percival and others in July 2018; Quebec Subclass Counsel became aware of it, and the two actions were merged shortly thereafter.

[11] With the institution of the underlying action, Canada requested time to investigate the allegations being made since, as mentioned earlier, the plight of the boarding home survivors was not widely known, and it was important for Canada to understand what was being litigated. In November 2018, following the first case management conference, Madam Justice Strickland ordered a pause on further procedural steps to permit the parties to engage in dialogue and exchange information to narrow the issues. Documentary disclosure from Canada began shortly thereafter, in December 2018, mostly with archival records from government libraries regarding the Indian Boarding Home Program over time and across regions. Although some work had

initially begun for Quebec residents as a result of the Quebec proceeding instituted in 2016, the Department of Crown-Indigenous Relations and Northern Affairs Canada [CIRNAC] contracted with independent research firms to undertake the research and document collection and to draft reports on federal policies and program operations, the devolution of Indian Boarding Home Program administration to First Nation entities, Tribal Council or provincial government control, and student placement records; all told, this work took place over the course of about 6 years.

[12] Discussions continued amongst the parties to narrow the issues so as to increase the prospects for certification. Particularly challenging was identifying who to include in the class on account of the transfer-of-responsibility issue, as well as how to craft a class definition that would not be so narrow as to exclude those with valid claims, yet not so broad as to make certification impossible. Attempts were made to chart the dates on which responsibility for the administration of the Indian Boarding Home Program was transferred from Canada to the various Indigenous authorities. CIRNAC researchers reviewed thousands of archival documents for information on the transfer of authority from Canada to Indigenous organizations and provided more than 1,000 documents comprising thousands of pages; for the most part, there was little if any information regarding transfer of responsibility for the administration of the Indian Boarding Home Program; the information in most of the documents concerning transfers was incomplete or ambiguous, as many of the documents dealt with education generally but did not state whether it was Canada or the band that was responsible for placing the children. In fact, at this point, information for only about 25% of the Indian bands was available. In the end, and in light of the difficulty in obtaining relevant archival information despite assistance from outside

experts, the parties were not able to reliably determine specific dates of transfer of responsibility for specific bands.

[13] It is for this reason that the class definition operates with a deeming provision; as mentioned earlier, Class Members placed in the Indian Boarding Home Program prior to June 30, 1992, are deemed to have been placed by Canada, while students placed after that date may also qualify for class membership if, as mentioned, they can show that they were "placed prior to the date on which responsibility for such placement was transferred from Canada to an Indigenous governing body".

[14] As the extent of the Indian Boarding Home Program became apparent, and following a constructive meeting of the parties in February 2019 to narrow the issues, the underlying action was certified as a class proceeding, on consent and on agreed terms, by Madam Justice Strickland on June 28, 2019. There is of course a difference between certification, which is more a procedural question, and possible settlement on the merits of the claim, and Canada's consenting to certification was not a signal that it was ready to settle. Concerns remained, I take it, with fully understanding the contours of the Indian Boarding Home Program—its start and end dates and the policies in place to manage it; the issue of transfer of responsibility may still have been an unresolved question, although, with expert reports in hand, the potential size of the class may have been fairly well understood by then. In any event, I take it that consent certification at that point did allow the parties to focus on giving notice to the class. Documentary disclosure continued, and Canada produced its first draft historical report a few months later. I should mention that consent certification did not occur in a vacuum, as it rarely

does; rather, it was the culmination of a series of meetings between Class Counsel, Quebec Subclass Counsel and counsel for Canada, which allowed the parties to come to a common position on defining the issues.

[15] The COVID-19 pandemic stalled in-person meetings and caused significant delays in the completion of documentary disclosure in 2020 and 2021; however, Class Counsel and Quebec Subclass Counsel continued to prepare a series of increasingly detailed compensation models for Canada to consider, and the parties were nonetheless able to move forward with the work being undertaken by experts retained by both sides, in particular with respect to determining the dates of transfer of responsibility from Canada to the Indigenous governing bodies and developing legacy and reconciliation projects as part of the settlement. In addition, the limited exchange of information continued even though the government archives housing most of the documentation remained closed. The documents disclosed by Canada and Canada's historical report assisted the parties in understanding the Indian Boarding Homes Program's scope over time, geographically in terms of the changing number of students enrolled. They also revealed Canada's own understanding of the program at the time, including its legal framework, governing policies, funding rules, reporting and decision-making structures.

[16] Coming out of the pandemic, it seems fair to say that the parties had a good idea of the lay of the land; Class Counsel and Quebec Subclass Counsel signalled what they thought a settlement could look like and, although counsel for Canada did not respond, they did not refuse to listen either. In August 2022, counsel for Canada announced that they had received instructions to negotiate a settlement of the underlying class action, and from there, things moved

quickly. After a couple of months of meetings and discussions, primarily to discuss issues of (1) the history of the Indian Boarding School Program, including its end date; (2) the size of the class and its calculation; and (3) the process for compensating class members and the basis on which they would be compensated, the parties took part in two dispute resolution sessions with Madam Justice Strickland, from November 14 to 16, 2022, and on December 6 and 7, 2022; these sessions led to the adoption of the Agreement in Principle on December 7, 2022. In February and March 2023, the parties participated in further discussions and negotiations, culminating in the Settlement Agreement on June 15, 2023. Overall, other than the terms of the settlement itself remained hotly debated, there were few, if any, contested motions as part of the litigation. I understand from all counsel that the parties worked together in good faith throughout to achieve a resolution of the underlying action.

III. Lived Experiences of Indian Boarding Home Program Survivors

[17] During the settlement approval hearing, either before me or by way of affidavit evidence, I heard very moving first-hand accounts from several boarding home survivors and their families, who showed great courage in coming forward to tell their stories, thereby having to relive their experiences. These individuals were as follows:

(i) Kenneth Weistche, a member of the Cree Nation of Waskaganish, located in the Eeyou Istchee territory in Northern Quebec;

(ii) Reginald Percival, a member of the Nisga'a nation, born in Gitlaxt'aamiks, British Columbia;

(iii) Annie Irene Trapper Weistche, a member of the Cree Nation of Waskaganish;

(iv) Allan Medrick McKay, a member of the Nisga'a Nation, who was born in Middle Bay, British Columbia, but moved to Laxsgalts'ap with his family when very young;

(v) Iona Teena McKay, a member of the Nisga'a Nation, born in Laxsgalts'ap, British Columbia;

(vi) Lorna Watts, a member of the Nisga'a Nation, born in Kincolith, British Columbia;

(vii) Claudia Newashish, from the Première Nation des Atikamekw de Manawan;

(viii) Louise Tekahawáhkwen Mayo, from the Mohawk Territory of Kahnawake;

(ix) Nicole Wesley, a member of the Lax Kw'alaams community;

(x) Tania Percival, a member of the Nisga'a Nation;

(xi) David Cheechoo, Executive Director at the Wiichihiiwewin Centre of Waskaganish, the applicant in the Quebec class proceeding; and

(xii) Rose Victoria Adams, an Inuk from Kuujjua.

Regarding those who courageously appeared before me, either in person or virtually, I must say that the trembling of their voices as they recounted their stories was palpable, and the trauma reflected in their eyes as they relived their experiences was truly overwhelming; these are stories that all Canadians should hear.

[18] The stories were consistent, with each boarding home survivor recounting how, at a young age, they were torn from their parents and siblings and from the only community and life they had known, rounded up onto buses over the cries of protest and tears of their distraught parents, and driven to live hundreds of miles away, mostly in urban settings, often with non-Indigenous families they did not know, whose language they did not understand, and whose ways were foreign to them. Their stories spoke of physical, sexual, verbal and psychological abuse on countless occasions while living in the boarding homes, of confinement and isolation, of being used as free child labour and being taken advantage of by their boarding home families for monetary gain, and of suffering at the hands of boarding home families, other students

billeted with them and other members of their host communities. Their stories also spoke of attempts at suicide, of having lost all connection to their Indigenous language, culture, customs and traditions while growing up, and of being denied the opportunity to maintain real and substantial contact with their families, thereby losing any knowledge of themselves or any sense of self-worth. Many were also survivors of residential schools, where they were forced to endure abuse that is now well-documented as part of our collective history as Canadians.

[19] A vast number of boarding home survivors did not complete high school because of the extensive abuse they suffered, leaving them with permanent emotional scars. When many finally did try to return to their communities, they found that they simply could not fit in; they spoke of having become outsiders in their own homes, of turning inward and feeling that their rights had been taken away from them, and of losing trust in others, especially individuals in authority. Most turned to alcohol and drugs to cope with the pain and suffering, constantly feeling forgotten, abused and abandoned; they felt shame and viewed themselves as a burden on society rather than a contributor. When the time came to raise their own families, their marriages were consumed by alcoholism, drug use and domestic abuse, all coping mechanisms to forget their suffering and the pain they have had to endure. Survivors spoke, among other things, of having projected onto their own children the scars of their mistreatment while in residential schools and boarding homes, never having learned how to love or truly care for children—today we speak of the reality of intergenerational trauma and the experiences of intergenerational survivors such as Tania Percival and Rose Victoria Adams, who appeared before me so that I could hear how they, as children of residential school and boarding home survivors, struggled to cope and accept

events that took place before they were even born, and how they now stand with their parents to help them heal.

[20] However, there were also rays of hope: Mr. Weistche and others spoke of having been able to tame the beast of alcohol and drug abuse and, through sheer strength of character, resilience and the assistance of others they sought out, becoming substance-free, coming to terms with their past, better understanding their own sense of self-worth and, in many cases, being able to finally graduate from college or university—the healing process continues; they mentioned being able to find employment later in life, often within their Indigenous communities, of becoming Hereditary Chiefs of their communities and counsellors to those still suffering from the experiences of the Indian Boarding Home Program and the Residential School program. Others spoke of devoting their lives to learning traditional songs, dances, and cultural ritual and rites, of taking in Indigenous children themselves to assist and guide them on their path towards a better life. And others spoke of how lucky they were to have been part of the lives of their children, to wake them up in the morning, to have supper with them in the evening, and finally, after years on the path of healing, to be able to be together with their parents, children and grandchildren to enjoy the milestones of their lives and communities; little things that many of us take for granted with our own families and communities.

[21] I mention Mr. Weistche, the representative plaintiff for the Quebec Subclass, in particular because since the issuance of the Approval Order, Mr. Weistche has passed away. No doubt his memory will live on, and his courage, strength, leadership and tenacity in seeking justice for boarding home survivors will forever be a part of his legacy, as it will for Reginald Percival,

Allan Medrick McKay, Iona Teena McKay and Lorna Watts, all representative plaintiffs in their own right.

[22] Individuals such as Louise Mayo spoke as a member of the Family Class; she has been working in the area of First Nations health and mental health development. She also has extensive experience working in communities, including in the implementation of the Day Schools settlement (*McLean v Canada*, 2019 FC 1075 [*McLean*]). As part of the lessons learned from that process, she noted that it is important to minimize re-traumatization of victims in the claims process and to prioritize building a relationship of trust with them. Those working on the implementation of the Settlement Agreement need proper and compassionate training, a code of ethics, abidance by rules of confidentiality, and knowledge of First Nations and Inuit communities. She spoke of the importance of the Claims Administrator being alive to issues such as those surrounding the availability of identity documents, jurisdictional issues on- and off-reserve, literacy skills of Class Members, and the development and implementation of protocols and best practices when working in communities.

[23] Individuals such as David Cheechoo also gave a message of hope, where truth starts with acknowledgement and where survivors are finding ways to heal together and survive as a nation. Mr. Cheechoo is encouraged with how First Nation cultures are slowly being embraced, and in how reconciliation is breaking down walls so that survivors can live free from hatred and hostility, thus breaking the cycle of pain and suffering. Mr. Cheechoo was also supportive of the Settlement Agreement as a step towards truth and reconciliation between Indigenous Peoples and Canada.

[24] I also had the benefit of learning from Dr. Matthew Coon Come, a member of the Cree Nation of Mistissini, former Grand Chief of the Grand Council of the Crees, former National Chief of the Assembly of First Nations, and a residential school and boarding home survivor; I understand from Class Counsel that Dr. Coon Come's experience with the difficulties encountered with the implementation of past settlement agreements of this kind—lessons learned from the implementation of the IRSSA, the Day Schools settlement, the Day Scholars settlement (*Gottfriedson v Canada*, 2021 FC 988), the Sixties Scoop settlement and the Band Reparations settlement (*Tk'emlúps te Secwépemc First Nation v Canada*, 2023 FC 327)—was helpful and informed the structure and substance of what eventually became the Settlement Agreement.

[25] Dr. Coon Come expressed his support for the Settlement Agreement but asked that, in moving forward, sufficient thought be given to how the Class Members would be advised of the settlement through the notice program and how they would complete and file their claims through the claims process, including estate claims. In the view of Dr. Coon Come, these two issues more often than not determine the success of any settlement and whether the settlement benefits the class members as a whole.

[26] Regarding the notice program, Dr. Coon Come highlighted to the Court the importance of issuing the notice of the settlement in plain language, in English, French, and the most commonly spoken Indigenous languages, both online and on paper. He also recommended that notice of the settlement be given periodically, at the beginning of the claims period, during the claims period, six months before the end of the claims period and three months before the end of the claims period. Notices should include the contact information of individuals who can assist

Class Members in preparing their claims; it is key that the message of the settlement be received across the country, in particular in remote communities.

[27] Dr. Coon Come also shared his concerns about the accessibility and use of the claims forms and process; he recommended that the claims application be published in plain language, and be available online and on paper for those who do not have access to computers or reliable Wi-Fi connections in their remote communities (for example, printed claims forms inside self-addressed stamped envelopes should be considered). Dr. Coon Come stressed the importance of keeping in mind that, although the claims forms are being prepared by the Claims Administrator with an eye on administrative efficiency, the forms are being prepared for the benefit of the Class Members.

[28] Regarding Category 2 claims, Dr. Coon Come also urged the parties to agree ahead of time on what type of evidence would be expected from claimants. Although the Settlement Agreement gives claimants the benefit of the doubt, it would be more useful to determine this issue in advance and seek Court input, rather than leaving it to be dealt with solely by the Claims Administrator. Dr. Coon Come reminded us that, as was the case in the Day School settlement, where the claims process was also entirely paper-based, the idea that it is easier for claimants to recount their stories on paper than through oral testimony is not always correct, as it is traumatic to recount these experiences in any format. Moreover, many claimants are not comfortable expressing their experiences in English or French and thus cannot adequately share their stories because of this language barrier; they therefore run the risk of having their claims refused or significantly discounted.

[29] Dr. Coon Come also raised the complicated issues surrounding estate claims, for example, that many communities lack banking institutions, thus making it difficult to open estate bank accounts to receive claims cheques. As well, Dr. Coon Come stated that Indigenous claimants who live on reserve often pass away without a will, in which case their assets are administered by Indigenous Services Canada, which puts the Minister of Indigenous Services in a conflict of interest. Dr. Coon Come suggested following the example set out in the Day Scholars settlement, whereby representation of the estate was undertaken by independent lawyers so as to avoid such a conflict.

[30] Dr. Coon Come also highlighted that, for a host of reasons, many claimants will likely hire independent lawyers to assist them with navigating the claims process, in particular for the more rigorous Category 2 claims. Individual counsel will have to help claimants in person; communication over the telephone is not ideal for discussing traumatic experiences, and videoconferencing is not reliable owing to poor network connections in smaller communities. Considering the high travel costs in northern Canada due to the remoteness of some fly-in communities and the time required to assist claimants—often with multiple interviews—individual counsel fees will quickly add up. For this reason, Dr. Coon Come believes that the presumptive cap on legal fees of 5% of the Category 2 compensation may be undervaluing the need for outside counsel.

[31] Finally, Dr. Coon Come spoke in support of having resources for claimants throughout the process and giving Class Members access to Resolution Health Support Workers [RHSWs], who are already present in many First Nation and Inuit communities. This would replicate the

process in the Day Schools settlement, where claimants were offered telephone hotline services to help them deal with the traumatizing experience of presenting a claim; such services would be a welcome initiative according to him.

IV. Key Terms of Settlement Agreement

[32] Canada acknowledges the unique and difficult legacy of the Indian Boarding Home Program and the importance for the representative plaintiffs, the Class Members and their families, and for all Canadians as part of truth and reconciliation, of coming to an agreement with respect to the underlying class proceeding. For my part, I am satisfied that the structure of the Settlement Agreement minimizes to the extent possible the risk of re-traumatization and creates an atmosphere that encourages Class Members to come forward and tell their stories. It was the intention of the parties that the environment created by the Settlement Agreement be affirming, in that it acknowledge the trauma experienced by the Class Members and provide an opportunity for them to tell their stories on the path to reconciliation and healing. As outlined in the preamble of the Settlement Agreement, the intent of the settlement is to reach a fair, comprehensive and lasting settlement of the claims related to the Indian Boarding Home Program, while promoting healing, education, commemoration and reconciliation. This Settlement Agreement is the product of lessons learned from similar past class action settlements and an improvement of those past settlements in many ways.

[33] Some will say that the Settlement Agreement is not perfect, and it is not; however, I consider it to be fair, reasonable, in the best interests of the class as a whole and within the zone or range of what is considered a reasonable outcome (*McLean* at para 65; *Tataskweyak Cree*

Nation v Canada (Attorney General), 2021 FC 1415 at para 63). In acknowledging the importance of the issues raised by Dr. Coon Come, Class Counsel reiterated that much thought has been given to those issues in the development of the Settlement Agreement, and it is believed that the concerns have been reasonably addressed, to the extent reasonably possible under the circumstances.

[34] The key terms in this Settlement Agreement are set out below.

A. *Eligibility*

[35] I have already set out who the Primary Class and Family Class Members would be; as well, to be eligible, a claimant must have been alive on July 24, 2016. Eligibility for compensation is events-based rather than harm-based. As mentioned, individuals placed in the Indian Boarding Home Program during the class period are deemed to be entitled to compensation and those placed after June 30, 1992 will be entitled to compensation if they can establish that they were placed before the transfer of responsibility for Indigenous education from Canada to an Indigenous governing body. The decision to adopt a global approach to class membership and eligibility was informed by past experiences with similar class actions. Having a single, clear time frame avoids confusion for Class Members (*McLean* at para 60).

[36] It would seem that a transfer of responsibility for Indigenous education from Canada to the Indigenous groups took place in most individual cases. Given the paucity of documentation confirming the date on which this occurred in the case of each Class Member, the deeming provision is a vital improvement over past settlements of this kind, as it avoids most Class

Members having to prove what may be difficult if not impossible to establish. I appreciate that deeming periods by their nature mean that some claimants do not make the cut and must then establish, so as to receive compensation, that they were placed in a private home for purposes of schooling before the transfer took place. However, I agree with Class Counsel that this global approach to class membership is simpler than, for example, the experience of the IRSSA, which included long lists of institutions with varying dates of eligibility; a single timeframe provides greater clarity for Class Members who can determine immediately whether they are eligible. From what I understand, based on the documentation and historical research conducted by the parties, instances where the transfer of responsibility to an Indigenous governing body was not completed by 1992 are expected to be rare. In any event, the Settlement Agreement provides for an Exceptions Committee to address theses situations. Although not perfect, I am satisfied, given the record and representation of counsel, that the period of September 1, 1951, to June 30, 1992, is reasonable.

[37] The estates of Primary Class Members are eligible for individual compensation if the Class Member died on or after July 24, 2016, which is two years before the underlying action was filed. Where there is an estate executor, the matter is straightforward and the executor may apply for compensation on behalf of deceased Primary Class Member, assuming a claim had not already been filed by the Primary Class Member before their death. If there is no estate executor—an issue identified by Dr. Coon Come—the compensation to which the deceased Primary Class Member would have been entitled under this Settlement Agreement will be paid in accordance with the estates claims protocol that I approved on April 29, 2024. It is my understanding that the estate claims protocol was finalized only after the close of the claims

period in the Day Scholars settlement, thus allowing the protocol to be developed building upon the experience of that settlement.

[38] I appreciate that for Canada, as asserted by counsel, dealing with estate issues is complicated in the context of a national class, as estate issues are primarily under provincial jurisdiction. Canada has been working towards a simplified process so that the heirs of survivors who pass away intestate have the opportunity to make a claim even without an often expensive and cumbersome probate process (an example is the process developed in the Day Scholars settlement). I am satisfied that the parties recognize this issue, as highlighted by Dr. Coon Come, and will work to make the process as simple and straightforward as possible within what is legally permitted. As for the potential conflict in having Indigenous Services Canada administer, under the *Indian Act*, the estates of Class Members who pass away intestate, I understand from counsel that Canada recognizes the potential for conflict and has a process in place to appoint an independent claims administrator so as to address the issue, a process that has been used, for example, in the Day Schools settlement to remove the potential for or appearance of conflict.

B. *Compensation and Support*

[39] There are two categories of compensation under this Settlement Agreement for individual claimants. Category 1 provides compensation in the amount of $10,000 to Class Members for loss of culture and loss of connection to family and community as a result of being placed by Canada in the Indian Boarding Homes Program. This category of compensation is available to all Class Members simply upon verification of class membership; the form is simple and does not require lengthy submissions from Class Members, thus minimizing re-traumatization as much as

possible. It also provides for prompt payment of compensation, thereafter giving the time needed to the Class Members to address what will in most cases be a much more emotionally difficult process of preparing submissions for Category 2 compensation.

[40] Category 2 provides five additional levels of compensation from $10,000 to $200,000 for claims of abuse, with the level of compensation increasing with the seriousness of the incident in accordance with a compensation grid based on the compensation categories in the Day Schools settlement but with changes for simplicity and efficiency, focusing on incidents rather than proof of harm. This will be a difficult and emotional process; however, it is based solely on documents, which the claimants may assemble and deal with in their own time, in their own way and with the assistance of counsel or others in their community during the lengthy claims period, without the need to appear at an oral hearing, as was the case with the IRSSA.

[41] It is important that Class Members take their time to submit their Category 2 claim, as it is not possible to modify the claim once submitted in order to seek greater compensation. Specifically, claimants can apply for compensation under both categories separately and do not have to do so simultaneously, thus avoiding the issues seen with past settlements where class members found themselves in the difficult situation of having to choose a simple, expedited claim over a more complex, emotional one. Separating the Category 1 and Category 2 claims is an innovation in this Settlement Agreement which avoids the problem seen in the Day Schools settlement of progressive disclosure, where some claimants filed a claim for base-level compensation which was quickly processed, then subsequently wished to amend their submission to claim enhanced compensation; recently, the Federal Court of Appeal determined

that the Day Schools settlement did not allow for it (*Waldron v Canada (Attorney General)*, 2024 FCA 2).

[42] In short, Category 1 claims are processed expeditiously; therefore, claimants are expected to receive compensation under that category quickly and efficiently. If desired, claimants may then file a claim for compensation under Category 2 at their own pace and convenience, as long as it is within two years and six months after the settlement implementation date. I am satisfied that the compensation scheme is structured in this way to ensure that claimants have access to fair compensation and have control over what is clearly an emotionally demanding and difficult process.

[43] The Settlement Agreement also provides that Canada will make its best efforts to obtain the agreement of the provinces and territories that the receipt of any payments pursuant to the Settlement Agreement will not affect the amount, nature or duration of any social benefits or social assistance benefits payable to a Primary Class Member pursuant to any legislation of any province or territory of Canada, and similarly from the relevant departments of the Government of Canada regarding any Canadian social benefit programs, including Old Age Security and the Canada Pension Plan. In fact the record includes a letter from the Government of Quebec confirming that its general policy is to exclude settlements from Indigenous class actions so that the amounts received from such settlement will not affect the amount, nature or duration of any social benefits or social assistance benefits payable to, in this case, Quebec Subclass Members. I understand that the benefits under the Settlement Agreement, as was the case in the Day Schools

settlement, are characterized as general damages so as to minimize the impact on other benefits programs to which the Class Members may be eligible.

[44] Importantly, there is also no cap or limit on the overall settlement amount, meaning that Class Members will be able to receive compensation promptly, rather than having to wait for all claims to be filed to appreciate any pro-rata reduction in a claimant's compensation. This is a major benefit.

C. *Claims Process*

[45] Tania Percival stated it clearly: residential school and other survivors are exhausted; they came through the Truth and Reconciliation Commission, telling their stories and reliving their experiences, resulting in the 94 calls to action. She asked only that the claims process be as simple as it can be. I agree.

[46] The claims process is not one of the protocols for which Court approval is to be sought under the Settlement Agreement. Unlike other claims processes in past settlements of this type, the claims process in this case was not already developed at the time of the settlement approval hearing; this was done intentionally so that the development of the process remains flexible, and thus deliverable. I appreciate that each case is different, with its unique facts, and that flexibility is required with a class membership as large and diverse as in this case, so that a host of measures are available to accommodate each individual's situation, thus avoiding the parties' having to continuously come back to the Court for amendments a Court-approved claims protocol. Here, the Claims Administrator is intended to be and has been in charge of developing

an effective claims protocol with the flexibility to seek guidance on best practices. In this context, significant attention is to be placed on providing adequate assistance to claimants. The Court will remain involved in supervising the implementation of the Settlement Agreement; the supervisory role of the Court in ensuring that claimants receive the benefits they were promised were reiterated by the Supreme Court of Canada in *JW v Canada (Attorney General)*, 2019 SC 20, 431 DLR (4th) 579 (see also *McLean* at paras 72 and 73).

[47] Upon recommendation of the parties, PricewaterhouseCoopers Inc. was approved on October 3, 2023, to be the Claims Administrator to develop the claims forms, processes and protocols under the Settlement Agreement; the duties of the Claims Administrator are set out in Section 8 of the Settlement Agreement. I understand that guidance and feedback from professionals involved in past settlements of this type have been sought so as to design the claims process to be expeditious, cost-effective, user-friendly, culturally sensitive and respectful of Class Members' privacy. As part of the principles governing claims administration, the good faith of the claimant will be presumed, with the benefit of all reasonable and favourable inferences. As I mentioned earlier, claims are made entirely in writing, with minimal evidentiary requirements. Claimants will not have to testify or be subjected to cross-examination, unlike the situation claimants faced under the IRSSA.

[48] Here, the claims process is purely paper-based, as was the case in the Day Schools settlement, with the added benefit of the Category 1 claim not requiring claimants to prove that harm was inflicted upon them—the harm is deemed from their forced involvement in the Indian Boarding Home Program, with all the consequences that resulted.

[49] Claimants have two and a half years from the Settlement Agreement's implementation date—the date the Settlement Agreement becomes operational—to file their claims. The implementation date is set out in the Settlement Agreement as being the latest of (1) 30 days after the expiry of the Opt-Out Period; (2) the expiry of the time to appeal the Approval Order; and (3) the final determination of any appeal of the Approval Order. As stated earlier, the Approval Order is dated December 11, 2023; consequently, the delays for any appeal have long expired. The Opt-Out Period under the Settlement Agreement began upon the publication of the notice of certification of the underlying action as a class proceeding (the Order approving the notice of certification was rendered on June 16, 2023) and is to end on a date set by the Court that is at least 60 days from the Approval Order. As I did not wish for the time taken to finalize the claims documents and the protocols requiring Court approval under the Settlement Agreement to impact the period allowed for Class Members to opt out of the Settlement Agreement, the order that the Opt-Out Period expire on Monday, July 22, 2024, was not made until April 29, 2024. Accordingly, as the appeal period of the Approval Order has now expired, the Settlement Agreement's implementation date, that is, the date the settlement becomes operational, is 30 days from July 22, 2024, with claimants having, as stated, up to two and a half years from then [claims deadline] to file their claims.

[50] As stated, the claims process is strictly paper-based, with the process and forms developed on the basis of lessons learned from similar past settlements. The balance between the process in the IRSSA—which involved oral hearings to establish one's claim—and that the Day School settlement—which called for a paper-based claims system but with less of a support system in place to assist claimants—is expected to be achieved with more boots on the ground to

support boarding home survivors throughout the claims process. Category 1 claimants will fill out a claims form, and the Claims Administrator will verify the claimants' participation in the Indian Boarding Home Program and pay those who are eligible. This is an improvement over the Day Schools settlement, which had only the equivalent of a Category 2 claim, meaning that claimants had to provide proof of the harm for compensation to be paid. Here, it is enough for claimants to be members of the class to be entitled the Category 1 payment as compensation for loss of culture, language and connection to family and community.

[51] For Category 2 claims in this case, claimants must provide a more detailed application in which they describe their experiences during their enrolment in the Indian Boarding Home Program within, as stated, a purely paper-based claims process similar to that in the Day Schools settlement; no hearings requiring oral testimony, as was the case with the IRSSA, will be necessary. The Claims Administrator will review the application on the basis of the Compensation Grid set out in Schedule B to the Settlement Agreement.

[52] Reconsideration of a claim may be sought within 120 days of receipt by the Class Member of either a notice of denial of the claim or notice of approval but for an amount below the amount requested. I approved the Reconsideration Request Protocol on April 29, 2024, which provides for the review of claims for which reconsideration is sought, where appropriate, by an independent reviewer and by the Exceptions Committee; the independent reviewer and Exceptions Committee will be appointed by the Court. I note that, under the Settlement Agreement, the Exceptions Committee shall endeavour to reach consensus on any given claim but, where that is not possible, the chair of the Exceptions Committee will cast the deciding vote.

[53] There is also a provision for requesting a deadline extension within 6 months of the expiry of the claim deadline, in other words, beyond the 2½-year claims period, in limited circumstances. Another new feature in the Settlement Agreement is that the request for a deadline extension will be a single form that includes all the information required to support an application, as well as why the claims deadline was not met; avoiding a two-step process makes claims processing more efficient and timely. It is important to note that no further extensions will be considered beyond the 6-month extension.

[54] Canada had confirmed as part of the Settlement Agreement that Class Members will have access to existing federal government mental health and emotional support services, which will be made available to them during the claims resolution process. In addressing the concerns expressed by Dr. Coon Come, I understand from Class Counsel that these support services, including access to RHSWs and cultural support providers that have been funded for many years as part of the IRSSA, are part of the overall commitment to outreach, assistance and support that will be provided to Class Members during the claims process; it is recognized by the parties that, separately or overlapping with the claims process, Class Members may experience re-traumatization while moving through the claims process, and it is important for them to have psycho-social support separate from legal services and advocacy support. As stated, RHSWs are already present in First Nations and Inuit communities providing emotional and cultural support services to former residential school students and their families, in addition to mental health counselling services by psychologists and social workers; it is this role, rather than one of advocacy, that is expected to be extended to support boarding home survivors who, in many

cases, are also residential school survivors so have worked with these same RHSWs for some time within their community.

[55] Moving forward beyond the approval of the settlement, the obligation to ensure that the settlement is operating effectively and is achieving its goals will fall primarily on Class Counsel and Quebec Subclass Counsel, whose responsibility it will be to ensure effective Class Member outreach, claims assistance and mental health support. The Foundation, which I discuss below, will have to be created and set up.

[56] During the hearing before me, significant time was spent discussing the nature and level of assistance to be provided to Class Members throughout the claims process. The parties confirmed that they were mindful of the fact that, in past settlements, challenges were encountered in this area; in the Day Schools settlement, Justice Grammond expressed concern about the assistance on the ground being given to the class members. No real concern was expressed on this issue in the Days Scholars settlement; however, that settlement had only a Category 1 equivalent, not Category 2. In the Sixties Scoop settlement, again, problems were noted with assistance to class members. Here, the intention is to draw on the experience of those within the communities who have been involved in the IRSAA, the Day Schools settlement and the Days Scholars settlement, to offer the assistance necessary to the Class Members in this case. The Court does not approve the protocols for Class Member assistance, keeping in mind the concerns expressed by Dr. Coon Come, and the fact that groups of Class Members, such as inmates for example, may require separate strategies, different approaches for outreach, assistance and support will have to be developed as we move forward. As stated, the Court will

remain involved in supervising the implementation of the Settlement Agreement. Consequently, and as acknowledged by the parties, I will retain jurisdiction in this matter as part of the Court's ongoing supervisory role, and the parties will continue to report back to the Court on the progress of the settlement implementation on the ground.

[57] Finally, Canada has agreed to pay the costs of administering the Settlement Agreement.

D. *Legacy Measures*

[58] Canada will contribute $50 million to the establishment of an Indigenous-led foundation as a Canada not-for-profit corporation [Foundation] to undertake activities and programs dedicated to the promotion and support of Class Members and their descendants in healing, wellness, education, languages, cultures, heritage, commemoration and reconciliation. In particular, and in order to pursue the call for full and public disclosure of the experiences of boarding home survivors, the Foundation is to take measures to commemorate and memorialize the harms caused by the Indian Boarding Home Program by creating a historical record that will be accessible to all for future study and use.

[59] The Foundation will have at least five first directors appointed by the parties, reflecting national First Nations and Inuit representation, including Quebec, and be guided by an advisory board, with regional representation and with an understanding and knowledge of the loss and revitalization of Indigenous languages, cultures, wellness and heritage. Having already issued the Approval Order back in December 2023 will allow the parties time to establish the Foundation prior to the implementation date, as required by the Settlement Agreement.

E. *Counsel Fees*

[60] First of all, Class Counsel's fees will not be paid out of the compensation to Class Members; Canada has agreed to pay separately for the fees and disbursements of Class Counsel and Quebec Subclass Counsel for past and future work on behalf of the Class, which is considered by this Court to be fair and reasonable. It is to be noted that the parties did not come to an agreement on the amount to be paid as Class Counsel Fees, consequently the matter is left to the Court to determine as part of its approval of Class Counsel Fees by way of a separate motion before me under rule 334.4 of the *Federal Courts Rules*.

[61] As for Class Members, they have the option of retaining independent counsel of their choice to assist them with the preparation of their Category 2 claim; the Protocol for Payment of Individual Legal Fees was approved on April 29, 2024. Canada will pay legal fees up to an amount equal to 5% of the claimant's Category 2 payment as part of its ongoing support of Class Members, without the need for Court approval and without any deduction from the compensation paid to the Class Members.

[62] By contrast, although a protocol was eventually put in place by Mr. Justice Phelan in the Day School settlement after the fact, for the payment of legal fees for counsel, such fees came out of the compensation fund for class members, and independent counsel also had to systematically seek court approval under rule 334.4 of the *Federal Courts Rules* for the payment of their fees and disbursements, which proved to be quite burdensome for the lawyers and the resources of the Court. Another shortcoming of the Day Schools settlement was that claimants were restricted to a single law firm to represent them; here, claimants have the choice of their

own lawyers, a material advantage for the Class Members. The payment of legal fees under the IRSSA was also not ideal; although it involved an amount of 15% rather than the 5% in the present case, the larger amount was meant to cover a claims process which included individual hearings for claimants with an exhaustive exchange of documents, issues that do not arise in this case.

[63] I am mindful of the concerns expressed by Dr. Coon Come regarding the cost of travel across much of northern Canada and appreciate that, in dealing with serious Category 2 claims, simplifying the claims form is not enough. Boarding home survivors, as with claimants in previous settlements of this nature, often have difficulty expressing the highly traumatic events they lived through; these are stories more fully recounted in person, where multiple visits by lawyers may be required so as to properly tell those stories so that claimants receive the highest amount of compensation to which they are entitled. As such, I appreciate that an amount of 5% may not be sufficient for all claimants, but I note that it is a step forward from past settlements; in the Day Schools settlement and the Sixties Scoop settlement, no provision was made for the payment of legal fees to independent counsel although, as mentioned, one was eventually put in place for the Day Schools settlement in which, I might add, Mr. Justice Phelan expressed his view that 5% is reasonable in the circumstances, in particular where that there is no risk of non-payment but rather only a risk in the level of claim and resulting quantum. I also have confidence in the ability of the lawyers serving claimants in remote communities to find economies of scale, possibly meeting multiple claimants during the same visit to a community and visiting multiple communities during a single trip. In any event, the door to a payment of up to an additional 5%

of legal fees and disbursements, plus taxes, is not closed; however, it will require the approval of the Court as stated earlier.

[64] Overall, and although not ideal, I cannot say that this element of the Settlement Agreement alone causes the entire agreement to be unreasonable and not in the interests of the class members as a whole.

F. *Opting Out*

[65] Primary Class Members and Family Class Members have the right to opt out of the class proceeding. If more than 4,000 Primary Class Members opt out [Opt-Out Threshold], the Settlement Agreement will be considered null and void, and the Approval Order will be set aside in its entirety, subject to the right of Canada to waive compliance of the Opt-Out Threshold no more than 30 days after the end of the Opt-Out Period. The Opt-Out Threshold does not include any Family Class Members who may have opted out. As I indicated earlier, by Order dated April 29, 2024, I set Monday, July 22, 2024, as the expiry of the Opt-Out Period. At the hearing before me, Class Counsel mentioned that they had received about 16 to 20 opt-out requests since the notice of certification was issued; however, it would seem after follow-up that about half were completed by Class Members in error, thinking they were completing a claim form rather than electing to opt out of the class proceeding.

V. Analysis

[66] Subrule 334.29(1) of the *Federal Courts Rules* stipulates that class action settlements require Court approval. It provides as follows:

Approval	**Approbation**
334.29 (1) A class proceeding may be settled only with the approval of a judge.	334.29 (1) Le règlement d'un recours collectif ne prend effet que s'il est approuvé par un juge.
Binding effect	**Effet du règlement**
(2) On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding.	(2) Il lie alors tous les membres du groupe ou du sous-groupe, selon le cas, à l'exception de ceux exclus du recours collectif.

[67] This Court will approve a class action settlement if it is satisfied that the settlement is "fair and reasonable and in the best interests of the class as a whole" (*McClean* at para 65; *Merlo v Canada*, 2017 FC 533 at para 16 [*Merlo*]). The Court will either approve or reject the settlement; it cannot revise or modify it (*McClean* at para 70; *Merlo* at para 17). In making my assessment, I am to review a series of non-exhaustive factors to reach my conclusion. These factors are summarized in *Condon v Canada*, 2018 FC 522 at paragraph 19, and reiterated in *McLean* at paragraph 66, and they include but are not limited to the following:

- The likelihood of recovery or likelihood of success;
- The amount and nature of discovery, evidence or investigation;
- Terms and conditions of the proposed settlement;
- The future expense and likely duration of litigation;
- The recommendation of neutral parties, if any;
- The number of objectors and nature of objections;
- The presence of arm's length bargaining and the absence of collusion;

- The information conveying to the Court the dynamics of, and the positions taken by, the parties during the negotiations;
- The degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and
- The recommendation and experience of counsel.

These factors, addressed below, are considered as a whole, and each factor may be given varying weight depending on the circumstances at hand (*McClean* at para 67). Overall, the settlement is judged by a standard of reasonableness, not perfection, as settlements are by their very nature creatures of compromise (see *Merlo* at para 18, citing *Châteauneuf v Canada*, 2006 FC 286 at para 7).

A. *Likelihood of Recovery or Likelihood of Success*

[68] Although a factor that relates more to the settlement than to the likelihood of success at trial as assessed at the commencement of the action, and accepting that hindsight is twenty-twenty, I think it more probable than not that, by the time the underlying class proceeding was instituted, the winds favoured settlement by Canada of Indigenous child education policy–related litigation, as long as there was a case to be made.

[69] Here, regarding the likelihood of success at trial and as conceded by Quebec Subclass Counsel, although there was a sense of a good likelihood of recovery and success when the Quebec action was instituted in 2016 and the underlying action was instituted in 2018, the sentiment was not consistent as regards every point of claim. On the other hand, although the issue of negligence or vicarious liability of Canada for abuses committed against boarding home

survivors within private homes while under the care of boarding home families (acting as independent contractors) was not settled, by the time Mr. Percival connected with Class Counsel, loss of language, culture, heritage and identity as a cause of action had been acknowledged in the Sixties Scoop settlement, although admittedly there was no vindication by way of a final judgment on this issue. There was also the question of applicable limitation periods, maybe less so with respect to the issues of loss of language and culture, but nonetheless a question that had to be factored into the equation.

[70] Moreover, I think it is fair to say that, had there not been some likelihood of success, at least in the eyes of Class Counsel and Quebec Subclass Counsel, neither the Quebec action in 2016 nor the underlying action would have been instituted. That is not to say that overall success was guaranteed; as mentioned, the true risk as to the viability of a class proceeding in this case was the unknown: the nature of the Indian Boarding Home Program was obscure, as was its potential scope and class size. Initially both Class Counsel and Quebec Subclass Counsel thought the issue was limited both geographically and in terms of the size of the potential class; indeed, at the outset, Canada also needed time to digest the nature and magnitude of the program and the issues it raised. Consequently, the determination as to whether there was a case to be made for a class proceeding was clearly not certain, at least not initially.

[71] Of greater concern, as I understand it, was that the individual aspect of the class action would create the greatest challenges. If a settlement could not be reached, would each of the estimated 33,000 Class Members have to prove causation and damages individually at trial, which would be overwhelming for the parties and the Court? Assuming that common issues such

as limitation and liability had been dealt with, the concern would be establishing damages—in particular trying to pin down the amount of damages for each individual claimant—and complex causation issues. In addition, given the age of the Class Members, it would be, in the words of counsel, almost irresponsible to opt for the scheduling of a hearing for each claimant because there would be a serious risk of losing many Class Members prior to their hearing.

B. *Amount and Nature of Discovery, Evidence or Investigation*

[72] Although no formal discovery took place in this matter, nor was certification contested, nor were there any contested issues having to be seriously dealt with by the Court, the parties did carry out a significant amount of pre-trial work at the disclosure stage: over 1,000 documents were exchanged at as early a stage as possible, mostly archival documents discovered by Canada, so as to understand the breadth and scope of the Indian Boarding Home Program and, in particular, preferably on a case by case basis, the dates on which the transfer of responsibility for Indigenous education took place between Canada and Indigenous organizations and entities. This seems to have been the threshold issue that had to be overcome, and in the end, it was addressed by the deeming provision.

[73] Overall, I am satisfied that both parties did their due diligence so as to be certain that they were coming to a fair and lasting settlement. The conduct of the parties reflected, from what I can tell, a genuine effort to find a solution and ultimate closure, to the extent that a settlement can bring closure, for boarding home survivors; there were also expert reports prepared to gauge these issues. By about the time of the Settlement Agreement, the evidence in the record confirmed that hundreds of Quebec Subclass Members had contacted Quebec Subclass Counsel

and that about 1,500 other Class Members had contacted Class Counsel, thus allowing counsel for the plaintiffs to cross reference and validate the documentary information on the nature and scope of the Indian Boarding Home Program they were receiving from Canada. As was the case in *Merlo*, I agree that the extent of documentary disclosure and community outreach by Class Counsel and Quebec Subclass Counsel gave both the plaintiffs and the defendant the best possible understanding of the underlying facts and circumstances of the claims; beyond the exchange of documents, the parties met on multiple occasions over five years to discuss the issues in this case, so I doubt proceeding to discoveries would have unearthed further information, given the good faith on both sides to come to terms with the issues so as to sufficiently understand the factual matrix of these claims and the challenges they would face in moving forward with the litigation.

C. *Terms and Conditions of Proposed Settlement*

[74] I have already discussed and commented on the various terms and conditions of the Settlement Agreement. I am mindful of the fact that at least two objections to the settlement were made that the amounts of the Category 1 and Category 2 claims were insufficient. As I stated, no amount of compensation can truly compensate Class Members and repair the deep wounds spoken about by boarding home survivors, and I am satisfied that the Settlement Agreement, as a whole, in its structure and claims process, provides significant advantages for Class Members. Some of the most noteworthy terms of this Settlement Agreement have been put in place as a result of lessons learned from past settlements in similar actions. For example, the settlement offers “claims made” compensation, meaning that all class members who apply and qualify will be paid the amounts set out in the settlement. Unlike previous settlements of this type, there is no

cap or limit on the aggregate amount of compensation Canada will pay to the class, thus no risk to the Class Members that there will be a *pro-rata* reduction to their compensation. In addition, class members will not have to wait until all claims are processed to finally receive compensation; compensation will be paid out once the individual claims are processed to the extent approved.

[75] In addition, counsel found that the oral testimony component required in the IRSSA was difficult for the victims. Accordingly, the claims process in the Settlement Agreement is entirely paper-based and non-adversarial, with safeguards for protecting the privacy of claimants, avoiding the need for oral testimony and minimizing the risk of re-traumatization of victims and rendering the claims process as simple and seamless as possible for claimants. This is also a key benefit as it aims to encourage people to come forward and tell their stories.

[76] This Settlement Agreement also has a clear time frame; the deeming provision was key to addressing the parties' concern with the transfer date issue. This also simplifies eligibility determinations for claimants. In addition, similar to the settlement in *Merlo*, this Settlement Agreement provides compensation based on the claims brought forward, rather than a lump sum payment paid out at the end of the time period. Practically speaking, it means that all claimants will be expeditiously compensated the set amount. The key terms of this Settlement Agreement are informed by and incorporate the lessons learned from similar past settlements and are tailored to make the process as simple and straightforward as possible for the victims. The compensation structure also ensures that the settlement fund will not be depleted, so that claimants will access the full compensation.

[77] No matter how good a settlement is, if it fails on the issues of notice to and identification of Class Members and the resources necessary for Class Members to file their claims, it can no longer be seen as a successful settlement. That said, perfection is impossible, and the geographic limitations associated with Class Members, specifically the remoteness of the communities where many Class Members live, often make it challenging to provide notification and especially resources to properly file claims. Does this mean that the settlement agreement should not be approved? I do not think so. Every settlement will have shortcomings, sometimes because of compromises made to reach the settlement and sometimes because certain inescapable realities negatively impact the ability to communicate and complete a claims process. Sometimes the impact can be reduced by building in features such as a purely paper-based claims process, to avoid the need for Class Members to travel, to tell their stories in front of strangers and to relive their nightmares in the telling. Sometimes the impact can be lessened through an online claims process with simple forms and plain language. Sometimes features can be built in that allow for the hiring of individuals close to the communities who can access remote areas without being considered outsiders. Sometimes it is necessary to make compromises and try to reach a balance, always seeking to minimize the likelihood that Class Members will be lost because insufficient notice is given or some element of the claims process is so high a hurdle that those claimants, who are often socially marginalized and lack adequate support, give up out of frustration or intimidation with respect to the process. Each class action is unique and has unique challenges that occur during the claims administration process. That is why flexibility in the claims process is important, along with continual monitoring of performance.

[78] Finally, I doubt that the creation of the Foundation, which will remain to benefit the children and grandchildren of boarding home survivors, could have reasonably resulted from anything other than settlement of the claims. All in all, I am satisfied that this Settlement Agreement achieves such a reasonable balance and, if implemented properly, will represent a successful next step in the healing process for boarding home survivors and their families.

D. *The Future Expense and Likely Duration of Litigation*

[79] If this dispute were to move towards litigation, the parties would be looking at a lengthy and costly litigation process, with many years of litigation before Class Members would receive compensation, if any. While the parties have already undergone extensive disclosure, there would be significant hurdles at trial. As I mentioned earlier, even assuming that the representative plaintiffs are successful at a common issues trial, trying to guide an estimated 33,000 Class Members through hearings so as to establish causation and damages would be overwhelming and likely impossible, given the likelihood of losing aging claimants over time. In the matter involving the Band Reparations settlement, 48 days were set aside for trial prior to the eventual settlement. The amount of time needed for a trial in this case would be at least that, if not more.

E. *Recommendation of Neutral Parties, If Any*

[80] Not to say that Madam Justice Strickland recommended the settlement, the Agreement in Principle was negotiated under her skillful supervision and assistance. The parties were assisted

by experts and ultimately succeeded at reaching a compromise on all the issues. In addition, individuals such as Dr. Coon Come were supportive; his views carry significant weight.

F. *Number of Objectors and Nature of Objections*

[81] Given the record, the testimony of those who appeared before me, and what I understand from counsel, this Settlement Agreement has received a tremendous amount of support, with significantly fewer objectors than in past settlements of this type. By the end of August 2023, a few weeks following the issuance of the Notice of Certification, Class Counsel had received only two letters of objection and eight opt-out requests; the numbers are not high; however, in fairness, the Notice of Certification had only recently been issued by then. I should also mention that no one appeared before me during the settlement approval hearing to voice any opposition to the settlement. As I stated earlier, the two objections relate to the base level of compensation in the present Settlement Agreement in comparison with that of the IRSSA; in the IRSSA, the base level of compensation, which was called the Common Experience Payment [CEP], consisted of an initial $10,000 plus an additional $3,000 for each year that the claimant had spent at a residential school. The two objections suggest that the Category 1 payments in the present Settlement Agreement should be comparable to the CEP and provide additional payments in accordance with the time spent in the Indian Boarding Home Program. These concerns have been duly considered. Class Counsel has taken the position, and I agree, that while Category 1 compensation may not be as high as the CEP in the IRSSA, it is understood and expected that most claimants in the present Settlement Agreement will claim both Category 1 and Category 2 payments. Therefore, the final compensation amount will likely be similar to the IRSSA amounts.

G. *Presence of Arm's Length Bargaining and Absence of Collusion*

[82] As mentioned above, this action began in 2018 and was certified on consent in 2019. The parties were involved in litigation for five years. Over these years, they engaged in a host of discussions and exchanges, including almost five full days of judicial dispute resolution conferences. Plenty of research was undertaken leading up to the dispute's resolution. Canada took steps to inform itself on the Indian Boarding Home Program and the contours of the group. Expert reports also played an instrumental part in informing the parties' understanding of the issue at stake. I am satisfied that by the time the parties reached the Agreement in Principle, they had a holistic understanding of the issues and were able to reach an informed agreement. The parties negotiated at arm's length and in good faith. I do not see any evidence of collusion.

H. *Information Conveying to the Court dynamics and positions of parties during negotiations*

[83] I think it goes without saying that five days of dispute resolution would not have been necessary if the parties were in agreement on all issues from the start. In addition, I have set out throughout my reasons the issues that arose during the three years leading up to the Agreement in Principle and then during the dispute resolution conference. I am comfortable that the information conveyed to the Court was sufficient to allow me to understand the dynamics of the negotiation process leading to the Settlement Agreement. As mentioned, what makes the evolution of this Settlement Agreement somewhat different from similar past settlements seems to be the recognition early on by Canada that, once the representative plaintiffs made out a case, and given the evolving picture from the archival documents and expert report regarding the scope, nature and consequences of the Indian Boarding Home Program, a positive outlook for

settlement emerged. The novelties of this Settlement Agreement, for example its deeming provision for Category 1 claims, reflect the positive engagement among counsel to find solutions to issues—here, the issue of transfer of responsibility—which otherwise might have remained an insurmountable hurdle to settlement.

[84] In *McLean v Canada (Attorney General)*, 2023 FC 1093 at paragraph 27, Mr. Justice Grammond outlined a number of issues regarding the implementation of their settlement agreement which precluded class members from bringing claims on time. These issues included, among others, an unreliable class size estimate, lack of personalized assistance to class members, and difficulties involving Internet access, language barriers and low literacy rates in many Indigenous communities. I am satisfied from what I have heard that the parties in this case are working together to address the issues outlined by Mr. Justice Grammond. Here, the bigger challenge will be one of remoteness; it is estimated that an overwhelming majority of the class in the present case was born in remote communities, however it is unclear whether the majority of Class Members returned as opposed to remaining within a more urban setting. It may take some time to understand the level of in-person outreach necessary to service remote communities, something which will be addressed in the implementation of the Settlement Agreement. Counsel and the Claims Administrator have developed a plan to reach out to communities in person through the RHSWs network. I am satisfied, at least for now, that the strategies developed for outreach, assistance and support for the Class Members, many of whom are marginalized individuals in both urban settings and in remote communities, will be successful in addressing the two primary concerns regarding sufficient notice of the settlement and the effectiveness of the claims process. I acknowledge that the notice program may have to be adjusted as time goes

on, to better its effect and address the concerns expressed by many; Class Counsel and counsel for Canada have expressed before me their commitment to deploying a continuous and ongoing notice campaign so as to reach the greatest number of Class Members possible. I approved the Notice Plan by order dated April 29, 2024.

I. *Degree and Nature of Communications by Counsel and Representative Plaintiffs with Class Members During Litigation*

[85] Class Counsel published a notice to the class pursuant to this Court's order, dated June 16, 2023, and have been maintaining a firm website to provide boarding home survivors with ongoing updates on the development of the Settlement Agreement. Enquiries from Class Members were dealt with swiftly and efficiently. In addition, the representative plaintiffs took a direct role in the settlement discussions and communication with potential class members.

J. *Recommendation and Experience of Counsel*

[86] The Class Members were represented by Class Counsel and Quebec Subclass Counsel, who have established expertise in class actions. As mentioned earlier, along with Mr. Percival's tenacity, Class Counsel's experience coming out of the Sixties Scoop settlement may well have been the impetus for the institution of the underlying class proceeding on a national level, leading to the Settlement Agreement. In fact given their experience in the area of class actions for over 27 years, this Court has previously recognized Class Counsel as highly experienced in class action litigation (see *Merlo* at para 34; *Tiller v Canada*, 2020 FC 323 at para 36). As for Quebec Subclass Counsel, they have established expertise in Indigenous law and extensive experience in representing Indigenous governments, non-profit organizations and individuals, as

well as class members; they were involved in various capacities in the Day School settlement. Both Class Counsel and Quebec Subclass Counsel recommend the approval of the Settlement Agreement and, as stated by the Supreme Court of British Columbia in *Jones v Zimmer GmbH*, 2016 BCSC 1847 at paragraph 36, "[e]xperienced class counsel is in a unique position to assess the risks and rewards of the litigation and his or her recommendations are given considerable weight by the reviewing court." In my view, Class Counsel and Quebec Subclass Counsel clearly have the necessary expertise and detailed knowledge of this particular case. For these reasons, I give significant weight to their recommendation to their clients to accept this Settlement Agreement.

VI. Conclusion

[87] The representative plaintiffs, the Class Members who spoke before me, and Canada all agree that the settlement of this matter is an important step on the road of reconciliation. For Canada in particular, in coming to this settlement, it was important that Class Members were compensated fairly, taking into account previous settlements on the various parts of Canada's historic policies and programs related to Indigenous child education and care—hence the similarities between the Settlement Agreement and past similar class action settlements—but also taking into account the unique experiences of boarding home survivors. With the Category 1 payment, counsel for Canada expressed before me Canada's recognition of the nature of the boarding home survivors' particular experiences, being taken away from their homes and communities, thus the importance of that aspect being recognized and fairly compensated.

[88] That said, no matter how good a settlement is, and as has been made clear to me, the process fails if there is a failure to address the issues of proper notice to and identification of Class Members and the resources necessary for those Class Members to file their claims. Consequently, engaged implementation will be required to address such challenges. On the whole, the Court must consider the best interests of the estimated 33,000 Class Members in light of the aforementioned limitations and constraints. These Class Members have suffered enough. Receiving this compensation may not heal the wounds within, but it is certainly our hope that it provides some closure and, in turn, some healing for the Class Members.

[89] For the reasons above, I am satisfied that the Settlement Agreement is fair and reasonable and in the best interests of the class as a whole. I therefore reiterate the Order I made on December 11, 2023, approving the Settlement Agreement attached thereto.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1417-18
STYLE OF CAUSE:	REGINALD PERCIVAL, ALLAN MEDRICK MCKAY, IONA TEENA MCKAY AND LORNA WATTS v HIS MAJESTY THE KING
REASONS FOR SETTLEMENT APPROVAL ORDER:	PAMEL J.
DATED:	MAY 30, 2024

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