Federal Court  Cour fédérale

Date: 20210924

Docket: T-1542-12

Citation: 2021 FC 988

Vancouver, British Columbia, September 24, 2021

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, ON HIS OWN BEHALF AND ON BEHALF OF ALL THE MEMBERS OF THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND AND THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND, CHIEF GARRY FESCHUK, ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SECHELT INDIAN BAND AND THE SECHELT INDIAN BAND, VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE AND RITA POULSEN

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

ORDER AND REASONS

[1] To redress the tragic legacy of Residential Schools and to advance the process of reconciliation, the Truth and Reconciliation Commission *Calls to Action* called upon Canada to work "collaboratively with plaintiffs not included in the Indian Residential Schools Settlement Agreement". This is a Motion for approval of the partial settlement of a class action brought on behalf of the Day Scholars who attended Residential Schools across Canada.

[2] In 2010, Chief Gottfriedson and Chief Feschuck decided to take action in response to the failure of the Residential School settlements to recognize the harms suffered by Day Scholars. At the urging of these Chiefs, in August 2012, this class action was filed to seek justice for the Residential School Day Scholars and to ensure that "no-one was left behind".

[3] On June 3, 2015, Justice Harrington certified this as a class proceeding for the benefit of three classes: the Survivor Class, the Descendant Class, and the Band Class (*Gottfriedson v Canada*, 2015 FC 706).

[4] On this Motion, the Court is asked to approve the proposed settlement reached between Canada and the Survivor Class and the Descendant Class for the loss of culture and language suffered by those who attended Residential Schools as Day Scholars between 1920 and 1997. The Band Class claims have not been settled and that part of the class proceeding will continue.

[5] This Motion was heard in a hybrid manner with legal counsel and representative class members appearing in person in Vancouver with others appearing virtually via Zoom or by telephone.

[6] For the reasons outlined below, although the Court heard from class members who oppose the proposed settlement, overall, the Court is satisfied that the settlement is fair and reasonable and in the best interests of the Survivor and Descendant Class members and the settlement is therefore approved.

Background

[7] To put these claims in context, I will touch briefly on the background of the Residential School system in Canada and the compensation provided by other settlements.

[8] In 1920, the *Indian Act* made it compulsory for "every Indian child" between the ages of 7 and 15 to attend a Residential School or other federally established school. Residential Schools remained in operation for many decades in Canada with the last Residential School not closing until 1997.

[9] In keeping with that timeframe, the class period for this proceeding is 1920 to 1997.

[10] Many students who attended Residential Schools also resided there; however, there were thousands of Day Scholars who attended those same schools but returned home each day. For most Day Scholars, the Residential School was located within their community.

[11] In 2006, the Indian Residential Schools Settlement Agreement (IRSSA) was reached between Canada, Residential School Survivors, and various Church Entities (*Canada (Attorney General) v Fontaine*, 2017 SCC 47 at para 5). As part of the IRSSA, survivors who resided at Residential Schools were eligible for a Common Experience Payment (CEP), in the amount of $10,000 for one school year, and $3,000 for any subsequent school year. In addition, those who suffered sexual abuse and/or serious physical abuse – whether they resided at the Residential School or not – could apply for compensation through an Individual Assessment Process (IAP).

[12] In addition to Residential Schools, there were also Indian Day Schools that were operated separately from Residential Schools. Students in these schools did not reside there full-time, but returned home each day. The Indian Day School Survivors were excluded from the IRSSA and a class action was started on their behalf in 2009. The Court approval of the Day School Survivors class action settlement is reported at *McLean v Canada*, 2019 FC 1075 [*McLean*].

[13] The Day Scholars of Residential Schools, remained unrecognized by both the IRSSA and *McLean* Settlement. Although the Day Scholars could apply for the IAP portion of the IRSSA if they suffered sexual abuse or serious physical abuse, they were not eligible for the CEP.

[14] The background to this class proceeding is best explained in Plaintiffs' Counsel's written submissions as follows:

> 20. Tk'emlúps te Secwépemc ("Tk'emlúps", also known as "Kamloops Indian Band" or "Tk'emlúps te Secwépemc Indian Band") and shíshálh Nation ("shíshálh", also known as "Sechelt Indian Band" or "shíshálh Band") are two of the First Nations which had Residential Schools on their reserve lands, and consequently had a large number of community members who

> attended as Day Scholars. The exclusion of Day Scholars from the CEP portion of IRSSA, and the corresponding lack of recognition for the common experiences of Day Scholars at Residential Schools, caused significant anger and frustration in these First Nations. In late 2010, the then-Chiefs of those First Nations (Shane Gottfriedson and Garry Feshuk, respectively), decided that their Nations would come together to fight on behalf of Day Scholars, including by retaining a legal team of experienced class action and Aboriginal law lawyers to consider legal options.

[15] In 2012, this class proceeding was filed on behalf of the Day Scholars for relief described as follows in Plaintiffs' Counsel's written submissions:

> 22. With regard to the Survivor and Descendant Classes, the focus of this lawsuit is on remedying the gap that was left by IRSSA – specifically, seeking recognition and compensation on behalf of the Survivor and Descendant Classes for the loss of Indigenous language and culture which they endured as a result of the forced attendance of Survivor Class Members at Residential Schools. The core claims in the Plaintiffs' pleading are that the purpose, operation and management of the Residential Schools destroyed Survivor and Descendant Class Members' language and culture, and violated their cultural and linguistic rights.

[16] After the filing of this class proceeding, Canada aggressively defended the claim. Prior to certification, Canada brought a number of procedural motions, including a Motion to stay the action pursuant to s. 50.1 of the *Federal Courts Act*. Canada also Motioned to bring third party claims against a number of Church Entities for contribution and indemnity, and took the position that the Federal Court did not have jurisdiction over these third party claims. The Motion and an appeal from the Motion were unsuccessful. After the Plaintiffs amended their claim to only seek "several" liability against Canada and not any damages for which the Church Entities might be liable, Canada responded by filing third party claims against five religious organizations. These claims were struck by Justice Harrington.

[17] In 2015, the Certification Motion in this action was contested by Canada necessitating a 4-day hearing. During the hearing, Canada took the following positons: the claims disclosed no reasonable cause of action; the class definitions were overbroad; the proposed common issues were not capable of class-wide determination; the claims were time-barred; and the claims were released pursuant to the IRSSA general release and the release signed by Survivor Class members who accessed the IAP.

[18] In April 2019, Canada filed an Amended Statement of Defence, in which they raised a number of the same defences raised at the Certification Motion. Canada argued that there was no breach of any fiduciary, statutory, constitutional or common law duties owed to the members, and that Canada did not breach the Aboriginal Rights of the members. Canada also argued that there was no private law duty of care to protect members from intentional infliction of mental distress, or if there was, they did not breach it. Further, Canada argued that any damages suffered by the plaintiffs were not caused by Canada.

[19] In keeping with the *Calls to Action* outlined in the Truth and Reconciliation Report, Canada's litigation strategy evolved. In the spirit of reconciliation, the parties undertook intensive settlement negotiations in 2019. When those negotiations failed, the parties pressed forward with the litigation. The common issues trial was scheduled to begin on September 7, 2021 and continue for 74 days.

[20] On June 4, 2021, the parties negotiated the proposed settlement agreement of the Survivor Class and Descendant Class claims.

[21] By order of this Court, on June 10, 2021, the parties undertook a notice campaign to provide details of the proposed settlement to class members.

Motion for Approval

[22] On this Motion for approval of the settlement agreement, the parties have filed the following Affidavits:

- Affidavit of Charlotte Anne Victorine Gilbert, representative plaintiff for the Survivor Class, sworn on August 23, 2021;

- Affidavit of Diena Marie Jules, representative plaintiff for the Survivor Class, sworn on August 23, 2021;

- Affidavit of Daphne Paul, representative plaintiff for the Survivor Class, sworn on August 23, 2021;

- Affidavit of Darlene Matilda Bulpit, representative plaintiff for the Survivor Class, sworn on August 23, 2021;

- Affidavit of Rita Poulsen, representative plaintiff for the Descendant Class, sworn on August 23, 2021;

- Affidavit of Amanda Deanne Big Sorrel Horse, representative plaintiff for the Descendant Class, sworn on August 23, 2021;

- Affidavit of Peter Grant, co-class counsel, sworn on August 25, 2021 (attaching the Affidavit of Dr. John Milloy, Professor of History at Trent University, sworn on November 12, 2013);

- Affidavit of Martin Reiher, Assistant Deputy Minister of the Resolution and Partnerships Sector of the Department of Crown-Indigenous Relations and Northern Affairs Canada, sworn on August 12, 2021;

- Affidavit of Dr. Rita Aggarwala, an expert retained by class counsel for the purpose of providing an opinion to the Court on the estimated size of the Survivor Class, sworn on August 20, 2021;

- Affidavit of Joelle Gott, Partner in the Financial Advisory Services Group at Deloitte LLP, proposed Claims Administrator, sworn on August 25, 2021; and,

- Affidavit of Roanne Argyle of Argyle Communications, the court-appointed Notice Administrator, sworn on August 23, 2021.

[23] In addition to the above, the Court received a number of written submissions regarding the proposed settlement. During the settlement approval hearing, the Court heard oral submissions from 11 class members who openly expressed their views on the proposed settlement.

[24] Although the majority of those who expressed their views are in support of the proposed settlement, there are a number of class members who oppose the settlement. I will specifically address the objections to the settlement below.

Terms of the Settlement Agreement

[25] The full settlement agreement in both English and French as well as the applicable Schedules are included in the Motion Record.

[26] The objectives of the settlement are noted in the preamble at Clause E, as follows:

> The Parties intend there to be a fair and comprehensive settlement of the claims of the Survivor Class and Descendant Class, and further desire the promotion of truth, healing, education, commemoration, and reconciliation. They have negotiated this Agreement with these objectives in mind.

[27] The compensation for individual Day Scholar claimants is outlined at paragraph 25.01 as follows:

> Canada will pay the sum of ten thousand dollars ($10,000) as non-pecuniary general damages, with no reductions whatsoever, to each Claimant whose Claim is approved pursuant to the Claims Process.

[28] Those eligible to make a claim are Day Scholars who attended any of the Residential Schools listed in Schedule E for even part of a school year, so long as they have not already received compensation for that school year as part of the CEP or *McLean* Settlement.

[29] For Day Scholars who passed away after the May 30, 2005 cut-off date, but who would otherwise be eligible, one of their descendants will be eligible to make a claim for distribution to their estate. In total, the claim period will be open for 24 months. Canada will cover the costs of claims administration and the *de novo* reconsiderations for any denied claims. Class members will also be entitled to free legal services from class counsel for reconsideration claims. Canada does not have any right to seek reconsideration.

[30] There is no limit or cap on the number of payments that can be made, and no amounts for legal fees or administration costs can or will be deducted from the payments.

[31] The claims process is described at paragraph 35.01 as follows:

> The Claims Process is intended to be expeditious, cost-effective, user-friendly, culturally sensitive, and trauma-informed. The intent is to minimize the burden on the Claimants in pursuing their Claims and to mitigate any likelihood of re-traumatization through the Claims Process. The Claims Administrator and Independent Reviewer shall, in the absence of reasonable grounds to the contrary, assume that a Claimant is acting honestly and in good faith. In considering an Application, the Claims Administrator and Independent Reviewer shall draw all reasonable and favourable inferences that can be drawn in favour of the Claimant.

[32] The creation of the Day Scholars Revitalization Fund is outlined at paragraph 21.01 as follows:

> Canada agrees to provide the amount of fifty million dollars ($50,000,000.00) to the Day Scholars Revitalization Fund, to support healing, wellness, education, language, culture, heritage and commemoration activities for the Survivor Class Members and Descendant Class Members.

[33] The purpose and operation of the fund is described at paragraph 22.01 as:

> The Parties agree that the Day Scholars Revitalization Society will use the Fund to support healing, wellness, education, language, culture, and commemoration activities for the Survivor Class Members and the Descendant Class Members. The monies for the Fund shall be held by the Day Scholars Revitalization Society, which will be established as a "not for profit" entity under the British Columbia *Societies Act*, S.B.C. 2015, c. 18 or analogous federal legislation or legislation in any of the provinces or territories prior to the Implementation Date, and will be independent of the Government of Canada, although Canada shall have the right to appoint one representative to the Society Board of Directors.

[34] If the settlement agreement is approved by the Court, Canada will be released from liability relating to the Survivor Class and Descendant Class members claims regarding their attendance at Residential Schools. However, the terms of the settlement agreement are completely without prejudice to the ongoing litigation of the Band Class claims.

[35] The Parties request that Deloitte LLP be appointed as the Claims Administrator. Deloitte is also the court-appointed Claims Administrator in the *McLean* Settlement.

Analysis

[36] Rule 334.29 of the *Federal Court Rules*, SOR/98-106 provides that class proceedings may only be settled with the approval of a judge. The applicable test is "whether the settlement is fair and reasonable and in the best interests of the class as a whole" (*Merlo v Canada*, 2017 FC 533 at para 16 [*Merlo*]).

[37] The Court considers whether the settlement is reasonable, not whether it is perfect (*Châteauneuf v Canada*, 2006 FC 286 at para 7; *Merlo*, at para 18). Likewise, the Court only has the power to approve or to reject the settlement; it cannot modify or alter the settlement (*Merlo*, at para 17; *Manuge v Canada*, 2013 FC 341 at para 5).

[38] The factors to be considered in assessing the overall reasonableness of the proposed settlement are outlined in a number of cases (see: *Condon v Canada*, 2018 FC 522 at para 19; *Fakhri et al v Alfalfa's Canada, Inc cba Capera*, 2005 BCSC 1123 at para 8) and include the following:

a. Likelihood of recovery or likelihood of success;

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

c. Settlement terms and conditions;

d. Future expense and likely duration of litigation;

e. Recommendations of neutral parties;

f. Number of objectors and nature of objections;

g. Presence of good faith bargaining and the absence of collusion;

h. Communications with class members during litigation; and,

i. Recommendations and experience of counsel.

[39] In addition to the above considerations, as noted in *McLean* (para 68), the proposed settlement must be considered as a whole and it is not open to the Court to rewrite the

substantive terms of the settlement or assess the interests of individual class members in isolation from the whole class.

[40] I will now consider these factors in relation to the proposed settlement in this case.

a. *Likelihood of recovery or likelihood of success*

[41] This class proceeding raises novel and complex legal issues. It is one of the few actions in Canada advancing a claim for the loss of Indigenous language and culture. Advancing novel claims is a significant challenge, and success was far from certain. Recovery of damages on such claims was even more of a challenge. Layered onto this is the inherent challenge of litigating claims for historical wrongs.

[42] When this class proceeding was filed, the likelihood of the success was uncertain. The exclusion of these claimants from the IRSSA and *McLean* Settlement foretold Canada's position on the viability of these claims. Canada aggressively argued against certification, and after certification, Canada advanced a number of defences including limitation defences and claims that the IRSSA releases were a complete bar to these claims. Canada denied any breach of fiduciary, statutory, constitutional or common law duties to the class members, and denied any breach of Aboriginal Rights. Success for Canada on any of these defences would mean no recovery for class members.

[43] As well, the potential liability of the Church Entities who were involved in the Residential Schools posed significant liability and evidentiary challenges.

[44] The passage of time and the historic nature of these claims is also a factor for consideration. Historic documentary evidence is difficult to amass, and the first-hand evidence from Day Scholars themselves was being lost with each passing year. Since the filing of the action, two of the Representative Plaintiffs have passed away as have a number of Survivor Class members. The risk of losing more class members increases the longer this litigation continues.

[45] The settlement agreement provides certainty, recovery, and closure for the Survivor Class and the Descendant Class members. These results could not be guaranteed if the litigation were to proceed.

b. *The amount and nature of discovery, evidence or investigation*

[46] The settlement agreement was reached a few months before the September 2021 common issues trial was scheduled to begin. A great deal of work had been undertaken to prepare this matter for trial. Documentary disclosure was largely complete with Canada having disclosed some 120,000 documents throughout 2020. The parties had retained experts. Examinations of Representative Plaintiffs and examinations for discovery in writing and orally had taken place. Pre-trial examinations were scheduled for March and April 2021.

[47] As this proceeding was trial ready, class counsel had reviewed thousands of pages of documentary evidence and had the benefit of expert opinions. This allowed class counsel to approach settlement discussions with a clear understanding of the challenges they would face in proving the asserted claims.

c. *Settlement terms and conditions*

[48] The settlement agreement provides for a $10,000 Day Scholar Compensation Payment for eligible Survivor Class member or, where an eligible Survivor Class member has passed away, their Descendants. Schedule E to the Agreement lists the Residential Schools which had, or may have had, Day Scholars. Any Survivor who attended a school listed in Schedule E, even if for part of the year, will be eligible for a compensation payment, provided they have not already received compensation as part of the *McLean* Settlement or IRSSA. A lengthy claim period of 21 plus 3 months and the limited 45-day timeframe within which Canada must assess claims provides flexibility to claimants while ensuring speedy resolution of their claims.

[49] Importantly, within the claims process, there is a presumption in favour of compensation and the process has been designed to avoid re-traumatization. No evidence and no personal narrative is required to make a claim. There is also a low burden of proof to establish a claim. As well, there is a simplified process for persons with a disability. This process is distinct from that of the IAP, which has been criticized for the re-victimization of survivor claimants (*Fontaine v Canada (Attorney General),* 2018 ONSC 103 at para 202).

[50] The settlement also includes a $50,000,000 Day Scholars Revitalization Fund. This fund provides for Indigenous led initiatives to support healing, wellness, education, language, culture, heritage and commemoration activities for the Survivor Class members and Descendant Class members. This is a significant feature of the settlement agreement, and it is uncertain if the Court could provide such a remedy as part of the common issues trial or otherwise (*McLean* at para 103).

[51] The legal fees payable to class counsel, which is the subject of a separate Order of this Court, were negotiated after the proposed settlement agreement. The legal fees agreement is not conditional upon the settlement agreement being approved. This "de-linking" of the agreements is important as it ensured that the issue of legal fees did not inform or influence the terms of the settlement agreement. As well, legal fees are not payable from the settlement funds. Therefore, there is no risk of depleting the funds available to class members.

d. *Future expense and likely duration of litigation*

[52] As noted, the common issues trial was scheduled to start in September 2021 and continue for 74 days. If the settlement agreement is not approved, a lengthy trial will be necessary and appeals are likely. The Survivor Class members are elderly. Two of the Representative Plaintiffs, Violet Gottfriedson and Frederick Johnson, passed away since litigation commenced, as have a number of class members. Given the nearly decade-long history of this action, as well as the novelty of the claims, the future expense and duration of litigation should the settlement not be approved is likely to be substantial and lengthy.

e. *Recommendations of neutral parties*

[53] In support of this Motion, class counsel re-submitted the Affidavit of Dr. John Milloy, an expert historian who provided evidence at the Certification Motion. Dr. Milloy is the author of *A National Crime*, a report on the Residential School system. Dr. Milloy outlined the Schools' purpose as "the eradication of the children's' traditional ontology, their language, spirituality and their cultural practices", and highlighted the inadequate conditions and standards of care in the

Schools. Significantly, Dr. Milloy also opined on the impact of Residential Schools on Day Scholars, writing:

> The impacts of residential schools on children were detrimental. Many lost their languages, belief systems and thus their connections to their communities. As a result, many have lived lives of considerable dysfunction, have found their way to other state institutions – prisons, mental hospitals and welfare services. Many survivor families have had their children taken from them by social service agencies. There is no reason to believe that the schools discriminated in their treatment of students between day students and resident students; all would have experienced Canada's attempt to extinguish their identities.

[54] The Court also has an Affidavit from Dr. Rita Aggarwala attaching her report titled *Estimating the Number of Day Scholars who Attended Canada's Indian Residential Schools.* Although Dr. Aggarwala notes concerns about the quality of the data she had access to for the purposes of her statistical analysis, she did provide estimates which are of assistance in understanding the order of magnitude of this settlement. Dr. Aggarwala estimates the class size of Day Scholars who attended Residential Schools from 1920 to 1997 and were alive as of 2005 to be approximately 15,484. Based upon this number, Dr. Aggarwala estimates the total value of the settlement of the Survivor Class claim, based upon a funding formula of $10,000 per survivor, to be approximately $154,484,000.

f. *Number of objectors and nature of objections*

[55] In advance of the hearing, class counsel filed 45 statements from class members of which 24 were objections. At the settlement approval hearing, the Court also heard oral submissions from 6 members objecting to the settlement.

[56] Those speaking against the proposed settlement provided moving and emotionally raw statements about their experiences at Residential Schools. Many made reference to the recent discovery of the bodies of young children within the school grounds as reopening the painful wounds left by the tragic legacy of Residential Schools. Their pain is real and it is palpable. The Court heard members of the Survivor Class explain how their souls were destroyed at the Residential Schools. They mourn the loss of their language, their culture, their spirit, and their pride. Survivors spoke about how the school was the centre of the community – and as a result of the treatment they received they lost both their community and their core identity. Some spoke about the opportunities lost without a proper education.

[57] Members of the Descendant Class spoke about the intergenerational trauma, the pain and dysfunction suffered by their parents and grandparents, and the resulting loss of meaningful family relationships and loss of cultural identity.

[58] Unsurprisingly, the common theme running through the objections is that a payment of $10,000 is simply not enough to compensate for the harms endured and the losses suffered. However, as acknowledged by almost all who spoke, putting a dollar value on the losses suffered is an impossible task. Some of those objecting to the $10,000 payment argued that any settlement should offer at least the same compensation levels as those offered through the IRSSA and the *McLean* Settlement.

[59] While it is understandable that class members compare the compensation offered by this settlement with that offered in the IRSSA and the *McLean* Settlement such a comparison fails to

recognize the key difference in the actions. The claims advanced in this class action are for loss of language and culture. The IRSSA and the *McLean* Settlement addressed claims for sexual and physical abuse.

[60] In any event, the $10,000 payment to Day Scholars in this settlement agreement is comparable with the IRSSA and *McLean* compensation models. In the IRSSA, class members were eligible for a CEP of $10,000 for the first school year, and $3,000 for each additional school year. In *McLean* compensation was based on grid or levels of harm. The range of the grid was from $10,000 for Level 1 claims, to $200,000 for Level 5, with the higher levels of compensation for those who suffered repeated and persistent sexual abuse or serious physical abuse.

[61] The Class Representative Plaintiffs who have been involved in the litigation throughout, overwhelmingly support the settlement. Their support of the settlement is compelling. They have shouldered the burden of moving these claims forward and have had to relive their own trauma by recounting their Residential School experiences. They did this for the benefit of all class members who now, because of the terms of the settlement, will not be required to do so.

[62] Overall, when assessing the reasonableness of the proposed settlement, the Court must consider the interests of all class members, estimated to be over 15,000, as against the risks and benefits of having this class action proceed to trial.

[63] I have considered the objections voiced at the hearing as well as the written objections filed. The objections were primarily focused on the inadequacy of the settlement amount. All while acknowledging that no amount of money can right the wrongs or replace that which has been lost. However, what is certain is that continuing with this litigation will require class members to re-live the trauma for many years to come, against the risk and the uncertainty of litigation. Bringing closure to this painful past has real value which cannot be underestimated.

[64] I acknowledge that the settlement of a class proceeding will never be perfectly suited to the needs of each person within the class, however, considering the obstacles that were overcome to reach this settlement, I am satisfied that this settlement agreement is in the best interests of the Survivor Class and the Descendant Class.

[65] Finally, I commend the lawyers for designing a claims process that protects class members against having to re-live the trauma in order to establish a claim for compensation.

g. *Presence of good faith and absence of collusion*

[66] This action has been ongoing since 2012. It was not until 2017 that the parties first undertook serious settlement discussions. At that time, exploratory discussions were held between class counsel and the Minister's Special Representative (MSR). The Parties met on ten occasions. In March 2017, class counsel forwarded a settlement framework to Canada. Settlement negotiations continued into 2018, and the parties engaged in several rounds of judicial dispute resolution. Unfortunately, a settlement was not reached at that time and the parties prepared to proceed to trial.

[67] On March 4, 2021, the MSR delivered a new settlement offer to class counsel. This ultimately became the settlement agreement that was signed in June 2021 and which is now before the Court for approval.

[68] I am satisfied the parties engaged in good faith negotiations throughout and there is no collusion.

h. *Communications with class members during litigation*

[69] Following the public announcement of the proposed settlement on June 9, 2021, class members were contacted pursuant to a Court approved 2-month Notice Plan. The methods used to communicate the settlement agreement with potential class members included media advertisements, a website, community outreach kits, outreach to national and regional journalists, 6 information webinars, and a "Justice for Day Scholars" Facebook group.

[70] Settlement notices were provided in English, French, James Bay Cree, Plains Cree Ojibwe, Mi'kmaq, Inuktitut, and Dene. Class counsel advises that hundreds of class members made contact by phone, email and mail, and that class counsel responded to all inquiries.

[71] Notice of the settlement agreement was also provided to provincial and territorial public guardians and trustees by letter, and to provincial and territorial provincial health insurers by letter. Finally, notice of the settlement agreement was provided to the Assembly of First Nations (AFN), all AFN Regional Chiefs, and a number of other leaders of Indigenous governance organizations.

[72] I am satisfied that a robust, clear and accessible notice of the proposed settlement was provided to potential class members.

i. *Recommendations and experience of counsel*

[73] Class counsel are experienced in class actions litigation and in Aboriginal law. They have first hand experience with the IRSSA and were specifically sought out to act on this class proceeding. They wholly recommend this settlement agreement, which, in their opinion, addresses the Representative Plaintiffs' objectives.

Conclusion

[74] For the above reasons, I have concluded that the settlement agreement is fair, reasonable, and in the best interests of the Survivor Class and Descendant Class. I echo the comments of Justice Phelan in *McLean* where he states at para 3: "It is not possible to take the pain and suffering away and heal the bodies and spirits, certainly not in this proceeding. The best that can be done is to have a fair and reasonable settlement of the litigation."

[75] I therefore approve the settlement agreement.

[76] With the approval of the settlement agreement, the claims of the Survivor and Descendant Class members against Canada will be dismissed with prejudice and without costs.

[77] Deloitte LLP is appointed as the Claims Administrator, as defined in the settlement agreement, to carry out the duties assigned to that role.

[78] The Certification Order of Justice Harrington will be amended as requested and the Plaintiffs are granted leave to file an Amended Statement of Claim in the form attached to the Plaintiffs' Notice of Motion.

ORDER IN T-1542-12

THIS COURT ORDERS that:

1. The Settlement Agreement dated June 4, 2021 and attached as Schedule "A" is fair and reasonable and in the best interests of the Survivor and Descendant Classes, and is hereby approved pursuant to Rule 334.29(1) of the *Federal Courts Rules*, SOR/98-106, and shall be implemented in accordance with its terms;

2. The Settlement Agreement, is binding on all Canada and all Survivor Class Members and Descendant Class Members, including those persons who are minors or are mentally incapable, and any claims brought on behalf of the estates of Survivor and Descendant Class Members;

3. The Survivor Class and Descendant Class Claims set out in the First Re-Amended Statement of Claim, filed June 26, 2015, are dismissed and the following releases and related Orders are made and shall be interpreted as ensuring the conclusion of all Survivor and Descendant Class claims, in accordance with sections 42.01 and 43.01 of the Settlement Agreement as follows:

    a. each Survivor Class Member or, if deceased, their estate (hereinafter "Survivor Releasor"), has fully, finally and forever released Canada, her servants, agents, officers and employees, from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims, and demands of every nature or kind available, asserted for the Survivor Class in the First Re-Amended Statement of Claim filed June 26, 2015, in the Action or that could have been

asserted by any of the Survivor Releasors as individuals in any civil action, whether known or unknown, including for damages, contribution, indemnity, costs, expenses, and interest which any such Survivor Releasor ever had, now has, or may hereafter have due to their attendance as a Day Scholar at any Indian Residential School at any time;

b. each Descendant Class Member or, if deceased, their estate (hereinafter "Descendant Releasor"), has fully, finally and forever released Canada, her servants, agents, officers and employees, from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims, and demands of every nature or kind available, asserted for the Descendant Class in the First Re-Amended Statement of Claim filed June 26, 2015, in the Action or that could have been asserted by any of the Descendant Releasors as individuals in any civil action, whether known or unknown, including for damages, contribution, indemnity, costs, expenses, and interest which any such Descendant Releasor ever had, now has, or may hereafter have due to their respective parents' attendance as a Day Scholar at any Indian Residential School at any time;

c. all causes of actions/claims asserted by, and requests for pecuniary, declaratory or other relief with respect to the Survivor Class Members and Descendant Class Members in the First Re-Amended Statement of Claim filed June 26, 2015, are dismissed on consent of the Parties without determination on their merits, and will not be adjudicated as part of the determination of the Band Class claims;

d. Canada may rely on the above-noted releases as a defence to any lawsuit that purports to seek compensation from Canada for the claims of the Survivor Class and Descendant Class as set out in the First Re-Amended Statement of Claim;

e. for additional certainty, however, the above releases and this Approval Order will not be interpreted as if they release, bar or remove any causes of action or claims that Band Class Members may have in law as distinct legal entities or as entities with standing and authority to advance legal claims for the violation of collective rights of their respective Aboriginal peoples, including to the extent such causes of action, claims and/or breaches of rights or duties owed to the Band Class are alleged in the First Re-Amended Statement of Claim filed June 26, 2015, even if those causes of action, claims and/or breaches of rights or duties are based on alleged conduct towards Survivor Class Members or Descendant Class Members set out elsewhere in either of those documents;

f. each Survivor Releasor and Descendant Releasor is deemed to agree that, if they make any claim or demand or take any action or proceeding against another person, persons, or entity in which any claim could arise against Canada for damages or contribution or indemnity and/or other relief over, whether by statute, common law, or Quebec civil law, in relation to allegations and matters set out in the Action, including any claim against provinces or territories or other legal entities or groups, including but not limited to religious or other institutions that were in any way involved with Indian Residential Schools, the Survivor Releasor or Descendant Releasor will expressly limit their claim so as to exclude any portion of Canada's responsibility;

g. upon a final determination of a Claim made under and in accordance with the Claims Process, each Survivor Releasor and Descendant Releasor is also deemed to agree to release the Parties, Class Counsel, counsel for Canada, the Claims Administrator, the Independent Reviewer, and any other party involved in the Claims Process, with respect to any claims that arise or could arise out of the application of the Claims Process, including but not limited to the sufficiency of the compensation received; and

h. Canada's obligations and liabilities under the Settlement Agreement constitute the consideration for the releases and other matters referred to in the Settlement Agreement and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Survivor Releasors and Descendant Releasors are limited to the benefits provided and compensation payable pursuant to the Settlement Agreement, in whole or in part, as their only recourse on account of any and all such actions, causes of actions, liabilities, claims, and demands.

5. The Court reserves exclusive and continuing jurisdiction over the claims of the Survivor and Descendant Classes in this action, for the limited purpose of implementing the Settlement Agreement and enforcing the Settlement Agreement and this Approval Order.

6. Deloitte LLP is hereby appointed as Claims Administrator.

7. The fees, disbursements, and applicable taxes of the Claims Administrator shall be paid by Canada in their entirety, as set out in section 40.01 of the Settlement Agreement.

8. The Claims Administrator shall facilitate the claims administration process, and report to the Court and the Parties in accordance with the terms of the Settlement Agreement.

9 No person may bring any action or take any proceeding against the Claims Administrator or any of its employees, agents, partners, associates, representatives, successors or assigns for any matter in any way relating to the Settlement Agreement, the implementation of this Order or the administration of the Settlement Agreement and this Order, except with leave of this Court.

10. Prior to the Implementation Date, the Parties will move for approval of the form and content of the Claim Form and Estate Claim Form.

11. Prior to the Implementation Date, the Parties will identify and propose an Independent Reviewer or Independent Reviewers for Court appointment.

12. Class Counsel shall report to the Court on the administration of the Settlement Agreement. The first report will be due six (6) months after the Implementation Date and no less frequently than every six (6) months thereafter, subject to the Court requiring earlier reports, and subject to Class Counsel's overriding obligation to report as soon as reasonable on any matter which has materially impacted the implementation of the terms of the Settlement Agreement.

13. The Certification Order of Justice Harrington, dated June 18, 2015, will be amended as requested.

14. The Plaintiffs are granted leave to amend the First Re-Amended Statement of Claim in the form attached hereto.

15. There will be no costs of this motion.

"Ann Marie McDonald"
Judge