

Federal Court



Cour fédérale

Date: 20190819

Docket: T-2169-16

Citation: 2019 FC 1074

Ottawa, Ontario, August 19, 2019

PRESENT: The Honourable Mr. Justice Phelan

CLASS PROCEEDING

BETWEEN:

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

Plaintiffs

and

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

Defendant

**ORDER
(Settlement Approval)**

THIS MOTION, made by the Plaintiffs for judgment approving the settlement of this action in accordance with the terms of the Settlement Agreement entered into on March 12,

2019, amended on May 13, 2019, was heard on May 13, 14 and 15, 2019 respectively, at the Federal Court, 363 Broadway, Winnipeg, Manitoba, R3C 3N9.

WHEREAS this Court certified this action as a class proceeding by Order dated June 21, 2018;

AND WHEREAS the Plaintiffs and the Defendant entered into an Agreement in Principle dated November 30, 2018 in respect of the Plaintiffs' claims against the Defendant;

AND WHEREAS the Parties entered into a Settlement Agreement (the "**Settlement Agreement**") on March 12, 2019;

AND WHEREAS the Parties amended the Settlement Agreement pursuant to an Amending Agreement on May 13, 2019;

AND WHEREAS this Court approved the form of notice and the plan for distribution of the Notice of Certification and Settlement Approval Hearing by Order dated March 13, 2019 (the "**Notice Order**");

AND WHEREAS all applicable parties have adhered to and acted in accordance with the Notice Order and the procedures provided therein, the Notice Order has constituted good and sufficient notice of the hearing of the motion for Settlement Approval;

AND WHEREAS, based on information received from putative class members following the Notice Order, Class Counsel has provided to the Defendant requests for independent review and investigation of (i) named schools omitted from Schedule K and (ii) schools operated outside the time period specified in Schedule K;

AND WHEREAS the Parties have updated Schedule K, based on the results of the aforementioned requests for review and investigation;

UPON READING the Motion Record of the parties and the facts of the parties;

AND UPON HEARING the motion made by the Plaintiffs for an order approving the terms of the Settlement Agreement dated March 12, 2019, amended on May 13, 2019 (the “**Settlement Agreement**” or “**Settlement**”) including the oral submissions of counsel for the Plaintiffs and the Defendant as well as the oral submissions of class member supporters and class member objectors or in the case of the latter, counsel designated by such objectors to make oral submissions on their behalf;

THIS COURT ORDERS that:

1. For the purposes of this Order, the following definitions shall apply:
 - a. “**Approval Date**” means the date that this Court approved the Settlement Agreement;
 - b. “**Approval Order**” means this Order;
 - c. “**Canada**” means Her Majesty the Queen in Right of Canada, the Attorney General of Canada, and their legal representatives, employees, agents, servants, predecessors, successors, executors, administrators, heirs, and assigns;
 - d. “**Class Action**” means *McLean et al v Her Majesty the Queen* (Court File No. T-2169-16);
 - e. “**Class Member**” means a Survivor Class Member or a Family Class Member;
 - f. “**Class Period**” means the period from and including January 1, 1920 and ending on the date of closure of any particular Indian Day School, or the date on which

the management and control of a particular Indian Day School was effectively transferred from Canada or, if not transferred from Canada, the date on which a written offer of transfer by Canada was not accepted by the affected First Nation or Indigenous government;

- g. **“Family Class Member”** means all persons who are a spouse or former spouse, child, grandchild, or sibling of a Survivor Class Member and the spouse of a child, grandchild, or sibling of a Survivor Class member;
- h. **“Federal Indian Day School” or “Federal Day School”** means a day school established, operated, maintained and controlled by Canada after 1920 as specified in Schedule K to the Settlement Agreement, amended as of the Approval Date;
- i. **“Fees Approval Order”** means the Order of this Court approving Class Counsel Fees;
- j. **“Implementation Date”** means the latest of:
 - i. thirty (30) days after the expiry of the Opt-Out Period; and
 - ii. the day following the last day on which a member of the Survivor Class or the Family Class may appeal or seek leave to appeal the Approval Order; and,
 - iii. the date of the final determination of any appeal brought in relation to the Approval Order;
- k. **“Indian Day School”** means both a Federal Indian Day School and a Federal Day School, as defined at (h) above, as listed in Schedule K to the Settlement Agreement, amended as of the Approval Date;

- l. “**Opt Out Period**” or “**Opt Out Deadline**” means the ninety (90) day period which commences on the date that the Federal Court approves the Final Settlement Agreement, pursuant to paragraph 3 below;
- m. “**Releasees**” means individually and collectively, Canada, and each of the past, present, and future Ministers of the federal government, its Departments and Agencies, employees, agents, officers, officials, subrogees, representatives, volunteers, administrators and assigns;
- n. “**Settlement Agreement**” means the Settlement Agreement dated March 12, 2019, amended on May 13, 2019, and otherwise amended by order of this Court;
- o. “**Settlement Fund**” also referred to as the “Legacy Fund” means the settlement fund established pursuant to section 3.01 of the Settlement Agreement;
- p. “**Schedule K**” means the list of day schools established, funded, controlled, and managed by Canada during the Class Period and specifically limited to the dates of federal operation associated with each particular school, as attached to this Order as **Appendix A**;
- q. “**Survivor Class**” or “**Survivor Class Members**” means all persons who, wherever they may now reside or be domiciled, attended an Indian Day School during the Class Period.

SETTLEMENT APPROVAL

2. The Settlement Agreement is fair, reasonable and in the best interests of the Plaintiffs and the Class Members.

3. The Settlement Agreement, which is expressly incorporated by reference into this Order, shall be and hereby is approved and shall be implemented in accordance with this Order and further orders of this Court.
4. Schedule K to the Settlement Agreement, as updated by the parties to the Approval Date, is attached as **Appendix A** to this Order and is hereby closed to further revision.
5. The claims of the Class Members and the Class as a whole shall be discontinued against the Defendant and are released against the Releasees in accordance with section 12.01 of the Settlement Agreement; in particular, as follows:
 - a. Each Survivor Class Member or his/her Estate Executor who has not opted out on or before the expiry of the Opt Out Period (hereinafter “Survivor Class Releasers”) has fully, finally and forever released Canada, her servants, agents, officers and employees, from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims, and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including for damages, contribution, indemnity, costs, expenses, and interest which any such Survivor Class Releaser ever had, now has, or may hereafter have, directly or indirectly, arising from or in any way relating to or by way of any subrogated or assigned right or otherwise in relation to the individual claims under the Federal Court Class Action, and this release includes any such claim made or that could have been made in any proceeding, whether asserted directly by the Survivor Class Releaser or by any other person, group, or legal entity on behalf of or as representative for the Survivor Class Releaser.

- b. For greater certainty, Survivor Class Releasors are deemed to agree that if they make any claim or demand or take any actions or proceedings against another person or persons in which any claim could arise against Canada for damages or contribution or indemnity and/or other relief over, whether by statute or the common law, Quebec civil law in relation to the individual claims under the Federal Court Class Action, including any claim against Provinces or Territories or other entities, the Survivor Class Releasor will expressly limit his or her claims so as to exclude any portion of Canada's responsibility.
- c. Upon a final determination of a Claim made under and in accordance with the Claims Process, Survivor Class Releasors are also deemed to agree to release the Parties, Class Counsel and counsel for Canada, the Claims Administrator, and the Third Party Assessor 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.
- d. Each Family Class Member who has not opted out on or before the expiry of the Opt Out Period ("Family Class Releasors") has fully, finally and forever released Canada, her servants, agents, officers and employees, from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims, and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including for damages, contribution, indemnity, costs, expenses, and interest which any such Family Class Releasor ever had, now has, or may hereafter have, directly or indirectly, arising from or in any way relating to or by way of any subrogated or

assigned right or otherwise in relation to the individual claims under the Federal Court Class Action, and this release includes any such claim made or that could have been made in any proceeding, whether asserted directly by the Family Class Releasor or by any other person, group, or legal entity on behalf of or as representative for the Family Class Releasor.

- e. For greater certainty, Family Class Releasors are deemed to agree that if they make any claim or demand or take any actions or proceedings against another person or persons in which any claim could arise against Canada for damages or contribution or indemnity and/or other relief over, whether by statute or the common law, Quebec civil law in relation to the individual claims under the Federal Court Class Action, including any claim against Provinces or Territories or other entities, the Family Class Releasor will expressly limit his or her claims so as to exclude any portion of Canada's responsibility.
6. This Order, for greater certainty, does not affect the rights of:
 - i. Class Members who opt out of the Approved Settlement; nor,
 - ii. Individuals who are not Class Members.
 7. As provided for in Rule 334.21(2), any class member who has commenced a legal proceeding against the Defendant in relation to its establishing, funding, control, and management of a Federal Indian Day School or Federal Day School and who does not discontinue that proceeding on or before the opt out deadline, will be excluded from this Settlement, will be deemed to have opted out of the Settlement and will be ineligible to apply for compensation under this Settlement.

8. This Order, including the releases referred to in paragraph 5 above, and the Settlement Agreement are binding on all Class Members who have not opted out of it including those persons who are under a disability and any claims brought on behalf of the Estates of Class Members.

EXCLUSIVE AND CONTINUING JURISDICTION

9. This Court, without in any way affecting the finality of this Order, reserves exclusive and continuing jurisdiction over this action, the Plaintiffs, all Class Members who have not opted out of the Settlement Agreement, and the Defendant for the limited purposes of implementing the Settlement Agreement and enforcing and administering the Settlement Agreement and this Order.
10. Save as set out above, leave is granted to discontinue this action against the Defendant, without costs and with prejudice, and such discontinuance shall be an absolute bar to any subsequent actions against the Defendant in respect of the subject matter in the within action.

CLAIMS ADMINISTRATOR AND CLAIMS PROCESS

11. Deloitte Canada shall be and is hereby appointed as Claims Administrator pursuant to the Settlement Agreement. Subject to the Court's ongoing supervision and orders, the Claims Administrator will develop, install and implement systems, forms, information, guidelines and procedures for processing and making decisions on Claim Applications in accordance with the Settlement Agreement and will develop, install and implement systems and procedures for making payments of compensation in accordance with the Settlement Agreement.

12. The Claims Form, attached to this Order as **Appendix B**, is hereby approved. It may be distributed to Class Members by Class Counsel, the Claims Administrator or through the Indian Day Schools website, on request, at any time subsequent to the issuance of this Order, however, the Claims Administrator may elect not to begin claims administration until the Implementation Date.
13. Prior to the Implementation Date, the parties will identify and propose the Third Party Assessor for Court appointment. Upon appointment, the Third Party Assessor shall discharge the responsibilities specified in the Settlement Agreement.
14. Prior to the Implementation Date, the parties will identify and propose for Court appointment members of the Exceptions Committee to supervise and monitor all future work to be carried out by the Claims Administrator and the Third Party Assessor, as specified in the Settlement Agreement.
15. Fees, disbursements and applicable taxes of the Claims Administrator and the Third Party Assessor shall be paid by the Defendant in accordance with the Settlement Agreement.
16. Fees, disbursements and applicable taxes of the members of the Exceptions Committee shall be paid by the Defendant in accordance with the Settlement Agreement with the exception of the costs of Class Counsel, which will be paid from the Post-Implementation Fees paid to Class Counsel pursuant to the Fees Approval Order, and shall be approved by the Court on a quarterly basis.
17. No person may bring any action or take any proceeding against the McLean Day Schools Settlement Corporation including its directors and officers, the Claims Administrator including the Third Party Assessor and the Exceptions Committee or against the members, employees, agents, partners, associates, representatives, successors or assigns

of such bodies, for any matter in any way relating to the Settlement Agreement, the administration of the Settlement Agreement or the implementation of this judgment, except with leave of this Court on notice to all affected parties.

OPT OUT PROCESS

18. The opt-out form in this proceeding attached as **Appendix C** to this Order is hereby approved. The Opt-Out Period shall commence on the issuance of this Order. The opt-out form shall be available to eligible Class Members through Class Counsel and through the Federal Indian Day School website; www.indiandayschools.com. Each opt-out form must be completed as directed and returned to Class Counsel on or before November 18, 2019. At the conclusion of the 90-day Opt-Out Period, Class Counsel shall deliver to the Claims Administrator and to the Defendant a list of all eligible Class Members who submitted an opt-out form prior to the end of the opt-out period together with a copy of the submitted opt-out form for each person listed.
19. For greater certainty, as noted in paragraph 8 above, this Order and all applicable provisions of the Settlement Agreement are binding on all eligible Class Members who have not delivered a completed and properly executed opt-out form to Class Counsel by the opt-out deadline specified above.
20. In the event that the number of persons who are eligible for compensation under the Settlement Agreement and who opt out of this class proceeding exceeds ten thousand (10,000), the Settlement Agreement will be void and this judgment will be set aside in its entirety, subject only to the right of Canada, at its sole discretion, to waive this threshold as specified in the Settlement Agreement.

NOTICE OF SETTLEMENT APPROVAL

21. Notice of this judgment shall be given in the manner attached hereto as **Appendix D** entitled Notice of Settlement Approval and shall include notice of the commencement of the Opt Out Period and of the Claims Process. Distribution of the Notice of Settlement Approval shall be undertaken in accordance with the Notice Plan, attached as **Appendix E** to this Order, and shall be funded by Canada.

REPORTING TO THE COURT

22. 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 the overriding obligation to report as soon as reasonable on any matter, which has materially impacted the implementation of the terms of the Settlement Agreement.
23. This Court may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Settlement Agreement and this Order.

“Michael L. Phelan”

Judge