Federal Court  Cour fédérale

Date: 20231120

Dockets: T-402-19
T-141-20
T-1120-21

Citation: 2023 FC 1533

Ottawa, Ontario, November 20, 2023

PRESENT: The Honourable Madam Justice Aylen

CLASS PROCEEDING

T-402-19

BETWEEN:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (BY HIS LITIGATION GUARDIAN, JONAON JOSEPH MEAWASIGE) AND JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

T-141-20

BETWEEN:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON (BY HIS LITIGATION GUARDIAN, CAROLYN BUFFALO), CAROLYN BUFFALO AND DICK EUGENE

JACKSON ALSO KNOWN AS RICHARD JACKSON

Plaintiffs

and

HIS MAJESTY THE KING AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

T-1120-21

BETWEEN:

ASSEMBLY OF FIRST NATIONS AND ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR SETTLEMENT APPROVAL ORDER

[1] This settlement is the culmination of a 15-year-long proceeding before the Canadian Human Rights Tribunal and three class actions concerning Canada's chronically underfunded and discriminatory First Nations Child and Family Services [FNCFS] program on reserves and in the Yukon, and Canada's failure to provide non-discriminatory access to essential health and

social services. This $23.34 billion, First Nations-led settlement represents a monumental step towards reconciliation and will provide life-changing relief to hundreds of thousands of marginalized First Nations youths and families.

[2] The Plaintiffs brought a motion, on consent and pursuant to Rule 334.29 of the *Federal Courts Rules*, SOR/98-106 [*Rules*], for an order approving the final settlement agreement executed by the Plaintiffs and the Defendant on April 19, 2023 and as amended by way of Addendum dated October 10, 2023 [Final Settlement Agreement] and approving an honorarium for the representative plaintiffs.

[3] At the hearing of the motion on October 24, 2023, I advised the parties that I would be issuing an order approving the Final Settlement Agreement and granting the requested honoraria, with reasons to follow. My Order was issued on November 3, 2023 and I am now providing herein my reasons for doing so.

I. Background

A. *Nature of the claim and history of the litigation*

[4] In the underlying proceedings, the Plaintiffs advanced claims for two related categories of discriminatory conduct:

A. Canada chronically underfunded the FNCFS program on reserves and in the Yukon, and operated it in a discriminatory manner, which systemically incentivized the removal of First Nations children from their families, communities and cultures; and

B. Canada failed to provide non-discriminatory access to essential health and social services, in breach of section 15 of the *Canadian Charter of Rights and Freedoms* and Jordan's Principle.

[5] In relation to the first category (the removed child claims), the Plaintiffs state that, for decades, Canada underfunded child and family services for First Nations children living on reserve and in the Yukon. In particular, Canada underfunded supportive prevention services that would allow First Nations children to remain in their homes. At the same time, Canada funded the removal of those children from their families and communities, which created a perverse incentive – namely, children had to be removed from their homes to receive public services that were available to children off reserve.

[6] The removal of children from their home causes severe and often permanent trauma. As such, it is typically only employed as a measure of last resort. However, in the case of First Nations children on reserve and in the Yukon, it became a measure of first resort due to the underfunding of services, resulting in the staggering overrepresentation of First Nations children in state care.

[7] The Plaintiffs state that this underfunding persisted despite: (a) the heightened need for such services on reserve due to the inter-generational trauma inflicted on First Nations people by the legacy of the Indian residential schools and the Sixties Scoop; and (b) Canada's knowledge of the deficiencies in the FNCFS program based on numerous governmental and independent reports detailing these significant deficiencies, the inequities in the FNCFS program and their harmful impacts on First Nations people.

[8] The Plaintiffs state that the incentive to remove First Nations children from their homes has caused traumatic and enduring consequences for First Nations children (including the Representative Plaintiffs), many of whom already suffer the effects of trauma inflicted by Canada on their parents, grandparents and ancestors by Indian residential schools and the Sixties Scoop.

[9] In relation to the second category (the essential services claims), the Plaintiffs state that Canada failed to provide First Nations children with adequate and non-discriminatory access to essential health and social services and products, contrary to Jordan's Principle. Jordan's Principle, named after Jordan River Anderson (a First Nations child born with complex illnesses), is a legal obligation requiring that the government department first presented with a request for essential services by a First Nations child must pay for those services before arguing over which level of government or which department should pay. The Plaintiffs state that, notwithstanding that Canada has acknowledged its legal obligation to comply with Jordan's Principle, Canada ignored this obligation for decades and denied crucial health and social services and products to many First Nations children.

[10] On March 4, 2019, Xavier Moushoom commenced a proposed class action proceeding (Court file no. T-402-19) seeking compensation for children who had suffered discrimination related to the FNCFS program since April 1, 1991 and the discriminatory delivery of essential services and non-compliance with Jordan's Principle since April 1, 1991 [Moushoom Class Action]. Jeremy Meawasige, by his litigation guardian, Jonavon Joseph Meawasige (and prior to

him, their late mother Maurina Beadle) and Jonavon Joseph Meawasige were subsequently joined as representative plaintiffs.

[11] On January 28, 2020, the Assembly of First Nations [AFN] and a number of proposed representative plaintiffs commenced a second proposed class action proceeding (Court file no. T-141-20) [AFN Class Action], which overlapped with the Moushoom Class Action. The representative plaintiffs in the AFN Class Action are Ashley Dawn Louise Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson (by his litigation guardian, Carolyn Buffalo), Carolyn Buffalo and Dick Eugene Jackson (also known as Richard Jackson).

[12] On July 7, 2021, the Moushoom Class Action and the AFN Class Action were consolidated [Consolidated Action], on consent. However, the parties agreed to remove from the consolidated action claims relating to delays, denials or gaps in the provision of essential services before December 11, 2007 and that such claims would be addressed in a separate proceeding to be commenced by Zacheus Trout and the AFN. At that point in time, Canada took the position that Jordan's Principle did not exist prior to December 12, 2007 (when the House of Commons passed a motion in support of Jordan's Principle) and therefore opposed the certification of any claims before December 12, 2007.

[13] On July 16, 2021, Mr. Trout and the AFN commenced a proposed class action (Court file no. T-1120-21) dealing with the claims previously advanced in the Moushoom Class Action relating to delays, denials and gaps in the provision of essential services between April 1, 1991

and December 11, 2007 [Trout Class Action]. The Trout Child Class is named in memory of Mr. Trout's two late children, Sanaye and Jacob Trout.

[14] On November 26, 2021, the Consolidated Action was certified as a class proceeding on consent.

[15] Canada subsequently abandoned its opposition to the pre-December 12, 2007 claims and on February 11, 2022, the Trout Class Action was also certified as a class proceeding on consent.

B. *Relationship between these actions and the proceedings before the Canadian Human Rights Tribunal*

[16] In 2007, the AFN and the First Nations Child and Family Caring Society of Canada [Caring Society] filed a complaint with the Canadian Human Rights Commission [Commission] against Canada. On October 14, 2008, the Commission referred the complaint to the Canadian Human Rights Tribunal [Tribunal].

[17] The allegations in the Consolidated Action duplicated, in part, allegations first made before the Tribunal on behalf of: (a) First Nations children removed and placed off-reserve between 2006 and 2022; (b) First Nations children who faced a denial, delay or gap in the provision of essential services (breaches of Jordan's Principle) between 2007 and 2017; and (c) some caregiving parents and grandparents of those children.

[18] After a 70-day hearing with 25 witnesses and 500 documentary exhibits, on January 26, 2016, the Tribunal found that Canada violated section 5 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [*CHRA*] in two ways: (i) the FNCFS program discriminated against First Nations children and families on reserve and in the Yukon, resulting in inadequate fixed funding that hindered the delivery of culturally appropriate child welfare services, created incentives for its agencies to take First Nations children into care, and failed to consider the unique needs of First Nations children and families; and (ii) Canada discriminated by taking an overly narrow approach to Jordan's Principle, which resulted in service gaps, delays, and denials [Merit Decision]. The Merit Decision recognized that Canada's discriminatory funding practices caused First Nations children and families living on reserves and in the Yukon to suffer.

[19] The Tribunal ordered that Canada immediately cease its discriminatory practices and engage in any reforms needed to bring itself into compliance with the Merit Decision, and immediately implement Jordan's Principle's full meaning and scope. Finally, the Tribunal sought submissions from the parties regarding remedies.

[20] Neither Canada nor the complainants sought judicial review of the Merits Decision, which became final on March 2, 2016.

[21] In March 2019, the CHRT returned to the question of remedy. Canada made submissions opposing entitlement to individual compensation on the basis that the Tribunal lacked jurisdiction. In September 2019, the Tribunal rejected Canada's arguments and ordered Canada to provide compensation in the amount of $40,000.00 plus interest to those children and their

caregiving parents and grandparents who were affected by Canada's discriminatory underfunding of family and child services or by its narrow application of Jordan's Principle (as provided in the Merits Decision) [Compensation Decision].

[22] Canada sought judicial review of the Compensation Decision. In September 2021, the Federal Court dismissed Canada's application for judicial review of the Compensation Decision. In its decision, this Court urged the parties to work towards achieving a fair and just settlement. Canada appealed this Court's judicial review decision. Canada agreed to withdraw it appeal on approval of the Final Settlement Agreement.

C. *Settlement Negotiations*

[23] Starting in 2019, the parties to the class action proceedings engaged in various forms of settlement negotiations.

[24] From November 2020 to September 2021, the parties to the Consolidated Action engaged in mediation before Justice Leonard Mandamin. The negotiations covered not only compensation for certain classes in the Consolidated Action but also long-term reform. During this time, Canada refused to engage in negotiations regarding the Trout Class Action. The parties were unable to reach an agreement and Class Counsel sought to advance the litigation.

[25] In November of 2021, the parties to the Consolidated Action agreed to enter into further negotiations facilitated by the Honourable Murray Sinclair. Toward the end of these negotiations, Canada agreed to include the Trout Class Action in the settlement discussions.

[26] On December 31, 2021, the Plaintiffs and Canada reached an agreement in principle, which set out the principal terms of their agreement to settle all of the class actions. Canada made agreement on compensation conditional on the Tribunal parties concurrently reaching an agreement on long-term reform of the federal First Nations child welfare system. A separate agreement in principle was concluded on long-term reform, which does not form part of the settlement before the Court on this motion.

[27] After several months of negotiations, the parties executed a final settlement agreement dated June 30, 2022 [First Agreement], which provided for a total settlement amount, excluding legal and administrative fees, of $20 billion. The First Agreement was conditional on the Tribunal confirming that the First Agreement satisfied the Compensation Decision and related compensation orders.

[28] On July 22, 2022, the AFN and Canada brought a joint motion to the Tribunal for confirmation that the First Agreement satisfied the Compensation Decision and related compensation orders. The Caring Society and the Commission opposed the joint motion.

[29] On October 24, 2022, the Tribunal issued a letter decision dismissing the joint motion, with full reasons following on December 20, 2022. In its full reasons, the Tribunal found that, while the First Agreement substantially satisfied the Tribunal's Compensation Decision and related compensation orders, it did not fully satisfy them in four material respects:

A. First Nation children ordinarily living on a reserve who were voluntarily sent by their caregivers to stay with non-family off-reserve (the parties have now named this group "Kith") were entitled to compensation.

B. The estates of deceased parents and grandparents of affected children were entitled to compensation.

C. While affected children were limited to the Tribunal's damages cap of $40,000.00, certain parents and grandparents who had more than one child affected were entitled to that amount for each child—meaning that if, for example, a father had four children removed from his care, he should be entitled to $160,000.00.

D. The Tribunal needed more certainty and clarity on the parties' approach to Jordan's Principle and a longer opt-out period.

[30] After further rounds of negotiation between January and April 2023, the parties and the Caring Society reached an updated agreement on April 19, 2023 that was ultimately formalized in the Final Settlement Agreement. The Final Settlement Agreement addressed the four issues raised by the Tribunal and added $3.34 billion (for a total of $23.34 billion) in compensation to cover the additional requirements.

[31] On June 30, 2023, the AFN and Canada brought a fresh joint motion before the Tribunal for an order that the Final Settlement Agreement satisfied the Compensation Decision and related compensation orders, which order was granted.

D. *Key provisions of the FSA*

[32] Under the terms of the Final Settlement Agreement, Canada will pay $23,343,940,000 to settle the claims of the Class in the Consolidated Action and the Trout Class Action, which the parties advise is the largest class action settlement in Canadian history.

[33] The Final Settlement Agreement provides for nine classes with a combined estimated membership total of over 300,000 individuals, with the following simplified definitions:

A. “Removed Child Class” means all First Nations individuals who (i) while under the age of majority, and (ii) while they, or at least one of their caregivers were ordinarily resident on reserve or living in the Yukon, (iii) were removed from their home by child welfare authorities or voluntarily placed into care between April 1, 1991 and March 31, 2022, and (iv) whose placement was funded by Indigenous Services Canada.

B. “Removed Child Family Class” means all brothers, sisters, mothers, fathers, grandmothers and grandfathers of a member of the Removed Child Class at the time of removal.

C. “Essential Service Class” means all First Nations individuals who, between December 12, 2007 and November 2, 2017, did not receive from Canada an essential service (whether by denial or service gap) relating to a confirmed need, or whose receipt of an essential service relating to a confirmed need was delayed by Canada on grounds including a lack of funding or jurisdiction, or as a result of a service gap or jurisdictional dispute.

D. “Jordan’s Principle Class” means all members of the Essential Service Class who experienced the highest level of impact (including pain, suffering or harm of the worst kind).

E. “Jordan’s Principle Family Class” means all brothers, sisters, mothers, fathers, grandmothers or grandfathers of a member of the Jordan’s Principle Class at the time of the delay, denial or service gap.

F. “Trout Child Class” means all First Nations individuals who, between April 1, 1991 and December 11, 2007, did not receive from Canada an essential service (whether by denial or service gap) relating to a confirmed need, or whose receipt of an essential service relating to a confirmed need was delayed by Canada on grounds such as a lack of funding or jurisdiction, or a result of a service gap or jurisdictional dispute.

G. “Trout Family Class” means the brothers, sisters, mothers, fathers, grandmothers or grandfathers of a member of the Trout Child Class at the time of the delay, denial or service gap.

H. “Kith Child Class” means First Nations Children placed with an unpaid non-family caregiver off-reserve during the Removed Child Class Period at a time when a child welfare authority was involved in the First Nations Child’s case.

I. “Kith Family Class” means the caregiving parents or, in the absence of caregiving parents, the caregiving grandparents of an Approved Kith Child Class Member who was in a placement between January 1, 2006 and March 31, 2022.

[34] The Final Settlement Agreement sets out the criteria for entitlement to a payout for each Class and the principles for determining the amount that each Class Member may receive. In general, the Final Settlement Agreement contemplates payment of a base compensation amount, plus the possibility of an enhanced payment for those individuals that were most impacted by Canada’s discriminatory conduct.

[35] Removed Child Class Members will receive a base compensation of $40,000.00, together with interest, a time value enhancement (to create parity amongst Remove Child Class Members accessing payouts over the course of a claims process expected to last 20 years) and a possible enhancement payment. The Plaintiffs and experts have identified objective factors that aggravated the harm suffered so as to entitle a Class Member to an enhanced payment, including the age at which they were removed for the first time, the total number of years spent in care, the age at which they exited the child welfare system, whether they were removed to receive an essential service relating to a confirmed need, whether they were removed from a northern or remote community, and the number of spells in care or the number of out-of-home placements applicable to a Removed Child Class Member who spent more than one year in care. Based on Class Counsel’s initial approach to the calculation of enhancement payments (which is subject to further consultation with experts and approval of the Settlement Implementation Committee), Removed Child Class Members who meet the criteria for multiple enhancement factors may receive total payouts of approximately $230,000.00.

[36] A budget of $7.25 billion has been allocated to the Removed Child Class based on a class size estimate of 116,000, which was arrived at with the assistance of experts.

[37] Removed Child Family Class Members will receive a base compensation of $40,000.00 (in some cases, multiplied by the number of affected children), with no enhancement payment available. Compensation is available for up to two caregiving parents or grandparents per child, with conflicts among purported caregivers to be resolved based on a pre-defined priority list. Caregivers who have committed sexual or serious physical abuse related to the Removed Child Class Member's removal are not eligible for compensation in relation to that child. A budget of $5.75 billion has been allocated to the Removed Child Family Class, with a further budget of $997 million for any multiplication of the base compensation.

[38] Members of the Essential Service Class, Jordan's Principle Class and Trout Child Class will be eligible for compensation if they had a confirmed need for an essential service and (i) they requested the essential service and it was denied; (ii) they requested an essential service and faced an unreasonable delay; or (iii) there was a service gap such that the essential service was not available, even if the essential service was not requested. Claimants will be required to provide supporting documentation that the essential service was recommended by a professional at the relevant time.

[39] The Final Settlement Agreement is structured so that those who suffered greater harms (Jordan's Principle Class) receive at least $40,000.00, whereas those who suffered lesser harms (Essential Service Class) receive at most $40,000.00. Funds will be distributed first to those who

suffered greater harms, with the balance to be distributed *pro rata* to those who suffered lesser harms. A budget of $3 billion has been allocated to the Essential Service Class and Jordan's Principle Class, based on an estimate of 65,000 Jordan's Principle Class Members, arrived at with the assistance of experts.

[40] Compensation for the Trout Child Class Members will be made using the same guiding principle, with those who suffered greater harms receiving at least $20,000.00 and those who suffered lesser harms receiving at most $20,000.00. The compensation differential between the Trout Child Class Members and the Essential Service Class and Jordan's Principle Class Members is rooted in the heightened litigation risk for the Trout Class Action, which advanced novel essential service claims, had no overlap with the Tribunal's Compensation Decision and pre-dated Jordan's Principle. A budget of $2 billion has been allocated to the Trout Child Class, based on an estimate of 104,000 Trout Child Class Members, arrived at with the assistance of experts.

[41] Only caregiving parents or grandparents of an approved Jordan's Principle Class Member may be entitled to compensation if they themselves suffered the highest level of impact, in which case they will receive a base compensation of $40,000.00, assessed using objective factors developed in consultation with experts. Similarly, only caregiving parents or grandparents of an approved Trout Class Member may be entitled to compensation if they themselves suffered the highest level of impact, although no set amount of compensation is prescribed in the agreement. Rather, the amount of compensation will be determined by the Settlement Implementation Committee with the assistance of an actuary. All other Jordan's Principle Family Class Members

and Trout Family Class Members will not receive direct compensation, but are intended to benefit from the *cy-près* fund (addressed below). A budget of $2 billion has been allocated to the Jordan's Principle Family Class and the Trout Family Class.

[42] The base compensation entitlement of an approved Kith Child Class Member will be $40,000.00, with no available enhancement payments. Compensation entitlement for Kith Child Family Class Members follows a similar method to that applicable to certain Removed Child Family Class Members (with some nuances) and provides a base compensation of $40,000.00. A budget of $600 million has been allocated to the Kith Child Class (based on an estimated class size of 15,000) and a budget of $702 million has been allocated to the Kith Family Class (based on an estimated class size of 17,550).

[43] With respect to the claims period, individuals who have reached the age of majority are entitled to file claims for up to three years following the implementation of the claims process. For those who are still minors, the claims period will remain open for three years following the date on which they reach the age of majority. The Final Settlement Agreement contains certain exceptions that permit the filing and payment of a claim before a child reaches the age of majority, and for extending the claim deadline if necessary.

[44] The Final Settlement Agreement also establishes a First Nations-led *cy-près* fund endowed with:

A. $50 million for supports to Class Members who did not receive direct compensation, funded by the interest earned on the settlement funds. These supports include: (i) family and community unification, reunification, connection and reconnection for

youth in care and formerly in care; (ii) reducing the costs associated with travel and accommodations to visit community and family, including for First Nations youth in care and formerly in care, support person(s) or family members; and (iii) facilitating access to culture-based, community-based and healing-based programs, services and activities to Class Members and children of First Nations parents who experienced a delay, denial or service gap in the receipt of an essential service; and

B. $90 million for post-majority supports for high needs Jordan's Principle Class Members until the age of 26 to ensure their personal dignity and well-being, funded by allocated settlement funds.

[45] The Final Settlement Agreement contains a number of other key provisions and design features, including the following:

A. Detailed provisions are included regarding deceased Class Members and the eligibility of their estates for payouts under the settlement.

B. The implementation will be fully First Nations-led.

C. The claims process will be trauma-informed and culturally sensitive, and has been approved after extensive consultations with First Nations stakeholders. Class Members will not need to submit to an interview or examination, which will minimize the risk of re-traumatization.

D. Class Members will be provided with fully-funded supports to help them navigate the claims process and to address mental health, cultural, administrative, legal and financial needs throughout the claims process.

E. Measures have been included to protect Class Members against predatory practices of non-class counsel, who have attempted in this proceeding and in other First Nations class action settlements to take advantage of Class Members' lack of sophistication in navigating the claims process.

F. There will be no encroachment on the settlement funds. Canada has committed to pay the costs of notice to the Class, Class Counsel fees, health and wellness supports, claims process supports, and all administration and implementation costs, over and above the $23.34 billion settlement fund.

G. Canada has committed to make best efforts to ensure that: (i) payouts received under the Final Settlement Agreement will not impact any social benefits or assistance that Class Members would otherwise receive from Canada or from a province or territory;

and (ii) compensation paid through the claims process will not be considered income for tax purposes.

H. A substantial amount of the settlement funds will be invested (in accordance with the guidance of an Investment Committee) given the length of time over which the settlement will be administered. The interest and income earned on the principal investment is anticipated to be substantial (billions of dollars) and will be directed entirely to Class Members.

I. Canada will propose to the Office of the Prime Minister that the Prime Minister make a public apology for the discriminatory conduct underlying the Class Members' claims and the past and ongoing harm it has caused.

E. *Notice to the Class and to Opt-outs*

[46] The notice plan for the first phase of notice related to certification, opt-out and the settlement approval hearing was approved by the Court on August 11, 2022 and implementation of the notice plan began on August 19, 2022. The dissemination of notice in accordance with the notice plan continued uninterrupted until August 16, 2023, when the Court approved revised notices providing details of the settlement approval hearing held on October 23-24, 2023.

[47] This class action has had an opt-out period of 14 months, with an extended opt-out period for the Kith Child and Kith Family Classes. However, not a single Class Member has opted out of the Class. Sixteen completed opt-out forms were received, but upon inquiries by the Administrator and/or Class Counsel, it was determined that each form was submitted in error, with the Class Members thinking they needed to complete the form in order to receive compensation.

F. *Settlement Approval Motion*

[48] The settlement approval motion was heard on October 23-24, 2023. Extensive evidence was filed by the Plaintiffs in the form of the following affidavits:

A. The affidavit of Robert Kugler sworn October 16, 2023;

B. The affidavit of Joelle Gott sworn October 12, 2023;

C. The affidavit of Dean Janvier sworn October 12, 2023;

D. The affidavit of Kim Blanchette sworn October 16, 2023;

E. The affidavit of Janice Ciavaglia sworn September 6, 2022;

F. The affidavit of Amber Potts sworn October 16, 2023;

G. The affidavits of Dr. Lucyna M. Lach sworn September 6, 2022 and September 19, 2023;

H. The affidavit of William Colish affirmed September 2, 2022;

I. The affidavits of Jonavon Joseph Meawasige sworn September 1, 2022 and September 25, 2023;

J. The affidavit of Karen Osachoff affirmed September 5, 2022;

K. The affidavit of Ashley Dawn Louise Bach affirmed September 6, 2022;

L. The affidavit of Melissa Walterson affirmed September 6, 2022;

M. The affidavit of Zacheus Joseph Trout sworn September 2, 2022;

N. The affidavit of Xavier Moushoom affirmed August 23, 2022;

O. The affidavit of Carolyn Buffalo affirmed September 6, 2022; and

P. The affidavit of Richard Jackson affirmed September 7, 2022.

[49] Canada also filed the affidavit of Valerie Gideon affirmed October 16, 2023, in support of the motion.

[50] Class Members were on notice of the settlement approval motion hearing, and given an opportunity to express an intention to object to the Final Settlement Agreement in writing or in person at the hearing. No Class Member raised any objections with the Administrator in advance of the hearing and no Class Members objected to the settlement at the hearing of the motion.

[51] All of the Representative Plaintiffs support the approval of the Final Settlement Agreement. In addition to their affidavits, a number of the Representative Plaintiffs also gave statements in support of the settlement at the hearing and one Class Member provided a written statement in support of the settlement that was read aloud at the hearing.

II. Analysis

[52] The two issues before the Court on this motion are as follows:

A. Whether the Final Settlement Agreement should be approved as fair, reasonable and in the best interests of the Class as a whole; and

B. Whether honoraria should be paid to the representative plaintiffs.

A. *Approval of the Final Settlement Agreement*

[53] Subsection 334.29(1) of the *Rules* provides that a class proceeding may be settled only with the approval of a judge. Once approved, the settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding.

[54] The legal test to be applied in approving a class action settlement is whether the settlement is "fair, reasonable and in the best interests of the class as a whole." The test for settlement is not perfection [see *Wenham v Canada*, 2020 FC 588 at para 51, aff'd 2020 FCA 186, leave to appeal ref'd [2021] SCCA No 2; *McLean v Canada (Attorney General)*, 2019 FC 1075 at para 76; *Merlo v Canada*, 2017 FC 533 at para 18].

[55] In assessing whether a settlement meets this standard, this Court may take into account a number of factors, the weighing of which will vary depending on the circumstances. The non-exhaustive list of factors to consider includes: (a) the terms and conditions of the settlement; (b) the likelihood of success/recovery; (c) the amount and nature of pre-trial activities, including investigation, assessment of evidence, production and discovery; (d) the arm's length bargaining

and information regarding dynamics of negotiations; (e) the recommendation of class counsel; (f) the communications with class members; (g) any expression of support and objections; (h) the presence of good faith and absence of collusion; (i) the future expense and likely duration of litigation; and (j) any other relevant factor or circumstance [see *Tk'emlúps te Secwépemc First Nation v Canada*, 2023 FC 327 at para 49; *Wenham*, supra at para 50; *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1415 at para 64; *Lin v Airbnb, Inc*, 2021 FC 1260 at para 22; *McLean v Canada (Attorney General)*, 2019 FC 1075 at para 66].

[56] Settlements must be looked at as a whole. It is not open for this Court to rewrite the substantive terms of a settlement or assess the interests of the individual class members in isolation from the whole class. Settlements involve some "give and take"—even where it is difficult for the injured parties to see why any concessions should be made [see *Tataskweyak Cree Nation*, supra at para 63; *McLean v Canada (Attorney General)*, 2019 FC 1075 at para 68].

[57] Ultimately, when approving a settlement, this Court cannot modify or alter the agreement of the parties—it must approve it as is, or reject it. Were it otherwise, the parties may be discouraged from settling the matter because their bargain might be upended by the Court [see *McLean v Canada (Attorney General)*, 2023 FC 1093 at para 37; *Tataskweyak Cree Nation*, supra at para 62].

[58] Settlements need not be perfect, as long as they fall in the "zone of reasonableness." To reject a settlement, this Court must conclude that the settlement does not fall within the range of reasonable outcomes. The zone of reasonable outcomes reflects the fact that settlements rarely

give all of the parties exactly what they want, and are instead the result of compromise [see *Tataskweyak Cree Nation*, supra at para 63; *McLean v Canada*, 2019 FC 1075 at para 76].

[59] I will now consider each of the factors in relation to the Final Settlement Agreement.

1) Terms and conditions of the settlement

[60] A summary of the key terms and conditions of the Final Settlement Agreement is outlined earlier in these Reasons.

[61] Some of the salient features of the Final Settlement Agreement which I find underpin its fairness and reasonableness and demonstrate that it is in the best interests of the Class are the following:

A. The Final Settlement Agreement provides for a historic level of compensation at $23.34 billion, ensures proportionality of compensation based on objective proxies for harm and favours those children who have suffered the greatest harms.

B. The scope of the settlement is vast, providing significant amounts of compensation to an estimated Class of over 300,000 First Nations individuals.

C. The Final Settlement Agreement was drafted to ensure that all settlement funds are available for the benefit of Class Members, with all Class Counsel fees and administrative and support costs paid separately by Canada.

D. The Final Settlement Agreement contains a number of safeguards to ensure that compensation is paid in a manner that minimizes re-traumatization (such as by avoiding the need for an interview or examination of Class Members in order for them to advance a claim), and includes free supports to the Class Members throughout the claims process that are both culturally sensitive and trauma-informed.

E. The parties have gone to extensive lengths to ensure that claimants can navigate the claims process without the need for assistance from non-class counsel, so as to ensure that Class Members receive the full value of their compensation without the

deduction of any legal fees. The Final Settlement Agreement also contemplates a non-class counsel protocol aimed to ensure that vulnerable Class Members are not victimized by predatory legal professionals seeking a percentage of their recovery.

F. The Final Settlement Agreement provides for a sizeable *cy-près* fund that will enable Class Members who are not eligible for direct payments to indirectly benefit from the settlement and to provide additional relief to high needs Jordan's Principle Class Members who are beyond the age of majority.

G. The entirety of the interest earned on the settlement funds (which is expected to be in the billions of dollars) will be distributed to the Class Members.

[62] I am satisfied that the terms and conditions of the Final Settlement Agreement provide significant advantages to the Class Members, many of which would not have been achieved with the continuation of the litigation.

2) Likelihood of recovery/success at trial

[63] A consideration of this issue requires a fragmentation of the claims advanced by the Plaintiffs.

[64] For those claims that are also covered by the Tribunal's Merit Decision and Compensation Decision, the likelihood of recovery in the litigation was far greater, even with a pending appeal to the Federal Court of Appeal of the dismissal of Canada's application for judicial review of the Compensation Decision.

[65] For those claims not covered by the Tribunal's Merit Decision and Compensation Decision, the likelihood of recovery in the litigation was uncertain. The Trout Class Action is based on Canada's discrimination prior to the recognition of Jordan's Principle in 2007.

Similarly, members of the Removed Child Class and the Removed Child Family Class for the period from 1991 to 2005 and those who were apprehended from their families but placed within their communities were excluded from the Tribunal proceeding and therefore could not benefit from the liability findings made by the Tribunal.

[66] Even if both groups of claims were ultimately successful at trial, there would remain uncertainty as to whether the Class Members would be entitled to recover damages in the range of $23.34 billion. Moreover, the additional benefits associated with the Final Settlement Agreement (such as a trauma-informed, culturally sensitive and First Nations-led claims process, extensive fully-funded supports to help Class Members navigate the claims process and to address mental health, cultural, administrative, legal and financial needs, the *cy-près* fund and the formal request for a public apology from the Office of the Prime Minister) would not be recoverable at trial.

3) Amount and nature of pre-trial activities

[67] Neither the Consolidated Action nor the Trout Class Action proceeded past the certification stage. However, I am satisfied that the work that was done in the context of the Tribunal proceedings enabled the success of the negotiations. As acknowledged by the Plaintiffs in their written representations, the Tribunal proceedings provided a "wealth of knowledge about the case." I am therefore satisfied that Class Counsel had a sufficient evidentiary basis upon which to undertake the negotiations.

[68] Moreover, there would be a significant amount of pre-trial activities required absent a settlement, which is a factor that supports the approval of the settlement.

4) Presence of arm's length bargaining and information regarding the dynamics of the negotiations

[69] The lengthy negotiations that led to the First Agreement and then the Final Settlement Agreement were arm's length and adversarial in nature, involving well-respected First Nations jurists as mediators. The negotiations also benefited from extensive consultation with First Nations leadership and communities, as well as third party review, comment and criticism.

5) Class Counsel recommendation

[70] Class Counsel assert that the Final Settlement Agreement is fair, reasonable and in the best interests of the Class Members. The various counsel comprising Class Counsel have extensive class action litigation experience and, importantly, extensive experience representing First Nations individuals. Collectively, they are alert to the unique challenges that arise in relation to mega-settlements of this nature, including the prospects for re-traumatization. Accordingly, I give their recommendation substantial weight in the approval process.

6) Communications with Class Members

[71] The evidence before the Court is that the communications with Class Members regarding the Final Settlement Agreement and the hearing of the settlement approval motion has been ongoing, broad in reach and in compliance with the notice plan approved by the Court. In

relation to the initial settlement approval hearing notice and the revised September 2023 notice, this included:

A. Social media advertisements – over 14 million impressions, 173,456 clicks, 3,986 base comments and 15,356 post shares.

B. Engagements with the First Nations Child and Family Services and Jordan's Principle Class Action Facebook page – 4,233 followers, 275 engagements, 218 shares of posts and 105 comments.

C. 2,902 calls to the information line.

D. 525,0000 estimated impressions from Indigenous media placement, both digital and print.

[72] The evidence further demonstrates that the AFN has provided ongoing updates to First Nations leadership on negotiations, the structure of the settlement and the substance of what would be included in the Final Settlement Agreement, including approximately 50 briefings to the AFN Executive, AFN Regional Chiefs and Chiefs' Assemblies.

7) Expression of support and objections

[73] All of the representative plaintiffs support the Final Settlement Agreement and not a single Class Member or third party has come forward to raise any objections to the settlement. Similarly, not a single Class Member has opted out of the class proceedings. Moreover, the evidence before the Court demonstrates that First Nations leadership unanimously and unequivocally supports the Final Settlement Agreement.

8) Presence of good faith and absence of collusion

[74] I am satisfied that all parties negotiated in good faith and there is no evidence whatsoever before the Court of any collusion on the part of any of the parties or their counsel.

9) Future expense and likely duration of litigation

[75] Absent a settlement, I am satisfied that continued litigation would be long, complex and expensive, as the litigation had not yet progressed beyond the certification stage. Moreover, I find that the prolonged uncertainty of the litigation would be traumatizing to Class Members. Eliminating such trauma by avoiding expensive and lengthy litigation is yet another tangible and important benefit of the settlement.

[76] Accordingly, I find that all of the aforementioned factors favour the approval of the Final Settlement Agreement as fair, reasonable and in the best interests of the Class as a whole.

B. *Payment of honoraria*

[77] Class Counsel request that an honorarium of $15,000.00 be awarded to each representative plaintiff to be paid out of Class Counsel's legal fees (which will be addressed on a separate motion), with the exception of Ms. Osachoff, who has advised that she wishes to decline any honorarium awarded to her.

[78] There is no specific provision in the *Rules* that governs the payment of honoraria, although this Court has repeatedly acknowledged that it has the discretion to award honoraria to Representative Plaintiffs [see *Lin v Airbnb Inc*, 2021 FC 1260 at paras 118-119; *McLean v Canada*, 2019 FC 1077 at para 57-60; *Wenham v Canada (Attorney General)*, 2020 FC 588 at paras 90-95; *Condon v Canada*, 2018 FC 522 at paras 114-120].

[79] Honoraria are not to be awarded as a routine matter but rather as recognition that a representative plaintiff meaningfully contributed to the Class Members' pursuit of access to justice by contributing more than the normal effort of such a position – for example, by forfeiting their privacy in a high profile class action and participating in extensive community outreach [see *Merlo v Canada*, 2017 FC 533 at paras 68-74]. Honoraria to representative plaintiffs are to be awarded sparingly, as representative plaintiffs are not to benefit from the class proceeding more than other class members [see *Eidoo v Infineon Technologies AG*, 2015 ONSC 2675 at paras 13-22].

[80] I agree with the request of Class Counsel that honoraria should be paid to the representative plaintiffs in this case and I will respect Ms. Osachoff's choice to decline an honorarium. The representative plaintiffs have each given their name and face to very high profile litigation that raised traumatic and painful issues, thereby foregoing their privacy for the benefit of the Class Members and exposing themselves to pain and suffering. This was particularly apparent at the hearing of the settlement approval motion. In addition, they have participated in extensive community outreach in order to raise awareness of the litigation with Class Members, including by speaking directly with Class Members in their communities and

across the country, by speaking with the media and by speaking at the AFN's Annual General Assembly in support of the settlement. They have also travelled extensively to fulfill their roles as representative plaintiffs, including to attend mediations and settlement meetings.

[81] I find that the efforts of the representative plaintiffs have been extraordinary and are most certainly deserving of an honorarium.

III. Conclusion

[82] For all of these reasons, I am satisfied that the Final Settlement Agreement is fair, reasonable and in the best interests of the Class as a whole. Moreover, I am also satisfied that honoraria should be paid as requested by Class Counsel.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-402-19
STYLE OF CAUSE:	XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE v THE ATTORNEY GENERAL OF CANADA]
AND DOCKET	T-141-20
STYLE OF CAUSE	ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO and DICK EUGENE JACKSON also known as RICHARD JACKSON v THE ATTORNEY GENERAL OF CANADA
AND DOCKET	T-1120-21
STYLE OF CAUSE	ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 23, 2023, OCTOBER 24, 2023
REASONS FOR SETTLEMENT APPROVAL ORDER:	AYLEN J.
DATED:	NOVEMBER 20, 2023

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