Federal Court  Cour fédérale

Date: 20231221

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

Citation: 2023 FC 1739

Ottawa, Ontario, December 21, 2023

PRESENT: The Honourable Madam Justice Aylen

Docket: T-402-19

BETWEEN:

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

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-141-20

AND 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

Docket: T-1120-21

AND BETWEEN:

**ASSEMBLY OF FIRST NATIONS AND
ZACHEUS JOSEPH TROUT**

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

**ORDER AND REASONS
(Class Counsel Fee Motion)**

[1] In the underlying class proceedings, the Plaintiffs advanced claims for two related categories of discriminatory conduct: (i) Canada chronically underfunded the First Nations Child and Family Services [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 (ii) 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.

[2] A settlement of the three underlying class actions was ultimately reached, and recently approved, pursuant to which Canada agreed to pay $23,343,940,000 in damages for its discriminatory conduct, as well as to fund various additional supports for the impacted First Nations youths and families.

[3] Now before the Court is a motion brought by Sotos LLP, Kugler Kandestin LLP, Miller Titerle + Co., Nahwegahbow, Corbiere and Fasken Martineau DuMoulin LLP, who are class counsel for the Plaintiffs in the underlying class proceedings [collectively, Class Counsel]. They seek an order approving their counsel fee.

[4] The circumstances of this motion are unique. The underlying settlement is what is known as a "mega-fund settlement", a term used to describe class action settlements where the amount of recovery is in excess of $100 million. This mega-fund settlement is the largest class action settlement in Canadian history, by a significant margin, and this Court has yet to expressly consider

how a settlement of this magnitude impacts the approach that the Court should take in assessing the reasonableness and fairness of the counsel fee sought to be approved.

[5] Moreover and importantly, these class actions did not raise entirely novel claims. To the contrary, Class Counsel deliberately commenced class proceedings that overlapped with a lengthy and ongoing proceeding before the Canadian Human Rights Tribunal [Tribunal]. In the Tribunal proceeding, Canada had already been found liable for the same discriminatory conduct that was alleged by certain class members for a portion of relevant period.

[6] When the first of these class proceedings was commenced (by counsel who had had no involvement in the Tribunal proceedings), the Tribunal's liability finding was final and the Tribunal was in the process of determining the appropriate remedy. Six months later, the Tribunal issued a decision ordering compensation of approximately $9.59 billion.

[7] The settlement entered into between the parties settled both the class action proceedings and the Tribunal's compensation awards. Given that the claims in the class action proceedings overlap, in part, with the claims advanced before the Tribunal, Class Counsel financially benefits from the recovery efforts secured before the Tribunal. Based on their final compensation agreements (which are discussed more fully below), Class Counsel achieved the maximum counsel fee available to them ($80 million) based solely on the $9.59 billion Tribunal recovery.

[8] Another unique aspect of this motion is that the parties reached a settlement of the quantum of Class Counsel's fee after the hearing of the motion. When the motion was originally filed and

argued before the Court, Class Counsel sought fees in the amount of $80 million (exclusive of taxes) and disbursements. Canada opposed the amount of fees sought as excessive, asserting that compensation in the range of $40-50 million, together with taxes and disbursements, was fair and reasonable. However, Canada's counterarguments to approving the fees were of somewhat limited assistance to the Court because their submissions failed, in my view, to apply the necessary degree of rigour to the analysis. As a result of Canada's approach, at the hearing of the motion, I raised a number of significant concerns with Class Counsel regarding the amount of, and basis for, the fees requested, which concerns had not been raised by Canada. Notwithstanding my concerns, during the hearing, Class Counsel continued to assert that $80 million in fees was entirely fair and reasonable in the circumstances.

[9] However, five days after the hearing, Class Counsel advised the Court that the parties had reached a settlement on the quantum of counsel fees, with Class Counsel agreeing to a significant reduction. Specifically, the parties agreed to settle on the following basis:

A. Class Counsel would receive $50 million in fees (exclusive of taxes and disbursements) for all work up until October 31, 2023; and

B. Class Counsel would be paid commercial hourly rates for work after October 31, 2023 until the Court's approval of the last distribution protocol, up to a maximum of $5 million.

[10] The parties' agreement on the quantum of fees is clearly a relevant consideration. But it does not change the degree of scrutiny that the Court must apply in its assessment of whether the fees sought are fair and reasonable.

[11] For the reasons that follow, I find that the counsel fee now jointly proposed by the parties remains excessive. I approve counsel fees in the amount of $40 million, plus disbursements and taxes, for all work completed to October 31, 2023. Moreover, I am satisfied that counsel fees for work completed from November 1, 2023 until completion of the last distribution protocol should be paid based on actual work performed (with no enhancement) using commercial hourly rates up to a maximum of $5 million. However, the approved amount of those fees shall be determined on a future motion or motions once the work has been completed, with appropriate supporting evidence.

I. Background

A. *The proceedings before the Canadian Human Rights Tribunal*

[12] In 2007, the Assembly of First Nations [AFN], represented by the law firm Nahwegahbow, Corbiere, 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 Tribunal.

[13] The AFN and the Caring Society alleged that Canada was violating the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*] by discriminating against First Nations children and families who live on reserve and in the Yukon by underfunding the delivery of child and family services.

They argued that this discrimination was based on race and national or ethnic origin. The complaint noted the dramatic overrepresentation of First Nations children in foster care, the systemic and ongoing nature of the discrimination and the need for the proper implementation of Jordan's Principle. Jordan's Principle is a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them.

[14] The complaint also described past efforts by the Caring Society, AFN and others to advocate for program reform and additional funding.

[15] 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 *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.

[16] 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.

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

[18] In March 2019, the Tribunal returned to the question of remedy. Canada made submissions opposing entitlement to individual compensation, asserting that the Moushoom Class Action (defined below) was the preferable forum to determine the nature of class members' compensatory rights, if any.

[19] In September 2019, the Tribunal rejected Canada's arguments against compensation 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 Merit Decision) [Compensation Decision]. The Compensation Decision awarded the maximum remedy the Tribunal could award under the *CHRA*, with the Tribunal stating:

> In awarding the maximum amount allowed under our Statute, the Panel recognizes, to the best of its ability and with the tools that it currently has under the *CHRA*, that this case of racial discrimination is one of the worst possible cases warranting the maximum awards.

[20] On October 14, 2019, Canada sought judicial review of the Compensation Decision.

[21] On September 29, 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.

[22] On October 29, 2021, Canada appealed this Court's judicial review decision.

[23] On November 5, 2021, Canada requested, on behalf of all parties, that the appeal be held in abeyance until December 31, 2021 as the parties engaged in settlement discussions. The parties thereafter requested additional extensions to this abeyance while a settlement was pursued. The appeal remained in abeyance until the Final Settlement Agreement was approved and will shortly be discontinued, as required under the settlement.

B. ***The Class Actions***

[24] 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.

[25] 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.

[26] 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.

[27] 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.

[28] 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.

[29] 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.

[30] Three years after the Tribunal's Merit Decision, 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].

[31] On January 28, 2020, the 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.

[32] 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.

[33] 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.

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

[35] 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.

C. *Retainer Agreements and the Consortium Agreement*

[36] In 2019, class counsel for the Moushoom Class Action (Sotos LLP, Kugler Kandestin LLP and Miller Titerle + Company) entered into contingency fee retainer agreements with the Moushoom Class Action Plaintiffs and in 2020, the same counsel entered into a contingency fee

retainer agreement with Mr. Trout in relation to the Trout Class Action. The contingency fee retainer agreements contained the following standard percentages fees:

> (a) For any Aggregate Amount Recovered for the Class: twenty percent (20%) of the first two hundred million dollars of the Aggregate Amount Recovered, plus ten percent (10%) of any Aggregate Amount Recovered beyond the first two hundred million dollars (the percentages in this subparagraph shall not apply to any Individual Inquiry Recovery); plus
>
> (b) For any Individual Inquiry Recovery for individual Class members: twenty five percent (25%) of any such amounts; plus
>
> (c) Any amount of costs ordered by the Court in favour of the Client or the Class.

[37] Class counsel for the AFN Class Action (Nahwegahbow, Corbiere and Fasken Martineau DuMoulin LLP, as well as Strosberg Sasso Sutts LLP for a period of time) had similar percentage-based contingency fee retainer agreements with their clients that contained the following standard percentage fees, but included a cap:

> (a) TEN PERCENT (10%) of any Recovery achieved prior to the commencement of the trial, subject to a cap of $80 million; and thereafter,
>
> (b) FIFTEEN PERCENT (15%) when the common issues trial begins, subject to a cap of $100 million.

[38] On June 26, 2020, Class Counsel in the Moushoom Class Action and AFN Class Action executed a consortium agreement [Consortium Agreement], under which they agreed to work together to prosecute the class actions. The Consortium Agreement was executed by each of the five law firms comprising Class Counsel and not by any of the representative plaintiffs.

[39] The stated objectives of the Consortium Agreement are as follows:

> 1. The Parties agree to work together to advance the Case for the collective benefit of their respective clients and the members of the Class, whether through litigation or through a negotiated settlement.
>
> 2. The Parties shall seek, as a consequence of the Case, compensation for all members of the Class, as well as permanent, systemic changes that address the historical discrimination against First Nations children and improve Indigenous child welfare in Canada.

[40] Under the heading of "Fees", the Consortium Agreement provided, in part, as follows:

> 17. The Parties shall seek the following fees ("Fees"), subject to Court approval:
>
> (a) Ten percent (10%) of any payment received by the Class by way of settlement or judgment ("Proceeds") obtained prior to the commencement of a common issues trial, subject to a cap of $80 million; and thereafter,
>
> (b) Fifteen percent (15%) of any payment obtained after the commencement of a common issues trial but prior to judgment or settlement, subject to a cap of $100 million; and thereafter,
>
> (c) Twenty percent (20%) of any payment obtained after the completion of a common issues trial in first instance, subject to a cap of $120 million.
>
> (d) The above amounts are exclusive of applicable taxes.
>
> 18. The Parties may, by agreement, seek a lower amount where doing so would be reasonable, appropriate and consistent with the principles stated in this Agreement.

[41] The inclusion of a fee cap was a term required by the AFN and ultimately agreed to by Class Counsel.

D. *Events Following the Commencement of the Class Actions and Leading to the Global Settlement*

[42] The Compensation Decision was released by the Tribunal on September 6, 2019. Pursuant to that decision, compensation of $40,000.00 plus interest was to be paid to First Nations children removed from their families, homes and communities, and to children delayed, denied or suffering a gap in essential services from 2006 forward, as well as their caregiving parents and grandparents.

[43] Approximately two months later, on December 5, 2019, the federal Government committed in its Speech from the Throne that it would "ensure that Indigenous people who were harmed under the discriminatory child welfare system are compensated in a way that is both fair and timely".

[44] Following the issuance of the AFN Class Action on January 28, 2020, the class action proceedings did not move forward for a number of months, during which time the Consortium Agreement was executed.

[45] In July of 2020, Canada proposed to Class Counsel in the Consolidated Action that the parties agree to enter mediation. Discussions regarding a possible mediation were held in July and August. In late August, the parties agreed to seek the appointment of the Honourable Justice Leonard Mandamin as mediator.

[46] From November 2020 to September 2021, the parties in the Consolidated Action engaged in mediation before Justice Mandamin. However, 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.

[47] In September of 2021, following this Court's dismissal of the judicial review of the Compensation Decision, Canada proposed continued negotiations towards a comprehensive resolution of both the class actions and the Tribunal proceedings. Subsequently, 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 discussions.

[48] On October 29, 2021, the Honourable Patty Hajdu, Minister of Indigenous Services, the Honourable Marc Miller, former Minister of Crown-Indigenous Relations and the Honourable David Lametti, former Minister of Justice and Attorney General of Canada, issued the following public statement:

> We have been unequivocal from the start: we will compensate those harmed by child and family services policies in order to mend past wrongs and lay the foundation for a more equitable and stronger future for First Nations children, their families and communities.
>
> Today, the Government of Canada and the Parties, the First Nations Child and Family Caring Society and Assembly of First Nations, are announcing that we have agreed to sit down immediately and work towards reaching a global resolution by December 2021 on outstanding issues that have been the subject of litigation. This will include:
>
> - providing fair, equitable compensation to First Nations children on-reserve and in the Yukon who were removed from their homes by child and family services agencies, as well as those who were impacted by the government's narrow definition of Jordan's Principle,
>
> - achieving long-term reform of the First Nations Child and Family Service program, and
>
> - funding for the purchase and/or construction of capital assets that support the delivery of child and family services on-reserve and Jordan's Principle.

> As we work to ensure that those who have been harmed are fairly compensated, we are also committing to significant investments to address long-term reform of the First Nations Child and Family Services and will work with the parties to put in place an approach that best serves these children. We will also continue this work through the ongoing implementation of *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, which affirms and recognizes their jurisdiction over child and family services.
>
> In order to allow the Parties time to have meaningful discussions and to reach a lasting agreement, Canada, the First Nations Child and Family Caring Society and Assembly of First Nations have agreed to pause litigation on the Canadian Human Rights Tribunal decision. Providing the space to reach agreement on compensation and funding for future reforms will help us reach the best outcome. This means that <u>while Canada filed what is known as a protective appeal of the Federal Court decision of September 29, 2021, the appeal will be on hold and the focus will be squarely on reaching an agreement outside of court and at the table</u>…
>
> [Emphasis added.]

[49] In the November 23, 2021 Speech from the Throne, this commitment was reiterated:

> The Government will also make sure communities have the support they need to keep families together, while ensuring fair and equitable compensation for those harmed by the First Nations Child and Family Services program".

[50] On December 13, 2021, Minister Hajdu and then-Minister Miller made a further public statement committing to compensating those harmed:

> We have been unequivocal throughout these historic negotiations: we will compensate those harmed by the federal government's discriminatory funding practices and we will lay the foundation for an equitable and better future for First Nations children, their families and communities".

[51] The December 16, 2021 mandate letter sent by the Prime Minister to the Minister of Indigenous Services Canada [ISC] directed ISC to:

> continue to work with First Nations partners to ensure fair and equitable compensation for those harmed by the First Nations Child and Family Services program and to ensure the long-term reform of child and family services in First Nations communities, including to help children and families stay together and providing First Nations youth who reach the age of majority the supports they need for up to two additional years.

[52] 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 and family services system. A separate agreement in principle was concluded on long-term reform, which is not before the Court on this motion.

[53] 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.

[54] 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.

[55] 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 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.

[56] On November 23, 2022, the Honourable Patty Hajdu, Marc Miller and David Lametti, issued the following statement:

> Canada will ensure fair and equitable compensation to First Nations children and families harmed by the discriminatory underfunding of the First Nations Child and Family Services program and those impacted by the federal government's narrow definition of Jordan's Principle.

> To that end, we will work with the Parties under the existing final settlement agreement, so that compensation can flow to children and families.

[57] After further rounds of negotiation between January and April 2023, the parties and the Caring Society reached an updated agreement on April 19, 2023, which was later amended by way of an addendum dated October 10, 2023 [collectively, 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.

[58] 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.

E. ***The Final Settlement Agreement***

[59] 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 and to satisfy the Tribunal's Compensation Decision, which the parties advise is the largest class action settlement in Canadian history.

[60] 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 ISC.

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.

[61] 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.

[62] Removed Child Class Members will receive a base compensation of $40,000.00, together with interest, a time value enhancement (to create parity amongst Removed 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.

[63] 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.

[64] 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.

[65] 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.

[66] 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.

[67] 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 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.

[68] 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.

[69] The base compensation entitlement of an approved Kith Child Class Member will be $40,000.00, with no available enhancement payments. Compensation entitlement for the 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).

[70] With respect to Class Counsel fees, Class Counsel and Canada agreed that counsel fees would not be deducted from amounts recovered for the Class, even though Class Counsels' original retainer agreements and the Consortium Agreement permitted this. Article 17.01 of the Final Settlement Agreement provides:

> Canada will pay Class Counsel the amount approved by the Court, plus applicable taxes, in respect of their legal fees and disbursements for the prosecution of the Actions to the date of the Settlement Approval Hearing, together with advice to Class Members regarding the Agreement and Acceptance, over and above the Settlement Funds…

[71] 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.

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.

[72] 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.

F. Class Counsel Fee Approval Motion

[73] In support of this motion, Class Counsel filed the following evidence:

A. The affidavit of Xavier Moushoom affirmed October 2, 2023;

B. The affidavit of Jonavon Joseph Meawasige sworn October 3, 2023;

C. The affidavit of Zacheus Joseph Trout sworn October 5, 2023;

D. The affidavit of Carolyn Buffalo affirmed October 11, 2023;

E. The affidavit of Ashley Dawn Louise Bach affirmed October 6, 2023;

F. The affidavit of Melissa Walterson affirmed October 6, 2023;

G. The affidavit of Dianne Corbiere affirmed October 6, 2023; and

H. The affidavit of David Sterns affirmed October 6, 2023.

[74] In response to the motion, Canada filed the affidavit of Marc Boivin affirmed October 18, 2023.

[75] Mr. Sterns was cross-examined on his affidavit on October 20, 2023 and a copy of the transcript from his cross-examination was before the Court.

[76] After the parties settled the motion post-hearing, I permitted them to file supplemental motion materials. Class Counsel filed a further affidavit from Ms. Corbiere affirmed November 6, 2023 and supplemental written representations. In her affidavit, Ms. Corbiere provided evidence regarding the settlement of fees after the hearing, paramount considerations in the settlement of the fees, Class Counsel's budget for future work, the work involved in finalizing the various distribution protocols and an update on the legal work incurred as of October 31, 2023. Canada filed brief supplemental written representations in the form of a letter dated November 6, 2023.

II. Analysis

A. Jurisdiction of the Court to Assess Class Counsel Fees

[77] Part 5.1 of the *Federal Courts Rules*, SOR/98-106 sets out this Court's supervisory jurisdiction over class proceedings. In relation to counsel fees, Rule 334.4 provides:

334.4 No payments, including indirect payments, shall be made to a solicitor from the proceeds recovered in a class proceeding unless the payments are approved by a judge.	334.4 Tout paiement direct ou indirect à un avocat, prélevé sur les sommes recouvrées à l'issue d'un recours collectif, doit être approuvé par un juge.

[78] Class Counsel argues that since the Final Settlement Agreement provides that counsel fees are not payable from the $23.34 billion in proceeds, this Court does not have jurisdiction to assess counsel fees under Rule 334.4. Rather, Class Counsel asserts that the Court's jurisdiction to assess counsel fees is contractual and arises from Article 17.01 of the Final Settlement Agreement, which states that "Canada will pay Class Counsel the amount approved by the Court". Canada did not directly address this issue in their submissions.

[79] Class Counsel did not point to any authority that would support their assertion, nor any decision of this Court in which this issue was squarely raised. Judges of this Court have found that Rule 334.4 requires that the Court approve all legal counsel fees in a class proceeding, without making any qualification as to whether the counsel fees were payable from the class proceeds or in addition thereto. In *Tk'emlúps te Secwépemc First Nation v Canada*, Justice McDonald found that this Court had jurisdiction under Rule 334.4 to approve the fee agreement for class counsel,

which had been negotiated (and would be funded) independently from the settlement agreement [see *Tk'emlúps te Secwépemc First Nation v Canada*, 2023 FC 357 at paras 13, 21 [*Tk'emlúps*]; see also *McLean v Canada*, 2019 FC 1077 at para 2 [*McLean*]].

[80] I cannot accept Class Counsel's submission that Rule 334.4 has no application where the parties have negotiated a separate agreement for counsel fees with fees not payable from the class proceeds. To do so would allow parties to side-step the Court's supervisory role by omitting contractual terms requiring the Court's approval of counsel fees as part of their settlement.

[81] That said, for the purpose of this motion, nothing turns on this issue, as Class Counsel acknowledges that the Court's jurisdiction to assess the counsel fee under Article 17.01 of the Final Settlement Agreement.

B. Applicable Legal Test and the Burden of Proof

[82] The overarching test applicable to class counsel fees is that they have to be "fair and reasonable in all of the circumstances" [see *Condon v Canada*, 2018 FC 522 at para 81 [*Condon*]; *Manuge v Canada*, 2013 FC 341 at para 28 [*Manuge*]; *Lin v Airbnb*, 2021 FC 1260 at para 70 [*Lin*]; *McLean*, *supra* at para 2].

[83] This Court has identified a non-exhaustive list of ten factors that it will consider in making the determination of whether class counsel fees are fair and reasonable. The weight given to each factor will vary according to the particular circumstances of the class action. The factors are: (i) risk undertaken by class counsel; (ii) results achieved; (iii) time and effort expended by class

counsel; (iv) complexity and difficulty of the matter; (v) degree of responsibility assumed by class counsel; (vi) fees in similar cases; (vii) expectations of the class; (viii) experience and expertise of class counsel; (ix) ability of the class to pay; and (x) the importance of the litigation to the plaintiffs [see *Wenham v Canada (Attorney General),* 2020 FC 590 at para 33 [*Wenham*]; *McLean*, *supra* at para 25; *McCrea v Canada*, 2019 FC 122 at para 98 [*McCrea*]; *Condon*, *supra* at para 82; *Manuge*, *supra* at para 28; *Lin*, *supra* at paras 71-72].

[84] That said, this Court has repeatedly held that the two most important factors are the risk assumed by class counsel and the results achieved [see *Condon*, *supra* at para 83; *McLean*, *supra* at para 25; *Tk'emlúps*, *supra* at para 15; *Lin*, *supra* at para 72].

[85] With respect to the risk assumed by class counsel, risk in this context is measured from the commencement of the action and as the litigation continued, but not with the benefit of hindsight when the result looks inevitable [see *Condon*, *supra* at paras 83, 97; *Lin*, *supra* at para 77]. These risks include all of the risks facing class counsel, such as liability risk, recovery risk and the risk that the action will not be certified as a class action, or will not succeed on the merits [see *Condon*, *supra* at para 83; *Wenham*, *supra* at para 34; *Lin*, *supra* at paras 72, 77]. The litigation risk assumed by class counsel is a function of the probability of success, the complexity of the proceedings and the time and resources expended to pursue the litigation [see *Lin*, *supra* at para 77].

[86] The greater the risk of failure and non-payment or, put differently, the more serious the impact on class counsel, the larger the premium warranted. While class counsel need not “bet the firm” in order to recover a premium, this Court must go beyond the formulaic recitation of well-known risks of litigation and assess the nature and extent of the actual financial impact of the

particular case on class counsel in order to ensure that the "risk incurred" analysis has meaning [see *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 41-44 *McLean, supra* at para 33].

[87] While it is important to incentivize class counsel to take on risky actions and to do them well, it is also important that the Court's approval of class counsel's fees not result in windfalls. As noted by Justice Belobaba, there are "too many cases" in which "windfall recoveries for lawyers far exceed a reasonable return or the incentive necessary to bring socially useful lawsuits" [see *Brown, supra* at para 50, citing Rhode, *Access to Justice* (2004), at page 35, quoted in Kalajdzic, *Class Actions in Canada* (2018) at page 145]. This Court must avoid approving counsel fees that result in windfalls, as class action litigation is not a lottery and the purpose of this Court's class action regime is not to make lawyers wealthy [see *Brown, supra* at para 51].

[88] At the hearing of this motion, I raised the issue of the burden of proof. Class Counsel had asserted in their written submissions that the percentage-based fees set out in a contingency fee retainer (in this case, the Consortium Agreement) are presumptively valid and should only be rebutted in clear cases based on principled reasons, relying on *Condon, supra* at paragraph 85 and *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at paragraph 8. In such circumstances, Class Counsel asserted that the burden would lie on Canada to rebut the presumption by demonstrating that: (a) there was a lack of full understanding or true acceptance on the part of the representative plaintiffs; (b) the agreed-to contingency amount is excessive; or (c) the presumptively valid contingency fee would result in a fee award so large as to be unseemly. As such, Class Counsel argued that the burden rested on Canada to demonstrate that the amount sought was excessive or unseemly.

[89] In their supplemental written representations, Class Counsel asserted that, as a matter of first principles, the moving party (Class Counsel) has the burden of proof on this motion. However, Class Counsel went on to assert:

> 20….The question is: what must the moving party prove? In other words, what do class counsel need to prove on a consent motion about contingency legal fees that do not come from the class's recovery, and which were negotiated at arm's length with a sophisticated defendant with extensive experience in comparable class actions.
>
> 21. First, a *prime facie* presumption of fairness applies when fees are negotiated at arms-length after the parties have reached agreement on the predicate settlement.
>
> 22. Second, on a motion such as this one for approval of contingency legal fees, the Court's function (contouring the moving party's corresponding burden) is not that of an assessment officer determining a complaint about a lawyer's bill. This is particularly so where, as here, fees are not paid by the class and the work incurred is not disputed.
>
> 23. The nature of the inquiry in contingency legal work and fees is inherently different, hence the governance of factors in the jurisprudence of this Court and across the country that do not otherwise apply in regular hourly billing.
>
> 24. On this motion, class counsel's burden and the sole focus of the Court's inquiry and approval is whether the settled fee arrangement is within a range of fair and reasonable outcomes, considering the trite jurisprudential test that governs class counsel fees.

[90] At the hearing of the motion, Canada took the position that the presumption of validity in *Condon* and *Cannon* had no application to the circumstances before the Court as: (a) this matter involves a mega-fund settlement; (b) the Consortium Agreement is not a fee agreement with the representative plaintiffs; and (c) the amount sought by Class Counsel is not a percentage-based fee, but rather a quantum set absent any methodology. Canada therefore asserted that there was no

shifting of the burden of proof and that the burden rested with Class Counsel to demonstrate that the fees sought were fair and reasonable. In their supplemental submission, Canada confirmed that its position regarding the burden of proof remained unchanged.

[91] As is apparent, Class Counsel's position on the issue of burden of proof and the applicability of the presumption evolved once the issue of counsel fees was settled as between the parties. Had the parties not reached a settlement, I would have found that the presumption in *Condon* and *Cannon* had no application on the facts of this case. First, I agree with Justice Belobaba of the Ontario Superior Court of Justice (who decided *Cannon*) that the presumed validity approach for contingency fee retainers should not be applied in the context of mega-fund settlements. In *Brown v Canada (Attorney General)*, 2018 ONSC 3429, Justice Belobaba stated:

> [46] In *Cannon,* I embraced the percentage of the fund approach and accorded presumptive validity to the percentage that was agreed to in the contingent fee retainer agreement (up to one third) if certain conditions were satisfied. I wasn't overly concerned about "risk incurred" because the risk incurred by class action lawyers, like personal injury lawyers, was best measured by the wins and losses in many cases over many years and not just by the specific case that was before the court. I was comfortable doing this because almost all of the settlements were under $40 million (i.e. they were not mega-fund cases) and there was rarely, if ever, any direct evidence in the record that the straight-forward application of the percentage approach resulted in legal fees that were excessive or otherwise unreasonable.
>
> […]
>
> [56] My view today is that the *Cannon* / percentage of the fund approach remains viable but should be limited to settlement amounts that are common-place, that is, under $50 million. *Cannon* should never be used in the mega-fund case where the settlement or judgment is more than $100 million. And if there is evidence before the court that the requested legal fees are excessive, unseemly or otherwise unreasonable — *whatever the amount of the judgment or settlement* — the class action judge should roll up her sleeves and

> examine the risk incurred to help her decide whether the amount being requested by class counsel is indeed fair and reasonable.

[92] Second, I find that the Consortium Agreement was not a percentage fee recovery agreement between Class Counsel and the representative plaintiffs. Rather, it was an agreement among Class Counsel themselves. In terms of the nature of the agreement, the Consortium Agreement provided for a fixed cap recovery ($80 million) in the circumstances of this settlement and not a percentage of recovery. Further, the amount now sought on the motion ($50 million) bears no resemblance to the cap or a percentage of recovery.

[93] However, the position now advanced by Class Counsel does not rely on the presumptive validity of the Consortium Agreement, but rather stresses the presumptive validity of the agreement reached between Class Counsel and Canada.

[94] As the motion is currently framed, I find that the burden of proof lies with Class Counsel. Moreover, the fact that the parties reached an agreement on the amount of counsel fees does not make them presumptively valid or change the determination that must be made by the Court – namely, whether the fees sought are fair and reasonable. Rather, the agreement of the parties is merely one factor for the Court to take into consideration in the context of its fairness and reasonableness analysis [see *McLean, supra* at para 24].

C. The Appropriate Approach on Mega-Fund Settlements

[95] As noted earlier in these reasons, this case involves a mega-fund settlement and thus raises unique considerations. In assessing what is fair and reasonable in the context of a mega-fund

settlement, the traditional approach used by the Court to assess counsel fees proves somewhat unsatisfactory.

[96] In many class actions, class counsel have entered into retainer agreements with their clients that provide a percentage-based fee on contingency, subject to court approval, with counsel often recovering anywhere from 10 to 30 percent of the amounts recovered in the class proceeding. Courts are therefore often asked to consider whether the amount sought in counsel fees is fair and reasonable in comparison to the amount recovered for the class members. As noted above, in this case, Class Counsel's original retainer agreements were based on a percentage-based fee, with Class Counsel receiving 20% of the first $200 million in recovery and 10% thereafter.

[97] However, in a mega-fund settlement, a percentage-based fee is likely to result in an inappropriate windfall to counsel. In this case, the Consortium Agreement recognized this potential by imposing a cap of $80 million prior to the commencement of trial and $100 million after the commencement of trial. Had such a cap not been imposed, Class Counsel fees would have been in excess of $2 billion, which this Court would certainly have found to be a windfall.

[98] Moreover, even simply using a percentage of recovery as a "check and balance" when assessing the fairness and reasonableness of a proposed class counsel fee is of no assistance to the Court in the case of a mega-fund settlement. Class Counsel repeatedly stressed to the Court in their written representations that a counsel fee of $80 million was only 0.35% of the actual recovery, in an effort to demonstrate the reasonableness of the amount sought. In their supplemental written

representations, Class Counsel stressed that the settled fee of $50 million was only 0.21% of the Plaintiffs' actual recovery and was lower than any percentage recovery ever in a mega-fund case.

[99] While one might be tempted to conclude that fees representing less than 1% of the Plaintiffs' actual recovery are reasonable (particularly given that class counsel often seek 10-30% of the recovery), one need only probe the issue slightly further to realize that is not the case. Doubling the amount of Class Counsel's fee to $160 million – which I would certainly have found to be excessive – still only represents 0.6% of the actual recovery. This demonstrates the fallacy of considering the percentage of recovery as a probative "check and balance" for fee approvals in the context of a mega-fund settlement.

[100] Another tool used by the Court as a "check and balance" is the multiplier –that is, to look at the number by which the amount of actual legal fees incurred must be multiplied to arrive at the amount of fees sought by class counsel. Multipliers as low as 1.5 to as high as 8 have been approved in recent class action proceedings.

[101] However, even in the context of non-mega-fund settlements, the use of a multiplier has been criticized for encouraging inefficiency and duplication, discouraging early settlement and being unacceptably subjective if not completely arbitrary [see *Condon, supra* at para 86; *Lin, supra* at para 96; *McLean, supra* at para 37]. This Court has determined that, at most, a multiplier can only serve as a useful "check and balance" [see *McLean, supra* at para 37].

[102] In the context of a mega-fund settlement, I am skeptical of the reliability of a multiplier, even in such a limited role as a check and balance. The use of a multiplier requires the Court to compare the multipliers used in other class proceedings and then determine whether the proposed multiplier in the present case "aligns" with or falls within the range of multipliers used in comparable settlements. The lack of reliability of such an exercise in the context of a mega-fund settlement was recently addressed by Justice Perrell in *Fresco v Canadian Imperial Bank of Commerce*, 2023 ONSC 3335 at paragraph 102, where he stated:

> Outside the entrepreneurial system of class actions, there are ways to measure the value of the lawyer's work that is put at risk, such as assessments by an assessment officer. But in the *Emperor's New Clothes* world of fee approvals, these methods are generally eschewed and instead a variety of information proxies, the lodestar methodology, and comparisons to other class actions are used as a cross-check. None of this is a reliable verification. For the reasons expressed above, there is no discipline in determining who and how many should do the legal and forensic work and what and how much work should be done. The juridical methodology of *stare decisis*, comparing cases, is of little assistance because while the legal principles are constant and while Class Counsel's arguments are uniformly predictable in their consistency, each genre of class action is different and each and every class action is unique.

[103] In *Fresco*, Justice Perrell found that $25 million was an appropriate class counsel fee and noted that this correlated with a multiplier of 1.5 times the actual fees of $16.5 million. He went on to state that "[f]or the reasons expressed above, this cross-check is not a reliable cross-check and comparable cases are also of little assistance, save to indicate that as the multiplicand of a contingent fee increases the multiplier should decrease" [see *Fresco*, *supra* at para 136]. I agree with Justice Perrell's comments.

[104] So where does that leave us? In the case of a mega-fund settlement, I find that the Court must ensure that the approval of legal fees remains as principled as possible and not result in excessive and unseemly windfalls. The Court should begin by considering the actual fees incurred and determine whether they are reasonable. That said, I am not advocating for a forensic analysis of class counsel's dockets, but rather a holistic consideration of the reasonableness of the docketed fees based on a description of the work undertaken and the time attributed thereto. On a fee approval motion before this Court, the Judge making the determination is also the Case Management Judge and thus has a familiarity with the steps taken in the proceeding and, in the case of a settlement, some familiarity with the efforts that went into the negotiation and structuring of the settlement.

[105] The Court can also rely on the submissions of opposing counsel as to the reasonableness of the actual fees or, where the motion is on consent, the Court has the option of appointing an *amicus curiae* to assist in that determination. Where the Court is not satisfied that the actual fees as reported by class counsel are reasonable, they should be reduced.

[106] Once the appropriate amount of actual fees has been established by the Court, the Court retains the discretion to adjust the fees by approving a premium that incentivizes class counsel to take on risky actions and to do them well, but that is fair and reasonable and maintains the integrity of the profession.

[107] In considering what is fair and reasonable in circumstances where the counsel fee is not paid out of the class recovery, the Court should consider the issue from the perspective of Class

Counsel, the class members, the defendant(s) and the public interest [see *McCrea v Canada*, 2019 FC 122 at para 108].

[108] The determination of the premium should be based on all of the circumstances of the case, including the predominant considerations of the risk undertaken by class counsel and the results achieved, followed by the additional considerations noted above (the time and effort expended by class counsel, the complexity and difficulty of the matter, the degree of responsibility assumed by class counsel, fees in similar cases, expectations of the class, experience and expertise of class counsel, the ability of the class to pay and the importance of the litigation to the plaintiff). While fees in similar cases have been recognized as a relevant consideration, I find that their utility is limited in mega-fund settlements (for the reasons noted above), but I see no reason to remove it completely from the list of factors. Rather, I anticipate that the weight this Court gives to fee comparisons in mega-fund settlements such as this will be minimal.

[109] Moreover, I find that an additional factor should be added to the list – namely, whether the amount requested is on the consent of all parties.

[110] The amount of weight to be attributed to each of the factors and, in particular, the predominant factors of risk and result, will depend upon the facts of the case. That said, there will come a point where the weight attributed to the result achieved (and the resulting adjustment) must plateau no matter how high the financial settlement achieved.

[111] In determining the premium, the Court should also be guided by the principle of proportionality, which underpins the *Federal Courts Rules,* so that fees are not excessive in the sense of having little relation to the risk undertaken or the results achieved [see *Brown, supra* at para 53].

[112] Therefore, in a mega-fund settlement, rather than focusing on the percentage of recovery or the multiplier, the Court's focus should be on the actual dollar amount of the approved counsel fee.

D. Application of the Legal Principles to this Matter

[113] There is no question that Class Counsel are entitled to receive a premium on their actual legal fees. The issue before the Court is the appropriate amount of the adjustment.

[114] I will begin by considering whether the actual fees incurred are reasonable. By way of affidavit evidence from Mr. Sterns of Sotos LLP and Ms. Corbiere of Nahwegahbow, Corbiere, Class Counsel provided the Court with information regarding the fees docketed for work in relation to the class proceedings. Approximately 24,000 hours of billable time were recorded by legal professionals across the five Class Counsel firms, with lawyer billing rates ranging between $180.00 and $975.00 per hour. No docket entries were provided for any of the billed work, nor a general description of the work undertaken by each legal professional. Rather, only annual hour totals for each legal professional were provided. Class Counsel reported that the total actual fees they had incurred up to October 31, 2023 was $17.591 million.

[115] Canada does not take issue with the number of hours recorded by Class Counsel. However, in their written submissions, Canada questioned the legitimacy of the hourly rates used to calculate the actual fees, asserting that they are largely theoretical as Class Counsel's practice is to act on the basis of contingency fees. On cross-examination, Mr. Sterns admitted that his $975.00 hourly rate is not a rate that he regularly charges clients. Moreover, Canada criticized the rates used by some of the more senior counsel as being at the highest end of rates charged in their respective markets.

[116] However, when I asked Canada at the hearing what the Court should do with their concerns regarding the hourly rates, Canada offered no suggestion. Instead, Canada reversed its position and stated that they now accept the total dollar figure for work completed to date.

[117] Class Counsel asserted at the hearing of the motion that it does not lie within the Court's discretion to question the amount of hours docketed by Class Counsel. I reject this assertion. To accept at face value the amount of recorded hours, as well as hourly rates, without any level of scrutiny would be to abdicate the Court's supervisory jurisdiction.

[118] Class Counsel asserted that while Canada questioned the hourly rates, there was no evidence before the Court to suggest that the rates were unreasonable. This submission misses the point - the burden of proof lies with Class Counsel to demonstrate the reasonableness of their actual fees (which includes their hourly rates) and not with Canada to demonstrate that they are unreasonable.

[119] I have concerns regarding the number of recorded hours and the hourly rates used to calculate actuals, largely driven by: (a) the lack of detail provided by Class Counsel regarding the breakdown of their 24,000 hours; (b) there being no evidence to support the hourly rates used other than a blanket statement by Mr. Sterns that "usual and ordinary billable rates" were used in the calculation and that all Class Counsel's hourly rates are reasonable in their respective markets, without any justification for such a statement (other than in relation to his own hourly rate of $975); and (c) the lack of rigour applied by Canada to these issues.

[120] However, despite these concerns, I will nonetheless accept $17.591 million as the amount of actual fees upon which to base my adjustment. Counsel are cautioned, however, that the Court expects a greater rigour to be applied by Class Counsel in justifying the reasonableness of their actual fees and where a party opposes the reasonableness of the requested fee, a similarly greater rigour is required to explain the basis for the opposition. Class actions cannot be an open-ended invitation for class counsel to docket their time without regard to productivity, knowing that there is no client who will scrutinize their dockets in the same manner that a traditional paying client would do. Moreover, the use of inflated hourly rates, which has the effect of artificially increasing the amount of actual fees, is a further mischief to which this Court is alert and it will not be tolerated.

[121] I now turn to consider the applicable factors.

(1) Risk Assumed by Class Counsel

[122] With respect to risk, Class Counsel assert that at the time the Moushoom Class Action was commenced and throughout the proceedings, the risks assumed were substantial and unpredictable. Specifically:

A. When the Moushoom Class Action was commenced, the only decision available was the Merit Decision. The Compensation Decision had not been rendered and Canada opposed the request for compensation before the Tribunal.

B. The Tribunal's Compensation Decision did not include all class members. For example, the Tribunal awarded compensation to children removed from their homes, families and communities from 2006-2022, but Class Counsel asserted in the class proceedings that removed children were entitled to compensation, even if moved elsewhere on reserve. Class Counsel also included claims for removed children since 1991, adding 15 years and many class members to the claims advanced in the class actions. Class Counsel also advocated that the statutory award from the Tribunal was insufficient to compensate removed children and thus sought additional compensation.

C. Canada contested the Trout Class Action, which advanced novel claims for pre-Jordan's Principle essential services claims. Class Counsel obtained a settlement of the Trout Class Action for $3 billion that had no overlap with the Tribunal proceedings.

D. The Tribunal's findings only overlapped with part of the Class in the class actions. The Tribunal found that the complaint concerning removed children was only substantiated as of 2006, and the Jordan's Principle complaint as of December 12, 2007 (when Jordan's Principle was recognized by the House of Commons).

E. Canada sought judicial review of the Compensation Decision and when that was unsuccessful, they appealed the dismissal of the judicial review, which placed the benefit of the Compensation Decision at risk.

F. Canada's insistence that long-term reform be negotiated at the same time as the settlement, and its insistence that there be finality before the Tribunal, introduced an extreme risk and complexity into the negotiations and settlement prospects.

G. Certain First Nations stakeholders (and the Tribunal) opposed any compromise, which is the very foundation of any settlement, thus materially increasing the risks posed to a negotiated resolution of the class proceedings.

H. The AFN required its counsel to cap legal fees to ensure they would not be unseemly. Moushoom Counsel also agreed to cap its fees to $80 million. This capped fee for settlement before trial posed risk, as Class Counsel could not seek additional fees regardless of how many more years of pre-trial negotiations and litigation followed.

I. Class Counsel faced the risk that a new government might completely change the course of negotiations or settlement, or impose a legislated end to the case.

J. There was uncertainty about class size and a range of arguments existed that could have limited class size and the breadth of the proceedings.

K. Certain aspects of the claims being advanced were complex, such as the derivative claims by family members, and the claims as a whole introduced novelty and complexity as they involved matters of constitutional, Aboriginal and Indigenous law.

[123] For a number of reasons, I do not share Class Counsel's views as to the level of risk that they assumed in this proceeding.

[124] This was not a "self-made" class proceeding. The Tribunal proceedings had been ongoing for 12 years when Sotos LLP, Kugler Kandestin LLP and Miller Titerle + Company [Moushoom/Trout Counsel] decided to commence the Moushoom Class Action. At that time, Canada had already been found liable for discrimination related to the FNCFS program, the discriminatory delivery of essential services and non-compliance with Jordan's Principle in the Merit Decision and the Merit Decision was final. The Tribunal was also, at that time, in the process of considering the remedies that would flow from their liability finding.

[125] It does not strain credulity to find that Moushoom/Trout Counsel saw the opportunity to commence a class proceeding off of the back of the efforts of counsel who had worked to secure the Tribunal's liability finding and were working to secure a remedy. The heavy lifting had been successfully done before the Tribunal by counsel other than the Moushoom/Trout Counsel and they sought to financially benefit from those efforts.

[126] I pause to note that Nahwegahbow, Corbiere was one of the firms acting in the Tribunal proceedings and the result that they achieved before the Tribunal was admirable. However, such work is not compensable in the context of this proceeding and they have not sought compensation for the direct efforts undertaken before the Tribunal.

[127] Under the retainer agreements for the Moushoom Class Action, Moushoom/Trout Counsel stood to recover approximately $1 billion in fees solely by framing their class action to deliberately overlap with the Tribunal's determinations.

[128] While I appreciate that the Compensation Decision was subject to judicial review and then a further appeal to the Federal Court of Appeal, Canada was also making repeated public statements of its intention to compensate those affected and to settle the claims advanced in the class actions, which statements began in December of 2019, just months after the commencement of the Moushoom Class Action and prior to the commencement of the AFN Class Action and the Trout Class Action. These public statements from Canada continued after the commencement of the AFN Class Action and the Trout Class Action and were backed by offers made by Canada to engage in negotiations and mediations. While these statements did not obviate the risks to Class Counsel, I find that they certainly lessened the risk.

[129] As acknowledged by Class Counsel in their written representations in support of the approval of the Final Settlement Agreement, the Tribunal proceedings provided a "wealth of knowledge about the case". There were certain facts that had been established by the Tribunal and issues that had been decided with finality. Class Counsel knew what to expect in this proceeding with respect to the evidence and productions. As noted in the Litigation Plan dated July 9, 2019, there was overlapping evidence between the Tribunal proceeding and the class actions, such that Class Counsel anticipated a streamlined trial:

> The plaintiffs intend to proceed to trial on an expedited basis or a hybrid summary judgment/*viva voce* trial. It is anticipated that all of the documentary evidence produced by the Crown in the CHRT

> Proceeding will be relevant and producible in this class proceeding. Because of the extensive documentary production in the CHRT Proceeding, the plaintiffs expect few, if any, disputes as to documentary productions in this case. Furthermore, in light of the extensive testimony given at the CHRT Proceeding, it is anticipated that oral discovery can proceed quickly after certification and can be completed in a limited period of time.

[130] I accept that the Trout Class Action and certain other claims advanced in the Consolidated Action did not directly benefit from the determinations made by the Tribunal. However, the class proceedings as a whole were built on the foundation of the Merit Decision and the Compensation Decision, raising allegations against Canada that were based on shared facts. The novelty of these additional claims undoubtedly created risk, but that risk was attenuated by the legal precedent set by the Tribunal in the related claims.

[131] Under the Consortium Agreement, Class Counsel later agreed (after commencing the Trout Class Action) to cap their fees at $80 million in the event of a settlement before trial. While Class Counsel suggests that this somehow imposed additional risk, the reality is that Class Counsel had already reached the $80 million cap from the deliberate overlap of their claims with the Compensation Decision, regardless of the degree of success achieved in the Trout Class Action.

[132] This was also not a case of “bet the firm” litigation. The risks of the proceedings were spread across five law firms, including at least one major class action law firm and one large international law firm. Four of the firms carried unbilled work in the range of $3.3 to $4.7 million per firm over a five year period, with the fifth firm at less than $1 million. Class Counsel provided the Court with no evidence of any actual financial hardship due to carrying these unbilled fees or dedicating their time to these proceedings.

[133] That said, the absence of such evidence is not surprising. For a major class action firm, the business model that they use offsets the risk of losing one matter against the significant financial benefit associated with winning another, and such benefits far exceeds the actual value of their time spent working on the matter. Moreover, large international law firms are well-positioned to carry unbilled fees of less than $1 million per year for a four-year period.

[134] Class Counsel asserts that the inclusion of long-term reforms in the negotiations heightened the risk profile of this matter. While Canada has agreed to pay $20 billion towards long-term reforms, the long-term reforms do not form part of the Final Settlement Agreement in this proceeding. Rather, they are addressed in a separate settlement agreement that is not before the Court. There is little evidence before the Court as to the role Class Counsel played in the long-term reform discussions and how those negotiations progressed. Class Counsel has not provided the Court with the necessary information to endorse their submission regarding this asserted heightened risk.

[135] As Canada was the defendant in the class proceedings, I find that there was no material risk of non-payment and Class Counsel’s assertion that there was significant risk in litigating against Canada is inconsistent with the evidence, in particular Canada’s repeated commitment to compensation and a negotiated resolution.

[136] In these proceedings, Class Counsel began by characterizing the risk they faced as "substantial". Throughout these proceedings, Canada characterized the risk faced by Class Counsel

as "moderate" at best. At the hearing, Class Counsel stated in reply that it agreed that "moderate" risk was an appropriate characterization of the risk.

[137] Even though both sides agree that the risk level was moderate, there was still a significant delta between counsel as to what that "moderate" risk translates to in terms of fair and reasonable compensation. To Class Counsel, "moderate" risk initially meant that $80 million (and then following the hearing, $50 million) was an appropriate level of compensation, but for Canada, "moderate" risk meant counsel fees in the range of $40-50 million. It is therefore clear that for counsel in this proceeding, a "moderate" risk could itself lead to significant variations in compensation.

[138] There is value, in my view, to placing the level of risk faced by Class Counsel on a continuum, to show, at least in general terms, what level of risk was faced by Class Counsel. Looking at risk in this way, and taking into account the circumstances addressed above, I find that the risks incurred by Class Counsel were on the lower end of the spectrum.

(2) Results Achieved by Class Counsel

[139] In considering the results achieved, it is important to distinguish what was achieved in the Final Settlement Agreement from what was achieved in the Tribunal proceeding. The Final Settlement Agreement provided additional financial compensation beyond that which was secured before the Tribunal:

A. For tens of thousands of additional class members, including children who were removed from their families on reserve but placed into care within their communities, children who were removed between 1991 and 2006 (and their families) and children who were denied essential services between 1991 and 2007 (and their families).

B. By providing enhanced payments and benefits above the Tribunal's statutory limits to class members that suffered greater harms.

C. By providing a substantial First Nations-administered *cy-près* fund for class members who are not entitled to direct compensation.

[140] Class Counsel estimates that the total financial compensation in the Final Settlement Agreement over and above what the Tribunal awarded is approximately $13.75 billion.

[141] Moreover, as noted above, the Final Settlement Agreement provides significant non-financial benefits (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, and the formal request for a public apology from the Office of the Prime Minister) that were not available as part of the Tribunal proceeding.

[142] The size of the settlement - $23.34 billion – is historic and even if I were to remove from consideration of this factor the value of the Compensation Decision (which is appropriate in the circumstances), the amount recovered still far exceeds any other class action settlement in Canada

to date. In the circumstances, I have no hesitation in finding that the result achieved was very significant.

[143] I also agree with the comments made by other courts that large recoveries, even in the context of mega-fund settlements, should be rewarded with appropriately commensurate legal fees [see *MacDonald et al v BMO Trust Company et al,* 2021 ONSC 3726 at para 47]. That said, as noted above, there comes a point where it would be unreasonable and disproportionate to award additional counsel fees, no matter how large the recovery. It is not necessary for me to "plant a flag" and establish what the cap on recovery would be, but it certainly is a relevant consideration and one that goes to the weight to be ascribed to the results achieved.

[144] Canada asserted at the hearing that another relevant consideration is that the size of the settlement in this matter was driven, in part, by "happenstance". That is, the size of the recovery was more attributable to the happenstance of a large class size than to any corresponding assumption of risk or effort on the part of class counsel, relying on *MacDonald*, *supra* at paragraph 28 and footnote 22.

[145] Class Counsel opposed the suggestion that the class size was happenstance, but rather asserted that class size was the result of their carefully crafted class definitions. I reject this assertion. Regardless of how carefully Class Counsel defines a given class, the reality is that there are only so many people that will fall within a given class definition and that is outside of the control of Class Counsel. It may be hundreds of people or thousands of people and I agree with Canada that whether it is hundreds or thousands is simply happenstance.

[146] That said, should happenstance impact the Court's consideration of the results achieved? I agree that it is a relevant consideration when determining the weight to be ascribed to this factor and in this case, I find that the size of the recovery was impacted by happenstance.

(3) Remaining Factors

[147] The parties focused their written and oral submissions on the risk and result factors, with few, if any, submissions made on the balance of the factors. In keeping with the jurisprudence of this Court, I find that these factors should be ascribed less weight than the risk and result factors. Subject to my comments below, I find that these additional factors nonetheless support the approval of a premium on Class Counsel's fee.

[148] With respect to the time and effort expended by Class Counsel, it is apparent in the number of docketed hours and the participation of Class Counsel in the extensive negotiations that followed the certification (on consent) of the class actions, that Class Counsel devoted considerable time and resources to the proceedings.

[149] With respect to the complexity and difficulty of the matter, Class Counsel asserts that the path to settlement was extraordinarily complex because of the breadth and scope of the class and the need to satisfy the Court, the Tribunal and the parties to the Tribunal proceeding. Moreover, they assert that the size of the action contributed to its complexity—in terms of class size, temporal scope, novelty and the complexity of the legal and factual issues.

[150] I am satisfied that both the claims asserted in the proceeding and the structuring of the settlement were complex. This is apparent from the numerous experts that were consulted regarding child welfare issues, Jordan's Principle and essential services, as described in Mr. Sterns' affidavit. The number of stakeholders involved in decision making (both in the Tribunal proceedings covered by the settlement and with respect to negotiations for the class action) added complexity as well, as there were certain issues that required broad consultation.

[151] With respect to the degree of responsibility assumed by Class Counsel, the five law firms comprising Class Counsel assumed complete responsibility for commencing, prosecuting and settling the class actions, with no other related proceedings commenced before the provincial or territorial courts.

[152] With respect to fees in other cases, I have considered the amount of fees approved in other mega-fund proceedings, but I do not find the comparison to be of any practical utility other than to demonstrate that $40 million is also within the range of compensation approved in such cases. Each case must turn on its own facts and the impact of the Tribunal's Merit and Compensation Decisions render the facts of this case uniquely distinguishable from other cases.

[153] With respect to the expectations of the class, I find that the fee request is consistent with the expectations of the class. It honours a condition negotiated between Class Counsel and the AFN to cap counsel fees at $80 million if the case settled before trial, as executed in the Consortium Agreement. The amount now sought is not only lower than the $80 million cap provided for in the Consortium Agreement and the AFN's retainer agreement, it is also lower than

the previous contingency fee retainer agreements that the Moushoom/Trout Counsel executed with the Moushoom and Trout Class Actions Plaintiffs.

[154] Class Counsel and Canada also agreed that legal fees would not be deducted from amounts recovered for the Class, even though Class Counsel's original retainer agreements and the Consortium Agreement contemplated fees being paid out of the recovery.

[155] The Representative Plaintiffs' affidavits all state how pleased they are with the performance of Class Counsel and express their support for the fees sought. Moreover, there is no evidence before the Court of any opposition from Class Members to the fees sought by Class Counsel.

[156] With respect to the experience and expertise of Class Counsel, Class Counsel are a team of highly experienced lawyers combining their expertise in Aboriginal law and class action litigation. In fact, Nahwegahbow, Corbiere had acted as counsel for the AFN in the Tribunal proceeding since 2007 and brought valuable litigation knowledge and expertise from a First Nations perspective to these class actions. Class Counsel were clearly committed to these class actions and prosecuted the claims diligently. Ultimately, within five years of the first class action being filed, Class Counsel was able to achieve an historic settlement. Class Counsel will also continue to provide legal services as administration of the settlement transitions to the First Nations-led Settlement Implementation Committee.

[157] With respect to the ability of the Class to pay, it is unlikely Class Members would have been able to afford to retain Class Counsel on a fee for service basis given the complexity of the

child and family welfare system, the novelty of certain claims and the vulnerability of some of the Class Members.

[158] With respect to the importance of the litigation to the Plaintiffs, as acknowledged by the Tribunal, the settlement of this dispute represents a significant step towards reconciliation [see *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2023 CHRT 44 at para 1].

[159] The affidavits of the Representative Plaintiffs describe how important these class actions were to them, their families and their communities. The Class Members include some of Canada's most vulnerable members of society, who have been separated from their families or been unable to access essential services that are available to non-First Nations Canadians. Moreover, the Final Settlement Agreement requires Canada to recommend that the Prime Minister deliver an apology to Class Members for the discrimination they have faced, which further demonstrates the importance of this litigation to the Plaintiffs.

[160] Finally, as noted above, the amount sought in Class Counsel fees is now on consent of all parties.

[161] Having considered each of the factors noted above and the appropriate weight to be attributed thereto (keeping in mind the perspectives of Class Counsel, Class Members, Canada and the public interest), I am satisfied that a premium on Class Counsel's fee that would result in total

fees of $40 million (exclusive of taxes) for work completed to October 31, 2023 is fair and reasonable and will maintain the integrity of the legal profession.

[162] Having made my determination of the appropriate premium, I want to return for a moment to the concept of the multiplier. The multiplier agreed to by the parties that underlies their $50 million fee request is 2.843. The multiplier that underlies my determination of the appropriate fee amount is 2.273. The difference between the two multipliers is 0.57. However, this small differential in multiplier accounts for $10 million in fees, which demonstrates how focusing on the appropriate multiplier as opposed to focusing on the actual dollar value of the fees is unhelpful.

[163] Canada does not dispute the disbursements claimed by Class Counsel to date in the approximate amount of $642,000.00, plus applicable taxes, and I am satisfied that the disbursements claimed are fair and reasonable.

[164] With respect to future Class Counsel fees, I am satisfied that the agreement reached by the parties is fair and reasonable and maintains the integrity of the profession. As such, counsel fees for work completed from November 1, 2023 until completion of the last distribution protocol shall be paid based on actual work performed (with no enhancement) using commercial hourly rates up to a maximum of $5 million. However, the approved amount of those fees shall be determined on a future motion or motions once the work has been completed, with appropriate supporting evidence.

ORDER in T-402-19, T-141-20, T-1120-21

THIS COURT ORDERS that:

1. Class Counsel fees in the amount of $40,000,000.00 (forty million dollars) plus disbursements, together with applicable taxes, are hereby approved for all work completed up to October 31, 2023 [Approved Class Counsel Fee].

2. The Defendant shall pay the Approved Class Counsel Fee in accordance with the terms of the Final Settlement Agreement.

3. Class Counsel fees for work completed from November 1, 2023 until completion of the last distribution protocol shall be paid based on actual work performed (with no enhancement) using commercial hourly rates up to a maximum of $5 million. The approved amount of any such fees shall be determined on a future motion or motions once the work has been completed, with appropriate supporting evidence.

4. There shall be no costs of this motion.

"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 26, 2023
REASONS FOR ORDER AND ORDER:	AYLEN J.
DATED:	DECEMBER 21, 2023

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Nathan Surkan Peter Mantas	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
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NAHWEGAHBOW, CORBIERE Rama, ON FASKEN MARTINEAU DUMOULIN Ottawa, ON	FOR THE PLAINTIFFS 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
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