



TAB 3

**Report to Convocation
June 28, 2018**

Professional Regulation Committee

Committee Members

William C. McDowell (Chair)
Malcolm Mercer (Vice-Chair)
Jonathan Rosenthal (Vice-Chair)
Fred Bickford
John Callaghan
Gisèle Chrétien
Suzanne Clément
Seymour Epstein
David Howell
Carol Hartman
Michael Lerner
Brian Lawrie
Virginia MacLean
Susan Richer
Raj Sharda
Jerry Udell

Purpose of Report: Decision and Information

**Prepared by the Professional Regulation Division
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COMMITTEE PROCESS

1. The Professional Regulation Committee met on June 14, 2018. In attendance were Malcolm Mercer (Vice-Chair), Jonathan Rosenthal (Vice Chair), Fred Bickford, John Callaghan, Gisèle Chrétien, Suzanne Clément, Seymour Epstein, Ross Earnshaw, Carol Hartman, Michael Lerner (by telephone), Susan Richer, Raj Sharda, Andrew Spurgeon, Jerry Udell (by telephone) and Heather Zordel.
2. Law Society staff members Diana Miles, Cara-Marie O'Hagan, Jim Varro, Juda Strawczynski, and Matthew Wylie were also in attendance.

TAB 3.1

FOR DECISION

**GUIDELINES FOR LAWYERS WORKING WITH
INDIGENOUS PEOPLES**

Motion

3. That Convocation approve the *Guidelines for Lawyers Working with Indigenous Peoples* as set out at [Tab 3.1.1 \(English\)](#) and [Tab 3.1.2 \(French\)](#).

Context

4. At its June 2018 meeting, the Professional Regulation Committee (the “Committee”) directed that the *Guidelines for Lawyers Working with Indigenous Peoples* proceed to Convocation for approval.
5. In addition, the Committee approved an approach to disseminating information and resources about the Sixties Scoop Settlement Agreement to licensees, claimants, and members of the public, including that
 - a. the background paper and information and resources sheet ([Tabs 3.1.3 and 3.1.4](#) respectively) be prominently displayed on the Law Society website; and
 - b. the communications bulletin ([Tab 3.1.5](#)) be prepared in final form to be published after the Sixties Scoop Settlement Agreement is approved by the Ontario Superior Court of Justice, to be followed by further communications bulletins as required.

The Guidelines

6. At its May 2018 meeting, the Committee directed that staff review the *Guidelines for Lawyers Acting in Cases Involving Claims of Aboriginal Residential School Abuse* (“Residential School Guidelines”) to consider whether it would be appropriate to draft similar guidelines for lawyers acting in cases involving the Sixties Scoop.
7. Subsequent to the Committee’s May meeting, Convocation approved recommendations in the Report of the Review Panel on Regulatory and Hearing Processes Affecting Indigenous Peoples (the “Review Panel”). The Report included a recommendation that the Law Society “review the *Guidelines for Lawyers Acting in Residential School Cases* and revise them accordingly as

required to ensure that they are current and cover the broad scope of representation of those from Indigenous communities who may seek legal assistance as a claimant.”¹

8. As a starting point in the review of the Residential School Guidelines, staff consulted with Kathleen Lickers, member of the Review Panel and co-chair of the Indigenous Advisory Group (“IAG”). In discussions with Ms. Lickers about the Sixties Scoop Settlement and the Review Panel’s recommendation, it was agreed that the preferred approach would be to review and redraft the existing Residential School Guidelines so that they would be applicable for lawyers representing Indigenous peoples in all instances, including matters involving institutional abuse such as the Sixties Scoop.
9. Ms. Lickers then conducted that review, with input from other members of the IAG, and has proposed new Guidelines, titled *Guidelines for Lawyers Working with Indigenous Peoples* (the “Guidelines”), which are attached at **Tab 3.1.1**.
10. The Committee now requests that Convocation approve the Guidelines, and that they replace the Residential School Guidelines on the LSO website to provide a resource for lawyers working with Indigenous clients.

Sixties Scoop Settlement

11. In October, 2017, an Agreement in Principle was reached to settle multiple class actions launched by certain survivors of the Sixties Scoop against the federal government (the “Settlement Agreement”).² The agreement defines a class of claimants and provides for payments of up to \$50,000 per claimant. In order to take effect, the Settlement Agreement requires approval by the Federal Court of Canada and the Ontario Superior Court of Justice.³
12. The Settlement Agreement specifically provides for the payment of legal fees, with the federal government agreeing to compensate counsel representing the parties for their legal fees and disbursements in the amount of \$75 million plus tax. Compensation is to be divided between four named law firms⁴ and these firms are precluded from charging any claimant for fees and disbursements. Further, no

¹ Report to Convocation of the Review Panel on Regulatory and Hearing Processes Affecting Indigenous Peoples available at http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2018/Convocation-Law-Society-Review-Panel-Report.pdf (see Recommendation #9).

² Additional Information about the Sixties Scoop is available at **Tab 3.1.3**.

³ Sixties Scoop Settlement Agreement (the “Settlement Agreement”) available at [https://sixtiesscoopsettlement.info/Documents/Agreement%20in%20Principle%20\(fully%20executed\)%20November%2030,%202017%20w_Schedules.PDF](https://sixtiesscoopsettlement.info/Documents/Agreement%20in%20Principle%20(fully%20executed)%20November%2030,%202017%20w_Schedules.PDF)

⁴The four firms are Wilson-Christen LLP and Koskie Minsky LLP in Toronto, Merchant Law Group LLP in Regina, Saskatchewan, and Klein Lawyers in Vancouver, British Columbia

other lawyer can charge fees to any claimant without prior approval of the Federal Court.

13. The Settlement Agreement also includes an “opt out threshold”. It provides that if over 2000 class members opt out of the settlement or are deemed to have opted out, the Settlement Agreement is rendered void and the approval orders will be set aside. The “opt out period” runs for ninety days commencing on the date the Federal Court approves the Settlement Agreement.
14. On May 11, 2018, Justice Michel Shore of the Federal Court approved the Settlement Agreement with respect to claims that had been consolidated into the Omnibus Federal Court Class Action.⁵
15. On May 30, 2018, on the second day of approval hearings in the Ontario Superior Court of Justice, Justice Belobaba advised parties that additional issues needed to be addressed before determining whether the Settlement Agreement could be approved. In particular, Justice Belobaba asked that the named law firms provide written submissions detailing their billable work so that he may consider whether the legal fees provided for in the Settlement Agreement are reasonable.⁶
16. On June 20, 2018, Justice Belobaba approved the Settlement Agreement other than the \$75 million legal fees provision, which he found to be “excessive and unreasonable”.⁷ Justice Belobaba noted that the Class counsel in the *Brown v. Canada (Attorney General)*, the first of multiple class actions, agreed to de-link the \$75 million fees provision so as to ensure that the rest of the Settlement Agreement is not delayed or derailed over the issue of legal fees.⁸ Justice Belobaba also indicated that he was confident that the Class counsel in the consolidated federal class actions would also agree to de-link the fees provision and indicated that the court should be advised when the parties had reached an agreement with respect to fees.⁹

Information and Resources about the Sixties Scoop

17. To ensure that information and resources are available,
 - a. to provide guidance and education to licensees who may advise indigenous clients with respect to the Sixties Scoop Settlement; and

⁵ *Federal judge approves multimillion-dollar Sixties Scoop settlement*, Toronto Star, May 11, 2018, available at <https://www.thestar.com/news/canada/2018/05/11/federal-judge-approves-multimillion-dollar-60s-scoop-settlement.html>. See also sections 1.01 and 5.01 of the Settlement Agreement

⁶ *Ontario judge needs concerns about 60s Scoop settlement addressed before approving*, APTN News, May 30, 2018 (<http://aptnnews.ca/2018/05/30/ontario-judge-needs-concerns-about-60s-scoop-settlement-addressed-before-approving/>)

⁷ See *Brown v. Canada (Attorney General)* 2018 ONSC 3429, para 90, at [Tab 3.1.6](#).

⁸ *Ibid* at para 84.

⁹ *Ibid* at paras 91 and 92.

- b. for claimants or members of the public who may require additional information about the Sixties Scoop and the Settlement Agreement

the Committee has approved the following:

Website Resource

18. The list of online resources and information (**Tab 3.1.4**), as well as the background paper (**Tab 3.1.3**) about the Sixties Scoop and the proposed Settlement Agreement, which will be made immediately available to licensees, claimants, and members of the public via the LSO website, both in the Latest News section and on the Indigenous Initiatives page.

Communications

19. A communications bulletin (**Tab 3.1.5**) aimed at informing licensees, potential claimants, and members of the public about the Settlement Agreement and directing them to the resources on our website, will be published in an upcoming Law Society e-bulletin, with a copy also posted in the Latest News section of the Law Society website.
20. Staff will continue to monitor the progress of the Settlement Agreement and provide further communication bulletins as required.
21. In addition, staff in the Client Service Centre of the Corporate Services Division, who address the vast majority of inbound telephone and electronic inquiries to the LSO, will also be informed about the available resources and information so that they can appropriately direct and respond to inquiries.

Tab 3.1.1

**GUIDELINES FOR LAWYERS WORKING
WITH INDIGENOUS PEOPLES**

Preamble

The Law Society of Ontario recognizes the Indigenous community's unique experience and history, and specifically the (ongoing) impacts of colonization across Canada. These Guidelines are therefore provided as 1) a tool primarily to assist lawyers who act for Indigenous peoples and 2) the need for the Law Society of Ontario to implement safeguards for Indigenous peoples engaged in legal processes.

These Guidelines are in keeping with the spirit and letter of the *Rules of Professional Conduct* ("the Rules"). In particular, Rule 2.1-1 Commentary paragraph [4.1] recognizes that lawyers have a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights law in force in Ontario. These Guidelines are also an attempt to answer Call to Action 27 from the Truth and Reconciliation Commission to:

Ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal Rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

The Guidelines, advisory in nature, are meant to be educational and should be read in conjunction with the Rules. A lawyer will not be subject to discipline by the Law Society for a breach of the Guidelines, but may be subject to discipline for a breach of the standards of professional conduct found in the Rules, some of which are referenced in these Guidelines. The Guidelines have been created with a view to ensuring the competence and professional conduct of lawyers in providing legal services to Indigenous peoples and non-discriminatory access to legal services in Ontario.

In these Guidelines, words such as "respect" and "healing" are used throughout. These words have significant meaning in an Indigenous world-view. For the purposes of these Guidelines, "respect" reflects either an acceptance of the importance of the issue referred to, or polite, honourable, kind and careful consideration of the person referred to. "Healing" refers to the person's emotional, psychological, physical and spiritual journey towards health and wellness in their life, and in their relationships with family and community.

General

1. Given the specific knowledge required to responsibly serve the legal needs of Indigenous Peoples, lawyers should ensure they are culturally competent to act prior to accepting Indigenous clients, and specifically in matters of institutional abuse or vulnerable circumstances. Rule 3.1-1 provides a definition of a “competent lawyer”. Rule 3.1-1(h) states that being a competent lawyer includes “recognizing limitations in one’s ability to handle a matter, or some aspect of it, and taking steps accordingly to ensure the client is appropriately served.” Competence also involves “performing all functions conscientiously, diligently, and in a timely and cost-effective manner.”
2. Lawyers should be aware of the possible need for training for law office personnel to effectively manage the practice and maintain culturally competent legal service to clients. Lawyers acting in institutional abuse cases, for example, are encouraged to ensure that employee assistance programs and counselling are available for law office lawyers and staff.
3. Lawyers should recognize and respect that clients may be seriously damaged from their experiences, which may include cultural damage resulting from being cut off from their own society, culture and traditions and removed from their parents. These experiences may be aggravated by clients having to relive their childhood abuse, and healing may be a necessary component of any real settlement. Accordingly, lawyers should take into account that any redress provided to clients may include a broader range beyond the monetary. Lawyers should endeavour to understand and respect clients’ cultural roots, customs and traditions.

Guidance for Counsel

4. Lawyers should recognize and respect the unique nature of institutional abuse cases and appreciate clients’ need for “healing” in the legal process. Lawyers should recognize and respect the special nature of clients’ cases and should assist in facilitating their client’s healing process through, where possible:
 - a) Seeking compensation for the costs of rehabilitative and treatments services and resources;
 - b) identifying and providing referrals to appropriate community resources, including counselling resources, to assist the client;
 - c) referring their client to treatment programs, if appropriate;
 - d) for lawyers acting for a client pursuing a claim within the processes established by the Sixties Scoop Settlement Agreement or Indian Residential School Settlement Agreement (IRSSA), referring their client to the mental health and emotional services available through the settlement agreement, if appropriate; and,
 - e) recognizing and respecting the need for the client to develop a personal support network.

Lawyers should review these options with the client at the beginning of and throughout the retainer.

5. Lawyers should recognize and respect that certain cases may place unique demands on the lawyer and other law office staff by virtue of the complicated legal issues, the emotional nature of such cases, the additional amount of time and resources required for each case, the special needs of clients, the potential need for crisis intervention and management, and the lawyer’s role in facilitating the client’s healing process. Lawyers should recognize and respect that these demands may place a practical limit on the number of cases which they can

competently and responsibly take on at any one time. Lawyers must also remember that they must act consistent with their responsibilities to their clients.

6. In the case of residential schools, lawyers should ensure that new clients are aware of the relevant settlement agreement (including the IRSSA for example), including the legal processes established by the relevant settlement agreement, any deadlines established by it for new claims, and the clients' available legal options in light of the agreement. Although most claims being pursued by lawyers are or will proceed through legal processes established by the settlement agreement, if lawyers pursue claims through a class action, lawyers should ensure that the clients understand the impact of participating in the class on other legal rights which may be available to the them, including the impact on potential claims available through legal procedures established by the settlement agreements, the nature of a class action, and the need for a representative group of clients from whom the lawyer will take instructions. The lawyer should also implement appropriate information distribution systems for the benefit of all clients.
7. Lawyers should appreciate the need for the utmost sensitivity in dealings with clients. Lawyers should ensure that the methods they employ in making legal services available to claimants are culturally appropriate and comply with Rule 4.1, in particular Rule 4.1-2(c) which prohibits unconscionable or exploitive means in offering legal services to vulnerable persons or persons who have suffered a traumatic experience and have not yet had a chance to recover. Lawyers should make reasonable efforts to ensure that initial communications offering legal services to claimants are welcomed and respectful. Care should be taken to ensure that these communications will not result in further trauma to the client. Subject to protecting and advising the client with respect to solicitor and client privilege, lawyers may wish to consider having community support people available at the initial meeting with the client and should recognize that clients may require support people to be present throughout various stages of the legal retainer. In some cases, the Lawyer may want to consider having several meetings with the client to build comfort and trust so that the client has the opportunity to fully tell their story and give instructions.
8. Lawyers should ensure that advertising aimed at soliciting clients is in good taste, is not false or misleading, and complies with Rule 4.2-1.
9. Lawyers acting on behalf of clients must comply with Section 3.6 of the Rules and ensure that all fees and disbursements are clearly communicated to the client in a way that is understandable. Lawyers acting for Indigenous clients:
 - a) who as children between 1951 and 1991 were taken into care and placed with non-Indigenous parents where they were not raised in accordance with their cultural traditions nor taught their traditional languages ("the Sixties Scoop"), have a particular obligation to advise clients about those provisions in the Sixties Scoop Settlement that address legal fees;
 - b) Lawyers acting on behalf of clients making claims under the Sixties Scoop Settlement should ensure that their clients are aware that they should not be charged legal fees with respect to any claims made under the Settlement;
 - c) More specifically, lawyers acting for claimants within the Independent Assessment Process established by the IRSSA should additionally communicate the IRSSA provisions related to the claimant's legal fees and disbursements in a manner that is clear and understandable;
 - d) Given the unique nature of residential school cases and needs of clients, lawyers should make reasonable efforts to ensure that there is clear and understandable communication regarding the lawyer and client relationship, the legal process including settlement and alternative dispute resolution processes, responsibilities of

lawyer and client, and fees and disbursements. Accordingly, lawyers should, whenever possible, meet in person with the client before establishing a lawyer and client relationship or accepting retainers from residential school claimants.

10. Lawyers may enter into an arrangement with a client for a contingency fee provided the arrangement is in accordance with Rule 3.6-2.
11. Lawyers acting for Indigenous clients should ensure that they are accessible and that clear lines of communication exist with the client. Lawyers should recognize and respect the special communication needs that some clients may have including language barriers, cultural barriers, and limited access to telephone and internet service. Rule 3.2- 2A requires that a lawyer advise a client of their language rights, including the right to use the official language of the client's choice, and a language recognized in provincial or territorial legislation as a language in which a matter may be pursued, including, where applicable, Indigenous languages.
12. Lawyers may be required to consider the services of interpreters, as necessary. Lawyers' written communications to clients should be in an understandable and accessible format and lawyers should make reasonable efforts to follow up to ensure client comprehension. Lawyers should also communicate at all stages of the matter in a timely and effective manner, in accordance with Rule 3.1-1(d). This also involves being clear with the client about what the legal system can and cannot deliver, and, depending on the circumstances, involving the client in determining the approach to gathering information relevant to the claim. Lawyers should also be prepared to deal with a client's progressive disclosure of issues related to the matter, given the emotional vulnerabilities that many clients may experience.
13. Lawyers should recognize that some clients may reside in remote areas of the province or may not have access to telephone and internet services on a regular basis. As a result, to the extent that a lawyer can, they should consider sharing information with tribal councils, friendship centres, indigenous health and justice organizations, and band councils for the purposes of distributing class information. Lawyer should update any information they share on a regular basis. Lawyers should also promptly return phone calls from these institutions and other lawyers in a timely manner as these entities can assist and be a great asset to ensuring information is distributed in a timely manner.
14. Sensitivity to the emotional, spiritual and intellectual needs of clients is necessary in the provision of legal services. Lawyers should recognize and respect that clients have had control taken from their lives and may have been victims of child and sexual abuse and therefore, as clients, should be routinely informed about and consulted as much as possible on the direction of their case. Lawyers should ensure that they obtain instructions from clients at every stage of the legal process. Lawyers should also recognize and respect that for some Indigenous clients, interaction with lawyers and the legal process can be extremely stressful and difficult.
15. Lawyers should recognize and respect that some clients may be at risk of suicide and/or violence toward themselves and others, and should seek appropriate instruction and training for all law office staff to deal with such occurrences. Lawyers should be aware of available and appropriate resources and supports in order to make referrals when crisis intervention is warranted.

ONGLET 3.1.2

**LIGNES DIRECTRICES POUR LES AVOCATS QUI TRAVAILLENT AVEC DES
CLIENTS AUTOCHTONES**

Préambule

Le Barreau de l'Ontario reconnaît l'expérience et l'histoire uniques des communautés autochtones, et particulièrement les effets (continus) de la colonisation au Canada. Les présentes lignes directrices sont donc données principalement 1) pour aider les avocats qui représentent des justiciables autochtones et 2) pour répondre au besoin du Barreau de l'Ontario de mettre en œuvre des mesures pour protéger les demandeurs autochtones visés par des procédures judiciaires.

Les lignes directrices respectent l'esprit et la lettre du *Code de déontologie* (« le Code »). Le commentaire [4.1] de la règle 2.1-1, en particulier, tient compte du fait que les avocats ont des responsabilités spécifiques, notamment celles de respecter la diversité de la société ontarienne, de protéger la dignité des personnes et de respecter les lois sur les droits de la personne en vigueur en Ontario. Ces lignes directrices sont aussi une tentative de répondre à l'Appel à l'action 27 de la Commission de vérité et réconciliation, qui spécifie ce qui suit :

Veiller à ce que les avocats reçoivent une formation appropriée en matière de compétences culturelles, y compris en ce qui a trait à l'histoire et aux séquelles des pensionnats, à la *Déclaration des Nations Unies sur les droits des peuples autochtones*, aux traités et aux droits des Autochtones, au droit autochtone de même qu'aux relations entre l'État et les Autochtones. À cet égard, il faudra, plus particulièrement, offrir une formation axée sur les compétences pour ce qui est de l'aptitude interculturelle, du règlement de différends, des droits de la personne et de la lutte contre le racisme.

Les lignes directrices, de nature consultative, servent de guide et devraient être lues en conjonction avec le Code. Un avocat ne sera pas assujéti à la discipline du Barreau pour ne pas les avoir suivies, mais peut être discipliné pour une infraction aux normes de conduite qui se trouvent dans le Code, dont certaines sont mentionnées dans les présentes lignes directrices. Les présentes lignes directrices ont été développées en vue de garantir la compétence et la conduite professionnelle des avocats dans la prestation de services juridiques aux demandeurs autochtones et l'offre d'un accès libre de toute discrimination à ces services en Ontario.

Dans les présentes lignes directrices, les mots tels que « respect » et « guérison » sont utilisés à plusieurs reprises. Ils ont une signification importante du point de vue des Autochtones. Aux fins des présentes lignes directrices, « respect » reflète soit l'acceptation de l'importance de la question mentionnée, ou la considération polie, honorable et attentionnée de la personne mentionnée. « Guérison » renvoie au cheminement émotif, psychologique, physique et spirituel vers la santé et le bien-être durant leur vie et dans leurs relations avec la famille ou la communauté.

Généralités

1. Compte tenu des connaissances particulières nécessaires pour servir de façon responsable les besoins juridiques des peuples autochtones, les avocats doivent s'assurer d'être culturellement compétents en la matière avant d'accepter des dossiers de clients autochtones et particulièrement en ce qui a trait à des affaires de violence institutionnelle ou dans des circonstances de vulnérabilité. La règle 3.1-1 du *Code de déontologie* donne une définition de l'expression « avocat compétent ». L'alinéa 3.1-1(h) précise que le fait d'être une avocate ou un avocat compétent suppose de « reconnaître ses limites professionnelles dans une affaire ou sur un point particulier et faire le nécessaire pour assurer un service satisfaisant au client ». La compétence implique aussi de « remplir en temps utile ses fonctions de façon consciencieuse, prompt et rentable ».
2. Les avocats doivent être conscients de la possibilité que leur personnel puisse avoir besoin de formation pour bien gérer la pratique et offrir des services sensibles à la culture et de qualité aux clients. Les avocats qui agissent dans des affaires touchant la violence institutionnelle, par exemple, sont encouragés à veiller à ce que les programmes d'aide et de conseils soient à la portée des avocats et des employés.
3. Les avocats doivent reconnaître et respecter le fait que l'expérience passée des clients peut les avoir profondément traumatisés, notamment si l'on tient compte des préjudices d'ordre culturel qu'ils ont subis du fait d'avoir été séparés de leur société, de leur culture et de leurs traditions et enlevés à leurs parents. Revivre les sévices subis par les clients dans leur enfance peut aggraver une telle expérience et la guérison peut constituer une composante essentielle de tout véritable règlement pour les clients. Par conséquent, les avocats doivent tenir compte du fait que les redressements offerts aux demandeurs peuvent comprendre d'autres aspects que l'argent. Les avocats doivent tenter de comprendre et de respecter les racines, les coutumes et les traditions culturelles des clients.

Guide pour les avocats

4. Les avocats doivent reconnaître et respecter la nature particulière des affaires touchant la violence institutionnelle et la respecter. Ils doivent également saisir le besoin qu'ont les clients de « guérir » dans le cadre de la procédure judiciaire. Les avocats doivent être conscients du caractère particulier des affaires mettant en cause des clients, le respecter et faire de leur mieux pour favoriser le processus de guérison de leurs clients, notamment, dans la mesure du possible :
 - a) en cherchant des indemnisations pour les frais de services de réadaptation et traitements ;
 - b) en trouvant des ressources communautaires utiles, y compris des services de consultation, et en y renvoyant les clients ;
 - c) en référant les clients à des programmes de traitement, si cela est nécessaire ;
 - d) en référant les clients aux services de santé mentale et de soutien affectif disponible par le biais de l'entente de règlement, pour les avocats engageant des poursuites selon les procédures établies par l'entente de règlement ayant trait à la

raffe des années 1960 ou la Convention de règlement relative aux pensionnats indiens (CRRPI),

- e) en reconnaissant et en respectant le besoin qu'ont les clients de pouvoir disposer de leur propre réseau de soutien.

Les avocats devraient examiner ces options avec leurs clients au début et tout au long du mandat.

5. Les avocats doivent reconnaître et respecter le fait que certaines affaires peuvent imposer, à eux et au personnel de leur cabinet, des exigences particulières compte tenu de la complexité des questions juridiques que ces affaires soulèvent, de leur caractère émotionnel, du temps et des ressources que requiert chaque affaire, des besoins particuliers des clients, de la possibilité qu'il soit nécessaire d'avoir recours à des services d'intervention immédiate ou de gestion des crises, ainsi que du rôle de l'avocat ou de l'avocate dans le processus de guérison des clients. Les avocats doivent reconnaître et respecter le fait que ces exigences puissent restreindre de façon concrète le nombre d'affaires dont ils peuvent se charger de façon compétente et responsable. Les avocats doivent aussi garder à l'esprit d'assurer la cohérence entre leurs actions et leurs responsabilités envers leurs clients.
6. Dans le cas des pensionnats, les avocats doivent s'assurer que les nouveaux clients sont informés de l'entente de règlement pertinente (comme la CRRPI, par exemple), y compris des procédures juridiques, l'entente de règlement pertinente et les dates limites pour les nouvelles demandes établies par celle-ci, ainsi que des recours juridiques à la lumière de l'entente. Bien que la plupart des demandes poursuivies par les avocats procèdent ou procéderont par l'intermédiaire de procédures juridiques établies par l'entente de règlement, si les avocats agissent dans un recours collectif, ils doivent s'assurer que les clients comprennent l'impact de leur participation au recours, particulièrement l'impact sur les autres droits juridiques pouvant leur être accessibles, notamment les demandes potentielles disponibles par l'intermédiaire des procédures juridiques établies par les ententes de règlement. Les avocats doivent également s'assurer que les clients comprennent la nature d'un recours collectif et le besoin d'avoir un groupe représentatif qui fournira des instructions aux avocats. Ils devraient également mettre en place des systèmes de distribution des renseignements pour tous les clients.
7. Les avocats doivent être conscients de la nécessité de faire preuve d'une grande sensibilité dans leurs rapports avec des clients. Ils doivent veiller à ce que les moyens qu'ils utilisent pour leur offrir des services professionnels soient adaptés à leur culture et conformes à la règle 4.1, en particulier à l'alinéa 4.1-2 (c), qui interdit les moyens qui « exploitent une personne qui est vulnérable ou qui n'a pas encore eu le temps de se remettre d'une expérience traumatisante ». Les avocats doivent déployer des efforts raisonnables pour s'assurer que les communications initiales visant à offrir des services professionnels aux demandeurs soient accueillies favorablement et soient respectueuses, et prendre soin qu'elles ne les traumatisent pas davantage. Sous réserve du secret professionnel qui lie l'avocat et son client, les avocats peuvent envisager d'inviter des personnes de la communauté en tant que soutien lors de la première rencontre avec le client et doivent

reconnaitre que les clients peuvent avoir besoin de cette présence à diverses étapes du mandat juridique. Dans certains cas, l'avocat peut envisager de tenir plusieurs réunions avec le client pour créer un climat où le client se sent à l'aise et en confiance pour que celui-ci ait l'occasion de raconter son histoire en entier et de donner des instructions.

8. Les avocats doivent veiller à ce que la publicité visant à solliciter des clients soit de bon gout, ne soit ni fausse ni trompeuse et soit conforme à la règle 4.2-1.
9. Les avocats représentant des clients doivent se conformer à l'article 3.6 du Code et veiller à les informer de tous les honoraires et débours d'une manière compréhensible. Les avocats agissant pour des clients autochtones doivent faire ce qui suit :
 - a) si les clients autochtones étaient enfants entre 1951 et 1991 et étaient placés avec des parents non autochtones où on ne leur enseignait ni leurs traditions culturelles ni leurs langues traditionnelles (« la rafle des années 60 »), les avocats ont une obligation particulière de conseiller leurs clients sur les dispositions de l'entente de règlement ayant trait à la rafle des années 1960 portant sur les frais juridiques ;
 - b) Lorsqu'ils représentent des clients faisant des réclamations en vertu de l'entente de règlement ayant trait à la rafle des années 1960, les avocats devraient s'assurer que leurs clients sont conscients qu'ils ne devraient pas avoir à payer de frais juridiques à l'égard de toute réclamation faite aux termes de l'entente ;
 - c) dans le cadre du processus d'évaluation indépendant établi par la CRRPI, les avocats doivent, en outre, communiquer les dispositions de la CRRPI liées aux honoraires et débours du demandeur de façon claire et compréhensible.
 - d) Compte tenu de la nature particulière des affaires touchant les pensionnats autochtones et des besoins des clients, les avocats doivent faire des efforts raisonnables pour veiller à informer leurs clients de façon claire et compréhensible quant à la nature du rapport avocat-client, à la procédure judiciaire notamment la transaction et les mécanismes alternatifs des règlements des conflits, aux responsabilités des avocats et des clients, ainsi qu'en ce qui concerne les honoraires et débours. Les avocats doivent donc, dans la mesure du possible, rencontrer les clients en personne avant d'établir un rapport avocat-client ou d'accepter un mandat lié aux pensionnats autochtones.
10. Les avocats peuvent convenir avec leurs clients de toucher des honoraires conditionnels, dans la mesure permise par la règle 3.6-2 du *Code de déontologie*.
11. Les avocats qui représentent des clients autochtones doivent veiller à être à la disposition de leurs clients et à établir des voies de communication claires avec eux. Les avocats doivent reconnaître et respecter les besoins particuliers de certains clients sur le plan des communications, notamment les obstacles linguistiques et culturels, ainsi que l'accès limité aux services téléphoniques et à Internet. La règle 3.2-2A exige que l'avocat informe son client de ses droits linguistiques, y compris de son droit à l'emploi de la langue officielle de son choix dans le traitement de son dossier, ou à l'emploi d'une autre langue

prescrite par les lois provinciales ou territoriales à cet effet, notamment, le cas échéant, une langue autochtone.

12. Les avocats peuvent avoir recours aux services d'un interprète, au besoin. Les communications écrites avec les clients doivent être compréhensibles et accessibles et les avocats s'efforceront, dans la mesure du possible, d'en effectuer le suivi pour vérifier que les destinataires les ont bien comprises. Les avocats doivent également communiquer l'information tout au long de l'affaire en temps opportun et de façon efficace, et ce conformément à l'alinéa 3.1-1 d). Cela implique également d'expliquer clairement aux clients les possibilités et les limites qu'offre le système judiciaire, et, selon les circonstances, impliquer le client dans choix de l'approche à suivre dans la collecte d'informations pertinentes à sa demande. Les avocats doivent aussi savoir que la divulgation des questions portant sur l'affaire pourrait se faire de manière progressive, étant donné les vulnérabilités émotionnelles que de nombreux clients peuvent éprouver.
13. Les avocats devraient reconnaître que certains clients peuvent habiter dans des régions éloignées de la province ou peuvent ne pas avoir accès aux services téléphoniques et à Internet de façon régulière. Par conséquent, dans la mesure du possible, l'avocat devrait envisager de partager l'information avec des conseils de tribus, des centres de l'amitié, des organismes de santé et justice autochtones, et des conseils de bandes aux fins de distribuer l'information sur le recours collectif. L'avocat devrait mettre à jour toute information qu'il partage de façon régulière. Les avocats devraient aussi rappeler rapidement ces établissements et d'autres avocats, parce qu'ils représentent un grand atout pour assurer la distribution de l'information en temps utile.
14. Il importe d'être sensible aux besoins psychologiques, spirituels et intellectuels des clients lorsqu'on leur fournit des services juridiques. Les avocats doivent reconnaître et respecter le fait que, dans de nombreux cas, le contrôle sur leur vie leur a été soustrait et qu'ils pourraient avoir été victimes de mauvais traitements et de sévices sexuels dans leur enfance. Par conséquent, en tant que clients, il faut les informer régulièrement de leur affaire et les consulter autant que possible sur l'orientation du dossier. Les avocats devraient obtenir des instructions de la part des clients à toutes les étapes de la procédure. Ils devraient également reconnaître et respecter le fait que, pour des clients autochtones, les rapports avec des avocats et l'appareil judiciaire peuvent être extrêmement éprouvants et difficiles.
15. Les avocats doivent reconnaître et respecter le fait que certains clients peuvent avoir des tendances suicidaires et présenter des risques de violence envers eux-mêmes ou autrui. Ils doivent donc donner à tout leur personnel des directives et une formation adéquates pour faire face à de tels événements. Les avocats devraient connaître les ressources et les moyens de soutien adaptés disponibles pour y avoir recours en situation de crise.

The Sixties Scoop

Background

The Sixties Scoop is a phrase for policies enacted by provincial child welfare authorities beginning in the early 1950s and continuing until the early 1990s. Under agreements with the federal government, thousands of Indigenous children were removed from their homes and families and placed into provincial child welfare systems. Children who were removed from their homes were most often placed in non-Indigenous foster or adoptive families, institutions, and in some instances, residential schools.¹ “Scooped” children were often moved to other provinces, the United States, or even overseas.²

The term “Sixties Scoop” first appeared in the 1983 book, *Native Children and the Child Welfare System* after its author, Patrick Johnston interviewed a social worker in British Columbia who said that during the 1960s, she and her colleagues “scooped” children from First Nation communities, “almost as a matter of course”.³

According to the Truth and Reconciliation Commission, “the 1960s Scoop was in some measure simply a transferring of children from one form of institutional care, the residential school, to another, the child-welfare agency.”⁴

As a result of these policies, there was an accelerated over-representation of Indigenous children in the child welfare system. For instance, by 1980, 4.6% of all First Nations children were in care, compared to 0.96% of the general population.⁵

Many children who were “scooped” during this time were displaced from their birth families, lost their culture, language and identity as Indigenous persons, and were subjected to emotional, spiritual, sexual or physical abuse. The removal of children from their communities and culture has been linked with “high suicide rates, sexual exploitation, substance use and abuse, poverty,

¹Peristerakis, Julia. “We Must Separate Them From Their Families”: *Canadian Policies of Child Apprehension and Relocation from Indigenous Communities*. (2014) University of Manitoba Master of Arts Thesis p. 12. Available online at: <https://mspace.lib.umanitoba.ca/xmlui/handle/1993/24015>

² See *Ibid* p. 13. See also, *The Sixties Scoop: How Canada’s “Best Intentions” Proved Catastrophic*, First Nation Drum, March 24, 2009, available online at: <http://www.firstnationsdrum.com/2009/03/the-sixties-scoop-how-canadas-best-intentions-proved-catastrophic/>.

³ Patrick Johnston, “Revisiting the ‘Sixties Scoop’ of Indigenous Children”, *Policy Options* July 26, 2016, online at <http://policyoptions.irpp.org/magazines/july-2016/revisiting-the-sixties-scoop-of-indigenous-children/>

⁴ *Canada’s Residential Schools: The History, Part 2 1939-2000*. The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1. Available at http://www.myrobust.com/websites/trcinstitution/File/Reports/Volume_1_History_Part_2_English_Web.pdf at p. 147.

⁵ *Ibid*.

low educational achievement and chronic unemployment.”⁶ Ongoing community based research has shown that many of the missing and murdered Indigenous women, girls, trans and two spirited were involved in the child welfare system.⁷

In February 2009, Marcia Brown and Robert Commanda, two Ontario survivors of the Sixties Scoop, brought a class action lawsuit against the Government of Canada (“Canada”), which they alleged had enacted a policy of “systemic assimilation . . . purposely designed to destroy First Nations families and communities”(the “Brown Class Action”).⁸

The plaintiffs alleged that Canada wrongfully delegated its responsibility for Indigenous persons when it entered into an agreement with Ontario that authorized a child welfare program that systemically eradicated the Indigenous culture, society, language, customs, traditions and spirituality of the children.⁹

Ms. Brown and Mr. Commanda brought their action on behalf of approximately 16,000 individuals.¹⁰ Damages of \$50,000 were claimed for each class member and a declaration was sought that Canada “breached its non-delegable fiduciary obligation and duty of care to protect rights and did commit the actionable wrong of ‘identity genocide’.”¹¹

Between 2010 and 2017, at least six procedural decisions were made, relating primarily to the certification of the class. In February 2017, Justice Belobaba of the Superior Court of Justice considered the merits of the case.¹²

In that ruling, Justice Belobaba found that Canada was obliged to consult with each “Indian Band before any provincial welfare program, including child welfare services, was extended to the reserve in question”, and that no such consultations ever took place.¹³ In addition, he found that Canada “failed to take reasonable steps to prevent the loss of aboriginal identity . . .”¹⁴ Furthermore, Canada was subject to a common law duty to take steps to prevent those Indigenous children who were subject to the Sixties Scoop from losing their cultural identity and was liable for breaching that duty.¹⁵

⁶ Lavell-Harvard, D. M. & Lavell, J.C. (Eds.). (2006). *Until Our Hearts Are On The Ground: Aboriginal Mothering, Oppression, Resistance and Rebirth*. Toronto: Demeter Press, cited in Alston O’Connor, Emily, “The Sixties Scoop: Implications for Social Workers and Social Work Education”, *Critical Social Work* 2010, Vol 11, No. 1 at p. 54.

⁷ Interim report on Community Database research August 2016 – No More Silence <http://itstartswithus-mmiw.com/>

⁸ *Brown v. Canada (Attorney General)*, 2010 ONSC 3095, at p. 498.

⁹ Memorandum of Fact and Law of the Plaintiffs, submitted in *Jessica Riddle, Wendy Lee White and Catriona Charlie*, by Koskie Minsky LLP, Klein Lawyers LLP, and Merchant Law Group LLP, at para 17, citing the Affidavit of D. Rosenfeld. Available at <https://kmlaw.ca/wp-content/uploads/2016/10/Memorandum-of-Fact-and-Law-Plaintiffs-April-19-2018.pdf>.

¹⁰ *Ibid.*

¹¹ *Ibid.*, at p. 499.

¹² See *Brown v. Canada (Attorney General)*, 2017 ONSC 251, at para 1.

¹³ *Ibid.* at para 62.

¹⁴ *Ibid.* at paras 62-63.

¹⁵ *Ibid.* at paras 83-85.

Before the matter proceeded to the damages assessment stage, an Agreement in Principle was reached with Canada on August 30, 2017.

Beginning just after the Brown Class Action, similar litigation was commenced in Manitoba, Saskatchewan, Alberta, and British Columbia, as well as in Federal Court, where three matters were consolidated into an Omnibus Federal Court Class Action for the purposes of the settlement.¹⁶

Settlement Agreement

In February, 2017, Carolyn Bennett, then Minister of Indigenous and Northern Affairs announced the federal government's interest in negotiating an agreement in principle to settle the Sixties Scoop litigation.¹⁷

On October 6, 2017, Minister Bennett announced that an agreement in principle aimed at resolving the Sixties Scoop litigation had been reached (the "Settlement Agreement").¹⁸

The proposed settlement includes all registered Indians, as defined in the *Indian Act* (R.S.C., 1985, c. I-5) and Inuit persons, or persons eligible to be registered Indians or Inuit, who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents ("Class Members") and who were alive on February 20, 2009 ("Eligible Class Members").¹⁹

Terms of the Settlement Agreement

The Settlement Agreement provides for payments from the federal government as follows:

- a. If more than 30,000 Eligible Class Members submit a claim, each would receive an equal payment calculated by dividing \$750 million by the number of claimants;
- b. If fewer than 20,000 Eligible Class Members submit a claim, each would receive an equal payment calculated by dividing \$500 million by the number of claimants to a maximum of \$50,000 per person;

¹⁶ Supra note 8.

¹⁷ See *Minister Bennett Announces Launch of Negotiations Towards National Resolution to Sixties Scoop Litigation* available at <https://www.newswire.ca/news-releases/statement--minister-bennett-announces-launch-of-negotiations-towards-national-resolution-to-sixties-scoop-litigation-612472033.html>.

¹⁸ See *Agreement-In-Principle Reached to Resolve the Sixties Scoop Litigation* available online at: <https://www.newswire.ca/news-releases/agreement-in-principle-reached-to-resolve-the-sixties-scoop-litigation-649754963.html>.

¹⁹ See *Sixties Scoop Settlement Agreement*, November, 2017, and *Proposed Settlement of Sixties Scoop Class Action*, information sheet created by Collectiva Class Action Services Inc. Both available online at: <https://www.sixtiesscoopsettlement.info/Record.htm?record=193012491129&heading=The+Sixties+Scoop+Settlement>.

- c. If between 20,000 and 30,000 Eligible Class Members submit a claim, each claimant would receive \$25,000.²⁰

Payments to individuals will not exceed \$50,000.²¹

In addition, the federal government has proposed to fund a foundation in the initial amount of \$50 million (the “Foundation”). Although there would be further negotiations to particularize the objects of the Foundation, the Settlement Agreement provides that the intention of the Foundation is to benefit Class Members and its main purpose would be to enable change and reconciliation and provide in particular, access to healing/wellness, commemoration and education activities.²²

The Settlement Agreement specifically provides for the payment of legal fees, with the federal government agreeing to compensate counsel representing the parties for their legal fees and disbursements in the amount of \$75 million plus tax. Compensation is to be divided between four named law firms²³ and these firms are precluded from charging any Class Member for fees and disbursements. Further, no other lawyer can charge fees to any Class Member without prior approval of the Federal Court.

The Settlement Agreement also includes an “opt out threshold”. It provides that if over 2000 Class Members who would have been Eligible Class Members opt out of the settlement or are deemed to have opted out, the Settlement Agreement is rendered void and the Approval Orders will be set aside. The “opt out period” runs for ninety days commencing on the date the Federal Court approved the Settlement Agreement.

Court Approval

The Settlement Agreement requires court approval. It provides that the Federal Court must certify the Omnibus Federal Court Class Action and approve the Settlement Agreement as fair, reasonable and in the best interests of the Class Members. The Ontario Superior Court of Justice must also approve the Settlement Agreement on the same basis with respect to the Class Members in the Brown Class Action.

On May 11, 2018, Justice Michel Shore of the Federal Court of Canada approved the Settlement Agreement with respect to those Class Members included in the Omnibus Federal Court Class Action.²⁴

²⁰ Ibid.

²¹ Settlement Agreement s 6.02(2)

²² Ibid s 3.01.

²³ The four firms are Wilson-Christen LLP and Koskie Minsky LLP in Toronto, Merchant Law Group LLP in Regina, Saskatchewan, and Klein Lawyers in Vancouver, British Columbia

²⁴ *Federal judge approves multimillion-dollar Sixties Scoop settlement*, Toronto Star, May 11, 2018, available at <https://www.thestar.com/news/canada/2018/05/11/federal-judge-approves-multimillion-dollar-60s-scoop-settlement.html>. See also sections 1.01 and 5.01 of the Settlement Agreement

On May 30, 2018, on the second day of approval hearings, Justice Belobaba advised the parties that additional issues must be addressed before determining if the Settlement Agreement could be approved. In particular, Justice Belobaba indicated that he would consider the reasonableness of legal fees provided for in the Settlement Agreement. He asked the law firms involved in the settlement to provide submissions within seven days on their billable work.

On June 20, 2018, Justice Belobaba approved the Settlement Agreement other than the \$75 million legal fees provision, which he found to be “excessive and unreasonable”.²⁵ Justice Belobaba noted that the Class counsel in the *Brown v. Canada (Attorney General)*, the first of multiple class actions, have agreed to de-link the \$75 million fees provision so as to ensure that the rest of the Settlement Agreement is not delayed or derailed over the issue of legal fees.²⁶ Justice Belobaba also indicated that he was confident that the Class counsel in the consolidated federal class actions would also agree to de-link the fees provision and indicated that the court should be advised when the parties had reached an agreement with respect to fees.²⁷

²⁵ See *Brown v. Canada (Attorney General)* 2018 ONSC 3429, para 90.

²⁶ *Ibid* at para 84.

²⁷ *Ibid* at paras 91 and 92.

Sixties Scoop Settlement– Information & Resources

This information is current as of June 20, 2018. We will continue to provide updates as more information becomes available.

The Law Society has compiled the following information and resources to provide guidance and education to licensees who may advise Indigenous clients with respect to the Sixties Scoop litigation and the related settlement, and for claimants or members of the public who may require additional information about the Sixties Scoop and the related settlement.

What is the Sixties Scoop and the Settlement?

The “Sixties Scoop” refers to policies enacted by provincial child welfare authorities beginning in the early 1950s and continuing until the early 1990s. Under agreements with the federal government, thousands of Indigenous children were removed from their homes and families and placed into provincial child welfare systems. Beginning in 2009, Indigenous adults who were “scooped” as children initiated class action law suits against the federal government, initially in Ontario and subsequently in multiple provinces. In October 2017, the federal government announced that an agreement in principle had been reached to settle these law suits.

Additional information about the Sixties Scoop and the Settlement Agreement is available [here](#) (link to background paper at Tab 3.1.3).

Lawyers Representing Claimants

Under the terms of the Settlement Agreement, lawyers representing claimants will be paid by the Government of Canada pursuant to the terms of the agreement.

The Settlement Agreement provides for four law firms to represent claimants and states that none of those firms or their lawyers will charge claimants any fees or disbursements for any payments under the Settlement Agreement or for any other legal work with respect to claims made under the agreement.

In addition, the Settlement Agreement provides that no other lawyer may charge claimants any fees in relation to claims without the prior approval of the Federal Court.

The four law firms listed in the Settlement Agreement are:

Wilson-Christen LLP

Email: thesixtiesscoopclaim@gmail.com

Tel: 416-360-5952 ext 217

Toll Free: 1-866-360-5952 ext. 217

Koskie Minsky LLP

Toll Free: 1-855-595-2626

Email: federalcourt60sscoopclassaction@kmlaw.ca

Merchant Law Group LLP
Toll Free: 1-888-567-7777

Klein Lawyers
Tel: 604-714-2070

Claims Information

All Sixties Scoop claims are administered by Collectiva Class Action Services Inc.

Collective's website contains information about the Settlement, including how to register for compensation or how to object to the proposed settlement, as well as key documents and updates about the settlement process.

Collectiva
Class Action Services Inc.
1176 Bishop Street, suite 208
Montreal QC H3G 2E3
1-844-287-4270
email: sixtiesscoop@collectiva.ca
website: <https://sixtiesscoopsettlement.info/>

A copy of the Settlement Agreement is available [here](#)

A summary of the terms of the Settlement Agreement is available [here](#)

A copy of the form to opt out of the Settlement is available [here](#). For further information on the impact of opting out, see the background paper, available [here](#)

A copy of the claim form, to register for compensation will be available [here](#) following approval of the Settlement by the Ontario Superior Court.

Background

[The Sixties Scoop – Background \(link to the background paper at Tab 3.1.3\)](#)

[Sixties Scoop - The Canadian Encyclopedia](#)

[The Sixties Scoop Explained - CBC](#)

[Birth of a Family – Docs POV – CBC](#)

[Making Up for Lost Time – Unreserved - CBC Radio](#)

[Sixties Scoop – Indigenous Foundations](#)

[Sixties Scoop Ruling, The Agenda with Steve Paikin](#)

[Brown v. Canada \(Attorney General\), 2010 ONSC 3095](#)

[Brown v. Canada \(Attorney General\), 2017 ONSC 251](#)

[Canada's Residential Schools: The History, Part 2 1939 to 2000 – The Final Report of the Truth and Reconciliation Commission of Canada \(the Sixties Scoop in residential schools at pg. 159\)](#)

Additional Settlement Information and Resources

[Sixties Scoop Agreement in Principle – Government of Canada](#)

[Are you part of the Sixties Scoop class litigation? – Indigenous and Northern Affairs Canada](#)

[Ontario Sixties Scoop Claim](#)

[Guide for Working with Indigenous Peoples](#)

[Guidelines for Lawyers Acting in Aboriginal Residential School Cases](#)

[Truth and Reconciliation Commission of Canada - TRC Findings](#)

[Truth and Reconciliation Commission of Canada - Calls to Action](#)

[Summary of the Final Report of the Truth and Reconciliation Commission of Canada](#)

[Royal Commission on Aboriginal Peoples, Volume 3, Gathering Strength. Chapter 2, The Family](#)

[United Nations Declaration on the Rights of Indigenous Peoples](#)

Sixties Scoop Communications Bulletin

If you represent or provide advice to Indigenous clients you should know about the Sixties Scoop Settlement.

What is the Sixties Scoop and the Settlement?

The “Sixties Scoop” refers to policies enacted by provincial child welfare authorities beginning in the early 1950s and continuing until the early 1990s. Under agreements with the federal government, thousands of Indigenous children were removed from their homes and families and placed into provincial child welfare systems. Beginning in 2009, Indigenous adults who were “scooped” as children initiated class action law suits against the federal government, initially in Ontario and subsequently in multiple provinces. In October, 2017, the federal government announced that an agreement in principle had been reached to settle these law suits.

Effective June ____, 2018, the Federal Court of Canada and the Ontario Superior Court of Justice have approved a settlement between the Federal Government of Canada and people who are status “Indians” (within the meaning of the *Indian Act*) or “Inuit” and were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents.

A copy of the Settlement Agreement is available [here](#).

Additional background information about the Sixties Scoop and the Settlement Agreement is available here ([link to background paper at Tab 3.1.3](#)).

Legal Representation and Legal Fees

As outlined in the terms of the Settlement Agreement, lawyers representing claimants will be paid by the Government of Canada.

The Settlement Agreement provides for four named law firms to represent claimants and states that none of those firms or their lawyers will charge any eligible claimant any fees or disbursements for any payments under the Settlement Agreement or for any other legal work for any eligible claimant with respect to claims made under the Settlement Agreement.

As of June ____, 2018, the legal fees that will be paid to the four named law firms remains under negotiation.

In addition, no other lawyer may charge fees to claimants in relation to claims under the Settlement Agreement without the prior approval of the Federal Court.

All lawyers acting for Indigenous clients, including with respect to the Sixties Scoop Settlement, are encouraged to review and consult the [Guide for Working with Indigenous Peoples](#) a joint project of the Advocates’ Society, the Indigenous Bar Association, and the Law Society of Ontario. Lawyers are also strongly encouraged to consult the Law Society’s [Guidelines for Lawyers Working with Indigenous Peoples](#).

The four law firms named in the Settlement Agreement are:

Wilson-Christen LLP

Email: thesixtiesscoopclaim@gmail.com
Tel: 416-360-5952 ext 217
Toll Free: 1-866-360-5952 ext. 217

Koskie Minsky LLP

Toll Free: 1-855-595-2626
Email: federalcourt60sscoopclassaction@kmlaw.ca

Merchant Law Group LLP

Toll Free: 1-888-567-7777

Klein Lawyers

Tel: 604-714-2070

How to Claim Compensation or Opt Out of the Settlement

Claims under the Settlement Agreement are administered by Collectiva Class Action Services Inc. Information about the Settlement Agreement, including how to register for compensation or how to opt out of the Settlement Agreement, as well as key documents and updates about the settlement process, are available through Collectiva,

Collectiva
Class Action Services Inc.
1176 Bishop Street, suite 208
Montreal QC H3G 2E3
1-844-287-4270
email: sixtiesscoop@collectiva.ca
website: <https://sixtiesscoopsettlement.info/>

Additional information about the Sixties Scoop Settlement, including links to the Settlement Agreement, the opt out form, and the claim form are available here (link to the main Sixties Scoop page).

Brown v. Canada (Attorney General) 2018 ONSC 3429

COURT FILE NO.: CV-09-372025-CP

DATE: 20180620

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Marcia Brown / Representative Plaintiff

AND:

The Attorney General of Canada / Defendant

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Jeffery Wilson* and *Morris Cooper* for the Plaintiff

Catharine Moore, Travis Henderson and *Gail Sinclair* for the Defendant

HEARD: May 29 and 30, 2018 and subsequent written submissions

The “Sixties Scoop”

Motion to Approve the National Settlement

[1] The Sixties Scoop, nationally acknowledged as a “dark and painful chapter in Canada’s history,”¹ generated some 23 actions in superior and federal courts across the country. The Ontario action that is before me, *Brown v. Canada*, is the most advanced. In litigation for almost nine years, it was *Brown* that established Canada’s liability in tort to the Sixties Scoop survivors in Ontario.² The other actions remain at the starting gate.

¹ The Hon. Carolyn Bennett, Minister of Indigenous and Northern Affairs, Press Release (February 1, 2017).

² The certification decision is *Brown v. Canada (Attorney General)*, 2013 ONSC 5637. The summary judgment decision establishing Canada’s legal liability in tort is *Brown v. Canada (Attorney General)*, 2017 ONSC 251.

- Page 2 -

[2] Canada agreed to settle *Brown* but only if the other actions were included in one nation-wide settlement.

[3] Justice Michel Shore of the Federal Court mediated the national settlement. The parties reached an agreement in principle on August 30, 2017. The national settlement agreement (“the Settlement Agreement” or “Agreement”) was formally executed on November 30, 2017. As part of the national settlement, the other actions were consolidated into an omnibus Federal Court action,³ which I will refer to as the *Riddle* action.

[4] On May 11, 2018 after two days of hearings in Saskatoon, Justice Shore approved the Settlement Agreement for the purposes of the *Riddle* action. He was satisfied that the national settlement was fair and reasonable and in the best interests of the class members.⁴ The approval order has been signed but the reasons for decision have not yet been released.

[5] The Settlement Agreement is now before me for a similar approval in the context of the *Brown* action. It is clear from the language in the Agreement that the approval of both courts is required. If I decline to approve any part of this Agreement, then the Agreement will not take effect and Justice Shore’s approval order in *Riddle* will be rendered null and void.⁵

Overview of the settlement agreement

[6] A copy of the “agreement in principle” is attached in the Appendix.

[7] The cornerstones of the Agreement are the payment of individual compensation without proof of harm and the establishment of a national foundation that will be devoted to memorializing the stories of the Sixties Scoop survivors and dedicated to the goals of reconciliation and healing.

[8] Canada has agreed to pay a minimum of \$500 million and a maximum of \$750 million to cover the individual payments to Sixties Scoop survivors. The individual payments are capped at \$50,000 per person. Canada has also agreed to pay a further \$50 million to fund the foundation and \$75 million in legal fees to class counsel.

³ *Riddle, White and Charlie v. Her Majesty the Queen*, (Fed. Ct. Docket T-2212-16).

⁴ *Dabbs v. Sun Life Assurance* (1998), 40 O.R. (3d) 429 (Gen. Div.), aff’d (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, October 22, 1998.

⁵ Settlement Agreement (November 30, 2017), at ss. 2.02, 12.01; and Approval Order of Justice Shore in the *Riddle* action (May 11, 2018), at s. 31.

[9] The most likely overall value of the Settlement Agreement is about \$550 million – \$50 million for the foundation and a minimum of \$500 million for the individual payments. The potential overall value is \$800 million – \$50 million for the foundation and a maximum of \$750 million for the individual payments.⁶

[10] There is much in the design and content of the Settlement Agreement that is impressive and reflects well on the parties and their legal counsel and, of course, on Justice Shore as mediator. For example, the decision to resolve all of the Sixties Scoop class actions in one national settlement; the expansion of the class definition and the operable time period so that many more Sixties Scoop survivors can be included; Canada’s commitment to pay a fixed damages amount to every eligible claimant without requiring proof of harm; the use of a simplified one-page application form; the provision of an “exceptions” mechanism to deal with unusual or difficult cases; the payment of a separate and all-inclusive legal fee to class counsel to cover both work done to date and any future assistance that claimants may require; and, of course, the establishment of a national foundation to address reconciliation and healing.

The applicable law

[11] Section 29(2) of the *Class Proceedings Act* (“CPA”)⁷ provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.⁸

[12] The supervising court must compare the settlement with what would probably be achieved at trial, discounting for any defences, legal or evidentiary hurdles or other risks that would have to be confronted and overcome if the matter were to proceed to trial.⁹ A settlement does not have to be perfect. The question for the court is whether the settlement falls within a zone of reasonableness.¹⁰

⁶ If one adds the costs of the notice program and the legal fees payment, the potential value of the settlement is close to \$880 million.

⁷ *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

⁸ *Dabbs*, *supra* note 4. Most recently discussed in *Welsh v. Ontario*, 2018 ONSC 3217.

⁹ Discussed in more detail in *Welsh*, *supra* note 8, at para. 68.

¹⁰ *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.); and *Dabbs*, *supra* note 4.

Initial impression

[13] On balance, I was favourably impressed when I first reviewed the Settlement Agreement. The establishment of a national foundation for reconciliation and healing was clearly of over-arching importance. The agreement to pay individual compensation based on a one-page application form and without requiring proof of harm was admirable. I was also aware that Chief Marcia Brown Martel, the representative plaintiff in the *Brown* action who was deeply involved in every aspect of both the litigation and the settlement discussions, was satisfied overall that the Settlement Agreement was fair and reasonable and in the best interests of the class.¹¹

Two concerns

[14] I had only two concerns when I concluded my review of the Agreement. First, whether a \$25,000 to \$50,000 payment as damages for the loss of one's Indigenous cultural identity was indeed a fair and reasonable amount given the harm that was sustained by the class members. Second, the \$75 million payment to class counsel for legal fees.

[15] I am now satisfied that given the risks of further litigation, a \$25,000 to \$50,000 payment for the loss of one's Indigenous cultural identity is fair and reasonable and should be approved. But not the payment of \$75,000,000 for legal fees. I am not satisfied that \$75 million for legal fees is anywhere close to reasonable.

[16] I will explain each of these conclusions in turn.

The size of the individual payment

[17] The parties' best estimate is that 22,400 Indigenous children nation-wide were "scooped" from their homes and placed with non-Indigenous foster or adoptive parents over the applicable 40-year time-period. The best estimate of a take-up rate is that just under half of the eligible claimants – or about 10,000 claimants – will apply for compensation. If this take-up estimate proves correct, then each claimant will receive the maximum of \$50,000. If there are 15,000 claimants, the individual payment will fall to \$33,333. If there are 20,000 to 30,000 claimants, the individual payment will be \$25,000. Class counsel believe that the individual payment will most likely be in the range of \$25,000 to \$50,000.

¹¹ Given Chief Brown Martel's extraordinary level of involvement in this class proceeding, I have no difficulty approving the requested \$20,000 honorarium.

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[18] Only a tiny percentage of the class members in *Brown* submitted written objections or attended in court to tell their stories and voice their concerns in person. The primary concern was that the \$25,000 to \$50,000 payment was not enough.

[19] I can certainly understand this objection. Even though the *Brown* action is limited to the loss of cultural identity, the harm that was done to the “scooped” children on this point alone was lasting and profound. The stories told by the Sixties Scoop survivors are deeply disturbing. But equally poignant is the realization of these very survivors that “no amount of money can ever fix the damage [that was done] ... no amount of money can give me a family ... no amount of money can give people back their sense of belonging.”

[20] On the Sixties Scoop Website, one finds an exchange that goes to the very heart of the matter. The key question is posed as follows: “*What about \$25,000 - \$50,000? That doesn't seem very much for someone who lost their cultural identity?*” The answer, provided by lead class counsel Jeffery Wilson, was astute and unassailable:

You're right. It isn't very much. There is no amount of money that could replace what you have lost or that could make up for what you suffered ... There is no “enough”. I know someone wrote in and said, “It should be a hundred thousand dollars.” Maybe, it should be more. But, no court would have ever ordered anything close to \$100,000. We negotiated against the backdrop of what we could realistically get from the court, applying western law. Like any other case, this one is the beginning, the first step.

And while this settlement cannot give you back what you deserve or what you have lost, it can make a very big difference. It is symbolic and shows that cultural identity will now be something that courts have to consider, and measure in all cases from this point forward. Because of you, the law must now recognize that “saving the child” means keeping him or her with family, or extended family or her or his community.

Loss of cultural identity is a collective loss. That means we have to consider the total of what we have achieved, and not simply the amount per claimant.

[21] There is little doubt that a \$25,000 to \$50,000 payment to the Sixties Scoop survivors for the loss of their cultural identity is a modest amount of money. However, after reviewing all the evidence before me and after considering the many pitfalls that await the class members if the lawsuit were to continue, I conclude that a payment in this range is indeed fair and reasonable and in the best interests of the class. I say this for the following reasons:

- The claim itself (damages for loss of cultural identity) is a novel claim in Canadian law. It is true that some Australian courts have recognized a “loss of cultural

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fulfilment” tort claim in the aboriginal context but most of the damage awards in these cases are in the \$10,000 to \$40,000 range;¹²

- In her statement of claim, the representative plaintiff claimed “at least \$50,000” in general damages for the loss of cultural identity, thus signalling that a \$50,000 payment would be acceptable;
- The \$50,000 damages award should be discounted substantially to reflect the risks that await the class members if they continue with the litigation – the limitation defences, causation issues,¹³ the likely unavailability of an aggregate damages approach and the need for literally thousands of individual trials, and the inevitable and time-consuming appeal process. In short, years of further litigation with no guarantee of success and a very real risk of getting nothing. When one considers the risks of continued litigation, an immediate payment in the range of \$25,000 to \$50,000 without having to show any proof of harm is not unreasonable;
- Most importantly, the Settlement Agreement provides for the establishment of a federally-funded national foundation that will be dedicated to the memorialization of the survivors’ stories and to the ongoing process of reconciliation and healing. This is an important institutional benefit that could not have been attained with continued litigation.

[22] Class counsel in *Brown* submit that the settlement, including the \$25,000 to \$50,000 individual payment, “exceeds our best day in court.” I do not disagree.

[23] I am satisfied that the payment of \$25,000 to \$50,000 falls within a zone of reasonableness and should be approved. In sum, I am satisfied that the core settlement provisions that provide from \$550 million to \$800 million in cash and non-cash benefits are fair and reasonable and in the best interests of the class.

¹² The case law is discussed in Orr, “Damages for Loss of Cultural Fulfilment in Indigenous Community Life” (1997), online: Indigenous Law Bulletin <classic.austlii.edu.au/au/journals/IndigLawB/1997/90.html>.

¹³ Here is an example of a causation issue. My finding of Canada’s legal liability was based on a relatively narrow point – the federal government’s failure to provide printed information to the provincial child care authorities for delivery to the affected foster and adoptive parents who, in turn, would share this information with the Indigenous children under their care. But as I noted in my summary judgment decision, “[o]ne does not know how many of the foster and adoptive parents, having received this information, would have shared the information with the aboriginal child that had been placed in their home. Probably most, but this is an issue that will have to be determined on evidence that will be presented at the damages stage.” See *Brown* (2017), *supra* note 2, at fn. 23.

[24] The same cannot be said about the legal fees provision.

The \$75 million for legal fees

[25] Under section 11.01 of the Settlement Agreement, Canada agreed to pay \$75 million in legal fees to class counsel, separate and apart from the \$550 million-plus settlement. The \$75 million amount, plus applicable taxes, will be paid to four firms: Wilson-Christen, who worked with Morris Cooper in the *Brown* action, and the three firms who have carriage of the consolidated *Riddle* action, namely Klein Lawyers, Koskie Minsky and the Merchant Law Group. The \$75 million is intended to cover both work done to date and any future legal assistance that claimants may require when filing claims or pursuing appeals to the exceptions committee.

[26] The four firms have agreed among themselves that half of the \$75 million or \$37.5 million will be paid to Wilson-Christen for its work in *Brown* and the other half will be divided among the other three firms with each getting \$12.5 million for their work in the *Riddle* action. In his approval order in *Riddle*, Justice Shore approved the payment of the \$37.5 million to Klein, Koskie Minsky, and Merchant Law in equal \$12.5 million shares.¹⁴

[27] It is important to note that my focus as the supervising judge in the *Brown* action is the global payment of \$75 million in legal fees and not the internal divisions agreed to by class counsel.

[28] The \$75 million for legal fees was described by some objectors as “outrageous.” I do not disagree. In my view, the payment of \$75 million to class counsel for legal fees on the facts of this mega-fund settlement is excessive and unreasonable and cannot be approved.

[29] My reasoning is as follows.

(i) Jurisdiction to review the legal fees provision

[30] I begin by noting that my jurisdiction to review a legal fees payment provision that is contained in a settlement agreement is rooted in s. 29(2) of the CPA, which provides that “a settlement of a class proceeding is not binding unless approved by the court.” This means I must approve every provision in the Settlement Agreement including the legal fees provision. And this is so even where the payment of the legal fees amount is separate and apart from the compensation fund and the defendant government has obviously

¹⁴ Order of Justice Shore in the *Riddle* action (May 11, 2018), at para. 23.

agreed to the quantum.¹⁵ This court is still entitled to review for reasonableness for at least two reasons: one, because the law requires this review, and two, because whatever is approved in this case will become precedent and will no doubt be relied on by class counsel in future cases, whether the defendant is in the public or private sector.

[31] Because I am not being asked to review a contingent fee arrangement under ss. 32 or 33 of the CPA, I cannot fix what, in my view, is a reasonable fee.¹⁶ I can only approve or disapprove the \$75 million legal fees provision in its entirety.

[32] Does the fact that Justice Shore approved the Settlement Agreement and then issued an approval order endorsing the \$37.5 million in legal fees payable to the three *Riddle* firms prevent or preclude my review of the global \$75 million payment provision? Class counsel in *Riddle* say it does.¹⁷ In my view, it does not. Sections 2.02 and 12.01 of the Settlement Agreement make clear that both courts (*Riddle* and *Brown*) must be satisfied with every provision in the Settlement Agreement, including section 11 that deals with legal fees, before the Settlement can take effect:

2.02 None of the provisions of this Agreement will become effective unless and until the Courts approve all the provisions of this Agreement.

12.01 This Agreement will not be effective unless and until it is approved by the Courts ... and if such approval is not granted by the Courts on substantially the same terms and conditions ... this Agreement will thereupon be terminated ...

[33] The requirement that both the *Riddle* and *Brown* courts must approve all the provisions of the Settlement Agreement before it can take effect is also made clear in the draft approval orders that are attached to the Agreement – in Schedule I for *Riddle* and Schedule J for *Brown*. Both draft orders provide that “the Order will be rendered null and void in the event that the Settlement Agreement is not approved in substantially the same terms by [the other court]”.

[34] It is true that both draft orders also contain a provision that “the legal fees, disbursements and applicable taxes owing to Class Counsel shall be determined by

¹⁵ In *Killough v. The Canadian Red Cross*, 2007 BCSC 941 (the Hepatitis C settlement), the agreement with the federal government contained a similar legal fee provision. Justice Pitfield asked whether it was appropriate for the court to be concerned “with the manner in which the Government of Canada chooses to spend taxpayers’ money” but then concluded that judicial review was statutorily required and otherwise proper.

¹⁶ CPA, *supra* note 7, at ss. 32(4), 33(8).

¹⁷ On my invitation, class counsel in *Riddle* provided a written submission on the legal fees issue.

further order of this Court.” All this means is that *after* the supervising court has approved the Settlement Agreement in its entirety, including the \$75 million legal fees provision, it can issue the scheduled approval order and defer to a later order the legal fees owing *to class counsel in the action that is before that court*. This does not mean, however, that the *Brown* court cannot review the global legal fee provision as set out in section 11.01 of the Agreement. The court must do so before it can approve the actual allocation of the \$75 million legal fee as agreed to by class counsel (if such approval is even required).

[35] As it happened, Justice Shore did not defer his order about the legal fees owing to class counsel in *Riddle*. In his approval order, Justice Shore approved the entire Agreement and, also, added his approval of the payment of the \$37.5 million, in equal shares, to the class counsel in *Riddle*. It was, of course, his right to do so. But his approval of the \$37.5 million to class counsel in *Riddle* does not prevent or preclude me from reviewing the reasonableness of the global amount of \$75 million as set out in section 11.01 of the Settlement Agreement.

[36] In a further attempt to discourage my review of the legal fees provision, class counsel in *Riddle* also advanced the “comity” argument – that the decision of one court approving counsel fees in its jurisdiction should be respected by the other court.¹⁸ In my view, this comity principle does not apply on the facts herein. This is not a case like *Frohlinger*¹⁹ or *Jeffery*²⁰ where a multi-jurisdictional settlement had been achieved and class counsel were seeking approval of their respective contingent fee agreements in their respective jurisdictions. Nor is it a case like *Adrian*²¹ where the settlement agreement explicitly provided that each group of class counsel were to seek approval of its share of legal fees from the court in its jurisdiction.²²

[37] In none of these “comity” cases was the approval of the settlement made expressly contingent on the approval of the legal fees payment. Here it is clear that the Settlement Agreement is “conditional”²³ and if one of its provisions, such as the global \$75 million

¹⁸ *Frohlinger v. Nortel Networks Corporation*, 2007 CanLII 696 (ONSC), at para. 32.

¹⁹ *Ibid.*

²⁰ *Jeffery v. Nortel Networks Corporation*, 2007 BCSC 69.

²¹ *Adrian v. Canada (Minister of Health)*, 2007 ABQB 377.

²² *Ibid.*, at para. 7.

²³ The heading for section 12.01 of the Agreement reads “Agreement is Conditional”.

legal fees provision, is not approved, the Settlement Agreement, as a whole, cannot take effect and is terminated.²⁴

[38] Again, as already noted, my focus is the global \$75 million legal fees provision and not the internal division of this amount or Justice Shore's order that \$37.5 million be paid to the three *Riddle* firms in equal shares.

(ii) The applicable law

[39] The applicable test when the legal fees are paid by the defendant pursuant to a provision in the settlement agreement is the same as in a motion by class counsel for the approval of a contingency fee arrangement under ss. 32 or 33 of the CPA, namely whether the legal fees are fair and reasonable.²⁵

[40] The list of factors that judges may consider when assessing whether the legal fees request is fair and reasonable are lengthy and include (a) the time spent and work done; (b) the factual and legal complexities; (c) the risk undertaken; (d) the degree of responsibility assumed by class counsel; (e) the monetary value of the matters in issue; (f) the importance of the matter to the class; (g) the degree of skill and competence demonstrated by class counsel; (h) the results achieved; (i) the ability of the class to pay; (j) the expectations of the class as to the amount of the fees; and (k) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.²⁶

[41] The two most important factors are risk incurred and results achieved.²⁷ As between the two, it is the risk incurred that "most justifies" a premium in class proceedings.²⁸ The nature of the risk incurred is primarily the risk of non-payment. As

²⁴ Recall sections 2.02 and 12.01 of the Settlement Agreement above at paragraph 32.

²⁵ *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92, at paras. 23-25, 27.

²⁶ *Smith v. National Money Mart*, 2010 ONSC 1334, rev'd 2011 ONCA 233; and *Fischer v. I.G. Investment Management Ltd.*, 2010 ONSC 7147. Also see *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2009] O.J. No. 4271 (S.C.), aff'd 2009 ONCA 690; and *Gariepy v. Shell Oil Co.*, [2003] O.J. No. 2490 (S.C.). See also the discussion in Winkler, Perell, Kalajdzic and Warner, *The Law of Class Actions in Canada* (2014), at pp. 398-400; and Kalajdzic, *Class Actions in Canada* (2018), at pp. 145-47.

²⁷ *Lavier*, *supra* note 25, at para. 27.

²⁸ *Ibid.*, at para. 58. Also see Winkler J., as he then was, in *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.), at para. 18: the premium on fees in class action litigation is "for undertaking risk". The same point is made in the CPA in the context of the multiplier approach. Section 33(7) of the CPA makes clear that the multiplier is intended to reflect "the risk incurred in undertaking and continuing the proceeding." American courts have also concluded that the risk incurred is the most important factor in determining whether class counsel deserve an enhancement above the base fee/lodestar amount. See the broad-ranging survey in Casey, "Reforming Securities

noted by the Ontario Law Reform Commission in its seminal *Report on Class Actions*, “the class lawyer will be assuming a risk that after the expenditure of time and effort no remuneration may be received ... [that is] the risk of non-payment.”²⁹

[42] A British Columbia judge put it this way in *Jeffery v. Nortel Networks*:

It is well-recognized that when counsel assume a significant risk of not being paid, they are entitled to fees that exceed what would otherwise be reasonable when they succeed. The real risk of failure with personal consequences to counsel cannot be ignored. An enhanced fee is appropriate.³⁰

[43] The greater the risk of failure and non-payment – that is, the greater the resulting financial impact on class counsel and their firm – the larger the premium. In a case where a class action has been settled with a minimal investment of time or effort, the risk of non-payment causing “personal consequences” to class counsel is relatively insignificant.

[44] In a case where the settlement has been achieved after many years of effort with an enormous investment of time and money, the risk of non-payment causing “personal consequences” to class counsel can be significant. Although few Canadian judges use this phrase, the key question in my view is the extent to which class counsel has “bet the firm” – the more this is shown to be the case, the larger the premium.

[45] In Canada and the U.S., premiums on legal fees are determined in two ways: a percentage of the fund approach or the multiplier approach. The latter requires the court to first determine a reasonable base fee (or what Americans call the “lodestar”³¹) which may then be increased by an appropriate multiplier that in “the most deserving case”, according to the Court of Appeal, can be up to four times the base fee.³²

Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging” (2003) 4 BYU L. Rev. 1239, at p. 1293; and *Goldberger v. Integrated Res. Inc.*, 209 F. (3d) 43 (2d Cir. 2000), at p. 54.

²⁹ Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. III, at p. 737.

³⁰ *Jeffery*, *supra* note 20, at para. 73.

³¹ The lodestar is the number of hours reasonably worked multiplied by a reasonable hourly rate.

³² See the Court of Appeal’s direction in *Gagne v. Silcorp* (1998), 41 O.R. (3d) 417 (C.A.), at p. 425: the range of the appropriate multiplier is “slightly greater than one to three or four in the most deserving case.”

(iii) Percentage of the fund or multiplier

[46] In *Cannon*,³³ 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.

[47] When I decided *Cannon* and later *Rosen*,³⁴ I noted in *obiter* that the percentage of the fund approach should not be used where the resulting legal fees award would be "so large as to be unseemly or otherwise unreasonable."³⁵ I was thinking at that time of the mega-fund case where the judgment or settlement amount was very large, that is, more than \$100 million.³⁶

[48] However, there may well be cases where the application of the percentage of the fund approach can result in an unseemly or unreasonable award even in the context of a lower-end settlement. In other words, even in settlements under \$50 million, if there is evidence in the record that a legal fees award based directly or indirectly on the percentage in the retainer agreement would be excessive or otherwise unreasonable, the court should not presume the validity of the percentage approach as set out in *Cannon*. The supervising judge should examine the actual risk incurred to determine whether the requested legal fee is reasonable.

[49] In the mega-fund case the supervising judge should also examine the actual risk incurred to determine whether the requested legal fee is reasonable. It is one thing to adopt a percentage of the fund approach when dealing with lower-end settlements. It is

³³ *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

³⁴ *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752.

³⁵ *Cannon*, *supra* note 33, at para. 9.

³⁶ *Rosen*, *supra* note 34, at para. 23.

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quite another when the settlement or judgment is in the hundreds of millions of dollars. As the Federal Court noted in *Manuge v. Canada*³⁷:

Cases that generate a recovery of a few million dollars may well justify a 25% to 30% award. It is more difficult to support such an approach where the award is in the hundreds of millions of dollars.³⁸

[50] It is of course important to incentivize class action lawyers to take on risky actions on a contingent fee basis and do them well.³⁹ However it is also important that the court's approval of class counsel's legal fees not result in windfalls. 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."⁴⁰

[51] Mega-fund cases are rare and when they settle, and almost all of them settle, the size of the settlement fund can be in the hundreds of millions of dollars. A percentage of the fund approach, given economies of scale, will result in windfalls.⁴¹ Windfalls should be avoided because class action litigation is not a lottery and the CPA was not enacted to make lawyers wealthy.

[52] In a mega-fund settlement, it is not enough for class counsel to say, "We could have asked for 30 per cent based on our retainer agreement, but we're only asking for 10 per cent – aren't we reasonable." Even a reduced percentage can still be excessive and unreasonable. In the VW diesel "defeat device" litigation which was settled in Canada for \$2.1 billion,⁴² no judge would ever have approved class counsel legal fees of 10 per cent (\$200 million) or even 5 per cent (\$100 million) especially when the Canadian settlement piggy-backed to a large extent on the American settlement and the level of risk incurred by Canadian class counsel was fairly modest.⁴³ As it turned out, class counsel agreed to a

³⁷ *Manuge v. Canada*, 2013 FC 341.

³⁸ *Ibid*, at para. 50.

³⁹ *Gagne*, *supra* note 32, at p. 425.

⁴⁰ Rhode, *Access to Justice* (2004), at p. 35, quoted in Kalajdzic, *supra* note 26, at p. 145.

⁴¹ American class action judges understand that "economies of scale can cause windfalls in common fund cases with large funds" and that "windfalls should be avoided": *In re Citigroup Inc.*, 965 F. Supp. (2d), at p. 388; and Prout and Boyd, "Current Topics in Attorneys' Fees in Class Actions" (August 2015), online, at p. 8: <www.bmelaw.com>.

⁴² *Quenneville v. Volkswagen*, 2017 ONSC 2448.

⁴³ It was highly unlikely that Volkswagen would have settled the litigation in the U.S. but not in Canada or that the Canadian settlement would have differed fundamentally from that in the U.S.

legal fees payment of \$26 million, plus disbursements and taxes, which was paid directly by Volkswagen.⁴⁴

[53] The Court of Appeal noted in *Lavier* that class action judges generally should apply the principle of proportionality so that fees are not “clearly excessive or unduly high in the sense of having little relation to the risk undertaken or the result achieved.”⁴⁵ This admonition is particularly important in the context of the mega-fund settlement. The percentage of the fund approach that bears no relation to the significance of the risk incurred should not be used in a mega-fund settlement.

[54] In *Rosen*,⁴⁶ I commented that “exceptionally large class action settlements (for me, anything over \$100 million) will require more thought about the calculation of the appropriate contingency fee.”⁴⁷

[55] I have now given this more thought.

[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.

[57] To demonstrate the risks incurred, class counsel will be required to produce evidence of the time and money invested - with the court making appropriate adjustments in the docketed time for over-lawyering, higher than reasonable hourly rates, duplication, and docket-padding. The court should also consider the degree of responsibility assumed - how far along was the litigation when the action was settled? Was the action still at the pleadings stage or was it certified as a class proceeding? Were there any appeals? Any motions for summary judgment? How close was class counsel to “betting the firm?”

⁴⁴ *Quenneville v. Volkswagen*, 2017 ONSC 3594.

⁴⁵ *Lavier*, *supra* note 25, at para. 32.

⁴⁶ *Rosen*, *supra* note 34.

⁴⁷ *Ibid*, at fn. 18.

[58] A reasonable base or lodestar amount must first be determined because, as noted in the Hepatitis C settlement, “class actions must not represent an open-ended invitation to accumulate time without regard to productivity.”⁴⁸ Once the reasonable base fee has been determined, the appropriate multiplier can then be applied ranging from just over one in the lowest-risk case to four in the highest-risk and most deserving case. The court can consider but would not be bound by whatever was said in the retainer agreement about the level of multiplier.

[59] I know that the multiplier approach has fallen out of favour, at least in the context of lower-end settlements.⁴⁹ But I also know that the percentage of the fund approach that bears no relation to risk incurred in the mega-fund context will always or almost always result in a windfall.

[60] It is interesting to note that in mega-fund cases in the U.S., American judges who have generally preferred the percentage approach over the lodestar/multiplier method have returned in recent years to using the lodestar as a cross-check to “pressure test the propriety of the percentage against the time spent by counsel.”⁵⁰

[61] But if there is value in using the lodestar as a cross-check, why not use it more directly. By using the lodestar directly, the immediate focus will be on the risks incurred and the legal fees determination will be in dollars rather than percentages. Judges think in dollars not percentages. In my view, the question “What is the reasonable fee?” at least in mega-fund cases must be answered “not as a percentage but in dollars.”⁵¹

[62] I have no reason to believe, based on the evidence to date, that the maximum four-times multiplier will discourage mega-fund litigation. If it does, the Court of Appeal can revise its remarks in *Gagne*,⁵² and allow higher multipliers. In any event, the base fee/multiplier method provides the most workable safeguard against windfall legal fees.

(iv) Incentivizing class counsel

[63] If the percentage approach is not available in the mega-fund context, will class action lawyers still take on risky litigation on a contingent fee basis? Or will they be

⁴⁸ *Killough*, *supra* note 15, at para. 45.

⁴⁹ See for example my rant in *Cannon*, *supra* note 33, at fn. 10.

⁵⁰ Prout and Boyd, *supra* note 41, at p. 5.

⁵¹ *Richardson v. Low* (1996), 23 B.C.L.R. (3d) 268 (S.C.), at para. 35.

⁵² *Gagne*, *supra* note 32.

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discouraged from doing so? Two comments. First, as already noted, class proceedings are not intended to be vehicles for windfall legal fees or even overly generous fee awards. As the Court of Appeal observed in *Lavier*, “the viability of the class action regime does not depend on an overly generous award being approved in every case.”⁵³

[64] Second, consider the empirical evidence to date. For more than 25 years since the enactment of the CPA in 1992, class counsel in Ontario have been sufficiently incentivized to bring a wide variety of risky class actions, including mega-fund actions, on a contingent basis knowing full well that any request for a premium on their legal fees would require court approval. They accepted the uncertainty; they understood that contingent fee approvals involved more art than science, and by and large they still prospered. Professor Kalajdzic puts it best:

[I]t bears repeating that class counsel agree to act despite the risk of non-payment altogether and with the expectation that their fee will ultimately have to be approved by the court. The only certainty that ought to be promoted is the certainty that a fair and reasonable fee will be determined by a judge [...].⁵⁴

[65] I can now turn to the \$75 million legal fees provision. Given the risks incurred by the class counsel in *Brown* and *Riddle*, is the \$75 million legal fees provision fair and reasonable?

[66] I will first consider *Brown*, then *Riddle*.

(v) The risks incurred in *Brown*

[67] It is not my intention, nor is it my place, on this motion for settlement approval to fix a reasonable legal fee for class counsel in *Brown*. I can, however, indicate how I would go about making this determination. By assessing the risk incurred and estimating the appropriate multiplier, I will have a better understanding of the overall reasonableness of the global \$75 million legal fee provision which remains my focus.

[68] The risk incurred by class counsel in *Brown* was, in a word, enormous. More than eight years of contested certification motions and appeals, a risky summary judgment motion on liability, an uncertain pathway on the remaining damages claim and more than \$7 million in docketed time.

⁵³ *Lavier*, *supra* note 25, at para. 63.

⁵⁴ Kalajdzic, *supra* note 26, at p. 145.

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[69] The full cost of lead counsel Jeffery Wilson's single-minded dedication to the best interests of his Sixties Scoop clients is best measured not only in docketed time or lost opportunity costs but also in terms of the overall impact on his small family law firm. As partner Brenda Christen explained in her affidavit, the firm's involvement in *Brown* was so profound and so public that many people, including clients, thought that the law firm would not survive. This in turn made it difficult to attract new clients or staff or do any forward planning. Meanwhile, the investment of time and money in *Brown* was in the millions of dollars and continued to grow. Bluntly put, this is as close a case of class counsel "betting the firm" as I have seen.

[70] The overall result achieved, a nation-wide settlement with the federal government for some 23 actions, fuelled in large part by what was achieved in the *Brown* action, was not just reasonable, but remarkable, and very much in the best interests of the class. As I told counsel at the hearing in Toronto, if we had a "Class Counsel Hall of Fame" Jeffery Wilson, Morris Cooper and their exceptional associate Jessica Braude would be distinguished members. The risks undertaken, the responsibility assumed and the results achieved in *Brown* were extraordinary.

[71] It is therefore beyond dispute that class counsel in *Brown* deserve a significant premium in the calculation of their legal fees. In my view, this is that "most deserving case" that justifies a four-times multiplier. Accepting \$6 million as the reasonably adjusted base amount and using the four-times multiplier, the resulting legal fee would be \$24 million.⁵⁵ This should be increased by another \$1 million to include an amount for future costs and disbursements. The overall total would therefore be \$25 million.⁵⁶

[72] Again, I am not fixing a reasonable legal fee. I am only applying a methodology that results in a reasonable legal fee. The real point of this exercise is to demonstrate that a fair and reasonable legal fee in the range of \$25 million is well under the \$37.5 million that has been allocated to class counsel in *Brown* and is a long way from the \$75 million amount that is set out in the Settlement Agreement.

⁵⁵ Here is my calculation of the reasonable base amount. Class counsel say they billed about \$7.5 million in fees and disbursements. Subtract the \$525,000 in disbursements leaving \$6.975 million in fees. Adjust the billed hourly rates of \$700 to \$800 to a more reasonable \$500. The adjusted fees amount is now close to \$6 million. Multiply this base fee by four and you get \$24 million. Counsel ask for another \$1 million for future legal expenses assisting class members with their claims. Given the simplified one-page application procedure and the fact that much if not most of this ongoing legal assistance, including the "exception" appeals, can be provided by properly briefed younger lawyers billing at say \$200 an hour, it is reasonable to reduce the future costs component to \$500,000 at most. Add this to the \$24 million and the tally is \$24.5 million. Add back the \$525,000 for disbursements and the final total is just over \$25 million.

⁵⁶ *Ibid.*

(vi) The risks incurred in *Riddle*

[73] Compared to *Brown*, the risks incurred by class counsel in *Riddle* are at the opposite end of the spectrum. The risks incurred in *Riddle* were not significant. Even if a very generous multiplier is applied to a reasonable base amount, the resulting fee amount cannot make up the gap between the \$25 million estimate for *Brown* and the \$75 million provided for in the Settlement Agreement. At best, the risks incurred by class counsel in *Brown* and *Riddle* together justify about one-half of the \$75 million set out in section 11.01 of the Settlement Agreement.

[74] The *Riddle* action is a consolidation of some 22 actions that were commenced in numerous provinces by three or more law firms that were all acting independently. Counsel in *Riddle* tried to apply my decision in *Cannon* and argue that a “stacked fees approach based on an equal allocation between provinces and using the retainer percentages” would have resulted in legal fees for the three firms totalling \$124 million⁵⁷ – an amount that on its face exceeds the \$75 million legal fees provision and by comparison appears to make the \$75 million amount look reasonable.

[75] However, as I have already noted, the approach in *Cannon* should not be used where there is evidence before the court that the legal fee request is excessive or unreasonable even where the request is based on separate tranches that are each under \$100 million. The evidence that strongly suggests that the risks incurred by the *Riddle* class counsel in their respective actions were relatively insignificant and do not justify a *Cannon*-type percentage of the fund approach is the following:

- At the time of settlement, all 22 of the *Riddle* actions were still at the statement of claim stage. In two cases, class counsel had filed certification material but none of these cases had yet been certified as class proceedings. Because none of the cases were certified, they could be discontinued on a dime;⁵⁸

⁵⁷ The “stacked fees approach based on an equal allocation between provinces and using the retainer percentages” can be summarized as follows. Assume the overall compensation is at the minimum \$500 million. Allocate the \$500 million across the provinces with the majority of the survivors – British Columbia, Alberta, Saskatchewan, Manitoba and Ontario. Apply the retainer agreement percentage of the *Riddle* class counsel that are leading the actions in B.C., Alberta, Saskatchewan and Manitoba – such percentages ranging from 25 to 33 per cent – to the first \$100 million in each of these four provinces as per *Cannon* and *Rosen*. The legal fees award to class counsel in *Riddle* based on their retainer agreements would be \$124 million in total. This is more than the \$75 million legal fees provision and much more than the \$37.5 million that class counsel in *Riddle* have agreed to accept.

⁵⁸ Once an action is certified as a class proceeding, “counsel [are] committed to bringing it to a final conclusion on behalf of all of the members of the class.” See *Manuge, supra* note 37, at para. 31, citing *Slater Vecchio LLP v. Cashman*, 2013 BCSC 134. Once an action is certified, it can only be discontinued with the approval of the court: s. 29(1) of the CPA.

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- By my count, 9 of the 22 actions were filed by class counsel in *Riddle* last year, *after* the release of my summary judgment decision or Canada’s announcement that it intended to settle all of the Sixties Scoop actions. Two of the nine were filed after the agreement in principle was signed on August 30, 2017. This strongly suggests opportunistic filings – that is, filing “place holder” actions and then sitting in the bleachers pretty much risk-free, waiting to see what happens in *Brown* or in the ensuing settlement discussions;
- At least one of the lawyers in *Riddle* seems to accept this characterization. In one of the carriage motion skirmishes, the senior class counsel from Koskie Minsky described the work of Klein Lawyers and Merchant Law as “years of wasted time and resources.” He criticized their “inaction” in their provincially-filed proposed class actions and described their lawsuits in British Columbia, Alberta, Saskatchewan and Manitoba as “opportunistic filings.”
- I was also surprised (“stunned” might be a better word) by class counsel’s straight-faced submission that collectively they had docketed more than \$10 million in fees for lawsuits that were still at the starting gate. I repeat, ten million dollars.

[76] In sum, the evidence before me suggests that the risks incurred and responsibility assumed by class counsel in *Riddle* were modest at best – none of the actions were certified and many of the filings were “opportunistic.” The percentage of the fund approach applied in *Cannon* should yield for the reasons just stated to a risks-incurred analysis. Whether a premium is owing in the consolidated *Riddle* action should be determined by the base fee/multiplier method.

[77] A reasonable base fee in *Riddle* is about \$5.25 million.⁵⁹ The appropriate multiplier, given the very good results achieved, is probably in the range of 1.4 or 1.5.

⁵⁹ Class counsel in *Riddle* say they docketed just over \$10.6 million in fees and disbursements. Take out the \$447,290 in disbursements and the fees amount is around \$10.1 million. Reduce this to \$9.4 million to reflect reasonable hourly rates of say \$500 for senior lawyers and not \$700 or \$800. Eliminate the \$1.4 million attributed to carriage fights (because these were only in the interests of the two equally capable firms doing battle and not in the interests of any potential class members) and the tally is now \$8.0 million. The \$3.3 million charge for “communication” with potential class members should be reduced by at least half because much of this could have been done by more junior lawyers or even law clerks. The fees amount is now down to around \$6.35 million. The \$2.3 million charge for research and pleadings (drafting and filing the various statements of claim and in two cases filing certification material) – which I have isolated by unbundling the Klein data and attributing \$638,134 to this category – should be reduced by half because of the reality of piggy-backing on *Brown*, and if not, the reality of duplicate or almost duplicate statements of claim. The running tally for fees is now down to \$5.2 million. Given the positive results achieved, the highest possible multiplier is two and the resulting fee is \$10.4 million. Counsel ask for another \$3 million to \$5 million for future legal expenses assisting class members with their claims. Even \$3 million

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[78] Even if one were to apply a two-times multiplier, in my view the absolute maximum,⁶⁰ this would result in a fee of \$10.5 million. Add another \$1.5 million for future legal costs and \$447,290 for disbursements and the total is just under \$12.5 million.⁶¹

[79] It is interesting to note that when “risks incurred” are properly assessed class counsel in *Brown* would be awarded something in the range of \$25 million and class counsel in *Riddle* would be awarded half that or \$12.5 million. This accords with my sense of overall fairness. Most of the heavy lifting was done in *Brown* – it is only right that class counsel in *Brown* receive at least twice the fees that are paid to class counsel in *Riddle*.

[80] In any event, the estimated reasonable fee of \$12.5 million for class counsel in *Riddle* (as determined above) is one-third of the allocated \$37.5 million amount and together with the \$25 million for class counsel in *Brown* amounts to one-half of the \$75 million legal fee provision. In other words, using a well-deserved four-times multiplier in *Brown* and an extraordinarily generous two-times multiplier in *Riddle*, the resulting tally is at most \$37.5 million. The \$75 million legal fee provision (twice this amount) is therefore excessive and unreasonable and is not approved.

(vii) De-linking the legal fees provision

[81] Because the \$75 million legal fees provision is not approved, the rest of the Settlement Agreement cannot take effect – unless the legal fees provision is de-linked from the other settlement provisions that have been approved.

[82] To their credit, class counsel in *Brown* have consented to such de-linking. In an email to the court, Jeffery Wilson advised, “In the interests of survivors across the country, we agree to de-linking.” Class counsel in *Riddle* took the position that their consent was not needed because the proposed draft orders in schedules I and J to the

is unreasonable. Given the simplified one-page application procedure and the fact that much if not most of this legal assistance can be provided by properly briefed younger lawyers billing at say \$200 an hour, it is reasonable to reduce the future costs component by half to \$1.5 million at most. Add this to the \$10.4 million and the tally is \$11.9 million. Add back the \$525,000 for disbursements and the final total is \$12.425 million, at most \$12.5 million.

⁶⁰ It is important to recall that in the Indian Residential Schools Settlement of 2006, a \$1.9 billion national settlement that was a complicated and demanding case for all counsel involved, the legal fees approved for the “national consortium” of class counsel resulted in a 2.73 multiplier. See *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.), at para. 57.

⁶¹ *Supra* note 59.

Settlement Agreement make clear that settlement approval and the approval of legal fees were never linked to begin with.

[83] As I have already explained,⁶² the provision at issue in these draft orders deals only with the portion of the \$75 million in legal fees that is allocated to class counsel in *Riddle* and *Brown* respectively and does not deal with the global \$75 million legal fees provision in s. 11.01 of the Settlement Agreement. To repeat, neither the *Riddle* court nor the *Brown* court is precluded from reviewing the \$75 million legal fees provision which is a provision in the Settlement Agreement.

[84] What flows from all of this is the following. Class counsel in *Brown* have agreed to de-link the \$75 million fees provision from the rest of the Settlement Agreement. They have done so in the interests of their class members. They obviously do not want to see an otherwise admirable Settlement Agreement derailed or delayed by a lawyers' squabble over legal fees. Class counsel in *Riddle* have not yet agreed to any such de-linking.

[85] In the Indian Residential Schools Settlement of 2006, the supervising judges in Alberta and British Columbia, in very similar circumstances, concluded that the legal fees provision setting out the payment to class counsel should be de-linked from the rest of the settlement even if class counsel did not agree.⁶³ In *Northwest v. Canada*,⁶⁴ Justice McMahon described the "underlying problem" as follows:

When the settlement for the class members is made conditional upon approval of the agreed legal fees, the class members cannot and do not receive independent legal advice as to the merits of their settlement alone. The opinion of Plaintiffs' counsel in respect of the fairness of the class settlement can be perceived to be influenced by counsel's view on the adequacy of their fees ... To ensure the independence of the advice the class members receive as to their settlement, the class settlement must be resolved first and not be made conditional upon the lawyers' fees being approved.

⁶² See discussion above at paras. 34-35.

⁶³ See *Northwest v. Canada (Attorney General)*, 2006 ABQB 902; and *Quatell v. Attorney General of Canada*, 2006 BCSC 1840.

⁶⁴ *Northwest*, *supra* note 63, at paras. 65-66.

[86] In *Quatell v. Attorney General of Canada*,⁶⁵ Chief Justice Brenner agreed and added this before going on to approve the legal fees provision:

While I appreciate that in this case the legal fees ... are being paid by Canada and not the members of the class, it is nonetheless my view that the settlement of a class action should not be made conditional on the approval by the court of class counsel's fees. Even where the fees are to be paid by a defendant, the court retains a statutory obligation to ensure that the settlement of a class proceeding is fair, reasonable and in the best interests of the class. In order to make that determination, the court must conduct a review of the legal fees independent of the terms of the substantive settlement to ensure that both of these components meet the statutory fairness test. To do that, court approval of class counsel's fees should not be made a term of a class proceeding settlement.

In this case, while I am prepared to grant the approvals as outlined earlier, I do so only after de-linking the legal fees application from the substantive settlement and after separately reviewing the extensive evidence filed in support. That evidence demonstrates the risks assumed and the amount of time and work expended by class counsel in this lengthy and difficult case. Hence I conclude that the fees ... are fair, reasonable and in the best interests of the class members.⁶⁶

[87] My jurisdiction on this approval motion, as I have already noted, is to review the Settlement Agreement in the context of *Brown*. Given that class counsel in *Brown* have consented to de-linkage, there is no need to adopt the approach that was suggested in *Northwest* and *Quatell*. Here it is enough that the Settlement Agreement is going back to the negotiating table with the focus being the \$75 million legal fees provision, at least for class counsel in *Brown*.

[88] I remain hopeful that class counsel in *Riddle* will also do the right thing and focus only on the section 11.01 legal fees provision. It would be beyond tragic if the Sixties Scoop Settlement Agreement was derailed or delayed because of an unseemly squabble among class counsel over legal fees.

Disposition

[89] The Settlement Agreement, other than the \$75 million legal fees provision, is approved.

⁶⁵ *Quatell*, *supra* note 63.

⁶⁶ *Ibid*, at paras. 17-18.

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[90] The \$75 million legal fees provision is excessive and unreasonable and is not approved.

[91] Class counsel in *Brown* have agreed to de-link the legal fees provision from the rest of the Settlement Agreement. I am confident that class counsel in *Riddle* will agree to do likewise and will not jeopardize the entire Agreement because a reasonable legal fees provision remains to be negotiated.

[92] The court should be advised when a revised section 11.01 has been agreed to by the parties.

Justice Edward P. Belobaba

Date: June 20, 2018

Appendix

AGREEMENT IN PRINCIPLE

THE FOUNDATION

1. Canada shall establish a Foundation in accordance with the guidelines in the *Canada Not for Profit Corporations Act*. Canada shall fund the Foundation to the extent of \$50M (the "Initial Funding"); however, the Initial Funding may be augmented from other sources. The Parties agree that they will convene a separate negotiation table to particularize the objects of the Foundation (the "Foundation Table"); however, the Parties agree that the main purpose of the Foundation is to enable change and reconciliation and, in particular, access to education, healing/wellness and commemoration activities for communities and individuals. The Parties also acknowledge that the Foundation is a living entity' and may be amended from time to time to respond to the challenges of current and future needs. The Foundation is intended to complement and not duplicate government programs.

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2. The Foundation Table shall consist of three (3) representative plaintiffs; two (2) plaintiffs' counsel, the Assistant Deputy Minister, Resolution and Individual Affairs for INAC or his agreed-upon designate Krista Robertson, one (1) counsel from Canada, and Justice Shore.

CLASS DEFINITION

3. All "Indians" (as per the *Indian Act* – registered or entitled to be registered) and "Inuit" who were removed from their homes in Canada from 1951 to 1991 and placed in the care of non-Indigenous foster or adoptive parents.

APPROVED CLAIMANTS

4. All "Indians" (as per: the *Indian Act* – registered or entitled to be registered) and "Inuit" who were removed from their homes in Canada from 1951 to 1991 and who were adopted or made Crown wards or permanent wards and placed in the care of non- Indigenous foster or adoptive parents.
5. Individual Payments shall be made to Approved Claimants as follows:
 - Canada shall pay \$500M to the Administrator (the "Designated Amount");
 - The Administrator shall pay \$25,000 to each Approved Claimant (the "Base Payment");
 - Any residue after the Base Payments are made shall be distributed equally among the Approved Claimants to a maximum total payment of \$50,000 to each Approved Claimant (the "Augmented Payment");
 - After payment of the Augmented Payments, any further residue shall be applied to the Foundation described in paragraphs 1 and 2.

UNLESS

The Designated Amount is insufficient to make a Base Payment to each Approved Claimant THEN Canada shall pay an amount sufficient to make a Base Payment to each Approved Claimant (the "Enhanced Amount")

HOWEVER

In no circumstances shall Canada be required to pay any amount in excess of a total of \$750M for individual payments to Approved Claimants; and,

If the Enhanced Amount is not sufficient to make a Base Payment to each Approved Claimant, then the Enhanced Amount shall be divided equally among the Approved Claimants.

For greater certainty, if the number of Approved Claimants is:

- 10,000, each individual will receive \$50,000;
- 15,000, each individual will receive [\$33,333] ...
- 20,000, each individual will receive \$25,000;
- 25,000, each individual will receive \$25,000 ...

...

NOTICE AND ADMINISTRATION

6. The Parties shall jointly agree on a notice program and administration process to be paid for by Canada to an agreed-upon maximum amount.

RELEASES

7. The class members agree to release Canada from any and all claims that have been pleaded or could have been pleaded with respect to their placement in foster care, Crown wardship or permanent wardship, and/or adoption. Such release shall include, but not be limited to, claims for: loss of language, culture, and identity, claims for sexual and physical abuse, Charter or constitutional claims, etc.

SETTLEMENT APPROVAL

8. The Parties agree that the settlement agreement shall be approved:
 - a) In *Brown v. Canada* in the Ontario Superior Court of Justice; and,
 - b) In an action constituted in the Federal Court consistent with the terms of the settlement agreement.
9. Furthermore, the Parties agree that class counsel shall amend all other actions to eliminate claims which will be settled in this action and seek bar orders with respect to any actions that have or may be brought against any other party where Canada may be added as a third party.

EXCEPTIONAL CIRCUMSTANCES

10. The Parties agree to establish a mechanism to consider class members who are not Approved Claimants but whose circumstances are such that they should be considered for individual payment or other relief.

OPT-OUTS

11. For each opt out who is eligible to receive an individual payment, Canada shall deduct \$25,000 from the Enhanced Amount.
12. Should 2,000 class members opt out, Canada, in its sole discretion, may decide not to proceed with the settlement agreement and shall have no further obligations in this regard.
13. The Parties agree to work to minimize the number of optouts.

SOCIAL BENEFITS AND TAXATION

14. Canada shall make best efforts ensure that any Approved Claimant's entitlement to federal social benefits or social assistance benefits will not be negatively affected by receipt of an individual payment and that individual payments will not be considered taxable income within the meaning of the *Income Tax Act*.
15. Canada will use its best efforts to obtain agreement with provincial and territorial governments to the effect that the receipt of any individual payments will not affect the amount, nature, or duration of any social benefits or social assistance benefit; available or payable to any class member.

LEGAL FEES

16. Canada shall pay to class counsel 15% of the Designated Amount plus applicable GST/PST/HST as legal fees. Class counsel agree that no amount shall be taken from any payments made to Approved Claimants on account of fees. Class counsel further agree to perform any additional work required on behalf of class members at no additional charge.

Signed at Vancouver this 30th day of August 2017.

CANADA as represented by the Attorney General of Canada

BY: _____

ATTORNEY GENERAL OF CANADA

For the Defendant

BY: _____

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ATTORNEY GENERAL FOR CANADA

For the Defendant

BY: _____

ATTORNEY GENERAL OF CANADA

For the Defendant

THE PLAINTIFFS, as represented by Class Counsel

BY: _____

KLEIN LAWYERS

For the Plaintiff Catriona Charlie

BY: _____

MERCHANT LAW GROUP LLP

For the Plaintiff Jessica Riddle

BY: _____

KOSKIE MISKY LLP

For the Plaintiff Wendy Lee White

BY: _____

WILSON-CHRISTEN LLP

For the Plaintiff Marcia Brown

BY: _____

MORRIS COOPER

For the Plaintiff Marcia Brown

Mediated, authorized and approved by Justice Michel M.J. Shore of the Federal Court Mediator of the matter, known as the Sixties Scoop, 1951-1991.

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Michel M. J. Shore

FOR INFORMATION

NINTH REPORT OF THE ADVERTISING & FEE ARRANGEMENTS ISSUES WORKING GROUP

Issue to address

22. The Working Group¹ has been considering practices involving payment of fees and offering of benefits by title insurers to real estate lawyers or their staff. The Working Group has heard that the practice of some lawyers has been to receive fees from title insurers without disclosing the fee to the client. It has also heard reports of benefits and incentives, such as contest opportunities, volume discounts and gift cards, offered to lawyers and their staff by certain title insurers.

Context

A. Title insurance and the real estate lawyer

23. Title insurance is “an insurance policy that protects residential or commercial property owners and their lenders against losses related to the property’s title or ownership.”² Title insurance is commonly used in residential real estate transactions, although it is not required. The insurance costs “a few hundred dollars on average”, but can protect against various risks with respect to title, including title fraud.³
24. In Ontario, regulation 69/07 of the *Insurance Act* requires title insurers to obtain a concurrent certificate of title to the property to be insured from a lawyer who is not employed by the title insurer.

¹ The Advertising & Fee Arrangements Issues Working Group is providing this interim report on its work. Since it was established in February 2016, the Working Group has been studying current advertising, referral fee and contingency fee practices in a range of practice settings, including real estate, personal injury, criminal law and paralegal practices, to determine whether any regulatory responses are required with respect to them. The history of the Working Group can be found on the Law Society’s website at <https://www.lsuc.on.ca/advertising-fee-arrangements/>. The Working Group is chaired by Malcolm Mercer. Working Group members include Jack Braithwaite, Paul Cooper, Jacqueline Horvat, Michael Lerner, Marian Lippa, Virginia Maclean, Jan Richardson, Jonathan Rosenthal, Andrew Spurgeon and Jerry Udell. Benchers Robert Burd and Carol Hartman served on the Working Group until August, 2016.

² Financial Services Commission of Ontario, Understanding Title Insurance, online at <https://www.fSCO.gov.on.ca/en/insurance/brochures/Pages/understanding-title-insurance.aspx>.

³ Rob Carrick, This insurance can save home owners from budget-busting expenses, *The Globe and Mail*, published April 2, 2018, online at: <https://www.theglobeandmail.com/investing/personal-finance/household-finances/article-this-insurance-can-save-home-owners-from-budget-busting-expenses/> [“Carrick”].

25. In many cases, clients purchase real estate policies through their lawyer, with the lawyer also providing services to the title insurer. Some lawyers provide a title certificate to the title insurer so that the title insurer can meet its obligation pursuant to regulation 69/07. Some lawyers provide other services to the title insurer.

B. Title insurer payments and other benefits to lawyers

26. The input received by the Working Group indicates that, for many years, some title insurers provide compensation to lawyers for:
- Legal services provided to the title insurer, namely providing a certificate of title, e.g. acting as a title examining counsel; and
 - Other services, such as completing the title insurance application online on behalf of the client through the title insurance company's software or title insurance ordering platform.
27. Some title insurers offer other benefits or incentives to lawyers, law firms and their staff. For example, lawyers may receive payments, gifts or other incentives based on the volume of title insurance placed by the lawyer and lawyers of the law firm. Law firm staff may receive retail gift cards or ballots based on insurance policy orders for entry into contests with a chance to win prizes such as travel vouchers, or other incentives.
28. In addition, at least one title insurer offers legal services coverage combined with the title insurance. While this provides protection for the client, it also benefits the lawyer. When there is an issue with a real estate transaction which involves the legal services provided, the lawyer may not need to make a claim under his or her professional liability insurance thereby potentially avoiding increased insurance costs such as deductibles and increased premiums.

C. The Rules of Professional Conduct regarding title insurance in real estate conveyancing

29. Lawyers have particular professional obligations pursuant to the Rules of Professional Conduct when advising clients, who are purchasing or refinancing property, with respect to title insurance. The rules are intended to protect the client's interest, and are as follows:

Title Insurance in Real Estate Conveyancing

3.2-9.4 A lawyer shall assess all reasonable options to assure title when advising a client about a real estate conveyance and shall advise the client that title insurance is not mandatory and is not the only option available to protect the client's interests in a real estate transaction.

Commentary

[1] A lawyer should advise the client of the options available to protect the client's interests and minimize the client's risks in a real estate transaction. The lawyer should be cognizant of when title insurance may be an appropriate option. Although title insurance is intended to protect the client against title risks, it is not a substitute for a lawyer's services in a real estate transaction.

[2] The lawyer should be knowledgeable about title insurance and discuss with the client the advantages, conditions, and limitations of the various options and coverages generally available to the client through title insurance. Before recommending a specific title insurance product, the lawyer should be knowledgeable about the product and take such training as may be necessary in order to acquire the knowledge.

3.2-9.5 A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to their client.

3.2-9.6 A lawyer shall disclose to the client that no commission or fee is being furnished by any insurer, agent, or intermediary to the lawyer with respect to any title insurance coverage.

Commentary

[1] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance of any hidden fees by the lawyer, including the lawyer's law firm, any employee or associate of the firm, or any related entity.

3.2-9.7 If discussing TitlePLUS insurance with a client, a lawyer shall fully disclose the relationship between the legal profession, the Law Society, and the Lawyers' Professional Indemnity Company (LawPRO).

Analysis

A. Operation of the current Rule

30. At the operational level, based on the rules, the Law Society has taken the view since at least the late 1990s that the lawyer is not prohibited from accepting fees from a title insurer for services actually rendered to the title insurer. However, the lawyer must disclose such fees and relationship to all clients in the retainer.
31. The Working Group has learned of instances of lawyers failing to disclose payments or benefits received from title insurers. The Working Group heard from licensees about this issue. It is also an issue that has been flagged by the Law Society's audit teams. For

audits conducted in 2016 and 2017, among audited firms who handle title insured real estate transactions and receive fees from a title insurer, approximately one third were found not to have disclosed the fees in writing to their clients.

B. Call for Input

32. To assist the Working Group as it further explores this area, it invites comment with respect to the following questions:
- a. How are Rules 3.2-9.4 to Rule 3.2-9.7 operating in practice? Are parts of these rules difficult to interpret or practically apply? Do they reflect the realities of real estate practice?
 - b. Do you routinely recommend a particular title insurer? If so, why?
 - c. Are you aware of fees being offered by title insurers for services?
 - i. For what services are fees being offered?
 - ii. How much are the fees / what is the range of the fee per transaction?
 - iii. If you accept fees what is the process for disclosing them to your client? What do you do with the fees? Does the fee affect the amount charged to your client?
 - iv. If you do not accept the fee, why do you decline it?
 - d. Are you aware of benefits being offered by title insurers for arranging title insurance policies?
 - i. What benefits are offered (e.g. discounts for volume of policies issued, gifts, referral payments, incentives to staff including gift cards and contest opportunities, waiver of deductibles or insurance levies on errors and omission claims etc.)?
 - ii. How much is the benefit / what is the range of the benefit per transaction?
 - iii. If you accept such benefits, what is the process for disclosing them to your client? What do you do with the benefit? Does the benefit affect the amount charged to your client?
 - iv. If you do not accept such benefits, why do you decline them?
 - e. Do you think that the existing disclosure requirements should be

enhanced? If so, how?

- f. Do you think clients should consent in writing to payment of a fee or conferral of benefits to their lawyers by title insurers? How would this work in practice?
- g. What do you think about banning the acceptance of fees and benefits from title insurers? How would this work in practice? What would the effect of a ban be?
- h. Are you aware that legal services coverage offered by some title insurance policies benefit the lawyer by waiving deductibles and insurance levies? If so, do you explain the potential benefits to the client and/or to you to the client?

Next Steps

- 33. As summer is a busy time for the real estate bar, the Working Group invites comments by October 31, 2018.
- 34. The Working Group will receive and consider the feedback, and will then report further on this issue, either in late fall 2018 or early 2019.