

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

CHIEF SHANE GOTTFRIEDSON, on behalf of the TK'EMLUPS TE
SECWEPEMC INDIAN BAND and the TK'EMLUPS TE SECWEPEMC
INDIAN BAND, and CHIEF GARRY FESCHUK, on behalf of the SECHELT
INDIAN BAND and the SECHELT INDIAN BAND

Plaintiffs

and

HIS MAJESTY THE KING IN RIGHT OF CANADA
as represented by THE ATTORNEY GENERAL OF CANADA

Defendant

NOTICE OF MOTION
(Motion for Settlement Approval)

TAKE NOTICE THAT the Plaintiffs will make a motion to the Court, to commence at 9:30 a.m. on February 27, 2023, at the Federal Court, in the City of Vancouver, in the Province of British Columbia.

THE MOTION IS FOR:

1. an order that the settlement agreement dated January 18, 2023 (together with all of its schedules, the "**Settlement Agreement**"), attached as **Schedule "A"** to this notice of motion, is a fair and reasonable settlement of the claims of the Band Class, and is in the best interests of the Band Class;

2. an order approving the Settlement Agreement pursuant to Rule 334.29 of the *Federal Courts Rules*, SOR/98-106, and directing that it shall be implemented in accordance with its terms;
3. an order and declaration that the Settlement Agreement is binding on the Defendant and on all members of the Band Class;
4. an order directing that notice of approval of the Settlement Agreement (the “**Notice**”) be given to the Band Class in accordance with the Notice Plan attached hereto as **Schedule “B”**, and the Notice shall be substantially the form of Notice attached hereto as **Schedule “C”**;
5. an order dismissing the claims of the Band Class Members as against the Defendant, with prejudice and without costs, and granting the comprehensive release in favour of the Defendant that is set out at ss. 27.01 – 27.09 of the Settlement Agreement;
6. an order that the not-for-profit entity incorporated by Plaintiffs pursuant to the *Canada Not-for-Profit Corporations Act*, SC 2009, c 23 or analogous federal legislation or legislation in any of the provinces or territories (the “**Not-For-Profit**”) will act as the sole trustee of the Trust, as defined by s. 1.01 the Settlement Agreement;
7. an order that Canada shall pay two billion eight hundred million Canadian dollars (\$2,800,000,000) (the “**Fund**”) forthwith and no later than thirty (30) days after the Implementation Date to settle the Trust;
8. an order that the Not-For-Profit, as sole trustee of the Trust, shall receive, hold, invest, manage and disburse the Trust for the benefit of the Band Class Members in accordance

with the Settlement Agreement, the terms of the Trust as set out in a written trust agreement signed by the Not-For-Profit to indicate its acceptance of the Trust and the duties and obligations of trustee, and in accordance with the Investment Policy and Disbursement Policy attached as Schedules D and E to the Settlement Agreement;

9. an order that Canada shall make best efforts to exempt any income earned by the Trust from federal taxation, and Canada shall have regard to the measures that it took in similar circumstances for the class action settlements addressed in paragraph 81(1)(g.3) of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp.);
10. an order that The Fund will be used in furtherance of the Four Pillars as defined by s. 21.03 and Schedule F of the Settlement Agreement;
11. an order that neither the Fund nor income earned on the Fund can be used:
 - a) to fund individuals;
 - b) to fund commercial ventures;
 - c) as collateral or to secure loans; or
 - d) as a guarantee;
12. an order that no monies paid out from the Trust to a Band Class Member may be subject to redirection, execution, or seizure by third Parties, including third party managers;
13. an order that, if the Settlement Agreement is not approved, the parties are all restored, without prejudice, to their respective positions as such existed on September 21, 2022, prior to the adjournment *sine die* of the common issues trial; and

14. such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. this action was commenced on August 15, 2012;
2. an Amended Statement of Claim was filed June 17, 2013, a First Re-Amended Statement of Claim was filed on June 26, 2015;
3. by order of this Court dated June 18, 2015 (and subsequently amended), this action was certified as a class proceeding for a Class Period of 1920 to 1997 on behalf of three subclasses: the Survivor Class (sometimes referred to as the Day Scholars); the Descendant Class, consisting of the children of members of the Survivor Class (by birth or adoption); and the Band Class;
4. after almost a decade of hard-fought litigation, the Parties executed a settlement agreement dated June 4, 2021, to resolve the claims of the Survivor and Descendant Classes in their entirety;
5. on September 24, 2021, Justice McDonald approved the Survivor and Descendant Classes' settlement, pursuant to Rule 334.29 of the *Federal Court Rules*, as fair, reasonable, and in the interests of the Survivor and Descendant Classes, and without prejudice to the ongoing litigation of the Band Class;
6. at the request of the Parties, the Certification Order was amended on February 8, 2022. On February 11, 2022, the Representative Plaintiffs filed a Second Re-Amended Statement of Claim, which set out the continued claims of the Band Class.

7. pursuant to the amended Certification Order, the Band Class is defined as “the Tk’emlúps te Secwépmc Indian Band and the shíshálh Band and any other Indian Band that:
 - a) has or had some members who are or were Survivors, or in whose community a Residential School is or was located; and
 - b) is specifically added to this claim in relation to one or more specifically identified Residential Schools.”
8. the term “Survivors” in the above class definition is defined by the Second Re-Amended Statement of Claim as “all Aboriginal Persons who attended as a student or for educational purposes for any period at a Residential School, during the Class Period”;
9. on September 17, 2022, the Parties reached a framework to settle the Claim;
10. on September 21, 2022, at the request of the Parties, the Court adjourned the common issues trial *sine die* to facilitate ongoing settlement negotiations between the Parties;
11. the Parties executed the Settlement Agreement on January 18, 2023;
12. amongst other terms, the Settlement Agreement provides that:
 - a) Canada is to pay a lump-sum amount of \$2.8 billion to establish the Fund, to be held in the Trust for the benefit of the Band Class;
 - b) the Representative Plaintiffs will cause to be incorporated the Not-For-Profit as sole trustee of the Trust, to administer the Fund for the purposes of the Four Pillars, namely:

- (1) revitalizing and protecting Indigenous languages of the Band Class;
 - (2) protecting and revitalizing Indigenous cultures of the Band Class;
 - (3) protecting the heritage of the Band Class; and
 - (4) promoting wellness for Indigenous communities and their members;
13. the Settlement Agreement includes an Investment Policy and a Disbursement Policy that set requirements regarding how the Not-For-Profit will invest the Fund and disburses the Fund and income earned from investment of the Fund to the Class;
 14. the Settlement Agreement is subject to this Court's approval, pursuant to Rule 334.29 of the *Federal Court Rules*, before it is binding;
 15. the Settlement Agreement is the result of intensive arm's-length negotiations by experienced class action counsel, and is fair, reasonable, and in the best interests of the Band Class;
 16. the Settlement Agreement is supported by the Representative Plaintiffs;
 17. the Band Class Members were provided with notice of the proposed settlement and settlement approval motion hearing in accordance with the Order of this court dated January 21, 2023;
 18. if the Court approves the Settlement Agreement, the Plaintiffs will bring further motions for approval of the Notice of Settlement Approval;
 19. Rule 334.29 of the *Federal Courts Rules*, SOR/98-106;

20. the motion is made on consent and by agreement of the Defendant and the Plaintiffs; and
21. such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. the affidavit of Peter Grant, sworn February 20, 2023;
2. the affidavit of former Chief Shane Gottfriedson, affirmed February 21, 2023
3. the affidavit of former Chief Garry Feschuk, affirmed February 22, 2023;
4. the affidavit of former Chief Matthew Coon Come, affirmed February 20, 2023;
5. the affidavit of Jeanine Alphonse, sworn February 22, 2023; and
6. such further and other evidence as counsel may advise and this Honourable Court may permit.

February 22, 2023

**WADDELL PHILLIPS
PROFESSIONAL CORPORATION**
Suite 1120, 36 Toronto Street
Toronto, ON M5C 2C5

John Kingman Phillips, K.C.

john@waddellphillips.ca

W. Cory Wanless

cory@waddellphillips.ca

Jonathan Schachter

jonathan@waddellphillips.ca

Flora Yu

flora@waddellphillips.ca

Tel: 647.261.4486

Fax: 416.477.1657

PETER GRANT LAW
#407- 808 Nelson Street
Vancouver, BC V6Z 2H2

Peter R. Grant
pgrant@grantnativelaw.com
Tel: 604.688.7202
Fax: 604.688.8388

DIANE SOROKA AVOCATE INC.
447 Strathcona Ave.
Westmount, QC H3Y 2X2

Diane Soroka
dhs@dsoroka.com

Tel: 514.939.3384
Fax: 514.939.4014

SOLICITORS FOR THE PLAINTIFFS

TO: **DEPARTMENT OF JUSTICE, CANADA**
British Columbia Region
National Litigation Sector
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Travis Henderson
Travis.Henderson@justice.gc.ca
Ainslie Harvey
Ainslie.Harvey@justice.gc.ca

SOLICITORS FOR THE DEFENDANT