Court File No. T-1542-12

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

WRITTEN REPRESENTATIONS OF THE PLAINTIFFS

(Motion for Settlement Approval)

February 22, 2023

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PART I - OVERVIEW

1. Canada's establishment and operation of the Indian Residential Schools ("**Residential Schools**" or "**IRSs**") system has been widely recognized as a cultural genocide: a "systematic, government-sponsored attempt to destroy Aboriginal culture and languages…"[1] Canada has repeatedly acknowledged the assimilationist intent of the IRS system and the harm that it has caused to survivors, their families, and their communities – notably through the 2008 Statement of Apology by then-Prime Minister Stephen Harper and subsequent public statements by current Prime Minister Justin Trudeau.[2]

2. The Band Class Claim was commenced to seek reparations for the harm suffered by Indigenous communities as collectives as a result of Canada's Residential School polices, including the loss of language and culture. The Band Class consists of 325 Bands from across Canada.

3. After eleven years of hard-fought litigation, quite literally on the eve of trial, the Parties reached an historic $2.8 billion settlement which, if approved, will resolve the claims of the Band Class, and will give the Bands themselves some of the tools and the resources necessary to engage in the difficult and important tasks of reviving and protecting Indigenous languages and cultures, engaging in community healing, and protecting heritage based upon their own assessment of priorities within their own communities.

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[1] Truth and Reconciliation Commission, "Honouring the Truth, Reconciling for the Future, Summary of the Final Report of the Truth and Reconciliation Commission of Canada" (2015) ("TRC Summary Report") at p. 153, online (pdf): < https://nctr.ca/records/reports/>.

[2] Affidavit of Peter Grant, sworn February 20, 2023 ("Grant Settlement Affidavit"), at paras 29-30, **Plaintiffs' Motion Record for Settlement Approval ("Settlement Approval MR"), Tab 2**.

4. The Settlement Agreement adopts a generational model which will provide long-term and Indigenous-controlled funding for language, culture and heritage projects, and empowers Band Class Members to decide for themselves how best to use these funds to remedy the harms caused to their respective communities as a result of Residential School policies. This unique and visionary model, which was proposed by the Representative Plaintiffs, could not have been ordered by a Court, even if the plaintiffs had fully succeeded at trial.

5. Without this settlement, the Band Class Members will have to await the uncertain result of a lengthy, vigorously-contested first phase of the common issues trial, followed by a similarly lengthy second phase of the common issues trial, likely each followed by appeals, and then likely by individual assessments of each Band Class Member's damages – a process that in total would take many years. This delay will have real and irreparable consequences: for some Band Class Members, further delays would mean losing language speakers and knowledge keepers whose knowledge will be key to revitalization efforts.[3]

6. The proposed settlement is the result of extensive arm's-length negotiation, is supported by Class Members, is recommended by experienced Class Counsel, and represents a fair and reasonable resolution of the Band Class claim. Its approval is in the best interests of the Class.

7. In light of the considerable evidence that the proposed settlement is a fair and reasonable compromise, as compared to what might reasonably have been accomplished at trial, this settlement ought to be approved by this Court.

[3] Affidavit of Garry Feschuk, sworn February 22, 2023 ("Feschuk Affidavit"), at para 35, **Settlement Approval MR, Tab 5.**

PART II - FACTS

A. The Indian Residential School system

8. Prior to the start of the Class Period, Indigenous peoples across the land that later became Canada had their own distinctive languages and cultures that they had developed, practised, retained and transmitted from generation to generation over thousands of years.[4]

9. Starting in the 1870s and continuing for over 100 years, Canada funded, oversaw and, together with certain religious organizations, operated a system of Residential Schools in "a systematic, government-sponsored attempt to destroy Aboriginal cultures and languages and to assimilate Aboriginal peoples so that they no longer existed as distinct peoples."[5]

10. The Truth and Reconciliation Commission concluded that "Canada's residential school system for Aboriginal children was an education system in name only for much of its existence. These residential schools were created for the purpose of separating Aboriginal children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture—the culture of the legally dominant Euro-Christian."[6]

11. While Residential Schools were often operated by churches and religious orders, they were created and operated under the authority, and pursuant to the supervision and direction of, Canada. Canada began funding and controlling the operation of Residential Schools as early as 1868, and amended the *Indian Act* in 1920 to make it compulsory for "every Indian child" between the ages of 7 and 15 to attend either an IRS or other federally established school, as determined by Canada.[7]

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[4] Grant Settlement Affidavit at para 21, **Settlement Approval MR, Tab 2**.
[5] Grant Settlement Affidavit at para 22, **Settlement Approval MR, Tab 2**; TRC Summary Report at p. 153.
[6] Grant Settlement Affidavit at para 23, **Settlement Approval MR, Tab 2**; TRC Summary Report at p. v.
[7] Grant Settlement Affidavit at paras 24-25, **Settlement Approval MR, Tab 2**.

Parents who refused to send their children to IRSs were imprisoned, and Canada gave truant officers broad powers to enforce compulsory attendance.[8] Canada maintained control over the IRS system through Orders-In-Council and funding agreements that required IRSs to be run in accordance with its regulations and standards until the last Residential School closed in 1997.[9]

12. The TRC concluded that Canada's assimilationist policy towards Aboriginal people, including the establishment and operation of Residential Schools, was cultural genocide:[10]

> For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. **The establishment and operation of residential schools were a central element of this policy, which can best be described as "cultural genocide"**.

13. Canada has repeatedly acknowledged the assimilationist intent of Residential Schools and the harm done by the IRS system to Indigenous children who attended these schools, their families, and their communities.[11]

14. The consequences of Canada's Indian Residential School policies were profoundly negative, and this system has had a lasting and damaging impact on Indigenous survivors, their families, and communities.[12] The IRS system and policies caused grievous damage to all Indigenous cultures and has led to a catastrophic decline in all Indigenous languages over the past 100 years, in particular by disrupting or eliminating the intergenerational transmission of language

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[8] Grant Settlement Affidavit at para 25, **Settlement Approval MR, Tab 2**.

[9] Grant Settlement Affidavit at para 26, **Settlement Approval MR, Tab 2**.

[10] Grant Settlement Affidavit at para 27, **Settlement Approval MR, Tab 2**; TRC Summary Report, p. 1 (emphasis added).

[11] Grant Settlement Affidavit at para 28, **Settlement Approval MR, Tab 2**.

[12] Settlement Agreement, executed January 18, 2023 ("**Settlement Agreement**") at para C, **Settlement Approval MR, Tab 1A**.

and culture.[13] Both Representative Plaintiff First Nations, and all Band Class members, suffered such losses to their respective communities.[14]

15. This Court is acutely familiar with the devastating impact of Residential Schools on students who attended as residents, as well as on Day Scholars, whose compensation was the subject of a prior settlement approved by this Court in this proceeding.

B. Nature & history of this Action

16. While the 2006 Indian Residential Schools Settlement Agreement ("**IRSSA**") was intended to provide a "fair, comprehensive and lasting resolution of the legacy of Residential Schools" and to promote "healing, education, truth and reconciliation and commemoration,"[15] it nonetheless left some matters unresolved.

17. This class action was commenced by Tk'emlúps te Secwe̓pemc Indian Band and Sechelt Indian Band (now known as shíshálh Nation) in order to address two gaps left by the IRSSA: first, the exclusion of Day Scholars (children who attended Residential Schools during the day only) from receipt of the IRSSA's Common Experience Payment, and second, the failure to address the collective harms caused to Indigenous communities as whole as a result of Canada's IRS policies.[16]

18. This action was commenced on August 15, 2012, and certified as a class proceeding on June 18, 2015 on behalf of three classes: the Survivor Class, sometimes referred to as the Day

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[13] Grant Settlement Affidavit at paras 31-23, **Settlement Approval MR, Tab 2**.

[14] Feschuk Affidavit at paras 9-19, **Settlement Approval MR, Tab 5**; Affidavit of Shane Gottfriedson, sworn February 22, 2023 ("Gottfriedson Affidavit"), at para 34, **Settlement Approval MR, Tab 4**.

[15] Grant Settlement Affidavit at para 33, **Settlement Approval MR, Tab 2**.

[16] Grant Settlement Affidavit at para 37, **Settlement Approval MR, Tab 2**.

Scholars, consisting of children who attended an IRS for an educational purpose but did not receive the Common Experience Payment under IRSSA; the Descendant Class, consisting of the children of members of the Survivor Class (by birth or adoption); and the Band Class. The certification order names Tk'emlúps te Secwe̓pemc Indian Band and Sechelt Indian Band (now known as shíshálh Nation) as Representative Plaintiffs for the Band Class.[17] In certifying this Action as a class proceeding, Justice Harrington observed that "the outcome of the case is far from certain."[18]

19. On June 4, 2021, after nearly a decade of hard-fought litigation, the parties executed the Day Scholar Survivor Class and Descendant Class Settlement Agreement ("**Day Scholars Settlement Agreement**") to resolve the claims of the Survivor and Descendant Classes in their entirety, while permitting the Band Class claim to continue to be litigated.[19] The Court approved the Day Scholars Settlement Agreement on September 24, 2021.[20]

C. Continued claims of the Band Class

20. The Band Class claim continued after the Day Scholars Settlement Agreement.[21] The Band Class claim is about the collective harm suffered by Indigenous communities as a group as a result of Canada's Indian Residential School policies.[22] The Action claims that the purpose, establishment, funding, operation, supervision, control, maintenance, and obligatory attendance of children at Residential Schools destroyed the Band Class Members' language and culture, violated their cultural and linguistic rights, and caused cultural, linguistic and social damage and irreparable harm to the Band Class Members. The Action seeks declarations and compensation for the

[17] Grant Settlement Affidavit at paras 39-40, **Settlement Approval MR, Tab 2**.
[18] *Gottfriedson v Canada*, 2015 FC 706 at para. 80, Tab 1 of Book of Authorities [BoA].
[19] Grant Settlement Affidavit at para 45, **Settlement Approval MR, Tab 2**.
[20] Grant Settlement Affidavit at para 47, **Settlement Approval MR, Tab 2**.
[21] Grant Settlement Affidavit at paras 48-49, **Settlement Approval MR, Tab 2**.
[22] Grant Settlement Affidavit at para 53, **Settlement Approval MR, Tab 2**.

collective losses of language and culture and other collective harms caused by Canada's Residential School policies.[23]

D. Band Class membership

21. Justice Harrington certified the Band Class claim on an opt-in basis in order to respect the sovereignty of Band governments.[24] In order to become a class member, a Band was required to opt in by the opt-in deadline, or otherwise be added to the Class by Court order.[25]

22. In total, there are 325 Bands that have opted-in to this Action, or otherwise added been to the Class.[26]

E. Band Class trial preparation

23. Soon after the Day Scholars Settlement was approved by the Court, the parties began to prepare for trial in earnest again. The first phase of the common issues trial for the Band Class claims was scheduled to commence in September 2022 for ten weeks.

24. Trial preparation for a claim of such scope, historical significance, and national importance was a prodigious and intensive undertaking. It involved, amongst other things, review of hundreds of thousands of historical documents, retaining and instructing expert witnesses, preparing and conducting examinations for discovery, conducting legal research, preparing trial strategy,

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[23] Grant Settlement Affidavit at para 53, **Settlement Approval MR, Tab 2**.
[24] Grant Settlement Affidavit at para 67, **Settlement Approval MR, Tab 2**.
[25] Grant Settlement Affidavit at para 57, **Settlement Approval MR, Tab 2**.
[26] Grant Settlement Affidavit at para 64, **Settlement Approval MR, Tab 2**.

identifying and preparing witnesses, and crafting opening and closing submissions.[27] By September 2022, Class Counsel and the Representative Plaintiffs were fully trial ready.[28]

F. Canada's defences

25. From the commencement of this claim right up until the trial adjournment on September 19, 2023, Canada took a hard line in its defence of the Action, which set the parties up for protracted and hard-fought litigation.[29] Throughout the litigation, Canada admitted very little, and put the Representative Plaintiffs to the strict proof of all aspects of their claim.

26. In Canada's Second Amended Statement of Defence, Canada maintained the following positions, amongst others:[30]

a. in establishing and operating Residential Schools, when measured against the standards of the day, Canada acted with due care and in good faith, and within its legislative authority;

b. Canada sought to rely on the releases contained in IRSSA as a bar to the claims of the Classes, including the Band Class;

c. Canada did not breach any fiduciary, statutory, constitutional or common law duties owed to, or the Aboriginal Rights of, the Class Members in the operation of Residential Schools;

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[27] Grant Settlement Affidavit at para 75, **Settlement Approval MR, Tab 2**.

[28] Grant Settlement Affidavit at para 76, **Settlement Approval MR, Tab 2;** Feschuk Affidavit at para 30, **Settlement Approval MR, Tab 5.**

[29] Grant Settlement Affidavit at para 69, **Settlement Approval MR, Tab 2**.

[30] Grant Settlement Affidavit at para 71, **Settlement Approval MR, Tab 2**.

d. Canada challenged the Band Class Representative Plaintiffs' legal authority to pursue the claim for breach of Aboriginal Rights;

e. Canada denied that it breached or unjustifiably infringed the Aboriginal or other rights of members of the Classes, or any of them, to speak their traditional languages, to engage in their traditional customs and religious practices and to govern themselves in their traditional manner; and

f. Canada denied that any damages suffered by the Classes were caused by Canada.

27. Canada's trial brief, delivered one week before the trial on September 7, 2022, set out in great detail its intended arguments at trial and continued the approach of vigorously contesting every aspect of the Plaintiffs' claim:[31]

a. Canada would deny that there was a "universal policy or common approach related to residential schools as alleged, or at all, that could have violated the rights of all Class Members, given the variations in the schools geographically and over time."

b. Canada would argue that the case is inappropriate for class-wide determination: "The Plaintiffs' claims are based on the conduct of the 23 different federal governments in office throughout the 77 year Class Period from 1920 to 1997, in designing and implementing what they refer to as the 'Residential Schools Policy'." Further, "The record will demonstrate that there was no single system implemented universally by Canada for all Indian Residential Schools, in all geographic locations throughout Canada, and for the entire duration of the 77-year Class Period."

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[31] Grant Settlement Affidavit at para 73, **Settlement Approval MR, Tab 2**.

c. Canada would argue that "the Court should accept no evidence, or should significantly limit and give little weight to evidence, about what happened at residential schools, or at least any other than the two related to the representative Plaintiffs."

d. Canada's trial brief noted that the Court could decertify the case if it determined that the certified common issues could not be answered in common.

e. On the basis of the Bifurcation Order, Canada would attempt to limit the Plaintiff's evidence on liability to exclude any evidence of harms, causation or damages.

f. Canada would vigorously deny that Canada owed a fiduciary duty, or if it did have a fiduciary duty, it did not apply Class-wide, and would maintain that if there was a duty owed, it was owed exclusively to individual children who attended a Residential School. Even if a duty were established, Canada would argue that the record does not support the finding of a breach across the entire Class and Class Period.

g. Canada would argue that Canada did not owe the Class Members a duty not to take steps to destroy their languages and cultures. It would argue, rather, that "[t]he circumstances, timing and manner in which Canada became involved in the residential schools found in [the Representative Plaintiffs'] communities, and those of the other Class Members, involved, at most, an undertaking (whether or not a duty) to educate their children in colonial languages and ways of life in a manner Canada believed at the time was in their best interests based on the prevalent knowledge of convictions held during the historical period". In other words, Canada

was prepared to argue at trial in 2022 that Canada's destruction of Indigenous language and culture through Residential Schools was historically justified.

h. Canada would argue that even if there was a generic Aboriginal right to speak traditional languages and to engage in traditional customs and religious practices, which they denied, the record did not have sufficient evidence that all Class Members had the right, or that each Class Member had standing to advance a claim to the right's infringement.

i. Canada would argue that the rights asserted by the Representative Plaintiffs are too general and broad to be sustainable at law. The asserted rights, according to Canada, are not adequately detailed and not supported by evidence "for any or all Class Members".

j. Canada would argue that the Aboriginal rights issues would have to be determined both pre-1982 and post-1982, by virtue of the fact that section 35 of the *Constitution Act, 1982* came into force in 1982 and did not have retroactive effect. Canada would argue further that any common law Aboriginal rights proven by the Representative Plaintiffs were not breached by Canada's conduct in the period prior to 1982 and that "there is no Crown conduct after 1982 that can give rise to a claim of infringement [of the Representative Plaintiffs' s. 35 rights]".

k. Canada indicated that it would object to all of the Representative Plaintiffs' expert reports as inadmissible or of little weight and probative value, notwithstanding that those experts included, for example, the leading Canadian historian on Residential Schools who had contributed to the Royal Commission on Aboriginal Peoples and

been consulted by the TRC, leading linguists in the field of Indigenous languages, and Canada's foremost expert on genocide.

G. Negotiations leading to the settlement of the Band Class Action

28. Negotiations leading to the settlement of the Band Class Action first started in October 2016, when then Minister of Indigenous and Northern Affairs, Carolyn Bennett appointed Thomas Isaac to be the Minister's Special Representative ("**MSR**") to conduct exploratory discussions with the Representative Plaintiffs and Class Counsel.[32] In the six years since, the Parties engaged in several rounds of negotiations and talks regarding the claims of all three Classes.

(i) Development of the Four Pillars Trust Model

29. After the certification of this action, the Grand Council of the Crees (Eeyou Istchee) (the "**Grand Council**") entered into an agreement with Tk'emlúps te Secwépemc and shíshálh Nation (together, the "**Three Nations**"), whereby the Grand Council would provide support for the ongoing litigation and participate in decision-making on the DSEC.[33]

30. In preparation for the 2017 settlement discussions, the Representative Plaintiffs, together with their legal counsel and the DSEC, developed a detailed framework for resolution of the Band Class claim that became known as the Four Pillars Trust Model.[34] That framework was based on the following central considerations:

[32] Grant Settlement Affidavit at paras 77-78, **Settlement Approval MR, Tab 2**.

[33] Grant Settlement Affidavit at paras 41-43, **Settlement Approval MR, Tab 2;** Affidavit of Matthew Coon Come, sworn February 20, 2023 ("Coon Come Affidavit"), at para 22-23, **Settlement Approval MR, Tab 3**.

[34] Coon Come Affidavit at para 28, **Settlement Approval MR, Tab 3**.

a. first, because of the longstanding and intergenerational effects of Residential Schools, the Representative Plaintiffs considered it essential that the model offer a generational solution to the Band Class;

b. second, that the model was directed at remedying the central harms caused by Residential Schools to communities, namely loss of language, loss of culture, loss of heritage, and damage to the social fabric;

c. third, that the model included a source of long-term funding for programs and initiatives, rather than a one-time payment to Band Class Members;

d. fourth, that the model empower Band Class Members to set their own priorities and make their own decisions regarding how to remedy harms caused to their own communities as a result of the Residential School system;

e. fifth, that control over use of the funds lay in the hands of Indigenous people, rather than the Government of Canada.[35]

31. It was a central concern of the Representative Plaintiffs that, in the past, to the extent that Canada has tried to address issues such as loss of language and culture, it has done so through a top-down approach, with Canada dictating priorities and determining what funding was available or how it was spent.[36] Not only is this approach deeply colonial, but, as seen in the case of shíshálh Nation, it often results in insufficient and unreliable funding and unfairness to bands with small populations and bands that contribute their own funds towards linguistic and cultural revitalization

[35] Grant Settlement Affidavit at para 80, **Settlement Approval MR, Tab 2**; Coon Come Affidavit at para 28, **Settlement Approval MR, Tab 3**.

[36] Grant Settlement Affidavit at para 81-82, **Settlement Approval MR, Tab 2;** Feschuk Affidavit at paras 47-48, **Settlement Approval MR, Tab 5.**

projects.[37] The Four Pillars is a complete rethink about how best to remediate historical wrongs by putting control back in the hands of Indigenous peoples.

32. In March 2017, the Representative Plaintiffs and the DSEC presented the Four Pillars Trust Model to resolve the Band Class Claims to the MSR. Former National Chief Matthew Coon Come explained in extensive detail the proposed Four Pillars Trust Model on behalf of the Plaintiffs.[38] The Four Pillars Trust Model presented to Canada involved the following:

a. the settlement would be animated by the "**Four Pillars**" objectives established by the Representative Plaintiffs, namely:

   (i) revival and protection of Indigenous languages;

   (i) revival and protection of Indigenous cultures;

   (ii) wellness for Indigenous communities and their members; and

   (iii) protection and promotion of heritage.

b. settlement funds earmarked for the Band Class would be put into a long-term trust designed to earn income for the benefit of the Class;

c. annual income from the trust would be used to fund initiatives in furtherance of the Four Pillars for the benefit of the Class members; and

d. the trust would be Indigenous controlled, and all decisions regarding which initiatives support of the Four Pillars to pursue would be made by the Band Class members themselves for their own communities.[39]

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[37] Feschuk Affidavit at para 52, **Settlement Approval MR, Tab 5**.

[38] Coon Come Affidavit at para 31, **Settlement Approval MR, Tab 3**.

[39] Coon Come Affidavit at para 32, **Settlement Approval MR, Tab 3**; Grant Settlement Affidavit at para 83, **Settlement Approval MR, Tab 2**.

33. The MSR took the Four Pillars Trust Model proposal with respect to each of the three Classes to the Government for consideration.[40] Negotiations continued throughout 2018. In early 2019, as a result of the breakdown in negotiations, the Parties returned to active litigation.[41]

34. In 2021, the Parties engaged in successful negotiations that were entirely focused on attempting to resolve the Survivor and Descendant Class claims. Time was of the essence, given that the Survivor Class was an aging population and Survivor Class Members continued to die. It was agreed that the claims of the Band Class would continue notwithstanding the Day Scholars Settlement.

(ii) 2022 Negotiations and the Band Class Settlement Agreement

35. Right up to the eve of the scheduled trial date, Class Counsel was operating under the assumption that the trial would proceed. As reflected in its trial brief, Canada continued to push to trial aggressively and had conceded little.[42]

36. On September 2, 2022 – just over one week before the common issues trial was set to begin – Class Counsel received a call from the MSR, Mr. Isaac, advising that Canada had been working internally on resolving the Band Class action based on the proposal made by the Representative Plaintiffs in 2017.[43] Mr. Isaac advised that the Honourable Marc Miller, who was named the Minister of Crown-Indigenous Relations on September 19, 2021, and who he represented, wished

[40] Grant Settlement Affidavit at para 85, **Settlement Approval MR, Tab 2**.

[41] Grant Settlement Affidavit at paras 88-91, **Settlement Approval MR, Tab 2**.

[42] Grant Settlement Affidavit at paras 73 and 96, **Settlement Approval MR, Tab 2**; Affidavit of Peter Grant, sworn February 20, 2023 ("Grant Fee Affidavit"), at para 66, **Fee Approval MR, Tab 2**.

[43] Grant Settlement Affidavit at para 95, **Settlement Approval MR, Tab 2**; Feschuk Affidavit at para 30, **Settlement Approval MR, Tab 5**.

to resolve the Band Class claim on the basis of the Four Pillars Trust Model. He suggested a meeting on September 7, 2022 to discuss, and suggested a one-week adjournment of the trial.[44]

37. Negotiations moved swiftly. On September 11, 2022, after a number of calls and meetings between Mr. Isaac and Class Counsel, Mr. Isaac orally presented Canada's full offer to the Representative Plaintiffs, the DESC, and Class Counsel. Canada confirmed the offer in writing on September 14, 2022, and sent a slightly revised offer in writing on September 17, 2022.[45]

38. Canada's offer consisted of a $2.8 billion payment to fund a Trust for the benefit of the Band Class in accordance with the Four Pillars Trust Model. During this meeting, Mr. Isaac made clear to Class Counsel that the amount in the offer was the maximum that Canada was willing to pay to resolve the lawsuit.[46] Minister Miller confirmed this at a subsequent meeting with hiwus Warren Paull, Kúkpi7 Rosanne Casimir, and Matthew Coon Come.[47]

39. Class Counsel and the DSEC convened a series of meetings and discussions with Chiefs Feschuk and Gottfriedson, along with the current Chiefs and other Councillors of shíshálh Nation and Tk'emlúps te Secwe̓pemc, to review the offer in detail.[48] There continued to be a strong reluctance to adjourn the trial, and the discussion was intense and passionate. The real question for the Representative Plaintiffs was whether Canada's proposal was sufficient to start addressing the

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[44] Grant Settlement Affidavit at para 97, **Settlement Approval MR, Tab 2**.

[45] Grant Settlement Affidavit at paras 98-105, **Settlement Approval MR, Tab 2**; Grant Fee Affidavit at paras 14-15, **Fee Approval MR, Tab 2**.

[46] Grant Settlement Affidavit at para 105, **Settlement Approval MR, Tab 2**.

[47] Grant Settlement Affidavit at paras 109-110, **Settlement Approval MR, Tab 2**.

[48] Feschuk Affidavit at para 38, **Settlement Approval MR, Tab 5**.

legacy of Canada's IRS policies on their communities and on the communities of the other 323 Band Class Members.[49]

40. In the meantime, the Representative Plaintiffs retained independent financial advisors to assess how the settlement amount could be invested over various time periods to ensure that the Band Class Members received ongoing funding over a period of time that was sufficient to implement the Four Pillars or those of the Four Pillars that were a priority to each Band Class Member.[50]

41. Following receipt of Canada's revised offer on September 17, 2022, each member of the DSEC returned to their respective councils to review and decide whether the offer should be accepted. Class Counsel received instructions from the Three Nations to accept Canada's offer on September 18, 2022. Class Counsel accepted the offer on the Representative Plaintiffs' behalf on September 19, 2022.[51]

42. Between September 20, 2022 and January 18, 2023, the parties negotiated the text of the full Settlement Agreement. Key issues that remained to be negotiated included, amongst other things: the structure and framework of a Trust or similar legal entity, tax exempt status, distribution and investment policies, and the release.[52]

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[49] Grant Settlement Affidavit at para 107, **Settlement Approval MR, Tab 2**.

[50] Grant Settlement Affidavit at para 111, **Settlement Approval MR, Tab 2**.

[51] Grant Settlement Affidavit at paras 112-113, **Settlement Approval MR, Tab 2**.

[52] Grant Settlement Affidavit at para 118, **Settlement Approval MR, Tab 2**.

43. Negotiations regarding legal fees and disbursements were separate from negotiations regarding the Settlement Agreement, and did not commence in any form until after all key terms in the Settlement Agreement had been finalized.[53]

H. The Band Class Settlement Agreement

44. If the Band Class Settlement Agreement is approved, the government of Canada will make a payment of $2.8 billion to an Indigenous controlled, twenty-year Trust that will generate investment income that in turn would be used to fund initiatives and programming aimed at undoing the collective damages caused to First Nations as a result of Canada's Residential School policies.[54] It will empower Band Class Members to set their own priorities and make their own decisions with respect to the types of revitalization efforts will benefit their own communities.[55]

(i) The Four Pillars

45. The Four Pillars are a central part of the settlement. The entire Settlement Agreement is animated by the Four Pillars as set out in the Preamble, s. 21.03, and explained more fully in Schedule F to the Settlement Agreement, namely:

a. revival and protection of Indigenous languages of the Band Class Members;

b. revival and protection of Indigenous cultures of the Band Class Members;

c. wellness for Indigenous communities and their members;

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[53] Grant Settlement Affidavit at para 120, **Settlement Approval MR, Tab 2**.

[54] Grant Settlement Affidavit at paras 123, 125-126, **Settlement Approval MR, Tab 2**.

[55] Grant Settlement Affidavit at para 123, **Settlement Approval MR, Tab 2;** Coon Come Affidavit at para 42, **Settlement Approval MR, Tab 3;** Feschuk Affidavit at paras 45-46, **Settlement Approval MR, Tab 5**; Gottfriedson Affidavit at para 60, **Settlement Approval MR, Tab 4**.

d. protection and promotion of the heritage of the Band Class Members.[56]

46. The Four Pillars are aimed at addressing the damage done to First Nations as collectives by the Canada's IRS policies.[57]

(ii) The Fund and Distribution of the Fund to Band Class Members

47. The vision of the Four Pillars Trust Model was that a structure would be put in place that would provide continued funding for initiatives related to the Four Pillars for a generation.[58] The central premise of a trust model is that a majority of the settlement funds would be put into a long-term trust and be used to generate investment income, which in turn can be used as a long-term source of funding.[59] The Settlement Agreement provides for the creation of a Trust substantially in the form of the 2017 Four Pillars Trust Model.[60]

48. As set out in the Investment Policy and Disbursement Policy, the Settlement Agreement includes the following key features regarding the $2.8 billion fund (the "**Fund**") and the distribution of the Fund:

a. Canada will make a payment of $2.8 billion to an Indigenous-controlled Trust.

b. The Trust is responsible for prudently investing the monies from the Fund for a period of twenty years, and for distributing investment income from the Fund and the Fund itself, in accordance with the Disbursement Policy.

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[56] Settlement Agreement, **Settlement Approval MR, Tab 1A**; Grant Settlement Affidavit at para 124, **Settlement Approval MR, Tab 2**.

[57] Grant Settlement Affidavit at para 125, **Settlement Approval MR, Tab 2;** Coon Come Affidavit at para 28, **Settlement Approval MR, Tab 3**.

[58] Coon Come Affidavit at para 29, **Settlement Approval MR, Tab 3**.

[59] Coon Come Affidavit at paras 29-30, **Settlement Approval MR, Tab 3**; Grant Settlement Affidavit at para 83(b), **Settlement Approval MR, Tab 2**.

[60] Coon Come Affidavit at para 35, **Settlement Approval MR, Tab 3**.

c. Canada will make best efforts to exempt any income earned by the Trust from federal taxation, including by using measures it has taken in other class action settlements through amendments to paragraph 81(1)(g.3) of the *Income Tax Act*. In other words, income earned by the Trust will be tax-free.

d. At the outset, each Band Class Member will receive initial Planning Funds of $200,000 for the purposes of developing a plan to carry out one or more of the objectives and purposes of the Four Pillars. Planning funds for the entire Band Class amounts to $65 million withdrawn from the initial capital.

e. $325 million of the Fund will be earmarked for the purposes of providing Kick-Start Funds to each Band Class Member. Upon receipt and review of a ten-year plan, each Band Class Member will receive Initial Kick-Start Funds, which shall be equal to that Band's proportionate share of the $325 million, with an adjustment for population, with 40% of the amount distributed being distributed equally to each Band and with the remaining 60% distributed proportional to each Band's population relative to the total population of opted-in Bands. The Board, once fully constituted, will then determine an appropriate adjustment for remoteness for the Initial Kick-Start Funds, with any such funds required to account for remoteness being in addition to the $325 million and taken from capital.

f. Funds remaining in Trust after the disbursement of Planning Funds and Kick-Start Funds (the "**Capital**"), which will equal $2.41 billion less any amounts determined by the Board to be necessary to account for remoteness as part of the Kick-Start Funds, will be prudently invested for a period of twenty years.

g. Each year, as part of the Band's Annual Entitlement, the Trust will disburse investment income earned from the Capital to the Band Class, while maintaining the Capital in Trust. Each Band will receive a share of annual investment income that is available for distribution. That share will be equal to the Band's proportionate share, adjusted for population and remoteness in accordance with the Disbursement Formula to be set by the Board.

h. Throughout the twenty-year life of the Trust, the Capital will be preserved, meaning that at the end of twenty years, the Trust will consist of $2.41 billion less any amounts determined by the board to be necessary to account for remoteness as part of the Kick-Start Funds, plus any investment income earned over the twenty years that has not been fully disbursed to the Band Class as part of the Annual Entitlement.

i. At the end of twenty years, the Capital plus any undistributed investment income will be disbursed to Band Class members in an amount equal to the Band's proportionate share, adjusted for population and remoteness in accordance with a Disbursement Formula to be set by the Board subject to a further ten year or shorter plan provided to ensure that the funds are utilized in furtherance of one or more of the Four Pillars.[61]

(a) Bands' control over funds

49. It was a central premise of the Four Pillars Trust Model that control over funding and programs intended to repair the harm done by Residential Schools be taken out of the hands of

[61] Grant Settlement Affidavit at para 126, **Settlement Approval MR, Tab 2**.

Government and put in the hands of Indigenous communities.[62] Under the Settlement Agreement, Band Class Members retain complete control over use of the funds to which they are entitled, subject only to the requirement that the funds be used to advance one or more of the Four Pillars.[63]

50. Band Class Members are responsible for meeting certain planning and reporting obligations including:

a. Preparing a ten-year plan prior to receiving the Kick-Start Funds, again after ten years, and again prior to receipt of the final payout after twenty years. These ten-year plans set out the Band's plan for use of the Kick-Start Funds and Annual Entitlement in a manner that furthers the Four Pillars;

b. Preparing yearly reports that provide updates regarding use of the funds, and progress towards achieving the objectives set out in the Band's ten-year plan;

c. At the end of twenty years, preparing a final report setting out the Band's plan for use of its share of the remaining Fund. If it is for an ongoing project, to report on the progress of that project for up to the completion of the project or ten years, whichever is shorter, in order to ensure that the funds are used for the Four Pillars.[64]

51. Band Class Members have the option of deferred distribution by requesting that the funds to which they are entitled be retained in Trust to accrue interest, and to be disbursed at a later date in accordance with that Band Class Member's plan.[65]

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[62] Coon Come Affidavit at para 33, **Settlement Approval MR, Tab 3**.
[63] Grant Settlement Affidavit at para 127, **Settlement Approval MR, Tab 2**.
[64] Grant Settlement Affidavit at para 128, **Settlement Approval MR, Tab 2**.
[65] Grant Settlement Affidavit at para 129, **Settlement Approval MR, Tab 2**.

(b) Governance

52. The Settlement Agreement requires the creation of a not-for-profit entity ("**Not-For-Profit**") in order to act as trustee for the Trust. The Not-For-Profit will be governed by nine directors, all of whom must be Indigenous, and cannot be elected officials of any of the Band Class Members. There will be three directors chosen by Tk'emlúps te Secwe̓pemc, shíshálh Nation, and the Grand Council, five regional directors, and one director chosen by Canada.[66]

53. In order to ensure that the Not-For-Profit and Trust are established quickly, the Settlement Agreement contemplates that the Not-For-Profit be governed by an interim board with a limited mandate focused on ensuring Not-For-Profit is ready to receive and start investing the Fund as soon as possible.[67]

(c) Tax exemption

54. As part of the Settlement, Canada will make best efforts to exempt any income earned by the Trust from federal taxation, including by using measures it has taken in other class action settlements through amendments to paragraph 81(1)(g.3) of the *Income Tax Act*. In other words, income earned by the Trust will be tax-free.[68]

(d) Legal fees separate

55. The Fee Agreement, which was separately negotiated and will be the subject of a separate motion to be heard before this Court, precludes any possibility that the legal fees and disbursements

[66] Grant Settlement Affidavit at para 130, **Settlement Approval MR, Tab 2**.
[67] Grant Settlement Affidavit at para 131, **Settlement Approval MR, Tab 2**.
[68] Grant Settlement Affidavit at para 126(c), **Settlement Approval MR, Tab 2**.

to be paid to Class Counsel and the Three Nations would come from the Settlement Amount, or reduce the compensation for the Class Members.[69]

(iii) Release

56. The terms of the release were of paramount importance for all parties, and were the subject of extensive and prolonged negotiations.[70] Three central concerns animated negotiations from the perspective of the Band Class:

a. ensuring that the release did not release any potential legal claims that Band Class Members may have regarding children from their Bands who died or disappeared while attending IRSs;

b. ensuring that the release was limited in scope to the subject matter of the litigation, and that it did not impact any Aboriginal or Treaty Rights of the Band Class Members or any potential claims related to loss of language and culture that was not related to the IRS policies; and

c. ensuring that the release did not cover the religious institutions who participated in the operation of Residential Schools.[71]

57. The deaths and disappearances of children from their Bands at IRSs were at the forefront of Class Counsel's and the Representative Plaintiffs' considerations throughout the negotiations in the lead-up to the Settlement Agreement.[72] This was especially so because in May 2021, Representative Plaintiff Tk'emlúps te Secwe̓pemc announced the discovery of the remains of 215

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[69] Grant Fee Affidavit at paras 7, 11-12, 16, **Fee Approval MR, Tab 2**; Grant Settlement Affidavit at para 120, **Settlement Approval MR, Tab 2**.

[70] Grant Settlement Affidavit at para 134, **Settlement Approval MR, Tab 2**.

[71] Grant Settlement Affidavit at paras 134-139, **Settlement Approval MR, Tab 2**.

[72] Grant Settlement Affidavit at para 134, **Settlement Approval MR, Tab 2.**

children on the grounds of the Kamloops Indian Residential School. This announcement had a deep and profound impact on the Band Class Members and on the Canadian public as a whole. Several more of announcements of similar findings at Residential Schools sites across the country followed, and the full extent of this tragedy and its impacts on the Class Members remain to be seen.[73]

58. The release was negotiated with these serious concerns in mind. The result is a general release found at subsection 27.01, with a scope that is closely tailored to the subject-matter of the lawsuit, followed by a number of subsections that provide additional clarification about what the Settlement Agreement does not release. Subsection 27.01 states that the release applies to claims:

> … available against Canada that were asserted or could have been asserted in relation to those asserted in the Second Re-Amended Statement of Claim regarding the purpose, creation, planning, establishment, setting up, initiating, funding, operation, supervision, control and maintenance of Residential Schools, the obligatory attendance of Survivors at Residential Schools, the Residential Schools system, and/or any Residential Schools policy or policies.[74]

59. Subsection 27.02 clarifies that the released Claims do not relate to, or include, any claims regarding children who died or disappeared while in attendance at Residential School. Thus, any and all potential claims relating to children who died or disappeared while in attendance at Residential School are unaffected by the Settlement Agreement.[75]

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[73] Grant Settlement Affidavit at para 137, **Settlement Approval MR, Tab 2**.

[74] Grant Settlement Affidavit at para 140, **Settlement Approval MR, Tab 2**.

[75] Grant Settlement Affidavit at para 141, **Settlement Approval MR, Tab 2**.

60. Subsection 27.03 clarifies that the Settlement Agreement does not release any claims that any Band Class Member has regarding Aboriginal or Treaty rights other than claims related to the IRS system.[76]

61. Subjection 27.04 clarifies that the release is provided for the benefit of Canada only, and cannot be relied on by any third party, including any religious organization that was involved in the creation and operation of Residential Schools.[77]

PART III - ISSUES

62. The sole issue on this motion is whether the Court should approve the Settlement Agreement as fair, reasonable, and in the best interests of the Class.

PART IV - THE LAW

A. General principles of settlement approval

63. Rule 334.29 of the *Federal Courts Rules* provides that "a class proceeding may be settled only with the approval of a judge."[78]

64. The test for court approval of a settlement of a class action is whether the settlement is "fair, reasonable and in the best interests of the class as a whole".[79] Whether a settlement is fair, reasonable and in the best interests of the class as a whole is not judged against a standard of perfection or what the Court considers ideal.[80]

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[76] Grant Settlement Affidavit at para 142, **Settlement Approval MR, Tab 2**.

[77] Grant Settlement Affidavit at para 143, **Settlement Approval MR, Tab 2**.

[78] *Federal Courts Rules,* SOR/98-106, rule 334.29(1).

[79] *Wenham v Canada (Attorney General)*, 2020 FC 588 at para. 48, Tab 2 of BoA.

[80] *Toronto Standard Condominium Corporation No 1654 v Tri-Can Contract Incorporated*, 2022 FC 1796 at para. 16, Tab 3 of BoA.

65. In assessing a proposed settlement, the court engages in a stand-alone assessment of the fairness and reasonableness of the terms of the settlement, as well as a comparative analysis 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".[81]

66. To be approved, the proposed settlement must fall within a "zone or range of reasonableness".[82] This approach recognizes that resolution of litigation is not an exact science. A zone of reasonableness allows for a spectrum of possible resolutions, including a mix of terms negotiated between parties at arm's length.

67. The idea of a zone of reasonableness recognizes the reality of the uncertainties of law and fact in any particular case, and the concomitant risks and costs necessarily inherent in taking any litigation to completion.[83]

68. Not every provision in a proposed settlement must meet the test of reasonableness – some will, and some may not. This result reflects inherent compromises required to negotiate settlements.[84]

69. In assessing whether a settlement is reasonable and in the best interests of the class, the court may consider the following non-exhaustive list of factors:[85]

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[81] *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at para. 12, Tab 4 of BoA; see also *Hodge v Neinstein*, 2019 ONSC 439 at para. 42, Tab 5 of BoA.

[82] *Toronto Standard Condominium Corporation No 1654 v Tri-Can Contract Incorporated*, 2022 FC 1796 at para. 16, Tab 3 of BoA.

[83] *Condon v Canada*, 2018 FC 522 at para. 78, Tab 6 of BoA.

[84] *McLean v Canada*, 2019 FC 1075 at para. 77, Tab 7 of BoA.

[85] *Lin v Airbnb, Inc*, 2021 FC 1260 at para. 22, Tab 8 of BoA.

a. the terms and conditions of the settlement;

b. the likelihood of recovery or success;

c. the expressions of support, and the number and nature of objections;

d. the degree and nature of communications between class counsel and class members;

e. the amount and nature of pre-trial activities including investigation, assessment of evidence and discovery;

f. the future expense and likely duration of litigation;

g. the presence of arm's length bargaining between the parties and the absence of collusion during negotiations;

h. the recommendation and experience of class counsel; and

i. any other relevant factor or circumstance.

70. These factors are not applied mechanically. Not all factors need to be present, nor must they be given equal weight in a given case. Their weight will vary according to the circumstances and to the factual matrix of each proceeding.[86]

71. The law of class proceedings, including settlement approval, is to be given a generous, broad, liberal and purposive interpretation in order to promote the goals of class proceedings – namely, judicial economy, access to justice, and behaviour modification.[87]

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[86] *Toronto Standard Condominium Corporation No 1654 v Tri-Can Contract Incorporated*, 2022 FC 1796 at para. 15, Tab 3 of BoA.

[87] *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158 at para. 15, Tab 9 of BoA.

72. While the court must seriously scrutinize a settlement and ensure that "class members' interests are not being sacrificed",[88] settlement through compromise furthers the important objective of judicial economy,[89] and has the practical effect of expediting the compensation of class members, which furthers the objective of access to justice.

73. The purpose of settlement is to avoid the risks of a trial.[90] Accordingly, a proposed settlement must be looked at as a whole, and compared against the alternative of there being no settlement at all, with the parties being forced to resume litigation.[91]

74. It is always necessary to consider that a proposed settlement represents the parties' desire to settle the matter out of court without any admission by either party regarding the facts or regarding the law.[92]

75. Settlements allow the parties to resolve issues for themselves and are "much preferred to a judge made determination with which neither or even one of the parties might be pleased."[93] There is thus a strong presumption that an arm's-length settlement negotiated in good faith should not be readily rejected:[94]

> The parties are, after all, best placed to assess the risks and costs (financial and human) associated with taking complex class litigation to its conclusion. The rejection of a multi-faceted settlement…also carries the risk that the process of negotiation will unravel and the spirit of compromise will be lost.

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[88] *Hodge v Neinstein*, 2019 ONSC 439 at para. 40, Tab 5 of BoA.

[89] *Bancroft-Snell v Visa Canada Corporation*, 2015 ONSC 7275 at para. 49, Tab 10 of BoA.

[90] *Châteauneuf v Canada*, 2006 FC 286 at para. 7, Tab 11 of BoA.

[91] *Riddle v Canada*, 2018 FC 641 at para. 33, Tab 12 of BoA.

[92] *Châteauneuf v Canada*, 2006 FC 286 at para. 7, Tab 11 of BoA.

[93] *Seed v Ontario*, 2017 ONSC 3534 at para. 14, Tab 13 of BoA.

[94] *Manuge v Canada*, 2013 FC 341 at para. 6, Tab 14 of BoA; *Toronto Standard Condominium Corporation No 1654 v Tri-Can Contract Incorporated*, 2022 FC 1796 at para. 17, Tab 3 of BoA.

76. Importantly, the Court's role in assessing a proposed settlement is to accept or reject the settlement as a whole; the Court does not have authority to modify the substantive terms of a settlement. The Court is not permitted to reopen negotiations between the litigants in the hope of improving particular terms of the agreement.[95]

77. Unlike in individual litigation, the overriding concern when assessing a class action settlement is the wellbeing of the entire class as a collective. It is not open to the Court to assess the interests of individual class members in isolation from the whole class.[96]

78. There is a strong presumption of fairness where a settlement has been negotiated at arm's length by experienced counsel.[97] As Horkins J noted, in *Serhan v Johnson & Johnson*:[98]

> [w]here the parties are represented, as they are in this case, by reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

B. Terms and conditions of the settlement

79. The Band Class Settlement Agreement is an historic settlement, notable both in terms of the quantum of the settlement fund, and its unique structure.

80. The key terms and conditions of the settlement are described in detail at paragraph 48 above. The Settlement Agreement is based on the Four Pillars Trust Model first proposed by the

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[95] *Manuge v Canada*, 2013 FC 341 at para. 5, Tab 14 of BoA; *Lin v Airbnb, Inc*, 2021 FC 1260 at para. 23, Tab 8 of BoA.

[96] *McLean v Canada*, 2019 FC 1075 at para. 68, Tab 7 of BoA.

[97] *Tiller v Canada*, 2020 FC 321 at para. 53, Tab 15 of BoA.

[98] *Serhan v Johnson & Johnson*, 2011 ONSC 128 at para. 55, Tab 16 of BoA, as cited in *Heyder v Canada (Attorney General)*, 2019 FC 1477 at para. 64, Tab 17 of BoA.

Representative Plaintiffs in negotiations with Canada in 2017.[99] The proposal put forward by the Representative Plaintiffs was unique, visionary and forward thinking. The collective damage caused by Canada's Residential School policies is deep, complex and intergenerational. Any solution with any chance of success was going to necessarily involve sustained effort by members of the Band Class over many years.[100] The Settlement Agreement is intended to give the Band Class Members the tools and the resources necessary to engage in the difficult and important task of reviving and protecting Indigenous languages and cultures, engaging in community healing, and protecting heritage based upon their own assessment of priorities. The Settlement Agreement also reflects and respects that different Class Members may have different priorities within the Four Pillars and different timelines to achieve their goals, and empowers them to move forward as they see best for their respective communities.[101]

(i) The Settlement Amount

81. The $2.8 billion Fund is the key benefit of the settlement and an appropriate way to resolve the claims of the Band Class. While no amount of money can sufficiently compensate Class Members for their collective losses of languages and cultures, the Fund is large enough to both allow for a significant initial kick-start payment to each of the Class Members, while still preserving a significant amount which can then be invested to generate income for twenty years to fund meaningful language, culture, and heritage initiatives for Class Members.

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[99] Grant Settlement Affidavit at para 83, **Settlement Approval MR, Tab 2; C**oon Come Affidavit at para 28, **Settlement Approval MR, Tab 3**.

[100] Grant Settlement Affidavit at para 122, **Settlement Approval MR, Tab 2**.

[101] Grant Settlement Affidavit at para 122, **Settlement Approval MR, Tab 2**.

(ii) The Trust Model

82. The structure of the Trust, led by regionally representative Indigenous directors appointed collectively by the Class Members and given a mandate to prudently invest the Funds over a twenty-year period, is consistent with the Representative Plaintiffs' vision of the Four Pillars Trust Model originally proposed in 2017. The Four Pillars principles that animate the Settlement Agreement and the resulting Trust are articulated broadly and give Band Class Members control over how to address the particular circumstances of their communities and the unique ways in which the IRS system has harmed them.[102] Such a structure has not been available through existing funding arrangements (such as federal government block grants that have been available to the Bands),[103] cannot be ordered by the Court, and was only achievable through this settlement.

83. The proposed structure of the Trust is designed to minimize taxation of the Fund in order to ensure the maximum amount of any income earned on the money is used for the stated purposes rather than losing a portion of the income to taxes.[104] This feature was included in the Settlement Agreement at the insistence of the Representative Plaintiffs.[105]

(iii) Release provisions

84. The release of liability, which is the key consideration to be given by the Class Members in exchange for the benefits of the Settlement Agreement, was the subject of careful deliberation and extensive negotiation. The Representative Plaintiffs and Class Counsel carefully crafted the release language to release only the claims set out in the Second Re-Amended Statement of Claim,

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[102] Grant Settlement Affidavit at para 126(c), **Settlement Approval MR, Tab 2**.
[103] Feschuk Affidavit, at paras 48-49, **Settlement Approval MR, Tab 5**.
[104] Grant Settlement Affidavit at para 122, **Settlement Approval MR, Tab 2**.
[105] Settlement Agreement at section 24.05, **Settlement Approval MR, Tab 1A**.

while clarifying specific terms that preserve the Class Member's rights of action outside the subject matter of the present claim.

85. It was the announcement made by Representative Plaintiff Tk'emlúps te Secwépemc regarding the unmarked graves of 215 children that brought the issue of the deaths of children while in attendance at Residential Schools back into the public consciousness in May 2021.[106] With the tragedy striking so close to home, the Representative Plaintiffs and Class Counsel were especially sensitive to the potential implications of any release provision on the Band Class Members' ability to bring future actions against Canada regarding unmarked graves at the sites of former IRSs throughout the country. In negotiations, the Representative Plaintiffs and Class Counsel insisted on including an explicit clarification that the release does not apply to any claims arising from children who died or disappeared while in attendance at IRS.[107]

86. Overall, the proposed settlement, "considered in its overall context, provides significant advantages to Class Members which continued litigation might not have achieved."[108]

C. Likelihood of success/recovery

87. Most cases involving historic wrongdoing face a number of evidentiary problems, and the issue is exacerbated where, as here, the case is a complex one involving a lengthy period of time, and many institutions. As this Court observed in approving the *McLean* settlement, "[w]hile there

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[106] Grant Settlement Affidavit at para 137, **Settlement Approval MR, Tab 2**.
[107] Settlement Agreement at section 27.02, **Settlement Approval MR, Tab 1A**.
[108] *Wenham v Canada (Attorney General)*, 2020 FC 588 at para. 60, Tab 18 of BoA.

may be some assurance of some success, its nature and breadth is clearly uncertain."[109] This type of case "cries out for settlement."[110]

(i) Litigation risks

88. The Band Class claims faced a number of significant litigation risks, as detailed below, that helped to inform the ultimate decision to accept Canada's settlement offer. At certification, Justice Harrington noted that the fact that the action was proceeding on a no-cost basis was a "clear advantage to the plaintiffs" as it pertained to the Band Class claim, because the "outcome of the case is far from certain."[111]

(a) Novelty of the claim

89. The novelty of the claim introduced substantial risk. Although such claims have been previously made, Class Counsel is unaware of any court ruling in Canada on a claim brought against a government for collective loss of language and culture suffered by Indigenous groups, and certainly not as a class proceeding.[112]

90. The novelty of the legal claim added substantial risk, which is a factor that has previously been recognized by this Court when approving the Sixties Scoop settlement, the Day Scholars settlement, and the Clean Drinking Water settlement.[113]

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[109] *McLean v Canada*, 2019 FC 1075 at para. 79, Tab 7 of BoA.
[110] *McLean v Canada*, 2019 FC 1075 at para. 79, Tab 7 of BoA.
[111] *Gottfriedson v Canada*, 2015 FC 706 at para. 80, Tab 1 of BoA.
[112] Grant Settlement Affidavit at para 165, **Settlement Approval MR, Tab 2**.
[113] *Riddle v Canada*, 2018 FC 641 at para. 47, Tab 12 of BoA; *Tk'emlúps te Secwépemc First Nation v Canada*, 2021 FC 988 at para. 41, Tab 19 of BoA; *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1415 at para. 68, Tab 20 of BoA.

91. This Court would have had to grapple with a large number of novel and complex issues never considered by a Canadian court before. Those questions included (amongst many others):[114]

a. Is loss of language and culture a compensable harm?

b. Is there a generic right to Indigenous language and culture under s. 35 of the Constitution? Can the Quebec Court of Appeal's decision in *Reference re First Nations Children*[115] (leave to the Supreme Court of Canada granted) be relied upon as an authority for the existence of generic rights common to all Aboriginal peoples without requiring evidence of activities, practices or customs of a specific group?

c. Can First Nations and other Indigenous groups claim for loss of language and culture of the collective as a whole?

d. What entity is the proper rights holder for collective rights like language and culture?

e. Can a court quantify damages for a claim of collective loss of language and culture? If so, how?

92. A loss on any one of these key questions could have been catastrophic to the entire claim.[116]

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[114] Grant Settlement Affidavit at para 166, **Settlement Approval MR, Tab 2**.

[115] *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185, Tab 21 of BoA.

[116] Grant Settlement Affidavit at para 167, **Settlement Approval MR, Tab 2**.

(b) Challenges to commonality

93. As indicated throughout its statement of defence and Trial Brief, Canada has never wavered from its position that there was no policy or pattern of conduct that was applied consistently across all IRSs throughout the entire class period.[117]

94. The Representative Plaintiffs successfully established at certification, on the some-basis-in-fact standard, that there were issues of fact and law capable of common determination. At trial, however, the Representative Plaintiffs faced the more onerous task of proving, on a balance of probabilities, that Canada's liability extended to the entire class throughout the 77-year Class Period by leading evidence of systemic or policy-level wrongdoing by Canada (*i.e.*, that a breach was occasioned through Canada's "purpose, operation, and/or management of the IRS").[118]

(c) Justiciability and compensation

95. There are few Canadian cases in which the loss of language and culture is specifically recognized as grounds for recovery of damages, and there are no precedents in Canada where a Court ordered compensation to an Indigenous government for a collective loss of language and culture.[119] Class Counsel was prepared to make innovative yet principled arguments, but success was not a given.

96. Canada made clear that it would hotly contest whether or not the loss of Indigenous languages and cultures was compensable.[120] Moreover, it intended to argue that damages caused by the IRS have already been significantly compensated under the IRSSA and other IRS class

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[117] Grant Settlement Affidavit at para 169, **Settlement Approval MR, Tab 2**.
[118] Grant Settlement Affidavit at para 170, **Settlement Approval MR, Tab 2**.
[119] Grant Settlement Affidavit at para 173, **Settlement Approval MR, Tab 2**.
[120] Grant Settlement Affidavit at para 174, **Settlement Approval MR, Tab 2**.

action settlement agreements, and that the individual IRS survivors have released Canada from any further IRS-related liability by being class members in these other settlements.

97. Further, Canada intended to argue that any compensation to the Class Members should be reduced to account for the programs established and funded by Canada with the purported goal of supporting Indigenous languages and cultures.[121] While the Representative Plaintiffs disagreed with this approach, it was an argument that the Representative Plaintiffs would have to deal with during the second phase of the common issues trial.

(d) Scope and test for s. 35 Aboriginal rights

98. The Representative Plaintiffs allege that Canada breached the Class Members' section 35 Aboriginal rights to culture and language through the purpose, operation, and/or management of the IRSs. There is significant uncertainty in how a court would deal with this claim in the context of a class action.

99. Recently, in *Reference re First Nations Children*,[122] the Quebec Court of Appeal affirmed a generic right (a right to self-government) finding the right to be common to all Aboriginal peoples without requiring evidence of activities, practices or customs of a specific group, the test initially established in *Van der Peet*, and later modified in *Delgamuukw* to suit claims to title. Class Counsel intended to argue for an application of the approach adopted by the Quebec Court of Appeal, namely that the Aboriginal rights to language and culture were generic rights that were held in common by all Indigenous peoples without requiring evidence of activities, practices or customs

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[121] Grant Settlement Affidavit at para 174, **Settlement Approval MR, Tab 2**.

[122] *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185, Tab 21 of BoA.

of a specific group.[123] Canada, on the other hand, argued that the correct approach to recognizing Aboriginal rights remained the *Van der Peet* test, which would require the Representative Plaintiffs to lead evidence regarding the languages and cultural practices of each Band Class Member in order to establish the existence of an Aboriginal right.[124]

100. The Representative Plaintiffs' position relied significantly on the Quebec Court of Appeal's decision in *Reference re First Nations Children*. The Supreme Court of Canada heard an appeal of that decision in December 2022. The Supreme Court's judgment remains under reserve. If the Supreme Court overturns the Quebec Court of Appeal's decision, the Representative Plaintiffs' strategy regarding the commonality of the determination of the Class's s. 35 rights could be undermined.

(e) Uncertainty regarding damages

101. Perhaps the biggest area of uncertainty and risk, lay in the issue of damages, and how to quantify those damages.[125] The issue of damages would not be determined at the first phase of the common issues trial. Instead, it had been deferred by the bifurcation order to be determined at a later date at the second phase of a common issues trial (if aggregate damages could be assessed) or at individual damages trials for each of the 325 Band Class Members (if aggregate damages could not be assessed).

102. The first issue is whether the collective loss of language and culture by a Band was a compensable harm.[126]

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[123] Grant Settlement Affidavit at para 177, **Settlement Approval MR, Tab 2**.
[124] Grant Settlement Affidavit at para 177, **Settlement Approval MR, Tab 2**.
[125] Grant Settlement Affidavit at para 180, **Settlement Approval MR, Tab 2**.
[126] Grant Settlement Affidavit at para 181, **Settlement Approval MR, Tab 2**.

103. The second issue is how to measure the collective loss of language and culture for purposes of quantifying damages.[127] There are no known precedents in Canada that assist, and accordingly the range of potential damages was very large. [128]

104. The third issue was how to deal with the responsibility of the religious entities that participated in the operation of IRSs. To avoid the complications associated with third-party proceedings, the Representative Plaintiffs abandoned claims for damages for any losses "attributable to the fault or liability of any third-party and for which Canada might reasonably be entitled to claim from any one or more third-party for contribution, indemnity or an apportionment at common law, in equity, or pursuant to the *British Columbia Negligence Act*, RSBC 1996, c 333, as amended."[129]

105. Canada intended to argue that any damages award should be apportioned between it, and the religious entities, and that Canada should only be required to pay damages that are proportionate to its fault.[130] This would involve a court having to determine the relative levels of responsibility as between Canada and the religious entities, and to apportion damages accordingly. This potential apportionment could have a very significant impact on damages actually awarded to, and recoverable by, the Class as well as extensive delay while apportionment was argued and appealed.

106. The fourth issue is the potential impact of causes of loss of languages and culture other than the IRS system. We expected to contend with arguments that any losses of language and

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[127] Grant Settlement Affidavit at para 182, **Settlement Approval MR, Tab 2**.
[128] Grant Settlement Affidavit at para 182, **Settlement Approval MR, Tab 2**.
[129] Grant Settlement Affidavit at para 183, **Settlement Approval MR, Tab 2**.
[130] Grant Settlement Affidavit at para 184, **Settlement Approval MR, Tab 2**.

culture suffered by the Class Members were the result of assimilative forces and would have occurred even without Canada's wrongdoing.[131] While the Representative Plaintiffs' language and culture experts concluded that the IRS system was a major cause of loss of language and culture, they also acknowledged that the IRS system was not the only cause of that loss. The Representative Plaintiffs would need to prove that the damages sought were caused by IRSs and not by other factors.[132] Canada intended to argue that damages should be reduced significantly in light of other potential causes of the harms at issue.

107. A further key outstanding issue is whether it was possible for a court to award aggregate damages to the Band Class.[133] We fully expected that Canada would argue that the variation between, and unique circumstances of, each Band Class Member made it impossible to determine damages in common or in aggregate. We anticipated that Canada would argue that the damages suffered by each Band Class Member as a result of the IRS system had to vary based on the conditions, standards and practices in the IRS in question; how many children from the Band Class Member attended IRSs; the location of the IRS (*i.e.*, in or outside of the community); the size of the Band; and the location of the IRS (*i.e.*, whether it was located remotely, or in proximity to other populations).[134]

108. If a court concluded that it was not possible to determine aggregate damages, then the damages would need to be determined on a Class Member-by-Class Member basis through expensive and protracted individual trials in order to prove the damages specifically suffered by each Band.[135] Even if aggregate damages were awarded, it was possible that the court may

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[131] Grant Settlement Affidavit at para 185, **Settlement Approval MR, Tab 2**.
[132] Grant Settlement Affidavit at para 186, **Settlement Approval MR, Tab 2**.
[133] Grant Settlement Affidavit at para 187, **Settlement Approval MR, Tab 2**.
[134] Grant Settlement Affidavit at para 187, **Settlement Approval MR, Tab 2**.
[135] Grant Settlement Affidavit at para 188, **Settlement Approval MR, Tab 2**.

determine that there remained individual damages that would need to be assessed on an individual basis. These individual damages inquiries would necessitate hundreds of individual hearings, on complex historical evidence, thereby further delaying compensation for years if not decades.[136] It would also likely require a staggering amount of court resources to manage.

109. Although Class Counsel and the Plaintiffs take the position that all of these litigation risks were, and are, surmountable, a holistic consideration of the litigation risks and pitfalls demonstrates that the settlement is a compromise which is a good result for the Class, and which therefore should receive court approval.

D. Communication with Class Members

110. Since the action was certified in 2015, Class Counsel and the Representative Plaintiffs have been in regular and active communication with prospective and opted-in members of the Band Class. Significant events such as certification, the reopening and extension of the opt-in period, the start of trial, and the conclusion of a settlement-in-principle prompted more intensive communication efforts.[137]

111. Between the execution of the Settlement Agreement and the scheduled Settlement Approval Hearing, Class Counsel led a notice campaign that has been "robust, clear and accessible".[138] Notice of the proposed settlement was distributed to the Class Members in accordance with Notice Plan approved by this Court's January 20, 2023 order.[139] Class Counsel disseminated notice directly to all 325 Class Members by mail, email, fax and, if necessary, phone,

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[136] Grant Settlement Affidavit at para 188, **Settlement Approval MR, Tab 2**.

[137] Affidavit of Jeanine Alphonse, sworn February 22, 2023 ("Alphonse Affidavit"), at paras 3-5, 7-15, 16-19, **Settlement Approval MR, Tab 6**.

[138] *Tk'emlúps te Secwépemc First Nation v Canada*, 2021 FC 988 at para. 72, Tab 19 of BoA.

[139] Alphonse Affidavit at para 23, **Settlement Approval MR, Tab 6**.

and answered the questions of all representatives and legal counsel for Class Members who posed questions.[140]

E. Class Members' expressions of support or objection

112. In total, as of February 21, 2023, Class Counsel has received five written statements from Class Members regarding the Settlement Agreement, four of which were statements of support, and one of which was a statement of objection.[141]

(i) Elsipogtog First Nation

113. In supporting the Settlement Agreement, Elsipogtog First Nation, located in New Brunswick, describes the damage done to Mi'kmaq language, and to Mi'kmaq culture, spirituality and traditions by attendance of its members at Shubenacadie Indian Residential School in Nova Scotia. Sagamao Arren Sock, Chief of Elsipogtog First Nation states:

> Elsipogtog supports the Band Class Reparations Settlement and believes that the four pillars named in Schedule F, namely, the revival and protection of Indigenous language, the revival and protection of Indigenous language culture, protection and promotion of heritage and wellness for Indigenous communities and people will give rise to a measure of needed repair over time.
>
> Language revitalization and the establishment of Mi'kmaq language and cultural programs are very important to the essence of Elsipogtog in current times, and to our future. Elsipogtog First Nation sees the Band Class Reparations Settlement as a set of instruments to commence collectively healing harms done to the community and to revitalize the deeply affected cultural knowledge base.

[140] Alphonse Affidavit at paras 24-27, **Settlement Approval MR, Tab 6**.

[141] Band Class Members' Written Statements, Exhibit "K" to the Alphonse Affidavit at para 23, **Settlement Approval MR, Tab 6**.

(ii) Star Blanket Cree Nation

114. Chief Michael Starr submitted a statement of support on behalf of Star Blanket Cree Nation, located in Saskatchewan, which states in part:

> The Star Blanket Cree Nation is looking forward to developing a long-term strategic plan utilizing the four pillars of this class action settlement. This longterm funding will enhance and support on going Plains Cree Language revitalization and sustainability into the future. With only one fluent Cree speaker remaining in our nation, this work will be vitally important.

(iii) Taku River Tlingit First Nation

115. Taku River Tlingit First Nation's statement emphasizes deep hurt and devastation caused by imposition of Residential Schools. It speaks of the social harm felt by Taku River Tlingit First Nation in the form of crumbling families and addiction. Spokesperson Thom writes:

> While these settlement funds serve as a first step towards reconciling the dark history between First Nations people and non-First Nations people in Canada, we must remember that reconciliation is not about forgetting the lasting impact of these schools on our community and our people, but about acknowledging the true extent of the wrongfulness of what occurred at these schools without using euphemisms and soft language to minimize what happened. True reconciliation can only occur without censoring our history so that present and future generations can learn from the past and break the cycle of historical trauma, violence and cultural suppression so that the evil inflicted on First Nations people is never again repeated.

(iv) Tootinaowaziibeeng Treaty Reserve #292

116. Tootinaowaziibeeng Treaty Reserve #292 "fully supports the proposed settlement between the Representative Plaintiff Bands and the Government of Canada". Like the other bands that submitted statements in support, Tootinaowaziibeeng Treaty Reserve #292 notes the irreparable harm caused by Residential Schools: "There is not a corner of our community that has not been touched with the awfulness that Residential School was and remains to this day".

117. As Jessica Ironstand-Nelson writes on behalf of her Nation:

> With funding meant for Cultural and Language revival and protection, wellness for our community and its members, and promotion of Heritage, there can be great change achieved. Our people can begin to revert to the old ways that were stolen from us and we can make a better community for our children and the future generations.

(v) Wauzhushk Onigum Nation (Rat Portage) #153

118. The sole statement in opposition to the settlement is from Waushushk Onigum Nation. Waushushk Onigum has also filed a motion with the Federal Court seeking an order amending the Certification Order allowing Waushushk Onigum a period of up to one year in which to opt-out of the Action.

119. Waushushk Onigum's primary position is that Canada should clarify in a legally binding way that the Release will in no way affect Wauzhushk Onigum's ability to bring a claim arising out of the discovery of 171 potential burial sites in the vicinity of St. Mary's Indian Residential School. If Canada can provide certainty in a legally binding form on this point, Wauzhushk Onigum will not oppose the settlement. If such clarification is not provided, Wauzhushk Onigum opposes the settlement on the grounds that:

a. the release provided in the Settlement Agreement unreasonably covers claims that are outside the scope of the Second Re-Amended Statement of Claim, namely by barring a claim that may be brought by Wauzhushk Onigum against Canada as a result of the discovery of the 171 potential graves at St. Mary's IRS; or

b. in the alternative, it does not permit Wauzhushk Onigum a period in which to rescind its decision to opt in.

120. Class Counsel, and the Representative Plaintiffs, were alive to Class Member concerns surrounding the announcement of findings of unmarked graves at IRS, and the importance of negotiating a release that did not impact the rights of the Class Members regarding those unmarked graves.[142]

121. In fact, the 2021 discovery – by the Representative Plaintiff Tk'emlúps te Secwépemc – of the remains of 215 children on the grounds of the Kamloops Indian Residential School first brought the issue of unmarked graves at Residential Schools back into the national spotlight.[143] As a result, Class Counsel steadfastly negotiated for a specific clarification in the release to ensure that it did not release "any claims regarding, children who died or disappeared while in attendance at Residential School".[144] In Class Counsel's view, and in accordance with the intentions of the parties to the Settlement Agreement, this exclusion from the release means that no claim brought by a Class Member in respect of the unmarked graves of children who died while attending an IRS is released by the Settlement Agreement.

F. Amount and nature of pre-trial activities

122. The proposed settlement was concluded literally on the eve of the first phase of the common issues trial after over ten years of litigation. Certification was hard fought between the parties in 2015. Over 120,000 documents had been exchanged and reviewed as part of the discovery process, witnesses had been identified and prepared for direct and cross-examination, and the Plaintiffs had substantially drafted their closing arguments by the commencement date of the trial.[145] Thousands of hours of substantive legal work had been done, on both sides, in order to

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[142] Grant Settlement Affidavit at paras 136-138, **Settlement Approval MR, Tab 2**.

[143] Grant Settlement Affidavit at paras 137, **Settlement Approval MR, Tab 2**.

[144] Settlement Agreement at section 27.02, **Settlement Approval MR, Tab 1A**.

[145] Grant Fee Affidavit at paras 60-61, **Fee Approval MR, Tab 2**.

ready this litigation for trial. Up until September 2, 2023, Class Counsel, the Representative Plaintiffs, and DSEC had little reason to believe that Canada intended to do anything other than to vigorously defend the action for the full ten weeks that were scheduled for the first phase of the trial, and beyond.[146]

123. The amount of preparatory work that had already been done in the present action is remarkable, as common issues trials are uncommon in Canada. The amount and nature of pre-trial activities completed especially stands in contrast to recent class action settlements that have been approved by this Court, including the ones listed in the chart below.

Case	Statement of Claim	Certification	Year / Stage at Settlement
Tataskweyak Cree Nation[147]	2019	2020 (on consent)	2021 (prior to scheduled summary judgment motion)
Tiller[148]	2017	2019 (concurrent with settlement)	2019 (prior to discovery)
Heyder[149]	2016	2019 (concurrent with settlement)	2019 (prior to discovery)
Toth[150]	2014	2016 (on consent)	2018 (mid-discovery)
McCrea[151]	2012	2014 (contested)	2018 (prior to discovery)
McLean[152]	2016	2018 (on consent)	2019 (prior to discovery)

[146] Grant Settlement Affidavit at para 72, **Settlement Approval MR, Tab 2**.
[147] *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1415, Tab 20 of BoA.
[148] *Tiller v Canada*, 2020 FC 321, Tab 15 of BoA.
[149] *Heyder v Canada (Attorney General)*, 2019 FC 1477, Tab 17 of BoA.
[150] *Toth v Canada*, 2019 FC 125, Tab 22 of BoA.
[151] *McCrea v Canada*, 2019 FC 122, Tab 23 of BoA.
[152] *McLean v Canada*, 2019 FC 1075, Tab 7 of BoA.

124. At the time of settlement, the parties were already completely immersed in the issues. Class Counsel had already reviewed all of the available evidence and had the opportunity to review Canada's trial brief and knew the strengths and weaknesses of their respective cases well as possible.[153]

G. Future expense and likely duration of litigation

125. Accepting Canada's offer will mean that if the settlement is approved, the $2.8 billion fund could be transferred as soon as 90 days after the Implementation Date. This could be as soon as Spring 2023. Distribution of the Planning Funds would follow shortly thereafter, allowing the Band Class to start the process of revitalization in 2023.[154]

126. On the other hand, continuing with litigation would mean that it would be another several years and possibly even another decade at great cost before Band Class Members would receive any compensation, even if fully successful.[155] The Band Class Members would have to await the uncertain result of a lengthy, vigorously-contested first phase of the common issues trial, followed by a similarly lengthy second phase of the common issues trial, likely each followed by appeals, and then likely by individual assessments of each Band Class Member's damages – a process that in total would take many years.[156]

127. After having already spent over a decade on this litigation, further delays may cause irreversible harm to some members of the Band Class. Since this litigation began, the Band Class has lost important leaders and elders in their respective communities.[157] Further delays would

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[153] See *Silver v Imax Corp*, 2016 ONSC 403 at para. 24, Tab 24 of BoA.
[154] Grant Settlement Affidavit at para 192, **Settlement Approval MR, Tab 2**.
[155] Feschuk Affidavit at para 34, **Settlement Approval MR, Tab 5**.
[156] Grant Settlement Affidavit at para 193-198, **Settlement Approval MR, Tab 2**.
[157] Feschuk Affidavit at para 35, **Settlement Approval MR, Tab 5**.

mean continuing to lose language speakers and knowledge keepers whose knowledge will be key to the revitalization efforts that the Settlement will help fund. Additionally, there is the time-value of money. Delays in transferring the $2.8 billion settlement fund to the Trust would also cost the Class Members approximately half a million dollars a day in foregone investment income that could have otherwise gone towards revitalization projects.[158] A $2.8 billion settlement now is significantly more valuable to the Class than a $2.8 billion judgment several years from now.

128. In circumstances like these, "it is in the interests of the class members to have a timely and prompt payment."[159] The likely duration of the litigation strongly favours settlement approval.

H. Arm's-length bargaining/dynamics of negotiations

129. A detailed description of the vigorous negotiations with Canada that took place over the span of six years is found in the Settlement Approval Affidavit of Peter Grant at paragraphs 77-79 and 95. Those negotiations started in 2016, and continued up until after the scheduled start of the common issues trial. At various points during that long negotiation history, negotiations broke down and the Parties returned to active litigation and preparation for a very adversarial trial.

130. At every step from certification to the trial scheduled for September 2022, Canada took aggressive legal positions, denying virtually everything and making virtually no concessions or admissions. Even as settlement negotiations were ongoing, Canada delivered a trial brief that reflected its entrenched positions on the common issues.[160]

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[158] Grant Settlement Affidavit at para 192, **Settlement Approval MR, Tab 2**.

[159] *McCarthy v Canadian Red Cross Society*, [2001] OJ No 2474 at para. 18, Tab 25 of BoA.

[160] Grant Settlement Affidavit at para 73, **Settlement Approval MR, Tab 2**.

131. "Given the record in this case, the aggressive litigation posture of Canada and the dogged determination of the Class" there can be no doubt that the bargaining was arm's length, in the absence of collusion.[161] The circumstances around the negotiations make it such that the settlement benefits from a strong presumption of fairness.[162]

I. Recommendation of Class Counsel

132. Class Counsel's recommendations are given substantial weight in the process of approving a class action settlement.[163]

133. Class Counsel are a very experienced group of class action and Aboriginal law lawyers. Not only do they have formidable subject matter expertise and knowledge, but they were all intimately involved with IRSSA,[164] the most closely related precedential case that directly gave rise to this litigation.

134. Peter Grant has been almost exclusively practising Aboriginal law since 1976, with a focus on litigation and negotiation on behalf of Indigenous clients. He has litigated numerous and often precedent-setting cases related to Aboriginal title, Aboriginal rights, and treaty rights, including eleven Supreme Court of Canada appearances in seminal cases such as *Delgamuukw v British Columbia* and *Blackwater v Plint et al, FSM v Clarke* and *Aleck v Clarke*.

135. Diane Soroka has practiced for over 45 years as a lawyer for various First Nations and Indigenous organizations in Quebec and British Columbia on issues related to the recognition of Aboriginal and Treaty rights. She has represented First Nations individuals as plaintiffs and

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[161] *Wenham v Canada (Attorney General)*, 2020 FC 588 at paras. 73, 75, Tab 18 of BoA.

[162] *Tiller v Canada*, 2020 FC 321 at para. 53, Tab 15 of BoA.

[163] *Lin v Airbnb, Inc*, 2021 FC 1260 at para. 62, Tab 8 of BoA.

[164] Grant Settlement Affidavit at paras 19, 148-149, **Settlement Approval MR, Tab 2**.

interveners in litigation related to abuses at Indian Residential Schools since the 1990s. She has acted for the Grand Council of the Crees since 1975, and joined the Class Counsel team when the Grand Council of the Crees began supporting the prosecution of the Action in 2016.[165]

136. John Kingman Phillips, K.C. is a trial lawyer with a broad legal practice that includes class actions, corporate/commercial litigation, administrative law, and criminal law. He frequently appears in superior courts, Federal Court and courts of appeal across Canada, and has appeared at the Supreme Court of Canada. Mr. Phillips was counsel to the then National Chief Phil Fontaine and the Assembly of First Nations in *Fontaine v Canada*, a multi-jurisdictional class action brought on behalf of Indian Residential School survivors, that culminated in the IRSSA.[166]

137. Class Counsel strongly recommend the Settlement Agreement as being in the best interests of the Band Class based on their collective expertise and knowledge after litigating this case for more than a decade, as well as their extensive experience in class action litigation and Aboriginal law litigation in general.[167] Class Counsel's recommendation is based on a full appreciation of the litigation and the risks of trial.

138. The Settlement Agreement was ultimately the result of lengthy, good faith, arm's-length, and tough bargaining that took place between 2016 and 2023. By the time of the most recent round of negotiations, Class Counsel team had established a good and forthright relationship with Mr. Isaac, which allowed the parties to get straight to the heart of the key terms of a settlement.[168]

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[165] Grant Settlement Affidavit at para 148, **Settlement Approval MR, Tab 2**.
[166] Grant Settlement Affidavit at para 149, **Settlement Approval MR, Tab 2**.
[167] Grant Settlement Affidavit at para 156, **Settlement Approval MR, Tab 2**.
[168] Grant Settlement Affidavit at para 153, **Settlement Approval MR, Tab 2**.

139. Class Counsel's recommendation benefited from very involved Representative Plaintiffs. Unlike in a typical class action, the Representative Plaintiffs in the ongoing Band Class action were the First Nations themselves. These Representative Plaintiffs were also assisted by the involvement of the GCC through its participation on the DSEC. Accordingly, the Band Class Representative Plaintiffs brought with them a level of professionalism, institutional knowledge, and understanding that is not typical of representative plaintiffs in most class actions.[169]

140. The Representative Plaintiffs and the DSEC actively participated in all negotiations from 2016 to 2022, with strong views regarding what must and must not be included in the ultimate agreement.[170] The Settlement Agreement fully incorporated the Four Pillars Trust Model that had been developed and proposed by the Representative Plaintiff and DSEC in 2017. All terms of the Settlement Agreement that deal with the proposed structure, including the Trust and its length, the Four Pillars, the Disbursement Policy, the Investment Policy, governance of the Not-For-Profit and restrictions on use of the fund were proposed by Class Counsel on instruction from the Representative Plaintiffs, and accepted by Canada.[171]

141. The Settlement Agreement is signed by former Chief Shane Gottfriedson and acting Kúkpi7 Joshua Gottfriedson on behalf of Tk'emlúps te Secwe̓pemc, and by former Chief Garry Feschuk and hiwus Warren Paull from shíshálh Nation.[172] The Settlement Agreement was signed by the Representative Plaintiffs after full consideration of the Settlement Agreement and the

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[169] Grant Settlement Affidavit at para 160, **Settlement Approval MR, Tab 2**.

[170] Grant Settlement Affidavit at para 161, **Settlement Approval MR, Tab 2;** Coon Come Affidavit at para 36, **Settlement Approval MR, Tab 3;** Feschuk Affidavit at para 38, **Settlement Approval MR, Tab 5**; Gottfriedson Affidavit at para 54, **Settlement Approval MR, Tab 4**.

[171] Grant Settlement Affidavit at para 154, **Settlement Approval MR, Tab 2**.

[172] Grant Settlement Affidavit at para 162, **Settlement Approval MR, Tab 2**.

recommendations of Class Counsel, by Chief and Council of both Tk’emlúps te Secwépemc and shíshálh Nation.[173]

J. Conclusion

142. The Settlement Agreement, through the incorporation of the Four Pillars as its foundation, acknowledges the harm done to the Band Class by the IRS system and allows the Band Class Members to determine their own projects to address the collective damage to their languages and cultures as a result of the IRS policy within their own communities.

143. The alternative to approving this settlement would be that the Band Class Members go on to trial, and then possible appeals. Not only would further years of litigation delay compensation, it would result in a judgment that could not possibly achieve the key benefits of the proposed – the establishment of an Indigenous-directed trust to fund meaningful language, culture and heritage initiatives for the benefit of the Class Members.

144. The Band Class claim has been ably prosecuted by Class Counsel to date. Having fully canvassed the litigation risks and the available evidence, Class Counsel now recommend the proposed settlement.

145. After over a decade of fighting, it is time for the Band Class to receive its due compensation.

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[173] Coon Come Affidavit at paras 36-37, **Settlement Approval MR, Tab 3;** Feschuk Affidavit at paras 37-39, **Settlement Approval MR, Tab 5**; Gottfriedson Affidavit at para 54, **Settlement Approval MR, Tab 4.**

PART V - ORDER SOUGHT

146. The Plaintiffs respectfully request that this Court make an Order in accordance with the relief set out in the Draft Order at Tab 7 of the Plaintiffs' Motion Record for Settlement Approval.

147. In the event that the Settlement Agreement is not approved, the Plaintiffs respectfully request that this Court make an Order declaring that the parties are all restored, without prejudice, to their respective positions as such existed on September 1, 2023, prior to commencement of settlement negotiations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of February, 2023.

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John Kingman Phillips, K.C.

Peter R. Grant

Diane Soroka

W. Cory Wanless

Jonathan Schachter

Flora Yu

SCHEDULE "A" – JURISPRUDENCE

Tab	Title	Pinpoints
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2	*Wenham v Canada (Attorney General)*, 2020 FC 588	48
3	*Toronto Standard Condominium Corporation No 1654 v Tri-Can Contract Incorporated*, 2022 FC 1796	15-17
4	*Brown v Canada (Attorney General)*, 2018 ONSC 3429	12
5	*Hodge v Neinstein*, 2019 ONSC 439	40, 42
6	*Condon v Canada*, 2018 FC 522	78
7	*McLean v Canada*, 2019 FC 1075	68, 77, 79
8	*Lin v Airbnb, Inc*, 2021 FC 1260	22-23, 62
9	*Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158	15
10	*Bancroft-Snell v Visa Canada Corporation*, 2015 ONSC 7275	49
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14	*Manuge v Canada*, 2013 FC 341	5-6
15	*Tiller v Canada*, 2020 FC 321	53
16	*Serhan v Johnson & Johnson*, 2011 ONSC 128	55
17	*Heyder v Canada (Attorney General)*, 2019 FC 1477	64
18	*Wenham v Canada (Attorney General)*, 2020 FC 588	60, 73, 75
19	*Tk'emlúps te Secwépemc First Nation v Canada*, 2021 FC 988	41, 72
20	*Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1415	68
21	*Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185	
22	*Toth v Canada*, 2019 FC 125	
23	*McCrea v Canada*, 2019 FC 122	
24	*Silver v Imax Corp*, 2016 ONSC 403	24
25	*McCarthy v Canadian Red Cross Society*, [2001] OJ No 2474	18

SCHEDULE "B" – LEGISLATION

***Federal Courts Rules*, SOR/98-106**

Settlements

Approval

334.29 (1) A class proceeding may be settled only with the approval of a judge.

Binding effect

(2) On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding.

Règlement

Approbation

334.29 (1) Le règlement d'un recours collectif ne prend effet que s'il est approuvé par un juge.

Effet du règlement

(2) Il lie alors tous les membres du groupe ou du sous-groupe, selon le cas, à l'exception de ceux exclus du recours collectif.