Court File Nos. T-402-19 / T-141-20 / T-1120-21

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

REPLY MEMORANDUM OF FACT AND LAW
(CLAIMS PROCESS APPROVAL)

June 7, 2024

SOTOS LLP
180 Dundas Street West, Suite 1200
Toronto, ON M5G 1Z8

David Sterns / Mohsen Seddigh
[redacted]

Tel: 416-977-0007
Fax: 416-977-0717

KUGLER KANDESTIN LLP
1 Place Ville-Marie, Suite 1170
Montréal, QC H3B 2A7

Robert Kugler
[redacted]

Tel: 514-878-2861
Fax: 514-875-8424

MILLER TITERLE + CO.
300 - 638 Smithe Street
Vancouver BC V6B 1E3

Joelle Walker
[redacted]

Tel: 604-681-4112
Fax: 604-681-4113

Lawyers for the plaintiffs, Xavier Moushoom, Jeremy Meawasige (by his litigation guardian, Jonavon Joseph Meawasige), Jonavon Joseph Meawasige, and Zacheus Joseph Trout

NAHWEGAHBOW, CORBIERE
5884 Rama Road, Suite 109
Rama, ON L3V 6H6

Dianne G. Corbiere
[redacted]

Tel: 705.325.0520
Fax: 705.325.7204

FASKEN MARTINEAU DUMOULIN
55 Metcalfe St., Suite 1300
Ottawa, ON K1P 6L5

D. Geoffrey Cowper, Q.C.
[redacted]

Tel: 613.236.3882
Fax: 613.230.6423

Lawyers for the plaintiffs Assembly of First Nations, Ashley Dawn Louise Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson by his Litigation Guardian, Carolyn Buffalo, Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson

TO: **PAUL B. VICKERY**
3 Forsyth Lane
Ottawa ON K2H 9H1

Paul B. Vickery

Tel: 613-402-4957

Lawyers for the Defendant

AND TO: **CLARKE CHILD AND FAMILY LAW**
36 Toronto Street Suite 950
Toronto, ON M5C 2C5

Sarah Clarke
[redacted]

Tel: (416) 260-3030

CONWAY BAXTER WILSON LLP/S.R.L.
400-411 Roosevelt Ave
Ottawa, ON K2A 3X9

Thomas G. Conway
[redacted]
David Taylor
[redacted]
Logan Stack
[redacted]

Rel: 613.780.2002

Lawyers for the Caring Society

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I. OVERVIEW

1. The plaintiffs and the Settlement Implementation Committee have invited the Caring Society's constructive contribution to the implementation process, and they continue to welcome the Caring Society's input within the parameters of the Final Settlement Agreement, as this Claims Process and the important work that lies ahead is finished.[1]

2. Regarding the Claims Process before this Honourable Court, the plaintiffs opened the door to the Caring Society to attend meetings and be included in the extensive, year-long deliberation that has resulted in the Claims Process.[2]

3. The Caring Society raises objections that would effectively override the phased approach adopted in the Claims Process that resulted from decisions made with a view to the best interest of the entire class on the basis of availability of data, expected completion timelines, and the considered weighing of risks by the plaintiffs. The Caring Society's conditions on the approval of the Claims Process would delay and potentially disrupt the distribution of funds to over 149,000 identified Removed Child Class Members, and their respective Caregiving Parents and Caregiving Grandparents.

4. The orders sought by the Caring Society in its responding memorandum of fact and law should be denied, because:

(a) The Caring Society has no standing to seek orders of the Court on a motion arising from the Final Settlement Agreement;

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[1] Letter to Caring Society dated February 2, 2024, Supplemental Responding Motion Record [Supp. Responding MR] at page 140.
[2] Affidavit of Joelle Gott sworn April 12, 2024 at para 8.

(b) The orders sought are inconsistent with the terms of the Final Settlement Agreement and unavailable as a matter of principle; and

(c) Regardless, the orders sought are inappropriate, premature, and superfluous.

II. REPLY SUBMISSIONS

A. The Caring Society lacks standing to seek orders

5. The Caring Society does not represent any class member in this proceeding. Its standing within this settlement and proceeding is purely contractual. It stems from the Final Settlement Agreement, which carefully delineates the Caring Society's participation rights, while safeguarding the interests of the class. Article 22.05 of the Final Settlement Agreement states:

> 1) The Caring Society **will have standing to make submissions** on any applications brought for Court approval by the Settlement Implementation Committee or the Parties pertaining to the administration and implementation of this Agreement after the Settlement Approval hearing, including approval of the Claims Process and distribution protocol to the extent that issues impact the rights of the following classes:
>
> > (a) Removed Child Class Members placed off-Reserve as of and after January 1, 2006, and Removed Child Family Class Members in relation to Children placed off-Reserve as of and after January 1, 2006, including deceased members of these classes;
> >
> > (b) Kith Child Class Members and Kith Family Class Members, including deceased members of these classes; and
> >
> > (c) Jordan's Principle Class Members and Jordan's Principle Family Class Members, including deceased members of these classes.
>
> 2) The Caring Society is entitled to **notice and receipt of all applications** brought in relation to matters in Article 22.05(1) in advance of any hearing before the Court in keeping with **the timeline requirements under the *Federal Courts Rules***. [emphasis added]

6. The Court previously heard a contested application by the Caring Society to be granted intervener party status in this case. The Court dismissed that application. Associate Judge Molgat found in reasons that remain equally valid today:

> Considering the first criteria set out in *Sport Maska*, the Caring Society is a non-profit organization—it is not a member of the class of individuals who suffered as a result of Canada's discrimination on whose behalf these proceedings were brought. Nor does the Caring Society act for class members. Yet it is essentially seeking to make submissions on behalf of the class (or a sub-set of them) whose interests are already represented by Class Counsel and the Representative Plaintiffs.[3]

7. Article 22.05, cited above, intentionally does not allow the Caring Society to bring applications or to seek orders of its choosing regardless of impact on the class.

8. The only other contractual basis for the Caring Society's involvement in this matter is the separate settlement agreement that the Caring Society concurrently negotiated with Canada and the Assembly of First Nations, which delineates its limited scope of interest.[4]

9. That side agreement was not part of the Final Settlement Agreement approved by this Court, and the representative plaintiffs are not parties to it. That side agreement did, however, further clarify the Caring Society's role within this proceeding:

> As the **Caring Society is not a party to the Consolidated Class Action**, the Caring Society's involvement in **reviewing and commenting** on the Agreement is **focused on the victims identified by the Tribunal** for compensation pursuant to the Canadian Human Rights Act within this proceeding.[5]

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[3] Reasons dated September 23, 2022 at para 19.
[4] Minutes of Settlement with the Caring Society (April 19, 2023).
[5] Minutes of Settlement with the Caring Society, Article 1.

> Canada will pay **$5 million to the Caring Society** to facilitate the Caring Society's **participation** in the implementation and administration of the Agreement over the approximately twenty (20) year term of the Agreement on a non-profit basis.[6] [emphasis added]

10. As such, the side agreement that the Caring Society signed:

(a) acknowledges the Caring Society's non-party status;

(b) restricts the Caring Society's role to "reviewing and commenting";

(c) restricts the Caring Society's interest to a subset of the class of the Caring Society's choosing only; and

(d) allocates a block $5-million fee for the Caring Society's participation in these motions.

11. As the Final Settlement Agreement makes clear, "the Claims Process will be within the **sole discretion of the Plaintiffs**, subject to the approval of the Court"[7] and the plaintiffs "**may** seek input from the Caring Society".[8] Although the plaintiffs went beyond this and welcomed the Caring Society into the fold throughout this months-long process, this invitation did not extend to granting party status to the Caring Society or permitting it to act as a self-appointed guardian of the class.

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[6] Minutes of Settlement with the Caring Society, Article 8.
[7] Article 5.01(1).
[8] Article 5.01(1) [emphasis added].

B. The Caring Society's requested orders are inappropriate

i. "Companion Claims Process"

12. The Caring Society's request for a companion Claims Process as a condition to the approval of this stage of the claims process is premature, ill-advised, and should be rejected for the following three reasons.

13. First, the order sought is based on speculation about the existence of "Removed Child Class Members who have not been identified on the ISC Database, but are otherwise eligible for compensation under the FSA".[9] No serious concern arises in this respect given that:

(a) the Claims Process does not deny eligibility to any claimant who is not identifiable on the ISC Database, which is still being completed;

(b) no claimant is delayed in making a claim; and

(c) the number of unique individuals on the still incomplete ISC Database already far exceeds the estimated class size.

14. The Caring Society's submissions seek to sow doubt about the Claims Process and the ISC Database based on speculation. This approach risks creating mistrust in members of the class[10] when there is no basis for concern.

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[9] Responding Memorandum of Fact and Law of the Caring Society of Canada at para 109.
[10] *Moushoom v. Canada (Attorney General)*, 2022 FC 1212 para 13.

15. Second, the premise underlying the "companion Claims Process" cannot be verified until the ISC Database is completed. The actual evidence before the Court—apart from speculation—is the evidence of Ms. Corbiere in her affidavits[11] and on cross-examination:

> A. I don't agree with that either because there's a lot of line items for individual persons. There could be entries so they -- they might -- they're going to be on the database so I don't agree with that. I think that once we get to the end of getting the database we'll be in a better position, you know, to be able to make the statement that you're making now.
>
> Q. But if a child was in care for one month and their date of birth and name was incorrectly provided to the Federal Government, is it not possible that that child's name and date of birth will then not be on the ISC database?
>
> A. Again, I'm not sure that they're not on the ISC database. We are not complete in this process.[12]

16. Third, the Caring Society disregards the phased approach to the Claims Process embedded in the Final Settlement Agreement[13] and approved by the Court. It seeks to substitute its own inappropriate and unrealistic timeline on the process regardless of the circumstances in which the parties are working to implement the FSA.

17. As embedded in the Claims Process itself, the Settlement Implementation Committee will assess the circumstances with the benefit of concrete facts after the ISC Database is complete, and will determine at that time what alternative process is advisable, if any is necessary.[14]

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[11] Affidavit of Dianne Corbiere affirmed April 15, 2024 ("**Corbiere Affidavit**") at para 6; Reply Affidavit of Dianne G. Corbiere, Affirmed May 13, 2024 ("**Reply Affidavit**") at para 30.
[12] Cross-examination of Dianne Corbiere, Qs 36-37, Supp. Responding MR at page 15-16.
[13] Articles 1.01 (Claims Process), 5.01(10)
[14] Claims Process, s 4.7.

ii. Rushed Approach to Abuse

18. The Caring Society seeks to rush a matter of significant sensitivity and potential harm for the class, namely caregiver abuse. This sensitive issue is of great concern to the representative plaintiffs, the First Nations-led Settlement Implementation Committee appointed by the Court, class counsel, and to all stakeholders.

19. Having been invited to and having attended the meetings where the Claims Forms were reviewed and discussed word by word, and having provided no such suggestion at the time, the Caring Society now requests an order of this Court that:

> The Claims Form should also include statements about the provisions for Abuse in the FSA and an option for Removed Child Class Members to be kept informed about the process.[15]

20. The Caring Society phrases the request as the "option" of disclosing that the Removed Child Class Members were victims of abuse, without however explaining what the administrator or Third-Party Assessor is to do with such a disclosure:

(a) Is the administrator required to take the Removed Child Class Member's word?

(b) Is the administrator required to inform the Removed Child Family Class Member that their claim will be denied based on the Removed Child's disclosure of Abuse?

[15] Responding Memorandum of Fact and Law of the Caring Society of Canada at para 97.

(c) If the Removed Child Family Class Member denies that there was Abuse, how will there be a determination of whether Abuse occurred, when it is an essential condition of the FSA that no Removed Child Class Member will be asked to testify?

21. These are merely some questions that require further thought and consultation before the Removed Child Family Class Members' claims are to be determined by the administrator. These issues have been the subject of extensive discussions and debates in the Caring Society's presence. Now the Caring Society requests an order from the Court that would impose its unilateral view, dispensing with essential deliberations and consultation.

22. The ongoing work on Abuse, as defined in the FSA, is addressed in the moving materials on this motion. [16] The Removed Child Claims Forms intentionally do not mention Abuse and will not mention Abuse, whether as an option or requirement given the vulnerabilities of the class and the terms of the FSA.[17]

23. Abuse is not an issue that should be rushed given that no caregiver will be paid before four years from Launch Date. The Caring Society's requested order provides no justification on why that issue needs be rushed.

24. This request for a hurried approach to a sensitive issue is all the more concerning given the Caring Society's positions on parental abuse throughout in these proceedings. Under the Caring Society's approach,[18] up to 30% of First Nations caregivers could be excluded from the FSA on account of broad notions of "emotional" or "psychological" abuse arising from poverty and

[16] Gott Affidavit at para 14(m).
[17] Cross-examination of Joelle Gott, Qs 95-98, Supp. Responding MR at pages 106-107.
[18] Responding Memorandum of Fact and Law of the Caring Society of Canada at para 98.

neglect, while the actual number of First Nations parents who committed sexual or serious physical abuse is a miniscule fraction of that group. The plaintiffs, guided by the affected First Nations communities, fundamentally disagreed with the Caring Society's broad conceptualization of parental abuse as it disregarded the intergenerational context of the harm at issue in this case and harshly penalized many of the parents who lost their children to poverty and a broken system.[19]

25. The narrow definition of "Abuse" in the FSA reflects this:

> "**Abuse**" means sexual abuse (including sexual assault, sexual harassment, sexual exploitation, sex trafficking and child pornography) or serious physical abuse causing bodily injury, but does not include neglect or emotional maltreatment.

26. In addition, Article 6.04(4) of the FSA further narrows that definition, and requires:

> A Caregiving Parent or Caregiving Grandparent who has **committed Abuse that has resulted in the Removed Child Class Member's removal** is not eligible for compensation in relation to that Child. [emphasis added]

27. The Caring Society does not represent any Caregiving Parents or Caregiving Grandparents in these proceedings, and its desired order on this motion directly conflicts with the interests of that class. The plaintiffs previously explained to the Caring Society, as they submitted to the Court at the settlement approval hearing, their rationales for not rushing the Abuse issue. Those rationales remain equally applicable today:

> <u>Caregiver Abuse</u>

[19] Letter to Caring Society dated February 2, 2024, Supp. Responding MR at page 141.

> We understand the concerns of some Removed Child Class Members. We also need to counterbalance such concerns with:
>
> (a) the terms of the FSA, which limit "Abuse" to sexual or serious physical abuse;
>
> (b) the need not to impose a culturally inappropriate notion of abuse on First Nations parents who once lost their children to a system that applied an overbroad notion of abuse to them;
>
> (c) First Nations communities' directions that colonial notions of abuse should not be imposed on the parents unless in clear cases, and without inquiring from the affected child; and
>
> (d) procedural fairness to the affected parents.[20]

28. The Caring Society, which acts for no parent or Removed Child Class Member in this action, seeks to make every payment of compensation to a Removed Child conditional on what it calls "a safe, evidence-based and expert/clinically informed approach for Removed Child Class Members to identify Abuse".[21]

29. But the Caring Society proposes no such approach itself now, nor did it during the meetings where this issue was discussed.

30. The Settlement Implementation Committee strongly opposes the Caring Society's attempt to put its own notions of parental abuse front and centre in this phase of the distribution and respectfully urges the Court to reject this condition.

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[20] Letter to Caring Society dated February 27, 2024, Supp. Responding MR at page 161.
[21] Responding Memorandum of Fact and Law of the Caring Society of Canada at para 109.

iii. Superfluous Conditions on Supports

31. Throughout the development of the Claims Process, the plaintiffs invited and gave the Caring Society ample opportunity to express its views, which it did on this issue, and which the plaintiffs and the administrator duly considered.[22]

32. Further, the Caring Society's executive director personally attended several of the parties' plenary meetings. She discussed her views on supports at length in the presence of all parties and the administrator at least at two of those meetings on September 15, 2023, and November 21, 2023. A substantial part of the day-long plenary meeting of the parties in Montreal on November 21, 2023 was yielded to her who fully expressed her views and asked questions until she needed to leave near the end of the day.[23]

33. Even ignoring the terms of the order sought—which expressly seek to make the Settlement Implementation Committee answerable to the suggestions of a non-party with no obligation to the class or to this Court[24]—the order sought by the Caring Society is improper and superfluous.

34. As recently summarized by this Court with respect to the Indian Day Schools settlement[25] and the extensive jurisprudence on the Indian Residential Schools Settlement Agreement,[26] the FSA is a contract and subject to the same interpretative standards employed under contract law. The objective of contract interpretation is to give effect to the intentions of the parties as expressed

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[22] Letter to Caring Society, dated February 2, 2024, Exhibit 6 to Cross-examination of Joelle Gott, Supp. Responding MR at page 143.
[23] Letter to Caring Society, dated February 2, 2024, Exhibit 6 to Cross-examination of Joelle Gott, Supp. Responding MR at page 143.
[24] Responding Memorandum of Fact and Law of the Caring Society of Canada at para 109(c).
[25] *McLean v. Canada (Attorney General)*, 2023 FC 1093 at para 38.
[26] *Fontaine v Canada (Attorney General)*, 2014 ONSC 283 at para 51.

in the written agreement.[27] The method of interpretation of settlement agreements has been outlined in *Fontaine v. Canada (Attorney General)*:

> The principles of interpretation applicable to the Settlement Agreement are straightforward. The text of the agreement must be read as a whole. The plain meaning of the words used will be important as will the context provided by the circumstances existing at the time the Settlement Agreement was created. A consideration of both is necessary to reach a proper conclusion about the meaning of the contested provisions.[28]
>
> Generally, words should be given their ordinary and literal meaning: .... However, if there are alternatives, the court should reject an interpretation or a literal meaning that would make the provision or the agreement ineffective, superfluous, absurd, unjust, commercially unreasonable, or destructive of the commercial objective of the agreement: ....[29]

35. The Claims Process embeds the requirement that the process be launched with FSA supports in place. Those supports must be consistent with the Final Settlement Agreement as approved by the Court.

36. The extensive supports available to claimants are contained in the FSA. There is no ambiguity on this point. Article 9(1) of the FSA states that supports shall be consistent with Schedule I and Article 3.02.

37. Furthermore, under Articles 9(3) and (4), Canada must pay for and fund the enhancement of the Hope for Wellness Line to include training to their call operators and counsellors and pay for mental health, and cultural supports, navigators to promote communications and provide referrals to health services, etc. Hope for Wellness Helpline has been expanded to make Indigenous

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[27] *Manulife Bank of Canada v. Conlin*, [1996] 3 SCR 415 at para 79.
[28] *Fontaine et al v The Attorney General of Canada et al*, 2013 ONSC 684 at para 68.
[29] *Fontaine v Canada (Attorney General)*, 2014 ONSC 4585 at para 70.

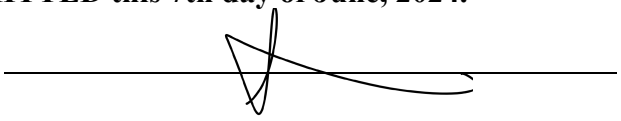
culturally competent counsellors in trauma and mental health support available to all class members 24 hours a day, seven days a week, in English, French, Cree, and Ojibway (Anishinaabemowin).[30]

38. No party to the FSA has raised a concern that the balance of the work in progress on supports is inconsistent with Article 9, nor could they reasonably do so before the work is even completed.

39. No party to the FSA has agreed to include or pay for additional supports now suggested by the Caring Society.

40. The requested relief should be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of June, 2024.



[30] https://www.hopeforwellness.ca/

SCHEDULE A – LIST OF AUTHORITIES

CASES	
1.	*Moushoom v. Canada (Attorney General)*, 2022 FC 1212
2.	*Fontaine et al v The Attorney General of Canada et al*, 2013 ONSC 684
3.	*Fontaine v Canada (Attorney General)*, 2014 ONSC 283
4.	*Fontaine v Canada (Attorney General)*, 2014 ONSC 4585
5.	*Manulife Bank of Canada v. Conlin*, [1996] 3 SCR 415
6.	*McLean v. Canada (Attorney General)*, 2023 FC 1093