The Sixties Scoop

Background

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

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

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

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

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

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

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

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

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

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

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

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¹⁰ Ibid.
¹¹ Ibid, at p. 499.
¹³ Ibid at para 62.
¹⁴ Ibid at paras 62-63.
¹⁵ Ibid at paras 83-85.
Before the matter proceeded to the damages assessment stage, an Agreement in Principle was reached with Canada on August 30, 2017.

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

**Settlement Agreement**

In February, 2017, Carolyn Bennett, then Minister of Indigenous and Northern Affairs announced the federal government’s interest in negotiating an agreement in principle to settle the Sixties Scoop litigation.\(^\text{17}\)

On October 6, 2017, Minister Bennett announced that an agreement in principle aimed at resolving the Sixties Scoop litigation had been reached (the “Settlement Agreement”).\(^\text{18}\)

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

**Terms of the Settlement Agreement**

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

1. If more than 30,000 Eligible Class Members submit a claim, each would receive an equal payment calculated by dividing $750 million by the number of claimants;

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

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\(^\text{16}\) Supra note 8.


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

Payments to individuals will not exceed $50,000.\textsuperscript{21}

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

The Settlement Agreement specifically provides for the payment of legal fees, with the federal government agreeing to compensate counsel representing the parties for their legal fees and disbursements in the amount of $75 million plus tax. Compensation is to be divided between four named law firms\textsuperscript{23} and these firms are precluded from charging any Class Member for fees and disbursements. Further, no other lawyer can charge fees to any Class Member without prior approval of the Federal Court.

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

\textbf{Court Approval}

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

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

\begin{footnotesize}
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\item \textsuperscript{20} Ibid.
\item \textsuperscript{21} Settlement Agreement s 6.02(2)
\item \textsuperscript{22} Ibid s 3.01.
\item \textsuperscript{23} The four firms are Wilson-Christen LLP and Koskie Minsky LLP in Toronto, Merchant Law Group LLP in Regina, Saskatchewan, and Klein Lawyers in Vancouver, British Columbia
\item \textsuperscript{24} \textit{Federal judge approves multimillion-dollar Sixties Scoop settlement}, Toronto Star, May 11, 2018, available at \url{https://www.thestar.com/news/canada/2018/05/11/federal-judge-approves-multimillion-dollar-60s-scoop-settlement.html}. See also sections 1.01 and 5.01 of the Settlement Agreement
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On May 30, 2018, on the second day of approval hearings, Justice Belobaba advised the parties that additional issues must be addressed before determining if the Settlement Agreement could be approved. In particular, Justice Belobaba indicated that he would consider the reasonableness of legal fees provided for in the Settlement Agreement. He asked the law firms involved in the settlement to provide submissions within seven days on their billable work.

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

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26 Ibid at para 84.
27 Ibid at paras 91 and 92.