IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tanchak v. British Columbia,* 2024 BCSC 644

Date: 20240423
Docket: S186178
Registry: New Westminster

Between:

Sarah Tanchak

Plaintiff

And

His Majesty the King in Right of the Province of British Columbia and the Attorney General of Canada

Defendants

Proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for the Plaintiff:	E.F.A. Merchant, K.C. A. Tibbs
Counsel for the Defendant, Attorney General of Canada:	T. Henderson J. Smith
Counsel for the Defendant, His Majesty the King in Right of the Province of British Columbia:	L. Mauro
Counsel for Ms. Varley and Ms. Lukowich, representative plaintiffs in Federal Court Action, T-2166-18 (Toronto):	C. Poltak
Place and Dates of Hearing:	New Westminster, B.C. October 16-18, 2023
Place and Date of Judgment:	New Westminster, B.C. April 23, 2024

Table of Contents

Overview

[1] The two defendants in this proposed class action (the "Tanchak Action"), and the representative plaintiffs in Federal Court action, T-2166-18 (Toronto) (the "Varley Action"), apply to have this action struck or stayed as an abuse of process.

[2] The Tanchak Action and the Varley Action concern the "Sixties Scoop", the events generally beginning in the 1950s and continuing to the 1990s, where children of Indigenous families were taken and placed with non-Indigenous foster or adoptive parents.

[3] Sarah Tanchak is the proposed representative plaintiff in this action. The defendants are the Attorney General of Canada ("Canada"), and His Majesty the King in Right of the Province of British Columbia (the "Province").

[4] Shannon Varley and Sandra Lukowich are the representative plaintiffs (the "Varley Plaintiffs") in the Varley Action, which is a certified national class proceeding. The sole defendant in that action is Canada.

[5] The applicants argue that the Tanchak Action is an abuse of process because it is: (1) entirely duplicative of claims that are either (i) the subject of a national settlement in 2018, and Ms. Tanchak and her counsel have contravened that settlement agreement, or (ii) already being advanced in the Varley Action; and (2) the circumstances of the Tanchak Action demonstrate that it is not being advanced for any legitimate purpose. The Province has an additional argument that part of the claim against it is an abuse of process because it is barred by the pleadings, or a combination of the pleadings and the national settlement in 2018.

[6] Ms. Tanchak argues that: (1) the claims are not duplicative, and she has not contravened the settlement in 2018; and (2) there is a legitimate purpose for the Tanchak Action, the circumstances alleged by the applicants being neither accurate nor legally relevant. She argues that the national settlement in 2018 specifically provided for the continuation of this action against the Province.

[7] These applications do not concern a determination of the merits of the claims of those persons who were taken in the Sixties Scoop. The overall issue is whether it is an abuse of process to advance those claims in this action.

[8] For the reasons below:

a) Ms. Tanchak is ordered to amend the pleadings as required by the national settlement in 2018, and the remainder of the action is stayed against Canada;

b) the application to stay, strike the pleadings, or dismiss this action against the Province as an abuse of process is dismissed; and

c) the application of Canada and the Varley Plaintiffs to have costs awarded personally against counsel for Ms. Tanchak is dismissed.

Legal Principles

[9] This Court has inherent jurisdiction to strike or stay a pleading that is an abuse of process: *Fantov v. Canada Bread Company, Limited*, 2019 BCCA 447 at para. 53; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 35. Rule 9-5(1)(d) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*], also provides that the court may order that part or all of a pleading be struck or amended, or that the proceeding be stayed if it is an abuse of process.

[10] Abuse of process is a flexible doctrine which includes “the inherent power of the court to prevent the misuse of its procedure, in a way that would … bring the administration of justice into disrepute”. It has been applied where allowing a claim to proceed would violate “such principles as judicial economy, consistency, finality, and the integrity of the administration of justice”: *Toronto (City)* at paras. 37–38, 43.

[11] Abuse of process extends to circumstances where “the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose”, or proceedings which are “without foundation or serve no useful purpose”, or where there are “multiple or successive proceedings which cause or are likely to

cause vexation or oppression": *Babavic v. Babowech*, [1993] B.C.J. No. 1802 (S.C.) at paras. 17–18, cited in *Skyllar v. The University of British Columbia*, 2023 BCCA 90 at para. 51.

[12] In the proposed class action context, a parallel action may be an abuse of process if it can be shown that it is a "duplicative action" that serves "no legitimate purpose": *Fantov* at paras. 71–72; *DALI 675 Pension Fund v. SNC Lavalin*, 2019 ONSC 6512 at paras. 15–19; *Hafichuk-Walkin v. BCE Inc.*, 2016 MBCA 32 at para. 40; *Boehringer Ingelheim (Canada) Ltd. v. Englund*, 2007 SKCA 62 at para. 40.

[13] Duplicative class actions raise "the potential for much mischief, such as the risk of inconsistent decisions, waste of judicial and court resources, duplication of work by counsel, and the possibility of 'forum shopping' by counsel": *Gomel v. Ticketmaster Canada LLP*, 2019 BCSC 2178 at para. 33.

[14] However, there may be entirely valid reasons for duplicative actions: *Boehringer Ingelheim (Canada) Ltd.* at para 40; *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819 at paras. 263–264. A proposed class action is not an abuse of process "simply because there is another class action ongoing in another jurisdiction dealing with the same subject matter": *Fantov* at paras. 71–72.

[15] Duplicative proposed class actions which are brought for no legitimate reason and are "simply trying to get a piece of the class-action-action" have attracted negative comments from courts: *Asquith v. George Weston Limited*, 2018 BCSC 1557 at paras. 71–72; *Kowalyshyn* at para. 264. Likewise, duplicative proposed class actions filed by the same plaintiff and same law firm in multiple jurisdictions for no legitimate purpose, have attracted negative comments: *Hafichuk-Walkin* at para. 57; *Boehringer Ingelheim (Canada) Ltd.* at paras. 37–40; *Drover v. BCE Inc.*, 2013 BCSC 1341 at para. 56. A class action brought for an improper purpose is an abuse of process: *Piett v. Global Learning Group Inc.*, 2021 SKQB 232 at paras. 49–51, leave to appeal ref'd, 2022 SKCA 141.

[16] Determining whether a duplicative action is an abuse of process and ought to be stayed requires consideration of the entire context in which the action is brought: *Piett* at para. 52; *Krist v. British Columbia*, 2017 BCCA 78 at paras. 24, 26; *Hafichuk-Walkin* at para 43; *Kirsh v. Bristol-Myers Squibb*, 2021 ONSC 6190 at paras. 44, 57.

Background Facts

Varley Action

[17] The Varley Action follows a series of class actions against Canada concerning the Sixties Scoop which culminated in the 2018 certification of a class action and approval of a pan-Canadian settlement (the "2018 Settlement"): *Riddle v. Canada*, 2018 FC 641. The 2018 Settlement encompassed the claims advanced by Indigenous persons with status under the *Indian Act*, R.S.C., 1985, c. I-5, and those who are Inuit (the "2018 Settlement Class"), but did not include the claims of Indigenous persons without status and those who are Métis.

[18] In 2018, the Varley Action was commenced against Canada on behalf of Métis and non-status Indians who had been taken in the Sixties Scoop (i.e. all other Indigenous persons who did not benefit from the 2018 Settlement).

[19] At about the same time, other actions against Canada concerning the Sixties Scoop and covering the same proposed class (Métis and non-status individuals) were commenced: *LaLiberte v. Canada (Attorney General)*, 2019 FC 766 [*LaLiberte F.C.*] at paras. 6–8. Counsel in those other actions agreed to form a consortium and to consolidate the actions before the Federal Court (the "LMO Actions"). The Merchant Law Group ("MLG"), counsel for Ms. Tanchak in this proceeding, was a member of the LMO consortium of law firms. The class proposed by both the LMO group, and counsel for the Varley Action, was a national class consisting of all Métis and non-status Indians in Canada taken in the Sixties Scoop: *LaLiberte F.C.* at paras. 21 and 24. As a result, a carriage motion between the Varley Action and the LMO Actions was required.

[20] On May 31, 2019, the Federal Court ordered that the claims against Canada on behalf of the Métis and non-status Indians be advanced in the Varley Action (the "Carriage Order"), and stayed the LMO Actions: *LaLiberte F.C.* at para. 85.

[21] The proposed representative plaintiffs in the LMO Actions appealed the Carriage Order, and on July 13, 2020 the Federal Court of Appeal dismissed the appeal: *LaLiberte v. Day*, 2020 FCA 119.

[22] On June 10, 2021, the Federal Court certified the Varley Action with a national class: *Varley v. Canada (Attorney General)*, 2021 FC 589. The certification order defines the class as:

> All Indigenous persons, as referred to by the Supreme Court of Canada in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, at para. 6, excluding Indian persons (as defined in the *Indian Act*), and Inuit persons, who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and who were placed in the care of non-Indigenous foster or adoptive parents.

[23] This class includes persons taken in BC. In his reasons, Justice Phelan noted the existence of several overlapping actions that had been filed in the superior courts of provinces, specifically mentioning MLG, and found the following:

> [18] There are a number of overlapping claims filed in provincial superior courts. To date, none of those claims have been certified despite the fact that some are several years old and no steps have been initiated by proposed class counsel in those cases (the Merchant Law Group).
>
> [19] Give[n] the nature of the claim in this case, there is a presumption in favour of a national class. There are no aspects which are unique or specific to one or more provinces.
>
> [20] Experience from the 60's Scoop cases and the Indian Day School decision (*McLean v. Canada*, 2019 FC 1076) confirm the uniquely suitable nature of a federal class proceeding.
>
> [21] The Court has considered the CBA Class Action Protocol. This case suits a federal court class proceeding.

[24] The opt-out period in the Varley Action expired on November 4, 2021. Only two class members opted out, neither of whom were residents of BC.

[25] Paragraph 4 of the second amended notice of civil claim in the Varley Action (the "Varley ANOCC") describes that the Sixties Scoop was "largely dictated throughout Canada, although not exclusively" by agreements between Canada and the provinces or territories under which children were taken by child welfare or related agencies. In exchange, Canada reimbursed the provinces and territories for providing these services. The practice also occurred in the absence of bilateral agreements. Paragraph 10 of the Varley ANOCC pleads that Canada is vicariously liable for the acts of its employees, agents, and servants.

The Tanchak Action and the 2018 Settlement

[26] The Tanchak Action was commenced in 2016 (prior to the 2018 Settlement) as a proposed class action on behalf of all Aboriginal and Indigenous persons who were taken in the Sixties Scoop. This therefore included status, Inuit, non-status, and Métis individuals. When the 2018 Settlement was reached, the Tanchak Action, along with multiple other actions which had been commenced, were addressed in the settlement agreement (the "Settlement Agreement") and in the order approving the settlement (the "Settlement Order").

[27] MLG was co-counsel for Ms. Riddle, one of the representative plaintiffs in the 2018 Settlement, and at the time was, and still is, counsel for Ms. Tanchak in this action. Ms. Tanchak is a member of the 2018 Settlement Class. As a proposed representative plaintiff in the Tanchak Action, she received an honorarium for her role, in addition to the compensation to which she was entitled as a class member.

[28] The Settlement Agreement mandates that the Tanchak Action either be discontinued, or the pleadings be specifically amended. Canada and Ms. Tanchak disagree on what was required of Ms. Tanchak and MLG regarding these terms.

[29] The Settlement Agreement and Settlement Order contain a comprehensive release. The Province and Ms. Tanchak disagree on the scope and effect of this release as it may relate to the Province. They also disagree on the scope of the Tanchak Action pleadings.

[30] The relevant portions of the Settlement Agreement state:

> 5.04 Class Definitions
>
> …
>
> (4) The Parties agree to either amend the class definitions in the Proposed Class Actions listed in Schedule "C" or any other action commenced or continued by any of the counsel listed in Schedule "K" to specifically exclude the Class Members and to preclude claims by other parties against Canada in relation to the Class Members' claims, or to discontinue the Proposed Class Actions. For greater certainty, the nature of the amendments for each of the Proposed Class Actions is described in Schedule "H". Furthermore, should any Proposed Class Action listed in Schedule "C" that names Canada as the only defendant be amended to include any other defendant, then that claim shall also be amended to include language substantially in the form set out in Schedule "G".
>
> …
>
> 10.01 Class Member Releases
>
> The Approval Orders will declare that: [terms of Release which are replicated in the Settlement Order below].
>
> 10.02 Cessation of litigation
>
> ...
>
> (2) Each counsel listed in Schedule "K" undertakes not to commence or assist or advise on the commencement or continuation of any actions or proceedings against Canada calculated to or having the effect of undermining this Agreement.
>
> (3) Each counsel listed in Schedule "K" who commences or continues litigation against any person or persons who may claim contribution or indemnity from Canada in any way relating to or arising from any claim which is released by this Agreement, agrees that they will limit such claims to exclude any portion of Canada's responsibility.
>
> [Emphasis added.]

[31] The Tanchak Action is listed in Schedule "C". MLG is counsel listed in Schedule "K". Schedule "H" states that the pleading for each action listed "shall be amended" as set out in that schedule. With respect to the Tanchak Action, those amendments are:

> 5.1 The class includes a subclass consisting of all Indian (as defined in the Indian Act) and Inuit persons 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 ("Indian and Inuit subclass").
>
> 5.2 The Indian and Inuit subclass claims only as against British Columbia and makes no claim against Canada in this action.

> 5.3 The Indian and Inuit subclass expressly waive any and all rights they may possess to recover from any defendant, or any other party, any portion of their loss that may be attributable to the fault or liability of Canada, her servants, agents, officers, and/or employees, for which any defendant or other party might reasonably be entitled to claim from Canada, her servants, agents, officers, and/or employees for contribution, indemnity, or apportionment at common law, in equity, or pursuant to any Federal, Provincial, or Territorial legislation or regulation.
>
> 5.4 The Indian and Inuit subclass will not seek to recover from any party any portion of their losses, which have been claimed or could have been claimed, against Canada, her servants, agents, officers, and/or employees.
>
> [Underlining for the amendments in original.]

[32] Schedule “G” is described in clause 1.09 as “Schedule G – Language Restricting Claims to Several Liability”.

[33] The Federal Court approved the Settlement Agreement. The relevant portions of paragraphs 11 to 13 of the Settlement Order state:

> 11. The Settlement Agreement, which is expressly incorporated by reference into this Order, shall be and hereby is approved and shall be implemented in accordance with this Order and further order of this Court.
>
> 12. The claims of the Class Members and the Class as a whole, shall be discontinued against the Defendant and are released against the Releasees in accordance with section 10.01 of the Settlement Agreement, in particular as follows:
>
> > (i) Each Class Member and his/her Estate Executor and heirs (hereinafter “Releasors”) has fully, finally and forever released Canada, her servants, agents, officers and employees, from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including for damages, contribution, indemnity, costs, expenses and interest which any such Releasor ever had, now has, or may hereafter have, directly or indirectly arising from or in any way relating to or by way of any subrogated or assigned right or otherwise in relation to the Sixties Scoop and this release includes any such claim made or that could have been made in any proceeding including the Class Actions whether asserted directly by the Releasor or by any other person, group or legal entity on behalf of or as representative for the Releasor.
> >
> > (ii) This Agreement does not preclude claims against any third party that are restricted to whatever such third party may be directly liable for, and that do not include whatever such third party can be jointly liable for together with Canada, such that the third party has no basis

> to seek contribution, indemnity or relief over by way of equitable subrogation, declaratory relief or otherwise against Canada.
>
> (iii) For greater certainty, the Releasors are deemed to agree that if they make any claim or demand or take any actions or proceedings against another person or persons in which any claim could arise against Canada for damages or contribution or indemnity and/or other relief over under the provisions of the *Negligence Act*, R S,O. 1990, c. N-3, or its counterpart in other jurisdictions, the common law, Quebec civil law or any other statute of Ontario or any other jurisdiction in relation to the Sixties Scoop, including any claim against provinces or territories or other entities for abuse while in care; then, the Releasors will expressly limit their claims to exclude any portion of Canada's responsibility.
>
> …
>
> 13. This Settlement Agreement does not compromise any claims that Class Members have against any Province/Territory or any other entity, other than as expressly stated herein.
>
> [Emphasis added.]

[34] Ms. Tanchak and MLG have not amended the pleadings in the Tanchak Action to those in Schedule “H” of the Settlement Agreement. Up until the Tanchak amended notice of civil claim (“Tanchak ANOCC”) was filed in November 2022, over four years after the approval of the 2018 Settlement, the Tanchak Action asserted claims against Canada on behalf of all Aboriginal or Indigenous persons, which included the 2018 Settlement Class. It is not in dispute that the claims of these proposed class members against Canada relating to the Sixties Scoop had been unambiguously released in the 2018 Settlement.

[35] The first request for assignment of a case management judge in the Tanchak Action was made to this Court in August 2019, nearly three years after the action was commenced, and after the Carriage Order. No affidavit of service was filed prior to that request, and Ms. Tanchak’s counsel was advised that the request would not be considered until one was filed. On January 2020, proof of service was filed. In March 2020, I was assigned as case management judge and the first case management conference was set for early April 2020, but had to be adjourned. It was reset for August 2020. At the August 2020 hearing, there was discussion of a possible strike/stay application, the failure of Ms. Tanchak to amend her pleadings in accordance with the 2018 Settlement, and the need for Ms. Tanchak’s counsel

either to file an amended notice of civil claim or to confirm that Ms. Tanchak was proceeding with the claim as drafted so that the defendants could decide whether they would bring strike/stay applications. I directed Ms. Tanchak's counsel to address this matter, and that another case planning conference be set for the autumn. These directions were not followed.

[36] Having not heard of any activity on the file, I directed the parties to attend another case planning conference. This was held in November 2021. At this hearing, I directed Ms. Tanchak's counsel to file and serve any amended pleadings by December 31, 2021, and to request another case management conference for January 2022. Ms. Tanchak's counsel did not follow these directions.

[37] Another case planning conference was held on two dates in November 2022. Shortly before the hearing, on November 8, 2022, Ms. Tanchak filed the Tanchak ANOCC. I gave counsel for the Varley Plaintiffs standing to attend this case planning conference. Counsel for the defendants and the Varley Plaintiffs advised of their intention to bring strike/stay applications for abuse of process prior to the certification hearing. Ms. Tanchak's counsel opposed the Varley Plaintiffs having standing, and the timing of the strike/stay applications. Hence, there were subsequent applications with reasons indexed at 2023 BCSC 428 (the "Standing Reasons") and 2023 BCSC 1482 (the "Sequencing Reasons").

[38] Paragraph 4 of the Tanchak ANOCC describes the proposed class as "either 'Indians' as defined by the *Indian Act*, or 'Aboriginal' persons as defined by the *Constitution Act.* This therefore includes all status and non-status Indian, Inuit, and Métis persons. Paragraph 6 states that Ms. Tanchak brings this proceeding on behalf of a proposed class "including any Indian or Aboriginal person" who as a child was apprehended in BC during the class period. Thus, the proposed class includes the 2018 Settlement Class members who were apprehended in BC. The proposed class definition has not been amended to include a sub-class of 2018 Settlement Class members who do not advance any claim against Canada.

[39] Paragraph 5 alleges that the Province and Canada "worked cooperatively in a program", in furtherance of the Sixties Scoop, and that this "British Columbia/Canada assisted and supported program" operated from 1951 to 1991.

[40] Paragraph 7 states:

> 7. Members of the Class defined in the Riddle Settlement pursuant to the decision of the Federal Court of Canada in 2018 FC 641 may not recover from Canada for the wrongs asserted herein but may recover from British Columbia and a nuanced common issues trial judgment will be required to determine for this Member of the Class what percentage of their damages, at the individual stage, is the responsibility of Canada and in the result not payable to those Members of the Class.
>
> [Emphasis added.]

[41] Paragraph 25, under "Part 2: Relief Sought" states:

> 25. The Plaintiff claims, on her own behalf and on behalf of all of the Members of the Class (as defined above), on a joint and several basis against each of the Defendants: [list of damages claimed].
>
> [Emphasis added.]

[42] In Part 3, the Legal Basis section of the pleading (from paragraphs 26 to 63), Canada and the Province are referred to together as the "Defendants", who participated in programs aimed at removing Aboriginal children from their families. Paragraph 31 states:

> 31. Canada is not protected from liability because it delegated responsibility to British Columbia and is vicarious[ly] liable for the failings of British Columbia and its employees and agents.

[43] Paragraph 35 states:

> 35. Subject to the limitation regarding Canada as pled in paragraph 7 herein, the Defendants are liable *inter alia* to the Plaintiff and all Class Members for: [list of damages claims].

Issues

[44] The arguments of the applicants and Ms. Tanchak raise four distinct combinations of proposed class members and defendants, plus the issue of costs. The issues are:

a) Issue 1: Are the proposed claims against Canada by the 2018 Settlement Class members an abuse of process?

b) Issue 2: Are the proposed claims against Canada by those who are not 2018 Settlement Class members an abuse of process?

c) Issue 3: Are the proposed claims against the Province by the 2018 Settlement Class members an abuse of process?

d) Issue 4: Are the proposed claims against the Province by those who are not 2018 Settlement Class members an abuse of process?

e) Issue 5: Should special costs be awarded against Ms. Tanchak's counsel?

Issue 1: Are the proposed claims against Canada by the 2018 Settlement Class members an abuse of process?

Are the claims duplicative?

[45] There is no dispute between the parties that the proposed claims of the 2018 Settlement Class members against Canada which are alleged in the Tanchak Action, were settled and released in the 2018 Settlement.

Do the claims serve a legitimate purpose?

[46] Canada argues that because the claims against it are duplicative and have been released, the proposed action by the 2018 Settlement Class members against it serves no legitimate purpose. Canada refers to the wording of the Settlement Agreement and Settlement Order, which it argues, allowed it to gain finality regarding those with whom it was settling, to end its involvement as a party in the Tanchak Action with respect to the claims of the 2018 Settlement Class members, and at the same time to allow claims of that class to be pursued against other actors which the proposed class allege caused harm. Contrary to this, Ms. Tanchak and MLG have failed to comply with the 2018 Settlement. Canada characterizes this as egregious conduct on the part of MLG, and an abuse of process.

[47] While acknowledging that the Tanchak pleadings have not been amended to include the specific wording required by the Settlement Agreement in Schedule "H", MLG argues that it is not in breach of the Settlement Order, which MLG submits does not include the wording in Schedule "H". MLG submits that it is paragraph 12 of the Settlement Order which is binding, and paragraph 11 is of "no consequence". MLG argues that, "consistent with the intention of the parties" in the 2018 Settlement, paragraph 7 of the Tanchak ANOCC makes it clear that, to the extent the proposed class includes members of the 2018 Settlement Class, those individuals will not be able to recover from Canada but may recover from the Province. Ms. Tanchak and MLG argue that it is their intention to "honour the spirit of that agreement; however, argument as to the precise form of the class definition is a certification issue and not an issue of pleadings or an issue of relevance on this application".

[48] For the following reasons, I do not agree with MLG's submissions.

[49] The 2018 Settlement clearly mandates that the Tanchak Action either be discontinued, or that the pleadings be amended to include the specific wording set out in Schedule "H" of the Settlement Agreement. These were not "contemplated" amendments. Nor do I agree that it was consistent with the intent of the parties that there would be any other result.

[50] I reject MLG's argument that only paragraph 12 of the Settlement Order is binding or of consequence. Paragraph 11 of the Settlement Order states that the Settlement Agreement is "expressly incorporated", and is "approved and shall be implemented".

[51] Contrary to the Settlement Agreement, the Tanchak ANOCC does not treat the 2018 Settlement Class members as a sub-class which is not advancing any claim against Canada. If that were the case, but for the proposed class action against Canada by those who are not members of the 2018 Settlement Class, Canada would not be a defendant at all.

[52] The specific amendments are important. They are the wording that was agreed to in the 2018 Settlement. The Schedule "H" amendments make clear that no claim is being advanced against Canada by these proposed class members, and that any such claim is waived. The sub-class amendments have the effect of discontinuing these proposed class members' claims against Canada. Further, the amendments would form the basis upon which Canada would argue that any third-party action brought against it by the Province should be dismissed. This is because there would no longer be a basis in law for a claim for contribution or indemnity: *British Columbia Ferry Corp. v. T & N* (1995), 16 B.C.L.R. (3d) 115 at para. 15, 1995 CanLII 1810 (C.A.).

[53] Instead, the Tanchak ANOCC is drafted with the intent that Canada remain a defendant in the Tanchak Action with respect to these proposed class members' claims, to participate in a "nuanced common issues trial" (para. 7 of the Tanchak ANOCC), and that Canada's liability to each of these proposed class members be determined "at the individual stage" (para. 7 of the Tanchak ANOCC). This was not the intent of the Settlement Agreement and Settlement Order.

[54] No affidavit evidence has been tendered by Ms. Tanchak or MLG as to why they have not made the amendments specifically mandated by the Settlement Agreement. Ms. Tanchak's counsel's submissions indicate that failing to amend in accordance with Schedule "H" was a conscious decision, and that Ms. Tanchak's counsel sees some advantage in doing so.

[55] In oral submissions, Ms. Tanchak's counsel argued that there is a trend away from sub-classes, and it is not "modern thinking". No authority was cited for that proposition, which Canada contests. Ms. Tanchak's counsel also submitted that he signed the Settlement Agreement as counsel for Ms. Riddle (one of the representative plaintiffs), and that neither he nor Ms. Tanchak was a party to the Settlement Agreement. That submission ignores the obligations counsel undertook in clause 10.02, that he was also counsel for Ms. Tanchak when the Settlement Agreement was negotiated, that both MLG and Ms. Tanchak received financial

compensation for their roles in the 2018 Settlement, and that the Settlement Agreement specifically refers to the Tanchak Action. Finally, Ms. Tanchak's counsel also submitted there was a possible conflict between clause 5.2 and 5.4 of the amendments in Schedule "H", and therefore a triable issue. I am not persuaded there is any conflict, and even if there were, this is the agreed wording.

[56] There is no legitimate purpose for Canada to remain a defendant in the Tanchak Action with respect to the claims of the 2018 Settlement Class members. Those claims have been unequivocally released. No argument was advanced that Canada should remain a defendant for procedural reasons (such as discovery). Nor was this a term of the Settlement Agreement. The 2018 Settlement should have provided Canada with finality with respect to the claims of these proposed class members.

[57] I conclude that to the extent the proposed class includes individuals who were members of the 2018 Settlement Class, their claims against Canada are an abuse of process. It is plain and obvious that there is no possibility of success against Canada for those claims, nor was any persuasive reason provided as to why Canada should be required to participate as a party to this action regarding those claims. The failure to amend the Tanchak Action pleadings in accordance with the Settlement Agreement, and the Settlement Order which expressly incorporates and approves it, and to seek an advantage by not doing so, has undermined the principles of finality and the integrity of the administration of justice.

[58] MLG was twice directed to address the pleadings at Case Planning Conferences. It did not do so. In my view, the appropriate remedy is to order that within two weeks, Ms. Tanchak and MLG file and serve a further amended notice of civil claim that complies with the terms of Schedule "H", and that any other present inconsistent pleadings be amended accordingly. This will provide Canada with the pleadings that were agreed to in the 2018 Settlement. If this is done, it is not necessary to stay the action against Canada by the 2018 Settlement Class members because the pleadings would make clear that no claim is being made by them

against Canada. Canada is a defendant only with respect to the claims of the other proposed class members. If Ms. Tanchak and MLG fail to amend as ordered, the 2018 Settlement Class members' claims against Canada are immediately stayed at the expiry of the two weeks.

Issue 2: Are the proposed claims against Canada by those who are not 2018 Settlement Class members an abuse of process?

Are the claims duplicative?

[59] Canada and the Varley Plaintiffs argue that the claims against Canada in the Tanchak Action, of proposed class members who are not 2018 Settlement Class members, are duplicative of the claims already being advanced in the nationally certified Varley Action.

[60] Ms. Tanchak argues that there is only "limited overlap" in the issues that will be determined in each of the proceedings. This is because the Varley Action names only Canada as a defendant and relates exclusively to the conduct of Canada. The claims in the Tanchak Action relate to the conduct of the Province and Canada "together". Ms. Tanchak argues that the "conjoined conduct" of Canada and the Province will not be considered in any detail in the Varley Action, except perhaps to the extent that Canada attempts to avoid liability by shifting responsibility to the provinces. This was the only distinction argued by Ms. Tanchak in her written submissions. However, in oral argument, primarily in response to an argument made by the Province regarding the effect of the Settlement Order, counsel for Ms. Tanchak submitted that the Varley Action will not consider "abuse in care" and the Tanchak Action will seek to do so.

[61] I find that the claims against Canada in the Tanchak Action and in the Varley Action are substantially the same and duplicative. The pleadings are not identical. For example, the Tanchak Action refers to the United Nations *Convention on the Prevention and Punishment of the Crime of Genocide,* but the core allegations remain the same. More importantly, Ms. Tanchak never referred to any of these

differences, nor argued that they reflect any material difference between the two actions. Her submission focused on the “conjoined conduct”.

[62] The Varley ANOCC pleads that: (a) Canada had fiduciary duties (paras. 34–45) and common law duties of care (paras. 46–50); (b) which were breached (paras. 5, 51–55); and (c) that Canada is vicariously liable for the acts and omissions of its employees, agents and servants (para. 8). Paragraph 51 details the alleged breaches, almost all of which include the Province. In summary, these are that Canada: (a) illegitimately delegated its non-delegable duties in respect of the class members; (b) failed to ensure, monitor and oversee appropriate child welfare services for the class which were delivered in the provinces; (c) failed to intervene and prevent the provision of child welfare services which resulted in the class members being deprived of their culture and identity; (d) failed to ameliorate the harmful effects of the child welfare services in the provinces, for example by providing services or information which would enable class members to know and exercise their culture and identity, treaty and related rights; (e) failed to consult Indigenous communities and stakeholders; and (f) promoted a policy of cultural assimilation. The Varley ANOCC claims damages for listed injuries (para. 56), and punitive and exemplary damages (paras. 57–59).

[63] The Tanchak ANOCC pleads that: (a) the defendants were under fiduciary duties and common law duties to protect the proposed class members (paras. 45, 47, 55–56); (b) the duties were breached causing harm (paras. 57, 62); (c) Canada is vicariously liable for the failings of the Province (para. 31); and (d) the defendants are vicariously liable for the failings of any other agency acting as their agent (para. 46). The Tanchak ANOCC alleges: (a) the defendants were responsible for the program to assimilate the proposed class members into the Caucasian population and lose their culture and identity, and Canada delegated its duties to the Province (paras. 5, 10, 26, 33); (b) the defendants played a supervisory and oversight role (para. 27); (c) Canada failed to vet and monitor adoptive and foster care parents and institutions (para. 32); and (d) the defendants failed to screen, investigate, and protect proposed class members from harm, by hiring unqualified

individuals to administer and operate foster homes (para. 42). The ANOCC seeks general, special, aggravated, punitive and exemplary damages (paras. 25, 53–54, 58–62). The injuries claimed (paras. 35, 37–41, 48–52) are the same as those listed at para. 56 of the Varley ANOCC.

[64] I do not agree with Ms. Tanchak's argument that the Tanchak Action against Canada is different from, or advantageous over, the Varley Action because the Varley Action will not consider the "conjoined conduct" of the Province and Canada. This phrase does not describe a different cause of action, nor does it raise any different basis or theory of liability. The liability of each party is determined separately, although the factual matrix may be similar for both. The phrase "conjoined conduct" simply describes the same underlying factual allegation, in each action, that the practice of apprehending and placing children in non-Indigenous homes took place through contracts between Canada and the Province, where the Province or its agents took children and placed them in non-Indigenous homes, and in exchange the Province was reimbursed by Canada for each child in care. Further, the practice took place in the absence of such agreements (Varley ANOCC at para. 4; Tanchak ANOCC at paras. 5, 8, and 10–11). Both pleadings allege breach of fiduciary duty and negligence, and that Canada is vicariously liable for the acts and omissions of its employees and agents. Both pleadings allege the same damages.

[65] I do not agree with Ms. Tanchak's argument regarding abuse in care. Ms. Tanchak submitted that because the certified common issues in the Varley Action refer to whether Canada had a fiduciary duty or common law duty of care to take reasonable steps to prevent the class from losing their Indigenous identities, any claim for abuse in care was "buried and gone", and the Tanchak Action would seek certification of this as a common issue (the specific common issue was not identified). That argument ignores that there is also a certified common issue in the Varley Action as to whether the court can make an aggregate assessment of some or all damages, and that if not, there is a process for addressing individual issues. While the focus of both actions is on culture and identity, both the Varley Action and

the Tanchak Action claim damages for abuse in care (Tanchak ANOCC at paras. 35, 47; Varley ANOCC at para. 56). This submission also appears to be contrary to para. 34 of the Tanchak ANOCC which alleges this is an individual issue.

Do the claims serve a legitimate purpose?

[66] Canada argues that all of the surrounding circumstances demonstrate that these proposed class members' claims against Canada do not serve any legitimate purpose. These circumstances are: (1) the lack of any benefit due to the duplication; (2) the years-long delay in the prosecution of the Tanchak Action along with the conduct of MLG in the Tanchak Action; and (3) the circumstances surrounding the Carriage Order.

[67] The Varley Plaintiffs adopt those arguments, and allege an improper purpose, being an attempt to circumvent the Carriage Order and the Certification Order. They also argue that the Tanchak Action would only create chaos and confusion.

[68] Ms. Tanchak argues that to the extent that the Tanchak Action includes claims against Canada by those who are not members of the 2018 Settlement Class: (1) there is nothing inherently abusive about parallel or duplicative proceedings; (2) any delay is explainable and in any event does not amount to abuse of process; (3) the Carriage Order and Certification Order do not preclude this action; (4) these are preferability arguments that should be made at a certification hearing; and (5) the Tanchak Action would not cause class confusion.

[69] I address each of these arguments below.

Duplication

[70] Building upon its argument that these proposed class members' claims against Canada in the Tanchak Action are duplicative of the claims against it in the Varley Action, Canada argues that these members of the proposed class cannot gain any benefit from the continuation of their claims against Canada in this action. Ms. Tanchak has not filed any evidence establishing how it would be advantageous to these proposed class members to maintain the Tanchak Action against Canada.

Nor is there any evidence that the proposed class members' interests are not being protected in the Varley Action, and hence there would be no prejudice to their interests if the Tanchak Action were stayed against Canada. Looking through the lens of the objectives of class actions, Canada argues that no proposed plaintiff will be denied access to justice if these claims are stayed in this action, and judicial economy will be enhanced.

[71] While maintaining her position that there is limited overlap between the two actions, Ms. Tanchak argues that to the extent there is overlap, it is neither an abuse of process nor impermissible. Parallel and overlapping class proceedings are certified, and mechanisms for ultimately addressing any overlap are provided through the flexible provisions of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

[72] Ms. Tanchak argues that this situation is very similar to *Jiang v. Peoples Trust Company*, 2018 BCSC 299, where parallel proceedings had been commenced in BC and Ontario. The overlap in the class was not complete, but there were some in the class who would ultimately be able to assert claims through both the certified Ontario proceeding and the to-be-certified BC action. This arose because each claim asserted some different causes of action against different parties, although both actions involved substantially the same underlying factual situation. Justice Bowden determined that this was not a bar to certification, and that any potential multiple recoveries could be addressed by the relevant court at the conclusion of the trial process: at paras. 60–69. Ms. Tanchak also refers to *Bergen v. WestJet Airlines Ltd.*, 2021 BCSC 12 at paras. 102–108, where proceedings in another jurisdiction (found not to advance the same basis of liability) were referred to as part of the preferability analysis in the certification application. Justice Francis determined that any double recovery was not an imminent concern and could be addressed at a later point, if necessary.

[73] Ms. Tanchak also refers to several drug product liability cases, which involved a certified class action, and another overlapping or duplicative claim which was certified: *Wuttunee v. Merck Frosst Canada*, 2008 SKQB 229 and *Tiboni v. Merck*

Frost (Canada) Ltd. (2008), 295 D.L.R. (4th) 32, 2008 CanLII 37911 (Ont. Sup. Ct.), but see *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 and *Bear v. Merck Frosst Canada & Co.*, 2011 SKCA 152; *Kirsh v. Bristol-Myers Squibb*, 2020 ONSC 1499 and *Kirsh v. Bristol-Myers Squibb*, 2021 ONSC 6190; and *Gagnon v. Bayer Inc.*, 2020 QCCS 2324 and *Tluchak (Estate) v. Bayer Inc.*, 2018 SKQB 311, leave to appeal ref'd, 2019 SKCA 64, leave to appeal to SCC ref'd, 38825 (20 February 2020).

[74] Ms. Tanchak argues that there is a benefit to the Tanchak Action proceeding against Canada because: (1) there can be no guarantee that the Varley Action will proceed to a conclusion on the merits without decertification; and (2) "given the interplay and interrelationship between the Defendants, even with the recoverable damages being limited to that which is ultimately attributable to the Province, Canada will remain a necessary party to the proceedings".

[75] I have already determined that these proposed class members' claims against Canada in the Tanchak Action and the Varley Action are duplicative of each other with no material differences between them. *Jiang* is factually dissimilar to this case. It is an example of a parallel proceeding where there was some overlap, but where there were also differences in the proposed class, the defendants, the causes of action advanced, and the legislation relied on: paras. 63–64 of *Jiang*.

[76] Avoidance of duplication is a guiding interest, but the fact there are duplicative claims does not by itself indicate that a proposed class action is an abuse of process. The entire circumstances must be examined. The cases cited by the parties are all examples of this. In the Legal Principles section of these reasons, I cited types of cases where abuses of process were found. The cases cited by Ms. Tanchak are examples where abuse of process (at least initially in the *Wuttunee/Tiboni/Bear* actions) were not found or raised by the parties.

[77] For example, in *Kirsh*, the defendant did not object to certification in Quebec, but then sought to vigorously defend the certification of a similar class action in Saskatchewan which had been extensively prepared by plaintiff's counsel. Two days

prior to the certification motion in Saskatchewan, the Quebec plaintiff had amended its claim, without objection by the defendant, to mirror the more extensive and focused Saskatchewan claim. The defendants argued that the Saskatchewan action was an abuse of process. In rejecting the abuse of process argument, the chambers judge was concerned that this was a defendant attempting to stay an action against a "more formidable foe" in Saskatchewan, and the best interests of the class favoured permitting the Saskatchewan action to proceed.

[78] I accept that there would be a benefit to the proposed class in the Tanchak Action if the Varley Action were to be decertified at some point. However, that can be addressed by the terms of any stay. Other than this, I have found duplication. Ms. Tanchak's argument regarding the "interplay and interrelationship" between the Province and Canada, is a reiteration of the "conjoined conduct" argument which I have rejected. However, as noted previously, duplication by itself does not indicate an abuse of process.

Delay

[79] Canada argues that there has been inordinate delay in advancing the Tanchak Action from the filing of the notice of civil claim in 2016 until after the Carriage Order. There was further delay in the Tanchak Action after its reactivation three years later. No certification application was made before the defendants and the Varley Plaintiffs initiated steps toward their respective strike/stay applications in November 2022. In the seven years since the commencement of the Tanchak Action, no substantive progress has been made to advance the claims of the proposed class. Further, MLG has failed, without reasonable justification, to comply with the Court's directions in August 2020 and November 2021. Canada argues that these circumstances indicate that there is no *bona fide* intention of Ms. Tanchak to proceed against Canada.

[80] Canada argues that Ms. Tanchak and MLG have not filed any evidence explaining why there has been such delay. Despite that this Court noted in the

Sequencing Reasons (at para. 14) that no evidence had been filed regarding the reasons for the delay, no evidence was filed on this application.

[81] The Varley Plaintiffs characterize this as "parking" the action and refer to *Hafichuk-Walkin* at para. 44, where the Court stated:

> …Unreasonable delay in moving for certification or a lack of true intention to advance the class action proceeding as part of a multi-jurisdiction litigation strategy are each factors that may give rise to an abuse of process…

[82] The Varley Plaintiffs argue that if this action is not stayed, there is unlikely to be a certification application before 2025. The Tanchak Action could never catch up to the Varley Action as a direct result of MLG's intransigence and failure to pursue the matter.

[83] Ms. Tanchak denies there has been any inordinate delay, and if there was any delay, it does not equate to abuse of process or indicate a lack of *bona fide* intention to prosecute the claims of these proposed class members.

[84] Ms. Tanchak submits that the reason for the delay between 2016 and 2018 is self-evident, as the parties were engaged in negotiations leading to the 2018 Settlement. The advancement of the action against the Province had to be ironed out before any further steps could occur. The Varley Action was then filed, leading to the contested carriage determinations. With carriage determined in the Federal Court, and "recognizing that there could be some economies if the Federal Court action proceeded expeditiously", the Tanchak Action "was initially held in abeyance". However, by mid-2021, it was "obvious" that the Varley Action was "not advancing in any meaningful way", and the proposed class in Tanchak Action would be "disserved" by waiting indefinitely for the Varley Action, "particularly where Varley could only ever address a portion of the claims advanced". As to any delay between 2022 and the present, the applications for standing and sequencing were brought, and any delay from those cannot be visited upon Ms. Tanchak. A certification application has not yet been filed, predominantly because of the present uncertainty as to which defendants will be a part of the action, and the potential scope of the class. It would serve no purpose for Ms. Tanchak to deliver this material only to

potentially have to re-engineer it in light of the findings of the Court on these strike/stay applications. None of these explanations were supported by an affidavit.

[85] Ms. Tanchak refers to *Knight v. Imperial Tobacco Canada Limited*, 2017 BCSC 1487, where there was a delay of 14 years, with seven years having passed post-certification with no steps taken. The court noted "inordinate delay may be excused if a plaintiff was awaiting the resolution of a related proceeding in another jurisdiction in order to save litigation costs, obtain the benefit of a review of the available evidence or improve settlement prospects": at para. 35. Ms. Tanchak submits that applies here as for a time, there was some prospect that "certain aspects" of the claims against Canada might be resolved in the Varley Action.

[86] Ms. Tanchak argues that while Canada and the Varley Plaintiffs assert delay, there is no indication that the Varley Action has advanced significantly or at all since certification. Neither Canada nor the Varley Plaintiffs have filed any evidence regarding the status of the Varley Action. Based on the Court on-line docket for the Varley Action, Ms. Tanchak argues that "nothing is happening" because the parties have agreed to a "seemingly indefinite stand still to pursue settlement negotiations". Ms. Tanchak argues that there has been no progress beyond certification.

[87] Ms. Tanchak argues that these proposed BC class members have waited a significant amount of time for progress to be made and in the absence of such progress, this Court has a responsibility to them to provide access to justice: *Yee v. Aurelian Resources Inc.*, 2007 ABQB 368 at para. 18.

[88] In my view, there has been unexplained and lengthy delay in the prosecution of the Tanchak Action against Canada (and the Province) since the 2018 Settlement. No evidence was filed explaining the delay. I noted the lack of evidence in the Sequencing Reasons. None was filed on this application.

[89] I can infer that the negotiation of the 2018 Settlement is a likely reason for no steps being taken in the Tanchak Action as against Canada (but not against the Province) up until the time of settlement, and I do not count that time period. However, there was delay after that. The first step taken by Ms. Tanchak to pursue

claims against Canada on behalf of these proposed class members was after the carriage motion was lost in the Federal Court. Even after that, there has been unexplained delay by Ms. Tanchak in pursuing this action. MLG did request a certification date, but when I made directions to facilitate that (and to avoid what Ms. Tanchak now argues would have been wasted expense in preparing a certification motion), Ms. Tanchak and her counsel twice failed to comply with the directions, without explanation, for two years.

[90] While I agree that neither Canada nor the Varley Plaintiffs has filed evidence regarding the status of the Varley Action, I do not agree that "nothing is happening" in that case. The court docket for the Varley Action is in evidence, and it shows that in August 2022, the Court ordered that the registry convene case management conferences every 60 days, they not be recorded, and that if the parties determine that negotiations are not fruitful, the plaintiffs may require a defence to be filed. I infer that the Varley Action is being actively managed by that Court, and have no reason to conclude that the interests of the class members in BC are not being appropriately advanced.

[91] *Knight* was a want of prosecution application. While there may be circumstances where it would be reasonable to await developments in another action, Ms. Tanchak's argument is to some extent inconsistent with her other argument that there is "limited overlap" between the Tanchak Action and Varley Action. If there were limited overlap, it would be more reason to diligently to pursue the Tanchak Action. This case is also distinguishable from *Yee* which concerned an unsuccessful application to stay an action by Alberta residents when there was a proposed class action in Ontario that had not yet been certified, and where the inclusion of the Alberta residents in that proposed class was not a certainty.

[92] Despite Ms. Tanchak's submissions that the BC members of the proposed class have "waited long enough" to proceed against Canada, no BC resident who is a member of the Varley Action certified class opted out, nor is there evidence from

any member of that class that they think their interests are not being advanced. Ms. Tanchak is not a member of that class.

Carriage Order

[93] Canada acknowledges that in this action, Ms. Tanchak and MLG are not bound by the Carriage Order in the Federal Court, but argues that it is the conduct surrounding the order which is relevant. The Tanchak Action did not advance at all until after the Carriage Order. Canada argues that this demonstrates that MLG was putting its own interests ahead of the proposed class.

[94] The Varley Plaintiffs argue that MLG reactivating this action against Canada is an attempt to circumvent the Carriage Order. They argue that the continued inclusion of claims against Canada in the Tanchak Action only stands to benefit MLG, which would likely seek to extract a share of counsel fees in the event there is a resolution of the Varley Action.

[95] The Varley Plaintiffs also refer to *Hafichuk-Walkin* where the Court found that the plaintiff's law firm was maintaining the action as a form of insurance for the possibility of an unsuccessful result in another jurisdiction: at para. 56. The Court stated:

> [57] Subject to resolving choice of law issues, we see little in the way of a legitimate reason for what are, in substance, 'carbon copy' class actions involving the same plaintiffs, defendants, lawyers and allegations being allowed to process in two different jurisdictions once a final certification of a class action has occurred in one jurisdiction and all appeals of the certification are exhausted as is the case here. To allow otherwise offends the principle of comity and exposes the parties and the courts to incurring the evils that a multiplicity of proceedings can give rise to in a multi jurisdictional dispute.

[96] The Varley Plaintiffs argue that the same rationale applies here as the Tanchak Action involves the same allegations as those being advanced in the Varley Action, the same counsel (MLG) was denied carriage in the Federal Court, and the Tanchak Action has been "parked" in BC while the Varley Action has been certified for over two years.

[97] Ms. Tanchak argues that the Carriage Order does not preclude this action, and does not create any abuse of process as to proceedings in another jurisdiction. Ms. Tanchak refers to *Tharani v. LifeLabs Inc.*, 2020 BCSC 1670, where Justice Iyer considered a stay of proposed class proceedings in BC on the ground of abuse of process, after carriage had been decided (among different but allied firms) in Ontario. On the facts of that case, Iyer, J. rejected the argument that pursuing an action in BC, after having lost carriage in Ontario, amounted to abuse of process: at paras. 33–39. Ms. Tanchak also refers to decisions where a Court had granted carriage to a law firm or consortium despite the fact that carriage had been determined differently in another jurisdiction: *Wong v. Marriott International Inc.*, 2020 BCSC 55 at paras. 110–132; *Asquith* at paras. 19-21 and 85.

[98] The cases cited by counsel again reflect that whether a duplicative action amounts to abuse of process is a decision that must be considered in the totality of the unique circumstances of each case. For example, *Hafichuk-Walkin* was a "carbon copy" action commenced by the same plaintiff and same counsel in multiple jurisdictions, where the *bona fides* of doing so was in issue. *Tharani* was a case where there was overlap, but not duplicate actions, no certification had yet taken place, there was no evidence that the plaintiffs and law firms in BC were mere proxies for the counsel in Ontario, all the actions had been filed at about the same time, and there was no other evidence mentioned which supported a lack of legitimate purpose. *Asquith* (the appeal is *Fantov*) was a carriage application where Justice Baker found that there were differences between the proposed actions, which favoured a regional action in BC. On appeal, the other actions in BC were stayed as an abuse of process as they no longer served a legitimate purpose.

[99] In this case, the claims against Canada in the Tanchak Action by those who are not members of the 2018 Settlement Class, were not "copying" the Varley Action, as the Varley Action was filed subsequent to the Tanchak Action. However, I find that after the 2018 Settlement, the Tanchak Action was "parked" and not actively pursued up until and while pursuing, the carriage determinations in the Federal Court. The proposed class of the MLG consortium in the Federal Court was the

same as that in the Varley Action, being a national class of all non-status and Métis persons in Canada who were taken in the Sixties Scoop. This would include the proposed class in the Tanchak Action. I conclude that MLG's interest up until the loss of the carriage motion, was in advancing a national action against Canada in the Federal Court. Only when it lost that motion, were steps taken in this action.

Certification Decision

[100] The Varley Plaintiffs argue that Phelan J. concluded that the subject matter was uniquely suited to a national class proceeding, and ordered that it is in the best interests of the class for their claims against Canada to be advanced in the Varley Action.

[101] Ms. Tanchak argues that the Certification Order reasons have little to no bearing on the determination of a similar application in BC because the claims are different and involve different parties, with different factual matrices. Ms. Tanchak argues that the question Phelan J. considered was only whether the Varley Action was preferable to those provincial actions with respect to claims against Canada alone. Justice Phelan concluded that there would be no purpose to re-litigating those claims against Canada in each province. Justice Phelan did not consider whether the Varley Action can be preferable for determining claims that involve not only Canada but also the Province. Ms. Tanchak argues that in any event, preferability should be determined at certification.

[102] For the reasons already discussed, I do not agree with the underlying premise of Ms. Tanchak's argument that the action against Canada in the Tanchak Action is substantively different than the action against Canada in the Varley Action. This is a reiteration of the "conjoined conduct" argument which I have rejected.

[103] I also do not agree with Ms. Tanchak's interpretation of Phelan J.'s comments. I see nothing in Phelan J.'s reasons to indicate that he was referring only to actions in which Canada was the sole defendant. Justice Phelan referred to actions in which Canada was a defendant with respect to the claims relating to the

Sixties Scoop, and he did not make any distinction as to whether one of the provinces was also a defendant in those actions.

[104] *Fantov* held that multi-jurisdictional preferability should be considered at certification, but there may be circumstances where it is appropriate for an abuse of process application to be heard prior to certification: at paras. 65–66, and 71. There may be overlap between circumstances which are relevant to preferability at a certification hearing, and those which are relevant to an abuse of process application. Likewise, there may be overlap between those same circumstances and a carriage application, which is heard prior to certification. The fact that some of the circumstances are the same does not make consideration of these circumstances a preferability determination. Ultimately, they are different applications with different tests, although some of the underlying objectives may be the same. I acknowledge that the greater the overlap in circumstances, the more caution should be exercised to guard against what might be a preferability argument in the guise of abuse of process.

[105] Finally, I do not agree that Phelan J.'s reasons are irrelevant to an abuse of process application. His determination that there are no aspects of the claim against Canada which are unique or specific to a province, and that the claim is suitable for a national class proceeding in the Federal Court, while directed at preferability, are also relevant to considerations of judicial economy, consistency, and the integrity of the administration of justice, which underlie abuse of process. Ms. Tanchak had a full opportunity on these applications to advance arguments as to why this Court should find that the Tanchak Action against Canada is different from or advantageous over the Varley Action against Canada, and I have rejected those arguments.

Effect on the Varley Action

[106] The Varley Plaintiffs argue that as representative plaintiffs of a nationally certified class action, they are under a duty to protect the interests of the class members, and staying the claims against Canada in the Tanchak Action is

consistent with that duty. The continuance of the Tanchak Action will negatively impact the Varley Action, and only "sow chaos and confusion" with the existing certified class. If the Tanchak Action is permitted to continue, the class members could find themselves: (1) represented by different representative plaintiffs in different courts with respect to the same claims; (2) subjected to duplicative notice campaigns containing duplicative or conflicting information; and (3) unsure of who to contact for information and advice regarding their claims against Canada.

[107] Ms. Tanchak argues that the notice-related concerns raised by the Varley Plaintiffs are hypothetical, unfounded, and in any event, should be addressed at a certification hearing. If the Tanchak Action were certified as a class proceeding, this Court would have oversight of the notice process. *Jiang* implicitly stands for the proposition that while there may be some confusion, it is appropriate in certain instances. As stated in *Wilson v. DePuy International Ltd.*, 2019 BCCA 440 at para. 53, "[w]hile administrative challenges may loom large, courts are adequately equipped to address the possibility of conflicting outcomes, double recovery, and other issues by virtue of class proceedings legislation."

[108] I agree with Ms. Tanchak that any confusion arising from notice is something to be addressed at a certification hearing, but it also has some relevance to the efficient administration of justice. More directly relevant to legitimate purpose in this case, I consider that not one person from BC opted out of the Varley Action class, that the Varley Action has been certified for nearly three years and is being case managed while the parties explore potential resolution, and that a certification hearing in this action, which all of the parties submit would be complex, likely would not be heard until 2025.

Conclusion

[109] In assessing the arguments, I remind myself that abuse of process is focused on the inherent power of the court to prevent the misuse of its procedure in a way that would bring the administration of justice into disrepute. As stated in *Toronto (City)* at para. 51:

> [51] Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[110] The principles of judicial economy, consistency, finality, and the integrity of the administration of justice animate the issue of whether the Tanchak Action is a duplicative action and is being pursued for no legitimate purpose.

[111] In all of the circumstances, I conclude that it would be an abuse of process to allow the claims by those members of the proposed class who were not members of the 2018 Settlement Class, to proceed further against Canada in this action. I have considered all of the arguments and findings discussed above which have factored into this decision, but the main reasons for this conclusion are as follows.

[112] First, Canada has established that the claims of these members of the proposed class are duplicative of the nationally certified Varley Action. Ms. Tanchak has not provided any persuasive evidence or argument as to how the claims of these proposed class members are or could be materially different from, or would provide a benefit to these proposed class members by the maintenance of the Tanchak Action against Canada. However, as I have noted previously, this by itself does not indicate an abuse of process. I am also not persuaded that the claims of these class members are not advancing appropriately in the Varley Action.

[113] Second, there has been unexplained and lengthy delay. The Tanchak Action was filed before the Varley Action and there is no suggestion that it was an abuse of process when it was first filed. However, it then sat for years until after MLG had joined a consortium in Ontario to seek carriage of a proposed national class in the Federal Court, and lost that motion. The proposed class in that action included the proposed class in the Tanchak Action. Once the Carriage Order was made, and

having failed to comply with the 2018 Settlement, Ms. Tanchak then took an initial step in these proceedings. However, MLG was twice directed to address the pleadings and set case management conferences, but failed to comply with those directions, without explanation, for two years. The result was further delay while the Varley Action has proceeded.

[114] Finally, even though the 2018 Settlement directly concerns a different sub-group within the Tanchak Action proposed class, the conduct surrounding the 2018 Settlement in this action is concerning. The failure to comply with the 2018 Settlement is a significant factor in concluding that the remaining proposed class members' (non-status Indians and Métis) claims against Canada in this action, as opposed to the Varley Action, no longer have a legitimate purpose.

[115] The decision not to amend as required by the 2018 Settlement was a conscious decision. The reasons given for failing to amend were not persuasive. To consciously fail to comply with the Settlement Agreement and Settlement Order in this action, and to seek some advantage in doing so, undermines the integrity of the administration of justice, and cannot be in pursuit of a legitimate purpose. It is not in the best interests of the proposed class as a whole, or in the best interests of these particular members of the proposed class in their claims against Canada. The failure to comply with Court directions to address this issue has compounded the delay in this action. It has consumed numerous court days and legal resources, and undermines the efficient administration of justice.

[116] While this action did not start out as an abuse of process, it no longer has a legitimate purpose. The Tanchak Action risks all the mischief referred to in *Gomel*: inconsistent decisions, waste of judicial and court resources, duplication of work by counsel, and the possibility of "forum shopping" by counsel, without any additional benefit to these proposed class members.

[117] In my view, the appropriate remedy is to stay the action against Canada in this proceeding for the claims of these proposed class members. If the Varley Action is decertified or discontinued, Ms. Tanchak has leave to bring an application to lift the stay.

Issue 3: Are the proposed claims against the Province by 2018 Settlement Class members an abuse of process?

Are the claims duplicative?

[118] The Province argues that to the extent the proposed class members are members of the 2018 Settlement Class, the claims in the Tanchak Action against it are duplicative of the relief which has already been settled in the 2018 Settlement.

[119] The Province argues that pleadings are foundational: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at paras. 21–33. These proposed class members do not make any distinct, independent claim against the Province. On Ms. Tanchak's own articulation of the claim, Canada is liable for the entirety of the factual situation that entitles these class members to obtain a remedy against the Province. Paragraph 7 of the Tanchak ANOCC states that these proposed class members are not seeking damages for which Canada may be liable, but paragraph 31 pleads that Canada "is vicarious[ly] liable for the failings of British Columbia and its employees and agents". Thereafter, the ANOCC combines Canada and the Province into the single term "Defendants" for the remainder of the legal basis section. There is no distinction made between the actions against the Province and Canada.

[120] Ms. Tanchak argues that the claims advanced by these class members are not the same because the claim is against the Province and not Canada. Ms. Tanchak argues that the Province is liable for its participation in the Sixties Scoop, and is also independently liable for placing non-status and Métis persons in non-Indigenous homes where Canada was not involved in those decisions. The Tanchak ANOCC refers to the actions of Provincial ministries and agencies and their involvement in the Sixties Scoop (for example, paras. 2, 8, 10, 15, and 30, and 33).

[121] In my view, although the 2018 Settlement and the Tanchak Action arise out of the same or similar factual circumstances, the claims are not duplicative because these proposed class members are claiming against a different party. Even if Ms. Tanchak claims that Canada is vicariously liable for everything done by the

Province, that does not mean that will be the determination of the court. Further, even if Canada is vicariously liable for everything done by the Province, that fact alone does not release the Province of any liability. Vicarious liability does not diminish the personal liability of a direct tortfeasor: *67112 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 at para. 31.

Do the claims serve a legitimate purpose?

[122] The Province adopts the arguments of Canada and the Varley Plaintiffs on delay, the Carriage Order, the Certification Order, and the effect on the Varley Action. The Province makes further, separate arguments on legitimate purpose which I address below.

[123] Building upon its arguments that the Tanchak Action does not make any claim against the Province that would not attract a claim for contribution and indemnity against Canada, or for which Canada is not vicariously liable, the Province argues that those claims of the 2018 Settlement Class members against it are released or barred by a combination of the pleadings and the 2018 Settlement.

[124] The Province argues that the Settlement Order requires that the claims be discontinued against Canada, and prohibits claims against the Province by 2018 Settlement Class members, as the release includes all claims against a third party in which the third party has a basis to seek contribution, indemnity or relief against Canada. The Settlement Order does not preclude claims that are restricted to whatever a third party such as the Province may be directly liable for, and which do not include whatever the Province may be jointly liable for together with Canada, such that the Province has no basis to seek a claim over against Canada. The Province argues that if the claim against Canada is not stayed as it concerns those who are members of the 2018 Settlement Class, the Province intends to file a third-party notice against Canada for contribution and indemnity, however this assertion was not supported by any affidavit.

[125] The Province stresses that it is not arguing that a member of the 2018 Settlement Class may never bring a claim against the Province. It is arguing that this

claim, as it is pled, cannot be brought. Striking or staying the present claim will not preclude a member of the 2018 Settlement Class from advancing a claim that does not offend the Settlement Order.

[126] The Province also argues that the claims against the Province arise from the same factual foundation as that alleged in the 2018 Settlement. The Province argues that abuse of process may be found where subsequent litigation is found to be an attempt to relitigate a claim, and this includes where a second claim is brought against a different defendant. The Province refers to *Doria v. Warner Bros. Entertainment Canada Inc. et al.*, 2022 ONSC 4454 at para. 19, aff'd 2023 ONCA 321 in support of this argument.

[127] Ms. Tanchak argues that the Province has erred in its interpretation of the Settlement Agreement and Settlement Order. The Settlement Order does not mandate that the Tanchak Action be discontinued against Canada and the Province. There is no such language in the Settlement Agreement. The Settlement Order did not extinguish the right of 2018 Settlement Class members to pursue compensation against the Province. The opposite was intended. The intention of the parties, as expressed by paragraphs 12(iii) and 13, and Schedule "H", was that the 2018 Settlement would not disentitle the 2018 Settlement Class from pursuing a claim against the Province. To the extent that the Province may seek contribution and indemnity as against Canada, the Settlement Order contemplates that any portion of the liability ultimately found to be attributable to Canada would be unrecoverable. The 2018 Settlement does not preclude a claim against the Province simply because the Province "might" claim over. The Province is suggesting that it is essentially immune from litigation because it could possibly claim over against Canada. The Province has not in fact filed a third party claim against Canada, and its submission that it intends to do so is not supported by evidence.

[128] Ms. Tanchak argues that an abuse of process application is not the appropriate forum to attempt to resolve what is a merits issue, being the interpretation of the release in the Settlement Agreement and Settlement Order. It is

not plain and obvious that the claim against the Province will fail, nor is it appropriate to strike it as an abuse of process. The Province's interpretation of the 2018 Settlement is an attempt to elevate a potential defence, which may be a common issue for certain proposed class members, to an abuse of process argument. Ms. Tanchak refers to *Nelson v. Teva Canada Limited*, 2021 SKCA 171. That case concerned a proposed class action against the makers of a generic drug. There had been an earlier settlement in Ontario against the brand name manufacturer which purported, through an order, to preclude litigation against any third party who could possibly claim over against the brand name manufacturer. The Court found that it was an error for the judge to strike the action because the respondent had "only raised a potential defence to the appellants' claims against them": at para. 5. It was "far from certain" that the settlement order had released the appellants' claims against the respondents and had barred them from continuing the action: at paras. 13–14.

[129] Ms. Tanchak argues that to preclude a claim against the Province, who was not party to the litigation leading to the 2018 Settlement, a court would have to be completely satisfied that clear notice was given to 2018 Settlement Class members that this would be the effect of the 2018 Settlement. Ms. Tanchak argues that the suggestion that the Province would be relieved from potential liability when it was not present in the negotiations and did not contribute to the 2018 Settlement lacks common sense. It is significant that Canada does not urge the Court to adopt the Province's interpretation of the Settlement Agreement and Settlement Order.

[130] Finally, Ms. Tanchak argues that the 2018 Settlement does not preclude litigation against the Province as "re-litigation" against a second defendant and that *Doria* is distinguishable.

[131] In my view, the Province has not established that it is plain and obvious that the pleadings alone, or in combination with the release, bar the action against it. Ms. Tanchak's arguments regarding the interpretation of the Settlement Agreement and Settlement Order with respect to the alleged intended continuation of the claims against the Province are certainly plausible.

[132] This is a contested issue that raises a defence to the claims of the 2018 Settlement Class members, and is not a basis to find abuse of process. This is a different situation than that of the claims of the 2018 Settlement Class members against Canada in the Tanchak Action, because all parties agree that the Settlement Agreement and Settlement Order unequivocally released those claims against Canada, so it is plain and obvious that those claims cannot succeed.

[133] I agree with Ms. Tanchak that *Doria* is distinguishable. The issue was not "the identity of the defendant": para. 19. Rather, this was an attempt by a plaintiff to relitigate against a different defendant, the quantification of damages which arose from the same set of facts, when the damages had already been assessed in a prior binding arbitration proceeding. This was an abuse of process.

[134] Given my conclusions on no duplication, and that the effect of the pleadings alone or in combination with the 2018 Settlement as argued by the Province, is not plain and obvious, I find that the Province has not shown that the claims against it by the members of the 2018 Settlement Class are an abuse of process. In reaching this conclusion, I have also considered the Province's arguments on delay, the Carriage Order, and the Certification Decision, however they do not overcome the lack of duplication and Ms. Tanchak's arguable claims on the limited effect of the 2018 Settlement. I therefore dismiss the Province's abuse of process application with respect to these members of the proposed class.

Issue 4: Are the proposed claims against the Province by those who are not 2018 Settlement Class members an abuse of process?

Are the claims duplicative?

[135] The Province argues that the claims against it by these members of the proposed class are duplicative of the claims advanced in the Varley Action. The Tanchak Action seeks damages for the same causes of action, and is advancing a claim against Canada (both directly and vicariously) with no distinction made against the Province other than naming it as a defendant.

[136] Ms. Tanchak repeats her arguments that the claims are different, as summarized above.

[137] In my view, for the same reasons previously stated with respect to the claims of 2018 Settlement Class members against the Province, the claims of these proposed class members against the Province are not duplicative of the claims advanced in the Varley Action.

Do the claims serve a legitimate purpose?

[138] Building upon its argument as to duplication, the Province argues that Ms. Tanchak has failed to identify a single benefit to these proposed class members claims against it, and that would not be gained in the Varley Action. The only benefit would be to MLG itself. The Province also argues that if the court finds the Tanchak Action should not be struck in its entirety, the Tanchak Action ought to be stayed pending the resolution of the Varley Action and the Province's strike application should be adjourned generally. The Province argues that it may be that claims of these proposed class members in the Tanchak Action are disposed of in the Varley Action, making the Tanchak Action unnecessary. Any steps taken in the meantime would be a waste of resources for the court and the parties.

[139] Ms. Tanchak argues that there is a legitimate purpose to these claims and that there is a benefit to the Tanchak Action. These class members are seeking judgment against the Province for its alleged wrongs. The prospect of a settlement with Canada does not include any settlement in respect of the claims against the Province. There is no judicial economy to be achieved by temporarily staying the Tanchak Action to await the outcome in the Varley Action, because there is no basis to find that the substantive claims of these class members against the Province could ever be determined in the Varley Action. If the potential liability of Canada in the Varley Action is settled while the Tanchak Action proceeds, that will, to that limited extent, change the claim against the Province, but the Tanchak Action claim is primarily against the Province and that should not be further delayed.

[140] Given my conclusions on duplication, I find that the Province has not shown that the claims against the Province by these members of the proposed class do not have a legitimate purpose. In my view, the legitimate purpose is the potential liability of the Province for its alleged wrongful involvement in the Sixties Scoop.

[141] With respect to delay, while the carriage determinations concerning the actions against Canada were being argued in the Federal Court, there is no evidence of any steps being taken in this action against the Province. The delay is significant and it has not been explained. However, in my view, despite the significant delay, it does not overcome the lack of duplication and the existence of a legitimate purpose.

[142] Further, even if the Varley Action were to settle on similar terms to the 2018 Settlement, as discussed in Issue 3, this would not necessarily bar the action against the Province. It would only raise a potential defence to the claim against the Province. In my view, there is no reason for the claims of these proposed class members to await any potential resolution in the Varley Action.

[143] In all the circumstances, the Province has not established that the claim against by these proposed class members is an abuse of process. I therefore dismiss the Province's abuse of process application.

[144] Finally, I note that the Province's notice of application and written submissions contained an argument on jurisdiction of this Court and *forum non conveniens*. This was not mentioned in oral submissions, nor did I give leave for it to be heard prior to any certification hearing. I decline to address it. Should the Province wish to raise this argument, they may raise this matter at a case planning conference.

Issue 5: Costs

[145] Canada and the Varley Plaintiffs seek costs against Ms. Tanchak's counsel personally as special costs.

Legal Framework

[146] Rule 9-5(1) of the *SCCR* provides the Court with authority to order special costs on an application under that rule, which includes an application claiming abuse of process. Further, the court has inherent jurisdiction to order special costs payable by a party's lawyer: *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 at paras. 16,18; *A.S. v. British Columbia (Director of Child, Family and Community Services)*, 2017 BCSC 1175 at para. 14.

[147] The threshold for awarding special costs against a lawyer is high, and there must be a finding of reprehensible conduct by the lawyer that "represents a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system": *Jodoin* at para. 27; *A.S.* at para. 15.

[148] Special costs are only appropriate in "very special circumstances" where conduct is deserving of punishment or rebuke. A judge should be "extremely cautious" in awarding costs personally against lawyers given the potential chilling effect that would have on lawyers who are generally duty bound "to guard confidentiality of instructions and to bring forward with courage even unpopular causes." *Nuttall v. Krekovic*, 2018 BCCA 341, at paras. 26–29.

[149] As described by Justice Gascon for the majority in *Jodoin*:

> [29] In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate.

[150] Justice Gascon also noted that "a mere mistake or error of judgment will not be sufficient to justify awarding costs against a lawyer personally; there must at the very least be gross neglect or inaccuracy": at para 27.

[151] Finally, Rule 14-1(33)(c) and (d) of the *SCCR* provides:

> (33) If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through

> delay, neglect or some other fault, the court may do any one or more of the following:
>
> …
>
> (c) order that the lawyer be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;
>
> (d) make any other order that the court considers will further the object of these Supreme Court Civil Rules.
>
> [Emphasis added.]

[152] Rule 14-1(33) "expanded the scope of conduct which might support a costs order against lawyer". However, "it is still necessary to find reprehensible conduct on the part of the lawyer to justify an order for special costs". The lower standard must still be exercised sparingly and only in exceptional cases because whether the lawyer or his client caused the wasted costs may not always be clear and lawyer and client and privilege deserves "a high degree of protection". *Nuttall* at paras. 34–35, citing *Nazmdeh v. Spraggs*, 2010 BCCA 131 at paras. 103–104.

Positions of Applicants and MLG

[153] Canada argues that the conduct of Mr. Merchant justifies an award of special costs against him personally. MLG negotiated and signed the 2018 Settlement and received legal fees; however, MLG has failed to comply with the terms of the 2018 Settlement as it relates to the Tanchak Action, and flouted the court order that brought it that compensation. MLG also failed to comply with directions of this Court at the 2020 and 2021 case management conferences. Canada argues that MLG only took steps to advance the Tanchak Action when it lost the carriage motion and in the face of the certified Varley Action. Canada argues that behaviour like this needs to be discouraged. Canada does not seek to recover costs against Ms. Tanchak as, from its perspective, there is no indication that Ms. Tanchak has been involved the decisions which led to this situation. The Varley Plaintiffs make similar arguments.

[154] MLG argues that special costs against it are unavailable as a matter of law. As Canada and the Varley Plaintiffs do not seek costs against Ms. Tanchak, they are

not entitled, pursuant to Rule 14-1(33), to in its stead, seek an order of costs as against counsel personally.

[155] This issue was decided by Justice Fisher (as she then was) in *A.S*. One of the issues addressed was “Whether the Court can or should exercise its discretion to order costs against the solicitors, under the *SCCR* or its inherent jurisdiction, in circumstances where no costs are sought against the petitioners themselves”. At para. 33, Justice Fisher decided that such an order could be made under the court’s inherent jurisdiction, or under Rule 14-1(33)(d).

[156] With respect to the Varley Plaintiffs, MLG also argues that costs may also not be awarded to the Varley Plaintiffs because they are not a party to the Tanchak Action. They were only granted standing to bring an abuse of process application. I agree. While I granted the Varley Plaintiffs standing, it was primarily because of their interest in the effect on the Varley Action for Issue 2.

[157] MLG argues that even if there were authority to order special costs against counsel, there has been no reprehensible conduct on the part of Ms. Tanchak’s counsel that would meet the threshold for making such an award. Even seeking such costs places counsel in an untenable position as regards solicitor-client privilege. First, MLG argues that the interpretation of what is required by the 2018 Settlement is a contested allegation. Second, the allegations regarding delay were explained in the submissions on abuse of process and do not justify an order of special costs against counsel. Third, with respect to the Varley Plaintiffs’ allegation that the Tanchak Action is little more than a ploy by MLG to secure a financial benefit for the firm, while MLG agrees that courts have been critical of “proposed class proceedings which are motivated solely by the efforts of counsel to "get a piece of the class-action-action”, the Tanchak Action is not a tag-along action. It was commenced in 2016, prior to the settlement 2018 Settlement, and before the commencement of the Varley Action. This is not a case of a “copy cat” claim having been issued for no purpose other than securing a seat at the negotiating table, as is suggested by the Varley Plaintiffs. The 2018 Settlement specifically contemplated that Tanchak Action would continue notwithstanding that resolution.

[158] In my view, the only conduct which could be argued to possibly meet the rare and exceptional threshold is the circumstances surrounding the failure to comply with the 2018 Settlement. I have found those circumstances concerning and that the Settlement Agreement plainly states what is to be done. The failure to comply undermined the administration of justice, and was not in the best interests of the proposed class. However, I do not know what instructions were given to MLG. I am not satisfied that I can conclude that MLG's conduct reached the very high threshold to justify ordering that costs be paid by counsel personally as special costs. Further, up until these reasons, Canada properly remained a party regarding the proposed members of the class who were not part of the 2018 Settlement Class, until the stay was issued. The most significant contest on these applications was with respect to the claims of those who are not 2018 Settlement Class members against Canada.

[159] Each party and the Varley Plaintiffs will bear their own costs.

"Norell J."