Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CHARLES BAXTER, SR. AND ELIJAH BAXTER

Plaintiffs

- and –

THE ATTORNEY GENERAL OF CANADA

Defendant

- and –

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF CARIBOO, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE DIOCESE OF MOOSONEE, THE SYNOD OF THE DIOCESE OF WESTMINISTER, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE DIOCESE OF SASKATCHEWAN, THE SYNOD OF THE DIOCESE OF YUKON, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE PRESBYTERIAN CHURCH IN CANADA, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA), THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF CALGARY, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, THE ROMAN CATHOLIC BISHOP OF

VICTORIA, THE ROMAN CATHOLIC BISHOP OF NELSON, THE CATHOLIC EPISCOPAL CORPORATION OF WHITEHORSE, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD – McLENNAN, THE CATHOLIC ARCHDIOCESE OF EDMONTON, LA DIOCESE DE SAINT-PAUL, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF MACKENZIE, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, THE ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT-BONIFACE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF SAULT STE. MARIE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE MISSIONARY OBLATES OF MARY IMMACULATE – GRANDIN PROVINCELES PERES MONTFORTAINS (also known as THE COMPANY OF MARY), JESUIT FATHERS OF UPPER CANADA, THE MISSIONARY OBLATES OF MARY IMMACULATE – PROVINCE OF ST. JOSEPH, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (also known as LES REVERENDS PERES OBLATS DE L'IMMACULEE CONCEPTION DE MARIE), THE OBLATES OF MARY IMMACULATE, ST. PETER'S PROVINCE, LES REVERENDS PERES OBLATS DE MARIE IMMACULEE DES TERRITOIRES DU NORD OUEST, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (PROVINCE DU CANADA – EST), THE SISTERS OF SAINT ANNE, THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS), THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERT (also known as THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERTA), THE SISTERS OF CHARITY (GREY NUNS) OF THE NORTHWEST TERRITORIES, THE SISTERS OF CHARITY (GREY NUNS) OF MONTREAL (also known as LES SOEURS DE LA CHARITÉ (SOEURS GRISES) DE L'HÔPITAL GÉNÉRAL DE MONTREAL), THE GREY SISTERS NICOLET, THE GREY NUNS OF MANITOBA INC. (also known as LES SOEURS GRISES DU MANITOBA INC.), THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE, LES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE and INSTITUT DES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE (also known as LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE) DE NICOLET AND THE SISTERS OF ASSUMPTION, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA, THE DAUGHTERS OF THE HEART OF MARY (also known as LA SOCIETE DES FILLES DU COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY), MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEART AND MARY IMMACULATE, or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE), LES SOEURS DE LA

CHARITE D'OTTAWA (SOEURS GRISES DE LA CROIX) (also known as SISTERS OF CHARITY OF OTTAWA - GREY NUNS OF THE CROSS), SISTERS OF THE HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDER OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE), THE SISTERS OF CHARITY OF ST. VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX), LES SOEURS DE NOTRE DAME AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, SISTERS OF THE PRESENTATION OF MARY (SOEURS DE LA PRESENTATION DE MARIE), THE BENEDICTINE SISTERS, INSTITUT DES SOEURS DU BON CONSEIL, IMPACT NORTH MINISTRIES, THE BAPTIST CHURCH IN CANADA

Third Parties

JOINT FACTUM OF THE THIRD PARTIES
THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH OF CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF CARIBOO, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE BISHOP OF MOOSONEE, THE SYNOD OF THE DIOCESE OF NEW WESTMINISTER, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE DIOCESE OF SASKATCHEWAN, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA)

(Motion Returnable August 29, 30, and 31, 2006)

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PART I - NATURE OF THE MOTION

1. This Factum is submitted on behalf of the General Synod of the Anglican Church of Canada, The Presbyterian Church of Canada, and The United Church of Canada and entities related to them (collectively referred to as the "Protestant Church Entities") in

support of a motion for approval of the Indian Residential Schools Settlement Agreement (the "IRSSA").

PART II - THE PROTESTANT CHURCH ENTITIES

(i) Anglican Church Entities

2. The General Synod of the Anglican Church of Canada (the "General Synod") is a corporation pursuant to a private federal statute and was originally incorporated under the name "The General Synod of the Church of England in Canada" by An Act to Incorporate the General Synod of the Church of England in Canada, S.C. 1921, c. 82.

> *Affidavit of James Bruce Boyles, para 3, Motion Record, Vol. VII, Tab 21, p. 2175.*

3. The Missionary Society of the Anglican Church of Canada (the "Missionary Society") was initially a society constituted under Canon II of the Canons of the Unincorporated General Synod in 1902. In 1903, pursuant to a private federal statute, the Missionary Society incorporated under the name "The Missionary Society of the Church of England in Canada, S.C. 1903, c. 155, by An Act to Incorporate the Missionary Society of the Church of England in Canada, S.C. 1903, c. 155.

> *Affidavit of James Bruce Boyles, para 6, Motion Record, Vol. VII, Tab 21, p. 2175.*

4. In 1956 the names of the General Synod and the Missionary Society changed, respectively, to "The General Synod of the Anglican Church of Canada" and the "The Missionary Society of The Anglican Church of Canada" by S.C. 1956, c. 57.

Affidavit of James Bruce Boyles, para 7, Motion Record, Vol. VII, Tab 21, p. 2175.

5. The General Synod, the Missionary Society and individual Anglican Dioceses are separate legal structures enabling the Anglican Church of Canada to act in the temporal world. The Anglican Church of Canada is itself an ecclesiastical and not a legal entity comprising that collective body of Christian people in Canada who subscribe to Anglican doctrines of faith and worship.

Affidavit of James Bruce Boyles, para 8, Motion Record, Vol. VII, Tab 21, pp. 2175-2176.

6. In Canada, some 800,000 Anglicans worship in 30 Anglican Dioceses which are regional groupings of churches, each under the leadership of a Bishop and containing a number of parishes. Each Bishop is elected by the people of the diocese and consecrated by the Metropolitan Bishop of the ecclesiastical province in which the diocese is situated.

Affidavit of James Bruce Boyles, para 9, Motion Record, Vol. VII, Tab 21, p. 2176.

7. The dioceses of the Anglican Church of Canada are listed in Schedule "C". Each diocese is separately incorporated by (usually) provincial legislation, has a separate legal personality and operates independently from other dioceses and from the General Synod and the Missionary Society.

Affidavit of James Bruce Boyles, para 9, Motion Record, Vol. VII, Tab 21, p. 2176.

8. The General Synod is the corporate vehicle through which the decisions about the national work of the Anglican Church of Canada are formulated and carried out. The Council of the General Synod normally meets twice a year to conduct the business of the General Synod.

Affidavit of James Bruce Boyles, para 10, Motion Record, Vol. VII, Tab 21, p. 2176.

9. The Missionary Society is the corporate vehicle through which the general missionary work of the Anglican Church of Canada was carried out from 1903 until 1969. Over the years the work of the Missionary Society has included the management, funding, and support of missionary work among diverse peoples in many parts of Canada as well as overseas in Japan, China and India.

Affidavit of James Bruce Boyles, para 11, Motion Record, Vol. VII, Tab 21, p. 2176.

(ii) The Presbyterian Entities

10. The Presbyterian Church in Canada (the "Presbyterian Church"), is an unincorporated association which includes congregations, members and adherents of The Presbyterian Church in Canada who did not become part of The United Church of Canada on June 10, 1925, together with persons who have since that date joined The Presbyterian Church in Canada as members or adherents. The Church was referred to in *An Act to Incorporate The Trustee Board of The Presbyterian Church in Canada*, S.C. 1939, c. 64 and *An Act respecting the United Church in Canada*, S.C. 1939, c. 65.

Affidavit of Stephen Kendall, para 2, Motion Record, Vol. VII, Tab 23, p. 2235.

11. The Trustee Board of The Presbyterian Church in Canada (the "Trustee Board"), is a body corporate. The Trustee Board was incorporated by a Special Act of Parliament entitled *An Act to Incorporate The Trustee Board of The Presbyterian Church in Canada* S. C. 1939, c. 64 and was recognized by the Ontario Legislature in *An Act respecting the Trustee Board of The Presbyterian Church in Canada*, S. O. 1939, c. 69. The Trustee Board holds title to the property of the Church, subject to certain property of local congregations which is held by their own trustees.

Affidavit of Stephen Kendall, para 3, Motion Record, Vol. VII, Tab 23, p. 2235.

12. The Foreign Mission of The Presbyterian Church in Canada entered into agreements dated April 1, 1911 with His Majesty the King, represented by the Superintendent General of Indian Affairs of Canada, for the operation of the Cicilia Jeffrey Boarding School and the Birtle Boarding School and reported annually to The General Assembly of the Church and had oversight of, *inter alia*, missionary work to aboriginal peoples.

Affidavit of Stephen Kendall, para 6, Motion Record, Vol. VII, Tab 23, p. 2236.

13. The Women's Missionary Society of The Presbyterian Church in Canada, entered into agreements dated May 22, 1962, with Her Majesty the Queen in Right of Canada, for the operation of the Cecilia Jeffrey Indian Residential School and the Birtle Indian Residential School and reported annually to The General Assembly of the Presbyterian Church.

Affidavit of Stephen Kendall, para 7, Motion Record, Vol. VII, Tab 23, p. 2236.

(iii) The United Church Entities

14. The United Church of Canada was founded pursuant to a covenant formed between the members of its founding churches, and was incorporated between 1924 and 1926 by the Parliament of Canada and the Legislatures of the various provinces. The statutes adopted the said covenant and were and are each known as *The United Church of Canada Act*.

> *Affidavit of James Vincent Scott, para 3, Motion Record, Vol. VII, Tab 22, p. 2226.*

15. The Methodist Church was one of the founding churches of The United Church of Canada, and was described in *The United Church of Canada Act* as including "the body corporate known as the Methodist Church and all bodies corporate established or created by The Methodist Church or any Conference thereof under the provisions of any statute of the Parliament of Canada, or the Legislature of any Province thereof ... and all Methodist congregations separately incorporated under any statute of any Province of the Dominion of Canada". Pursuant to *The United Church of Canada Act,* the several corporations described as "The Methodist Church" merged into the corporation of The United Church of Canada.

> *Affidavit of James Vincent Scott, para 4, Motion Record, Vol. VII, Tab 22, pp. 2226-2227.*

16. The Board of Home Missions of The United Church of Canada was established in 1925 as an unincorporated internal administrative division of The United Church of Canada. The Board of Home Missions had responsibility for supervision and

administration of all of the missionary work of The United Church within Canada, including work with First Nations' people and with respect to Indian Residential Schools. In an internal restructuring of The United Church of Canada in 1971, the mandate and work of the Board of Home Missions was merged into the Division of Mission in Canada.

Affidavit of James Vincent Scott, para 5, Motion Record, Vol. VII, Tab 22, pp. 2227.

17. The Women's Missionary Society of The United Church of Canada came into existence in 1925 as an unincorporated internal organization for women within The United Church of Canada. Its mandate included the appointing of missionaries and associate workers in Canada, recruiting and training women church workers, producing missionary periodicals, carrying through mission education programs for all ages in the church, and fund-raising for all its mission activities. In 1962, the Women's Missionary Society joined with the Women's Society of The United Church of Canada to form the United Church Women.

Affidavit of James Vincent Scott, para 6, Motion Record, Vol. VII, Tab 22, p. 2227.

18. The Missionary Society of the Methodist Church of Canada existed as part of the Methodist Church of Canada, formed in 1874, and the Methodist Church (Canada), formed in 1884. The objects of the Society were the support of domestic, Aboriginal, immigrant, new Canadian, French Canadian, and other missions carried on under the direction of a central committee and board, and later also under the Conferences. The work covered the entire mission field including work with Aboriginal People in

Ontario, Quebec and Western Canada. In 1925, pursuant to *The United Church of Canada Act*, the body corporate of which the Missionary Society was part merged into the corporation of The United Church of Canada.

Affidavit of James Vincent Scott, para 7, Motion Record, Vol. VII, Tab 22, p. 2227.

PART III - THE FACTS

(i) Involvement of the Protestant Church Entities in the Operation of Indian Residential Schools ("IRSS")

19. From approximately 1880 and continuing to 1969, the General Synod, the Missionary Society and 14 Anglican dioceses (the "Anglican Entities") were involved or alleged to be involved in the operation of IRSs listed in Schedule "D".

Affidavit of James Bruce Boyles, paras 12 and 25, Motion Record, Vol. VII, Tab 21, pp. 2176 and 2180-2183.

20. From approximately 1886 and continuing to 1969, the Presbyterian Church directly or through the Woman's Missionary Society of the Presbyterian Church in Canada and the Foreign Mission of the Presbyterian Church in Canada were involved or alleged to be involved in the operations of the IRSs listed in Schedule "D".

Affidavit of Stephen Kendall, paras 5, 6 and 7, Motion Record, Vol. VII, Tab 23, p. 2236.

21. From 1925 to 1969, the United Church Entities were involved or alleged to be involved in the operation of the IRSs listed in Schedule "D".

Affidavit of James Vincent Scott, paras 2, 9 and 10, Motion Record, Vol. VII, Tab 22, pp. 2226 and 2228.

(ii) Involvement of Protestant Church Entities in Claims Arising from IRSs

22. Beginning in approximately 1998, the Anglican Entities began to be named as defendants in actions commenced by persons who attended IRSs and as a third parties by the federal government, who had been named as a defendant in actions commenced by persons who attended IRSs. To date, the Anglican Entities have been named as defendants or third parties in the following proceedings throughout Canada:

(a) approximately 2,200 individual actions either brought directly by plaintiffs or by way of third party claims commenced by the federal government;

(b) the Baxter national class action commenced in Ontario in which certification is pending;

(c) the Cloud class action issued in Ontario which has been certified under the *Ontario Class Proceedings Act*.

Affidavit of James Bruce Boyles, para 13, Motion Record, Vol. VII, Tab 21, pp. 2176-2177.

23. Beginning in approximately 1998, the Presbyterian Church began to be named as a defendant in actions commenced by persons who attended IRSs and as a third party by the federal government, who had been named as a defendant in actions commenced by persons who attended IRSs. To date, the Presbyterian Church and Trustee Board have been named as defendants or third parties in the following actions throughout Canada:

(a) approximately 140 individual actions either brought directly by plaintiffs or by way of third party claims commenced by the federal government; and

(b) the Baxter national class action commenced in Ontario in which certification is pending.

Affidavit of Stephen Kendall, para 8, Motion Record, Vol. VII, Tab 23, pp. 2236-2237.

24. Beginning in approximately 1995, The United Church Entities began to be named as Defendants in actions commenced by persons who attended IRS and as third parties by the federal government, who was named as a defendant in actions commenced by persons who attended IRS. To date, The United Church Entities have been named as Defendants or Third Parties in approximately 1,003 actions in Ontario, Manitoba, Saskatchewan, Alberta, and B.C. In addition, The United Church Entities have been named as Third Parties in the Baxter National Class Action commenced in Ontario, in which certification is pending. The United Church has also been named in a Class Action commenced in Saskatchewan.

Affidavit of James Vincent Scott, para 11, Motion Record, Vol. VII, Tab 22, p. 2228.

(iii) Contributions to Resolution of IRS claims prior to the IRSSA

(a) The Anglican Entities

25. As the number of legal actions against the Anglican Entities increased, the General Synod and several Anglican dioceses faced serious financial pressures as a result of

the legal costs of defending direct plaintiffs' claims and third party claims from the federal government. In many cases, substantial legal costs were spent in determining the apportionment of liability between the Anglican Entities and the federal government, which often involved complex, factual and legal questions arising over a lengthy period of time. In early 2002, the Anglican Entities began direct discussions with the federal government to arrive at an agreement which would bring an end to disputes between the Anglican Entities and the federal government relating to apportionment of liability and provide for a contribution to settlements from the Anglican Entities.

Affidavit of James Bruce Boyles, para 14, Motion Record, Vol. VII, Tab 21, p. 2177.

26. On March 20, 2003, the Anglican Entities and the federal government entered into a Settlement Agreement (the "Anglican Settlement Agreement") which provides that the federal government and Anglican Entities discontinue all third party claims against each other and not commence any further third party claims. The Anglican Entities agreed to create a Settlement Fund in the amount of $25,000,000 which would be used to contribute to 30% of any settlement or trial verdict of an individual civil action or to an award under the Dispute Resolution process that was being designed and is now in place for survivors to bring individual claims.

Affidavit of James Bruce Boyles, paras 15 and 16 and Exhibit B, Motion Record, Vol. VII, Tab 21, pp. 2177-2178.

27. A further term of the Anglican Settlement Agreement provides that once the $25,000,000 Settlement Fund had been fully paid out by way of the 30% contribution

described, the federal government will pay the full amount of the claims directly or by way of indemnification of the Anglican Entities.

Affidavit of James Bruce Boyles, para 17, Motion Record, Vol. VII, Tab 21, p. 2178.

28. The Settlement Fund created by the Anglican Settlement Agreement dated March 20, 2003 is administered by a corporation known as the Anglican Church of Canada Resolution Corporation which is responsible for administering the Settlement Fund and making the 30% payments on behalf of Anglican Entities.

Affidavit of James Bruce Boyles, para 18, Motion Record, Vol. VII, Tab 21, p. 2178.

29. As at February 16, 2006, the following amounts have been paid by the Anglican Entities for court actions and settlements and DR settlements under the Anglican Settlement Agreement.

Settlements Paid to Date (Litigation)	$5,923,783.05
Number of Claimants (approximate)	212
ADR Settlements Paid to Date	$1,774.635.88
Number of DR Claimants Settled	100
Additional DR Hearings – already taken place	114
Number of DR Hearings Scheduled	15
Number of Anglican Claims received to date by the General Secretary (This includes 33 post-agreement claims and 15 non ACC school claims.)	476

Total Paid out of Settlement Fund **$7,698.418.93**

Affidavit of James Bruce Boyles, para 19, Motion Record, Vol. VII, Tab 21, p. 2178.

(b) The Presbyterian Church

30. In late 2002, the Presbyterian Church began direct discussions with the federal government to arrive at an agreement which would bring an end to disputes between the Church and the federal government relating to apportionment of liability and provide for a contribution to settlements from the Church and Trustee Board.

Affidavit of Stephen Kendall, para 9, Motion Record, Vol. VII, Tab 23, p. 2237.

31. On February 13, 2003, the Presbyterian Church, the Trustee Board and the federal government entered into a Settlement Agreement (the "Presbyterian Settlement Agreement") which provides that the federal government and the Presbyterian Church will discontinue all third party claims against each other and not commence any further third party claims. The Presbyterian Church and Trustee Board agreed to create a Settlement Fund in the amount of $2,100,000 which would be used to contribute to 30% of any settlement or trial verdict of an individual civil action or to an award under the Dispute Resolution process that was being designed and is now in place for survivors to bring individual claims.

Affidavit of Stephen Kendall, paras 10 and 11 and Exhibit B, Motion Record, Vol. VII, Tab 23, p. 2237.

32. The Presbyterian Settlement Agreement provides that once the $2,100,000 Settlement Fund had been fully paid out by way of the 30% contribution, the federal government will pay the full amount of the claims subject to the Presbyterian Settlement Agreement directly or by way of indemnification of the Presbyterian Church and The Trustee Board.

Affidavit of Stephen Kendall, para 12, Motion Record, Vol. VII, Tab 23, p. 2237.

33. The Settlement Fund created by the Presbyterian Settlement Agreement is maintained as a segregated amount and is the source of funds for making the 30% payments on behalf of the Church and Trustee Board.

Affidavit of Stephen Kendall, para 13, Motion Record, Vol. VII, Tab 23, p. 2237.

34. As at March 10, 2006, the following is a summary of the number of court actions and settlements and ADR settlements contributed to by the Church pursuant to the Settlement Agreement.

Settlements Paid to Date (Litigation)	$156,809
Number of Claimants (approximate)	5
ADR Settlements Paid to Date	$210,085
Number of ADR Claimants Settled	15
Total Paid out of Settlement Fund	$366,894

Affidavit of Stephen Kendall, para 14, Motion Record, Vol. VII, Tab 23, p. 2238.

(c) The United Church

35. Unlike the other Protestant churches, The United Church did not enter into a prior settlement agreement with the federal government. Rather, The United Church was involved in ongoing litigation with the federal government with respect to, among other issues, the apportionment of responsibility for the wrongs committed or alleged to have been committed at IRS. Pending resolution of that issue by The Supreme Court of Canada, The United Church and the federal government had an informal arrangement whereby The United Church paid 25 to 30 percent of IRS settlements, on a case by case basis. In addition, The United Church participated in the IRS Dispute Resolution ("DR") Program which the federal government put in place to address IRS claims, and contributed 30 percent towards the resulting DR awards relating to claims involving The United Church.

> *Affidavit of James Vincent Scott, para 12, Motion Record, Vol. VII, Tab 22, pp. 2228-2229.*

36. To March 15, 2006, The United Church has paid, on behalf of itself and The United Church Entities, approximately $4,592,500.00 towards judgments and settlement of IRS actions. In addition, The United Church has paid approximately $1,403,500.00 towards DR Awards. Accordingly, to March 15, 2006, The United Church has paid a total of approximately $5,996,000.00 towards the resolution of IRS claims. In addition to the foregoing, as of March 15, 2006, there were approximately 258 outstanding DR claims involving The United Church, which had not been resolved.

Affidavit of James Vincent Scott, paras 13 and 14, Motion Record, Vol. VII, Tab 22, p. 2229.

(iv) Protestant Church Entities agreement to the IRRSA and bilateral agreements with the federal government

37. In June, 2005, the General Synod, the Presbyterian Church and the United Church were requested by the Honourable Frank Iacobucci to participate in discussions with the objective of bringing a fair resolution to both the legal and non-legal issues arising from the IRS legacy. Counsel for the three Protestant Church Entities participated in the discussions and are parties to the IRSSA that is before this court for approval.

Affidavit of James Bruce Boyles, para 21, Motion Record, Vol. VII, Tab 21, p. 2179.

Affidavit of Stephen Kendall, para 15, Motion Record, Vol. VII, Tab 23, p. 2238.

Affidavit of James Vincent Scott, para 15, Motion Record, Vol. VII, Tab 22, p. 2229.

38. In addition, the Protestant Church Entities entered into the following bilateral agreements with the federal government:

(a) The Anglican Entities entered into an Amending Agreement to the Anglican Settlement Agreement;

(b) The Presbyterian Church and the Trustee Board entered into a Second Amending Agreement to the Presbyterian Settlement Agreement; and

(c) The United Church entered into an agreement with the federal government (the "United Church Agreement").

Affidavit of James Bruce Boyles, para 22, Motion Record, Vol. VII, Tab 21, p. 2179.

Affidavit of Stephen Kendall, para 16, Motion Record, Vol. VII, Tab 23, p. 2238.

Affidavit of James Vincent Scott, para 19, Motion Record, Vol. VII, Tab 22, p. 2230.

Schedules 0-1, 0-2 and 0-4 to the IRSSA, Motion Record, Vol. II, Tab O-1, Tab O-2, Tab O-4.

39. In accordance with terms of the initial Anglican and Presbyterian Settlement Agreements and an agreement amongst the federal government and the Catholic and Protestant Church Entities, each of the four Canadian church denominations were to be treated in a proportionally equal and consistent manner in relation to any bilateral agreement made with the federal government.

Affidavit of James Bruce Boyles, para 22, Motion Record, Vol. VII, Tab 21, p. 2179.

Affidavit of Stephen Kendall, para 16, Motion Record, Vol. VII, Tab 23, p. 2238.

Affidavit of James Vincent Scott, para 16, Motion Record, Vol. VII, Tab 22, p. 2229.

40. The bilateral agreements with the federal government provide that each church organization is to contribute proportionally equal financial amounts, such proportionality being derived from the percentage of the IRS cases in which each church organization was involved. The proportional contribution of the churches was calculated based on the Catholic contribution. Under the IRSSA, the financial contribution of the Catholic Entities is to be between $54,000,000.00 and $79,000,000.00, depending upon the outcome of the fundraising campaign which the

Catholic Entities are to undertake pursuant to the IRSSA, in best efforts to raise an additional $25,000,000.00.

Affidavit of James Vincent Scott, paras 16 and 17, Motion Record, Vol. VII, Tab 22, pp. 2229-2230.

41. In addition, all church organizations agreed to non-financial terms, such as cooperating with and participating in the Truth and Reconciliation Commission which is to be established under the IRSSA. This participation in the Truth and Reconciliation Commission will entail a significant commitment from the churches, in terms of resources and person hours, which is in addition to the financial contribution of the Protestant Church Entities.

Affidavit of James Vincent Scott, para 18, Motion Record, Vol. VII, Tab 22, p. 2230.

(v) Terms of the Agreements between the federal government and each of the Protestant Church Entities

(a) The Anglican Entities

42. The Anglican Amending Agreement amends the Anglican Settlement Agreement as follows:

(a) The total amount to be paid by the Anglican Entities is reduced to $15,687,100 from the present sum of $25,000,000;

(b) From the date that the Amending Agreement comes into force, the federal government will pay all IRS Abuse Claims whether they are paid under the existing DR model, the

Independent Assessment Process ("IAP") which is part of the IRSSA, settlements of civil claims, or court judgments;

(c) The remainder of the $15,687,100 in the Anglican Settlement Fund not paid as a contribution to claims to date, will be used for the Anglican Entities' contribution to IRS Abuse Claims up to the date the Amending Agreement comes into force, for the funding of an Anglican Fund for Healing and Reconciliation which will make grants to assist with the healing and reconciliation of former IRS students and their families, and for eligible in kind contributions to assist with healing and reconciliation of former IRS students and their families.

Affidavit of James Bruce Boyles, para 23, Motion Record, Vol. VII, Tab 21, pp. 2179-2180.

Anglican Amending Agreement, Schedule 0-2 to IRSSA, Motion Record, Vol. II, Tab O-2.

43. Pursuant to the Anglican Settlement Agreement as amended by the Anglican Amending Agreement, the Anglican Entities have and will contribute the following amounts for judgments, settlement of civil actions, payments under the existing Dispute Resolution Model, funding grants made by the Anglican Fund for Healing and Reconciliation and in-kind payments:

A. Anglican Entities To Be Named As Defendants in the Omnibus Action.

Anglican Entity	**Amount Contributed**
The General Synod of the Anglican Church of Canada	$1,829,291

The Incorporated Synod of the Diocese of Algoma	$442,079
The Synod of the Diocese of Athabasca	$76,260
The Synod of the Diocese of Brandon	$154,546
The Anglican Synod of the Diocese of British Columbia	$611,836
The Synod of the Diocese of Calgary	$121,953
The Synod of the Diocese of Cariboo	$6,098
The Incorporated Synod of the Diocese of Huron	$1,280,504
The Synod of the Diocese of Keewatin	$112,806
The Bishop of Moosonee	$91,465
The Synod of the Diocese of New Westminster	$975,662
The Synod of the Diocese of Qu'Appelle	$243,906
The Synod of the Diocese of Saskatchewan	$137,197
The Synod of the Diocese of Yukon	$46,479
The Synod of the Anglican Church of the Diocese of Quebec	$82,318
Total:	**$6,212,400**

B. Anglican Entities not named as Defendants in this action that did not operate an IRS or did not have an IRS located within their geographical boundaries, defined in the final Settlement Agreement and proposed Judgment as Other Released Church Organizations.

Anglican Entity	Amount Contributed
The Bishop of the Arctic	$284,542
The Anglican Synod of the Diocese of Caledonia	$91,465
The Diocesan Synod of Central Newfoundland	$210,369
The Diocesan Synod of Eastern Newfoundland and Labrador	$365,858
The Synod of the Diocese of Edmonton	$304,882
The Diocesan Synod of Fredericton	$464,640
The Synod of the Diocese of Kootenay	$167,563
The Synod of the Diocese of Montreal	$304,882
The Synod of the Diocese of Niagara	$1,149,405
The Diocesan Synod of Nova Scotia and Prince Edward Island	$731,717
The Incorporated Synod of the Diocese of Ontario	$670,740

The Incorporated Synod of the Diocese of Ottawa	$975,622
The Synod of the Diocese of Rupert's Land	$286,589
The Diocese of Saskatoon	$182,929
The Incorporated Synod of the Diocese of Toronto	$3,073,210
The Diocesan Synod of Western Newfoundland	$210,369
Total:	**$9,474,782**

Affidavit of James Bruce Boyles, para 25, Motion Record, Vol. VII, Tab 21, pp. 2180-2183.

44. Beginning in 1991, the General Synod created a fund known as the Indigenous Healing Fund, which since that date and to present has made grants in the amount of $2,360,717 to indigenous organizations and communities to assist in the healing of IRS survivors, their families, and their communities.

Affidavit of James Bruce Boyles, para 26, Motion Record, Vol. VII, Tab 21, p. 2183.

(b) The Presbyterian Church Entities

45. The Presbyterian Second Amending Agreement amends the Presbyterian Settlement Agreement as follows:

(a) The total amount to be paid by the Church and Trustee Board is reduced to an amount between $900,700 and $1,317,700 (depending on the amount raised by the Catholic

Entities in a fundraising drive pursuant to the Catholic Settlement Agreement) from the present sum of $2,100,000;

(b) From the date that the Amending Agreement comes into force, the federal government will pay all IRS Abuse Claims whether they are paid under the existing DR model, the Independent Assessment Process ("IAP") which is part of the IRSSA, settlements of civil claims, or court judgments;

(c) The remainder of the $900,700 to $1,317,700 in the Settlement Fund not paid as a contribution to claims to date, will be used for the Church's contribution to IRS Abuse Claims up to the date the Amending Agreement comes into force and continuing, at the discretion of the Church; for the funding of a Presbyterian Fund for Healing and Reconciliation which will make grants to assist with the healing and reconciliation of former IRS students and their families; and for eligible in kind contributions to assist with healing and reconciliation of former IRS students and their families.

Affidavit of Stephen Kendall, para 17, Motion Record, Vol. VII, Tab 23, p. 2239.

Second Presbyterian Amending Agreement, Schedule 0-1, Motion Record, Vol. II, Tab O-1.

46. Pursuant to the Presbyterian Settlement Agreement, as amended by the Amending Agreement, The Presbyterian Church and Trustee Board will have or will contribute between $900,700 and $1,317,700, depending on the amount raised by the Catholic Entities in a fundraising drive pursuant to the Catholic Settlement Agreement, towards judgments, settlement of civil actions, payments under the existing Dispute Resolution

Model and funding grants made by the Presbyterian Fund for Healing and Reconciliation of and in-kind payments.

Affidavit of Stephen Kendall, para 19, Motion Record, Vol. VII, Tab 23, pp. 2239-2240.

(c) The United Church

47. The federal government and The United Church entered into an agreement ("The United Church Agreement"), pursuant to which the maximum that The United Church is required to contribute towards the resolution of IRS claims (although it is free to contribute more, at its discretion) is between $6,455,020.00 and $6,891,170.00 (depending upon whether the Catholic Entities raise over $20,000,000.00 in the fundraising campaign, described above). This amount is inclusive of the money already contributed by The United Church.

Affidavit of James Vincent Scott, para 19, Motion Record, Vol. VII, Tab 22, p. 2230.

48. Of its total financial contribution, The United Church can, at its discretion, make up to $2,180,750.00 in "in kind" contributions (as that term is defined in the United Church Agreement) to fund eligible programs to assist with healing and reconciliation for former IRS students and their families.

Affidavit of James Vincent Scott, para 20, Motion Record, Vol. VII, Tab 22, p. 2230.

49. In addition to the foregoing, beginning in 1994 The United Church established The Healing Fund of The United Church of Canada, to assist in the funding of community

based healing projects initiated by Aboriginal people to assist former IRS students. Since 1994, The United Church has provided over $2,700,000.00 to The Healing Fund. The Healing Fund is completely separate and apart from the financial obligations of The United Church under the IRSSA.

Affidavit of James Vincent Scott, para 22, Motion Record, Vol. VII, Tab 22, pp. 2230-2231.

PART IV - ISSUES AND THE LAW

(i) Test for Approval of a Class Proceedings Settlement

50. The various provincial class proceedings Acts require court approval of a class action settlement.

Class Proceedings Act (Alberta), S.A. 2003, c. C-16.5, s. 35.

Class Proceedings Act (British Columbia), R.S.B.C. 1996, c. 50, s. 35.

Class Proceedings Act (Manitoba), C.C.S.M. 2002, c. C130, s. 35(1).

Class Proceedings Act (Ontario), S.O. 1992, c. 6, s. 29(2).

Class Actions Act (Saskatchewan), S.S. 2001, c. 12.01, s. 38(1).

(a) The Standard for Approval

51. Although the Acts do not specify the test for approval of a settlement, the jurisprudence has established that the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interest of those affected by it.

Dabbs v. Sun Life Assurance Co. of Canada [1998] 40 O.R. (3d) 429 (Ont. Ct. Gen. Div.) at paragraph 30, Plaintiffs' Book of Authorities.

Parsons v. The Canadian Red Cross Society (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) at paragraph 68, Plaintiffs' Book of Authorities.

Haney Iron Works Ltd. V. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th) 565 (B.C.S.C.) at paragraph 27, Plaintiffs' Book of Authorities.

Sawatzky v. Société Chirurgicale Instrumentarium Inc., [1999] B.C.J. No. 1814 (B.C.S.C.) at paragraph 19, Plaintiffs' Book of Authorities.

52. The standard is essentially the same as that applied in other situations where court approval is required and there are affected parties not before the court.

Dabbs v. Sun Life Assurance Co. of Canada [1998] O.J. No. 1598; 1998 CarswellOnt 5823 (Ont. Ct. Gen. Div.) at paragraph 9, Protestant Churches' Book of Authorities, Tab 1.

53. Any settlement is the result of a compromise; each party surrenders something in order to avoid the risks and costs inherent in litigation. Thus, if a court engaged in a trial of the merits when considering approval of a settlement, it would emasculate the very purpose of a settlement.

Dabbs v. Sun Life Assurance Co. of Canada [1998] O.J. No. 1598; 1998 CarswellOnt 5823 (Ont. Ct. Gen. Div.) at paragraph 14, Protestant Churches' Book of Authorities, Tab 1.

Haney Iron Works Ltd. V. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th) 565 (B.C.S.C.) at paragraph 24, Plaintiffs' Book of Authorities.

54. For this reason, settlement approval should not involve the court in a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.

Dabbs v. Sun Life Assurance Co. of Canada [1998] O.J. No. 1598; 1998 CarswellOnt 5823 (Ont. Ct. Gen. Div.) at paragraph 12, Protestant Churches'

Book of Authorities, Tab 1; 40 O.R. (3d) 429 (Ont. Ct. Gen. Div.) at paragraph 30, Plaintiffs' Book of Authorities.

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130 (Ont. S.C.J.) at paragraph 89, Plaintiffs' Book of Authorities.

Parsons v. The Canadian Red Cross Society (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) at paragraph 69, Plaintiffs' Book of Authorities.

Sawatzky v. Société Chirurgicale Instrumentarium Inc., [1999] B.C.J. No. 1814 (B.C.S.C.) at paragraph 21, Plaintiffs' Book of Authorities.

55. The settlement must be fair, reasonable, and in the best interests of the class as a whole, not any particular member. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole, as long as class members retain, for a certain time, the right to opt out of a class proceeding.

Dabbs v. Sun Life Assurance Co. of Canada [1998] O.J. No. 1598; 1998 CarswellOnt 5823 (Ont. Ct. Gen. Div.) at paragraph 11, Protestant Churches' Book of Authorities, Tab 1.

Parsons v. The Canadian Red Cross Society (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) at paragraph 79, Plaintiffs' Book of Authorities.

Sawatzky v. Société Chirurgicale Instrumentarium Inc., [1999] B.C.J. No. 1814 (B.C.S.C.) at paragraph 19, Plaintiffs' Book of Authorities.

(b) Factors to Consider in Approving a Settlement

56. In *Dabbs v. Sun Life Assurance Co. of Canada*, Sharpe J., as he was then, stated that the following factors were a useful list of criteria for assessing the reasonableness of a proposed settlement:

(1) the likelihood of recovery, or likelihood of success;

(2) the amount and nature of discovery, evidence or investigation;

(3) the proposed settlement's terms and conditions;

(4) the recommendation and experience of counsel;

(5) the future expense and likely duration of litigation;

(6) the recommendation of neutral parties, if any;

(7) the number of objectors and nature of objections; and

(8) the presence of good faith and the absence of collusion during negotiations.

Dabbs v. Sun Life Assurance Co. of Canada [1998] O.J. No. 1598; 1998 CarswellOnt 5823 (Ont. Ct. Gen. Div.) at paragraph 13, Protestant Churches' Book of Authorities, Tab 1.

Haney Iron Works Ltd. V. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th) 565, (B.C.S.C.) at paragraph 23, Plaintiffs' Book of Authorities.

57. In *Parsons v. The Canadian Red Cross Society*, Winkler J. added two other factors to consider:

(9) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation;

(10) the existence of information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiation.

These two additional factors provide the court with insight into whether the parties were in equal or comparable bargaining positions, and whether the concerns of the class members have been adequately addressed by the settlement.

Parsons v. The Canadian Red Cross Society (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) at paragraph 72, Plaintiffs' Book of Authorities.

58. It is not necessary that all of the enumerated factors be present in each case; nor is it necessary that each factor be given equal weight in the consideration of any particular settlement.

Carom v. Bre-X Minerals Ltd. (2001), 15 C.P.C. (5th) 33; 2001 CarswellOnt 3779 (Ont. S.C.J.) at paragraph 8, Protestant Churches' Book of Authorities, Tab 2.

Parsons v. The Canadian Red Cross Society (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) at paragraph 73, Plaintiffs' Book of Authorities.

59. The court may not consider social or political factors; the court's jurisdiction is constrained to legal considerations.

Parsons v. The Canadian Red Cross Society (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) at paragraph 77, Plaintiffs' Book of Authorities.

60. Approval of the same settlement agreement in other provinces is also a factor which favours approval of a settlement. According to Brenner J., as he was then, in *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.*, judicial comity and the goal of certainty in litigation outcomes makes it essential that the courts in the class action jurisdictions in Canada afford considerable weight to the decisions in other Canadian jurisdictions in identical class action claims.

Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429 (Ont. Ct. Gen. Div.) at paragraph 39, Plaintiffs' Book of Authorities.

Haney Iron Works Ltd. V. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th) 565, (B.C.S.C.) at paragraphs 6 and 8, Plaintiffs' Book of Authorities.

(c) *Parsons v. Canadian Red Cross Society*

61. The facts of *Parsons v. Canadian Red Cross Society* are similar to those in the case at bar, given that it was also a mass tort case. It was brought on behalf of those infected by Hepatitis-C from the Canadian blood supply. The defendants were Her Majesty the Queen in Right of Ontario, the Attorney General of Canada, and the Canadian Red Cross Society. The settlement was intended to be a pan-Canadian agreement to settle the simultaneous class proceedings before the courts in not only Ontario, but also Quebec and British Columbia. Winkler J. granted the motion for approval of the settlement.

> *Parsons v. The Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) at paragraphs 1, 3, 30, and 133, Plaintiffs' Book of Authorities.

62. In applying the relevant factors enumerated above, Winkler J. found that the most significant consideration was the substantial litigation risk; that is, there was a high risk of failure at trial. In addition, he found that the plethora of complex legal issues would result in lengthy, protracted and expensive litigation, with a final result unlikely until years into the future.

> *Parsons v. The Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) at paragraph 92, Plaintiffs' Book of Authorities.

63. Considering the remaining factors, Winkler J. held that although there had been no examinations for discovery, the extensive proceedings before the Krever Commission served a similar purpose. Experienced counsel, as well as many of the interveners,

supported the settlement recommendation. There was no suggestion of bad faith or collusion tainting the settlement. The communication between class counsel and the class members was adequate, given the submissions made by the Canadian Hemophilia Society regarding the meetings held with class members. Finally, Winkler J. accepted the submissions made by counsel for all parties regarding the rigorous negotiations that resulted in the final settlement.

Parsons v. The Canadian Red Cross Society (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) at paragraph 93, Plaintiffs' Book of Authorities.

(ii) Modified Test for Certification in Anticipation of Settlement

(a) Standard Test for Certification

64. Although the specific provisions may vary between jurisdictions, there are generally five criteria which must be satisfied in order to certify a class action:

(1) the pleadings must disclose a cause of action;

(2) there must be an identifiable class;

(3) the proposed representative must be appropriate;

(4) there must be common issues;

(5) the class action must be the preferable procedure;

Class Proceedings Act (Ontario), S.O. 1992, c. 6, s. 5(1)(a)-(e).

Class Proceedings Act (British Columbia), R.S.B.C. 1996, c. 50, s. 4(1)(a)-(e).

Class Actions Act (Saskatchewan), S.S. 2001, c. 12.01, s. 6(a)-(e).

Class Proceedings Act (Manitoba), C.C.S.M. 2002, c. C130, s. 4(a)-(e).

Class Proceedings Act (Alberta), S.A. 2003, c. C-16.5, s. 5(1)(a)-(e).

65. The criteria that must be satisfied in order to certify a class action in provinces and territories where specific class proceedings legislation is not in force are quite similar to those found under the various class proceedings statutes. Specifically, the court must be satisfied that:

(1) the proposed class is capable of clear definition;

(2) the proposed class representative must adequately represent the class;

(3) there are issues of fact or law common to all class members; and,

(4) with regard to common issues, success for one class member must mean success for all.

Western Canadian Shopping Centres v. Dutton, [2001] 2 S.C.R. 534 at paragraphs 38-41, Plaintiffs' Book of Authorities.

(b) Modified Test for Certification

66. Courts in British Columbia and Ontario have modified this standard test when the certification is sought for the purpose of approving a proposed settlement.

67. In British Columbia, the court in *Haney Iron Works Ltd. V. Manufacturers Life Insurance Co.* articulated a modified certification test to be applied when the settlement agreement provides that certification is contingent upon the agreement being approved. The court stated that in this instance, the class need only establish that

there is a "*prima facie* case" for certification. If a prima facie case has been made out, the court then moves on to consider whether the settlement is fair and reasonable.

> *Haney Iron Works Ltd. V. Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565, (B.C.S.C.) at paragraph 16, Plaintiffs' Book of Authorities.

68. In Ontario, the court in *Millard v. North George Capital Management Ltd.* also took into account the proposed settlement when considering certification. The court noted that the settlement would tend to promote judicial economy, which is a factor that informs the preferable procedure requirement, by eliminating further interlocutory proceedings.

> *Millard v. North George Capital Management Ltd.* (2000), 47 C.P.C. (4th) 365; 2000 CarswellOnt 1450 (Ont. S.C.J.), at paragraph 16, Protestant Churches' Book of Authorities, Tab 3.

69. The reasoning in *Gariepy v. Shell Oil Company* illustrates the basis for a relaxed preferable procedure requirement. The plaintiffs settled with one of the three defendants, and sought certification for the purpose of settlement. Justice Nordheimer dismissed the motion for certification against the two non-settling defendants. However, he approved the motion for certification in the context of settlement. Justice Nordheimer held that

> although the requirement[s] for certification in a settlement context are the same as they are in a litigation context…their application need not…be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed.
>
> *Gariepy v. Shell Oil Company*, [2002] O.J. No. 4022 (Ont. S.C.J.) at paragraph 27, Plaintiff's Book of Authorities.

(iii) Release of Church Entities not named as Defendants

67. The IRSSA expressly provides that sixteen dioceses of the Anglican Church of Canada, defined as Other Released Church Organizations, are to be granted the benefit of the releases sought on the motion for court approval of the IRSSA.

68. In particular, the IRSSA provides:

> **"Other Released Church Organizations"** includes the Dioceses of the Anglican Church of Canada listed in Schedule "G" and the Catholic Entities listed in Schedule "H", that did not operate an Indian Residential School or did not have an Indian Residential School located within their geographical boundaries and have made, or will make, a financial contribution towards the resolution of claims advanced by person who attended an Indian Residential School;
>
> Approval Orders will be sought:
>
> (a) incorporating by reference this Agreement in its entirety;
>
> (d) ordering and declaring that on the expiry of the Opt Out Periods all class members, unless they have opted out or are deemed to have opted out on or before the expiry of the Opt Out Periods, have released each of the defendants and Other Released Church Organizations from any and all actions they have, may have had or in the future may acquire against any of the defendants and Other Released Church Organizations arising in relation to an Indian Residential School or the operation of Indian Residential Schools;
>
> (f) ordering and declaring that on the expiration of the Opt Out Periods all Class Members who have not opted out have agreed that they will not make any claim arising from or in relation to an Indian Residential School or the operation of Indian Residential Schools against any person who may in turn claim against any of the defendants or Other Released Church Organizations.
>
> *IRSSA, Sections 1.01 and 4.06(a)(d)(f), Motion Record, Vol. 1, Tab 2, pp. 89 and 102-104 .*

69. The definition of Other Released Church Organizations under the IRSSA includes sixteen diocese of the Anglican Church that have or will contribute $9,474,782

towards judgements, settlement of civil actions, payments under the existing Dispute Resolution Model, grants made by the Anglican Fund for Healing and Reconciliation, and in-kind payments.

Paragraph 43, supra

70. Having met the express definition of an Other Released Church Organization in the IRSSA, the sixteen diocese of the Anglican Church of Canada listed at Schedule "G' of the IRSSA are entitled to be released by the order sought approving the IRSSA.

PART IV-ORDER REQUESTED

70. It is requested that an order be granted certifying this action and approving the IRSSA, in accordance with the draft Judgment submitted by the parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 14, 2006

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Solicitors for the Third Parties, The Protestant Church Entities

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Ct. Gen. Div.).

2. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598; 1998 CarswellOnt 5823 (Ont. Ct. Gen. Div.).

3. *Parsons v. The Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.).

4. *Haney Iron Works Ltd. V. Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565, (B.C.S.C.).

5. *Sawatzky v. Société Chirurgicale Instrumentarium Inc.*, [1999] B.C.J. No. 1814 (B.C.S.C.).

6. *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.).

7. *Carom v. Bre-X Minerals Ltd.* (2001), 15 C.P.C. (5th) 33; 2001 CarswellOnt 3779 (Ont. S.C.J.).

8. *Millard v. North George Capital Management Ltd.* (2000), 47 C.P.C. (4th) 365; 2000 CarswellOnt 1450 (Ont. S.C.J.).

9. *Gariepy v. Shell Oil Company*, [2002] O.J. No. 4022 (Ont. S.C.J.).

SCHEDULE "B"
RELEVANT STATUTES

1. *Class Proceedings Act (Alberta)*, S.A. 2003, c. C-16.5.
2. *Class Proceedings Act (British Columbia)*, R.S.B.C. 1996, c. 50.
3. *Class Proceedings Act (Manitoba)*, C.C.S.M. 2002, c. C130.
4. *Class Proceedings Act (Ontario)*, S.O. 1992, c. 6.
5. *Class Actions Act (Saskatchewan)*, S.S. 2001, c. 12.01.

The Diocese of Saskatoon

The Incorporated Synod of the Diocese of Toronto

The Diocesan Synod of Western Newfoundland

The Synod of the Diocese of Yukon

Sarcee Boarding School	Sarcee Junction
St. Cyprian	Brocket, Peigan Reserve
St. Paul's Boarding School (Blood)	Blood Reserve
Wabasca, (St. John's IRS)	Wabasca
Whitefish Lake, (St. Andrew's IRS)	St. Andrew's Mission
Saskatchewan:	
Battleford Industrial School	Battleford
Gordon's Residential School	Gordon's Reserve
Lac la Ronge (Prince Albert)	La Ronge
Montreal Lake	Montreal Lake
Onion Lake (St Barnabas, Prince Albert)	Makaoo's Reserve
PAIRS (All Saints – Boys, St. Alban's -Girl's, PAISEC)	Prince Albert
Manitoba:	
Elkhorn, (Washakada)	Elkhorn
Mackay	The Pas, Dauphin
Rupert's Land, (St. Paul's)	Near Winnipeg
Nunavut:	
Coppermine Hostel	Coppermine
Ontario:	
Chapleau,	(St. Joseph's, St. John's)Chapleau

Moose Factory,	(Horden Hall, Moose Fort) Moose Island
Mohawk Institute	Brantford
Pelican Lake	Sioux Lookout
Shingwauk	Sault Ste. Marie
Quebec & Atlantic:	
Fort George	Fort George
La Tuque	La Tuque

INDIAN RESIDENTIAL SCHOOLS RELATED TO THE PRESBYTERIAN CHURCH IN CANADA

At Any And All Times:

Alberta

Stoney Plain

Saskatchewan

Regina Industrial School

Muscowepetung

Crowstand

Manitoba

Birtle Indian Residential School

Ontario

Cecilia Jeffrey Indian Residential School

BEFORE JUNE 10, 1925

British Columbia

Ahousaht Indian Residential School

Alberni Indian Residential School

Saskatchewan

File Hills Indian Residential School

Round Lake Indian Residential School

Manitoba

Portage la Prairie Indian Residential School

INDIAN RESIDENTIAL SCHOOLS RELATED TO THE UNITED CHURCH

At Any And All Times:

British Columbia

Cocqualeetza

Kitimaat

Alberta

Edmonton Indian Residential School

Morley Indian Residential School

Manitoba

Brandon Indian Residential School

Norway House Indian Residential School

Ontario

Mount Elgin Indian Residential School

After June 10, 1925:

British Columbia:

Ahousaht Indian Residential School

Alberni Indian Residential School

Saskatchewan

File Hills Indian Residential School

Round Lake Indian Residential School

Manitoba

Portage la Prairie Indian Residential School

CHARLES BAXTER, SR. AND ELIJAH BAXTER Plaintiffs	and	THE ATTORNEY GENERAL OF CANADA Defendant	and	THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, et al. Third Parties	Court File No: 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

JOINT FACTUM OF THE THIRD PARTIES, THE PROTESTANT CHURCH ENTITIES (MOTION RETURNABLE August 29, 30, and 31, 2006)

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Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CHARLES BAXTER, SR. AND ELIJAH BAXTER

Plaintiffs

- and –

THE ATTORNEY GENERAL OF CANADA

Defendant

- and –

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF CARIBOO, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE DIOCESE OF MOOSONEE, THE SYNOD OF THE DIOCESE OF WESTMINISTER, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE DIOCESE OF SASKATCHEWAN, THE SYNOD OF THE DIOCESE OF YUKON, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE PRESBYTERIAN CHURCH IN CANADA, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA), THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF CALGARY, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, THE ROMAN CATHOLIC BISHOP OF VICTORIA, THE ROMAN CATHOLIC BISHOP OF NELSON, THE CATHOLIC EPISCOPAL CORPORATION OF WHITEHORSE, LA CORPORATION

EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD – McLENNAN, THE CATHOLIC ARCHDIOCESE OF EDMONTON, LA DIOCESE DE SAINT-PAUL, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF MACKENZIE, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, THE ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT-BONIFACE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF SAULT STE. MARIE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE MISSIONARY OBLATES OF MARY IMMACULATE – GRANDIN PROVINCELES PERES MONTFORTAINS (also known as THE COMPANY OF MARY), JESUIT FATHERS OF UPPER CANADA, THE MISSIONARY OBLATES OF MARY IMMACULATE – PROVINCE OF ST. JOSEPH, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (also known as LES REVERENDS PERES OBLATS DE L'IMMACULEE CONCEPTION DE MARIE), THE OBLATES OF MARY IMMACULATE, ST. PETER'S PROVINCE, LES REVERENDS PERES OBLATS DE MARIE IMMACULEE DES TERRITOIRES DU NORD OUEST, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (PROVINCE DU CANADA – EST), THE SISTERS OF SAINT ANNE, THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS), THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERT (also known as THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERTA), THE SISTERS OF CHARITY (GREY NUNS) OF THE NORTHWEST TERRITORIES, THE SISTERS OF CHARITY (GREY NUNS) OF MONTREAL (also known as LES SOEURS DE LA CHARITÉ (SOEURS GRISES) DE L'HÔPITAL GÉNÉRAL DE MONTREAL), THE GREY SISTERS NICOLET, THE GREY NUNS OF MANITOBA INC. (also known as LES SOEURS GRISES DU MANITOBA INC.), THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE, LES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE and INSTITUT DES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE (also known as LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE) DE NICOLET AND THE SISTERS OF ASSUMPTION, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA, THE DAUGHTERS OF THE HEART OF MARY (also known as LA SOCIETE DES FILLES DU COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY), MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEART AND MARY IMMACULATE, or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE), LES SOEURS DE LA CHARITE D'OTTAWA (SOEURS GRISES DE LA CROIX) (also known as SISTERS OF CHARITY OF OTTAWA - GREY NUNS OF THE CROSS), SISTERS OF THE

HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDER OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE), THE SISTERS OF CHARITY OF ST. VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX), LES SOEURS DE NOTRE DAME AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, SISTERS OF THE PRESENTATION OF MARY (SOEURS DE LA PRESENTATION DE MARIE), THE BENEDICTINE SISTERS, INSTITUT DES SOEURS DU BON CONSEIL, IMPACT NORTH MINISTRIES, THE BAPTIST CHURCH IN CANADA

Third Parties

JOINT BOOK OF AUTHORITIES OF THE THIRD PARTIES THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH OF CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF CARIBOO, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE BISHOP OF MOOSONEE, THE SYNOD OF THE DIOCESE OF NEW WESTMINISTER, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE DIOCESE OF SASKATCHEWAN, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA)

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2. *Carom v. Bre-X Minerals Ltd.* (2001), 15 C.P.C. (5th) 33 (Ont. S.C.J.).
3. *Millard v. North George Capital Management Ltd.* (2000), 47 C.P.C. (4th) 365 (Ont. S.C.J.).

[1998] O.J. No. 1598

1998 CarswellOnt 5823

Dabbs v. Sun Life Assurance Co. of Canada

Paul Dabbs, Plaintiff and Sun Life Assurance Company of Canada, Defendant

Ontario Court of Justice (General Division)

Sharpe J.

Judgment: February 24, 1998
Heard: February 5, 1998
Docket: Toronto 96-CT-022862

Counsel: Michael A. Eizenga and Charles M. Wright, for Plaintiff.

H. Lorne Morphy and Patricia D.S. Jackson, for Defendant.

Michael Deverett, for 3 Objectors.

Gary R. Will and J. Douglas Barnett, for 11 Objectors.

Subject: Civil Practice and Procedure

Practice --- Disposition without trial -- Settlement -- Enforcement of terms

Plaintiff brought action for breach of contract and negligent misrepresentation against insurer -- Action was settled subject to court approval -- Motion was brought for certification as class action and court approval of settlement -- Fourteen members of proposed class filed objections -- Hearing was directed to determine procedural issues -- Parties proposing settlement bore onus of satisfying court that approval should be granted -- Role of court was to determine whether settlement was fair, reasonable and in best interest of class as whole -- Parties proposing settlement were required to present sufficient evidence to permit exercise of objective, impartial, and independent assessment of fairness of settlement -- Objectors could adduce evidence relevant to objection, but did not have right to oral or documentary discovery -- Objectors could cross-examine on affidavits filed in support of settlement, subject to conditions -- Case did not justify interim costs to ensure objectors could continue participation.

Practice --- Parties -- Representative or class actions -- Procedural requirements

Plaintiff brought action for breach of contract and negligent misrepresentation against insurer -- Action was settled

subject to court approval -- Motion was brought for certification as class action and court approval of settlement -- Fourteen members of proposed class filed objections -- Hearing was directed to determine procedural issues -- Parties proposing settlement bore onus of satisfying court that approval should be granted -- Role of court was to determine whether settlement was fair, reasonable and in best interest of class as whole -- Parties proposing settlement were required to present sufficient evidence to permit exercise of objective, impartial, and independent assessment of fairness of settlement -- Objectors could adduce evidence relevant to objection, but did not have right to oral or documentary discovery -- Objectors could cross-examine on affidavits filed in support of settlement, subject to conditions -- Case did not justify interim costs to ensure objectors could continue participation.

Cases considered by Sharpe J.:

Bowling v. Pfizer (1992), 143 F.R.D. 141 (U.S. Ohio) -- referred to

Kevork v. R., [1984] 2 F.C. 753, 17 C.C.C. (3d) 426 (Fed. T.D.) -- referred to

Mahar v. Rogers Cablesystems Ltd. (1995), 34 Admin. L.R. (2d) 51, 25 O.R. (3d) 690 (Ont. Gen. Div.) -- referred to

Newman v. Stein (1972), 464 F.2d 689, Fed. Sec. L. Rep. P 93, 547 (U.S. 2nd Cir. N.Y.) -- considered

Organ v. Barnett (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.) -- applied

Poulin v. Nadon, [1950] O.R. 219, [1950] O.W.N. 163, [1950] 2 D.L.R. 303 (Ont. C.A.) -- referred to

Sparling v. Southam Inc. (1988), 41 B.L.R. 22, 66 O.R. (2d) 225 (Ont. H.C.) -- applied

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 242(2) -- referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally -- pursuant to

s. 12 -- considered

s. 14 -- considered

s. 14(2) -- considered

s. 29 -- considered

s. 32(1) -- considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally -- referred to

R. 7.08(1) -- referred to

[1998] O.J. No. 1598

RULING on hearingto determine procedure for court approval of settlement and class action certification.

***Sharpe J.*:**

1. Nature of Proceedings

1 In this action, commenced pursuant to the *Class Proceedings Act 1992*, the plaintiff asserts claims for alleged breach of contract and negligent misrepresentation arising out of the manner in which whole life participating insurance policies with a premium offset option were sold. Similar actions were commenced in Quebec and in British Columbia. Before the defendant filed a statement of defence and before certification as a class proceeding, this action, together with the Quebec and British Columbia actions, was settled by written agreement, dated June 16, 1997, setting out detailed and complex terms. The settlement is subject to and conditional upon court approval in all three provinces.

2 Winkler J. approved a form of notice of motion for a certification/authorization and agreement approval to be sent to members of the proposed Ontario class. Similar orders were made in Quebec and British Columbia. The notice stated that members of the class who wished to participate in the hearing for approval of the settlement were required to file a written statement of objection and notice of appearance by a specified date. Fourteen members of the proposed Ontario class filed objections. Three are represented by Mr. Deverett and eleven by Messrs. Will and Barnett. At the opening of this hearing, Mr. Deverett indicated that one of the objectors he represents wished to withdraw from further participation.

3 On August 28, 1997 Winkler J. directed that there be a hearing to determine certain procedural issues, namely:

(a) Standing to object;

(b) Procedures for and scope of objection;

(c) The role of the court in approval of the agreement;

(d) Onus for approval of the agreement;

(e) Factors to be considered by the court for approval of the agreement;

(f) Cost consequences.

4 The issue of standing was determined by Winkler J. and it was contemplated that the motion to determine the remaining procedural issues would be heard on September 4, 1997. It did not proceed on that date as the Deverett objectors requested an adjournment. The Deverett objectors then brought a motion to set aside Winkler J.'s earlier order regarding the notice of motion for certification/authorization, to declare the plaintiff's counsel to be in a conflict of interest, and for other relief, including an order that those objectors be given immunity from costs and be awarded interim costs. While the costs issue remains outstanding, other aspects of the motion were dismissed by Winkler J. An application for leave to appeal from that order was dismissed by O'Driscoll J. on January 22, 1998.

5 I have now heard full argument on the outstanding procedural issues specified by Winkler J.'s August 29, 1997 direction. For convenience of analysis, I propose to deal with them in the following order:

(a) Onus for approval of the agreement

(b) The role of the court in approval of the agreement

(c) Factors to be considered by the court for approval of the agreement

(d) Procedures for and scope of objection

(e) Cost consequences.

6 I wish to emphasize at the outset that what follows is intended only to provide a procedural framework for the hearing of this motion. It would be entirely inappropriate to attempt to determine in the context of one case a process appropriate for all cases. My ruling has been determined on the basis of the submissions I have heard and is intended to do no more than provide guidance to the parties and objectors in the present case.

2. Analysis

(a) Onus for approval of the agreement

7 It is common ground that the parties proposing the settlement bear the onus of satisfying the court that it ought to be approved.

(b) The role of the court in approval of the agreement

8 There are two matters to be determined by the court: (1) should the action be certified as a class proceeding and, if the answer is yes, (2) should the settlement be approved. While the role of the court with respect to certification is well defined by the *Class Proceedings Act, 1992*, the same cannot be said of the approval of settlements. Section 29 provides that "[a] settlement of a class proceeding is not binding unless approved by the court" but the *Act* provides no statutory guidelines that are to be followed.

9 Experience from other situations in which the court is required to approve settlements does, however, provide guidance. Court approval is required in situations where there are parties under disability (see Rule 7.08(1)). Court approval is also required in other circumstances where there are affected parties not before the court (see *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 242(2) dealing with derivative actions). The standard in these situations is essentially the same and is equally applicable here: *the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.*

10 It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms: *Poulin v. Nadon*, [1950] O.R. 219 (Ont. C.A.), at 222-3. As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement: see eg *Bowling v. Pfizer*, 143 F.R.D. 141 (U.S. Ohio 1992). I would observe, however, that the fact that the settlement has already been approved in Quebec and British Columbia would have to be considered as a factor making changes unlikely in this case.

11 With respect to specific objections raised by the objectors, there is an additional factor to be kept in mind. The role of the court is to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member. As approval is sought at the same time as certification, even if the settlement is approved, class members will be afforded the right to opt out. There is, accordingly an element control that may be exercised to alleviate matters of particular concern to individual class members.

12 Various definitions of "reasonableness" were offered in argument. The word suggests that there is a range within which the settlement must fall that makes some allowance for differences of view, as an American court put it "a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion". (*Newman v. Stein*, 464 F.2d 689, (U.S. 2nd Cir. N.Y. 1972) at 693).

(c) Factors to be considered by the court for approval of the agreement

13 A leading American text, *Newberg on Class Actions*, (3rd ed), para 11.43 offers the following useful list of criteria:

1. Likelihood of recovery, or likelihood of success

2. Amount and nature of discovery evidence

3. Settlement terms and conditions

4. Recommendation and experience of counsel

5. Future expense and likely duration of litigation

6. Recommendation of neutral parties if any

7. Number of objectors and nature of objections

8. The presence of good faith and the absence of collusion

14 I also find the following passage from the judgment of Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.), at 230-1 to be most helpful. Callaghan A.C.J.H.C.was considering approval of a settlement in a derivative action, but his comments are equally applicable to the approval of settlements of class actions:

> In approaching this matter, I believe it should be observed at the outset that the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.
>
> In deciding whether or not to approve a proposed settlement under s. 235(2) of the Act, the court must be satisfied that the proposal is fair and reasonable to all shareholders. In considering these matters, the court must recognize that settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of upper and lower limits.
>
> In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal.
>
> The court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement.
>
> . . . . .
>
> The matter was aptly put in two American cases that were cited to me in the course of argument. In a decision of the Federal Third Circuit Court in Yonge v. Katz, 447 F.2d 431 (1971), it is stated:
>
> > It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement. Such procedure would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh the nature of the claim, the possible defences, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.
>
> In another case cited by all parties in these proceedings, Greenspun v. Bogan, 492 F.2d 375 at p. 381

(1974), it is stated:

> ... any settlement is the result of a compromise -- each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial. See *United Founders Life Ins. Co. v. Consumer's National Lifel Ins. Co.*, 447 F. 2d 647 (7th Cir. 1971); *Florida Trailer & Equipment co. v. Deal*, 284 F. 2d 567, 571 (5th Cir. 1960). *It is only when one side is so obviously correct in its assertions of law and fact that it would be clearly unreasonable to require it to compromise to the extent of the settlement, that to approve the settlement would be an abuse of discretion.* (Emphasis added)

15 It is apparent that the court cannot exercise its function without evidence. The court is entitled to insist on sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances.

16 In the arguments presented by the proponents of the settlement, considerable emphasis is placed on the opinion of senior counsel that the settlement is fair and reasonable as an important factor. While I agree that the opinion of counsel is evidence worthy of consideration, it is only one factor to be considered. It does not relieve the parties proposing the settlement of the obligation to provide sufficient information to permit the court to exercise its function of independent approval. On the other hand, the court must be mindful of the fact that as the consequence of not approving the settlement is that the litigation may well continue, there are inherent constraints on the extent to which the parties can be expected to make complete disclosure of the strengths and weaknesses of their case.

(d) Procedures for and scope of objection

17 The *Class Proceedings Act, 1992*, s. 12 confers a general discretion on the court with respect to the conduct of class proceedings:

> 12. The court, on the motion or a party or class member, may make an order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

Section 14 provides for the participation of class members in the following terms:

> 14(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.
>
> (2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

18 As already noted, the order of Winkler J. required class members who wished to object to the settlement to file written objections. It remains to determine the procedural and other rights objectors have in relation to the approval process.

19 In general, the procedural rights of all participants in the approval process must reflect the nature of the process itself and the special role of the court. The matter cannot be viewed in strictly adversarial terms. The plaintiff and the defendant find themselves in common cause, seeking approval of the settlement. The objectors have their own specific concerns which, upon examination, may or may not be reflective of the interests of the class as a whole.

20 In view of the fact that the purpose of the exercise is to ensure that the interests of the unrepresented class members are protected, the court is called upon to play a more active role than is called for in strictly adversarial proceedings. It is important that the court itself remain firmly in control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the

objectors on the other.

(i) Objectors' right to adduce evidence

21 I can see no reason why the objectors should not have the right to adduce evidence. However, given the interests of the objectors and the nature of the process, the right to adduce evidence is not at large. Any evidence adduced by the objectors must be relevant to the points they have raised by way of objection. It must also be adduced in a timely fashion. I direct that any evidence be adduced by way of affidavit filed at least 30 days prior to the date set for the hearing of this motion.

(ii) Objectors' right to discovery

22 Under the Rules of Court, the right to oral discovery and production of documents is restricted to parties to an action. The objectors are not parties to the action, and accordingly have no right to oral discovery or production of documents.

23 On the other hand, s. 14(2) of the Act does provide that participation "shall be in whatever manner and on whatever terms ... the court considers appropriate". On behalf of the objectors he represents, Mr. Deverett sought the right to conduct essentially a "no holds barred" discovery of the parties to the action. He submitted that as no discovery had been conducted, it was impossible to assess the merits of the case and the settlement without one. In my view, this submission misses the whole point of the settlement approval exercise. The very purpose of the settlement at an early stage of the proceedings is to avoid the cost and delay involved in discovery and other pre-trial procedures. If Mr. Deverett is right, then a class action could almost never be settled without discovery, for if the parties did not conduct one, an objector could insist upon doing so as a precondition of settlement. This would create a powerful disincentive to early settlements by the parties and would run counter to the general policy of the law which strongly favours early resolution of disputes. On the other hand, the lack of discovery is a factor the court may take into account in assessing the fairness of the settlement. However, the remedy in a case where the court concludes that the settlement cannot be approved without a discovery is to refuse to approve the settlement and not to have one conducted by an objector. Given the very different in approach to discovery in the United States, I do not find the American authorities cited by the objectors on this point to be persuasive.

24 The objectors represented by Mr. Will seek production of certain specific documents relevant to their claims. This request has to be assessed in the light of the settlement agreement itself. An important element of the settlement agreement is a process to resolve individual claims. One aspect of that process will entitled these objectors to production of documents. The process will also permit them to opt out of the settlement after they receive production. In my view, in light of the process contemplated by the settlement agreement, these objectors are not entitled to insist upon production of documents at this stage. The point of the approval process is to determine whether the settlement is fair, reasonable and in the best interests of those affected by it. The issue for the court, then, is to assess whether the process contemplated by the settlement agreement is a fair one. I fail to see what relevance documents pertaining to the claims of these objectors have at this stage or how they would assist the court in determining whether the settlement and the process it specifies is a fair one.

25 Accordingly, in the circumstances of this case, I find that it is not appropriate to grant the objectors the right to oral or documentary discovery.

(iii) Right to cross-examine

26 The objectors also seek a general right to cross-examine on the affidavits filed in support of approval of the settlement. There is not inherent right to cross-examine: see eg. *Kevork v. R.*, [1984] 2 F.C. 753 (Fed. T.D.) On the other hand, it is important that there be some way for the court to ensure that evidence on contentious points can be probed and tested. As I have already stated, I view the approval process as one which the court must control and in which the court must take an active role. In keeping with that principle, and in view of the extremely open-ended request made by the Deverett objectors, I direct as follows:

(1) that any cross-examination of deponents shall take place *viva voce* before the court on the dates set for

15 C.P.C. (5th) 33

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Carom v. Bre-X Minerals Ltd.

Donald Carom et al., Plaintiffs and Bre-X Minerals Ltd., Bresea Resources Ltd. et al., Defendants

Ontario Superior Court of Justice

Winkler J.

Judgment: October 29, 2001
Docket: 97-GD-39574

Counsel: Harvey T. Strosberg, Q.C., Michael J. Peerless, for Plaintiffs

W.A. Kelly, Q.C., for Bresea

Ira Nishisato, for Interim Receiver of Bresea

Lawrence Thacker, for Defendants, Walsh & McNulty

W.P. Dermody, friend of court

Subject: Civil Practice and Procedure

Practice --- Parties -- Representative or class proceedings under class proceedings legislation -- Orders, awards and related procedures -- Order on common issues and individual issues

Class action was brought against defendants X Ltd., B Ltd. and others for damages for fraudulent and negligent misrepresentation -- X Ltd. and B Ltd. were related companies which involved cross-ownership of shares -- Cross-ownership issue was resolved and B Ltd. made offer to settle with representative plaintiff -- Plaintiff brought motion for approval of settlement agreement -- Motion granted -- Pursuant to s. 29(2) of Class Proceedings Act, 1992, settlement of part or all of class proceedings is not binding without court approval, and court must be satisfied that settlement is fair, reasonable and in best interest of class as whole -- Likelihood of recovery or success against B Ltd. was 60 per cent -- Negotiations occurred over period of 22 months and were hard fought and difficult -- Settlement of $9,000,000 was reasonable when weighed against total potentially available and attendant risk of litigation, which was estimated as requiring additional three years for completion -- Agreement was approved by B Ltd.'s shareholders, recommended by representative plaintiff, and was not opposed by other defendants -- Class

Proceedings Act, 1992, S.O. 1992, c. 6, s. 29(2).

Practice --- Disposition without trial -- Money in court and offers to settle -- Offers to settle under rules of practice -- Disclosure of offer to court

Class action was brought against defendants X Ltd., B Ltd. and others for damages for fraudulent and negligent misrepresentation -- X Ltd. and B Ltd. were related companies which involved cross-ownership of shares -- Cross-ownership issue was resolved and B Ltd. made offer to settle with representative plaintiff -- Plaintiff brought motion for approval of settlement agreement -- Motion granted -- Pursuant to s. 29(2) of Class Proceedings Act, 1992, settlement of part or all of class proceedings is not binding without court approval, and court must be satisfied that settlement is fair, reasonable and in best interest of class as whole -- Likelihood of recovery or success against B Ltd. was 60 per cent -- Negotiations occurred over period of 22 months and were hard fought and difficult -- Settlement of $9,000,000 was reasonable when weighed against total potentially available and attendant risk of litigation, which was estimated as requiring additional three years for completion -- Agreement was approved by B Ltd.'s shareholders, recommended by representative plaintiff, and was not opposed by other defendants -- Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 29(2).

Cases considered by Winkler J.:

> Dabbs v. Sun Life Assurance Co. of Canada, [1998] I.L.R. I-3575, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18 (Ont. Gen. Div.) -- considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

> s. 28 -- referred to
>
> s. 28 et seq. -- referred to
>
> s. 29(2) -- referred to

MOTION by representative plaintiff for order approving settlement agreement between defendant and class.

Endorsement. ***Winkler J.*****:**

1 This is a motion for an order approving the Amended and Restated Settlement Agreement reached between counsel for the representative plaintiffs on behalf of the class and one of the defendants, Bresea Resources Ltd. Deloitte & Touche LLP is participating in this motion, as Trustee of the estate of Bre-X Minerals Ltd., as certain terms of the Agreement directly affect the administration of the Bre-X estate. Three other law firms representing plaintiffs in other proceedings arising from the Bre-X litigation are also parties to the agreement.

2 The settlement compromises the claims of the members of the class only as against Bresea. The class as it relates to the settlement with Bresea means "Persons in Canada who held shares in Bre-X as of March 26, 1997 and suffered a loss as a consequence of dealing in shares of Bre-X and any other person,...who suffered a loss as a consequence of dealing in shares of Bre-X in the period May 6, 1993 to May 2, 1997....".

3 Bresea and Bre-X were to some extent related companies. There was cross-ownership of the shares of each. A resolution of this cross-ownership has been reached as part of the settlement. The essential terms of the agreement at issue are that: (a) Bresea will pay $9,000,000 to Deloitte; (b) Deloitte will transfer the 8M common shares it holds, as Bre-X Trustee in Bresea, to Bresea; (c) Bresea will transfer the 49M common shares of Bre-X that it holds to Deloitte as Trustee of Bre-X; and (d) Bresea will excrow releases in favour of the co-defendants with Strosberg and thus will not share in any recovery against the remaining defendants. Of the $9,000,000 that is being paid to Deloitte, $2,450,000 will be distributed to the plaintiff law firms as fees, disbursements and taxes for the purposes of continuing the Bre-X litigation. $500,000 will be held in reserve by Deloitte to satisfy any costs awards in favour of

the defendants in the within class proceeding and the Bre-X class action currently ongoing in Texas. I note that any costs award from this fund shall be subject to further court approval. The remainder of the payment made to Deloitte as Trustee of Bre-X may be used by Deloitte for the administration of the Bre-X bankruptcy including the pursuit of litigation on behalf of the company. In the event that the fund is not completely exhausted in the process, the balance will be distributed to Bre-X shareholders as a dividend from the bankruptcy.

4 Bresea shareholders have approved the agreement and the Alberta Court of Queen's Bench has approved Bresea's Plan of Arrangement.

5 Class counsel states that the Bre-X litigation will in his opinion take three more years to complete. If the Amended and Restated Settlement Agreement is approved, Deloitte will have available sufficient funds to pursue the litigation in the Cayman Islands and the Bahamas where Walsh and Felderhof have assets. As such the court is advised that the agreement is a central part of class counsel's strategy for the conduct of the remaining litigation against the other defendants by creating a pool of resources and to co-ordinate the litigation.

6 A settlement of a class proceeding or part of one is not binding unless it is approved by the court. In approving a settlement the court must be satisfied that the settlement is fair, reasonable and in the best interests of the class as a whole. See: *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.); *Class Proceedings Act, 1992*, S.O. 1992, c.6, s.29 (2);.

7 Thus in the present case the court must be satisfied that the settlement agreement affords to the class members a fair exchange in return for the surrender of their litigation rights as against Bresea.

8 In weighing those considerations this court has held that the following factors may be taken into account:

(a) Recommendation and experience of counsel;

(b) The terms of the settlement;

(c) Likelihood of recovery or success;

(d) Extent of discovery, evidence or investigation;

(e) Number and nature of objections;

(f) Recommendation of neutral parties;

(g) Presence of good faith negotiations, absence of collusion and dynamics of negotiations;

(h) Future expense and likely duration of litigation;

(i) Recommendation of representative plaintiffs

However, it should be noted that it is not necessary that all of the enumerated factors be present in each case, nor is it necessary that each factor be given equal weight in the consideration of any particular settlement.

9 Strosberg and his team are experienced counsel and they recommend the agreement. They evaluate the chance of success against Bresea in light of all of the available information at about 60%. Critical to this analysis was the fact that Bresea's involvement in the conspiracy was very early in the piece and was limited to funding the acquisition of the Busang property. In their opinion, for Bresea to be held liable a court must find that the conspiracy began before the property was purchased. There is some risk that a court may not make such a finding on all of the evidence. Mr. Kelly assesses this litigation risk as being much higher than do plaintiffs counsel.

10 Given the extent of Bresea's current assets, and the ongoing costs which may dissipate those assets, the

plaintiffs' counsel estimate that Bresea will have approximately $12,000,000 in total available to satisfy any judgment that may issue at the conclusion of the anticipated litigation. In their estimate, a settlement of $9,000,000 at this point is reasonable when weighed against the total potentially available and the attendant risk of the litigation.

11 Although there have not been any discoveries, the essential facts surrounding Bresea's liability are known. Deloitte, in the same interest as the class as Trustee of Bre-X, has through it's counsel reviewed the Bre-X documents.

12 A senior vice-president of Deloitte familiar with the litigation and the affairs of Bre-X, and Deloitte's counsel for that matter, who are in essence neutral, recommend the settlement.

13 The negotiations were hard fought and difficult, occurring over a period from January 2000 to October 2001. The Bresea shareholders have approved the agreement. The representative plaintiffs recommend the settlement. The Children's Lawyer and the Public Trustee do not oppose the motion. Mr. Dermody was designated by the court as friend of the court for the purpose of receiving any objections to the settlement. He advises the court that he is in receipt of no objections. None of the defendants oppose the motion, although Mr. Thacker made submissions as to the form of the order.

14 Class counsel have had in place a toll free telephone and a web-site so that class members may keep up to date on developments and communicate with counsel.

15 I am satisfied in light of all of these considerations that the settlement is within the range of reasonableness. Accordingly, the settlement is approved in so far as it relates to Bresea's involvement in this litigation. However, I am concerned that the wording of s. 28 et seq. of the Agreement may be construed as binding the court in respect of future settlements, monetary recovery or class counsel fees in relation to the within action or other Bre-X litigation. I wish to make it clear that such is not the case and any future matters, including the distributions contemplated under s. 28 shall not be made without the further approval of this court.

Motion granted.

END OF DOCUMENT

47 C.P.C. (4th) 365

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Millard v. North George Capital Management Ltd.

Claude Millard and Roger Grisé, Plaintiffs and North George Capital Management Limited, Triple A Financial Services Inc., North George Capital Limited Partnership, North George Capital II Limited Partnership, North George Capital III Limited Partnership, North George Capital IV Limited Partnership, North George Capital V Limited Partnership, Lionaird Capital Corp., Roderick Alton, Michael Magee, Robert McGillen, Kenneth Gill, Anne Gilmour, Michael Goselin, Goselin & Associates, Stewart and Associates, McColl Turner, Irv Dyck and M.R.S. Trust Company, Defendants

Ontario Superior Court of Justice [Commercial List]

Farley J.

Heard: September 27, 28, 1999, March 3, 2000
Judgment: April 11, 2000
Docket: 98-CL-3048

Counsel: Steven Sofer, Jeffrey D. Glatt and Shani Briffa, for Plaintiffs.

W.R. Maxwell, Q.C., for Alton, Magee.

Benjamin Zarnett and Carolyn Silver, for McGillen.

Eric Fournie, for Gill, Gilmour.

Ann Dinnert, for Goselin, Goselin & Associates.

Robert J. Potts and Robert Muir, for Stewart & Associates.

Karen Groulx, for McColl Turner.

J. Owen N. Bury, for Dyck.

Christopher D. Bredt and Benjamin T. Glustein, for M.R.S. Trust Company.

John O'Sullivan, for Interim Receiver, Lindquist, Avey, MacDonald, Baskerville Company.

47 C.P.C. (4th) 365

Subject: Civil Practice and Procedure

Practice --- Disposition without trial -- Settlement -- General

Pursuant to court order, interim receiver was appointed for defendant limited partnerships and corporate defendants -- Plaintiffs alleged they were two of approximately 200 investing members who were victims of fraud perpetrated by defendants' principles -- Portion of defendants settled after resolution proceedings held before retired judges -- Plaintiffs brought motion for certification of action as class proceeding and approval of settlement -- Motion granted -- Settlement reached was time and cost effective for parties, was conducted by experienced counsel and judges, and was not prejudicial or unfair to those parties not consenting to settlement -- Consultation with more of class members was not absolute prerequisite -- Settlement was fair and reasonable and in best interests of all concerned on balance in litigation, including specific individual defendants as well as plaintiffs.

Practice --- Parties -- Representative or class actions -- General

Pursuant to court order, interim receiver was appointed for defendant limited partnerships and corporate defendants -- Plaintiffs alleged they were two of approximately 200 investing members who were victims of fraud perpetrated by defendants' principles -- Portion of defendants settled after resolution proceedings held before retired judges -- Plaintiffs brought motion for certification of action as class proceeding -- Motion granted -- Allegations of proposed members of class demonstrated common issues, disclosed cause of action and proposed classes, and subclasses were identifiable -- Fact that there may be need to bifurcate proceedings into resolution of individual issues and resolution of common issues was not fatal to certification -- Claims of members were generally small in relation to complexity of litigation and judicial economy would result if common issues only had to be decided once -- Two proposed representative plaintiffs had no conflict of interest with other members of class -- Proposed representative plaintiffs produced workable plan to advance proceedings on behalf of class and to notify class members of proceeding -- Class proceeding was preferable procedure.

Cases considered by Farley J.:

Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453, 31 C.P.C. (3d) 197, 78 O.A.C. 377, 121 D.L.R. (4th) 496 (Ont. Div. Ct.) -- referred to

Anderson v. Wilson (1999), 122 O.A.C. 69, 175 D.L.R. (4th) 409, 44 O.R. (3d) 673, 36 C.P.C. (4th) 17 (Ont. C.A.) -- considered

Bendall v. McGhan Medical Corp. (1993), 16 C.P.C. (3d) 156, 14 O.R. (3d) 734, 106 D.L.R. (4th) 339 (Ont. Gen. Div.) -- considered

Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) -- applied

Campbell v. Flexwatt Corp. (1997), 98 B.C.A.C. 22, 161 W.A.C. 22, 15 C.P.C. (4th) 1, [1998] 6 W.W.R. 275, 44 B.C.L.R. (3d) 343 (B.C. C.A.) -- referred to

Campbell v. Flexwatt Corp. (1998), 228 N.R. 197 (note), 120 B.C.A.C. 80 (note), 196 W.A.C. 80 (note) (S.C.C.) -- referred to

Carom v. Bre-X Minerals Ltd. (1999), 44 O.R. (3d) 173, 46 B.L.R. (2d) 247, 35 C.P.C. (4th) 43 (Ont. S.C.J.) -- referred to

Chace v. Crane Canada Inc. (1997), 14 C.P.C. (4th) 197, 164 W.A.C. 32, 101 B.C.A.C. 32, 44 B.C.L.R. (3d) 264 (B.C. C.A.) -- referred to

Chadha v. Bayer Inc. (1999), 45 O.R. (3d) 29, 36 C.P.C. (4th) 188 (Ont. S.C.J.) -- referred to

Dabbs v. Sun Life Assurance Co. of Canada, [1998] I.L.R. I-3575, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18 (Ont. Gen. Div.) -- applied

Dabbs v. Sun Life Assurance Co. of Canada (1998), 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243 (Ont. C.A.) -- referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note) (S.C.C.) -- referred to

Epstein v. First Marathon Inc. / Société First Marathon Inc. (2000), 2 B.L.R. (3d) 30, 41 C.P.C. (4th) 159 (Ont. S.C.J.) -- distinguished

Fisher v. C.H.T. Ltd., [1966] 2 Q.B. 475 (Eng. C.A.) -- considered

Harrington v. Dow Corning Corp., 48 C.P.C. (3d) 28, 22 B.C.L.R. (3d) 97, [1996] 8 W.W.R. 485, 31 C.C.L.T. (2d) 48 (B.C. S.C.) -- referred to

Hunt v. T & N plc, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. Hunt v. Carey Canada Inc.) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. Hunt v. Carey Canada Inc.) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959 (S.C.C.) -- referred to

Mouhteros v. DeVry Canada Inc. (1998), 22 C.P.C. (4th) 198, 41 O.R. (3d) 63 (Ont. Gen. Div.) -- referred to

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245, 25 O.R. (3d) 331 (Ont. Gen. Div.) -- referred to

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 40 C.P.C. (3d) 263, 129 D.L.R. (4th) 110, 25 O.R. (3d) 331 at 347 (Ont. Gen. Div.) -- referred to

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, 37 C.P.C. (4th) 175 (Ont. S.C.J.) -- considered

Ontario (Securities Commission) v. Consortium Construction Inc. (1993), 1 C.C.L.S. 117 (Ont. Gen. Div. [Commercial List]) -- considered

Parsons v. Canadian Red Cross Society (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) -- considered

Peppiatt v. Nicol (1993), 20 C.P.C. (3d) 272, 16 O.R. (3d) 133 (Ont. Gen. Div.) -- referred to

Robertson v. Thomson Corp. (1999), 171 D.L.R. (4th) 171, 85 C.P.R. (3d) 1, 43 O.R. (3d) 161, 30 C.P.C. (4th) 182 (Ont. Gen. Div.) -- referred to

Winnipeg Mortgage Exchange Ltd. v. Mortgage Holdings Ltd. (1982), [1983] 1 W.W.R. 213, 19 Man. R. (2d) 1, 43 C.B.R. (N.S.) 119 (Man. C.A.) -- considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally -- pursuant to

s. 1 "common issues" -- considered

s. 5 -- considered

s. 5(1) -- considered

s. 6 -- referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally -- considered

Securities Act, R.S.O. 1990, c. S.5

Generally -- referred to

Rules considered:

Rules of Civil Procedure, O. Reg. 560/84

R. 20 -- referred to

R. 21 -- referred to

Regulations considered:

Securities Act, R.S.O. 1990, c. S.5

General, R.R.O. 1990, Reg. 1015

Form. 20

MOTION by plaintiffs for approval of settlement and certification of class proceeding.

***Farley J.*:**

1 This was a certification motion by the proposed representative plaintiffs Claude Millard and Roger Grise in respect of these proceedings under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. ("CP Act"). The test for certification is set out at s. 5 of that legislation:

> s. 5(1). The Court shall certify a class proceeding on a motion under sections 2, 3 or 4 if,
>
> (a) the pleadings or the notice of action disclose a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (b) the claims or defences of the class members raise common issues;
>
> (c) a class proceeding would be the preferable procedure for the resolution of the common issues, and
>
> (e) there is a representative plaintiff or defendant who:

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of identifying class members of the proceeding; and

(iii) does not have on the common issues for the class, an interest in conflict with the interests of the other class members.

2 Pursuant to the Order of Ground J. dated September 23, 1998, Lindquist, Avey, MacDonald, Baskerville Company was appointed interim receiver ("IR") of the various defendant limited partnerships and of North George Capital Management Limited and Lionaird Capital Corp.

Claude Millard -- "Millard"

Roger Grise -- "Grise"

North George Capital Management Limited -- "Management"

Triple A Financial Services -- "AAA"

North George Capital Limited Partnership -- "LP1"

North George Capital II Limited Partnership -- "LP2"

North George Capital III Limited Partnership -- "LP3"

North George Capital IV Limited Partnership -- "LP4"

North George Capital V Limited Partnership -- "LP5"

LP1, LP2, LP3, LP4, LP5 collectively -- "Partnerships"

Lionaird Capital Corp. -- "Lionaird"

Management as General Partner of the Partnerships -- "GP"

Roderick Alton -- "Alton"

Michael Magee -- "Magee"

Robert McGillen -- "McGillen"

Kenneth Gill -- "Gill"

Anne Gilmour -- "Gilmour," wife of Gill

Michael Goselin -- "Goselin"

Goselin & Associates -- "Gosco"

Stewart and Associates -- "Stewco"

McColl Turner -- "McCollco"

Irv Dyck -- "Dyck"

M.R.S. Trust Company -- "MRS"

Alton, Magee, Bill and Gilmour collectively -- "Principals"

3 Millard and Grise assert that they are two of approximately 200 members who were victims of fraud or Ponzi schemes allegedly perpetrated by the Principals and as a result these members lost money invested in units ("Units") of the Partnerships or notes ("Notes") issued by Lionaird. They also allege that the professional defendants, lawyers McGillen and Stewco, the accounting firm McCollco and the trust company MRS were aware or ought to have been aware of the unlawful conduct of the Principals and did not merely "do nothing" but in fact took steps which in fact facilitated the ability of the Principals to perpetrate the schemes or they otherwise breached duties owed to their clients.

4 It is asserted that Alton owned and controlled AAA, a registered securities dealer authorized to sell mutual funds and private placement securities. Goselin and Dyck were registered as salespersons for AAA.

5 Millard and Grise assert that many purchasers of Partnership Units or of Lionaird Notes have either insufficient funds to pursue an individual action against the defendants or the costs of pursuing such an action are too high relative to the damages which they suffered. In the result, they assert that without certification of this action, many of the alleged victims will be denied fundamental access to justice. I think it is fair to observe that the IR has had great difficulty in receiving cooperation from the Principals, specifically as to payment of investigation costs awarded against Alton and Magee and in being able to trace (in the sense obtain) funds which were sent out of the jurisdiction to Switzerland and California and as to which litigation will have to be pursued in an attempt to recover same.

6 Millard and Grise made the further allegations as follows:

(a) Alton and Magee created the Partnerships as vehicles through which they would perpetrate the fraudulent or Ponzi scheme on the investors in Ontario.

(b) LP1 hired McGillen as its solicitor. He drafted the Offering Memorandum for LP1, a modified version of which was provided to all who purchased Units in any of the Partnerships following.

(c) The subscription form for investors in the LP1 Units provided for monthly earning payments of 5%.

(d) The LP1 partnership agreement, drafted by McGillen, provided that Management as GP (which made only a nominal capital contribution) would receive a 40% share of income earned by LP1; this was not disclosed in the Offering Memorandum.

(e) The business plan described in the Offering Memorandum effectively required the Partnership to lend the money supplied by the investors to the Partnership out on a fully secured basis to unnamed "Borrowers" at a rate in excess of 60% per annum (without even taking into account the 40% share of income referred to in (d) above) to meet the payments due to the investors. It would appear that on a bumped up basis, the effective rate of interest would be in excess of that rate legislated to be "criminal."

(f) In the LP1 Offering Memorandum, McGillen included various provisions which made him personally responsible as the Partnership's solicitor, for satisfying various conditions to secure the investors' investments. Examples of this include that the Offering Memorandum provided:

(i) [LP1] will only release [LP1's] funds upon receipt of a fully negotiable Letter of Credit or Bank Guarantee ... issued by one of the top 25 European Banks or one of the top 100 World Banks. The

terms of the Letter of Credit must meet with the satisfaction of [LP1's] Canadian Schedule A bank and lawyer to [LP1] [McGillen];

(ii) that all conditions to the transfer of funds out of the [LP1] must be met to the satisfaction of the [LP1's] Canadian banker and to its lawyer [McGillen].

(g) Goselin and Dyck were salespersons registered with AAA, a dealer owned and controlled by Alton. They agreed to sell Units to their clients for commissions as high as 4% per month. It would not appear that there was any detailed investigation of how this plan would work out in practice. Dyck in his affidavit has stated: "I do not do due diligence on the financial products I market."

(h) Goselin and Dyck sold most of the Units employing what might be generally referred to as a "common sales pitch." They claim that they essentially repeated information about the Partnerships provided to them by Alton which they believed to be true -- namely: high returns, secure principal, high liquidity.

(i) LP1 was cloned into four more offerings as to the other Partnerships, raising a total of US$4 million from more than 100 investors. Alton and Magee received more than $350,000 Cdn from the funds of the Partnership. Magee received an additional US$125,000 from Primesorb USA, one of the parties to which substantial amounts of the unrecovered funds of the Partnerships were purportedly transferred. Goselin and Dyck received the most material share of the $475,000 Cdn paid as sales commissions by the Partnerships. The remainder of the moneys put up by the investors was purportedly "loaned" to debtors of highly questionable quality under suspicious circumstances. As of this date, it is not apparent that any of such funds will be recoverable.

(j) No prospectus was prepared in respect of the offering of any of the Units of the Partnerships. Although Alton, AAA, Goselin and Dyck are registered securities dealers or salespersons, it is alleged that the securities laws of Ontario were ignored. The Principals were apparently relying on an exemption to the prospectus requirements but it is asserted that none of the requirements for such exemption were complied with.

(k) Year end financial statements and tax reports were prepared by McCollco which was retained as the accountants of the Partnerships. It is asserted that McCollco through such review would be able to see that funds were being transferred back and forth in such a way to assist "misappropriation" and further that payments being made to investors were being financed from the moneys invested by subsequent investors and not primarily from any earnings of the Partnerships as booked. It is asserted that disgruntled investors were being paid off for amounts in excess of their actual capital accounts balances so as to hide the fact of the balances being diminished by losses as payouts. It is further asserted that McCollco prepared the financial statements in two parts, allegedly contrary to normal industry practice, such that the investors would not be able to easily detect the Ponzi scheme.

(l) At Gill's suggestion, the Partnerships retained Stewco to resolve certain *Securities Act* violations. Stewco knew or ought to have known that Alton and Magee had done more than one partnership offering in the previous 12 months in breach of the *Securities Act*. Nevertheless Stewco prepared and filed a Form 20 for LP4 as if everything were in regular order and almost immediately thereafter Stewco was consulted on LP5 as to its offering.

(m) It is alleged that the Principals created Lionaird for the purpose of tapping into a new source of funds -- namely RRSP funds which investors wished to invest. Lionaird offered returns of 12% to 24% per annum on its Notes.

(n) Stewco was retained to incorporate and organize Lionaird and assist in the preparation of documents to offer for sale Lionaird Notes to investors for RRSP and non-RRSP investments. Notwithstanding Stewco's actual or reputed knowledge (i) of the non-resolution of the Partnerships' deficiencies under the *Securities*

(w) The balance of the Lionaird funds were either placed in an offshore account in Alton's name or sent to an offshore corporation created by Gill which was neither a subsidiary of, nor controlled by, Lionaird. As a result of these proceedings, a portion of the Lionaird funds has been recovered.

(x) On the basis of an initial Lindquist, Avey, MacDonald, Baskerville report dated September 22, 1998, Ground J. concluded in appointing that firm IR that

> ...If the Report doesn't indicate intentional fraud, it must indicate total and complete incompetence of the highest order on the part of those responsible for the management of the affairs and investments of the Corporation and the Partnerships.

(y) Alton is the president, a director and significant shareholder of Management, the GP of the Partnerships; he is also the president, a director and a significant shareholder of Lionaird; he also represents himself as a self-employed limited market dealer, operating through his controlled corporation AAA.

(z) Magee is an officer, a director and a significant shareholder of Management; he is an officer and significant shareholder of Lionaird.

(aa) Gill was at all material times an officer, a director and significant shareholder of Lionaird.

(bb) Gilmour was at all material times an officer of Lionaird.

(cc) Goselin is a financial planner operating through his company Gosco which has the slogan "Professional Management of Your Money." Goselin is a shareholder of and salesperson with AAA.

(dd) Stewco is a law firm practising in Ontario.

(ee) McGillen is a lawyer practising in Ontario.

(ff) McCollco is an accounting firm partnership.

(gg) Dyck is an independent financial planner and a salesperson with AAA.

(hh) MRS is an Ontario headquartered trust company offering its services as a trustee for RRSP plan accounts.

As to how the various defendants view matters, they made the following observations:

(a) Alton and Magee submit that the investors were greedy.

(b) McGillen submits that Millard has indicated that he purchased Partnership Units on the basis of Goselin's oral representations and assurances as to earning 5% on his money per month, that his principal was guaranteed and his investment was redeemable on 30 days' notice. There was no allegation that Millard was provided with a draft Offering Memorandum regarding the Partnerships or that he relied on the Offering Memorandum. Rather Millard advised that he did not understand much of what he read in the draft Offering Memorandum. McGillen points out that the draft Offering Memorandum indicated that the investment was speculative and subject to risk. Millard advised that Goselin advised him that the references in the draft to risk and speculative investment was merely "legal jargon" but that Goselin said his money was 100% guaranteed, would earn high returns and have a high liquidity. Millard based his decision to invest on what Goselin told him which he viewed as superseding what was in the draft Offering Memorandum. McGillen submits that the core of the claim concerning the Partnership Units was oral representations and not anything which relied on the documentation he prepared.

(c) McGillen submits that the investors were buying Units from the Partnerships and that McGillen was not alleged to have been acting as a lawyer for any investors. There was no allegation that any investor relied on what McGillen said or relied on McGillen in any way for legal advice or otherwise.

(d) McGillen observes that there is no reference in the draft Offering Memorandum to anything being a statement of McGillen, but rather the statements were of those issuing the Units, namely the Partnerships.

(e) Goselin and Gosco observe that no Letter of Credit or Bank Guarantee was obtained by the Partnerships before the funds were released. The Lindquist report stated that Management had taken or borrowed large sums from the funds of the Partnership; that funds received by one Partnership were used by Management as GP to pay money to investors in another Partnership or were simply paid back to the investors so that they would think the investments were continuing as successful; that large amounts had been placed by Management with a Swiss notary who had been arrested in Switzerland on fraud charges; and that moneys had been otherwise placed by Management in other questionable investment schemes and the monies appeared to be unrecoverable.

(f) Goselin points out that his wife was an investor and therefore a victim of the fraud.

(g) Goselin denies that there was a "common sales pitch" and further that he did due diligence (although he does not advise what due diligence he did do).

(h) Goselin observes that the only *written* evidence of a "common sales pitch" was obtained through an investigator (Woodruff) who apparently obtained the sheet at Tab 0 to Millard's affidavit from an unnamed investor in California who indicated he got it from Dyck or a salesman associated with Dyck. Goselin observes that Millard was not told of all the items on this sheet.

(i) Stewco observes that it was retained by LP4 for the express and limited purpose to prepare and file a Form 20 with the Ontario Securities Commission. Management certified the accuracy of the contents of Form 20. All of the securities referred to in this Form 20 had been sold and the monies disbursed before Stewco was retained. Stewco had no direct contact with any of the investors.

(j) Stewco was retained to incorporate Lionaird and thereafter to prepare an Offering Memorandum and subscription agreement in connection with the sale of Promissory Notes by Lionaird. In anticipation of the initial closing Stewco received cheques on behalf of nine investors ($330,000 aggregate) which were processed through Stewco's trust account and ultimately disbursed to Lionaird on closing. Stewco received no further moneys from investors other than the cheques received from MRS re RRSP accounts of MRS (these cheques were subsequently returned to MRS because of discrepancies with the Offering Memorandum and subsequent agreements).

(k) Stewco prepared Form 20s for the Lionaird transactions, the contents of which were certified by Lionaird.

(l) Stewco observes that it had no direct contact with any investors or that any investor sought or received legal or other advice from Stewco.

(m) McCollco observes that it was retained by the Partnerships as accountants, not auditors. However Millard made no allegation that he relied on the financial statements prepared by McCollco as to making his investment in Units of the Partnerships. McCollco states that if Millard had reviewed the Schedule of Partners' Capital received by him Millard would have known that he lost money in the year ending December 31, 1995 and that his capital account was being reduced.

prepared.

(y) MRS submits that there is no prohibition in the *Income Tax Act* (or in the DOT) against acquiring non-qualified investments in a self directed RRSP account. Rather the *Income Tax Act* provides specific rules directed as to the acquisition and disposition of non-qualified investments by an RRSP Account.

(z) MRS submits that there are many circumstances where debt issued by small business corporations may be a qualified investment for an RRSP account under the *Income Tax Act*. Rather the final determination on "qualified investment status" may turn on very specific facts which may be within the knowledge and control of the principals and promoters of the investment offering and/or the annuitant.

(aa) MRS observes that the offering memorandum of the Lionaird Notes describes the speculative nature of the investment, that the principal and interest of the Notes are not guaranteed by any third party, that the Notes will only be secured against the assets of Lionaird (which prior to the offering had no significant assets) and there was no assurance Lionaird would be able to repay the principal or interest on the Notes when they came due.

(bb) It was noted that investors would invest for varying reasons.

7 In between the submissions relating to certification on September 27-28, 1999 and a return to Court on March 3, 2000, the parties engaged in resolution discussions before firstly the Hon. R. Montgomery and then the Hon. Sidney Robins. During this period, I was requested not to render a decision. As a result of the resolution discussions before these two retired judges and further negotiations, the plaintiffs have reached settlements with certain of the defendants ("Settling Defendants"), namely (i) McGillen and Stewco as to $100,000 re all claims of North George Class members; (ii) Stewco as to $100,000 re all claims of Lionaird Class members; and (iii) MRS as to $400,000 re all claims of the Lionaird RRSP Subclass members; all subject to court approval.

8 The Hon. Robert Montgomery viewed the case against the lawyers as somewhat weak in absolute and relative terms. The Hon. Sidney Robins dealt only with the MRS aspect and he observed certain weaknesses in the case against MRS. Both retired judges counselled settlement at or below the settlement figures.

9 A bar order has been requested as part of the settlement so that the settling defendants and the non-settling ones would be precluded from making a claim of contribution or indemnity against each other. However, the settling defendants would participate in the continuing litigation to permit the court to assess their relative liability to the plaintiffs, as compared with the non-settling defendants. As well, it was agreed that as against the plaintiffs, the non-settling defendants would have the benefit of any claims for contribution and indemnity which they may have as against the settling defendants.

10 All Lionaird Class members would share in the settlement proceeds contributed by Stewco; however only the RRSP subclass would share the settlement proceeds contributed by MRS. It was proposed that with respect to the approximately $1 million otherwise recovered by the IR of Lionaird that because it was not entirely clear who was entitled to such funds amongst the investors in Lionaird after the interim receiver's first charge for its fees and disbursements, that all available assets be pooled and these investors share equally and rateably in the pooled assets. The North George settlement does not contemplate that any monies be paid directly to the North George investors out of the $100,000 proposed to be paid by McGillen and Stewco. Rather it was proposed that these funds be used to pursue claims against the notary in Switzerland (including a better understanding of what was happening in the Swiss proceedings and whether there was any realistic and reasonable opportunity of recovering any money there and if so, covering the costs of submitting an appropriate claim to recover the North George class members' share of the missing funds). In this regard, plaintiffs' counsel advised that they would defer seeking their fee out of this settlement in order to allow these funds to advance the interests of the North George class. Plaintiffs' counsel and Millard have been in touch with 26 North George class members and 44 Lionaird class members (of which 29 are also RRSP subclass members); all contacted have been in favour of the Settlement Agreement and the proposed distribution of proceeds.

11 The records of North George and Lionaird have been reviewed as to attempting to determine who are the North George and Lionaird class members. Since most of the investors appear to come from the greater Peterborough and North Bay areas, it was proposed to give notice by publication in newspapers circulated in those areas. Each investor has the opportunity of opting out of the class proceedings and thus the Settlement Agreement. Should any do so, the settling defendants have the option of withdrawing from the settlement.

12 I will now proceed to determine whether the proceedings should be certified as a class action according to the criteria set out in s. 5(1) of the CP Act. This will be broken down as to the Settling Defendants and the rest of the defendants.

13 For the purpose of settlement only, the Settling Defendants have conceded that as against them the plaintiffs' claims in negligence and otherwise state a cause of action against the Settling Defendants. The proposed North George Class (of which it is alleged that each member has a claim against the settling defendants McGillen and Stewco as well as against Alton, Magee, the applicable partnership, Management and McCollco) is essentially comprised of all purchasers of Units in the Partnerships other than the defendants or relatives of the defendants. Similarly the Lionaird Class (of which it is alleged that each class member has a claim against the Settling Defendant Stewco as well as against Alton, Magee, Gill, Gilmour and Lionaird) is essentially comprised of all of the purchasers of Notes of Lionaird other than the defendants or relatives of the defendants; the proposed RRSP subclass is essentially comprised of investors who held Lionaird Notes in an RRSP account with MRS other than the defendants or relatives of the defendants.

14 Section 1 of the CP Act defines "common issues" as:

> (i) common but not necessarily identical issues of fact, or
>
> (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

15 For settlement purposes only, the Settling Defendants have acknowledged the following to be common issues:

> (i) what role was played by the Settling Defendants in the creation of Lionaird and/or the Partnerships and the marketing and sales of the securities issued by these entities? and
>
> (ii) are the Settling Defendants liable for the losses suffered by the class members?

16 For settlement purposes only the Settling Defendants have acknowledged that a class proceeding is the preferable way to resolve the common issues above. It was submitted that certification of the action in this respect would advance the following objectives of the CP Act, namely access to justice and judicial economy. As for access to justice it was noted that many of the claims were for under $50,000 and as such it would generally be uneconomic for any one investor to litigate his or her claim given the cost and length of such relatively complex litigation and its uncertainties. In addition, it was to be recognized that for many investors, their investment represented a significant amount of their life or retirement savings so that their access to litigation funds to pursue their actions would be constrained. While at trial, the relative liabilities of the Settling Defendants would have to be determined and in this respect witnesses for the Settling Defendants would be available for examination. It was submitted that the more passive approach to the trial of the Settling Defendants would result in judicial economy as to a class action trial; in addition it should be observed that to deal with the matter as a class proceeding would assist in judicial economy as opposed to a slew of individual actions, but as well it should also be observed that the settlement if approved would tend to eliminate further interlocutory proceedings vis-à-vis the Settling Defendants (and as well, of course, any appeals by the Settling Defendants).

17 As for the representative plaintiff, it was observed that he need not share every characteristic of every other class (and subclass) member. The key was submitted to be that he have no conflict of interest on the common issues with the members of the class and that he be shown to be an individual who will fairly and adequately advance the class claims. The Settling Defendants did not challenge the suitability of the plaintiffs as representative plaintiffs.

18 In assessing whether a settlement should be approved, the court should consider a number of factors. These include the likelihood of recovery or success, the amount and nature of discovery, evidence and investigation, the settlement terms and conditions, the recommendations and experience of counsel, the future expenses and likely duration of the litigation, the recommendation of any neutrals, the nature of the objections and the force behind such objections and the presence of arm's length bargaining and the absence of collusion. See *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.) at pp. 439-44, affirmed (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. dismissed October 22, 1998 [reported (1998), 235 N.R. 390 (note) (S.C.C.)]; *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) at para. 71; *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.). Winkler J. in *Parsons* at para. 72 also considered the degree and nature of communication by counsel and the representative plaintiff with class members during the litigation and information conveying to the Court the dynamics of and the position taken by the parties during the negotiations. He did note at para. 73 that:

> Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process.

In *Ontario New Home Warranty Program*, Winkler J. stated at p. 147 that "the settlement of complex litigation is encouraged by the courts and favoured by public policy."

19 It would appear that the settling defendants have vigourously denied liability to the plaintiffs; they have strenuously opposed certification before the settlement and indicated that they would strongly oppose the claims. It is likely that this litigation including appeals could take a number of years. A significant percentage of the class members are older and have expressed a desire to resolve this matter earlier rather than later, with an attendant flow of funds. With this litigation having progressed over the past 1 $^{1}/_{2}$ years, it would appear that through the certification process and the ADR process including the oldest and most important focus of ADR -- negotiation -- that there has been a reasonable amount of "discovery" and investigation of the claims against the Settling Defendants.

20 What is reasonable in a settlement? What is the range that is tolerable? The Court should not expect perfection (see *Ontario New Home Warranty Program* at p. 151) nor should it hesitate to make reasonable assumptions about the future (in other words, the decision is to be made now on the basis of known facts as opposed to delaying the decision to take advantage of 20-20 hindsight). Sharpe J. at p. 440 of *Dabbs* reminded us that

> all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

Plaintiff's counsel noted that the settlement provides benefits to the plaintiff class such as (at para. 57 of their factum):

> (i) in the case of Lionaird, an immediate return of about 40% of their original investment to elderly investors, without the time, expense and risks of trial and possible appeal;
>
> (ii) for the North George class members, the settlement monies can be used to pursue the North George class members' claim against a notary in Switzerland who allegedly received a significant portion of the monies invested by the Class members. To date these claims have not been pursued because North George has no funds and the former interim receiver for North George was unable to obtain any from North George class members to retain counsel in Switzerland.

21 I would also note that Alton and Magee have not respected court orders to fund certain investigations. The notice and opt out provisions contemplated would appear to provide adequate protection for those class members who are not before the court and who do not wish to be bound. Plaintiffs' counsel have many years of experience in litigation generally; as well they have been involved in other class proceedings. They recommend that the settlement

25 McCollco advanced *Epstein v. First Marathon Inc. / Société First Marathon Inc.* (2000), 41 C.P.C. (4th) 159 (Ont. S.C.J.) as an example of a court following the criteria stated by Sharpe J. in *Dabbs* in dismissing a settlement proposal. However I would think that an analysis of the *Epstein* case would satisfy anyone that Cumming J. was there dealing with an abuse of process matter where the strike litigant -- or perhaps more accurately put, the strike counsel -- had the respondent corporation over a time barrel. If Cumming J. had approved that "settlement," everyone (but strike counsel who had protected his fees and disbursements of $190,000) would have been worse off including the justice system. The present case under review bears absolutely no similarity to the *Epstein* case on a facts and circumstances basis.

26 McCollco asserts that the proposed bar order is unfairly prejudicial to it since it asserts that the order will prevent it from obtaining contribution against the settling lawyers to cover the gap caused by the impecuniousity costs of any non-settling defendant. Citing Fleming John G., *The Law of Torts* 8th ed. (1992) at p. 264 and *Fisher v. C.H.T. Ltd.*, [1966] 2 Q.B. 475 (Eng. C.A.) at pp. 481 and 483, McCollco asserts at para. 29 of its factum:

> 29. Where there are more than two wrongdoers, and at least one wrongdoer is insolvent or otherwise unavailable to satisfy his or her share of liability, the *Negligence Act* is silent regarding how the burden of the insolvent or unavailable wrongdoers' portion of liability is to be absorbed as between the solvent wrongdoers. The liability of a concurrent wrongdoer who is unable to satisfy their share of liability should be divided between the concurrent wrongdoers in proportion to their respective degree of fault. In other words, where there are three or more tortfeasors, the share of liability attributable to one insolvent tortfeasor should be distributed proportionally among the remaining tortfeasors.

However what McCollco overlooks is that if that proposition is accepted as governing in Ontario, then the application of *Fisher* would result not in McCollco having to dip into its pockets for the *total* share of the impecunious defendant(s) but only its proportional share. Rather it is the plaintiffs who have to bear the burden of not getting anything extra from the settling defendants. Therefore I do not see that this aspect is unfair or prejudicial to the legal rights of McCollco.

27 McCollco also objects in that it is circumscribed as to its rights in respect of discovery and evidence at trial concerning the settling defendants. It objects to the requirement of having to obtain leave of the Court in order to conduct examinations for discovery and to obtain documentary discovery from the settling lawyers. I would note that Winkler J. observed at pp. 148-9 of *Ontario New Home Warranty Program* that failure to approve the integral prohibitive provision of the settlement agreement would mean that the entire settlement would fail. He then proceeded to weigh the advantages and disadvantages accruing to the plaintiffs and the objecting defendants. He noted at p. 148:

> The *Class Proceedings Act* is *sui generis* legislation which envisions the balancing of interests between the parties. Through legislative foresight, the court has been given the necessary power to adapt procedures to ensure that the interests of all parties can be adequately protected in situations where those interests conflict. Here the benefits of the settlement to the plaintiffs favour the approval of the settlement as presented, including the contentious prohibitive provisions. As I have stated above, these provisions do not occasion any substantive prejudice to the defendants. The procedural concerns may be adequately addressed through the terms on which the settlement is approved.
>
> . . . . .
>
> These terms, generally described, are that the non-settling defendants may, on motion to this court, obtain:
>
> . . . . .

Again, I do not see that in taking this balance that McCollco is being dealt with unfairly or is otherwise being prejudiced in relative terms. The court in any such leave motion would be able to deal with the request to ensure that McCollco was able to obtain what it reasonably required in the circumstances (prior discussions amongst counsel would likely be very helpful for all concerned) and the court would be able to deal with any actual or likely abuse on any side. The court continues to have full control over the process and costs.

pleading) that it is plain and obvious that they will fail.

38 As to identifiable classes, it appears to me that the proposed classes and sub classes meet the criteria set out by Winkler, J. in *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at p. 175. See above as to the proposed North George class and the proposed Lionaird class. The MRS subclass is dealt with as a subclass since only those with RRSP accounts in Lionaird also dealt with MRS. Similarly, the claims against Dyck and Goselin should be dealt with in subclasses since those defendants dealt with their "own" investors. I would concur with the identifiable classes and subclasses.

39 Are there common issues which will be advanced by proceeding in class litigation? The common issues need not be determined in the sense that liability be established now. It should be obvious that certification should be neutral as between the two sides -- that is, where the common issue is later decided one way or the other, that result will either benefit the plaintiffs or conversely, the defendants. Issues should be certified as common issues if their resolution would move the litigation forward. See *Anderson* at para 35; *Campbell v. Flexwatt Corp.* (1997), [1998] 6 W.W.R. 275 (B.C. C.A.) at pp. 291-3, leave to appeal to S.C.C. refused *Campbell v. Flexwatt Corp.* (1998), 228 N.R. 197 (note) (S.C.C.). When certifying common issues, it is preferable that the issues be generally stated as opposed to setting out a detailed list of issues which details would refer to all elements of all contemplated causes of action. See *Chadha v. Bayer Inc.* (1999), 36 C.P.C. (4th) 188 (Ont. S.C.J.) at para. 21; *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (Ont. Gen. Div.) at p. 173. Schedule A to the September 1999 factum of the plaintiffs in my view sets out the appropriate common issues. The plaintiffs seek relief against the Principals in the form of punitive damages; class proceedings, especially as to their aspect of behaviour modification, are well suited to deal with punitive damages. See *Chace v. Crane Canada Inc.* (1997), 14 C.P.C. (4th) 197 (B.C. C.A.) at pp. 204-5; *Carom v. Bre-X Minerals Ltd.* (1999), 35 C.P.C. (4th) 43 (Ont. S.C.J.) at para. 84.

40 Is a class proceeding here in keeping with the objectives of the CP Act; is a class proceeding a preferable procedure? Will it advance the objectives of the CP Act? If certification is denied, will the result be that effectively the investors (or many of them) will be denied access to the courts since their individual claims could not be economically litigated? See *Ontario New Home Warranty Program* at paras. 84 and 96. In my view the claims here are generally small in relation to the complexity of the litigation and the dedication of the defendants to fighting those claims on a variety of issues. I note that for many of the investors, these losses which they have presently incurred would be of a nature and magnitude that they would discourage all but the most dedicated and relatively well heeled from pursuing them individually. These losses have cut out substantial underpinnings in the foundations these investors have to finance their life up to and including retirement. There would not appear to be any appetite amongst the investors to pour more money into this area, an area which has caused them considerable financial loss and heartache already. I note that no investor was willing to now reach into their pocket in the North George situation to finance litigation as to the Swiss notary situation abroad. I agree with Sharpe J's observations at p. 434 of *Dabbs* and feel that his views have equal merit in this case. Where there are common issues which would take up a considerable amount of any individual case against the defendants, it is obvious that there will be judicial economy if these common issues need only be determined once, not many or as here hundreds of times. See *Anderson* at paras. 22-35; *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 127 D.L.R. (4th) 552 (Ont. Gen. Div.) leave for appeal refused (1995), 129 D.L.R. (4th) 110 (Ont. Gen. Div.). Even if individual issues have to be separately and individually determined, the amount of time required will be in the aggregate substantially reduced. See also *Campbell* at p. 295; *Anderson* at para. 32-6. See *Chace* and *Peppiatt* as to the question of behaviour modification. Where the risk of any one individual taking a defendant to court is remote, a defendant may feel secure and continue wrongful conduct. If the Principals here have engaged in fraud, then they should recognize that a bankruptcy discharge will not release them from a debt/judgment founded in fraud. The absence of funds from Canada (or their being hidden here) has made it very difficult to pursue these offshore "investments" in Switzerland and California. There appears to have been extremely limited cooperation in tracing and recovering such funds. A collective judgment, if given, may allow for further collective action to be taken in recovering these funds. Dyck apparently feels no particular obligation to any of his customers: the plaintiffs have portrayed this as a "buyer beware" attitude. Securities dealers are operating in a regulated industry in which there are certain duties and obligations. The determination of those duties and obligations in this case will assist others similarly situate in knowing where the lines are drawn. Similarly there appears to be merit as to the professionals and MRS that others similarly situate should conduct themselves appropriately; the plaintiffs here allege that these other parties carried out their activities with one eye (or both) closed to the obvious harm being dished out by the others and rather than taking an

appropriate level of caution, these other parties took a narrow blinkered analysis of their responsibility (preferring to rely on possibly exculpatory language for instance in the case of MRS as opposed to being alert and sensitive to some obvious alarms going off).

41 Winkler J. in *Bywater* at pp. 181-2 observed:

> The court in reaching its decision on preferable procedure must if necessary consider all of the common and individual issues as part of the factual matrix.

42 In consideration of the s. 6 factors, I would note that it would generally appear that compensatory damages can be calculated by the application of a simple formula and all the contracts in issue are what one might characterize as "standard forms."

43 Are Millard and Grisé appropriate representative plaintiffs? There is no requirement that the representative plaintiff be a clone of all the members of the class; it is sufficient that he or she has no conflict of interest and is shown to be an individual who will fairly and adequately advance the class claims. See *Abdool* at p. 465, *Bywater* at p. 183, *Campbell* at p. 296. Both Millard and Grisé appear to me to be without conflict and they appear to have been industrious to date in advancing this litigation in the interests of all affected investors, among whom they are two who have suffered. There is no requirement that the representative plaintiffs have a cause of action against every defendant, provided that he or she can adequately advance the class interests against all defendants with respect to the common issues. See *Campbell* at p. 289; *Harrington v. Dow Corning Corp.* (1996), 48 C.P.C. (3d) 28 (B.C. S.C.) at p. 47. The representative plaintiff need not be the representative witness in the sense of being the sole witness. The court will maintain a supervisory role of the action: See *Anderson* at para 39; *Chace* at p. 203. Millard and Grisé did not get early redemptions at the expense of the rest of the remaining investors.

44 It appears to me that the proposed representative plaintiffs have produced a workable plan to advance the proceedings on behalf of the class and to notify the class members of the proceeding.

45 Given the alleged role taken by Dyck, I do not think it material or relevant that he and his wife apparently lost money on their investments; I do not see that this fact should transfer them into the class that the other investors are in who did not participate in the sales process.

46 I am therefore of the view that when all the pros and cons of certifying this as proposed as a class action with Millard and Grisé as representative plaintiffs to advance the identical common issues on behalf of the identifiable classes against the defendants, it will be recognized that a class proceeding is the preferable procedure. I so find that on balance. Further I am of the view that the proposed settlement should be approved. In my view it is fair and reasonable and in the best interests of all concerned on balance in this litigation, including the specific individual defendants as well as those investors who are in the various classes.

47 As discussed above, the question of what should be done with the North George settlement funds of $100,000 is to be subject to the come back clause arrangement discussed above. If there are no objections or if at a hearing the objections are not sufficient to change the proposed course of action (any such hearing to be on a non-onus basis to the objector), then the proposed (and now authorized) use is to be put into action.

48 The IR wished to have an adjustment to the draft order submitted. However, it appears to me that paragraph 12 should be viewed as to the settlement providing compensation to the investors and not to the Partnerships directly. It appears that the change in paragraph 18 is all right. At this stage, but subject to review in the future, I would not see any realistic benefit as to the IR dealing with claims for unsecured creditors since it appears that this is a deep insolvency.

49 I note that there is some question of priority as to funds of approximately $1 million held by Lionaird's IR as a result of various PPSA registrations as more investors were revealed from a review of the records of Lionaird. Further the RRSP subclass investors did not receive secured notes, but because of the allegation of fraud, their sub class could claim *pari passu* treatment. I also am mindful of cases such as *Ontario (Securities Commission) v. Consortium Construction Inc.* (1993), 1 C.C.L.S. 117 (Ont. Gen. Div. [Commercial List]) at paras 76-8; *Winnipeg*

Mortgage Exchange Ltd. v. Mortgage Holdings Ltd. (1982), [1983] 1 W.W.R. 213 (Man. C.A.) at p. 218 where (a) investors were intended to rank equally; (b) fairness in the result necessitated that they have equality, so that the application of strict legal rules has been set aside by rulings that all available assets be pooled and all investors share equally and rateably in the pooled assets. In these circumstances and especially where priority disputes would delay proceedings and eat away at the available funds, it would generally appear appropriate to apply this rateable sharing concept. However, I am of the view that procedural fairness would dictate that the affected investor parties have the opportunity to utilize the come back clause to object to such treatment. This should be incorporated in the order and in the Notice in the same way as the $100,000 settlement proceeds in North George is dealt with *mutatis mutandis*.

50 I would be grateful if counsel would provide me with a revised draft order and Notice early next week. Given that I have not had any earlier opportunity to get this decision out after the March 3, 2000 hearing, it may be necessary to adjust some of the contemplated dates which may have been advanced in expectation of an earlier release. Counsel can arrange to see me at 9:30 or a 10 a.m. appointment next week as is seen fit by them.

Motion granted.

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CHARLES BAXTER, SR. AND ELIJAH BAXTER Plaintiffs	and	THE ATTORNEY GENERAL OF CANADA Defendant	and	THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, et al. Third Parties

Court File No: 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

JOINT BOOK OF AUTHORITIES OF THE THIRD PARTIES, THE PROTESTANT CHURCH ENTITIES (MOTION RETURNABLE August 29, 30, and 31, 2006)

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