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 U 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

Proceeding under the *Class Proceedings Act, 1992,* S.O. 1992, c.6

FACTUM OF THE ATTORNEY GENERAL OF CANADA

APPLICATION FOR APPROVAL OF AGREEMENT RESPECTING THE LEGAL FEES OF THE MERCHANT LAW GROUP

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I. OVERVIEW

1. This motion, for approval of the agreement respecting Merchant Law Group's legal fees, is part of an otherwise consent motion for certification of this action as a class proceeding and approval of the Settlement Agreement also before the court.

2. This motion, as part of the consent motions for certification and settlement approval, will be brought in the superior courts of nine jurisdictions: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nunavut, the Yukon and the Northwest Territories ("the Courts").

3. The motions are scheduled to be heard by the Courts on the following dates:

Ontario:	August 29-31, 2006
Quebec:	September 8, 2006
Saskatchewan:	September 18-20, 2006
Northwest Territories:	October 3-4, 2006
Manitoba:	October 5-6, 2006
Nunavut:	October 11-12, 2006
British Columbia:	October 10-12, 2006
Alberta:	October 12-13, 2006
Yukon:	October 16-17, 2006

4. The agreement respecting Merchant Law Group's legal fees, like the rest of the Settlement Agreement, must be approved by all the Courts on "substantially the same terms and conditions". It is a condition precedent of the Settlement Agreement that it does not become effective unless and until it is

approved by all of the Courts. As the agreement respecting Merchant Law Group's legal fees is a part of the Settlement Agreement, it must also be approved by all of the Courts before it becomes effective. Moreover, class proceedings legislation requires that agreements as to legal fees be approved by the Courts.

> ***"Date when Binding and Effective" in section 2.01 of the Settlement Agreement, p. 21, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]***
>
> ***"Effective in Entirety" in section 2.02 of the Settlement Agreement, p. 22, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]***
>
> ***"Consent Certification" in section 4.05 of the Settlement Agreement, p. 28, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]***
>
> ***"Agreement is Conditional" in section 16.01 of the Settlement Agreement, p. 79, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]***

5. In class proceedings, as in other proceedings, the legal fees payable to counsel will be approved if they are fair and reasonable. The agreement respecting Merchant Law Group's legal fees - which provides for a verification process to determine reasonable legal fees as opposed to a set amount of legal fees for Merchant Law Group – means that the Courts are being asked to approve a verification process which will, it is submitted, determine a fair and reasonable amount of legal fees for Merchant Law Group.

6. Recently in proceedings before Mr. Justice Ball of the Saskatchewan Court of Queen's Bench, Merchant Law Group has suggested that the agreement respecting its legal fees may not be binding and enforceable. As a result, the motion for approval of the agreement respecting Merchant Law Group's legal fees will be addressed separately in this factum, apart from the motions for certification and settlement approval. A separate *Factum of the Attorney General of Canada on an Application for Certification and Settlement Approval,* setting out its submissions on the issues of certification and settlement approval, is also before the Court.

7. Canada is not able to support any claim for legal fees or disbursements by Merchant Law Group until the verification process has taken place.

See Exhibit "A" to the affidavit of Ruth Ann Flear, sworn on August 11, 2006, [TAB 2]

II. NATURE OF MOTION

8. Consequently, on this motion, Canada seeks the Courts' approval of the agreement respecting the Merchant Law Group's legal fees, consisting of a verification process to determine a fair and reasonable amount of legal fees for Merchant Law Group.

III. FACTS

A. THE AGREEMENT RESPECTING THE LEGAL FEES OF MERCHANT LAW GROUP ("MLG")

(a) General Provisions

9. Like the legal fees of the National Consortium and Independent counsel, the Settlement Agreement provides that Canada will pay MLG's legal fees out of a separate fund. It is a significant benefit to Class Members that these legal fees are not deducted from the settlement funds and benefits available to them.

10. Importantly, MLG, like all other counsel who have signed the Settlement Agreement or who accept a payment for legal fees from Canada, undertakes not to charge any former student they represent, or represented as at May 30, 2005, any fees or disbursements in relation to the CEP. This means that the full amount of the CEP will be paid to former students, without reduction for contingency or other fees that might otherwise be payable for representation in relation to the CEP.

> ***"No Fees on CEP Payments" in section 13.05 of the Settlement Agreement, p. 66, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]***
>
> ***Affidavit of Frank Iacobucci, sworn on August 10, 2006, para. 14, [TAB 1]***

11. MLG's legal fees, like all other counsel, are based on the number of former students they represented as at May 30, 2005.

> ***Definition of "Retainer Agreement" in section 13.06 of the Settlement Agreement, pp. 66-67, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]***
>
> ***Affidavit of Frank Iacobucci, sworn on August 10, 2006, para. 14, [TAB 1]***

12. MLG's legal fees, like all other counsel, are subject to various verification processes.

> ***"Proof of Fees" in section 13.07of the Settlement Agreement, pp. 67, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]***

"The National Consortium and the Merchant Law Group Fees" in section 13.08(2), (3) and (4) of the Settlement Agreement, at pp. 68-69, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]

Schedule "V" of the Settlement Agreement, Exhibit "C" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]

Affidavit of Frank Iacobucci, sworn on August 10, 2006, paras. 15, 17, 20, 23, 25, [TAB 1]

13. Subject to a verification process, MLG could receive up to $40 million, plus reasonable disbursements and taxes. This amount is intended to recognize the substantial number of former students MLG purports to represent and the class action work MLG purportedly carried out. This sum will include fees for MLG's attendances at the negotiations between July, 2005 and November 20, 2005. However, MLG will receive additional fees for its attendances at the negotiations between November 20, 2005 and when the Settlement Agreement was executed.

"The National Consortium and the Merchant Law Group Fees" in section 13.08 of the Settlement Agreement, at pp. 68-69, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]

Schedule "V" of the Settlement Agreement Exhibit "C" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]

Affidavit of Frank Iacobucci, sworn on August 10, 2006, paras. 24, 25, [TAB 1]

"Fees to Complete Settlement Agreement (November 20, 2005 – Execution of Settlement Agreement) in section 13.03 of the Settlement Agreement, p. 65, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]

(b) Specific Provisions

14. MLG's legal fees are specifically addressed in section 13.08(2) of the Settlement Agreement, which provides:

> (2) The fees of the Merchant Law Group will be determined in accordance with the provisions of the Agreement in Principle executed November 20, 2005 and the Agreement between Canada and the Merchant Law Group respecting verification of legal fees dated November 20, 2005 attached hereto as Schedule "V", except that the determination described in paragraph 4 of the latter

Agreement, will be made by Justice Ball, or, if he is not available, another Justice of the Court of Queen's Bench of Saskatchewan, rather than by an arbitrator.

"The National Consortium and the Merchant Law Group Fees" in section 13.08(2) of the Settlement Agreement, p. 68, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]

15. Section 13.08(2) of the Settlement Agreement states that the fees of MLG will be determined in accordance with two earlier agreements:

(1) The Agreement in Principle, executed by the parties on November, 20, 2005, and,

(2) Schedule "V", entitled "*Agreement Between the Government of Canada and the Merchant Law Group Respecting the Verification of Legal Fees*" (hereafter the "Merchant Fees Verification Agreement").

16. The Merchant Fees Verification Agreement was executed by MLG and Canada on November 20, 2005, just prior to the execution of the Agreement in Principle.

Affidavit of Frank Iacobucci, sworn on August 10, 2006, para. 27, [TAB 1]

Kenneth Sparvier et al. v. Attorney General of Canada et al., 2006 SKQB 362, para. 4, [TAB 3]

17. Part XII of the Agreement in Principle, incorporated by reference in section 13.08(2) the Settlement Agreement, provides:

XII. LEGAL FEES

...

4. The National Consortium and the Merchant Law Group shall each be paid $40,000,000 plus reasonable disbursements, and GST and PST, if applicable, in recognition of the substantial number of Eligible CEP Recipients each of them represents and the class action work they have done on behalf of Eligible CEP Recipients. ...

5. **The Federal Representative shall engage in such further verification processes with respect to the amounts payable to the Merchant Law Group...as have been agreed to**. (Emphasis added)
...

"Legal Fees" in Part XII, section 5 of the Agreement in Principle, attached as Exhibit "B" to the Affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]

18. In fact, as explained above, a verification process had been agreed to by the parties: the Merchant Fees Verification Agreement, now Schedule "V" of the Settlement Agreement.

Affidavit of Frank Iacobucci, sworn on August 10, 2006, paras. 23, 27, [TAB 1]

19. The Merchant Fees Verification Agreement sets out a four part verification process as follows:

Agreement Between the Government of Canada and the Merchant Law Group Respecting the Verification of Legal Fees

The Government of Canada and the Merchant Law Group agree that in addition to the requirement to provide an affidavit set out in Article [ ] of the Agreement in Principle, the Merchant Law Group's fees shall be subject to the following verification process.

1) The Merchant Law Group's dockets, computer records of Work in Progress and any other evidence relevant to the Merchant Law Group's claim for legal fees shall be made available for review and verification by a firm to be chosen by the Federal Representative the Honourable Frank Iacobucci.

2) The Federal Representative shall review the materials from the verification process and consult with the Merchant Law Group to satisfy himself that the amount of legal fees to be paid to the Merchant Law Group is reasonable and equitable taking into consideration the amounts and basis on which fees are being paid to other lawyers in respect of this settlement, including the payment of a 3 to 3.5 multiplier in respect of the time on class action files and

the fact that the Merchant Law Group has incurred time on a combination of class action files and individual files.

3) If the Federal Representative is not satisfied as described in 2) above, he and the Merchant Law Group shall make all reasonable efforts to agree to another amount to be paid to the Merchant Law Group for legal fees.

4) If the Federal Representative and the Merchant Law Group cannot agree as described in 3) above, the amount to be paid to the Merchant Law Group for legal fees shall be determined through binding arbitration....

20. As set out above, under section 13.08(3) of the Settlement Agreement, the determination described in paragraph 4 of the Merchant Fees Verification Agreement will be made by Mr. Justice Ball, or, if he is not available, another Justice of the Court of Queen's Bench of Saskatchewan, rather than by an arbitrator.

B. ATTEMPT TO VERIFY MLG'S CLAIM TO LEGAL FEES

(a) Deloitte's Attendances at MLG's Office

21. After the Merchant Fees Verification Agreement and the Agreement in Principle were executed, Canada sought to verify MLG's claim to legal fees in accordance with the terms of the Merchant Fees Verification Agreement. This section describes the foiled attempts to verify MLG's claim to legal fees and the resulting proceedings in the Saskatchewan Court of Queen's Bench, where MLG asserted, *inter alia,* that the Merchant Fees Verification Agreement is not valid or enforceable.

22. In December, 2005, after the Merchant Fees Verification Agreement and the Agreement in Principle were executed, the parties began making arrangements to carry out the verification process.

Affidavit of Frank Iacobucci, sworn on August 10, 2006, para. 29, [TAB 1]

Kenneth Sparvier et al. v. Attorney General of Canada et al., supra, para. 8 [TAB 3]

23. On January 11, 2006, MLG advised that it was prepared to begin the verification process on January 16, 2006. The firm of Deloitte & Touche LLP ("Deloitte") was selected by the Federal Representative to carry out the verification process and from January 17, 2006 to January 24, 2006 attended MLG's Regina office for this purpose.

Affidavit of Frank Iacobucci, sworn on August 10, 2006, paras. 29, 30, [TAB 1]
Kenneth Sparvier et al. v. Attorney General of Canada, supra, para. 9, [TAB 3]

24. Deloitte's attempts to carry out the verification process are described in the affidavit of Edward Nagel, Chartered Accountant with Deloitte and Senior Manager of its Forensic & Dispute Services group, dated August 11, 2006.

Affidavit of Frank Iacobucci, sworn on August 10, 2006, para. 30, [TAB 1]

Affidavit of Edward Nagel, sworn on August 11, 2006, [TAB 4]

Kenneth Sparvier et al. v. Attorney General of Canada, supra, paras. 9-12 [TAB 3]

25. During Deloitte's attendances at MLG's offices, it requested of MLG, but did not receive, required information. From the information they were able to review, Deloitte made a number of observations that demonstrate the absolute necessity of a proper verification of MLG's claim to legal fees.

Affidavit of Edward Nagel, sworn on August 11, 2006, paras. 17, 18 – 26, [TAB 4]

26. MLG terminated the verification process on January 24, 2006, citing concerns that the process breached their obligation to maintain the solicitor-client privilege of their clients. It appears that MLG has never sought its client's consent to disclose the information required for it to comply with the Merchant Fees Verification Agreement.

Exhibit "C" to the affidavit of Edward Nagel, sworn on August 11, 2006, [TAB 4]

Kenneth Sparvier et al. v. Attorney General of Canada et al, supra, para. 11, [TAB 3]

(b) Proceedings in the Saskatchewan Court of Queen's Bench to Enforce Verification

27. On June 16, 2006, Canada applied to the Saskatchewan Court of Queen's Bench for an order permitting verification to proceed in a manner that would safeguard MLG's client's solicitor-client privilege and confidentiality. In support of that application, Canada filed the affidavit of the Honourable Frank Iacobucci, Q.C., and the affidavit of Edward Nagel, both sworn on June 15, 2006, in substantially the same words as the affidavits presently before this Court. The application was scheduled to be heard on July 4, 2006.

28. On June 29, 2006, MLG applied for an order striking out portions of the affidavits of both Mr. Iacobucci and Mr. Nagel. MLG made its application returnable July 4, 2006.

29 On July 4, 2006, Canada's application was rescheduled to be heard on July 25, 2006. MLG's application to strike out portions of the affidavits proceeded.

30. With respect to Mr. Iacobucci's affidavit, Mr. Justice Ball ordered that the last sentence of subparagraph 26(b) and all of subparagraph 26(c) be struck, and Exhibits "D", "E" and "F", referred to therein, be removed. These paragraphs have been removed from the affidavit of Mr. Iacobucci sworn August 10, 2006.

Kenneth Sparvier et al. v. Attorney General of Canada et al., 2006 SKQB 312, paras. 26-27, [TAB 5]

31. On July 26, 2006, Canada's application was heard. Canada sought the following order:

(a) Appointing the accounting firm Deloitte & Touche LLP, as agents of the Court for the purpose of conducting a review of the Merchant Law Group's dockets, computer records of Work in Progress, and any other evidence relevant to Merchant Law Group's claim for legal fees, and that Deloitte & Touche LLP be given access to such dockets, records and other relevant evidence as they may reasonably request for this purpose;

(b) That the results of the review be made available to the Court, to Merchant Law Group, and to the Federal Representative, the Honourable Frank Iacobucci; and

(c) That to the extent privilege is claimed for the dockets, records and other relevant evidence to which Deloitte & Touche LLP are to be given access, such information shall not be disclosed to the Federal Representative until the Court has reviewed it and made any redactions it considers necessary.

(d) Such other relief as may be requested and this Court may deem appropriate.

32. MLG contended, *inter alia,* that

> ...the Merchant Fee Verification Agreement is invalid and unenforceable or, if it is valid and enforceable, that it means something very different from what Canada suggests it means. He argues that in any event MLG has done everything it can do to provide verification without breaching solicitor-client privilege.
>
> ***Kenneth Sparvier et al. v. Attorney General of Canada et al., supra, para. 20, [TAB 3]***

33. As indicated earlier, MLG has not done everything it can to provide verification in that it has never sought its clients' informed consent to disclose

information for the purpose of complying with the Merchant Fees Verification Agreement.

34. Canada's application was dismissed in written reasons issued by Mr. Justice Ball on August 1, 2006. Essentially, Mr. Justice Ball held that it would be premature to order what amounted to specific performance of the Merchant Fees Verification Agreement before the court decided whether or not it will approve the Settlement Agreement:

> It would not promote the goals of judicial economy or efficiency for the court to order what amounts to specific performance of the Merchant Fee Verification Agreement before it has first heard the application for certification, decided whether it will approve the Settlement Agreement, and determined whether the Merchant Fee Verification Agreement has been incorporated into the Settlement Agreement. Similarly, it would not promote those goals for the court to make the orders requested by Canada before it has determined the obligations of each party under the Merchant Fee Verification Agreement and whether or not those obligations have been satisfied.
>
> ***Kenneth Sparvier et al. v. Attorney General of Canada, et al, supra, para. 38, [TAB 3]***

35. With respect to MLG's position, Mr. Justice Ball also stated that

> It is reasonable to assume that MLG is motivated to obtain payment of its legal fees and disbursements within the parameter set out in both the Settlement Agreement and the Merchant Fees Verification Agreement. If accurate, reliable and verifiable information can be assembled and provided by MLG to the Federal Representative without breaching solicitor-client privilege, it will be in MLG's interest to find a way to assemble and provide it. If it becomes necessary to seek informed client consent to waive solicitor-client privilege, MLG will wish to ensure that its clients are properly notified and informed. The reality is that if MLG does not satisfy the Federal Representative that its claim for fees and disbursements is reasonable and supportable, its fees and disbursements will not be paid without recourse to the court. In any event, MLG will have to support its claim for fees and disbursements.
>
> ***Kenneth Sparvier et al. v. Attorney General of Canada et al., supra, para. 22, [TAB 3]***

36. The Settlement Agreement does not become effective, and no amount for legal fees is payable, unless and until the Settlement Agreement is implemented. The conditions for implementation of the Settlement Agreement are as follows.

37. If the Courts certify the action and approve the settlement, the Settlement Agreement will become effective on the "Implementation Date". This is defined as the latest of:

> (1) the expiry of thirty (30) days following the expiry of the Opt-Out Periods; and
>
> (2) the day following the last day on which a Class Member in any jurisdiction may appeal or seek leave to appeal any of the Approval Orders; and
>
> (3) the date of a final determination of any appeal brought in relation to the Approval Orders.

38. The settlement is conditional on no more than 5000 Eligible CEP Recipients opting out of the class proceeding.

> ***"Implementation Date" in section 1.01 of the Settlement Agreement, p. 13, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]***
>
> ***"Date when Binding and Effective" in section 2.01 of the Settlement Agreement, p. 21, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]***
>
> ***"Effective in Entirety" in section 2.02 of the Settlement Agreement, p. 22, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]***
>
> ***" Opt Out Threshold" in section 4.14 of the Settlement Agreement, p. 42, Exhibit "B" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]***
>
> ***"Agreement is Conditional" in section 16.01 of the Settlement Agreement, p. 79, Exhibit "A" to the affidavit of Frank Iacobucci, sworn on August 10, 2006, [TAB 1]***

39. If these conditions are met, the terms and benefits of the settlement will be implemented and class counsel will be entitled to legal fees in accordance with

and subject to the conditions set out in the Settlement Agreement. In MLG's case, this includes the Merchant Fees Verification Agreement.

40. Canada has not waived compliance with the Merchant Fees Verification Agreement. On August 3, 2006, the Federal Representative sent a letter to MLG advising that he was not satisfied that MLG's claim to legal fees was reasonable as required by the Merchant Fees Verification Agreement. The letter states, in part:

> I am writing to advise that the Merchant Law Group has not satisfied me, as federal representative, that the fees it seeks are reasonable, as is required by the fee verification agreement entered into between us. As a result, I have recommended that Canada not support any application brought by the Merchant Law Group for fee approval. That recommendation has been accepted.
>
> ***Exhibit "A" to the affidavit of Ruth Ann Flear, sworn on August 11, 2006, [TAB 2]***

41. It is with this background and in the context of the parties' consent motion for certification and settlement approval that Canada seeks approval of the agreement respecting the legal fees of MLG, in particular of the process for determining and verifying MLG"S fees as set out in the Merchant Fees Verification Agreement.

IV. ISSUES AND LAW

42. Canada respectfully submits that the issue on this motion is:

(1) Whether the Merchant Fees Verification Agreement and the other provisions respecting MLG's legal fees should be approved by the Court?

A. THE TEST: WHETHER THE PROCESS FOR DETERMINING LEGAL FEES IS REASONABLE

43. The terms of the agreement respecting the legal fees of MLG - which provides for a verification process to determine reasonable legal fees as opposed to providing a set amount of legal fees for MLG – means that the Courts are being asked to approve a verification process which will, it is submitted, determine a fair and reasonable amount of legal fees for MLG.

44. Once verification occurs and a reasonable amount for MLG's legal fees is determined, it will be paid out of a separate fund. As a result, its legal fees do not directly affect the interests of Class Members.

45. The test for approval of legal fees in such a case is, simply, whether the fees sought are reasonable or, in the circumstances of this case, whether the agreed process for determining reasonable legal fees is reasonable.

> ***Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 (Gen Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 372, [TAB 6]***
>
> ***Bonanno. v. Maytag Corp., [2005] O.J. No. 3810 (S.C.J.) at para. 20, [TAB 7]***

46. To determine whether the fees sought are reasonable, the following factors are relevant:

(1) the time expended by the solicitor;

(2) the legal complexity of the matters to be dealt with;

(3) the degree of responsibility assumed by the solicitor;

(4) the monetary value of the matters in issue;

(5) the importance of the matter to the client;

(6) the degree of skill and competence demonstrated by the solicitor; and,

(7) the results achieved.

McArthur v. Canada Post Corp., [2004] O.J. No. 1406 (S.C.J.) at para. 11, [TAB 8]

Gariepy v. Shell Oil Co., [2003] O.J. No. 2490 (S.C.J.), at para. 13, [TAB 9]

47. In addition to the above factors, three tests are applied to assess whether the fees sought are reasonable:

(1) Whether the fees are a reasonable percentage of the gross recovery.

(2) Whether any multiplier falls within an acceptable range of one and three to four.

(3) Whether the fees sought are a sufficient economic incentive for lawyers to take on such cases.

Gariepy v. Shell Oil Co., supra, at para. 21, citing Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417 (C.A.), [TAB 9]

48. The verification process contemplated by the Merchant Fees Verification Agreement would address most, if not all, of the above factors and tests.

49. At present, MLG has not put any information, or sufficient information, before the Courts concerning its fees and disbursements. The Donald Outerbridge affidavit does not provide accurate, reliable and verifiable information about MLG's fees and disbursements to enable any assessment of MLG's claim to legal fees.

50. In any event, Canada is not able to support any claim for legal fees or disbursements by MLG until the verification process has taken place.

51. Given all of the foregoing, Canada respectfully submits that the verification process set out in the Merchant Fees Verification Agreement will result in a fair and reasonable legal fee for MLG.

V. ORDER REQUESTED

52. Canada respectfully asks this Honourable Court to approve the agreement respecting Merchant Law Group's legal fees comprised, in part, by the Merchant Fees Verification Agreement and to make any other order necessary to permit verification to proceed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14TH DAY OF AUGUST, 2006.

Attorney General of Canada

PER: _____
Paul Vickery, Counsel and Agent for the Deputy Attorney General of Canada, John H. Sims, Q.C.

PER: _____
Catherine A. Coughlan, Counsel and Agent for the Deputy Attorney General of Canada, John H. Sims, Q.C.

SCHEDULE A - LIST OF MATERIALS AND AUTHORITIES

TAB

1 Affidavit of The Honourable Frank Iacobucci, Q.C., sworn on August 10, 2006

2. Affidavit of Ruth Ann Flear, sworn on August 11, 2006

3. *Kenneth Sparvier et al. v. Attorney General of Canada et al.*, 2006 SKQB 362

4. Affidavit of Edward Nagel, sworn on August 11, 2006

5. *Kenneth Sparvier et al. v. Attorney General of Canada et al.*, 2006 SKQB 312

6. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. ref'd [1998] S.C.C.A. No. 372

7. *Bonanno v. Maytag Corp.*, [2005] O.J. No. 3810 (S.C.J.)

8. *McArthur v. Canada Post Corp.*, [2004] O.J. No. 1406 (S.C.J.)

9. *Gariepy v. Shell Oil Co.*, [2003] O.J. No. 2490 (S.C.J.)

Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CHARLES BAXTER SR., ELIJAH BAXTER, LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, JAMES FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, PETER GEORGE TAATI AIRO, MICHELLINE AMMAQ, DONALD BELCOURT, JOHN BOSUM, RHONDA BUFFALO, FREDDIE JOHNNY EKOMIAK, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, JIM CHEWANISH, EARL KENNETH COTE, MALCOLM DAWSON, ANN DENE, KEITH DIETER, VINCENT BRADLEY FONTAINE, MARIE GAGNON, PEGGY GOOD, CLIFFORD HOUSE, FRED KELLY, ROSEMARIE KUPTANA, JIMMIE KUMARLUK, ELIZABETH KUSIAK, THERESA LAROCQUE , JAME McCALLUM, CORNELIUS McCOMBER, STANLEY THOMAS NEPETAYPO, CAROLYN TAKATAK NIVIAXIE, FLORA NORTHWEST, ELIASIE NOWKAWALK, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, SIMON SCIPIO, ELIZABETH SCIPIO-KOOKASH, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, ALVIN GERALD STRAIGHTNOSE, EDWARD TAPIATIC, BLANDINA TULUGARJUK, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE BAPTIST CHURCH IN CANADA, 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, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, IMPACT NORTH MINISTRIES, INSTITUT DES SOEURS DU BON CONSEIL, JESUIT FATHERS OF UPPER CANADA, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (also known as LES REVERENDS PERES OBLATS DE L'IMMACULEE CONCEPTION DE MARIE), LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (PROVINCE DU CANADA-EST), LES PERES MONTFORTAINS (also known as THE COMPANY OF MARY), LES REVERENDS PERES OBLATS DE MARIE IMMACULEE DES TERRITOIRES DU NORD OUEST, 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), LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE NICOLET AND THE SISTERS OF ASSUMPTION, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA, LES SOEURS DE NOTRE DAME AUXILIATRICE, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE, LES SOEURS DE ST. FRANCOIS D'ASSISE, MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEARTS AND MARY IMMACULATE or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE), SISTERS OF THE HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDERS OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE), SISTERS OF THE PRESENTATION OF MARY (SOEURS DE LA PRESENTATION DE MARIE), ST. PETER'S PROVINCE, THE BENEDICTINE SISTERS, THE BOARD OF THE HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DAUGHTERS OF THE HEART OF MARY (also known as LA SOCIETE DES FILLES DE COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY), THE DIOCESE OF MOOSONEE,, THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE GREY NUNS OF MANITOBA INC. (also known as LES SOEURS GRISES DU MANITOBA INC.), THE GREY SISTERS NICOLET, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY OBLATES OF MARY IMMACULATE-GRANDIN PROVINCE, THE MISSIONARY OBLATES OF MARY IMMACULATE-PROVINCE OF ST. JOSEPH, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA , THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA), THE OBLATS OF MARY IMMACULATE, THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, 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 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 OF PROVIDENCE OF WESTERN CANADA, THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS), THE SISTERS OF SAINT ANNE, THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE, THE SISTERS OF THE CHARITY OF ST. VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX), THE SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE SYNOD OF THE DIOCESE OF BRITISH COLOMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF WESTMINISTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF FRANK IACOBUCCI
(sworn August 10, 2006)

I, Frank Iacobucci, Q.C., of the City of Toronto, MAKE OATH AND SAY:

1. Since May 30, 2005, I have served as the Federal Representative leading negotiations with interested parties toward the resolution of the legacy of Indian Residential Schools. These negotiations, which resulted in a Settlement Agreement as described below, included long and complex discussions respecting legal fees. Indeed, legal fees were a central element of the negotiations and there would have been no Settlement Agreement without an agreement on legal fees. I therefore have knowledge of the matters to which I depose herein.

2. The discussions of legal fees with Tony Merchant, Q.C., representing the Merchant Law Group ("MLG"), were particularly long and complex. As described in detail at paragraph 26 of this affidavit, I had and continue to have a number of very serious concerns about the information put forward by MLG to justify its position on legal fees. These concerns include:

(a) uncertainty about the number of former residential schools students who had retained MLG;

(b) lack of evidence or rationale to support the MLG's claim that it had Work-in-Progress of approximately $80 million on its residential school files; and

(c) an apparent discrepancy between the amount of class action work MLG represented it had carried out and the amount of class action work it had actually done.

3. As a result of these concerns, I required and MLG agreed that it would comply with the following four-part verification process as a condition of receiving payment for legal fees.

(a) First, MLG's dockets, computers records of Work-in-Progress and any other evidence relevant to the MLG's claim for legal fees will be made available for review and verification by a firm to be chosen by me.

(b) Second, I will review the material from the verification process and consult with MLG to satisfy myself that the amount of legal fees to be paid to MLG is reasonable and equitable taking into consideration the amounts and basis on which fees are being paid to other lawyers in respect of this settlement, including the payment of a 3 to 3.5 multiplier in respect of the time on class action files and the fact that MLG has incurred time on a combination of class action files and individual files.

(c) Third, if I am not satisfied that the $40 million is a reasonable and equitable amount in light of this test, MLG and I will make reasonable efforts to agree on another amount.

(d) Fourth, if we cannot reach agreement, the amount of the fees to be paid to MLG shall be determined by Mr. Justice Ball or, if he is not available, another Justice of the Court of Queen's Bench in Saskatchewan.

4. MLG has not complied with the verification process, taking the position that it cannot do so without breaching solicitor-client privilege.

5. Without this verification, there is no way to determine whether $40 million in legal fees is a reasonable and equitable amount to pay to MLG. I have therefore instructed counsel to bring this motion to request this Honourable Court's assistance to require MLG to comply with its verification requirements in a manner that provides appropriate protection to solicitor-client privilege.

Indian Residential Schools Settlement Agreement

6. On November 20, 2005, after five months of intensive negotiations, the parties executed an Agreement in Principle to form the basis of a comprehensive settlement package. The Agreement in Principle was approved by Cabinet on November 22, 2005. A copy of the Agreement in Principle is attached to this affidavit as Exhibit "A".

7. For the next five months, the parties continued negotiations to finalize the Agreement in Principle. The parties have now agreed on a comprehensive Settlement Agreement, which was approved by Cabinet on May 10, 2006. A copy of the Settlement Agreement is attached as Exhibit "B".

8. The Settlement Agreement comprises five main elements:

(a) a Common Experience Payment to be paid to each former residential school student who was living on May 30, 2005;

(b) an Independent Assessment Process under which a former residential school student can seek additional compensation for sexual or serious physical abuse;

(c) a Truth and Reconciliation Process, including the establishment of a Truth and Reconciliation Commission;

(d) funding for commemorative activities; and

(e) funding to the Aboriginal Healing Foundation for healing programs over a five-year period.

9. In addition to these five elements, the settlement of legal fees was a crucial component of the Settlement Agreement.

10. The parties are now engaged in the preparatory work to seek certification and approval of the Settlement Agreement from courts in nine provinces and territories at hearings commencing August 29, 2006 and ending on October 17, 2006.

Negotiations Respecting Legal Fees

11. There was extensive discussion during the course of these negotiations about the legal fees to be paid to plaintiffs' counsel. Obtaining agreement on legal fees was complicated by three main considerations:

(a) the existence of thousands of retainer agreements under which former residential school students had agreed to pay to their lawyers contingency fees which I understood ranged from 20 per cent to 45 per cent or more of any judgment or settlement;

(b) the strongly-expressed views of the Assembly of First Nations and Inuit representatives that the full amount of the Common Experience Payment must be paid to former residential school students without any reduction for contingency fees; and

(c) the claim by class action counsel on the basis of the existing jurisprudence that they should be paid significant multipliers of their normal fees on the basis of the risk they had incurred, and other factors, in pursuing these cases.

12. In the case of MLG, the discussions respecting legal fees were further complicated by the "hybrid" nature of MLG's representation of its clients. MLG claimed to have retainer agreements with thousands of former residential schools students -- far more than claimed by any other individual law firm -- but also claimed that it had incurred substantial class action time that should be subject to a multiplier rate.

Agreements Respecting Legal Fees

13. The agreements respecting legal fees are contained in Article Thirteen of the Settlement Agreement. These provisions are in most respects identical to the provisions respecting legal fees contained in Article XII of the Agreement in Principle.

The Payment of Legal Fees to Individual Lawyers

14. Sections 13.05 and 13.06 of the Settlement Agreement establish the fundamental principle for the payment of legal fees under the Settlement Agreement, namely, that each lawyer who had a retainer agreement or a substantial solicitor-client relationship (a "Retainer Agreement") with a former student as of May 30, 2005 will be paid for outstanding Work-in-Progress up to a cap of $4,000, so long as he or she does not charge any fees in respect of the Common Experience Payment. The requirement that a Retainer Agreement exist as of May 30, 2005 is intended to avoid providing a windfall to lawyers who "signed up" clients once my appointment and the existence of the settlement discussions was known.

15. Section 13.07 requires that, in order to receive this payment, each lawyer must provide a statutory declaration that attests to the number of Retainer Agreements he or she had with former students as of May 30, 2005 and the amount of outstanding Work-in-Progress in respect of these Retainer Agreements. Article 13.07 also allows the government to engage in such further verification processes with individual lawyers as circumstances require with the consent of the lawyers involved, such consent not to be unreasonably withheld.

16. Sections 13.02 and 13.03 also provide for the payment to lawyers of fees at their normal hourly rate for the negotiations leading to the Agreement in Principle and the finalization of the Settlement Agreement, commencing in July 2005 and terminating as of the date of execution of the Settlement Agreement.

Payment of Legal Fees to the National Consortium member firms and the Merchant Law Group

17. In addition to providing for the payment of legal fees to individual lawyers, the Settlement Agreement provides for the payment of legal fees in respect of the work of the 19

member law firms of the National Consortium, and the Merchant Law Group. In recognition of the substantial number of former students represented by each of these groups and the class action work they have done, each of these two groups is to be paid a lump sum of $40 million, subject to the verification processes described below. The lump sum is paid in lieu of the payments to individual lawyers of Work-in-Progress up to $4,000 and negotiation fees for the July 2005 to November 20, 2005 period.

(a) National Consortium Legal Fees

18. The National Consortium is a consortium of 19 law firms that is the successor to the 24-member National Association of Indian Residential School Plaintiffs' Counsel, formed in 1998. The Consortium includes: Thomson Rogers, lead counsel in the *Baxter* class action; Cohen Highley and Koskie Minsky, counsel in the *Cloud* class proceeding, certified as a class action in Ontario; Field LLP, lead counsel in the Alberta Test Case Litigation; David Paterson, counsel in the *Blackwater* proceedings in British Columbia; and Arnold, Pizzo and McKiggan, counsel for the Shubenacadie School representative action in New Brunswick. I understand that the National Consortium was established to coordinate the efforts of counsel involved in these and other actions.

19. Section 13.08(1) of the Settlement Agreement provides that the National Consortium will be paid $40 million in legal fees and that any lawyer who is a partner of, employed by or otherwise affiliated with a National Consortium member law firm is not entitled to the payments described in paragraph 14 above or the payment of negotiation fees for the July 2005 to November 20, 2005 period.

20. The National Consortium has prepared a draft affidavit describing the work done collectively by the National Consortium and each of its members, the proposed distributions of the $40 million payment to each of its members, and the rationales for the amounts of these payments. My colleagues and I are currently engaged in reviewing and commenting upon this affidavit.

(b) MLG Legal Fees

21. MLG claims to represent thousands of individual former residential school students. MLG has brought 10 class actions in jurisdictions across Canada on behalf of former residential school students. However, of these class actions, one was brought in 2002 and the rest were commenced only at the end of April 2005 onward. None of these actions has progressed beyond the filing of a statement of claim and some minor procedural activities.

22. The MLG class actions are:

a) ***Pauchay et al* v. *The Attorney General of Canada***
(Saskatchewan)
Date Filed: January 3, 2002

b) ***Sparvier et al* v. *Attorney General of Canada***
(Saskatchewan)
Date Filed: April 29, 2005

c) ***House et al* v. *Attorney General of Canada***
(Québec)
Date Filed: May 13, 2005

d) ***Sparvier et al* v. *Attorney General of Canada***
(Federal Court – Saskatchewan – Proposed Class Action)
Date Filed: May 13, 2005

e) ***Sparvier et al v. Attorney General of Canada***
(Ontario)
Date Filed: May 17, 2005

f) ***Northwest et al v. Attorney General of Canada***
(Alberta)
Date Filed: June 21, 2005

g) ***Semple et al* v. *Attorney General of Canada***
(Manitoba)
Date Filed: August 2, 2005

h) ***Quatell et al* v. *Attorney General of Canada***
(British Columbia)
Date Filed: August 2, 2005

i) ***Laliberte*** **v.** ***The Attorney General of Canada***
(Saskatchewan – Proposed Class Action)
Date Filed: September 23, 2005

j) ***Aubichon et al*** **v.** ***Attorney General of Canada***
(Saskatchewan – Proposed Class Action)
Date Filed: December 9, 2005

23. Section 13.08(2) of the Settlement Agreement establishes a distinct set of fees provisions for MLG, based on the legal fees provisions in the Agreement in Principle and in the Agreement between Canada and the Merchant Law Group respecting verification of legal fees entered into on November 20, 2005 (the "Merchant Fees Verification Agreement"), attached to this affidavit as Exhibit "C".

24. In light of the large number of former students MLG purports to represent and the ten class actions with respect to which MLG alleges it has expended considerable effort, the amount of fees to be paid to MLG is set at $40 million.

25. However, the payment of these fees is subject to the four-part verification process described at paragraph 3 of this affidavit.

26. I required this verification process as part of our fees agreement with MLG because I had very serious concerns about the information put forward by MLG to justify its position on fees. These concerns included the following.

(a) **Actual number of retainers.** MLG represented during the legal fees negotiations that it had entered into Retainer Agreements with 7,000 to 8,000 former students, but was unable to offer any evidence as to how many of these Retainer Agreements existed as of May 30, 2005.

(b) The number of retainers that MLG represented existed changed frequently during the negotiations and appeared not to make allowances for cases that had settled or determined by trial, former clients who had died, and those who were represented by other law firms.

(c) **Actual amount of Work-in-Progress.** MLG represented that it had Work-in-Progress outstanding on these files of approximately $80 million, but was

unable to offer any evidence to support this amount or to explain how and why these costs were incurred. I have recently been shown a copy of an article that appeared in the *Leader Post* on August 9, 2004 in which Mr. Merchant was reported to have stated that MLG carried approximately $12 million in unpaid work. A copy of this article is attached to this affidavit as Exhibit "D".

(d) **Actual amount of class action work.** MLG represented that it should be paid substantial fees in respect of the class actions it had brought but, unlike the National Consortium, MLG appeared to have expended very limited resources on these class actions.

27. Mr. Merchant signed the Merchant Fees Verification Agreement on November 20, 2006, which was the last day of negotiations before the Agreement in Principle was executed. Before Mr. Merchant signed the Merchant Fees Verification Agreement, my colleague John Terry and I explained to him and his colleagues the terms of the Merchant Fees Verification Agreement and the fact that the 19 law firms who were members of the National Consortium were not being asked to sign a similar agreement.

28. Neither Mr. Merchant nor any other representatives of MLG ever raised any issues respecting solicitor-client privilege when the Merchant Fees Verification Agreement was signed.

Attempts to Carry Out the Verification Process

29. In December 2005, my colleague John Terry contacted MLG to make arrangements for the verification process described in paragraph 3 of this affidavit to be carried out. MLG indicated that it was arranging for residential school files to be moved from its various offices to Regina so that verification might begin in mid-January. On January 11, 2006, MLG advised us that it had brought its files to Regina and would be prepared to begin the verification process on January 16, 2006. MLG expressed concerns that the verification process should be carried out without violating solicitor-client privilege.

30. Pursuant to the Merchant Fees Verification Agreement, I chose Deloitte & Touche LLP ("Deloitte") to carry out the verification. From January 17, 2006 to January 24, 2006, representatives of Deloitte attended at MLG's offices in Regina for the purpose of carrying out the verification process. Deloitte's attempts to carry out the verification process are described in the affidavit of Edward Nagel dated June 15, 2006, filed in this motion.

31. As Mr. Nagel explains, on January 24, 2006, the verification process was terminated by the MLG, citing concerns about solicitor-client privilege in respect of its files. As a result, the verification process has not been carried out.

32. The verification process agreed to by MLG is essential to provide me with sufficient information to determine the reasonableness of the fees to be paid to MLG. The Merchant Fees Verification Agreement requires me to satisfy myself that the amount of fees to be paid to MLG is reasonable and equitable "taking into consideration the amounts and basis on which fees are being paid to other lawyers in respect of this settlement". The basis on which fees are being paid to other lawyers in respect of this settlement is to compensate them for outstanding Work-in-Progress, capped at $4,000, in respect of each Retainer Agreement existing as of May 30, 2005 and to provide an appropriate multiplier for class action work. To apply these principles to the MLG fees, Canada needs to have reliable information respecting, among other things:

(a) the number of Retainer Agreements that MLG had with its clients as of May 30, 2005;

(b) the amount of MLG's Work-in-Progress in respect of each Retainer Agreement, bearing in mind the $4,000 cap for each Retainer Agreement; and

(c) the amount and nature of the class action work that MLG says it carried out.

33. I therefore request this Honourable Court's assistance to require MLG to comply with its verification requirements in a manner that provides appropriate protection to solicitor-client privilege through the supervision of Deloitte by this Honourable Court.

34. I make this affidavit is support of an application on behalf of the Defendant, the Attorney General of Canada, for further and better access to the records, documents, and client files of MLG.

SWORN BEFORE ME at the City of Toronto, on August 15, 2006.

A Notary Public in and for the Province of Ontario

Frank Iacobucci

THIS IS EXHIBIT .....A..... REFERRED TO IN THE AFFIDAVIT OF FRANK IACOBUCCI

SWORN BEFORE ME, THIS .....10th.....

DAY OF .....August..... 2006

.....

Notary Public in and for the Province of Ontario

NOTARY PUBLIC

May 8, 2006

CANADA, as represented by the Honourable Frank Iacobucci

-and-

PLAINTIFFS, as represented by the National Consortium
and the Merchant Law Group

-and-

Independent Counsel

-and-

THE ASSEMBLY OF FIRST NATIONS and INUIT REPRESENTATIVES

-and-

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA,
THE PRESBYTERIAN CHURCH OF CANADA,
THE UNITED CHURCH OF CANADA AND
ROMAN CATHOLIC ENTITIES

INDIAN RESIDENTIAL SCHOOLS SETTLEMENT AGREEMENT

May 8, 2006

INDIAN RESIDENTIAL SCHOOLS SETTLEMENT AGREEMENT

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May 8, 2006

Indian Residential Schools
Settlement Agreement

WHEREAS:

A. Canada and certain religious organizations operated Indian Residential Schools for the education of aboriginal children and certain harms and abuses were committed against those children;

B. The Parties desire a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools;

C. The Parties further desire the promotion of healing, education, truth and reconciliation and commemoration;

D. The Parties entered into an Agreement in Principle on November 20, 2005 for the resolution of the legacy of Indian Residential Schools:

(i) to settle the Class Actions and the Cloud Class Action, in accordance with and as provided in this Agreement;

(ii) to provide for payment by Canada of the Designated Amount to the Trustee for the Common Experience Payment;

(iii) to provide for the Independent Assessment Process;

(iv) to establish a Truth and Reconciliation Commission;

(v) to provide for an endowment to the Aboriginal Healing Foundation to fund healing programmes addressing the legacy

of harms suffered at Indian Residential Schools including the intergenerational effects; and

(vi) to provide funding for commemoration of the legacy of Indian Residential Schools;

E. The Parties, subject to the Approval Orders, have agreed to amend and merge all of the existing proposed class action statements of claim to assert a common series of Class Actions for the purposes of settlement;

F. The Parties, subject to the Approval Orders and the expiration of the Opt Out Periods without the Opt Out Threshold being met, have agreed to settle the Class Actions upon the terms contained in this Agreement;

G. The Parties, subject to the Approval Orders, agree to settle all pending individual actions relating to Indian Residential Schools upon the terms contained in this Agreement, save and except those actions brought by individuals who opt out of the Class Actions in the manner set out in this Agreement, or who will be deemed to have opted out pursuant to Article 1008 of *The Code of Civil Procedure of Quebec*;

H. This Agreement is not to be construed as an admission of liability by any of the defendants named in the Class Actions or the Cloud Class Action.

THEREFORE, in consideration of the mutual agreements, covenants and undertakings set out herein, the Parties agree that all actions, causes of actions, liabilities, claims and demands whatsoever of every nature or kind for damages, contribution, indemnity, costs, expenses and interest which any

Class Member or Cloud Class Member ever had, now has or may hereafter have arising in relation to an Indian Residential School or the operation of Indian Residential Schools, whether such claims were made or could have been made in any proceeding including the Class Actions, will be finally settled based on the terms and conditions set out in this Agreement upon the Implementation Date, and the Releasees will have no further liability except as set out in this Agreement.

ARTICLE ONE
INTERPRETATION

1.01 Definitions

In this Agreement, the following terms will have the following meanings:

"Aboriginal Healing Foundation" means the non-profit corporation established under Part II of the *Canada Corporations Act*, chapter C-32 of the Revised Statutes of Canada, 1970 to address the healing needs of Aboriginal People affected by the Legacy of Indian Residential Schools, including intergenerational effects.

"Agreement in Principle" means the Agreement between Canada, as represented by the Honourable Frank Iacobucci; Plaintiffs, as represented by the National Consortium, Merchant Law Group, Inuvialuit Regional Corporation, Makivik Corporation, Nunavut Tunngavik Inc., Independent Counsel, and the Assembly of First Nations; the General Synod of the Anglican Church of Canada, the Presbyterian Church in Canada, the United

Church of Canada and Roman Catholic Entities, signed November 20, 2005;

"Appropriate Court" means the court of the province or territory where the Class Member resided on the Approval Date save and except:

a) that residents of the provinces of Newfoundland and Labrador, Nova Scotia, New Brunswick and Prince Edward Island will be deemed to be subject to the Approval Order of the Superior Court of Justice for Ontario;

b) International Residents will be deemed to be subject to the Approval Order of the Superior Court of Justice for Ontario;

"Approval Date" means the date the last Court issues its Approval Order;

"Approval Orders" means the judgments or orders of the Courts certifying the Class Actions and approving this Agreement as fair, reasonable and in the best interests of the Class Members and Cloud Class Members for the purposes of settlement of the Class Actions pursuant to the applicable class proceedings legislation, the common law or Quebec civil law;

~~**"Business Day"** means~~ a day other than a Saturday or a Sunday or a day observed as a holiday under the laws of the Province or Territory in which the person who needs to take action pursuant to this Agreement is situated or a holiday under the federal laws of Canada applicable in the said Province or Territory;

"Canada" or "Government" means the Government of Canada;

"CEP" and **"Common Experience Payment"** mean a lump sum payment made to an Eligible CEP Recipient in the manner set out in Article Five (5) of this Agreement;

"CEP Application" means an application for a Common Experience Payment completed substantially in the form attached hereto as Schedule "A" of this Agreement and signed by an Eligible CEP Recipient or his or her Personal Representative along with the documentation required by the CEP Application.

"CEP Application Deadline" means the fourth anniversary of the Implementation Date;

"Church" or **"Church Organization"** means collectively, The General Synod of the Anglican Church of Canada, The Missionary Society of the Anglican Church of Canada, The Dioceses of the Anglican Church of Canada listed in Schedule "B", 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 **and the Catholic Entities listed in Schedule "C"**.

"Class Actions" means the omnibus Indian Residential Schools Class Actions Statements of Claim referred to in Article Four (4) of this Agreement;

"Class Members" means all individuals including Persons Under Disability who are members of any class defined in the Class Actions and who have not opted out or are not deemed to have opted out of the Class Actions on or before the expiry of the Opt Out Period;

"Cloud Class Action" means the *Marlene C. Cloud et al. v. Attorney General of Canada et al.* (C40771) action certified by the Ontario Court of Appeal by Order entered at Toronto on February 16, 2005;

"Cloud Class Members" means all individuals who are members of the classes certified in the Cloud Class Action;

"Cloud Student Class Member" means all individuals who are members of the student class certified in the Cloud Class Action;

"Commission" means the Truth and Reconciliation Commission established pursuant to Article Seven (7) of this Agreement;

"Continuing Claims" means those claims set out in Section I of Schedule "D" of this Agreement.

"Courts" means collectively the Quebec Superior Court, the Superior Court

of Justice for Ontario, the Manitoba Court of Queen's Bench, the Saskatchewan Court of Queen's Bench, the Alberta Court of Queen's Bench, the Supreme Court of British Columbia, the Nunavut Court of Justice, the Supreme Court of the Yukon and the Supreme Court of the Northwest Territories;

"Designated Amount" means one billion nine hundred million dollars ($1,900,000,000.00) less any amounts paid by way of advance payments, if any, as at the Implementation Date.;

"Designated Amount Fund" means the trust fund established to hold the Designated Amount to be allocated in the manner set out in Article Five of this Agreement;

"DR Model" means the dispute resolution model offered by Canada since November 2003;

"Educational Programs or Services" shall include, but not be limited to, those provided by universities, colleges, trade or training schools, or which relate to literacy or trades, as well as programs or services which relate to the preservation, reclamation, development or understanding of native history, cultures, or languages.

"Eligible CEP Recipient" means any former Indian Residential School student who resided at any Indian Residential School prior to December 31, 1997 and who was alive on May 30, 2005 and who does not opt out, or is not deemed to have opted out of the Class Actions during the Opt-Out

Periods or is a Cloud Student Class Member;

"Eligible IAP Claimants" means all Eligible CEP Recipients, all Non-resident Claimants and includes references to the term "Claimants" in the IAP.

"Federal Representative" means the Honourable Frank Iacobucci;

"IAP Application Deadline" means the fifth anniversary of the Implementation Date:

"IAP Working Group" means counsel set out in Schedule "U" of this Agreement.

"Implementation Date" means the latest of:

(1) the expiry of thirty (30) days following the expiry of the Opt-Out Periods; and

(2) the day following the last day on which a Class Member in any jurisdiction may appeal or seek leave to appeal any of the Approval Orders; and

(3) the date of a final determination of any appeal brought in relation to the Approval Orders;

"Independent Counsel" means Plaintiffs' Legal Counsel who have signed this Agreement, excluding Legal Counsel who have signed this Agreement in their capacity as counsel for the Assembly of First Nations or for the Inuit Representatives or Counsel who are members of the Merchant Law Group or

members of any of the firms who are members of the National Consortium;

"Independent Assessment Process" and **"IAP"** mean the process for the determination of Continuing Claims, attached as Schedule "D";

"Indian Residential Schools" means the following:

(1) Institutions listed on List "A" to OIRSRC's Dispute Resolution Process attached as Schedule "E";

(2) Institutions listed in Schedule "F" ("Additional Residential Schools") which may be expanded from time to time in accordance with Article 12.01 of this Agreement; and,

(3) Any institution which is determined to meet the criteria set out in Section 12.01(2) and (3) of this Agreement:

"International Residents" means Class Members who are not resident in a Canadian Province or Territory on the Approval Date.

"Inuit Representatives" includes Inuvialuit Regional Corporation ("IRC"), Nunavut Tunngavik Inc. ("NTI") and Makivik Corporation; and may include other Inuit representative organizations or corporations.

"NAC" means the National Administration Committee as set out in Article Four (4) of this Agreement;

"**NCC**" means the National Certification Committee as set out in Article Four (4) of this Agreement;

"**Non-resident Claimants**" means all individuals who did not reside at an Indian Residential School who, while under the age of 21, were permitted by an adult employee of an Indian Residential School to be on the premises of an Indian Residential School to take part in authorized school activities prior to December 31, 1997. For greater certainty, Non-resident Claimants are not Class Members or Cloud Class Members;

"**OIRSRC**" means the Office of Indian Residential Schools Resolution Canada;

"**Opt Out Periods**" means the period commencing on the Approval Date as set out in the Approval Orders;

"**Opt Out Threshold**" means the Opt Out Threshold set out in Section 4.14 of this Agreement;

"**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 persons who attended an Indian Residential School;

"Oversight Committee" means the Oversight Committee set out in the Independent Assessment Process attached as Schedule "D";

"Parties" means collectively and individually the signatories to this Agreement;

"Personal Credits" means credits that have no cash value, are transferable only to a family member who is a member of the family class as defined in the Class Actions or the Cloud Class Action, may be combined with the Personal Credits of other individuals and are only redeemable for either personal or group education services provided by education entities or groups jointly approved by Canada and the Assembly of First Nations pursuant to terms and conditions to be developed by Canada and the Assembly of First Nations. Similar sets of terms and conditions will be developed by Canada and Inuit Representatives for Eligible CEP Recipients having received the CEP who are Inuit. In carrying out these discussions with the Assembly of First Nations and Inuit Representatives, Canada shall obtain input from counsel for the groups set out in Section 4.09(4)(d), (e), (f) and (g);

"Personal Representative" includes, if a person is deceased, an executor, administrator, estate trustee, trustee or liquidator of the deceased or, if the person is mentally incompetent, the tutor, committee, Guardian, curator of the person or the Public Trustee or their equivalent or, if the person is a minor, the person or party that has been appointed to administer his or her affairs or the tutor where applicable;

"Person Under Disability" means

(1) a minor as defined by that person's Province or Territory of residence; or

(2) a person who is unable to manage or make reasonable judgments or decisions in respect of their affairs by reason of mental incapacity and for whom a Personal Representative has been appointed;

"Pilot Project" means the dispute resolution projects set out in Schedule "T" of this Agreement;

"RACs" means the Regional Administration Committees as set out in Article Four of this Agreement;

"Releasees" means, jointly and severally, individually and collectively, the defendants in the Class Actions and the defendants in the Cloud Class Action and each of their respective past and present parents, subsidiaries and related or affiliated entities and their respective employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, subrogees, representatives, executors, administrators, predecessors, successors, heirs, transferees and assigns the definition and also the entities listed in Schedules "B", "C", "G" and "H" of this Agreement.

"Trustee" means Her Majesty in right of Canada as represented by the incumbent Ministers from time to time responsible for Indian Residential

Schools Resolution and Service Canada. The initial Representative Ministers will be the Minister of Canadian Heritage and Status of Women and the Minister of Human Resources Skills Development, respectively.

1.02 Headings

The division of this Agreement into Articles, Sections and Schedules and the insertion of a table of contents and headings are for convenience of reference only and do not affect the construction or interpretation of this Agreement. The terms "herein", "hereof", "hereunder" and similar expressions refer to this Agreement and not to any particular Article, Section or other portion hereof. Unless something in the subject matter or context is inconsistent therewith, references herein to Articles, Sections and Schedules are to Articles, Sections and Schedules of this Agreement.

1.03 Extended Meanings

In this Agreement, words importing the singular number include the plural and *vice versa*, words importing any gender include all genders and words importing persons include individuals, partnerships, associations, trusts, unincorporated organizations, corporations and governmental authorities. The term "including" means "including without limiting the generality of the foregoing".

1.04 No Contra Proferentem

The Parties acknowledge that they have reviewed and participated in settling

the terms of this Agreement and they agree that any rule of construction to the effect that any ambiguity is to be resolved against the drafting parties is not applicable in interpreting this Agreement.

1.05 Statutory References

In this Agreement, unless something in the subject matter or context is inconsistent therewith or unless otherwise herein provided, a reference to any statute is to that statute as enacted on the date hereof or as the same may from time to time be amended, re-enacted or replaced and includes any regulations made thereunder.

1.06 Day For Any Action

Where the time on or by which any action required to be taken hereunder expires or falls on a day that is not a Business Day, such action may be done on the next succeeding day that is a Business Day.

1.07 When Order Final

For the purposes of this Agreement a judgment or order becomes final when the time for appealing or seeking leave to appeal the judgment or order has expired without an appeal being taken or leave to appeal being sought or, in the event that an appeal is taken or leave to appeal is sought, when such appeal or leave to appeal and such further appeals as may be taken have been disposed of and the time for further appeal, if any, has expired.

1.08 Currency

All references to currency herein are to lawful money of Canada.

1.09 Schedules

The following Schedules to this Agreement are incorporated into and form part of it by this reference as fully as if contained in the body of this Agreement:

Schedule A – CEP Application Form
Schedule B – Dioceses of the Anglican Church
Schedule C – Roman Catholic Entities
Schedule D – Independent Assessment Process
Schedule E – Residential Schools
Schedule F – Additional Residential Schools
Schedule G – Anglican Releasees
Schedule H – Catholic Releasees
Schedule I – Trust Agreement
Schedule J – Commemoration Policy Directive
Schedule K – Settlement Notice Plan
Schedule L – Process Flow Chart
Schedule M – Funding Agreement between the Aboriginal Healing Foundation and Canada
Schedule N – Mandate for Truth and Reconciliation Commission
Schedule O-1 – The Presbyterian Church Entities in Canada Agreement
Schedule O-2 – The Anglican Entities Agreement

Schedule O-3 – The Catholic Entities Church Agreement

Schedule O-4 – The United Church of Canada Agreement

Schedule P – IAP Full and Final Release

Schedule Q – Treasury Board Travel Directive

Schedule R – No Prejudice Commitment Letter

Schedule S – National Certification Committee Members

Schedule T – Pilot Projects

Schedule U – IAP Working Group Members

Schedule V – Agreement Between the Government of Canada and the Merchant Law Group Respecting the Verification of Legal Fees

1.10 No Other Obligations

It is understood that Canada will not have any obligations relating to the CEP, IAP, truth and reconciliation, commemoration, education and healing except for the obligations and liabilities as set out in this Agreement.

ARTICLE TWO
EFFECTIVE DATE OF AGREEMENT

2.01 Date when Binding and Effective

This Agreement will become effective and be binding on and after the Implementation Date on all the Parties including the Class Members and Cloud Class Members subject to Section 4.14. The Cloud Class Action Approval Order and each Approval Order will constitute approval of this Agreement in respect of all Class Members and Cloud Class Members

residing in the province or territory of the Court which made the Approval Order, or who are deemed to be subject to such Approval Order pursuant to Section 4.04 of this Agreement. No additional court approval of any payment to be made to any Class Member or Cloud Class Member will be necessary.

2.02 Effective in Entirety

None of the provisions of this Agreement will become effective unless and until the Courts approve all the provisions of this Agreement, except that the fees and disbursements of the NCC will be paid in any event.

ARTICLE THREE
FUNDING

3.01 CEP Funding

(1) Canada will provide the Designated Amount to the legal representatives of the Class Members and the Cloud Class Members in trust on the Implementation Date. The Class Members and the Cloud Class Members agree that, contemporaneous with the receipt of the Designated Amount by their legal representatives, the Class Members and Cloud Class Members irrevocably direct the Designated Amount, in its entirety, be paid to the Trustee.

(2) The Parties agree that the Designated Amount Fund will be held

and administered by the Trustee as set out in the Trust Agreement attached as Schedule "I" of this Agreement.

3.02 Healing Funding

On the Implementation Date Canada will transfer one hundred and twenty-five million dollars ($125,000,000.00) as an endowment for a five year period to the Aboriginal Healing Foundation in accordance with Article Eight (8) of this Agreement. After the Implementation Date the only obligations and liabilities of Canada with respect to healing funding are those set out in this Agreement.

3.03 Truth and Reconciliation Funding

(1) Canada will provide sixty million dollars ($60,000,000.00) in two instalments for the establishment and work of the Commission. Two million dollars ($2,000,000.00) will be available on the Approval Date to begin start-up procedures in advance of the establishment of the Commission. The remaining fifty-eight million dollars ($58,000,000.00) will be transferred within thirty (30) days of the approval of the Commission's budget by Canada. After the date of the final transfer, Canada will have no further obligations or liabilities with respect to truth and reconciliation funding except as set out in this Agreement.

(2) Canada will appoint an interim Executive Director to begin

start-up procedures for the Commission. The interim Executive Director may make reports to the NCC. The interim Executive Director will be appointed as soon as practicable after the Approval Date. That appointment will remain effective until the appointment of the Commissioners. Canada will assume responsibility for the salary of the Executive Director Position during this interim period.

3.04 Commemoration Funding

The funding for commemoration will be twenty million dollars ($20,000,000.00) for both national commemorative and community-based commemorative projects. The funding will be available in accordance with the Commemoration Policy Directive, attached as Schedule "J". For greater certainty, funding under this Section 3.04 includes funding previously authorized in the amount of ten million dollars ($10,000,000) for commemoration events. This previously authorized amount of ten million dollars ($10,000,000) will not be available until after the Implementation Date. After the Implementation Date the only obligations and liabilities of Canada with respect to commemoration funding are those set out in this Agreement.

3.05 IAP Funding

Canada will fund the IAP to the extent sufficient to ensure the full and timely implementation of the provisions set out in Article Six (6) of this Agreement.

3.06 Social Benefits

(1) Canada will make its best efforts to obtain the agreement of the provinces and territories that the receipt of any payments pursuant to this Agreement will not affect the quantity, nature or duration of any social benefits or social assistance benefits payable to a Class Member or a Cloud Class Member pursuant to any legislation of any province or territory of Canada.

(2) Canada will make its best efforts to obtain the agreement of the necessary Federal Government Departments that the receipt of any payments pursuant to this Agreement will not affect the quantity, nature or duration of any social benefits or social assistance benefits payable to a Class Member or a Cloud Class Member pursuant to any social benefit programs of the Federal Government such as old age security and Canada Pension Plan.

3.07 Family Class Claims

The Parties agree and acknowledge that the programmes described in Sections 3.02, 3.03 and 3.04 will be available for the benefit of the Cloud Class Members and all Class Members including the family class defined in the Class Actions.

ARTICLE FOUR
IMPLEMENTATION OF THIS AGREEMENT

4.01 Class Actions

The Parties agree that all existing class action statements of claim and representative actions, except the Cloud Class Action, filed against Canada in relation to Indian Residential Schools in any court in any Canadian jurisdiction except the Federal Court of Canada (the "original claims") will be merged into a uniform omnibus Statement of Claim in each jurisdiction (the "Class Actions"). The omnibus Statement of Claim will name all plaintiffs named in the original claims and will name as Defendants, Canada and the Church Organizations.

4.02 Content of Class Actions

(1) The Class Actions will assert common causes of action encompassing and incorporating all claims and causes of action asserted in the original claims.

(2) Subject to Section 4.04, the Class Actions will subsume all classes contained in the original claims with such modification as is necessary to limit the scope of the classes and subclasses certified by each of the Courts to the provincial or territorial boundaries of that Court save and except the Aboriginal Sub-class as set out and defined in the *Fontaine v. Attorney General*

of Canada, (05-CV-294716 CP) proposed class action filed in the Ontario Superior Court of Justice on August 5, 2005 which will not be asserted in the Class Actions.

4.03 Consent Order

(1) The Parties will consent to an order in each of the Courts amending and merging the original claims as set out in Section 4.01 and 4.02 of this Agreement.

(2) For greater certainty, the order consented to in the Ontario Superior Court of Justice will not amend **or** merge the Cloud Class Action.

4.04 Class Membership

Class membership in each of the Class Actions will be determined by reference to the province or territory of residence of each Class Member on the Approval Date save and except:

(a) residents of the provinces of Newfoundland and Labrador, Nova Scotia, New Brunswick and Prince Edward Island, and;

(b) International Residents,

who are be deemed to be members of the Ontario Class.

4.05 Consent Certification

(1) The Parties agree that concurrent with the applications referred to in Section 4.03, applications will be brought in each of the Courts for consent certification of each of the Class Actions for the purposes of Settlement in accordance with the terms of the Agreement.

(2) Consent certification will be sought on the express condition that each of the Courts, pursuant to the applications for consent certification under Section 4.05(1), certify on the same terms and conditions; including the terms and conditions set out in Section 4.06 save and except for the variations in class and subclass membership set out in Sections 4.02 and 4.04 of this Agreement.

4.06 Approval Orders

Approval Orders will be sought:

(a) incorporating by reference this Agreement in its entirety;

(b) ordering and declaring that such orders are binding on all Class Members, including Persons Under Disability, unless they opt out or are deemed to have opted out on or before the expiry of the Opt Out Periods;

(c) ordering and declaring that on the expiry of the Opt Out Periods all pending actions of all Class Members, other than the Class Actions, relating to Indian Residential Schools, which have been filed in any court in any Canadian jurisdiction against Canada or the Church Organizations, except for any pending actions in Quebec which have not been voluntarily discontinued by the expiry of the Opt Out Period, will be deemed to be dismissed without costs unless the individual has opted out, or is deemed to have opted out on or before the expiry of the Opt Out Periods.

(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.

(e) ordering and declaring that in the event the number of Eligible CEP Recipients opting out or deemed to have opted out under the Approval Orders exceeds five thousand (5000), this Agreement will be rendered void and the Approval Orders set aside in their entirety subject only to the right of Canada, in its

sole discretion, to waive compliance with Section 4.14 of this Agreement.

(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.

(g) ordering and declaring that the obligations assumed by the defendants under this Agreement are in full and final satisfaction of all claims arising from or in relation to an Indian Residential School or the operation of Indian Residential Schools of the Class Members and that the Approval Orders are the sole recourse on account of any and all claims referred to therein.

(h) ordering and declaring that the fees and disbursements of all counsel participating in this Agreement are to be approved by the Courts on the basis provided in Articles Four (4) and Thirteen (13) of this Agreement, except that the fees and disbursements of the NCC and the IAP Working Group will be paid in any event.

(i) ordering and declaring that notwithstanding Section 4.06(c), (d)

and (f), a Class Member who on or after the fifth anniversary of the Implementation Date had never commenced an action other than a class action in relation to an Indian Residential School or the operation of Indian Residential Schools, participated in a Pilot Project, applied to the DR Model, or applied to the IAP, may commence an action for any of the Continuing Claims within the jurisdiction of the court in which the action is commenced. For greater certainty, the rules, procedures and standards of the IAP are not applicable to such actions.

(j) ordering and declaring that where an action permitted by Section 4.06(i) is brought, the deemed release set out in Section 11.01 is amended to the extent necessary to permit the action to proceed only with respect to Continuing Claims.

(k) ordering and declaring that for an action brought under Section 4.06(i) all limitations periods will be tolled, and any defences based on laches or delay will not be asserted by the Parties with regard to a period of five years from the Implementation Date.

(l) ordering and declaring that notwithstanding Section 4.06(d) no action, except for Family Class claims as set out in the Class Actions and the Cloud Class Action, capable of being brought by a Class Member or Cloud Class Member will be released where such an action would be released only by virtue of being a member of a Family Class in the Class Actions or the Cloud Class Action.

4.07 Cloud Class Action Approval Order

There will be a separate approval order in relation to the Cloud Class Action which will be, in all respects save as to class membership and Section 17.02 of this Agreement, in the same terms and conditions as the Approval Orders referred to herein.

4.08 Notice

(1) The parties agree that the NCC will implement the Residential Schools Class Action Litigation Settlement Notice Plan prepared by Hilsoft Notifications and generally in the form attached as Schedule "K".

(2) The NCC will develop a list of counsel with active Indian Residential Schools claims and who agree to be bound by the terms of this Agreement, before the Approval date, which will be referenced in the written materials and website information of the notice program.

(3) The legal notice will include an opt out coupon which will be returnable to a Post Office Box address at Edmonton, Alberta.

(4) There will be a "1-800" number funded by Canada which will provide scripted information concerning the settlement. The information will convey a statement to the effect that although

there is no requirement to do so, Class Members may wish to consult a lawyer.

4.09 National Certification Committee

(1) The Parties agree to the establishment of a NCC with a mandate to:

a) designate counsel having carriage in respect of drafting the consent certification documents and obtaining consent certification and approval of this Agreement;

b) provide input to and consult with Trustee on the request of Trustee;

c) obtain consent certification and approval of the Approval Orders in the Courts on the express condition that the Courts all certify on the same terms and conditions.

d) exercise all necessary powers to fulfill its functions under the Independent Assessment Process.

(2) The NCC will have seven (7) members with the intention that decisions will be made by consensus.

(3) Where consensus can not be reached, a majority of five (5) of the seven (7) members is required.

(4) The composition of the NCC will be one (1) counsel from each of the following groups:

a) Canada;
b) Church Organizations;
c) Assembly of First Nations;
d) The National Consortium;
e) Merchant Law Group;
f) Inuit Representatives; and
g) Independent Counsel

(5) The NCC will be dissolved on the Implementation Date.

(6) Notwithstanding Section 4.09(4) the Church Organizations may designate a second counsel to attend and participate in meetings of the NCC. Designated second counsel will not participate in any vote conducted under Section 4.09(3).

4.10 Administration Committees

(1) In order to implement the Approval Orders the Parties agree to the establishment of administrative committees as follows:

a) one National Administration Committee ("NAC"); and

b) three Regional Administration Committees ("RACs").

(2) Notwithstanding Section 4.10(1) neither the NAC nor the RAC's will meet or conduct any business whatsoever prior to the Implementation Date, unless Canada agrees otherwise.

4.11 National Administration Committee

(1) The composition of the NAC will be one (1) representative counsel from each of the groups set out at section 4.09(4):

(2) The first NAC member from each group will be named by that group on or before the execution of this Agreement.

(3) Each NAC member may name a designate to attend meetings of the NAC and act on their behalf and the designate will have the powers, authorities and responsibilities of the NAC member while in attendance.

(4) Upon the resignation, death or expiration of the term of any NAC member or where the Court otherwise directs in accordance with 4.11(6) of this Agreement, a replacement NAC member will be named by the group represented by that member.

(5) Membership on the NAC will be for a term of two (2) years.

(6) In the event of any dispute related to the appointment or service

of an individual as a member of the NAC, the affected group or individual may apply to the court of the jurisdiction where the affected individual resides for advice and directions.

(7) The Parties agree that Canada will not be liable for any costs associated with an application contemplated in Section 4.11(6) that relates to the appointment of an individual as a member of the NAC.

(8) No NAC member may serve as a member of a RAC or as a member of the Oversight Committee during their term on the NAC.

(9) Decisions of the NAC will be made by consensus and where consensus can not be reached, a majority of five (5) of the seven (7) members is required to make any decision. In the event that a majority of five (5) members can not be reached the dispute may be referred by a simple majority of four (4) NAC members to the Appropriate Court in the jurisdiction where the dispute arose by way of reference styled as *In Re Residential Schools*.

(10) Notwithstanding Section 4.11(9), where a vote would increase the costs of the Approval Orders whether for compensation or procedural matters, the representative for Canada must be one (1) of the five (5) member majority.

(11) There will not be reference to the Courts for any dispute arising under Section 4.11(10).

(12) The mandate of the NAC is to:

(a) interpret the Approval Orders;

(b) consult with and provide input to the Trustee with respect to the Common Experience Payment;

(c) ensure national consistency with respect to implementation of the Approval Orders to the greatest extent possible;

(d) produce and implement a policy protocol document with respect to implementation of the Approval Orders;

(e) produce a standard operating procedures document with respect to implementation of the Approval Orders;

(f) act as the appellate forum from the RACs;

~~(g) review the continuation of RACs as set out in Section 4.13;~~

(h) assume the RACs mandate in the event that the RACs cease to operate pursuant to Section 4.13;

(i) hear applications from the RACs arising from a dispute

related to the appointment or service of an individual as a member of the RACs;

(j) review and determine references from the Truth and Reconciliation Commission made pursuant to Section 7.01(2) of this Agreement or may, without deciding the reference, refer it to any one of the Courts for a determination of the matter;

(k) hear appeals from an Eligible CEP Recipient as set out in Section 5.09(1) and recommend costs as set out in Section 5.09(3) of this Agreement;

(l) apply to any one of the Courts for determination with respect to a refusal to add an institution as set out in Section 12.01 of this Agreement;

(m) retain and instruct counsel as directed by Canada for the purpose of fulfilling its mandate as set out in Sections 4.11(12)(j),(l) and(q) and Section 4.11(13) of this Agreement;

(n) develop a list of counsel with active Indian Residential Schools claims who agree to be bound by the terms of this Agreement as set out in Section 4.08(5) of this Agreement;

(o) exercise all the necessary powers to fulfill its functions

under the IAP;

(p) request additional funding from Canada for the IAP as set out in Section 6.03(3) of this Agreement;

(q) apply to the Courts for orders modifying the IAP as set out in Section 6.03(3) of this Agreement.

(r) recommend to Canada the provision of one additional notice of the IAP Application Deadline to Class Members and Cloud Class Members in accordance with Section 6.04 of this Agreement.

(13) Where there is a disagreement between the Trustee and the NAC, with respect to the terms of the Approval Orders the NAC or the Trustee may refer the dispute to the Appropriate Court in the jurisdiction where the dispute arose by way of reference styled as *In Re Residential Schools*.

(14) Subject to Section 6.03(3), no material amendment to the Approval Orders can occur without the unanimous consent of the NAC ratified by the unanimous approval of the Courts.

(15) Canada's representative on the NAC will serve as Secretary of the NAC.

(16) Notwithstanding Section 4.11(1) the Church Organizations may

designate a second counsel to attend and participate in meetings of the NAC. Designated second counsel will not participate in any vote conducted under Section 4.11(9).

4.12 Regional Administration Committees

(1) One (1) RAC will operate for the benefit of both the Class Members, as defined in Section 4.04, and Cloud Class Members in each of the following three (3) regions:

a) British Columbia, Alberta, Northwest Territories and the Yukon Territory;

b) Saskatchewan and Manitoba; and

c) Ontario, Quebec and Nunavut.

(2) Each of the three (3) RACs will have three (3) members chosen from the four (4) plaintiff's representative groups set out in Sections 4.09(4)(d),(e),(f) and (g) of this Agreement.

(3) Initial members of each of the three (3) RAC's will be named by the groups set out in sections 4.09(4)(d),(e),(f) and(g) of this Agreement on or before the execution of this Agreement and Canada will be advised of the names of the initial members.

(4) Upon the resignation, death or expiration of the term of any

RAC member or where the Court otherwise directs in accordance with 4.12(7) of this Agreement, a replacement RAC member will be named by the group represented by that member.

(5) Membership on each of the RACs will be for a two (2) year term.

(6) Each RAC member may name a designate to attend meetings of the RAC and the designate will have the powers, authorities and responsibilities of the RAC member while in attendance.

(7) In the event of any dispute related to the appointment or service of an individual as a member of the RAC, the affected group or individual may apply to the NAC for a determination of the issue.

(8) No RAC member may serve as a member of the NAC or as a member of the Oversight Committee during their term on a RAC.

(9) Each RAC will operate independently of the other RACs. Each RAC will make its decisions by consensus among its three members. Where consensus can not be reached, a majority is required to make a decision.

(10) In the event that an Eligible CEP Recipient, a member of a

RAC, or a member of the NAC is not satisfied with a decision of a RAC that individual may submit the dispute to the NAC for resolution.

(11) The RACs will deal only with the day-to-day operational issues relating to implementation of the Approval Orders arising within their individual regions which do not have national significance. In no circumstance will a RAC have authority to review any decision related to the IAP.

4.13 Review by NAC

Eighteen months following the Implementation Date, the NAC will consider and determine the necessity for the continuation of the operation of any or all of the 3 RACs provided that any determination made by the NAC must be unanimous.

4.14 Opt Out Threshold

In the event that the number of Eligible CEP Recipients opting out or deemed to have opted out under the Approval Orders exceeds five thousand (5,000), this Agreement will be rendered void and the Approval Orders set aside in their entirety subject only to the right of Canada, in its sole discretion, to waive compliance with this Section of this Agreement. Canada has the right to waive compliance with this Section of the Agreement until thirty (30) days after the end of the Opt Out Periods.

4.15 Federal Court Actions Exception

The Parties agree that both the *Kenneth Sparvier et al. v. Attorney General of Canada* proposed class action filed in the Federal Court on May 13, 2005 as Court File Number: T 848-05, and the *George Laliberte et al v. Attorney General of Canada* proposed class action filed in the Federal Court on September 23, 2005 as Court File Number: T-1620-05, will be discontinued without costs on or before the Implementation Date.

ARTICLE FIVE
COMMON EXPERIENCE PAYMENT

5.01 CEP

Subject to Sections 17.01 and 17.02, the Trustee will make a Common Experience Payment out of the Designated Amount Fund to every Eligible CEP Recipient who submits a CEP Application provided that:

(1) the CEP Application is submitted to the Trustee in accordance with the provisions of this Agreement;

(2) the CEP Application is received prior to the CEP Application Deadline;

(3) the CEP Application is validated in accordance with the provisions of this Agreement; and

(4) the Eligible CEP Recipient was alive on May 30, 2005.

5.02 Amount of CEP

The amount of the Common Experience Payment will be:

(1) ten thousand dollars ($10,000.00) to every Eligible CEP Recipient who resided at one or more Indian Residential Schools for one school year or part thereof; and

(2) an additional three thousand ($3,000.00) to every eligible CEP Recipient who resided at one or more Indian Residential Schools for each school year or part thereof, after the first school year; and

(3) less the amount of any advance payment on the CEP received

5.03 Interest on Designated Amount Fund

Interest on the assets of the Designated Amount Fund will be earned and paid as provided in Order in Council P.C. 1970-300 of February 17, 1970 made pursuant to section 21(2) of the Financial Administration Act as set out in the Trust Agreement attached as Schedule "I".

5.04 CEP Application Process

(1) No Eligible CEP Recipient will receive a CEP without

submitting a CEP Application to the Trustee.

(2) The Trustee will not accept a CEP Application prior to the Implementation Date or after the CEP Application Deadline.

(3) Notwithstanding Sections 5.01(2) and 5.04(2) of this Agreement, where the Trustee is satisfied that an Eligible CEP Recipient is a Person Under Disability on the CEP Application Deadline or was delayed from delivering a CEP Application on or before the CEP Application Deadline as prescribed in Section 5.04(2) as a result of undue hardship or exceptional circumstances, the Trustee will consider the CEP Application filed after the CEP Application Deadline, but in no case will the Trustee consider a CEP Application filed more than one year after the CEP Application Deadline unless directed by the Court.

(4) No person may submit more than one (1) CEP Application on his or her own behalf.

(5) Where an Eligible CEP Recipient does not submit a CEP Application as prescribed in this Section 5.04 that Eligible CEP Recipient will not be entitled to receive a Common Experience Payment and any such entitlement will be forever extinguished.

(6) The Trustee will process all CEP Applications substantially in accordance with Schedule "L" attached hereto. All CEP

Applications will be subject to verification.

(7) The Trustee will give notice to an Eligible CEP Recipient of its decision in respect of his or her CEP Application within 60 days of the decision being made.

(8) A decision of the Trustee is final and binding upon the claimant and the Trustee, subject only to the CEP Appeal Procedure set out in Section 5.09 of this Agreement.

(9) The Trustee agrees to make all Common Experience Payments as soon as practicable.

5.05 Review and Audit to Determine Holdings

(1) The Trustee will review the Designated Amount Fund on or before the first anniversary of the Implementation Date and from time to time thereafter to determine the sufficiency of the Designated Amount Fund to pay all Eligible CEP Recipients who have applied for a CEP as of the date of the review.

(2) The Trustee will audit the Designated Amount Fund within twelve (12) months following the CEP Application Deadline to determine the balance held in that fund on the date of the audit.

5.06 Insufficiency of Designated Amount

In the event that a review under Section 5.05(1) determines that the Designated Amount Fund is insufficient to pay all Eligible CEP Recipients who have applied, as of the date of the review, to receive the Common Experience Payment to which they are entitled, Canada will add an amount sufficient to remedy any deficiency in this respect within 90 days of being notified of the deficiency by the Trustee.

5.07 Excess Designated Amount

(1) If the audit under Section 5.05(2) determines that the balance in the Designated Amount Fund exceeds the amount required to make the Common Experience Payment to all Eligible CEP Recipients who have applied before the CEP Application Deadline by more than forty million dollars ($40,000,000.00), the excess will be apportioned *pro rata* to all those who received a Common Experience Payment to a maximum amount of three thousand dollars ($3,000.00) per person in the form of Personal Credits.

(2) After the payment of the maximum amount of Personal Credits to all Eligible CEP Recipients who have received the CEP, including payment of all administration costs related thereto, all excess funds remaining in the Designated Amount Found will be transferred to the National Indian Brotherhood Trust Fund (NIBTF) and to the Inuvialuit Education Foundation (IEF),

consistent with applicable Treasury Board policies, in the proportion set out in Section 5.07(5). The monies so transferred shall be used for educational programs on terms and conditions agreed between Canada and NIBTF and IEF, which terms and conditions shall ensure fair and reasonable access to such programs by all class members including all First Nations, Inuit, Inuvialuit and Métis persons. In carrying out its discussions with NIBTF and IEF, Canada shall obtain input from counsel for the groups set out in Section 4.09(d), (e), (f) and (g).

(3) If the audit under Section 5.05(2) determines that the balance in the Designated Amount Fund exceeds the amount required to make Common Experience Payments to all Eligible CEP Recipients who have applied before the CEP Application Deadline by less than forty million dollars ($40,000,000.00), there will be no entitlement to Personal Credits, and the excess will be transferred to the NIBTF and IEF in the proportions set out in Section 5.07(5) for the same purposes and on the same terms and conditions set out in Section 5.07(2).

(4) Any and all amounts remaining in the Designated Amount Fund on January 1, 2015 will be paid to the NIBTF and the IEF in the proportions set out in Section 5.07(5) for the same purposes and on the same terms and conditions set out in Section 5.07(2).

(5) Funds in the Designated Amount Fund shall be transferred to

the NIBTF and the IEF respectively proportionately based on the total number of Eligible CEP Recipients other than Inuit and Inuvialuit who have received the CEP in the case of the NIBTF and the total number of Inuit and Inuvialuit Eligible CEP Recipients who have received the CEP in the case of the IEF.

5.08 CEP Administrative Costs

(1) It is agreed that Canada will assume all internal administrative costs relating to the CEP and its distribution.

(2) It is agreed that all internal administrative costs relating to the Personal Credits and their distribution will be paid from the Designated Amount Fund.

5.09 CEP Appeal Procedure

(1) Where a claim made in a CEP Application has been denied in whole or in part, the applicant may appeal the decision to the NAC for a determination.

(2) In the event the NAC denies the appeal in whole or in part the applicant may apply to the Appropriate Court for a determination of the issue.

(3) The NAC may recommend to Canada that the costs of an appeal under Section 5.09(1) be borne by Canada. In

exceptional circumstances, the NAC may apply to the Appropriate Court for an order that the costs of an appeal under Section 5.09(1) be borne by Canada.

ARTICLE SIX
INDEPENDENT ASSESSMENT PROCESS

6.01 IAP

An Independent Assessment Process will be established as set out in Schedule "D" of this Agreement.

6.02 IAP Application Deadline

(1) Applications to the IAP will not be accepted prior to the Implementation Date or after the IAP Application Deadline.

(2) Where an Eligible IAP Claimant does not submit an IAP Application as prescribed in this Section 6.02(1) that Eligible IAP Claimant will not be admitted to the IAP and any such entitlement to make a claim in the IAP will be forever extinguished.

(3) All applications to the IAP which have been delivered prior to the IAP Application Deadline will be processed within the IAP as set out in Schedule "D" of this Agreement.

6.03 Resources

(1) The parties agree that Canada will provide sufficient resources to the IAP to ensure that:

a) Following the expiry of a six month start-up period commencing on the Implementation Date:

(i) Continuing Claims which have been screened into the IAP will be processed at a minimum rate of two-thousand five-hundred (2500) in each twelve (12) month period thereafter; and

(ii) the Claimant in each of those two-thousand five hundred (2500) Continuing Claims will be offered a hearing date within nine months of their application being screened-in. The hearing date will be within the nine month period following the claim being screened-in, or within a reasonable period of time thereafter, unless the claimant's failure to meet one or more of the requirements of the IAP frustrates compliance with that objective.

b) Notwithstanding Section 6.03(1)(a), all IAP claimants whose applications have been screened into the IAP as of the eighteen (18) month anniversary of the Implementation

Date will be offered a hearing date before the expiry of a further nine month period or within a reasonable period of time thereafter, unless the claimant's failure to meet one or more of the requirements of the IAP frustrates compliance with that objective.

c) All IAP claimants screened-in after the eighteen (18) month anniversary of the Implementation Date will be offered a hearing within nine (9) months of their claim being screened in. The hearing date will be within the nine month period following the claim being screened-in, or within a reasonable period of time thereafter, unless the claimant's failure to meet one or more of the requirements of the IAP frustrates compliance with that objective.

d) For greater certainty, all IAP Applications filed before the expiration of the IAP Application Deadline will be processed prior to the six (6) year anniversary of the Implementation Date unless a claimant's failure to meet one or more of the requirements of the IAP frustrates compliance with that objective.

(2) In the event that Continuing Claims are submitted at a rate that is less than two-thousand five hundred (2,500) per twelve month period, Canada will be required only to provide resources sufficient to process the Continuing Claims at the rate at which they are received, and within the timeframes set out in

Section 6.03 (1)(a) and (b) of this Agreement.

(3) Notwithstanding Article 4.11(11), in the event that Continuing Claims are not processed at the rate and within the timeframes set out in Section 6.03(1)(a) and (b) of this Agreement, the NAC may request that Canada provide additional resources for claims processing and, after providing a reasonable period for Canada's response, apply to the Courts for orders necessary to permit the realization of Section 6.03(1).

6.04 Notice of IAP Application Deadline

One additional notice of the IAP Application Deadline may be provided on the recommendation of the NAC to Canada.

ARTICLE SEVEN
TRUTH AND RECONCILIATION AND COMMEMORATION

7.01 Truth and Reconciliation

(1) A Truth and Reconciliation process will be established as set out in Schedule "N" of this Agreement.

(2) The Truth and Reconciliation Commission may refer to the NAC for determination of disputes involving document production, document disposal and archiving, contents of the

Commission's Report and Recommendations and Commission decisions regarding the scope of its research and issues to be examined. The Commission shall make best efforts to resolve the matter itself before referring it to the NAC.

(3) Where the NAC makes a decision in respect of a dispute or disagreement that arises in respect of the Truth and Reconciliation Commission as contemplated in Section 7.01(2), either or both the Church Organization and Canada may apply to any one of the Courts for a hearing *de novo*.

7.02 Commemoration

Proposals for commemoration will be addressed in accordance with the Commemoration Policy Directive set out in Schedule "J" of this Agreement.

ARTICLE EIGHT
HEALING

8.01 Healing

(1) To facilitate access to healing programmes, Canada will provide the endowment to the Aboriginal Healing Foundation as set out in Section 3.02 on terms and conditions substantially similar to the draft attached hereto as Schedule "M".

(2) On or before the expiry of the fourth anniversary of the

Implementation Date, Canada will conduct an evaluation of the healing initiatives and programmes undertaken by the Aboriginal Healing Foundation to determine the efficacy of such initiatives and programmes and recommend whether and to what extent funding should continue beyond the five year period.

8.02 Availability of Mental Health and Emotional Support Services

Canada agrees that it will continue to provide existing mental health and emotional support services and agrees to make those services available to those who are resolving a claim through the Independent Assessment Process or who are eligible to receive compensation under the Independent Assessment Process. Canada agrees that it will also make those services available to Common Experience Payment recipients and those participating in truth and reconciliation or commemorative initiatives.

ARTICLE NINE
CHURCH ORGANIZATIONS

9.01 The Parties agree that the Church Organizations will participate in this Agreement as set out herein and in accordance with the Agreements between Canada and the Church Organizations attached hereto in Schedules "O-1", The Presbyterian Church Agreement, Schedule "O-2", The Anglican Entities Agreement, Schedule "O-3", The Catholic Entities Agreement and Schedule "O-4", The United Church of Canada Agreement.

ARTICLE TEN

Duties of the Trustee

10.01 Trustee

In addition to the duties set out in the Trust Agreement, the Trustee's duties and responsibilities will be the following:

a) developing, installing and implementing systems and procedures for processing, evaluating and making decisions respecting CEP Applications which reflect the need for simplicity in form, expedition of payments and an appropriate form of audit verification, including processing the CEP Applications substantially in accordance with Schedule "L"of this Agreement;

b) developing, installing and implementing systems and procedures necessary to meet its obligations as set out in the Trust Agreement attached as Schedule "I" hereto;

c) developing, installing and implementing systems and procedures for paying out compensation for validated CEP Applications;

d) reporting to the NAC and the Courts respecting CEP Applications received and being administered and compensation paid;

e) providing personnel in such reasonable numbers as are required for the performance of its duties, and training and instructing them;

f) keeping or causing to be kept accurate accounts of its activities and its administration of the CEP, including payment of compensation under the CEP, preparing such financial statements, reports and records as are required by the NAC and the Courts, in form and content as directed by the Courts and submitting them to the Courts so often as the Courts direct;

g) receiving and responding to all enquiries and correspondence respecting the validation of CEP Applications, reviewing and evaluating all CEP Applications, making decisions in respect of CEP Applications, giving notice of its decisions in accordance with the provisions this Agreement and communicating with Eligible CEP Recipients, in either English or French, as the Eligible CEP Recipient elects;

h) receiving and responding to all enquiries and correspondence respecting payment of compensation for valid CEP Applications, and forwarding the compensation in accordance with the provisions of this Agreement and communicating with Eligible CEP Recipients, in either

English or French, as the Eligible CEP Recipient elects;

i) administering Personal Credits in accordance with Section 5.07 of this Agreement;

j) maintaining a database with all information necessary to permit the NAC and the Courts to evaluate the financial viability and sufficiency of the Designated Amount Fund from time to time, subject to applicable law; and,

k) such other duties and responsibilities as the Courts may from time to time by order direct.

ARTICLE ELEVEN
RELEASES

11.01 Class Member and Cloud Class Member Releases

(1) The Approval Orders will declare that in the case of Class Members and Cloud Class Members:

a) Each Class Member and Cloud Class Member has fully, finally and forever released each of the Releasees from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including

for damages, contribution, indemnity, costs, expenses and interest which any such Class Member or Cloud Class Member ever had, now has, or may hereafter have, directly or indirectly arising from or in any way relating to or by way of any subrogated or assigned right or otherwise in relation to an Indian Residential School or the operation of Indian Residential Schools and this release includes any such claim made or that could have been made in any proceeding including the Class Actions or the Cloud Class Action whether asserted directly by the Class Member or Cloud Class Member or by any other person, group or legal entity on behalf of or as representative for the Class Member or Cloud Class Member.

b) The Class Members and Cloud Class Members are deemed to agree that they will not make any claim or demand or take any actions or proceedings against any Releasee or any other person or persons in which any claim could arise against any Releasee for damages and/or contribution and/or indemnity and/or other relief over under the provisions of the *Negligence Act*, R.S.O. 1990, c. N-3, or its counterpart in other jurisdictions, the common law, Quebec civil law or any other statute of Ontario or any other jurisdiction in relation to an Indian Residential School or the operation of Indian Residential Schools;

c) Canada's, the Church Organizations' and the Other Released Church Organizations' obligations and liabilities under this Agreement constitute the consideration for the releases and other matters referred to in Section 11.01(a) and (b) inclusive and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Class Members or and Cloud Class Members are limited to the benefits provided and compensation payable pursuant to this Agreement, in whole or in part, as their only recourse on account of any and all such actions, causes of actions, liabilities, claims and demands.

(2) Notwithstanding Section 11.01(1), no action, except for Family Class claims as set out in the Class Actions and the Cloud Class Action, capable of being brought by a Class Member or Cloud Class Member will be released where such an action would be released only by virtue of being a member of a Family Class in the Class Actions or the Cloud Class Action.

11.02 Non-resident Claimant Releases

(1) The Approval Orders will order and declare that Non-resident Claimants on being accepted into the IAP, must execute a Release in the form set out in Schedule "P" of this Agreement.

(2) Nothing in Section 4.06 (c), (d) or (f) or Section 11.01(1)(a)

will prevent a Non-resident Claimant from pursuing his or her claim in the IAP.

(3) For greater certainty nothing in this Section 11.02 will prevent the bringing of an action contemplated in Section 4.06(i) and (j) of this Agreement.

11.03 Claims by Opt Outs and Others

If any person not bound by this Agreement claims over or brings a third party claim, makes any claim or demand or takes any action or proceeding against any defendant named in the Class Actions or the Cloud Class Action arising in relation to an Indian Residential School or the operation of Indian Residential Schools, no amount payable by any defendant named in the Class Actions of the Cloud Class Action to that person will be paid out of the Designated Amount Fund.

11.04 Cessation of litigation

(1) Upon execution of this Agreement, the representative plaintiffs named in the Class Actions and the Cloud Class Action, and counsel from each of the groups set out in Section 4.09(4)(c), (d), (e), (f) and (g) will cooperate with the defendants named in the Class Actions and in the Cloud Class Action to obtain approval of this Agreement and general participation by Class Members and Cloud Class Members and Non-resident Claimants in all aspects of the Agreement.

(2) Each counsel from each of the groups set out in section 4.09(4)(c), (d), (e), (f) and (g) will undertake, within five days after the Approval Date, not to commence or assist or advise on the commencement or continuation of any actions or proceedings calculated to or having the effect of undermining this Agreement against any of the Releasees, or against any person who may claim contribution or indemnity from any of the Releasees in any way relating to or arising from any claim which is subject to this Agreement, provided that nothing in the Agreement will prevent any counsel from advising any person whether to opt out of the Class Actions and to continue to act for that person.

ARTICLE TWELVE
ADDITIONAL INDIAN RESIDENTIAL SCHOOLS

12.01 Request to Add Institution

(1) Any person or organization (the "Requestor") may request that an institution be added to Schedule "F", in accordance with the criteria set out in Section 12.01(2) of this Agreement, by submitting the name of the institution and any relevant information in the Requestor's possession to Canada;

(2) The criteria for adding an institution to Schedule "F" are:

a) The child was placed in a residence away from the family home by or under the authority of Canada for the purposes of education; and,

b) Canada was jointly or solely responsible for the operation of the residence and care of the children resident there.

(3) Indicators that Canada was jointly or solely responsible for the operation of the residence and care of children there include, but are not limited to, whether:

a) The institution was federally owned;

b) Canada stood as the parent to the child;

c) Canada was at least partially responsible for the administration of the institution;

d) Canada inspected or had a right to inspect the institution; or,

e) Canada did or did not stipulate the institution as an IRS.

(4) Within 60 days of receiving a request to add an institution to Schedule "F", Canada will research the proposed institution and determine whether it is an Indian Residential School as defined in this Agreement and will provide both the Requestor and the NAC with:

a) Canada's decision on whether the institution is an Indian Residential School;

b) Written reasons for that decision; and

c) A list of materials upon which that decision was made;

provided that Canada may ask the Requestor for an extension of time to complete the research.

(5) Should either the Requestor or the NAC dispute Canada's decision to refuse to add a proposed institution, the Requestor may apply to the Appropriate Court, or the NAC may apply to the court of the province or territory where the Requestor resides for a determination.

(6) Where Canada adds an institution to Schedule "F" under Section 12.01(4), Canada may provide the Requestor with reasonable legal costs and disbursements.

ARTICLE THIRTEEN
LEGAL FEES

13.01 Legal Fees

Canada agrees to compensate legal counsel in respect of their legal fees as

set out herein.

13.02 Negotiation Fees (July 2005 – November 20, 2005)

(1) Canada agrees to pay each lawyer, other than lawyers representing the Church Organizations, who attended the settlement negotiations beginning July 2005 leading to the Agreement in Principle for time spent up to the date of the Agreement in Principle in respect of the settlement negotiations at his or her normal hourly rate, plus reasonable disbursements, and GST and PST, if applicable except that no amount is payable under this Section 13.02(1) for fees previously paid directly by OIRSRC.

(2) All legal fees payable under Section 13.02(1) will be paid no later than 60 days after the Implementation Date.

13.03 Fees to Complete Settlement Agreement (November 20, 2005 – Execution of Settlement Agreement)

(1) Canada agrees to pay each lawyer, other than lawyers representing the Church Organizations, for time spent between November 20, 2005 and the date of execution of this Agreement in respect of finalizing this Agreement at each lawyer's normal hourly rate, plus reasonable disbursements and GST and PST, if applicable except that no amount is payable under this Section 13.03(1) for fees previously paid directly by OIRSRC.

(2) No fees will be payable under Section 13.03(1) for any work compensated under Section 13.04 of this Agreement.

(3) All legal fees payable under Section 13.03(1) will be paid no later than 60 days after the Implementation Date.

13.04 Fees Accrued after November 20, 2005 (NCC Fees)

(1) Legal fees payable to legal counsel from November 20, 2005 forward will be paid in accordance with the terms set out in Section 13.10(1)(2)(4) and (5) of this Agreement.

(2) Subject to 13.07, all legal fees payable under Section 13.06 and 13.08 will be paid no later than 60 days after the Implementation Date.

13.05 No Fees on CEP Payments

No lawyer or law firm that has signed this Settlement Agreement or who accepts a payment for legal fees from Canada, pursuant to Sections 13.06 or 13.08, will charge an Eligible CEP Recipient any fees or disbursements in respect of the Common Experience Payment.

13.06 Fees Where Retainer Agreements

Each lawyer who had a retainer agreement or a substantial solicitor-client

relationship (a "Retainer Agreement") with an Eligible CEP Recipient as of May 30, 2005, will be paid an amount equal to the lesser of:

a) the amount of outstanding Work-in-Progress as of the date of the Agreement in Principle in respect of that Retainer Agreement and

b) $4,000, plus reasonable disbursements, and GST and PST, if applicable,

and will agree that no other or further fee will be charged with respect to the CEP.

13.07 Proof of Fees

In order to receive payment pursuant to Section 13.06 of this Agreement, each lawyer will provide to OIRSRC a statutory declaration that attests to the number of Retainer Agreements he or she had with Eligible CEP Recipients as of May 30, 2005 and the amount of outstanding Work-in-Progress in respect of each of those Retainer Agreements as docketed or determined by review. OIRSRC will review these statutory declarations within 60 days of the Implementation Date and will rely on these statutory declarations to verify the amounts being paid to lawyers and will engage in such further verification processes with individual lawyers as circumstances require with the consent of the lawyers involved, such consent not to be unreasonably withheld.

13.08 The National Consortium and the Merchant Law Group Fees

(1) The National Consortium will be paid forty million dollars ($40,000,000.00) plus reasonable disbursements, and GST and PST, if applicable, in recognition of the substantial number of Eligible CEP Recipients each of them represents and the class action work they have done on behalf of Eligible CEP Recipients. Any lawyer who is a partner of, employed by or otherwise affiliated with a National Consortium member law firm is not entitled to the payments described in Section 13.02 and 13.06 of this Agreement.

(2) The fees of the Merchant Law Group will be determined in accordance with the provisions of the Agreement in Principle executed November 20, 2005 and the Agreement between Canada and the Merchant Law Group respecting verification of legal fees dated November 20, 2005 attached hereto as Schedule "V", except that the determination described in paragraph 4 of the latter Agreement, will be made by Justice Ball, or, if he is not available, another Justice of the Court of Queen's Bench of Saskatchewan, rather than by an arbitrator.

(3) The Federal Representative will engage in such further verification processes with respect to the amounts payable to the National Consortium as have been agreed to by those parties.

(4) In the event that the Federal Representative and either the National Consortium or the Merchant Law Group cannot agree on the amount payable for reasonable disbursements incurred up to and including November 20, 2005, under Section 13.08(1) of this Agreement, the Federal Representative will refer the matter to:

(a) the Ontario Superior Court of Justice, or an official designated by it, if the matter involves the National Consortium;

(b) the Saskatchewan Court of Queen's Bench, or an official designated by it, if the matter involves the Merchant Law Group;

to fix such amount.

(5) The National Consortium member law firms are as follows:

Thomson, Rogers	Troniak Law Office
Richard W. Courtis Law Office	Koskie Minsky LLP
Field LLP	Leslie R. Meiklejohn Law Office
David Paterson Law Corp.	Huck Birchard
Docken & Company	Ruston Marshall
Arnold, Pizzo, McKiggan	Rath & Company
Cohen Highley LLP	Levene Tadman Gutkin Golub

White, Ottenheimer & Baker	Coller Levine
Thompson Dorfman Sweatman	Adams Gareau
Ahlstrom Wright Oliver & Cooper	

All legal fees payable under Section 13.08 will be paid no later than 60 days after the Implementation Date.

13.09 Cloud Class Action Costs, Fees and Disbursements

(1) Canada will pay all cost awards in the Cloud Class Action that remain outstanding as of November 20, 2005 to Counsel for the Plaintiffs in that action. Canada will not seek to recover any portion of any costs paid pursuant to this Section 13.09(1) from the Anglican entities named as Defendants in the Cloud Class Action.

(2) Canada will pay the fees and disbursements of the Plaintiffs in the Cloud Class Action as set out in Article 13 of this Agreement.

13.10 NCC Fees

(1) Canada will pay members of the NCC fees based upon reasonable hourly rates and reasonable disbursements, but such fees will not include any fee for the Government of Canada, or the Church Organizations.

(2) Subject to Section 13.10(4), any fees referred to in Section 13.10(1) and accrued after April 1, 2006 will be subject to a maximum operating budget of sixty-thousand dollars ($60,000.00) per month.

(3) Notwithstanding Section 13.10(2) and subject to Section 13.10(4), the NCC may apply to Canada for additional funding in exceptional circumstances up to a maximum monthly amount of fifteen thousand dollars ($15,000.00).

(4) The maximum operating budget referred to in Section 13.10(1) and the maximum additional funding in exceptional circumstances referred to in Section 13.10(3) will be reviewed and reassessed by Canada on July 1, 2006 and the first day of each month thereafter. Canada, in its sole discretion, may reduce or increase the maximum operating budget or the maximum additional funding or both.

(5) Counsel who is designated by the NCC as counsel having carriage in respect of drafting, consent certification and approval of the settlement will be paid their normal hourly rates and reasonable disbursements to be billed by Counsel and paid by Canada on an ongoing basis. Such fees and disbursements are not subject to the maximum operating budget referred to in paragraph 13.10(2).

(6) Other counsel who appear in court, if designated by the NCC

and approved by Canada, will be paid an appearance fee of two thousand dollars ($2000.00) per diem. Such fees are not subject to the maximum operating budget referred to in paragraph 13.10(2).

(7) The NCC, and counsel appointed on behalf of the NCC, will submit their accounts to the OIRSRC for payment, and will be paid within 60 days of such submission.

(8) The NCC will submit its accounts to the OIRSRC for payment. The submitted accounts will be verified by OIRSRC to ensure compliance with the Treasury Board Travel Directive, attached as Schedule "Q", prior to payment.

13.11 NAC Fees

(1) Members of the NAC will be compensated at reasonable hourly rates subject to the maximum monthly operating budget set out at Section 13.11(2) of this Agreement except the representatives for Canada or the Church Organizations, who will not be compensated under this Agreement.

(2) Subject to Section 13.11(4), any fees referred to in Section 13.10(1) will be subject to a maximum operating budget of sixty-thousand dollars ($60,000.00) per month.

(3) Notwithstanding Section 13.11(2) and subject to Section

13.11(4), the NAC may apply to Canada for additional funding in exceptional circumstances up to a maximum monthly amount of fifteen thousand dollars ($15,000.00).

(4) The maximum operating budget referred to in Section 13.11(2) and the maximum additional funding in exceptional circumstances referred to in Section 13.11(3) will be reviewed and reassessed by Canada on the first day of the first month after the Implementation Date and on the first day of each month thereafter. Canada, in its sole discretion, may reduce or increase the maximum operating budget or the maximum additional funding or both.

(5) The NAC will submit its accounts to the OIRSRC for payment. The submitted accounts will be verified by OIRSRC to ensure compliance with the Treasury Board Travel Directive, attached as Schedule "Q", prior to payment.

13.12 RAC Fees

(1) Members of the RACs, will be compensated at reasonable hourly rates subject to the maximum monthly operating budget set out at Section 13.12(2).

(2) Canada will provide each RAC with an operating budget that will not exceed seven thousand dollars ($7,000.00) per month for each RAC except that each RAC may apply for additional

funding in exceptional circumstances.

(3) The RACs will submit their accounts to the OIRSRC for payment. The submitted accounts will be verified by OIRSRC to ensure compliance with the Treasury Board Travel Directive, attached as Schedule "Q", prior to payment.

13.13 IAP Working Group Fees

(1) Canada agrees to pay each member of the IAP Working Group, other than lawyers representing Canada or the Church Organizations, who attended the IAP Working Group meetings beginning November 20, 2005 for time spent up to the Implementation Date, as requested in writing by Canada, at his or her normal hourly rate, plus reasonable disbursements, and GST and PST, if applicable except that no amount is payable under this Section 13.13(1) for fees previously paid directly by OIRSRC.

(2) No fees are payable under Section 13.13(1) for time billed under Section 13.02 or 13.03.

(3) The IAP Working Group, will submit their accounts to the OIRSRC for payment, and will be paid within 60 days of such submission.

13.14 Oversight Committee Fees

(1) Canada agrees to pay an honorarium to each member of the Oversight Committee, other than members representing Canada or the Church Organizations, at the same rate and on the same conditions as apply from time to time for adjudicators appointed for the IAP.

(2) Notwithstanding 13.14(1), Oversight Committee members will be paid the honorarium set out in 13.14(1) for a period not exceeding 3 days per month in those months where they attend in-person meetings or 1 day per month in those months where the meeting is held by teleconference or other means.

(2) The Oversight Committee members will submit their accounts to the OIRSRC for payment. The accounts will be paid within 60 days of their submission. The accounts will be verified by OIRSRC to ensure compliance with the Treasury Board Travel Directive, attached as Schedule "Q", prior to payment.

ARTICLE FOURTEEN
FIRST NATIONS, INUIT, INUVIALUIT AND MÉTIS

14.01 Inclusion

For greater certainty, every Eligible CEP Recipient who resided at an Indian Residential School is eligible for the CEP and will have access to the IAP in

accordance with the terms of this Agreement including all First Nations, Inuit, Inuvialuit and Métis students.

ARTICLE FIFTEEN
TRANSITION PROVISIONS

15.01 No Prejudice

The parties agree that the no prejudice commitment set out in the letter of the Deputy Minister of the OIRSRC dated July, 2005, and attached as Schedule "R" means that following the Implementation Date:

(1) All Eligible CEP Recipients are entitled to apply to receive the CEP regardless of whether a release has been signed or a judgment received for their Indian Residential School claim prior to the Implementation Date.

(2) Where a release of an Indian Residential School claim was signed after May 30, 2005 in order to receive the payment of an award under the DR Model:

a) Canada will adjust the award to reflect the compensation scale set out at page 6 of the IAP attached as Schedule "D" of this Agreement;

b) the Eligible IAP Claimant may apply to have their hearing re-opened to reconsider the assignment of points under the

Consequential Loss of Opportunity category set out at page 6 of the IAP attached as Schedule "D" of this Agreement, and pursuant to the standards of the IAP, in any case where the adjudicator assessed their claim as falling within the highest level in the Consequential Loss of Opportunity category in the DR Model;

c) an Eligible IAP Claimant who alleges sexual abuse by another student at the SL4 or SL5 category, where such abuse if proven would be the most serious proven abuse in their case, may have their hearing re-opened to consider such an allegation in accordance with the standards of the IAP.

(3) Following the coming into force of the Approval Orders, at the request of an Eligible IAP Claimant whose IRS abuse claim was settled by Canada without contribution from a Catholic Entity set out in Schedule "C" of this Agreement, such settlement having been for an amount representing a fixed reduction from the assessed Compensation, Canada will pay the balance of the assessed compensation to the Eligible IAP Claimant. Provided, however, that no amount will be paid to an Eligible IAP Claimant pursuant to this section until the Eligible IAP Claimant agrees to accept such amount in full and final satisfaction of his or her claim against a Catholic Entity set out in Schedule "C" of this Agreement, and to release them by

executing a release substantially in the form of the release referred to in Section 11.02 of this Agreement.

(4) Until the Implementation Date, Canada will use its best efforts to resolve cases currently in litigation, including those that would not fit within the IAP.

15.02 Acceptance and Transfer of DR Model Claims

(1) No applications to the DR Model will be accepted after the Approval Date.

(2) DR applications received on or before the expiration of the Approval Date for which a hearing date had not been set as of the Implementation Date will be dealt with as follows:

a) any application which alleges only physical abuse will be processed under the DR Model unless the claimant elects to transfer it to the IAP;

b) any application which includes an allegation of sexual abuse will be transferred to the IAP unless the claimant, within 60 days of receiving notice of the proposed transfer, elects in writing to remain in the DR Model.

(3) An Individual whose claim is transferred under Section

15.02(2) of this Agreement is not required to complete an additional application to the IAP, but may modify their existing DR application to the extent necessary to claim the relief available under the IAP.

(4) Any Eligible IAP Claimant who received but did not accept a decision under the DR Model or a Pilot Project decision may apply to the IAP on the condition that all evidence used in the DR Model hearing or pilot project hearing will be transferred to the IAP proceeding.

ARTICLE SIXTEEN
CONDITIONS AND TERMINATION

16.01 Agreement is Conditional

This Agreement will not be effective unless and until it is approved by the Courts, and if such approvals are not granted by each of the Courts on substantially the same terms and conditions save and except for the variations in membership contemplated in Sections 4.04 and 4.07 of this Agreement, this Agreement will thereupon be terminated and none of the Parties will be liable to any of the other Parties hereunder, except that the fees and disbursements of the members of the NCC will be paid in any event.

16.02 Termination of Agreement

This Agreement will continue in full force and effect until all obligations under this Agreement are fulfilled.

ARTICLE SEVENTEEN
CEP PAYMENTS TO APPROVED PERSONAL REPRESENTATIVES

17.01 Compensation if Deceased on or after May 30, 2005

If an Eligible CEP Recipient, dies or died on or after May 30, 2005 and the CEP Application required under Article Five (5) has been submitted to the Trustee by him or her prior to his or her death or by his or her Personal Representative after his or her death and within the period set out in Section 5.04(2), the Personal Representative will be paid the amount payable under Article Five (5) to which the deceased Eligible CEP Recipient would have been entitled if he or she had not died.

17.02 Deceased Cloud Class Members

Notwithstanding Section 17.01, if an Eligible CEP Recipient who is a member of a certified class in the Cloud Class Action died on or after October 5, 1996, and the CEP Application required under Article Five (5) has been submitted to the Trustee by his or her Personal Representative within the period set out in Section 5.04(2), the Personal Representative will be paid the amount payable under Article Five (5) to which the deceased Eligible CEP Recipient would have been entitled if he or she had not died.

17.03 Person Under Disability

If an Eligible CEP Recipient is or becomes a Person Under Disability prior to receipt of a Common Experience Payment and the CEP Application required under Article Five (5) has been submitted to the Trustee by him or her prior to becoming a Person Under Disability or by his or her Personal Representative after he or she becomes a Person Under Disability within the period set out in Section 5.04(2), the Personal Representative will be paid the amount payable under Article Five (5) to which the Eligible CEP Recipient who has become a Person Under Disability would have been entitled if he or she had not become a Person Under Disability.

ARTICLE EIGHTEEN
GENERAL

18.01 No Assignment

No amount payable under this Agreement can be assigned and such assignment is null and void except as expressly provided for in this Agreement.

18.02 Compensation Inclusive

For greater certainty, the amounts payable to Eligible IAP Claimants under this Agreement are inclusive of any prejudgment interest or other amounts that may be claimed by Eligible IAP Claimants.

18.03 Applicable Law

This Agreement will be governed by the law of Ontario.

18.04 Dispute Resolution

The parties agree that they will fully exhaust the dispute resolution mechanisms contemplated in this Agreement before making any application to the Courts for directions in respect of the implementation, administration or amendment of this Agreement or the implementation of the Approval Orders. Application to the Courts will be made with leave of the Courts, on notice to all affected parties, or otherwise in conformity with the terms of the Agreement.

18.05 Notices

Any notice or other communication to be given in connection with this Agreement will be given in writing and will be given by personal delivery or by electronic communication addressed to each member of the NCC or NAC as the case may be or to such other address, individual or electronic communication number as a Party may from time to time advise by notice given pursuant to this Section. Any notice or other communication will be exclusively deemed to have been given, if given by personal delivery, on the day of actual delivery thereof and, if given by electronic communication, on the day of transmittal thereof if transmitted during normal business hours of the recipient and on the Business Day during which such normal business

hours next occur if not so transmitted. The names and business addresses of the members of the NCC are attached as Schedule "S".

18.06 Entire Agreement

This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and cancels and supersedes any prior or other understandings and agreements between the Parties with respect thereto. There are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or statutory between the Parties with respect to the subject matter hereof other than as expressly set forth or referred to in this Agreement.

18.07 Benefit of the Agreement

This Agreement will enure to the benefit of and be binding upon the respective heirs, assigns, executors, administrators and successors of the Parties.

18.08 Counterparts

This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same Agreement.

18.09 Official Languages

Canada will prepare a French translation of this Agreement for use at the Approval Hearings. Prior to Implementation Date, Canada will pay the costs of the preparation of an authoritative French version of this Agreement and

such cost shall include costs of review by a designate of the Parties. The authoritative French version shall be executed by the same Parties who executed this Agreement and, once executed, shall be of equal weight and force at law.

Signed this 15th day of June, 2006.

ON BEHALF OF HER MAJESTY THE QUEEN IN RIGHT OF CANADA

By: _____
The Honourable Jim Prentice

THE FEDERAL REPRESENTATIVE

By: _____
The Honourable Frank Iacobucci

ASSEMBLY OF FIRST NATIONS

By: _____
Phil Fontaine, National Chief

By: _____
Kathleen Mahoney

NUNAVUT TUNNGAVIK INC.

By: _____
Janice Payne

INUVIALUIT CORPORATION

By: _____
Hugo Prud'homme

MAKIVIK CORPORATION

By:

_____
Gilles Gagne

NATIONAL CONSORTIUM

By: _____
Craig Brown

MERCHANT LAW GROUP

By: _____
E.F. Anthony Merchant, Q.C.

COHEN HIGHLY LLP

By: _____
Russell Raikes

THE PRESBYTERIAN CHURCH IN CANADA

By:

_____
S. John Page

THE UNITED CHURCH OF CANADA

By: _____
Alexander D. Pettingill

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA

By: _____
S. John Page

SISTERS OF CHARITY, a body corporate also known as Sisters of Charity of St. Vincent de Paul, Halifax also known as Sisters of Charity of Halifax

By: _____
Thomas Mcdonald

THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX

By: _____
Hugh Wright

LES SOEURS DE NOTRE DAME-AUXILIATRICE

By: _____
Pierre L. Baribeau

LES SOEURS DE ST. FRANCOIS D'ASSISE

By: _____
Pierre L. Baribeau

INSITUT DES SOEURS DU BON CONSEIL

By: _____
Pierre L. Baribeau

LES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE (The Sisters of St. Joseph of St. Hyacinthe)

By: _____
Pierre L. Baribeau

LES SOEURS DE JESUS-MARIE

By: _____
Pierre L. Baribeau

LES SOEURS DE L'ASSOMPTION DE LA SAINTE VERGE

By: _____
Pierre L. Baribeau

LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA

By: _____

Pierre L. Baribeau

LES SOEURS DE LA CHARITÉ DE ST.-HYACINTHE

By: _____
Pierre L. Baribeau

LES OEUVRES OBLATES DE L'ONTARIO

By: _____
Pierre Champagne/Ron Caza

LES RÉSIDENCES OBLATES DU QUÉBEC

By: _____
Pierre Champagne/Ron Caza

LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (The Roman Catholic Episcopal Corporation of James Bay) THE CATHOLIC DIOCESE OF MOOSONEE

By: _____
Pierre Champagne/Ron Caza

SOEURS GRISES DE MONTRÉAL/GREY NUNS OF MONTREAL

By: _____
W. Roderick Donlevy/Michel Thibault

SISTERS OF CHARITY (GREY NUNS) OF ALBERTA

By: _____
W. Roderick Donlevy/Michel Thibault

LES SOEURS DE LA CHARITÉ DES T.N.O.

By: _____
W. Roderick Donlevy/ Michel Thibault

HÔTEL-DIEU DE NICOLET (HDN)

By: _____

THE GREY NUNS OF MANITOBA INC. – LES SOEURS GRISES DU MANITOBA INC.

By: _____
W. Roderick Donlevy

LA CORPORATION EPISCOPAL CATHOLIQUE ROMAINE DE LA BAIE D' HUDSON THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY

By: _____
Rheal Teffaine

MISSIONARY OBLATES–GRANDIN

By: _____
Curtis Onishenko

LES OBLATS DE MARIE IMMACULÉE DU MANITOBA

By: _____
Rheal Teffaine

THE ARCHIEPISCOPAL CORPORATION OF REGINA

By: _____
James Ehmann, Q.C.

THE SISTERS OF THE PRESENTATION

By: _____
Mitchell Holash

THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE

By: _____
Charles Gibson

LES SOEURS DE LA CHARITÉ D'OTTAWA – SISTERS OF CHARITY OF OTTAWA

By: _____

OBLATES OF MARY IMMACULATE-ST. PETER'S PROVINCE

By: _____
William Sammon

THE SISTERS OF SAINT ANN

By: _____
Patrick J. Delsey Law Corporation

SISTERS OF INSTRUCTION OF THE CHILD JESUS

By: _____
Violet Allard

THE BENEDICTINE SISTERS OF MT. ANGEL OREGON

By: _____
Azool Jaffer-Jeraj

LES PERES MONTFORTAINS

By: _____
Bernie Buettner

THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE

By: _____
John Hogg

THE BISHOP OF VICTORIA, CORPORATION SOLE

By: _____
Frank D. Corbett

THE ROMAN CATHOLIC BISHOP OF NELSON CORPORATION SOLE

By: _____
John Hogg

ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA

By: _____
Fr. Terry MacNamara OMI

THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA

By: _____
Ray Baril, Q.C.

LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD

By: _____
Karen Trace

ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN

By: _____
James Ehmann, Q.C.

LA CORPORATION ARCHIÉPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE

By: _____
Rheal Teffaine

LES MISSIONNAIRES OBLATES DE ST. BONIFACE THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE

By: _____
Rheal Teffaine

ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG

By: _____
Bill Emslie, Q.C.

LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT

By: _____
Mitchell Holash

THE ROMAN CATHOLIC BISHOP OF THUNDER BAY

By: _____
John Cyr

IMMACULATE HEART COMMUNITY OF LOS ANGELES CA

By: _____
Mark Rowan

ARCHDIOCESE OF VANCOUVER THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER

By: _____
Mary Margaret MacKinnon

ROMAN CATHOLIC DIOCESE OF WHITEHORSE

By: _____
Azool Jaffer-Jeraj

THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIE

By: _____
Karen Trace

THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT

By: _____
Gary R. Brown

FULTON & COMPANY

By: _____
Len Marchand, P. Eng.

ROSE A. KEITH, LLB

By: _____
Rose A. Keith

LACKOWICZ, SHIER & HOFFMAN

By: _____
Dan Shier

CABOTT & CABOTT

By: _____
Laura I. Cabott

KESHEN MAJOR

By: _____
Greg Rickford

BILKEY, QUINN

By: _____
David Bilkey

F. J. SCOTT HALL LAW CORPORATION

By: _____
Scott Hall

HEATHER SADLER JENKINS

By: _____
Sandra Staats

HUTCHINS GRANT & ASSOCIATES

By: _____
Peter Grant

By: _____
Brian O'Reilly

DUBOFF EDWARDS HAIGHT & SCHACHTER

By: _____
Harley Schachter

MACDERMID LAMARSH GORSALITZ

By: _____
Robert Emigh

MACPHERSON LESLIE & TYERMAN LLP

By: _____
Maurice Laprairie, Q.C.

THIS IS EXHIBIT .....B..... REFERRED TO IN THE AFFIDAVIT OF FRANK IACOBUCCI

SWORN BEFORE ME, THIS .....10.....

DAY OF .....August..... 2006

.....

Notary Public in and for the Province of Ontario

NOTARY PUBLIC

November 20, 2005

CANADA, as represented by The Honourable Frank Iacobucci

- and -

PLAINTIFFS, as represented by the National Consortium, Merchant Law Group, and other legal counsel as undersigned

- and -

THE ASSEMBLY OF FIRST NATIONS

- and -

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH OF CANADA AND ROMAN CATHOLIC ENTITIES

AGREEMENT IN PRINCIPLE

WHEREAS Canada and certain religious entities operated Indian Residential Schools for the education of aboriginal children and certain harms and abuses were committed against those children;

AND WHEREAS the parties desire a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools;

AND WHEREAS the parties further desire the promotion of healing and reconciliation;

AND WHEREAS the parties agree that this Agreement in Principle should form the basis of a comprehensive settlement package that the Honourable Frank Iacobucci will recommend to Canada;

AND WHEREAS the parties agree that the comprehensive settlement will not be effective anywhere until approved by every court as set out herein;

AND WHEREAS the Federal Representative has recommended that an advance payment on the Common Experience Payment will be made to certain elderly former students;

THEREFORE, in consideration of the mutual covenants set out herein, the parties have entered into this Agreement in Principle.

I. DEFINITIONS

"Church"or "Church organization" means any one or more of the entities listed in Schedule "A" hereof (the "Roman Catholic entities"), the General Synod of the Anglican Church of Canada[1], the United Church of Canada, the Presbyterian Church in Canada;

"Common Experience Payment" means the lump sum payment described herein ;

"Designated Amount" means $1,900,000,000.00;

"DR Model" means the dispute resolution model offered by Canada since November 2003;

"Eligible CEP Recipient" means all former students who resided at Indian Residential Schools.

"Eligible IAP Claimant" means all Eligible CEP Recipients and claimants who, while under the age of 21, were permitted by an adult employee to be on the premises of an Indian Residential School to take part in authorized school activities;

"Federal Representative" means the Honourable Frank Iacobucci;

"Independent Assessment Process" ("IAP") means the process for the determination of individual abuse claims attached hereto as Schedule "B";

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[1] It is understood that General Synod of the Anglican Church of Canada agrees to be bound by these provisions and to recommend them to all Dioceses and the Missionary Society.

"Indian Residential Schools" means the following:

1. Institutions listed on List "A" to IRSRC's Dispute Resolution Process attached as Schedule "C" (Whitehorse Baptist Mission to be re-added);

2. Institutions listed in Schedule "D" ("Additional Residential Schools") which may be amended from time to time; and,

3. any institution which is determined to meet the following criteria:

   (a) The child was placed in a residence away from the family home by or under the authority of the federal government for the purposes of education; and,

   (b) The federal government was jointly or solely responsible for the operation of the residence and care of the children resident there.

   (c) Indicators that the residence was federal in nature include, but are not limited to, whether:

      (i) The institution was federally owned;

      (ii) The federal government stood as the parent to the child;

      (iii) The federal government was at least partially responsible for the administration of the institution;

      (iv) The federal government inspected or had a right to inspect the institution; or,

      (v) The federal government did or did not stipulate that the institution was an IRS.

"NAC" means the national administration committee as described herein.

II. COMPENSATION TO ELIGIBLE CEP RECIPIENTS

1. Canada will make a Common Experience Payment to every Eligible CEP Recipient who was alive on May 30, 2005.

2. The amount of the Common Experience Payment will be:

   (a) $10,000 to every Eligible CEP Recipient who attended an Indian Residential School for one school year or part thereof.

   (b) $3,000 for each school year (or part thereof) thereafter that an Eligible CEP Recipient attended a residential school.

   (c) An Eligible CEP Recipient who accepts the Common Experience Payment will be deemed pursuant to the court orders contemplated by this Agreement in Principle

to have released Canada and the Church Organizations for all claims arising out of his or her residential School experience or attendance but will retain the right to pursue a claim in accordance with the terms and conditions of the Individual Assessment Process set forth below.

3. To effectuate the distribution of the Common Experience Payments, Canada will transfer the Designated Amount to Service Canada and will develop application procedures for Eligible CEP Recipients that will reflect the need for simplicity of form, expedition of payments, and an appropriate form of audit verification in consultation with all parties.

4. The Federal Representative will recommend to the Deputy Prime Minister that the Minister of Finance designate that the Designated Amount be entitled to earn interest pursuant to Canada's policy applicable thereto; any interest would be added to the Designated Amount.

5. In the event that the Designated Amount is insufficient to pay all Eligible CEP Recipients the Common Experience Payments to which they are entitled, Canada agrees to add a sufficient amount to remedy any deficiency in this respect.

6. In the event the Designated Amount proves to be in excess by more than $40,000,000 of the total amount required to pay all Eligible CEP Recipients their Common Experience Payments, Canada agrees to cause Service Canada to credit each Eligible Recipient with an amount up to $3,000 for each Eligible CEP Recipient for Personal Healing (the "Personalized Healing Amount") services from a list of healing entities or groups jointly approved by Canada and the AFN pursuant to terms and conditions to be developed by Canada and the AFN with input from all the parties that will reflect ease of access to any genuine programmes for healing among other factors. A similar set of terms and conditions will be developed by Canada and Inuit organizations for Eligible CEP Recipients who are Inuit. If the excess after payment of the Common Experience Payments is less than $40,000,000, such lesser amount will be paid to the Aboriginal Healing Foundation.

7. In the further event that the Designated Amount proves to be in excess of the amount required to pay the Personalized Healing Amounts, Canada agrees that Service Canada will transfer any such excess to the Aboriginal Healing Foundation.

8. It is agreed that Canada will assume the costs of verifying claims for the Common Experience Payments and administrative expenses relating to their distribution.

III. SETTLEMENT AGREEMENT PROVISIONS FOR THE INDEPENDENT ASSESSMENT PROCESS

1. The parties agree that the only IRS claims which may be pursued by former students of Indian Residential Schools and the compensation to be paid for such claims when proven, are as set out at pages 2-6 of the IAP attached as Schedule "B".

2. The parties further agree that the Instructions set out at pages 29-35 of the IAP are approved, subject to minor wording changes consistent with the intended meaning.

3. The parties further agree that the remaining standards for the IAP shall be substantially as set out in Schedule "B".

4. No limitations defence will be advanced in any continuing claim diverted by the Chief Adjudicator to the courts. Canada will rely on Crown immunity in such claims where applicable.

5. It is agreed that Canada will provide sufficient resources to permit, after a 6 month lead-in period, the resolution of no fewer than 2500 continuing claims per year, and to maintain the current standard of offering an IAP hearing, or to resolve an IAP claim, within nine months of an application having been screened in, provided the delay is not the responsibility of the claimant. Where these goals are not achieved the NAC may request that the government provide additional resources for claims processing, or may apply to the court for an order making changes to the IAP process sufficient to permit the realization of these goals.

IV. TRUTH AND RECONCILIATION

A Truth and Reconciliation process will be established substantially in the form attached hereto as Schedule "E".

V. COMMEMORATION

1. Canada will provide funding for commemoration initiatives, events, projects and memorials with respect to Indian Residential Schools at both the national and community level.

2. Such funding will be approximately $20 million covering both national commemorative and community-based activities and projects including funding already authorized.

VI. HEALING

1. Canada will provide one hundred and twenty-five million dollars ($125,000,000) as an endowment to the Aboriginal Healing Foundation to fund healing programmes over a five year period to address the legacy of harms including the physical and sexual abuse suffered in Indian Residential Schools.

2. In the fourth year after the court orders approving the settlement package, Canada agrees to have an evaluation of the healing initiatives and programmes undertaken by the Aboriginal Healing Foundation to determine the efficacy of such initiatives and programmes and to recommend whether and to what extent funding should continue.

VII. INUIT AND INUVIALUIT

For greater certainty, all Inuit and Inuvialuit students who attended institutions listed on Schedule "C" while such schools operated as residential schools or Schedule "D" are eligible for the CEP and will have access to the IAP in accordance with its terms.

The government will continue to research institutions from the list attached as Schedule "F" and provide a determination before December 1, 2005.

VIII. CHURCH PROVISIONS

The churches[2] and church entities agree that, as parties to the Settlement Agreement, they will:

1. Provide, at their own expense, assistance with witnesses and access to documents for the resolution of continuing claims on terms substantially similar to the following:

   -comply with all reasonable requests from Canada for information and assistance during the proceedings;

   -provide counsel for Canada and any researchers or experts retained by it, with full access to all relevant files and databases, excepting documents with respect to which solicitor-client privilege or other lawful privilege applies and is asserted. Any information obtained from records pursuant to this section will be used exclusively for the defence of the continuing claim or claims for which the information was sought unless otherwise agreed in writing; and

   -in litigation, provide disclosure and production of relevant documents in their possession or control, provide witness statements on request, attend as appropriate at the discovery of their witnesses, and otherwise facilitate the testimony of witnesses within their employ.

2. Provide along with Canada for the provision of all relevant documents to and for the use of the Truth and Reconciliation Commission, subject only to overriding concerns about the privacy interests of an individual. In such cases, researchers for the Commission shall have access to such documents provided privacy is respected.

3. Refrain from advancing or relying upon any limitations or laches defence in any continuing claim for which the Chief Adjudicator authorizes recourse to the courts, and pay any judgement in such claims to which they are a party and in which the Crown is immune from liability, provided that the Crown has agreed to indemnify the Church.

4. The Crown may settle any continuing claims without a hearing, subject to any rights of consultation set out in an applicable Church/Crown agreement.

5. Binding financial and other commitments will be entered into with the Crown concerning the resolution of the IRS legacy on terms substantially similar to existing letters of understanding with the Crown and certain denominations and the Memorandum of Understanding between the Crown and the Catholic entities.

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[2] It is understood that General Synod of the Anglican Church of Canada agrees to be bound by these provisions and to recommend them to all Dioceses and the Missionary Society.

The Government confirms its commitment to renegotiate existing church agreements to give effect to the most favoured nation clauses found within them with a view to maintaining equity among the denominations.

IX. ADDITIONAL INDIAN RESIDENTIAL SCHOOLS

Any person or organization ("Requestor") may propose institutions to be added to Schedule "D" by submitting the name of the institution and any relevant information in their possession to the government;

The government will research the proposed institution and determine whether it meets the test set out in part 3 of the definition of Indian Residential Schools and advise the Requestor and the national administration committee and provide the reasons for the determination and all the information on which the decision was based within 60 days;

Should either the Requestor or the national administration committee dispute the government's determination, they may apply to the class action court in the jurisdiction where they reside or, if they reside outside Canada, the Ontario Court for a determination of the issue.

X. IMPLEMENTATION

The implementation of the final settlement judgment shall be accomplished substantially in the form attached hereto as Schedule "G".

XI. SOCIAL BENEFITS OR SOCIAL ASSISTANCE BENEFITS

Canada will use its best efforts to obtain agreement with provincial and territorial governments and any federal government departments to ensure that the receipt of any payments under the settlement agreement will not affect the amount, nature or duration of any social benefits or social assistance benefits available or payable to an Eligible CEP Recipient or Eligible IAP Claimant. The other parties also agree to use their best efforts to reach similar results.

XII. LEGAL FEES

WHEREAS legal counsel have done very substantial work on behalf of Eligible CEPRecipients for many years, have contributed significantly to the achievement of the Agreement in Principle and have undertaken not to seek payment of legal fees in respect of the Common Experience Payment to be paid to Eligible CEP Recipients, Canada agrees to compensate legal counsel in respect of their legal fees as follows.

1. Each lawyer who had a retainer agreement or a substantial solicitor-client relationship (a "Retainer Agreement") with an Eligible CEP Recipient as of May 30, 2005 (the date that the Federal Representative's appointment was announced) shall be paid an amount equal to the lesser of the amount of outstanding Work-in-Progress as of the date of the Agreement in Principle in respect of that Retainer Agreement or $4,000, plus reasonable disbursements, and GST and PST, if applicable.

2. Each lawyer, other than lawyers representing the Churches, who attended the settlement negotiations beginning July 2005 leading to the Agreement in Principle shall be compensated for time spent up to the date of the Agreement in Principle in respect of the settlement negotiations at his or her normal hourly rate, plus reasonable disbursements, and GST and PST, if applicable.

3. Each lawyer shall provide to the Federal Representative an affidavit or statutory declaration that attests to the number of Retainer Agreements he or she had with Eligible Recipients as of May 30, 2005 and the amount of outstanding Work-in-Progress in respect of each of those Retainer Agreements as docketed or determined by review. The Federal Representative shall rely on these affidavits to verify the amounts being paid to lawyers and shall engage in such further verification processes with individual lawyers as circumstances require with the consent of the lawyers involved, such consent not to be unreasonably withheld.

4. The National Consortium and the Merchant Law Group shall each be paid $40,000,000 plus reasonable disbursements, and GST and PST, if applicable, in recognition of the substantial number of Eligible CEP Recipients each of them represents and the class action work they have done on behalf of Eligible CEP Recipients. Paragraphs 1, 2 and 3 above shall not apply to any lawyer who is a partner of, employed by or otherwise affiliated with a National Consortium member law firm or the Merchant Law Group.

5. The Federal Representative shall engage in such further verification processes with respect to the amounts payable to the Merchant Law Group and National Consortium as have been agreed to.

6. No lawyer or law firm that has taken part in these settlement negotiations or who accepts a payment for legal fees from the Canada shall charge an Eligible CEP Recipient any fees or disbursements in respect of the Common Experience Payment paid to that Eligible CEP Recipient.

7. Legal fees payable to legal counsel from November 20 forward shall be paid in accordance with the terms set out in Articles 44 and 45 of Schedule "G" to this Agreement in Principle.

8. All legal fees payable under the above provisions shall be paid no later than 60 days after the expiry of the latest applicable opt-out period.

9. The National Consortium member law firms are as follows:

Thomson, Rogers	Troniak Law Office
Richard W. Courtis Law Office	Koskie Minsky
Field LLP	Leslie R. Meiklejohn Law Office

David Paterson Law Corp.	Huck Birchard
Docken & Company	Ruston Marshall
Arnold, Pizzo, McKiggan	Rath & Company
Cohen Highley LLP	Levene Tadman Gutkin Golub
White, Ottenheimer & Baker	Coller Levine
Thompson Dorfman Sweatman	Adams Gareau
Ahlstrom Wright Oliver & Cooper	

XIII. TRANSITION PROVISIONS

It is agreed that the no prejudice commitment set out in the letter of the DM of IRSRC dated July, 2005, and attached as Schedule "H" means that following the coming into force of the final settlement agreement:

1. All Eligible CEP Recipients are entitled to receive the CEP regardless of whether a release has been signed or a judgment received for their IRS claim.

2. Where a release of an IRS claim was signed after May 30, 2005 in order to receive the payment of an award under the DR Model:

   (a) the government will recalibrate the award in light of the compensation scale set out at page 6 of Schedule "B";

   (b) the claimant may have their hearing re-opened to reconsider the assignment of points under the Consequential Loss of Opportunity category in Schedule "B", and pursuant to the standards of the IAP, in any case where the adjudicator assessed their claim as falling within the highest level in the Consequential Loss of Opportunity scale in the DR Model;

   (c) a claimant who alleges sexual abuse by another student at the SL4 or SL5 category, where such abuse if proven would be the most serious proven abuse in their case, may have their hearing re-opened to consider such an allegation in accordance with the standards of the IAP.

3. Following the coming into force of a final settlement agreement, Canada will, at the request of a claimant whose IRS abuse claim was settled by Canada without contribution

from a Catholic entity which was party to such claim and is a party to this Agreement in Principle, such settlement having been for an amount representing a fixed reduction from the assessed Compensation, offer to pay the balance of the assessed compensation to the Claimant. Provided, however, that no amount shall be paid to a Claimant pursuant to this section until the Claimant agrees to accept such amount in full and final satisfaction of his or her claim against the Catholic Defendants, and to release the Catholic Defendants.

As well until a final settlement agreement comes into force, Canada will make best efforts to resolve cases currently in litigation, including those that would not fit within the IAP.

XIV. CONFIDENTIALITY

Save as required by law, the parties agree that the undertaking of confidentiality as to discussions and all communications, whether written or oral, made in and surrounding the negotiations leading to this Agreement in Principle continues in force.

XV. COMMUNICATIONS

Save as required by law, the parties agree to not engage in any media or public communication as to this Agreement in Principle until after its approval by Cabinet. Following approval by Cabinet, Canada will make an initial public announcement.

XVI. FINAL SETTLEMENT AGREEMENT

It is acknowledged by the parties that further discussion will be necessary to give effect to the provisions of this Agreement in Principle in a final settlement agreement. Canada agrees to compensate lawyers for time spent in such further discussions between the date of execution of this Agreement In Principle and the date of execution of the final settlement at the lawyers' normal hourly rates, plus reasonable disbursements and GST and PST, if applicable.

It is understood by all the Parties that the Federal Representative is recommending to Canada that this Agreement in Principle should form the basis of a comprehensive settlement package and the Federal Representative has no authority to bind Canada.

Signed this 20th day of November, 2005.

THE FEDERAL REPRESENTATIVE

By: _____
The Honourable Frank Iacobucci

ASSEMBLY OF FIRST NATIONS

By: _____
Phil Fontaine, National Chief

By: _____
Kathleen Mahoney

CABOTT & CABOTT

By: _____
for Laura Cabott

COHEN HIGHLY LLP

By: _____
Russell Raikes

HEATHER SADLER JENKINS

By: _____
Sandra Staats

HUTCHINS, GRANT & ASSOCIATES

By: _____
Peter R. Grant

INUVIALUIT CORPORATION

By: _____
Hugo Prud'homme

KESHEN & MAJOR

By: _____
Greg Rickford

MERCHANT LAW GROUP

By: _____
E. F. Anthony Merchant, Q.C.

NATIONAL CONSORTIUM

By: _____
Craig Brown

NELLIGAN O'BRIEN PAYNE

By: _____
Lori O'Neill

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA

By: _____
S. John Page

THE PRESBYTERIAN CHURCH IN CANADA

By: _____
S. John Page

THE UNITED CHURCH OF CANADA

By: _____
Alexander D. Pettingill

CATHOLIC ENTITIES

By: _____
W. Roderick Donlevy

By: _____
Pierre L. Baribeau

FULTON & COMPANY

By: _____
Leonard S. Marchand

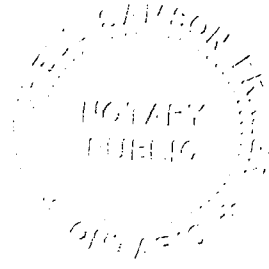
MARIVIK CORPORATION

per _____
GILLES GAGNÉ

THIS IS EXHIBIT ..... C ..... REFERRED TO IN THE AFFIDAVIT OF FRANK IACOBUCCI
SWORN BEFORE ME, THIS ..... 10th .....
DAY OF ..... August 2006

.....

Notary Public in and for the Province of Ontario



Agreement Between the Government of Canada and the Merchant Law Group Respecting the Verification of Legal Fees

The Government of Canada and the Merchant Law Group agree that in addition to the requirement to provide an affidavit as set out in Article ■ of the Agreement in Principle, the Merchant Law Group's fees shall be subject to the following verification process.

1) The Merchant Law Group's dockets, computer records of Work in Progress and any other evidence relevant to the Merchant Law Group's claim for legal fees shall be made available for review and verification by a firm to be chosen by the Federal Representative the Honourable Frank Iacobucci.

2) The Federal Representative shall review the material from the verification process and consult with the Merchant Law Group to satisfy himself that the amount of legal fees to be paid to the Merchant Law Group is reasonable and equitable taking into consideration the amounts and basis on which fees are being paid to other lawyers in respect of this settlement, including the payment of a 3 to 3.5 multiplier in respect of the time on class action files and the fact that the Merchant Law Group has incurred time on a combination of class action files and individual files.

3) If the Federal Representative is not satisfied as described in 2) above, he and the Merchant Law Group shall make all reasonable efforts to agree to another amount to be paid to the Merchant Law Group for legal fees.

4) If the Federal Representative and the Merchant Law Group cannot agree as described in 3) above, the amount to be paid to the Merchant Law Group for legal fees shall be determined through binding arbitration, but that amount shall in no event be more than $40 million or less than $25 million. The arbitration shall be by a single arbitrator who shall be a retired judge:

(a) selected by the Federal Representative and the Merchant Law Group from a list comprising:

  (i) John Major,

  (ii) Peter Cory,

  (iii) John Morden, or

  (iv) Allan McEachern; and

(b) if not so jointly chosen, then chosen by the Federal Representative in consultation with Tony Merchant and appointed in accordance with the Saskatchewan *Arbitration Act*, with the arbitration to take place in Saskatchewan.

November 20, 2005
Toronto, Ontario.

THIS IS EXHIBIT 10 REFERRED TO IN THE AFFIDAVIT OF FRANK IACOBUCCI
SWORN BEFORE ME, THIS 10th
DAY OF August 2006

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Notary Public in and for the Province of Ontario

The Leader-Post (Regina, Saskatchewan)

August 9, 2004 Monday
Final Edition

SECTION: SPECIAL SECTION; Kevin O'Connor; Pg. D9

LENGTH: 901 words

HEADLINE: **Just a Helping Hand?**: Are lawyers trying to settle residential school claims just to get rich?

BYLINE: Kevin O'Connor, The Leader-Post

BODY:

Regina lawyer Tony Merchant sits down at his desk, two huge stacks of residential school files in front of him, and ponders the $100-million question.

Is it possible, he's asked, that Regina-based Merchant Law Group could eventually make $100 million or more from Indian residential school lawsuits, as has been suggested before in the media?

His answer: it's possible.

"Over the course of years, you can get to huge numbers," said Merchant, whose Regina-based firm represents some 6,800 former residential school students across Canada.

"I hope the public is right and that things turn out to be wonderfully remunerative. We think we will do well, but what people ought to to understand is that currently we carry about $12 million of work that's unpaid."

The amount of money going to lawyers has been one of the ongoing controversies of the settlement process.

First Nations leaders have raised concerns about both the large fees abuse victims are paying to their lawyers, and to the many millions of dollars Ottawa is spending on government lawyers to defend the cases.

At the Assembly of First Nations annual conference in Charlottetown last month, Grand Chief Phil Fontaine said while $71 million has been spent to date settling claims, $200 million will be spent on lawyers.

Indian Residential Schools Resolution Department spokesperson Nicole Dauz says nowhere near that amount has been spent to date.

But no one disputes that plaintiffs lawyers have already made millions and stand to make many more millions as the settlement money begins to flow faster.

Ottawa plans to spend $954 million on payments to former residential school students over the next seven years.

Under the government's new fast-track approach to residential school settlements (Alternative Dispute Resolution), Ottawa adds 15 per cent to awards where lawyers are assisting the claimants.

However, any lawyer's fee, whether it's 15 per cent or 45 per cent, is still something that has to be worked out between the client and the lawyer, according to Indian Residential Schools Resolution director general Shawn Tupper.

Merchant said his residential school clients pay anywhere from 20 per cent to 40 per cent of their settlement or award, depending on what stage of the proceedings the case has proceeded to.

But he said he's heard of lawyers who charge their residential clients up to 50 per cent of their settlements.

The relatively high fee that applies on contingency work is fair because of the financial burden the lawyer assumes on cases that don't result in a settlement, he said.

There's also the high cost of taking these cases to court to consider, Merchant said. For example, one residential school case that went all the way to the Supreme Court of Canada required $260,000 of legal work, he said.

In a worst case scenario, the client could end up with a reduced settlement and the fee for the lawyer would be about $30,000.

Merchant said the public should be concerned more about the millions Ottawa is spending on their own lawyers in order to fight residential school lawsuits.

He points out that the federal government announced last year it expects to spend $1.7 billion on residential school cases over the next seven years, but only about $1 billion of that ($954 million) is going to the actual payouts.

Tupper said that doesn't mean Ottawa is spending $700 million on staff lawyers.

In fact, most of the non-settlement money will go to various programs aimed at helping aboriginal people.

This year, for example, the department's budget is $93 million, but about $8 million is for administration and $14 million will pay the Justice Department for lawyers.

The remaining $71 million will go toward a health program aimed at aboriginal people. Tupper said the government has been concerned about the amount of settlement money going to plaintiff lawyers and those considerations went into planning for the Alternative Dispute Resolution process.

"We had seriously considered whether we could design a process that had no lawyer involvement at all," Tupper said.

"But there are already more than 11,000 claims and those lawyers are there. They're unavoidable, they have a relationship with their clients and we can't interfere in that."

Eddie Bitternose, band councillor at the Gordon First Nation, estimates that more than half the money received by people who were sexually abused by former principal William Starr ended up going to the lawyers.

"Guys don't know that when they're going to have coffee with their lawyer, they're actually paying $150 or $200," he said.

"In one case in our community, there was one guy who ended up not getting anything. The visits and calls to his lawyer added up to more than his share.

"He ended up with nothing."

However, Merchant defended the contingency system, where clients don't pay the lawyer unless there's a settlement or court award.

"This is an example of something truly wonderful by lawyers," he said.

The financial arrangement is similar to that for typical personal injury liability cases, he said.

Under the contingency system, low-income people who couldn't afford to pay lawyers on an hourly basis are still able to take complex cases to trial.

"This is an example of lawyers doing what they really ought to be doing," he said.

"They ought to find people, particularly the downtrodden, who merit recognition and compensation...and find a solution for them. And that's really what's happened."

GRAPHIC: Photo: Bryan Schlosser, Leader-Post; Tony Merchant says lawyers are not working on the residential school settlements just to get rich.

LOAD-DATE: August 9, 2004

Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CHARLES BAXTER SR., ELIJAH BAXTER, LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, JAMES FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, PETER GEORGE TAATI AIRO, MICHELLINE AMMAQ, DONALD BELCOURT, JOHN BOSUM, RHONDA BUFFALO, FREDDIE JOHNNY EKOMIAK, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, JIM CHEWANISH, EARL KENNETH COTE, MALCOLM DAWSON, ANN DENE, KEITH DIETER, VINCENT BRADLEY FONTAINE, MARIE GAGNON, PEGGY GOOD, CLIFFORD HOUSE, FRED KELLY, ROSEMARIE KUPTANA, JIMMIE KUMARLUK, ELIZABETH KUSIAK, THERESA LAROCQUE , JAME McCALLUM, CORNELIUS McCOMBER, STANLEY THOMAS NEPETAYPO, CAROLYN TAKATAK NIVIAXIE, FLORA NORTHWEST, ELIASIE NOWKAWALK, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, SIMON SCIPIO, ELIZABETH SCIPIO-KOOKASH, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, ALVIN GERALD STRAIGHTNOSE, EDWARD TAPIATIC, BLANDINA TULUGARJUK, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE BAPTIST CHURCH IN CANADA, 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, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, IMPACT NORTH MINISTRIES, INSTITUT DES SOEURS DU BON CONSEIL, JESUIT FATHERS OF UPPER CANADA, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (also known as LES REVERENDS PERES OBLATS DE L'IMMACULEE CONCEPTION DE MARIE), LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (PROVINCE DU CANADA-EST), LES PERES MONTFORTAINS (also known as THE COMPANY OF MARY), LES REVERENDS PERES OBLATS DE MARIE IMMACULEE DES TERRITOIRES DU NORD OUEST, 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), LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE NICOLET AND THE SISTERS OF ASSUMPTION, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA, LES SOEURS DE NOTRE DAME AUXILIATRICE, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE, LES SOEURS DE ST. FRANCOIS D'ASSISE, MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEARTS AND MARY IMMACULATE or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE), SISTERS OF THE HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDERS OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE), SISTERS OF THE PRESENTATION OF MARY (SOEURS DE LA PRESENTATION DE MARIE), ST. PETER'S PROVINCE, THE BENEDICTINE SISTERS, THE BOARD OF THE HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DAUGHTERS OF THE HEART OF MARY (also known as LA SOCIETE DES FILLES DE COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY), THE DIOCESE OF MOOSONEE,, THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE GREY NUNS OF MANITOBA INC. (also known as LES SOEURS GRISES DU MANITOBA INC.), THE GREY SISTERS NICOLET, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY OBLATES OF MARY IMMACULATE-GRANDIN PROVINCE, THE MISSIONARY OBLATES OF MARY IMMACULATE-PROVINCE OF ST. JOSEPH, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA , THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA), THE OBLATS OF MARY IMMACULATE, THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, 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 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 OF PROVIDENCE OF WESTERN CANADA, THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS), THE SISTERS OF SAINT ANNE, THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE, THE SISTERS OF THE CHARITY OF ST. VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX), THE SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE SYNOD OF THE DIOCESE OF BRITISH COLOMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF WESTMINISTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF RUTH ANNE FLEAR
(sworn August 11, 2006)

I, Ruth Anne Flear, of the City of Toronto, MAKE OATH AND SAY:

1. I am a legal secretary with Torys LLP, counsel to the federal representative, the Honourable Frank Iacobucci.

2. I faxed to E. F. Anthony Merchant from the Honourable Frank Iacobucci a letter dated August 3, 2006 by sending a copy of same by fax to 306.522.3299. A copy of the letter along with fax cover page and transmission sheet are attached as Exhibit "A" to this my affidavit.

SWORN BEFORE ME at the City of Toronto, on August , 2006.

Commissioner for Taking Affidavits

DAVID OUTERBRIDGE

Ruth Anne Flear

6783409.1
01746-2002

THIS IS EXHIBIT .....A..... REFERRED TO IN THE AFFIDAVIT OF RUTH ANNE FLEAR

SWORN BEFORE ME, THIS .....11.....

DAY OF .....August..... 2006

.....

A Commission for Taking Affidavits

TORYS LLP
NEW YORK TORONTO

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The Honourable Frank Iacobucci, Q.C.
Direct Tel. 416.865.8217

fiacobucci@torys.com

August 3, 2006

FAX
Mr. E.F. Anthony Merchant
Merchant Law Group
Saskatchewan Drive Plaza
2401 Saskatchewan Drive
Regina, Saskatchewan S4P 4H8

Dear Mr. Merchant:

Re: Indian Residential Schools

I am writing to advise that the Merchant Law Group has not satisfied me, as federal representative, that the fees it seeks are reasonable, as is required by the fee verification agreement entered into between us. As a result, I have recommended that Canada not support any application brought by the Merchant Law Group for fee approval. That recommendation has been accepted.

I can advise that the federal government will continue to seek approval of the residential schools settlement and certification of the class actions as provided in the final settlement agreement to which you are a party.

It remains our intention to strictly enforce the fee verification agreement and, if you continue in your present course, we anticipate that, as suggested in Justice Ball's order, a trial of the issue will be required following the completion of the approval and certification process.

We would point out that at present there is no information whatsoever before the courts concerning MLG's fees and disbursements.

Yours truly,

Frank Iacobucci

FI/raf

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01746-2002

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100745

Date	August 3, 2003	**Client-Matter #**	01746-2002
From	The Honourable Frank Iacobucci	**Direct Tel**	416-865-8217
Page(s)	2 (including this cover page)		

Recipient	Fax Number	Tel Number
E. F. Anthony Merchant Merchant Law Group	**(306) 522-3299**	(306) 359-7777

Comments Please see attached.

********** -JOURNAL- ********** DATE AUG-03-2006 ***** TIME 16:21 **********

DATE/TIME	= AUG-03 16:20
JOURNAL NO.	= 15
COMM.RESULT	= OK
PAGES	= 02
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RESOLUTION	= STANDARD

-TORYS LLP TORONTO -

********** -416 865 7380 - ***** - 416 865 7380- **********

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2006 SKQB 362**

Date: **2006 08 01**
Docket: Q.B.G. No. 816/2005
Judicial Centre: Regina

BETWEEN:

KENNETH SPARVIER, DENNIS SMOKEYDAY, RHONDA BUFFALO, JOHN DOE I, JANE DOE I, JOHN DOE II, JANE DOE II, JOHN DOE III, JANE DOE III, JOHN DOE IV, JANE DOE IV, JOHN DOE V, JANE DOE V, JOHN DOE VI, JANE DOE VI, JOHN DOE VII, JANE DOE VII, JOHN DOE VIII, JANE DOE VIII, JOHN DOE IX, JANE DOE IX, JOHN DOE X, JANE DOE X, JOHN DOE XI, JANE DOE XI, JOHN DOE XII, JANE DOE XII, JOHN DOE XIII, JANE DOE XIII, and other John and Jane Does Individuals and Entities to be added

PLAINTIFFS

- and -

ATTORNEY GENERAL OF CANADA, and other James and Janet Does Individuals and Entities to be added

DEFENDANT

Counsel:

E. F. Anthony Merchant, Q.C. and Casey R. Churko — for the plaintiffs
Gary D. Young, Q.C. — for the defendant

FIAT
August 1, 2006

BALL J.

---

[1] Applications for certification of this action as a class proceeding and for approval of a Settlement Agreement, including the legal fees payable to class counsel, will be heard in Regina on September 18, 19 and 20, 2006. Similar applications are

scheduled to be heard in eight other provinces and territories between August 29, 2006 and October 17, 2006.

[2] Counsel for the plaintiffs in this action, Merchant Law Group ("MLG"), is one of the law firms applying for approval of its fees and disbursements. The defendant ("Canada") applies for the following orders:

(a) Appointing the accounting firm Deloitte & Touche LLP, as agents of the Court for the purpose of conducting a review of the Merchant Law Group's dockets, computer records of Work in Progress, and any other evidence relevant to Merchant Law Group's claim for legal fees, and that Deloitte & Touche LLP be given access to such dockets, records and other relevant evidence as they may reasonably request for this purpose;

(b) That the results of the review be made available to the Court, to Merchant Law Group, and to the Federal Representative, the Honourable Frank Iacobucci; and

(c) That to the extent privilege is claimed for the dockets, records and other relevant evidence to which Deloitte & Touche LLP are to be given access, such information shall not be disclosed to the Federal Representative until the Court has reviewed it and made any redactions it considers necessary.

(d) Such other relief as may be requested and this Court may deem appropriate.

FACTUAL BACKGROUND

[3] For several months in 2005 Canada negotiated with interested parties for the resolution of claims arising from the legacy of Indian Residential Schools. The Honourable Frank Iacobucci, Q.C. acted as the Federal Representative leading those negotiations. On November 20, 2005 Mr. Iacobucci and Tony Merchant of MLG signed an agreement. Canada refers to it as the "Merchant Fee Verification Agreement" or "MFVA". MLG prefers to call it the "Undated Document" or "UD". For the purposes of this fiat I will use Canada's reference.

[4] The Merchant fee Verification Agreement stated:

> Agreement Between the Government of Canada and the Merchant Law Group Respecting the Verification of Legal Fees
>
> The Government of Canada and the Merchant Law Group agree that in addition to the requirement to provide an affidavit as set out in Article ■ of the Agreement in Principle, the Merchant Law Group's fees shall be subject to the following verification process.
>
> 1) The Merchant Law Group's dockets, computer records of Work in Progress and any other evidence relevant to the Merchant Law Group's claim for legal fees shall be made available for review and verification by a firm to be chosen by the Federal Representative the Honourable Frank Iacobucci.
>
> 2) The Federal Representative shall review the material from the verification process and consult with the Merchant Law Group to satisfy himself that the amount of legal fees to be paid to the Merchant Law Group is reasonable and equitable taking into consideration the amounts and basis on which fees are being paid to other lawyers in respect of this settlement, including the payment of 3 to 3.5 multiplier in respect of the

time on class action files and the fact that the Merchant Law Group has incurred time on a combination of class action files and individual files.

3) If the Federal Representative is not satisfied as described in 2) above, he and the Merchant Law Group shall make all reasonable efforts to agree to another amount to be paid to the Merchant Law Group for legal fees.

4) If the Federal Representative and the Merchant Law Group cannot agree as described in 3) above, the amount to be paid to the Merchant Law Group for legal fees shall be determined through binding arbitration, but that amount shall in no event be more than $40 million or less than $25 million. The arbitration shall be by a single arbitrator who shall be a retired judge:

(a) selected by the Federal Representative and the Merchant Law Group from a list comprising:

(i) John Major,

(ii) Peter Cory,

(iii) John Morden, or

(iv) Allan McEachern; and

(b) if not so jointly chosen, then chosen by the Federal Representative in consultation with Tony Merchant and appointed in accordance with the Saskatchewan *Arbitration Act*, with the arbitration to take place in Saskatchewan.

"Tony Merchant"

"Frank Iacobucci"

"November 20, 2005"

"Toronto, Ontario"

Within hours after the Merchant Fee Verification Agreement was signed, an Agreement in Principle was signed by various interested parties, including Mr. Iacobucci as Federal Representative and Mr. Merchant as the representative of MLG. The Agreement in Principle was approved by the Federal Cabinet on November 22, 2005.

[5] The Agreement in Principle provided for payment of legal fees to MLG, to a group of 19 other law firms (known as the National Consortium) and to other individual lawyers. One portion of the Agreement in Principle stated:

> WHEREAS legal counsel have done very substantial work on behalf of Eligible CEP Recipients for many years, have contributed significantly to the achievement of the Agreement in Principle and have undertaken not to seek payment of legal fees in respect of the Common Experience Payment to be paid to Eligible CEP Recipients, Canada agrees to compensate legal counsel in respect of their legal fees as follows.
>
> . . . .
>
> 4. The National Consortium and the Merchant Law Group shall each be paid $40,000,000 plus reasonable disbursements, and GST and PST, if applicable, in recognition of the substantial number of Eligible CEP Recipients each of them represents and the class action work they have done on behalf of Eligible CEP Recipients. Paragraphs 1, 2 and 3 above shall not apply to any lawyer who is a partner of, employed by or otherwise affiliated with a National Consortium member law firm or the Merchant Law Group.
>
> 5. The Federal Representative shall engage in such further verification processes with respect to the amounts payable to the Merchant Law Group and National Consortium as have been agreed to.
>
> 6. No lawyer or law firm that has taken part in these settlement negotiations or who accepts a payment for legal fees from the[sic] Canada shall charge an Eligible CEP Recipient any fees or disbursements in respect of the Common Experience Payment paid to the Eligible CEP Recipient.

[6] Further discussions took place and the Agreement in Principle was eventually finalized by a Settlement Agreement approved by the Federal Cabinet on May 10, 2006. The Settlement Agreement dealt extensively with payment of legal fees to lawyers representing residential school claimants. Section 13.08(2) of the Settlement Agreement states:

> **13.08(2)** The fees of the Merchant Law Group will be determined in accordance with the provisions of the Agreement in Principle executed November 20, 2005 and the Agreement between Canada and the Merchant Law Group respecting verification of legal fees dated November 20, 2005 attached hereto as Schedule "V", except that the determination described in paragraph 4 of the latter Agreement, will be made by Justice Ball, or, if he is not available, another Justice of the Court of Queen's Bench of Saskatchewan, rather than by an arbitrator.

[7] Sections 13.08(4) of the Settlement Agreement states, in part, that in the event of a disagreement over the amount payable to Merchant Law Group for reasonable disbursements incurred up to and including November 20, 2005, the Federal Representative will refer the matter to the Saskatchewan Court of Queen's Bench, or an official designated by it.

[8] Deloitte & Touche LLP ("Deloitte") was chosen by Mr. Iacobucci as his representative to review and verify material pursuant to the Merchant Fee Verification Agreement. In December of 2005 MLG began moving its residential schools files from its various offices to Regina so that a verification process might begin in mid-January. However, MLG expressed its concerns that the verification process should be carried out without violating solicitor-client privilege.

[9] From January 17, 2006, to January 24, 2006, representatives of Deloitte attended at MLG's offices in Regina to carry out the verification process. Although there is substantial disagreement about the quality and quantity of information reviewed by Deloitte, it is clear that it included (but was not confined to) photocopies of 4,823 available retainer agreements, an electronic listing of 8,560 clients with whom the

Merchant Law Group claimed to have a solicitor-client relationship, an electronic summary listing of the law firm's work in progress and disbursements by client up to January 20, 2006, and detailed work in progress and disbursement reports for seven clients as selected by Deloitte.

[10] Edward Nagel, a senior manager in Deloitte's Forensic and Dispute Services Group, deposed that upon reviewing information provided by MLG serious concerns arose concerning the accuracy of information which had been provided by MLG during negotiations with Mr. Iacobucci. His affidavit also stated at paras. 17 and 18:

> 17. Deloitte requested of MLG, but did not receive, the following information/documentation, which I believe is required to complete the verification exercise:
>
> (a) Electronic listings of summary WIP for the *Residential Schools' class action file* from the inception of this matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006.
>
> (b) Electronic listing of total hours billed by MLG lawyers for each year since the inception of this matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006 in relation to:
>
> (i) This matter; and
>
> (ii) Total MLG billings.
>
> (c) Electronic listing of MLG lawyers with their respective level, initials, hourly rate(s), and related employee codes.
>
> (d) For the sample of client files included in Deloitte's request dated January 22, 2006 (*and Deloitte's revised request for information dated January 24, 2006*):
>
> (i) All information/documentation that supports a substantial solicitor-client relationship.
>
> (ii) A line-by-line detail of hours billed by MLG lawyers, by day, from the inception of this matter

through to November 20, 2005 and from November 21, 2005 to January 16, 2006.

(iii) A line-by-line detail of disbursements incurred from the inception of this matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006.

(e) Confirmation from MLG as to whether the following client codes relate to this matter (identified from the summary WIP listing referred to in paragraph 11 above) 479907, 569703, 539519, 409782, 480422, 465454, 471025, 470107, 460380, 469118, and 239742.

(f) Verification from Cindy Roth of MLG whether MLG's Billing System (EasyLaw) could be exported to Excel.

(g) Sample retainer agreement formats used by MLG's offices to secure clients in relation to this matter.

18. Further to the information/documentation referred to herein, additional as yet undetermined information may be required to complete the verification exercise. However, the potential need for additional information will only become known upon the resumption of the verification exercise.

[11] On January 24, 2006, a letter signed by an MLG partner, Gordon J.K. Neill, Q.C., was delivered to Deloitte's representatives. The letter stated in part:

I have been asked to write on behalf of our firm, further to a meeting which took place this morning.

For more than a decade, I have been the person designated to take the lead on issues of ethics and Law Society compliance. As a result, I have been asked to outline our firms decision concerning the verification process.

We collectively do not think there is more information we can provide you without being in clear breach of the cannons of ethics and our obligations to maintain solicitor-client confidentiality.

We can not breach solicitor-client privilege to *some degree*. It is simply not permissible. Moreover, any breach is simply impossible. There is no settlement of residential school litigation in place. Even if the common experience settlement is approved, thousands of our clients will have an

> ongoing litigation interest against your client (the federal government, under the proposed Independent Assessment Process). Some clients may also choose to reject the proposed structured settlement process, and instead will face a court trial against your client.
>
> It is unallowable to disclose solicitor-client privileged information to a third party, and the proposed disclosure of information here is to the agents of an opposing party regarding ongoing litigation.
>
> . . .
>
> I want to note that we have already given you access to a significant amount of information. You have seen our retainer agreement. You have seen our boxes and cabinets of files which we estimate would stretch 900 feet. You have seen our pre- and post-November 20 work in progress figures. We have provided you with a list of our files which includes an indication of when they were opened. Those records are accurate and we are prepared to swear affidavits confirming the same, as is contemplated by the agreement in principle.
>
> Although you have discussed with Evatt and Tony the possibility of being allowed to examine files, the same is simply impossible. The issues of propriety, confidentiality, and privilege prevent it.
>
> Any client specific information you have received must be returned. Your own data is yours to retain but any information that we have provided must remain here at Merchant Law Group, and if there is any information in dispute, it should be sealed in envelopes, which I will hold in trust.

[12] Upon receiving the letter from Mr. Neill, Deloitte's representatives left the office of Merchant Law Group. This application was then filed seeking orders requiring MLG to provide Deloitte with further and better access to information relevant to MLG's claim for fees.

THE AFFIDAVIT EVIDENCE

[13] Canada relied on the affidavits to Frank Iacobucci, Q.C., and Edward Nagel of Deloitte. The admissibility of those affidavits was dealt with in a fiat dated July 10, 2006 (2006 SKQB 312) and will not be the subject of further comment.

[14] The only evidence filed by MLG on the motion was an affidavit sworn by Donald I.M. Outerbridge, the executive director of the law firm. Most of the affidavit, which contains 61 pages, 248 paragraphs and many exhibits, was said to be based on information provided to the deponent by MLG lawyers. Tony Merchant was identified as a source, or the only source, of statements made in 143 of the 248 paragraphs.

[15] Portions of the affidavit of Mr. Outerbridge advance legal arguments, offer political commentary or express the beliefs and opinions of others who are not identified. A significant portion of the affidavit contains information about discussions which took place between Mr. Merchant and Mr. Iacobucci or his colleagues during the negotiations leading up to the Merchant Fee Verification Agreement, the Agreement in Principle, and the Settlement Agreement — discussions which Mr. Merchant has contended in argument were privileged and confidential. At various times in his affidavit Mr. Outerbridge purports to express Tony Merchant's beliefs and opinions about what the various agreements were intended to mean and the obligations they were intended to impose on MLG.

[16] In his submissions counsel for Canada stated that it was improper for Merchant Law Group to attempt to advance this type of information through Mr. Outerbridge, who knows nothing about most of what was in his affidavit. Nevertheless, Canada chose not to apply for an order striking out any portions of the affidavit, or to identify portions of the affidavit it considered objectionable, or to enunciate the reasons for its objections. If Canada wishes to contest the admissibility of portions of the affidavit of Mr. Outerbridge, it should do so by way of a proper application.

[17] Rule 319 of the *Queen's Bench Rules of Court* states:

> **319** Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may under special circumstances be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same; and where affidavits upon information and belief are filed which do not adequately disclose the grounds of such information and belief the court may direct that the costs of such affidavits shall be borne by the solicitor filing the same. [Emphasis added]

If there are any "special circumstances" in this situation, they are not apparent. Why Mr. Outerbridge was chosen to adduce so much information known only to Tony Merchant or other lawyers in MLG is also unclear. Counsel for Canada suggests that Mr. Outerbridge was selected as the deponent to circumvent the well established rule that a lawyer should not submit his own affidavit in proceedings in which the lawyer appears as an advocate. The rule also applies to the lawyer's partners and associates.

[18] In the absence of an application by Canada to strike portions of the affidavit of Mr. Outerbridge I will simply disregard statements that are clearly argumentative or clearly beyond the deponent's personal knowledge. One portion of the affidavit I will not disregard, however, outlines financial pressures experienced by MLG as a result of its representation of many residential school claimants. Mr. Outerbridge's responsibilities within the firm qualify him to give evidence on that subject.

SUBMISSIONS OF THE PARTIES

[19] Counsel for Canada, Mr. Young, argues that when Mr. Merchant agreed under the Merchant Fee Verification Agreement to make available MLG's dockets, computer records of work in progress and any other evidence relevant to its claim for

legal fees, he effectively waived MLG's ability to claim privilege over that information. Mr. Young says that unless the court intercedes in the verification process now, Canada will be unable to determine the amount that should reasonably be paid to MLG. Although he acknowledges that some of the information Canada seeks may be subject to solicitor-client privilege, Mr. Young submits that if Deloitte is appointed as an agent of the court rather than as agent of the Federal Representative, the issues relating to privilege can be avoided. Finally, he argues that the court's jurisdiction to make orders granting Deloitte access to the information can be found in s. 34 of *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01; Rule 251 of the *Queen's Bench Rules of Court*; s. 14 of *The Class Actions Act*, S.S. 2001, c. C-12.01 or the court's inherent jurisdiction.

[20] Mr. Merchant, representing MLG, acknowledges that his law firm provided Deloitte representatives with much privileged client information before January 24, 2006. However, he says that MLG was not aware of the privilege and that it only realized its breach "in hindsight". He argues that to require MLG to disclose potentially privileged information to Deloitte at this time could seriously prejudice MLG clients advancing residential schools claims if the proposed class action is not certified, if the Settlement Agreement is not approved, or if client claims are pursued through the Independent Assessment Process. He also contends that even if the Settlement Agreement is approved, the Merchant Fee Verification Agreement is invalid and unenforceable or, if it is valid and enforceable, that it means something very different from what Canada suggests it means. He argues that in any event MLG has done everything it can do to provide verification without breaching solicitor-client privilege.

ANALYSIS

[21] In his affidavit Mr. Outerbridge deposed that MLG has experienced severe financial pressures as a result of its representation of so many clients advancing claims from their residential school experiences. As a practical matter, that circumstance would appear to be relevant to this application.

[22] It is reasonable to assume that MLG is motivated to obtain payment of its legal fees and disbursements within the parameters set out in both the Settlement Agreement and the Merchant Fee Verification Agreement. If accurate, reliable and verifiable information can be assembled and provided by MLG to the Federal Representative without breaching solicitor-client privilege, it will be in MLG's interest to find a way to assemble and provide it. If it becomes necessary to seek informed client consent to waive solicitor-client privilege, MLG will wish to ensure that its clients are properly notified and informed. The reality is that if MLG does not satisfy the Federal Representative that its claim for fees and disbursements is reasonable and supportable, its fees and disbursements will not be paid without recourse to the court. In any event, MLG will have to support its claim for fees and disbursements.

[23] Canada acknowledges that if this application succeeds, Deloitte would gain access to information that could be subject to solicitor-client privilege. However, counsel for Canada submits that when Mr. Merchant agreed to provide all relevant information pursuant to the Merchant Fee Verification Agreement, he exercised ostensible authority to waive privilege on behalf of MLG's clients.

[24] I do not agree. The information to which Deloitte wants access (which includes, but is not restricted to, client files and bills of account) may be protected by solicitor-client privilege. The privilege can only be waived by individual clients. Not only must each client know the purpose of the waiver, each client must intend to waive privilege.

[25] There is no indication that any client has been notified by MLG of an intention to disclose potentially privileged information, or that any client is otherwise aware of and has consented to such disclosure. The fact that MLG has already provided Deloitte's representative with privileged information does not mean that it can continue to do so without first securing informed client consent.

[26] One way of viewing this application is that Canada applies for orders requiring specific performance by MLG of the Merchant Fee Verification Agreement. Another way of it is that Canada seeks orders requiring MLG as one party to an agreement to provide pre-trial discovery of information to Canada as the other party to the agreement.

[27] If the orders sought by Canada are viewed as requiring specific performance of an agreement, the court could not make them without first assuming that the agreement is valid, enforceable and free from ambiguity. It would also be necessary to assume that MLG has not met its obligations under the agreement. Those are the very questions that will be central to the pending application to approve or establish the fees and disbursements payable to MLG.

[28] If the application is viewed as one seeking pre-trial discovery from MLG, it is important to note that this proposed class action has not been certified, and that the Settlement Agreement and the Merchant Fee Verification Agreement have not bee approved. Again, a litigation base for discovery must be established and contested issues of validity, enforceability, and interpretation must be dealt with before discovery obligations can be clarified.

[29] Canada suggests that the orders it seeks should be made pursuant to s. 34 of *The Queen's Bench Act, 1998*, which reads:

> 34(1) In any action or matter, a judge may call in the aid of one or more specially qualified assessors if the judge thinks it expedient to do so, and try and hear the action or matter wholly or partially with their assistance.
>
> (2) The judge shall determine the remuneration, if any, to be paid to an assessor, and may direct payment of the remuneration by any party.

[30] The above provision is designed to give the court access to the assistance of specially qualified assessors at the trial or hearing of an action. If the application to be heard on September 18, 19 and 20, 2006, results in an order for the trial of one or more issues, and if the court is of the view that it would be expedient to have the assistance of such a person, s. 34 will allow that to happen. However, given that Deloitte currently acts as an agent for the Federal Representative, it is highly unlikely that Deloitte would be retained to assist the court in that capacity.

[31] Canada also relies on Rule 251 of the *Queen's Bench Rules* which states:

> **251** The court may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken by the local registrar or other competent person, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

[32] The purpose of Rule 251 becomes more apparent from Rule 256 which reads:

> **256** The result of such proceedings before the local registrar or other person for making inquiries or taking accounts shall be forwarded in a concise certificate to the court. It shall not be necessary for the judge to sign such certificate and the certificate shall be deemed to be approved and adopted by the court and shall thenceforth be binding upon all parties to the proceedings unless discharged or varied upon application to the court by a motion to be made before the expiration of nine days after the filing of the certificate.

[33] Ordinarily, a reference under Rule 251 is ordered at or after trial to verify accounts from documents filed as exhibits in court or forming part of the pleadings. The inquiry usually involves matters of calculation. The referee does not determine issues on conflicting evidence. Those disputes are dealt with by a judge. I am satisfied that this is not a situation in which an order pursuant to Rule 251 would be appropriate.

[34] Canada also cites s. 14 of *The Class Actions Act* which states:

> **14** The court may, at any time, make any order it considers appropriate respecting the conduct of a class action to ensure a fair and expeditious determination and, for that purpose, may impose on one or more of the parties any terms it considers appropriate.

[35] Section 14 applies only to a "class action", a term defined in s. 2 of *The Class Actions Act* as follows:

> 2 In this Act:
>
> . . .
>
> "class action" means an action certified as a class action pursuant to Part II.

[36] This action has not been certified as a class action. The application for certification is scheduled to be heard on September 18, 19 and 20, 2006. Until it is certified, s. 14 does not apply.

[37] Taking a broader view, the purpose of an order under s. 14 is to ensure a fair and expeditious determination of a class action. Although class actions legislation is intended to promote judicial economy and reduce the costs of litigation by aggregating similar individual actions, it is settled that the desire for an expeditious determination must be balanced with the need to ensure fairness.

[38] It would not promote the goals of judicial economy or efficiency for the court to order what amounts to specific performance of the Merchant Fee Verification Agreement before it has first heard the application for certification, decided whether it will approve the Settlement Agreement, and determined whether the Merchant Fee Verification Agreement has been incorporated into the Settlement Agreement. Similarly, it would not promote those goals for the court to make the orders requested by Canada before it has determined the obligations of each party under the Merchant Fee Verification Agreement and whether or not those obligations have been satisfied.

[39] Finally, Canada invites the court to rely on its inherent jurisdiction to make the requested orders. A superior court's inherent jurisdiction to control its own process has been defined as the exercise of its residual power to ensure due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. That jurisdiction is to be exercised judicially and only when the relief sought cannot reasonably and realistically be obtained by the applicant in some other lawful manner. The court's inherent jurisdiction will not be exercised in a manner that effectively renders remedial legislation redundant (See *Halstead v. Anderson* (1993), 115 Sask. R. 257 (Sask. Q.B.) per Baynton J. at para. 24).

[40] The procedure for settlement and approval of legal fees and disbursements in class actions is dealt with specifically in Rule 86 of *The Queen's Bench Rules* which provides:

> 86(1) An application for approval of an agreement respecting fees and disbursements must be brought after:
>
> (a) judgment on the common issues; or
>
> (b) approval of a settlement, discontinuance or abandonment of the class action.
>
> (2) The application pursuant to subrule (1):
>
> (a) shall be made to the judge who presided over the trial of the common issues, or who approved the settlement, discontinuance or abandonment, as the case may be, and
>
> (b) shall be made on such notice to class members as is required by the court.
>
> (3) Where, on an application pursuant to subrule (1), the court determines that the agreement ought not to be followed, the court may amend the terms of the agreement.

[41] Pursuant to Rule 86, an application for approval of an agreement respecting fees and disbursements must be brought after approval of a settlement. That is so because only then is the court in a position to consider relevant factors which may include, in addition to the overall fairness of the fee agreement, the competing positions of the parties in the law suit, the risks and probable costs of trial, and whether the proposed settlement is fair, reasonable and in the best interests of those affected by it. The sequence in which issues are to be addressed has been prescribed by Rule 86 and the court should not alter the process. Again, this application is premature.

CONCLUSION

[42] Canada's application is dismissed. Either party may speak to the question of costs in conjunction with the application for approval of the Settlement Agreement, including fees and disbursements payable to counsel, scheduled to be heard on September 18, 19 and 20, 2006.

D. P. Ball J.

Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CHARLES BAXTER SR., ELIJAH BAXTER, LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, JAMES FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, PETER GEORGE TAATI AIRO, MICHELLINE AMMAQ, DONALD BELCOURT, JOHN BOSUM, RHONDA BUFFALO, FREDDIE JOHNNY EKOMIAK, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, JIM CHEWANISH, EARL KENNETH COTE, MALCOLM DAWSON, ANN DENE, KEITH DIETER, VINCENT BRADLEY FONTAINE, MARIE GAGNON, PEGGY GOOD, CLIFFORD HOUSE, FRED KELLY, ROSEMARIE KUPTANA, JIMMIE KUMARLUK, ELIZABETH KUSIAK, THERESA LAROCQUE , JAME McCALLUM, CORNELIUS McCOMBER, STANLEY THOMAS NEPETAYPO, CAROLYN TAKATAK NIVIAXIE, FLORA NORTHWEST, ELIASIE NOWKAWALK, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, SIMON SCIPIO, ELIZABETH SCIPIO-KOOKASH, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, ALVIN GERALD STRAIGHTNOSE, EDWARD TAPIATIC, BLANDINA TULUGARJUK, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE BAPTIST CHURCH IN CANADA, 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, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, IMPACT NORTH MINISTRIES, INSTITUT DES SOEURS DU BON CONSEIL, JESUIT FATHERS OF UPPER CANADA, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (also known as LES REVERENDS PERES OBLATS DE L'IMMACULEE CONCEPTION DE MARIE), LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (PROVINCE DU CANADA-EST), LES PERES MONTFORTAINS (also known as THE COMPANY OF MARY), LES REVERENDS PERES OBLATS DE MARIE IMMACULEE DES TERRITOIRES DU NORD OUEST, 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), LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE NICOLET AND THE SISTERS OF ASSUMPTION, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA, LES SOEURS DE NOTRE DAME AUXILIATRICE, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE, LES SOEURS DE ST. FRANCOIS D'ASSISE, MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEARTS AND MARY IMMACULATE or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE), SISTERS OF THE HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDERS OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE), SISTERS OF THE PRESENTATION OF MARY (SOEURS DE LA PRESENTATION DE MARIE), ST. PETER'S PROVINCE, THE BENEDICTINE SISTERS, THE BOARD OF THE HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DAUGHTERS OF THE HEART OF MARY (also known as LA SOCIETE DES FILLES DE COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY), THE DIOCESE OF MOOSONEE,, THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE GREY NUNS OF MANITOBA INC. (also known as LES SOEURS GRISES DU MANITOBA INC.), THE GREY SISTERS NICOLET, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY OBLATES OF MARY IMMACULATE-GRANDIN PROVINCE, THE MISSIONARY OBLATES OF MARY IMMACULATE-PROVINCE OF ST. JOSEPH, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA , THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA), THE OBLATS OF MARY IMMACULATE, THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, 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 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 OF PROVIDENCE OF WESTERN CANADA, THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS), THE SISTERS OF SAINT ANNE, THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE, THE SISTERS OF THE CHARITY OF ST. VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX), THE SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE SYNOD OF THE DIOCESE OF BRITISH COLOMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF WESTMINISTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF EDWARD NAGEL
(sworn August 11, 2006)

I, EDWARD NAGEL, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a Chartered Accountant and Senior Manager in the Deloitte & Touche LLP Forensic & Dispute Services group ("Deloitte") and as such have personal knowledge of the matters herein deposed to.

2. I have focused exclusively on forensic and investigative accounting and dispute resolution since 1998. My experience encompasses conducting financial investigations, anti-fraud consulting, analysing and quantifying economic damages and resolving allegations of fraud and financial misconduct. I have provided expert witness testimony before the Superior Court of Justice in Ontario.

Scope to Deloitte Engagement

3. Deloitte was retained by Torys LLP ("Counsel") to assist in reviewing retainer agreements and other data relevant to this matter, in order to assist the Honourable Frank

Iacobucci in his evaluation and determination of the amount payable to Merchant Law Group (MLG") for their services in relation to the Residential School claims. Throughout, Deloitte has been represented by Peter Dent, Eric Khan and myself.

4. Specifically, as part of the verification process (hereinafter referred to as the "verification exercise"), Deloitte was asked to review the following:

(a) The number of retainer agreements that MLG had with its clients as at May 30, 2005;

(b) The amount of Work-in-Progress ("WIP") in respect of each retainer agreement, bearing in mind the $4,000 cap for each retainer agreement; and

(c) The amount and nature of the class action work that MLG indicated it carried out.

Approach to Deloitte Engagement

5. Deloitte (myself, along with Messr. Khan) attended MLG's Regina offices located at 2401 Saskatchewan Drive, Regina, Saskatchewan, S4P 4H8, from January 17, 2006 to January 24, 2006. We participated in several meetings with MLG representatives, including Tony Merchant, Evatt Merchant, Don Outerbridge, Gordon Neill, Cindy Roth and MLG's Information Technology professional (name unknown).

6. On January 17, 2006, MLG provided Deloitte with an undated document (copy attached as exhibit "A") relating to its physical files, confidentiality, disbursements as well as various correspondence compiled by MLG regarding solicitor-client privilege from select provincial law societies, including Manitoba, Alberta, and British Columbia (copies attached as Exhibit "B"). This documentation, together with MLG's letter to Deloitte dated January 24, 2006, (copy attached as Exhibit "C") highlighted MLG's concerns regarding solicitor-client privilege and client confidentiality, should Deloitte obtain unfettered and unsupervised access to its client files.

7. MLG advised Deloitte that there were 543 banker boxes, plus a further 102 3-foot tank drawers containing files relating to this matter. Deloitte mapped the location of the boxes,

cabinets and rooms in order to facilitate future review of such client files. Deloitte opened a random selection of 25 boxes/cabinets to verify that the labelled files contained within each were consistent with the list included with the box/cabinet, where available. Free access to remove and review the contents of MLG's client files was asked for; however, it was not provided to us. Deloitte cannot confirm the total number of boxes/files purported by MLG to relate to this matter.

8. MLG advised Deloitte that they were unable to obtain approximately 200 additional files relating to this matter (See Exhibit A).

9. Deloitte assembled the following team of professionals to complete the aforementioned scope of work (including the dates that they attended MLG's offices):

(a) Edward Nagel - January 17-24, 2006;

(b) Eric Khan - January 17-24, 2006;

(c) Marcia Barry - January 18-20, 2006;

(d) Thomas Matthews - January 18-24, 2006;

(e) Kimberly Mazzei - January 20-21, 2006;

(f) Nicole Osayande - January 20-22, 2006; and

(g) Ian Middlemas - January 22-24, 2006.

10. In an effort to address MLG's concerns relating to solicitor-client privilege and confidentiality of their client files, and based on discussions between Deloitte and MLG, Deloitte developed a Laptop Security and Chain of Custody document ("Protocol Document"). A copy of the Protocol Document that was executed by MLG and Deloitte on January 19, 2006, is attached hereto and marked as Exhibit "D". Pursuant to the Protocol Document, Deloitte sourced and configured two dedicated laptops with appropriate encryption software that was acquired for this matter. Deloitte also obtained four external USB devices

to back up its work product files. The terms of the Protocol Document required that all confidential information be maintained at MLG's Regional offices.

11. During our attendance at MLG's offices, Deloitte obtained the following information/documentation (in addition to documents otherwise referred to herein):

(a) A list of typical documents contained in MLG client work product files and samples of such documents.

(b) An electronic listing of the 8,560 clients with whom MLG claims to have had a solicitor-client relationship in this matter ("Client Listing").

(c) Photocopies of MLG's available 4,823 retainer agreements.

(d) An electronic summary listing of MLG's WIP and disbursements *by client* for the period from inception of this matter to November 20, 2005 and for November 21, 2005 to January 20, 2006.

(e) Four MLG client work product files, as selected by MLG, in relation to this matter.

(f) Hard copy detailed WIP and disbursement reports provided by MLG for seven clients in relation to this matter, as selected by Deloitte.

(g) Curriculum vitae for Don Outerbridge, MLG Director of Administrative Activities and Financial Management.

12. Deloitte developed an Access database to capture the information from our verification exercise. Deloitte provided MLG with screen prints of our database for their review, which included the information fields proposed to be captured during the verification exercise.

13. Deloitte developed a sampling approach for purposes of reviewing MLG's client files.

14. Deloitte reconciled the hard copy retainer agreements provided by MLG to its Client Listing, which encompassed a review of MLG client codes, MLG signatures, client signatures and retainer agreement dates.

15. Deloitte prepared three written document requests dated January 20, 2006, January 22, 2006 and January 24, 2006 (copies attached as Exhibit "E"). The first two requests were provided to MLG; the third document request was not provided to MLG due to the cessation of the verification exercise (See paragraphs 27 - 30).

16. Deloitte conducted preliminary research on EasyLaw to ascertain the functionality of the software with respect to obtaining electronic output from MLG's billing system.

Observations

17. Deloitte requested of MLG, but did not receive, the following information/documentation, which I believe is required to complete the verification exercise:

(a) Electronic listings of summary WIP for the *Residential Schools' class action file* from the inception of this matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006.

(b) Electronic listing of total hours billed by MLG lawyers for each year since the inception of this matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006 in relation to:

(i) This matter; and

(ii) Total MLG billings.

(c) Electronic listing of MLG lawyers with their respective level, initials, hourly rate(s), and related employee codes.

(d) For the sample of client files included in Deloitte's request dated January 22, 2006 (*and Deloitte's revised request for information dated January 24, 2006):*

(i) All information/documentation that supports a substantial solicitor-client relationship.

(ii) A line-by-line detail of hours billed by MLG lawyers, by day, from the inception of this matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006.

(iii) A line-by-line detail of disbursements incurred from the inception of this matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006.

(e) Confirmation from MLG as to whether the following client codes relate to this matter (identified from the summary WIP listing referred to in paragraph 11 above) 479907, 569703, 539519, 409782, 480422, 465454, 471025, 470107, 460380, 469118, and 239742.

(f) Verification from Cindy Roth of MLG whether MLG's Billing System (EasyLaw) could be exported to Excel.

(g) Sample retainer agreement formats used by MLG's offices to secure clients in relation to this matter.

18. Further to the information/documentation referred to herein, additional as yet undetermined information may be required to complete the verification exercise. However, the potential need for additional information will only become known upon the resumption of the verification exercise.

19. MLG provided Deloitte with access to its hardcopy retainer agreements, which amounted to 4,823 or approximately 56% of MLG's 8,560 purported clients. Based on Deloitte's review of such retainer agreements, we noted the following:

(a) 1,704 (or 35%) of the 4,823 were not signed by MLG.

(b) 31 (or 0.6%) of the 4,823 were not signed by the client.

(c) 782 (or 16%) of the 4,823 were not dated.

(d) 238 (or 5%) of the 4,823 were dated after May 30, 2005.

(e) 42 (or 0.9%) of the 4,823 were in a different format from the remaining population of retainer agreements provided by MLG.

20. During Deloitte's attendance at MLG's offices, we noted that additional retainer agreements were provided for consideration; these additional retainer agreements were, for the most part, dated in 2006.

21. As part of Deloitte's review of the 25 boxes/cabinets referred to in paragraph 7 above, Deloitte identified at least one box included amongst MLG's purported work product, which was unrelated to this matter.

22. At no time during the site visit to MLG's offices was Deloitte afforded unsupervised access to MLG work product. Further, Deloitte's review of MLG's purported 8,560 client work product files was restricted to a cursory review of four client work product files, all of which were selected by MLG.

23. Deloitte was provided with limited access to MLG's files for the purpose of reviewing WIP, which encompasses time spent on the class action file and time spent on individual client files. In order to test the validity of MLG's WIP, a detailed approach is required. Therefore, a verification of the *bona fide* hours charged could not be performed based on the procedures conducted to-date.

24. Deloitte noted that MLG Executive Director, Don Outerbridge, had time charged to client files. Tony Merchant stated that Don Outerbridge's time charges reflect work performed by MLG paralegal staff who were said to be dedicated exclusively to this matter.

25. MLG advises Deloitte that all Residential Schools' clients were identified with a 6-digit code that commenced with a "39". Based on a review of MLG's high-level WIP report, Deloitte identified at least 11 clients that appear to be unrelated to this matter based on their assigned code. Tony Merchant stated that no additional effort would be provided by MLG to remove the unrelated clients and that MLG would not be responsible for excluding same from its WIP report.

26. Based on Deloitte's review of seven detailed WIP reports provided by MLG (selected by Deloitte), our observations include the following:

(a) Multiple time and disbursements entries dated February 1, 2004 pertaining to work performed from September 1998 to early 2004: this requires further clarification. We noted a further entry dated February 1, 2004 for one lawyer that exceeded 1,200 hours; the description indicates "Settlement Conference". While a conversion of the EasyLaw billing system was purportedly conducted on February 1, 2004, and may explain these entries, this illustrates an apparent weakness of MLG's billing system in that it permits time entries to exceed 24 hours per day.

(b) The hourly rate charged by Tony Merchant on one of the detailed WIP reports that Deloitte reviewed relating to this matter was $750 per hour in contrast to $450 per hour charged by him on an apparently unrelated engagement.

(c) Deloitte noted time entries for 0.02 (or 1.2 minutes) corresponding to the preparation of letters by Tony Merchant amongst the seven WIP reports. Tony Merchant stated that recording time in this manner is common practice when the same letters are sent to multiple clients and charges are allocated amongst such clients.

Cessation of Verification Exercise

27. On January 23, 2006, MLG agreed to provide Deloitte with access to its client files based on the information fields and sampling methodology referred to in paragraphs 12 and 13, respectively and the Protocol Document that was developed.

28. In anticipation of gaining access to MLG's client files, Deloitte prepared a revised document request, a copy of which is included within Exhibit "E", that we intended to provide to MLG on the morning of January 24, 2006.

29. On January 24, 2006, upon arrival to MLG's Regina offices, Deloitte was advised that as a result of an MLG partner meeting, a letter setting out MLG's position with regards to Deloitte's access to its client files, would be forthcoming (See Exhibit "C").

30. Upon receipt of the letter referred to in paragraph 29 and a meeting between Deloitte (myself, along with Messr. Khan) and Tony Merchant, Evatt Merchant, Gordon Neill, and Don Outerbridge it became our understanding that MLG would not be granting further access to its client files, as previously agreed. In the absence of further access to MLG client files, the carrying out of the verification exercise would not be possible, based on the planned methodology described herein.

31. Based upon the limited access to MLG's records, documents and client files, Deloitte has not been able to complete its review of the following:

(a) the number of retainer agreements that MLG had with its clients as at May 30, 2005;

(b) The amount of WIP in respect of each retainer agreement, bearing in mind the $4,000 cap for each retainer agreement; and

(c) The amount and nature of the class action work that MLG indicated it carried out.

Time Spent by Deloitte team at the MLG offices

32. Although the Deloitte team was present for eight days at MLG's offices from January 17 to 24, 2006, the majority of that time was spent on meetings and planning with respect to the verification exercise, rather than executing the verification exercise. In addition, although we arranged for substantial resources (staff and equipment) to be present to execute the review, these resources could not be effectively utilized because we were given only very limited access to the documents we needed to execute the verification exercise.

33. Deloitte spent the majority of its time conducting the following:

(a) Participating in a series of meetings with various representatives of MLG to address concerns raised by MLG regarding solicitor-client privilege and timely completion of the verification exercise;

(b) Designing a mutually agreed upon methodology with MLG to conduct the verification exercise;

(c) Planning for the execution of the verification exercise; and

(d) Reconciling retainer agreements to MLG's Client Listing.

34. To the extent that Deloitte was able to conduct some aspects of the verification exercise (e.g. reviewing retainer agreements), Deloitte experienced delays given that Tony Merchant's consent was required for all significant decisions regarding MLG's participation in the review as well as access to its files. Tony Merchant's limited availability and competing client commitments restricted meeting times and further delayed the verification exercise.

35. As a result, Deloitte could not execute the verification exercise.

SWORN BEFORE ME at the City of Toronto, on August 11th, 2006.

A Notary Public in and for the Province of Ontario

KATE WILSON

Edward Nagel

THIS IS EXHIBIT .....A..... REFERRED TO IN THE AFFIDAVIT OF EDWARD NAGEL
SWORN BEFORE ME, THIS .....11th.....
DAY OF .....August..... 2006

Kate Wilson
.....

A Commission for Taking Affidavits

KATE WILSON

MERCHANT LAW GROUP

(AN INTERPROVINCIAL LAW FIRM)

SASKATCHEWAN DRIVE PLAZA 2401 SASKATCHEWAN DRIVE REGINA CANADA S4P 4H8 TELEPHONE 306 359-7777 FACSIMILE 306 522-3299

GORDON J.K. NEILL, Q.C.
DREW R. FILYK
Residing in REGINA
L. JAMES NEUMEIER *
JONATHAN S. ABRAMETZ
Residing in SASKATOON
J. E. JOSHUA MERCHANT
NATACHA DEVIL *
KEVIN LIESLAR
HOWARD TENNENHOUSE
WILLIAM G. SLATER
Residing in MONTREAL
REGISTERED MEDIATOR ▲

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MICHAEL R. TROY
ANTHONY L. BORYSKI
DWAYNE Z. BRAUN
JEREMY C.A. CAISSIE
RICHARD YAHOLNITSKY
RUPINDER K. DHALIWAL
GREGORY R. PINCOTT, Phd *
ANNA SHULMAN
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SUNEIL A. SARAI
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PRACTISES UNDER CORPORATION ‡

DAVID A. KALVORSEN ‡
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ROBERT G. CROWE *
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JONATHAN CROSS *
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JAMIE CRAMER *
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DARREN WILLIAMS
IN ARTICLES -

HENRI P.V. CHABANOLE ▲‡
STEVEN A. BAICHERT -
TIMOTHY E. TURPLE
EVATT F.A. MERCHANT
AYYMAN HAMMOUD *
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JANE ANN SUMMERS
SURREY/ VICTORIA
IN ARTICLES (ALBERTA) *

GERALD B. HEINRICHS
STEPHEN HILL -
JOHN D. HARDY
MATTHEW V.R. MERCHANT
TREVOR NEWELL
HELMUT ERMS
JASON FIEGE *
GRAHAM K. NEILL
S. NORMAN ROSENBAUM
SATNAM S. AUJLA
OWEN FALQUERO
NON-PRACTISING *

Physical Files

Although we are unable to get our hands on about 200 files, the balance of the files have been assembled in Regina. This constitutes 543 12" x 18" bankers boxes of files sent in from other offices which are in all our hallways and an additional 102 tank drawers which are 3feet long filled with the Regina files. If the files were stacked one on top of the other they would reach 849 feet into the air and with the currently missing files probably 900 feet high.

Confidentiality

Concerning confidentiality I enclose copies of the letters regarding solicitor client privilege and confidentiality received from Law Societies. Interpreting their advice liberally towards granting you maximum access, we believe that because you were not lawyers but here to count numbers and while client names are per se confidential, you could, within the office and without removing copies, be permitted to look at lists which disclose client names and basic computer information.

Disbursements

Our disbursements will change marginally as additional costs are docketed. Our fees will continue to accumulate as ongoing general residential school work continues, such as responding to inquiries by class members.

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KATE WILSON

The Law Society of Manitoba

219 KENNEDY STREET
WINNIPEG, MANITOBA
R3C 1S8

ALLAN FINEBLIT, Q.C., B.A., LL.B.
Chief Executive Officer

MARILYN W. BILLINKOFF, B.A., LL.B.
Deputy Chief Executive Officer

C. KRISTIN DANGERFIELD, LL.B.
Senior General Counsel

DARCIA A.C. SENFT, LL.B.
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Direct Line: (204) 926-2013
Fax: (204) 956-0624
Website: www.lawsociety.mb.ca
E-Mail: kdangerfield@lawsociety.mb.ca

January 4, 2005

Delivered by Courier
Personal and Confidential

Mr. S. Norman Rosenbaum
Merchant Law Group
812 - 363 Broadway
Winnipeg, MB R3C 3N9

Dear Mr. Rosenbaum:

Re: Practice Advice

Thank you for your letter of December 22, 2005. While you have raised a number of specific issues, I thought that given the time frame to which you have referred, it would be most useful to respond to your inquiry generally, and then should you require anything further, you can follow-up with me as required.

You have quite properly identified some significant concerns associated with a review of client files by a third party, in this case, chartered accountants retained by the Government of Canada. I would presume that the terms of the settlement reached with the Government of Canada, contemplate a process for approving fees which may in part address some of your concerns. You did not, however, reference any particular provisions in this regard, but it would nonetheless be prudent to review the terms of settlement specifically as they relate to the fee payment. For example, presumably the Government of Canada, as a named defendant, is already in a position to identify the names of your clients. While such information is always confidential, it is not the subject of solicitor client privilege. I would assume that no settlement funds will be forthcoming from the Government of Canada without the identification of the claimants. Leaving aside for the moment the issue of the need for client consent to disclose that information, if it is not already in the possession of the Government of Canada, is it likely that any funds would be forthcoming in the absence of that disclosure?

In any event, the Rules of Professional Conduct prevent a lawyer from releasing confidential information to a third party absent the client's consent. That consent may be provided either expressly or impliedly. In these unique circumstances, where your law firm will benefit significantly by a substantial payment from the Government of Canada, no information ought to be disclosed without the express authorization from your clients to do so. It would be incumbent upon you to carefully document the proposal with respect to the fee payment to your clients, in order that they can truly provide an informed consent to disclosure of what would otherwise be confidential (if not the subject of solicitor client privilege) information. Furthermore, anytime a third party pays some or all of a client's fees and disbursements, there is a risk of a conflict of interest. In particular, the lawyer may favour the interests of the third party (or indeed the lawyer's own interests) over those of the client. In the circumstances, it would be prudent to recommend that your clients obtain independent legal advice prior to authorizing you to disclose any information to agents of the Government of Canada for the purpose of securing payment of your legal fees.

Perhaps once you have had the opportunity to consider these comments, you may wish to contact the writer further to discuss any remaining concerns you might have.

Yours truly,

Kristin Dangerfield

C. Kristin Dangerfield
Senior General Counsel

CKD/lh

The Law Society of British Columbia

VIA FACSIMILE 306-522-3299

REPLY TO: Barbara Buchanan
Direct Line: 604-697-5816
Fax: 604- 646-5902
E-mail: bbuchanan@lsbc.org

December 28, 2005

Mr. E.F. Anthony Merchant, Q.C.
Barrister & Solicitor
2401 Saskatchewan Drive
Regina, Saskatchewan S4P 4H8

Dear Mr. Merchant:

Re: Duty of Confidentiality to Clients

As discussed in our telephone conversation of December 28, 2005, I am in receipt of your letter dated December 22, 2005 addressed to Ms. Felicia Folk. Ms. Folk has left the Law Society of BC and has gone into private practice.

Your questions are dealt with in Chapter 5 (Confidential Information) of the *Professional Conduct Handbook*. Rules 1 – 5 and 11 are particularly pertinent to the questions you raise. As an alternative to referring to the hard copy, you can access the *Professional Conduct Handbook* on the Law Society of BC website (www.lawsociety.bc.ca). A lawyer may only disclose a client's confidential information if the client has given the lawyer the authority to do so.

As I mentioned to you yesterday, I recommend that you also review the information on the Law Society website regarding the treatment of PST. Since you were not aware of the December 2005 BCCA decision regarding PST, you may wish to provide an email address to the Law Society of BC. In addition to posting PST information on the website, the Law Society sent the same information to BC lawyers by email.

You told me that you have two offices in BC so it concerns me that the PST information did not come to your attention until we spoke. You may wish to consider providing an email address to the Law Society so that you receive information quickly. You could even make the Law Society website your home page.

I trust this will be helpful to you.

Yours truly,

Barbara Buchanan

Barbara Buchanan
Practice Advisor
Ethics & Practice Advice

B4

CONFIDENTIALITY & PRIVILEGE: LAWYERS' ACCOUNTS

The distinction between the evidentiary law of privilege and a lawyer's duty to maintain confidentiality is occasionally focussed on the question of the production as evidence of a lawyer's accounting records.

Manes and Silver summarized the rule[1]:

> Generally, solicitor's dockets, accounts and cheques are not privileged because they are not communications occurring for the purpose of obtaining legal advice. However, where the dockets, accounts or cheques or attendant communications thereon may contain privileged notations by the solicitor, the court should review and delete those notations before ordering production.

The authors caution that "...such information must still be relevant to an issue in the proceedings...".

A lawyer's time records were in issue where a litigant sought to recover solicitor-client costs[2]. To an extent, privilege had been lost because the records had been proven in open court but, still, the court thought there might be unrelated or otherwise confidential information justifying some deletions.

The test is whether the records contain information amounting to communications for the purpose of obtaining legal advice. The Supreme Court of Canada has held that accounting information provided to a legal aid agency was privileged[3]. The Federal Court of Appeal has discussed the difference between privilege and confidentiality in the context of production of solicitor's accounts[4]. In considering what was producible, it stated[5]:

> Perhaps the most important distinction that needs to be highlighted is that it is only communications that are protected by the privilege. Acts of counsel or mere statements of fact are not protected....The general rationale for not protecting matters of fact or acts done is the detrimental effect it would have on litigation. For example, a person cannot avail himself or herself of the privilege by simply communicating a fact to a lawyer or allowing a lawyer to perform an act in his or her place.

Holding that a lawyer's statements of account are privileged, the court explained that trust ledgers and other financial records of the lawyer are not. The parts of those records revealing privileged communications can be severed. The cases are "...not really in conflict. It merely reflects the existence of a broad exception to the scope of the privilege, namely, that it is only communications which are protected. The acts of counsel or mere statements of facts are not protected[5a]". The Supreme Court of Canada has, in the context of search warrants, followed *Stevens* and held that even the amount of fees is privileged[7].

---

[1] *Solicitor-Client Privilege in Canadian Law*, Butterworths, Toronto, 1993, at p. 173.
[2] *Mintz v. Mintz* (1983), 38 C.P.C. 125 (Ont. H.C.J.)
[3] *Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590
[4] In *Stevens v. Canada*, [1998] F.C.J. No. 794
[5] Ibid, para.25.
[5a] Ibid, para. 42.
[7] *Maranda v. Richer*, [2003] S.C.J. 69

Documents of this nature produced on examination for discovery are subject to an implied undertaking that they cannot be used for any purpose outside of the litigation.

In summary, statements of account (invoices, bills of account) to clients are privileged as communications for the purpose of obtaining legal advice. Subject to severing portions containing advice or communications and to relevance, the following will be producible:

- Trust account records;
- Time records;
- Cancelled cheques and cheque stubs;
- Cheque requisitions;
- Periodic financial statements;
- Certain disbursement records.

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SATNAM S. AUJLA
OWEN FALQUERO
NON-PRACTISING *

January 24, 2006

Deloitte and Touche LLP

Attention: J. Eric Khan & Edward Nagel

Dear Sirs:

I have been asked to write on behalf of our firm, further to a meeting which took place this morning.

For more than a decade, I have been the person designated to take the lead on issues of ethics and Law Society compliance. As a result, I have been asked to outline our firms decision concerning the verification process.

We collectively do not think there is more information we can provide you without being in clear breach of the cannons of ethics and our obligations to maintain solicitor-client confidentiality.

We can not breach solicitor-client privilege *to some degree*. It is simply not permissible. Moreover, any breach is simply impossible. There is no settlement of residential school litigation in place. Even if the common experience settlement is approved, thousands of our clients will have an ongoing litigation interest against your client (the federal government, under the proposed Independent Assessment Process). Some clients may also choose to reject the proposed structured settlement process, and instead will face a court trial against your client.

It is unallowable to disclose solicitor-client privileged information to a third party, and the proposed disclosure of information here is to the agents of an opposing party regarding ongoing litigation.

There is no issue of the sacrosanct nature of the solicitor and client duty of confidentiality, and to use a Supreme Court wording, it is a superordinate principle, where appearance is every bit as important as reality, so that members of the public will know with absolute assurance that under no circumstances will the solicitor and client duty of confidentiality be breached. Bearing in mind the importance of this principle, the letters from Law Societies' practice advisors were stark in their clarity.

Nine of us met this morning over the issue of verification of legal fees. Tony ane Evatt Merchant, and to a limited extent Tim Turple, have been involved in various discussions concerning these matters in the past week. We have concluded that the verification process can not override our obligations under solicitor-client privilege, and I underscore advice we have received:

From the Manitoba Law Society: "In any event, the Rules of Professional Conduct prevent a lawyer from releasing confidential information to a third party absent the client's consent.... In these unique circumstances, where your law firm will benefit significantly by a substantial payment from the Government of Canada, no information ought to be disclosed without the expressed authorization from your clients to do so.... Furthermore, anytime a third party pays some or all of a client's fees and disbursements, there is a risk of a conflict of interest. In particular, the lawyer may favour the interest of the third party (or indeed the lawyer's own interests) over those of the client. In the circumstances, it would be prudent to recommend that your clients obtain independent legal advise prior to authorizing you to disclose any information to agents of the Government of Canada for the purpose of securing payment of the legal fees."

From the Law Society of British Columbia: "A lawyer may only disclose a client's confidential information if the client has given the lawyer the authority to do so."

From the Alberta Law Society: "The Supreme Court of Canada has held that accounting information provided to a legal aid agency was privileged. The Federal Court of Appeal has discussed the difference between privilege and confidentiality.... The Supreme Court of Canada has, in the context of search warrants, followed *Stevens* and held that in the amount of fees as privileged."

As the Law Society of Alberta has pointed out, the Sinclair Stevens decision, which has been followed in other cases, indicates that even solicitors accounts are privileged.

We have attempted to provide you information to allow for "verification" without breaching solicitor-client privilege. Additional information can only amplify the information provided and should not be necessary. This process was not intended to be an audit for value or similar process.

No Law Society, jurist, or arbitrator would find that it was acceptable for solicitor-client privilege to be breached, based upon clearly defined precedent, even if a different intention were intended by the federal government, Torys, and/or Merchant Law Group. These three entities can not enter into an agreement resulting in the deliberate breach of the solicitor and client duty of confidentiality to our clients and our requirement to protect the privileged and confidential information of our clients can not be contravened.

I want to note that we have already given you access to a significant amount of information. You have seen our retainer agreements. You have seen our boxes and cabinets of files which we estimate would stretch 900 feet. You have seen our pre- and post-November 20 work in progress figures. We have provided you with a list of our files which includes an indication of when they were opened. Those records are accurate and we are prepared to swear affidavits confirming the same, as is contemplated by the agreement in principle.

C2

Although you have discussed with Evatt and Tony the possibility of being allowed to examine files, the same is simply impossible. The issues of propriety, confidentiality, and privilege prevent it.

Any client specific information you have received must be returned. Your own data is yours to retain but any information that we have provided must remain here at Merchant Law Group, and if there is any information in dispute, it should be sealed in envelopes, which I will hold in trust.

I have been providing legal advice to accountants and auditors on a regular basis for over the last 35 years, and have some knowledge of the Handbook of the Institute of Chartered Accountants. With respect, we believe that the agreement in principle is being incorrectly interpreted by your client if they believe it gives you authority to see our client files or obtain more information than we have provided or are prepared to provide. If you are unable to complete verification based on the records provided, may I suggest that you qualify your opinion accordingly.

We regret any inconvenience this has caused you. I recognize that both sides have made substantial efforts. We appreciate that you have been here for eight days straight. We too put forward substantial effort in this process. We had hundreds of boxes of files assembled and shipped to Regina. We prepared lists and furnished copies of the over 5,000 retainer agreements from our files. When we made arrangements for you to come here, we thought you would be here for four days or less. We believed we were making arrangements for you to come last week in order to complete the verification process and report back to your client this week, so that the final agreement could be signed by February 1. We have done what we can but our firm as a whole has to ensure that we act appropriately. Merchant Law Group is not prepared to allow the creation of significant difficulties with our clients, the courts, and our Law Societies. We will not knowingly do the wrong thing and the terms of verification do not and could not require our firm to do so.

Thank you.

Yours truly,

MERCHANT LAW GROUP

Per:

Gordon J.K. Neill, Q.C.

GJKN*lc

cc. Hon. Frank Iacobucci, Q.C.
John Terry

C3

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A Commission for Taking Affidavits

KATE WILSON

Deloitte.

Deloitte & Touche LLP
79 Wellington Street West
Suite 1900
P.O. Box 29 TD Centre
Toronto ON M5K 1B9
Canada

Tel: 416.643.8309
Fax: 416.601.6690
www.deloitte.ca

Memo

Date: January 19, 2006

To: Tony Merchant, Merchant Law Group ("MLG")

From: Peter Dent, Edward Nagel, Eric Khan

Subject: Laptop Security and Chain of Custody

In order to maintain a secure computing environment (password protection and hard drive encryption) we would endeavour to take the following into consideration.

Laptop Configuration and Use

1. Forensically sterilize the dedicated laptop hard drives so that it contains no data whatsoever (as if the hard drive was factory sealed).
2. Install the following to create a "base" Operating System ("OS"):
    a. Windows XP
    b. Microsoft Office (which will include Microsoft Access)
    c. McAfee Anti-Virus Enterprise software
    d. PGP Whole Disk Encryption
    e. Install all Windows XP security updates
    f. Password protect the laptop
3. We would acquire a forensic copy of the laptops to create a snapshot of their configuration.
4. Develop and use the Microsoft Access database solely on the dedicated laptops.
5. Encrypted nightly backups copied to CD or USB thumb drives.

Maintaining the Chain of Custody

1. The dedicated laptops would be left on-site at MLG's Regina office in a secure location:
   - If there was a breach of the physical security of the location and the laptops are stolen, the data contained within would be unreadable due to encryption.
2. The backup CD's/thumb drives would also be left on-site in a secure location but not together with the laptops:
   - If there was a breach of the physical security of the location and the CD's or USB thumb drives were stolen, the data contained within would be unreadable due to encryption.
3. Only Deloitte practitioners will know the passwords used to log into the laptops.
4. A forensic analysis can be done on the laptop hard drives at any time during the engagement to determine any changes that have occurred to the data contained within.
5. Upon completion of Deloitte's fieldwork, all personal information (defined as client name, client address and client six-digit code) captured will be removed from all files, electronic and paper. In order to facilitate future reference to MLG's files, Deloitte will provide MLG with a legend that cross-references MLG's list with Deloitte's list using assigned identifiers.
6. All personal information (as defined above) provided to Deloitte by MLG will be maintained at all times at MLG's Regina offices.
7. MLG agrees to maintain the cross-reference list referred to in item #5 above until specifically instructed by Counsel, John Terry, Torys LLP (Toronto).

Scalability

1. As Deloitte will maintain a snapshot of the laptops prior to any sensitive data being put onto the hard drives, we can configure a third laptop to be used for the engagement.

Local LAN

1. We will implement a Local Area Network ("LAN") to ensure that all laptops utilize a single database to ensure data completeness.

D2

Tony Merchant
On behalf of The Merchant Law Group

Peter Dent
On behalf of Deloitte & Touche LLP

D3

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KATE WILSON

RESIDENTIAL SCHOOLS CLASS ACTION MATTER
Request for Information

Request from: Eric Khan
Request to: Cindy Roth
Date Requested: January 20, 2006

Nature of Request:

1. Please provide a report for the following Residential School clients, which includes a line-by-line detail of hours billed per lawyer, by day for the period (a) Inception of matter through to November 20, 2005; and (b) November 21, 2005 to current. In addition, we require details comprising disbursements for both periods.

   399938
   39F731
   399127
   399655
   399252
   402345
   399056

2. Please review the following list of client codes included in the WIP documents provided to us and advise whether or not they relate to the Residential Schools Class Action matter.

   479907
   569703
   539519
   409782
   480422
   465454
   471025
   470107
   460380
   469118
   239742

RESIDENTIAL SCHOOLS CLASS ACTION MATTER
Request for Information

Request from: Eric Khan, Edward Nagel
Request to: Evatt Merchant/Tony Merchant
Date Requested: January 22, 2006

Nature of Request:

1. Electronic listing of summary WIP by client from the inception of this Matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006 (*excluding non-Residential Schools clients*).
2. Electronic listing of summary WIP for the Residential Schools file[1] from the inception of this Matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006.
3. Electronic listing of total hours billed by MLG lawyer for each year since the inception of this Matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006 relating to:
   a. The Matter; and
   b. Total MLG billings.
4. Electronic listing of MLG lawyers with their respective level, initials, hourly rate, and related employee codes.
5. Blank copies of Retainer Agreements (all types).
6. For the clients listed in the table below, please provide the following information:
   a. All information/documentation that supports a substantial solicitor-client relationship.
   b. A line-by-line detail of hours billed per MLG lawyer, by day from the inception of this Matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006.
   c. A line-by-line detail of disbursements incurred from the inception of this Matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006.

Client Code	√	Client Code	√	Client Code	√	Client Code	√	Client Code	√

[1] For purposes herein, the Residential Schools file refers to docketed hours not pertaining to a specific MLG client, but rather activities incurred by MLG pursuant to the entire class population.

E2

RESIDENTIAL SCHOOLS CLASS ACTION MATTER
Request for Information

Request from: Edward Nagel, Eric Khan
Request to: Evatt Merchant/Tony Merchant
Date Requested: January 24, 2006

Nature of Request:

1. Electronic listing of summary Work-In-Progress ("WIP") by client from the inception of this Matter[1] through to November 20, 2005 and from November 21, 2005 to January 16, 2006 (*excluding non-Residential Schools clients*).
2. Electronic listing of summary WIP for the Residential Schools file[2] from the inception of this Matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006.
3. Electronic listing of total hours billed by The Merchant Law Group ("MLG") lawyer for each year since the inception of this Matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006 relating to:
    a. The Matter; and
    b. Total MLG billings.
4. Electronic listing of MLG lawyers with their respective level, initials, hourly rate, and related employee codes.
5. Blank copies of Retainer Agreement formats.
6. For the clients listed in the attached ***revised*** Appendix A, please provide the following information:
    a. All information/documentation that supports a substantial solicitor-client relationship.
    b. An electronic line-by-line detail of hours billed per MLG lawyer, by day from the inception of this Matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006.
    c. An electronic line-by-line detail of disbursements incurred from the inception of this Matter through to November 20, 2005 and from November 21, 2005 to January 16, 2006.

[1] For purposes herein, the Matter refers to all the Residential School files, including those associated with the Class Action as well as those corresponding to individual client files.
[2] For purposes herein, the Residential Schools file refers to docketed hours not pertaining to a specific MLG client, but rather activities incurred by MLG pursuant to the entire class population.

E3

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2006 SKQB 312**

Date: **2006 07 10**
Docket: Q.B.G. No. 816/2005
Judicial Centre: Regina

BETWEEN:

KENNETH SPARVIER, DENNIS SMOKEYDAY, RHONDA BUFFALO, JOHN DOE I, JANE DOE I, JOHN DOE II, JANE DOE II, JOHN DOE III, JANE DOE III, JOHN DOE IV, JANE DOE IV, JOHN DOE V, JANE DOE V, JOHN DOE VI, JANE DOE VI, JOHN DOE VII, JANE DOE VII, JOHN DOE VIII, JANE DOE VIII, JOHN DOE IX, JANE DOE IX, JOHN DOE X, JANE DOE X, JOHN DOE XI, JANE DOE XI, JOHN DOE XII, JANE DOE XII, JOHN DOE XIII, JANE DOE XIII, and other John and Jane Does Individuals and Entities to be added

PLAINTIFFS

- and -

ATTORNEY GENERAL OF CANADA, and other James and Janet Does Individuals and Entities to be added

DEFENDANT

Counsel:

E. F. Anthony Merchant, Q.C. and Casey R. Churko	for the plaintiffs
Gary D. Young, Q.C. and Catherine Coughlan	for the defendant

FIAT
July 10, 2006

BALL J.

---

[1] An application by the plaintiffs and the defendant seeking certification of this action as a class proceeding and approval of a Settlement Agreement, including the legal fees payable for class counsel, is scheduled to be heard in Regina on September 18, 19 and 20, 2006. One law firm that will be seeking

approval of its fees is Merchant Law Group, counsel for the plaintiffs in this action.

[2] On June 16, 2006, the defendant ("Canada") applied by notice of motion for an order permitting it to have further and better access to the files of Merchant Law Group relating to work done for clients seeking damages in connection with their attendance at an Indian Residential School. Filed in support of that application are affidavits sworn by The Honourable Frank Iacobucci, Q.C., the Federal Representative who led negotiations with interested parties which resulted in a Settlement Agreement, and by Edward Nagel, a chartered accountant with Deloitte & Touche LLP. The application was scheduled to be heard on July 4, 2006.

[3] On June 29, 2006, Merchant Law Group applied for an order striking out most of the affidavit of Mr. Iacobucci and significant portions of the affidavit of Mr. Nagel. That application was also made returnable on July 4, 2006.

[4] On July 4, 2006, Canada's application was rescheduled to be heard on July 25, 2006. This fiat deals with Merchant Law Group's application to strike out portions of the affidavits of Messrs. Iacobucci and Nagel.

FACTS

[5] The affidavit of Mr. Iacobucci filed in support of Canada's motion states that the Settlement Agreement, approved by Cabinet on May 10, 2006, comprised five main elements:

> (a) a Common Experience Payment to be paid to each former residential school student who was living on May 30, 2005;
>
> (b) an Independent Assessment Process under which a former residential school student can seek additional compensation for sexual or serious physical abuse;
>
> (c) a Truth and Reconciliation Process, including the establishment of a Truth and Reconciliation Commission;
>
> (d) funding for commemorative activities; and
>
> (e) funding to the Aboriginal Healing Foundation for healing programs over a five-year period.

[6] In addition to the Settlement Agreement, Canada and Merchant Law Group signed a Merchant Fees Verification Agreement ("MFVA") which provides for payment of fees to Merchant Law Group upon completion of a verification process. The MFVA was signed on November 20, 2005.

[7] Mr. Iacobucci deposes that settlement of legal fees was an important component of the Settlement Agreement, especially as they related to Merchant Law Group. His concerns about the amount of legal fees to be paid to Merchant Law Group and the manner of addressing those concerns are summarized in paragraphs 2 and 3 of the affidavit as follows:

> 2. The discussions of legal fees with Tony Merchant, Q.C., representing the Merchant Law Group ("MLG"), were particularly long and complex. As described in detail at paragraph 26 of this affidavit, I had and continue to have a number of very serious concerns about the information put forward by MLG to justify its position on legal fees. These concerns include:
>
> (a) uncertainty about the number of former residential schools students who had retained MLG;
>
> (b) lack of evidence or rationale to support the MLG's claim that it had Work-in-Progress of approximately $80 million on its residential school files; and

(c) an apparent discrepancy between the amount of class action work MLG represented it had carried out and the amount of class action work it had actually done.

3. As a result of these concerns, I required and MLG agreed that it would comply with the following four-part verification process as a condition of receiving payment for legal fees:

(a) First, MLG's dockets, computers records of Work-in-Progress and any other evidence relevant to the MLG's claim for legal fees will be made available for review and verification by a firm to be chosen by me.

(b) Second, I will review the material from the verification process and consult with MLG to satisfy myself that the amount of legal fees to be paid to MLG is reasonable and equitable taking into consideration the amounts and basis on which fees are being paid to other lawyers in respect of this settlement, including the payment of a 3 to 3.5 multiplier in respect of the time on class action files and the fact that MLG has incurred time on a combination of class action files and individual files.

(c) Third, if I am not satisfied that the $40 million is a reasonable and equitable amount in light of this test, MLG and I will make reasonable efforts to agree on another amount.

(d) Fourth, if we cannot reach agreement, the amount of the fees to be paid to MLG shall be determined by Mr. Justice Ball or, if he is not available, another Justice of the Court of Queen's Bench in Saskatchewan.

[8] The firm chosen by Mr. Iacobucci to review and verify the evidence relevant to Merchant Law Group's claim for legal fees was Deloitte & Touche LLP. Edward Nagel is a chartered accountant and senior manager in Deloitte's Forensic and Dispute Services Group. Mr. Nagel's affidavit states that he began an inspection of relevant information provided by Merchant Law Group, but upon discovering areas of significant concern (which are more fully outlined in his affidavit) he was advised by Merchant Law Group that it would not permit any further inspection of its records because of concerns about solicitor-client privilege.

[9] Canada therefore applied for an order requiring Merchant Law Group to comply with its verification obligations in a manner that would provide appropriate protection for solicitor-client privilege. The only response by Merchant Law Group was the application which is addressed by this fiat.

ANALYSIS

[10] Mr. Merchant, representing Merchant Law Group, submits that most of the affidavit of Frank Iacobucci and significant portions of the affidavit of Edward Nagel should be struck out pursuant to Rule 319 of *The Queen's Bench Rules*, which states:

> **319** Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may under special circumstances be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same; and where affidavits upon information and belief are filed which do not adequately disclose the grounds of such information and belief the court may direct that the costs of such affidavits shall be borne by the solicitor filing the same.

[11] Although Merchant Law Group did not file any affidavit material in support of its motion to strike, at the commencement of the hearing on July 4, 2006, Mr. Merchant filed a 178 page brief of law which contains a variety of arguments. Included among them is the contention that Mr. Iacobucci's affidavit offends Rule 319. To quote para. 76 of the brief of law:

> 76. We make seven primary objections to [*sic*] Rule 319. The Affidavit is on information and belief, but

(1) this is a final order, not interlocutory;

(2) the affidavit is not drawn in the first person;

(3) the deposition is not within the knowledge of Frank Iacobucci, Q.C.;

(4) the sources of information are not identified;

(5) the sources are not the original source;

(6) the deponent never states that he believes the sources;

(7) there are no special circumstances to admit an affidavit on information and belief; and

(8) the defects are not curable.

[12] Mr. Merchant submits that Canada's application for an order giving Deloitte & Touche further and better access to relevant Merchant Law Group information is not an interlocutory motion and, therefore, by virtue of Rule 319, it cannot be supported by affidavits based on information and belief. He cites a number of decisions in which it has been held that court orders requiring persons who are not parties to litigation to provide evidence are final orders. Although he acknowledges that Merchant Law Group is a party to the MFVA with the Government of Canada, he submits that the law firm is not a party to this litigation. He also argues that any order requiring Merchant Law Group to disclose further information relevant to its fees would lead to the irretrievable disclosure of privileged solicitor-client information. For those reasons, he submits, any order Canada might obtain against Merchant Law Group would be a final, rather than an interlocutory, order.

[13] I do not accept the proposition that Canada has applied for a final order for three reasons. First, I am not persuaded that Merchant Law Group is not a party to this litigation: an application for approval of its fees pursuant to s. 41 of *The Class Actions Act*, S.S. 2001, c. C-12.01, will follow certification of this action

as a class action; and approval of its fees has specifically been made part of the motion for approval of the Settlement Agreement. Second, the fundamental dispute between Merchant Law Group and Canada relates to the fees to be paid to the former by the latter. The order requested by Canada giving it access to further information will not finally determine that dispute. Third, the application by Canada does not seek access to any information that might be protected by solicitor-client privilege. On the contrary, Canada applies for an order requiring Merchant Law Group to comply with its verification obligations in a manner that would provide appropriate protection for solicitor-client privilege.

[14] Having concluded that Canada's application is an interlocutory motion for the purpose of Rule 319, it follows that affidavits sworn on information and belief, with the grounds thereof stated, may be admitted under special circumstances. The affidavits of Mr. Iacobucci and Mr. Nagel contain considerable information that—to use the terminology of Rule 319—they are able to "prove" of their own knowledge. To the extent that the affidavits contain statements based on information and belief, the grounds of the belief are generally identified or are apparent from the context in which they are made. Finally, the circumstances justify the use of most of the information contained in the affidavits: where the deponents do not have personal knowledge of the matters stated, they are in the best position to provide the evidence in a coherent and efficient fashion.

[15] There are, of course, limitations on the extent to which "special circumstances" enable evidence to be put forward based on information and belief. While the requirements of identification of the source, a statement as to the deponent's belief, and the grounds for that belief can often be implied from

the broader context and from the deponent's vantage point in the dispute, that is not always the case.

[16] Merchant Law Group takes particular exception to paragraph 26, subparagraph (b) of Mr. Iacobucci's affidavit, which states:

> 26. I required this verification process as part of our fees agreement with MLG because I had very serious concerns about the information put forward by MLG to justify its position on fees. Those concerns include the following:
>
> ...
>
> (b) The number of retainers that MLG represented existed changed frequently during the negotiations and appeared not to make allowances for cases that had settled or determined by trial, former clients who had died, and those who were represented by other law firms. My colleagues and I were approached on various occasions throughout the negotiations by other plaintiffs' counsel raising concerns about the client recruitment efforts of MLG and describing instances in which MLG was purporting to act for former students who were in fact represented by other lawyers.

[17] There are two sentences in subparagraph (b). The first sentence recites the fact that Mr. Iacobucci was concerned about information communicated to him during negotiations related to the number of retainers Merchant Law Group represented. Evidence that he did not accept the information being put forward and that he required verification is admissible. The second sentence, however, is neither necessary to, nor probative of, the first. Insofar as the requirements of Rule 319 are concerned:

(a) the "other plaintiffs' counsel" said to have raised concerns are not identified;

(b) the "colleagues" to whom these concerns were expressed are not identified;

(c) the source of the information concerning "client recruitment efforts" is unknown;

(d) the nature of the alleged "client recruitment efforts" is not identified;

(e) the "former students" and the "other lawyers" representing them are not identified and there is no description of the "instances in which Merchant Law Group was purporting to act;"

(f) the deponent, Mr. Iacobucci, does not state that he believes the information to be true, nor state the grounds of his belief; and

(g) the prejudicial effect of the statements outweighs the probative value to Canada in its application.

[18] For these reasons, I have decided that the second sentence of paragraph 26, subparagraph (b) of Mr. Iacobucci's affidavit must be struck.

[19] Merchant Law Group also objects to subparagraph (c) of paragraph 26 of Mr. Iacobucci's affidavit, which states:

> 26. I required this verification process as part of our fees agreement with MLG because I had very serious concerns about the

> information put forward by MLG to justify its position on fees. Those concerns include the following:
>
> ...
>
> (c) I am informed by counsel at the Department of Justice's Saskatoon Regional Office and believe that they conducted a review of the list of plaintiff names appended to the within class action statement of claim. The review showed that approximately 356 of the Plaintiffs' claims listed in the within action had been previously settled, resolved at trial or were duplicate claims. The lists of plaintiffs that fall within each of those categories, prepared by the Department of Justice's Saskatoon Regional Office, are attached to my affidavit as Exhibits "D", "E" and "F".

[20] Subparagraph (c) goes beyond expressing Mr. Iacobucci's concerns about the number of retainers Merchant Law Group represented. It is intended to introduce the lists of names in exhibits "D", "E" and "F" as proof of the validity of his concerns. That evidence cannot be introduced in this manner, even on an interlocutory motion, because:

(a) the "counsel" said to be the source of the information are not identified;

(b) the information on which those unidentified sources relied has not been identified;

(c) the authors of the lists appended as exhibits "D", "E" and "F" to the affidavit have not been identified;

(d) the deponent, Mr. Iacobucci, did not author the lists and cannot render them admissible by simply attaching them as an exhibit to his affidavit;

(e) the listing of names and addresses of persons in exhibit "F" with a column entitled "notes regarding duplicate names and addresses" has no discernable probative value.

[21] For these reasons, I have decided that subparagraph (c) of paragraph 26, of Mr. Iacobucci's affidavit does not meet the standard for affidavits set by Rule 319 and must be struck. The information contained therein could have been (and can be) provided by persons able to attest to its source and reliability.

[22] There will be an order striking the last sentence of subparagraph (b) and all of subparagraph (c) of paragraph 26 of Mr. Iacobucci's affidavit, and directing the local registrar to remove and return exhibits "D", "E" and "F" to counsel for Canada.

[23] Merchant Law Group also contends that various statements in Mr. Iacobucci's affidavit violate the parol evidence rule because they refer to discussions and representations made during the course of negotiations. I do not agree. The parol evidence rule prohibits evidence of discussions between the parties which add to, vary, subtract from or contradict a written agreement. The information contained in Mr. Iacobucci's affidavit relating to the discussions and representations appear to explain and supplement, rather than contradict, the written agreement. Specifically, it clarifies what it was that required "verification" pursuant to both the MFVA and the Settlement Agreement. In any event, if in due course any of the statements are found to be irrelevant or in conflict with either agreement, they can be ignored rather than struck from the affidavit.

[24] Some of the statements in Mr. Iacobucci's affidavit relate to discussions with Mr. Merchant during the negotiations which resulted in the MFVA. Mr. Merchant contends that all such discussions were privileged and cannot be disclosed. The statements he wishes to strike relate to representations he is said to have made to Mr. Iacobucci about the number of Merchant Law Group's residential schools' clients, the value of its work-in-progress on residential schools' files, and the amount of class action work it had carried out.

[25] The information in Mr. Iacobucci's affidavit outlining representations made to him by Merchant Law Group, and the need to confirm their accuracy, will not be struck. If payment of the fee under the MFVA was conditional on verification of those representations, as Mr. Iacobucci asserts, then of necessity the representations must be known and considered. If there is to be conflicting evidence on that issue, findings of fact will have to be made.

CONCLUSION

[26] This fiat addresses only the application by Merchant Law Group to strike portions of the affidavits of Frank Iacobucci, Q.C. and Edward Nagel. It does not consider the merits of the application for which the affidavits were filed. That application is scheduled to be heard on July 25, 2006 at 10:00 a.m. in Regina.

[27] There will be an order pursuant to Rule 319 of *The Queen's Bench Rules* striking out the last sentence of subparagraph (b) and all of subparagraph (c) of paragraph 26 of the affidavit of Frank Iacobucci, Q.C., sworn June 15, 2006. The local registrar is directed to remove exhibits "D", "E" and "F"

respectively from the affidavit and to return them to counsel representing Canada. There will be no order under Rule 319 with respect to the affidavit of Edward Nagel. There will also be no order as to costs.

J.
D. P. Ball

Indexed as:

Dabbs v. Sun Life Assurance Co. of Canada

Between
Paul Dabbs, plaintiff, and
Sun Life Assurance Company of Canada, defendant

[1998] O.J. No. 1598
Court File No. 96-CT-022862

Ontario Court of Justice (General Division)
Sharpe J.

Heard: February 5, 1998.
Judgment: February 24, 1998.
(14 pp.)

Practice — Persons who can sue and be sued — Individuals and corporations, status or standing — Class or representative actions, for damages — Settlements — Court approval.

Ruling as to procedural issues with respect to a motion for settlement approval of a class action suit involving a claim for damages against an insurer for breach of contract. The claim was settled by an agreement. Fourteen members of the proposed class filed objections to the settlement. The issues were the onus for approval of the agreement, the role of the court and factors to be considered in the approval of the agreement, procedures for and scope of the objection to the agreement and costs.

HELD: The parties proposing the settlement had the onus of showing that it should be approved. The role of the court was to find that the settlement was fair, reasonable and in the best interests of all those affected by it. The factors to be considered were the likelihood of recovery, the amount and nature of discovery evidence, the settlement terms, counsel's recommendations, the future expense of litigation, the number of objectors, the nature of objections and the presence of good faith. The objectors had the right to adduce evidence by way of affidavit but had no right to oral discovery or production of documents. They were subject to the discretion of the court to impose appropriate terms as to costs.

Statutes, Regulations and Rules Cited:

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 242(2).

Class Proceedings Act, 1992, ss. 12, 14, 29, 32(1).

Ontario Rules of Civil Procedure, Rule 7.08(1).

Counsel:

Michael A. Elzenga and Charles M. Wright, for the plaintiff.

H. Lorne Morphy and Patricia D.S. Jackson, for the defendant.
Michael Deverett, for 3 objectors.
Gary R. Will and J. Douglas Barnett, for 11 objectors.

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 (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 Inc. 143 F.R.D. 141 (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 (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 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 action:

> 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, t here 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 as 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 procedures 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 Life Inc. 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 in 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.

¶ 18 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 claims 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.

¶ 19 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.

¶ 20 In general, the procedural rights of all participate 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.

¶ 21 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

¶ 22 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

¶ 23 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.

¶ 24 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.

¶ 25 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 objections 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.

¶ 26 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

¶ 27 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. The Queen, [1984] 2 F.C. 753. 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 the hearing of the certification/approval motion;

(2) that any party or objector who wishes to cross-examine a deponent serve and file at least 10 days prior to the motion a written outline of the matters upon

which cross-examination is requested;

(3) that the nature and extent of cross-examination shall, subject to the discretion of the court, only be in an area indicated by the written outline and shall be subject to the discretion of the court to exclude such cross-examination which may be exercised either before or during the hearing of the motion;

(4) that any deponent for which cross-examination is requested shall be available to attend court on the days the motion is to be heard as if under summons;

(5) that in any event, Mr. Ritchie be in attendance for the motion;

(6) that the right of the court to question witnesses shall remain within the sole discretion of the court and shall not be in any way affected by para (2).

(e) Costs consequences

¶ 28 The Deverett objectors seek an order that they not be subject to any order as to costs and that they be awarded interim costs. It was suggested, in the alternative, by Mr. Will that I specify in advance the circumstances which would or would not lead to an adverse costs order.

¶ 29 In my view, no such orders or directives should be made. Nothing has been shown that would bring this case within the category of "very exceptional cases" contemplated by Organ v. Barnett (1992), 11 O.R. (3d) 210 as justifying an award of interim costs to ensure that the objectors are able to continue their participation. Section 32(1) of the Act, which provides that class members are not liable for costs except with respect to the determination of their own claims, does not apply. That provision contemplates the usual situation where a class member takes no active step in the proceedings. The objectors are subject to the discretion conferred by s. 14(2), which expressly preserves the right of the court to impose appropriate terms as to costs.

¶ 30 It is important that, as one means of controlling the process, the court retain its discretion with respect to the costs of this process. I hardly need add that my discretion is to be exercised in accordance with an established body of law dealing with cost orders. That body of law recognizes the right of the court to award costs to compensate for or sanction inappropriate behaviour by a litigant. It also recognizes that in certain cases, departure from the ordinary rule that an unsuccessful pay the costs of the winner may be appropriate: see eg. Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690.

CONCLUSION

¶ 31 If there are further procedural issues which arise prior to the hearing of the motion, I may be spoken to.

SHARPE J.

QL Update: 980427
qp/mii

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Case Name:

Bonanno v. Maytag Corp.

PROCEEDING UNDER the Class Proceedings Act, 1992

Between
Martha Bonanno, plaintiff, and
Maytag Corporation and Maytag Limited, defendants

[2005] O.J. No. 3810
Court File No. 73139/04

Ontario Superior Court of Justice
Newmarket, Ontario
J.B. Shaughnessy J.

Heard: June 24, 2005.
Judgment: September 13, 2005.
(24 paras.)

Civil procedure — Parties — Class or representative actions — Certification — Common interests — Members of class — Representative plaintiff — Certification of class proceeding relating to negligent design, manufacture, sale and servicing of washing machines — Civil procedure — Settlements — Approval — Litigation plan involving a settlement agreement was sound and workable — Civil procedure — Costs — Assessment or fixing of costs — Counsel fees — Legal fees and disbursements approved for services rendered regarding settlement of class proceeding.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6 s. 2, s. 5, s. 29, s. 33

Counsel:

Michael J. Peerless, for the Plaintiff

Robert B. Bell, for the Defendants

REASONS FOR ORDERS

¶ 1 **J.B. SHAUGHNESSY J.**:— On Friday, June 24, 2005, I issued an Order certifying the within proceeding as a class proceeding pursuant to the Class Proceedings Act, 1992, S.O. 1992 c. 6, ss. 2 and 5. I also made a declaration that a proposed settlement agreement was fair, reasonable and in the best interest of the Class Members and the same was approved pursuant to s. 29 of the Class Proceeding Act, 1992. Finally, I made a separate Order approving the Ontario Class Counsel legal fees and disbursements, pre and post the date of approval of the settlement agreement.

¶ 2 The Order of this Court approving the settlement agreement is contingent on approval of both the Supreme Court of British Columbia and the Cour Supérieure de Quebec.

¶ 3 The following are the Reasons in support of the Orders Made.

Class Certification

(a) Cause of Action

This action was commenced on October 18, 2004 under the Class Proceedings Act, 1992. The Plaintiff alleged that the Defendants were negligent in the design, manufacture, marketing, sale/or servicing of Maytag Neptune Front-Load Washing Machines. In particular, the Plaintiff pleads that there are problems with the washing machines with respect to:

i. odour, mould or mildew
ii. the door latch/wax motor
iii. the motor control
iv. related circuit board failures

(b) Identifiable Class

¶ 4 The Plaintiff proposes that the identifiable class for the proceeding be defined as:

> All persons and legal entities, except British Columbia and Quebec Class Members, located in Canada who have purchased or acquired a Maytag Neptune Front-Load Washing Machine or Maytag Neptune Stackable Combination between April 1, 1997 and May 15, 2005.

¶ 5 The material filed by the Plaintiff indicates that approximately 142,000 Neptune Washing Machines have been sold in Canada in the relevant period.

Common Issues

¶ 6 There is one common issue for which liability by the Defendants is to be assessed. The claims of all the Class Members now or in the future, relates to the negligent design, manufacture, marketing sale/or servicing of the Maytag Neptune Front-Load Washing Machines and specifically, issues relating to:

i. odour, mould or mildew
ii. the door latch/wax motor
iii. the motor control
iv. related circuit board failures

Preferable Procedure

¶ 7 I am satisfied that certification of this proceeding will achieve the objectives of the Class Proceedings Act, 1992, namely; judicial economy, access to justice and behaviour modification. The material filed indicates that the vast majority of the claims are small and in the absence of a class proceeding, they would not be economic to pursue. It is apparent that permitting Class Members to

establish their claims in one action will promote judicial economy. Finally, in my view the litigation plan, in the form of a settlement, is manageable and effective in terms of distributing damages to those affected.

Representative Plaintiff

¶ 8 Martha Bonanno is the named representative plaintiff. I find that she will fairly and adequately represent the interest of the class and on the common issue, she does not have an interest in conflict with other Class Members.

Settlement Agreement

¶ 9 The parties engaged in extensive settlement discussions to resolve all the claims of the Class Members. A settlement was achieved in April, 2005, subject to approval by the Court.

¶ 10 The settlement has two primary sources of relief. The first branch intends to resolve the claims of Class Members who have already incurred monetary damages, either through repair costs, or because they found their Neptune washer so unsuitable that they replaced it. Class Members who file sufficient proof of having incurred either of these costs are eligible for compensation. Class Members with repair reimbursement claims will be paid the full costs of those claims. Those who purchased a new washing machine will be eligible to receive cash compensation based upon the number of years that they owned their Neptune machine and a percentage of the cost of the replacement machine. However, the cash compensation to Class Members is limited to $300,000. If the total eligible claims for repair and replacement together are more than $300,000, then such compensation will be distributed pro rata, together with an Appliance Purchase Certificate in the dollar amount of the cash shortfall. The Appliance Purchase Certificate is transferable, and therefore, it has a sale value. However, if the entire cash fund is not used, Class Members could receive up to 150% of their repair reimbursement claims. The Defendants have no reversionary interest.

¶ 11 The second branch of Class members are those whose Neptune washers are currently in need of repair, or require repairs in the near future. In this category, Maytag is required within a specified time, to attempt to repair class claims. Where repairs are unsuccessful, or at Maytag's election, a Washing Machine Purchase Certificate for a Maytag Neptune Top-Load Washing Machine will be provided. The value of the Washing Machine Purchase Certificate will be based on the type of Neptune owned and the number of years that the Class Member owned their Neptune. The intent of the Washing Machine Purchase Certificate is to assist those class members whose Neptune washing machines cannot be repaired and accordingly, are left to replacing their Neptune machine. These Washing Machine Purchase Certificates are not transferable.

¶ 12 I have reviewed the other provisions of the proposed settlement, including the opt out provision, as well as the appointment of the Claims Administrator and Notice Provisions. I am satisfied that the litigation plan which involves a settlement agreement, is a sound, workable and reasonable plan.

¶ 13 Therefore, taking all these various factors into consideration, I find that this is an appropriate case for certification, and I so order. I note with approval that in Gariepy v. Shell Oil Co. [2002] O.J. No. 4022 (S.C.J.) and Haney Iron Works Ltd. v. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th), 565 at 570 (B.C.S.C.) that Courts in Ontario and British Columbia have held that the requirements for certification need not be as rigorously applied in the settlement context as they should be in the litigation context. In the settlement context, the certification test is satisfied when there is a prima facie case favouring certification.

¶ 14 It is apparent to me that the settlement negotiations were influenced by a number of factors, including the expense and burden of litigation; the risks and uncertainty associated with litigation, including certification, trials and perhaps appeals; and the range of damages that may be proven at trial.

¶ 15 I have reviewed and applied the principles enunciated in Dobbs v. Sun Life [1998] O.J. No. 1598 and Parsons v. The Canadian Red Cross Society [1999] O.J. No. 3572 and I am satisfied that the settlement proposed by the parties is fair, reasonable and in the best interest of the class. This settlement agreement was negotiated in good faith at arm's length and by experienced counsel on both sides. Sufficient information has been obtained and provided to permit the Court to exercise its function of independent approval. Accordingly, the Settlement Agreement is approved pursuant to s. 29 of the Class Proceedings Act, 1992.

Approval of Class Counsel Fees & Disbursements

¶ 16 I have heard the submissions of counsel and I have received the material filed in support of a motion brought for an Order approving Class Counsel fees, plus applicable taxes for services rendered up to the date of approval of the settlement agreement, as well as a further sum for fees incurred, plus applicable taxes, for future work, including disbursement through to the conclusion of the claims administration process. The Defendant's have agreed to pay the cost of Notice, claims administration and Class Counsel fees and disbursements.

¶ 17 I am satisfied that there were a number of risks associated with this litigation, including the risks of whether the Court would assume jurisdiction over a foreign defendant; that the Court would not certify a national class; that the Court would find no cause of action under Ontario law; that the Court would not agree that an aggregate damage assessment was possible. In undertaking a class action, Plaintiff's counsel automatically assume a risk of the time and expense which would be required to litigate the matter to conclusion, including appeals.

¶ 18 After the settlement terms were agreed upon, Counsel then engaged in arm's length, adversarial negotiations with respect to the issue of Class Counsel fees.

¶ 19 The representative Plaintiff does not oppose the fees sought by Class Counsel. The Defendants will be paying the Class Counsel fees and disbursements and such expenses will not be deducted from the settlement benefits payable to Class Members.

¶ 20 The issue then to be determined, is the reasonableness of the fees actually being sought. In Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417 at 422, the Ontario Court of Appeal stated:

> Another fundamental objective [of the Act] is to provided enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee, is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the Class Action succeeds, gives the lawyer the necessary economic incentive to take the case in the first place and do it well.

¶ 21 Class Counsel fees may be determined through a multiplier, percentage based or a lump sum calculation. (Class Proceedings Act, 1992, S.O. 1992, c. 6 s. 33; Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83 (Gen. Div.) and Nantais Teletronics Proprietary Canada Ltd. (1996), 28 O.R. (3d) 523 (Gen. Div.)

¶ 22 In Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386 (Gen. Div.), a number of factors were identified as relevant in assessing the reasonableness of the Class Counsel fee. Applying these factors to the present case, I find:

(a) The action involved both significant procedural and substantive risks;

(b) Class Counsel funded all of the disbursements and did not seek contribution from the representative plaintiff, or the Class Proceedings Fund;

(c) In the absence of a class proceeding, it is unlikely any relief would be available to a significant majority of Class Members;

(d) The settlement achieved will result in compensation being available to Class Members with relative ease and efficiency;

(e) The fee sought is consistent with the expectations of the representative plaintiff.

¶ 23 Accordingly, it is Ordered that Ontario Class Counsel's legal fees for the period up to the date when the settlement agreement is finally approved, or, if applicable, upon the expiry of any appeal period, or resolution of appeals, is approved in the amount of $175,000 plus applicable taxes.

¶ 24 And it is further Ordered that Ontario Class Counsel's legal fees for future work following the approval of the settlement agreement (or the expiry of any applicable appeal period or resolution of appeals) is fixed in the amount of $30,000 plus applicable taxes.

J.B. SHAUGHNESSY J.

QL UPDATE: 20050926
cp/e/qw/qlmxf/qlmll

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Case Name:

McArthur v. Canada Post Corp.

IN THE MATTER of a Claim under the Class Proceedings Act, S.O. 1992, c. 6

Between
Paul McArthur, plaintiff, and
Canada Post Corporation, Cybersurf Corp. and 3Web Corp., defendants

[2004] O.J. No. 1406
Court File No. 02-6522-CP

Ontario Superior Court of Justice
Hamilton, Ontario
Crane J.

Heard: March 3, 2004.
Judgment: March 31, 2004.
(22 paras.)

Barristers and solicitors — Compensation — Measure of compensation — Reasonable charges, reasonably performed — Practice — Persons who can sue and be sued — Class actions.

Motion by class counsel for the determination of their fees and disbursements pursuant to a settlement agreement. The agreement provided for reasonable fees and disbursements. The defendant Canada Post stated that the time spent was excessive and that the services were limited to negotiating a settlement. Class counsel claimed a success premium given the risk of class proceedings litigation. The base fee claimed was $220,000. The class consisted of 147,000 members. The nominal retail value of the recovery was $40.

HELD: Motion allowed. Fees were set at $260,000 to include a success premium.

Counsel:

David Thompson and M. Moloci, for the plaintiff.
Paul Martin and B. Moore, for the defendants.

¶ 1 **CRANE J.**:— Class Counsel, the firm of Scarfone, Hawkins, move for the determination of their fees and disbursements pursuant to the Settlement Agreement. This motion requires the interpretation of clause 12 of that agreement within the context of the Agreement and this class action, specifically the quantification of "the reasonable fees and disbursements of Class Counsel".

ISSUES

Quantum of "base fees" and whether a multiplier.

¶ 2 The interpretation of the Settlement Agreement, clause 12:

> I read the subject Settlement Agreement of the obligations of the defendants to pay "the reasonable fees and disbursements ...", in the context of class proceedings litigation, to mean the full solicitor and client fees and disbursements of Class Counsel so as to discharge the obligations for legal services of the representative plaintiff and the Class claimants.

¶ 3 This interpretation is informed by the terms of this settlement and consequent judgment that does not otherwise provide a mechanism for Class Counsel fees and disbursements. For a similar interpretation and result, as here, see Murphy v. Mutual of Omaha, [2000] B.C.J. No. 2046, [2000] B.C.S.C. 1510 (S.C.B.C.).

¶ 4 I do not find that "reasonable fees" under the subject Settlement Agreement excludes a premium or multiplier over a base fee. The issue here is whether this is a case for a multiplier.

¶ 5 The defendants do not dispute the hourly rates used. They do contest the time spent as excessive.

¶ 6 Counsel for the defendants have submitted the Class Counsel fees are excessive as the services were essentially limited to the negotiating of the Settlement. Counsel have made this submission without the defendants volunteering what they are being billed by their lawyers, the Faskens and McCarthy law firms.

¶ 7 Perhaps the best method of determining the reasonableness of fees in negotiating a settlement of a class proceeding is on the difficulty of success and the degree of success achieved.

¶ 8 The time charged is largely assigned to three functions, namely, (1) preparation of the action through delivery of the statement of claim; (2) preparation of the materials for a motion for certification and (3) negotiations for settlement, including a mediation meeting.

¶ 9 Certification was granted in consequence of the Settlement Agreement. The class is national, excluding the Province of British Columbia.

¶ 10 There are co-counsel for the Class, Mr. Thompson in Ontario and Mr. Poyner in British Columbia. Each counsel seeks his fees and disbursements from the same defendants, on motion to the Superior Court of the respective Province.

¶ 11 I am guided by the usual factors of consideration of a solicitor's account of:

(a) the time expended by the solicitor;

(b) the legal complexity of the matters to be dealt with;

(c) the degree of responsibility assumed by the solicitor;

(d) the monetary value of the matters in issue;

(e) the importance of the matter to the client;

(f) the degree of skill and competence demonstrated by the solicitor;

(g) the results achieved;

(h) the ability of the client to pay;

(i) the client's expectation as to the amount of the fee.

See Windisman v. Toronto College Park [1996], 3 C.P.C. (4th) 369 (Ont. Gen.); and

Sariepy v. Shell Oil [2003] O.J. No. 2490 @ para. 13.

¶ 12 Class Counsel submits that the risk of class proceedings litigation is such that in those cases of success, counsel is to be rewarded by a premium over the base fee in order to recognize and reward against the consequence of no remuneration plus substantial expense should the risk prove adverse. In short, the submission is that economic incentive is essential to undertake the risk.

¶ 13 I find this a valid, although not a universal argument, given the (often-stated) objectives of class actions.

¶ 14 Counsel for the defendants submit that in the process of determining Class Counsel fees regard must be had to the real benefit achieved as distinct from apparent or nominal gain of little or no interest to the claimants. They submit that class claimants will not undertake the refund process to achieve $9.95. The inference may be so. The argument as to real versus nominal value is always valid, in the context of class proceedings. Indeed it is an issue of concern to the courts.

¶ 15 My conclusion is that there must be a balancing of interests in each case on the particular circumstances of that case.

¶ 16 Class Counsel argue behaviour modification. Counsel for Canada Post argue that a mechanism existed absent class proceedings as evidenced by the settlement through Alberta Government Services.

¶ 17 I fix the base fees analogous to what was done in Maxwell v. M.L.G., 30 O.R. (3d) 304, namely, on the worth of the services, the judge's experience, and reference generally to a solicitor/client assessment.

¶ 18 Class Counsel advises that there are 147,000 class members, 132,200 of whom reside in Ontario. The base fee to date, proposed is $220,000. This sum is $1.67 per Ontario class member on nominal retail value of the recovery of $40.00. The defendants argue the real value is a small fraction of $10.00 per class member.

¶ 19 The legal services provided involved no adversarial court proceedings. I find the amount of time spent on a benefit to client basis as generous.

¶ 20 It is my determination that reasonable fees under clause 12 of the Settlement Agreement to be the sum of $260,000.00. Counsel will have his disbursements, as submitted, of $2,178.48.

¶ 21 This finding accepts the full "base fees" of Class Counsel of $220,000.00. The Settlement

Agreement does provide for some degree of monitoring and auditing of the settlement implementation. I allow a forward service sum having in mind a class of near 150,000 members. I join this factor with a premium to fix the sum of $260,000.00 as above stated.

¶ 22 I find the defendants jointly and severally liable to Ontario Class Counsel in the sum of $262,178.48 plus applicable G.S.T.

CRANE J.

QL UPDATE: 20040408
cp/e/nc/qw/qlgkw/qlkjg

Case Name:

Gariepy v. Shell Oil Co.

PROCEEDING UNDER The Class Proceedings Act, 1992

Between
Michael Gariepy, Lyne Marion, Wayne McGowan, Paul Berthelot and Dale Elliott, plaintiffs, and
Shell Oil Company, E.I. Du Pont De Nemours and Company and Hoechst Celanese Corporation, defendants

[2003] O.J. No. 2490
Court File No. 30781/99 (London)
Toronto Court File No.: 99-CT-030781CP

Ontario Superior Court of Justice
Nordheimer J.

Heard: May 29, 2003.
Judgment: June 3, 2003.
(23 paras.)

Barristers and solicitors — Compensation — Agreements, the retainer — Measure of compensation — Class actions.

Motion by plaintiffs' counsel to approve class counsel fees and disbursements, and to approve a retainer agreement. The parties had reached a settlement agreement which provided for the defendant EI Du Pont De Nemours and Company to pay fees to class counsel. The fees were over and above the amount set aside for the settlement itself. There was no information available as to the number of the members of the class who intended to take up the settlement offer. Although the settlement had been approved, the fees were not approved due to concerns about jurisdiction to approve fees for out-of-province counsel and, difficulties in measuring compensation against relative contribution. The court also had concern about the appropriateness of using time spent on the certification motion as justification for the reasonableness of the fees to be received. As a result, class counsel for the various jurisdictions filed a joint affidavit to support a request for approval of a lump sum fee, the division of fees was explained and all time and expenses attributable to unrelated issues such as the certification motion were omitted.

HELD: Motion to approve fees and disbursements allowed. Since the class members were not being called upon to pay the fees of class counsel, there was no need to approve the retainer agreement. A proper evaluation of the reasonableness of the fees sought would benefit from evidence as to the actual performance of the settlement reached. However, the absence of such evidence did not preclude the approval of the fees sought. It was highly unlikely that no class members would avail themselves of the settlement. Moreover, the fees were warranted in light of the complexity of the action and the result obtained.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 32(2).

Counsel:

Michael Peerless, for the plaintiffs.
Jeffrey S. Leon, for the defendant, E.I. Du Pont De Nemours and Company.

¶ 1 **NORDHEIMER J.**:— This is a motion for approval of class counsel fees and disbursements and for the approval of a retainer agreement which arises out of a settlement agreement reached between the plaintiffs and the defendant, E.I. Du Pont De Nemours and Company. At the outset, I should record the fact that, without deciding whether the other two defendants had standing to participate in this motion, I directed that they be given notice of the motion, which was done. Neither Shell nor Celanese appeared on the motion. Further, while Du Pont appeared on the motion, Mr. Leon did not make any submissions.

¶ 2 On October 22, 2002, I provisionally approved the settlement agreement subject to certain issues being addressed. On November 5, 2002, after amendments had been made to the settlement agreement to address those issues, I granted final approval. The settlement was subsequently approved by the British Columbia Supreme Court and the Quebec Superior Court.

¶ 3 In my October 22, 2002 reasons, I declined to grant approval to the fees to be paid to class counsel under the settlement agreement. I expressed certain concerns regarding those fees including the following:

(a) the Ontario Court's jurisdiction to approve fees for lawyers from British Columbia, Quebec and the United States;

(b) that counsel were seeking approval of a lump sum fee without disclosing the share that each counsel group would receive which thereby made it difficult for the court to measure the compensation to each counsel group against their contribution;

(c) the appropriateness of using time spent on the certification motion as a justification for the reasonableness of the fees to be received.

It should be noted in respect of the last point that I had dismissed the certification motion brought by the plaintiffs respecting the other two defendants. As a consequence of those concerns, it was agreed that the approval of the fees would be made the subject of a separate motion and that the approval of the settlement itself could proceed independently of the fees issue.

¶ 4 The matter now comes back before me through this motion brought by Ontario class counsel, Siskind, Cromarty, Ivey & Dowler LLP ("Siskinds"), on its own behalf and on behalf of all associated co-counsel. Co-counsel include Siskinds in Ontario, Poyner, Baxter in British Columbia, Siskinds, Desmeules in Quebec, United States counsel, William H. Garvin and members of his firm, and Richardson, Patrick, Westbrook & Brickman, L.L.C. also of the U.S.

¶ 5 The concerns which I earlier raised have been addressed in the following manner:

(a) class counsel from each of the three jurisdictions have filed joint affidavit evidence to support their request for approval of the lump sum fee which provides details of each counsel group's contributions toward the litigation;

(b) the co-counsel agreement and the division of fees between counsel has been explained;

(c) all time and expenses attributable to unrelated issues such as the certification motion against Shell and Celanese and earlier motions regarding jurisdiction have been omitted.

The fees and disbursements must also be approved by the British Columbia Supreme Court and the Quebec Superior Court. The British Columbia Supreme Court is scheduled to hold a hearing on the issue on June 11, 2003. The Quebec Superior Court has already held its hearing on the issue but no decision has yet been rendered.

¶ 6 Class counsel submit that this case is somewhat unique in that the various counsel groups participated jointly at every stage and worked together as a team to achieve the settlement on a national basis. In addition to the experience of counsel in each of the jurisdictions, the U.S. co-counsel had experience with the American litigation on the same subject. Given this joint approach to the litigation, the parties negotiated a lump sum amount for class counsel fees to be paid in addition to the benefits to the class. Class counsel now seek approval of this lump sum which, if approved, would then be divided pursuant to the co-counsel agreement.

¶ 7 The co-counsel agreement essentially provides that Siskinds, Poyner Baxter and the U.S. counsel would share the risk by each contributing to the disbursements incurred in the Canadian litigation and by working together throughout the litigation. Ultimately it was agreed that, if success were achieved at some stage, funds would be applied to the share of disbursements paid by each counsel and the remaining amount would be divided 35% to Siskinds, 35% to Poyner Baxter and 30% to U.S. counsel. As counsel in Quebec were part of a small firm and not in a position to assume as much monetary risk in the litigation, it was agreed that all of the Quebec time and disbursements would be paid by the U.S. counsel on a quarterly basis with the understanding that Quebec counsel may receive a "premium" if class counsel realized a significant premium at some stage.

¶ 8 The settlement agreement made with Du Pont provides benefits to the class amounting to a "soft cap" of $30 million, plus notice costs and class counsel fees. In this latter respect, the settlement agreement provides that Du Pont shall pay class counsel fees in the amount of $4.5 million, including disbursements and taxes, over and above the benefits being made available to the class.

¶ 9 I should mention one other fact. Each of the Canadian class counsel entered into retainer agreements with their respective representative plaintiffs. None of those retainer agreements was ever put before the courts for approval. The retainer agreements vary in their terms. Ontario class counsel entered into a retainer agreement that provided for payment on the basis of a 30% contingency fee of the first $10 million or any part thereof, 20% of the second $10 million or any part thereof, and 10% of all additional amounts, plus disbursements and taxes. British Columbia and Quebec class counsel were retained under retainer agreements that provided for payment on the basis of a 25% contingency fee.

¶ 10 I mention this because, before dealing with the issue of whether the fees should be approved, there is the issue of whether or not the retainer agreement for Ontario class counsel should be approved. Section 32(2) of the Class Proceedings Act, 1992, S.O. 1992, c. 6 states:

> "An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor."

¶ 11 Frequently, approval of the retainer agreement is sought early on in the proceeding so that class counsel has some degree of certainty regarding their arrangements for their remuneration. However, as I have mentioned, that was not done in this case. Now there is a settlement agreement which provides for Du Pont to pay fees to class counsel. Those fees are over and above the amount set aside for the settlement itself so the payment of the fees does not diminish the recovery for the members of the class. The result of those arrangements is that the class members are not being called upon to pay the fees of class counsel.

¶ 12 In such circumstances, I do not believe that there is any need to approve the retainer agreement. Indeed, given that the retainer agreement is not being relied upon for payment of the fees (although all of the retainer agreements are being relied upon as evidence of the reasonableness of the fees sought) the situation not only does not fall within the terms of section 32(2), it seems to me that to embark upon that exercise is to engage the court in considering an issue that is essentially moot. Put another way, whether I would have approved the retainer agreement is only of tangential relevance to the issue that I now have to determine, that is, the reasonableness of the fees actually being sought.

¶ 13 Turning then to that issue, the factors to be taken into account in considering the reasonableness of fees charged by a solicitor to a client are well-established. They are set out in the Court of Appeal's decision in Cohen v. Kealey & Blaney (1985), 26 C.P.C. (2d) 211 (Ont. C.A.) as follows:

(a) the time expended by the solicitor,

(b) the legal complexity of the matters to be dealt with,

(c) the degree of responsibility assumed by the solicitor,

(d) the monetary value of the matters in issue,

(e) the importance of the matter to the client,

(f) the degree of skill and competence demonstrated by the solicitor,

(g) the results achieved,

(h) the ability of the client to pay and

(i) the client's expectation as to the amount of the fee.

These factors are equally applicable in the class proceedings context - see Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.).

¶ 14 Class counsel provided the following chart outlining the value of the time that they have spent on this matter and the disbursements that they have incurred in pursuing the claim:

Counsel	Time	Disbursements	Total

Ontario	$ 531,280	$ 198,814.06	$ 730,094
B.C.	$ 538,253	$ 140,962.61	$ 679,215
Quebec	$ 226,773	$ 0	$ 121,496
U.S.	$ 516,001	$ 726,118.52	$ 1,242,119
TOTAL	$ 1,812,307	$ 1,065,895.19	$ 2,772,924

Counsel	% Share of contribution to total value	% Share pursuant to co-counsel agreement
Ontario	26.3%	35%
B.C.	24.5%	35%
Quebec	4.4%	potential premium
U.S.	44.8%	30%
TOTAL	100%	100%

*Note in calculating Quebec's contribution, the amount for discounted fees paid to Quebec from US was excluded leaving $121,496 in fees.

It should be noted that the time spent by B.C. counsel is an estimate. This situation arises, I am advised, because B.C. counsel apparently do not keep time records when they are operating under a contingency fee arrangement.

¶ 15 In considering each of the appropriate factors, I accept that class counsel have spent a great deal of time on this matter. Class counsel became involved in this matter six years ago. The action itself has been ongoing for four years. I also accept that the issues raised are complicated and that class counsel have assumed considerable responsibility in deciding to take on the task of prosecuting these claims. There is a significant monetary value to the claims as the settlement of $30 million dollars would aptly demonstrate. There is also no question as to the skill and competence of class counsel. The factors of the client's ability to pay and the expectation of the client regarding the amount of the fee do not really come into play in this case as the class is not paying the fees nor are the fees being taken out of what would otherwise be funds available to settle the class members' claims. However, insofar as the retainer agreements evidence the expectation of the representative plaintiffs regarding the fees to be paid to class counsel, the fees sought are well within the terms of those agreements.

¶ 16 Where I have some difficulty in this case is with the factors regarding the importance of the

matter to the client and the results achieved. At this stage, there is no information available as to the number of members of the class who will actually decide to take up the settlement offered. Without that information, it is difficult to fully evaluate the results achieved. It is also difficult to evaluate whether the resolution of the claims was truly important to the class members. Put another way, if very few of the members of the class wind up taking advantage of the settlement, that might be some evidence that the results of the settlement were less favourable than they might otherwise appear to be and/or that the issue itself is not one of great importance to the members of the class. It must be remembered in this regard that this action deals with allegedly defective products used in plastic plumbing systems. The plaintiffs allege that if such fittings and piping are used in potable water plumbing systems, they will fail prematurely leading to leaks and damages consequent on such leaks. Under the settlement, Du Pont has agreed to pay a portion, namely 25%, of the costs of repairs to the systems and of damages caused by failures of the systems. It is theoretically possible that class members may view problems with the systems, if any, as being too inconsequential to bother with the settlement or they may view the steps they have to take to participate in the settlement as overwhelming the gain to be achieved through the settlement.

¶ 17 Class counsel responds to these concerns in two ways. First, they assert that it is unfair to require class counsel to wait for the settlement to be completed particularly in a case such as this where the time frame to take up the settlement may extend for a number of years. Second, they assert that the court has already passed on these issues by approving the settlement in the first place.

¶ 18 I accept that there would be an unfairness in requiring class counsel to await the completion of the settlement in order to obtain their remuneration if that required no payment being approved to class counsel. However, it seems to me that it is open to the court to approve a base level of remuneration at this stage and consider a request for additional remuneration once the take up rate in the settlement is known, if the take up rate would demonstrate that additional recompense is justified. For example, payment only of the value of the time spent together with the disbursements could be approved (in this case this would amount to $3 million of the $4.5 million sought) and the balance could be considered at a later stage. Indeed, it appears that just such an approach was negotiated, and approved, in Directright Cartage Ltd. v. London Life Insurance Co., [2001] O.J. No. 4073 (S.C.J.).

¶ 19 I do not accept that the concern I have raised, or my suggested solution to it, is in some fashion foreclosed by the fact that the settlement itself has been approved. The settlement was approved specifically excising from that approval the issue of the fees. Approval of the settlement in those circumstances cannot be seen as in any way being even an indirect approval of the fees sought. I do accept that approval of the settlement inherently includes a finding that the settlement has value and would be of benefit to the class members. That finding, however, is made prospectively and cannot be considered, as a consequence, to be immutable. If actual experience shows that the class members did not avail themselves of the settlement then it may be that, notwithstanding the apparent value of the settlement, its actual value differs. Having said that, such a conclusion does not mean that the settlement is valueless nor does it mean that such concerns would lead to no fees being paid to class counsel. Rather, what this issue goes to is the level of premium or "multiplier" that it is appropriate to approve.

¶ 20 Class counsel further responds that it is unrealistic to expect that there will be no take up under the settlement. From that reality, they contend that, even if the take up rate should turn out to be low, the fees they seek would still be reasonable because the level of premium is low relative to other fees which have been approved in other settlements of class actions. In this respect, they point to the following:

(a) after taxes and disbursements, there remains $3,175,690.00 for legal fees which would be approximately half of the amount provided for in the lowest of the retainer agreements and accordingly well within the amount the representative plaintiffs would have expected to pay;

(b) the figure of $3,175,690.00 for fees can be compared to the total value of the settlement which is at least $30,500,000.00. Class counsel are, therefore, requesting fees that amount to 10.4% of the total value of the settlement, and;

(c) the figure of $3,175,690.00 for fees equates to a multiplier of approximately 1.75 on the total time expended to date by class counsel on this part of the litigation.

¶ 21 These points are clearly relevant to the issue that I must determine. In Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417 (C.A.), Mr. Justice Goudge identified three tests against which fees sought by class counsel should be measured. They are:

(a) the percentage which the fees sought are of the gross recovery. As noted above, in this case that is 10.4%;

(b) whether the resulting multiplier is appropriately placed within the acceptable range which he identified as being between one at the low end and three to four at the high end. As noted above, in this case the multiplier would equal 1.75, and;

(c) whether the compensation sought is viewed by the court as sufficient to provide a real economic incentive to solicitors to take on such cases. I find that the fees sought here clearly satisfy that concern.

I might add to those considerations a fourth one, namely, how the fees sought relate to the fees that would be payable under any retainer agreement that has been entered into. In this case, as already noted, the fees are well within the parameters of those agreements.

¶ 22 While I remain of the view that in class proceedings the proper evaluation of the reasonableness of the fees sought under a settlement would benefit from evidence as to the actual performance of the settlement reached, I have concluded that in this case the absence of such evidence ought not to preclude the approval of the fees sought. I accept the point that it is highly unlikely that no class members will avail themselves of the settlement. I agree with counsel for the plaintiffs that had I thought that such a result might obtain, I would not likely have approved the settlement in the first place. Further, even if, in the end result, a low percentage of the members of the class do in fact take up the settlement, I would still be hard pressed to conclude that the fees sought by class counsel were not warranted. The action was complex. It involved considerable risk as my denial of certification regarding the other two defendants evidences. Nonetheless, a significant resolution was achieved respecting this one defendant. In addition, the fees are being paid by that defendant over and above the amount being made available to the class members. Class counsel are entitled to be compensated relative to the result achieved. In that regard, the fees here satisfy the factors set out in Gagne v. Silcorp Ltd., supra, without being excessive.

¶ 23 As a result, having considered all of the above, I have concluded that the fees should be approved as requested. An order will therefore issue approving class counsel fees and disbursements in the amount of $4.5 million including taxes.

NORDHEIMER J.

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BAXTER, et al. v. ATTORNEY GENERAL v. ANGLICAN CHURCH OF CANADA, et al. Court File No: 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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APPLICATION FOR APPROVAL OF AGREEMENT RESPECTING THE LEGAL FEES OF THE MERCHANT LAW GROUP

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