JOINT FACTUM OF THE PLAINTIFFS

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 I'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

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Proceeding under the *Class Proceedings Act, 1992*

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PART I - NATURE OF THE MOTION

A. OVERVIEW

1. This motion seeks court approval, within the class proceedings context, of the pan-Canadian Indian Residential School ("IRS") Settlement. This Settlement resolves the various individual and class claims brought on behalf of IRS Survivors and their families and seeks to bring closure to wounds left by this tragic and shameful chapter in the history of Canada's relations with aboriginal peoples (First Nations, Metis and Inuit, collectively "Aboriginal").

2. The IRS litigation and this Settlement are unique. They arise from the IRS system that for more than a century saw government policy towards Canada's Aboriginal peoples combine with the evangelical mission of various religious groups to create institutions where Aboriginal children were separated from their families, homes, and communities and subjected to attack on their language, culture and very identity as Aboriginal persons. These institutions were often in poor condition and almost always overcrowded. They provided substandard care, treatment and education by staff who more often than not were unqualified. Many children in these IRS were subjected to horrendous abuse.

3. Under the IRS system, individual Survivors suffered injuries the effects of which have been felt in turn by their families and in their communities. Canada's Royal Commission on Aboriginal Peoples ("RCAP") summarized the IRS system and its effect as follows:

> Put simply, the Residential School system was an attempt by successive governments to determine the fate of Aboriginal people in Canada by appropriating and reshaping their future in the form of thousands of children who were removed from their homes and communities and placed in the care of strangers. Those strangers, the teachers and staff, were, according to Hayter Reed, a senior member of the department in the 1890s, to employ "every effort...against anything calculated to keep fresh in the memories of the children habits and associations which it is one of the main objects of industrial education to obliterate." Marching out from the schools, the children, effectively re-socialized, imbued with the values of European culture, would be the vanguard of a magnificent metamorphosis: the 'savage' was to made 'civilized', made fit to take up the privileges and responsibilities of citizenship.
>
> Tragically, the future that was created is now a lamentable heritage for those children and the generations that came after, for Aboriginal

> communities and, indeed, for all Canadians. The school system's concerted campaign "to obliterate" those "habits and associations", Aboriginal languages, traditions and beliefs, and its vision of radical re-socialization, where compounded by mismanagement and underfunding, the provision of inferior educational services and the woeful mistreatment, neglect and abuse of many children—facts that were known to the department and the churches throughout the history of the school system.
>
> **Affidavit of Richard Courtis, sworn July 27, 2006 ("Courtis Affidavit"), Joint Motion Record ("JMR") vol. 5, tab 10, para 10**

4. The legacy of the IRS system has given rise to litigation of unprecedented volume and scope both by way of individual claims and class proceedings on behalf of Survivors of the IRS as well as their families. At the same time, political and public debate has made that legacy an issue of national importance and a focal point in Canada's relationship with Aboriginal peoples.

5. The Settlement is the product of lengthy and difficult, but ultimately successful, negotiations between legal representatives of Survivors and their families, representatives of Aboriginal organizations and communities, including the Assembly of First Nations ("AFN") and Inuit Groups, church groups and the appointed federal representative, the Honourable Frank Iacobucci (the "Federal Representative")[1]. These negotiations spanned a period of almost a year and resulted in an Agreement in Principle signed on November, 20, 2005 and a final Settlement Agreement signed in counterpart in May and June, 2006.

6. The terms of the Settlement Agreement provide an array of compensation, programs, benefits and other measures intended to address both the direct harm to Survivors who attended the IRS as well as the effects on their families and in their communities. The focus of the Settlement is on both compensation and healing; it involves both redress for the wrongs that were committed and programs that will help Survivors and their families to look beyond the IRS legacy to the future.

7. The Settlement is supported by all the parties, who ask that the court grant the relief sought in order that the Settlement may be implemented at the earliest possible date.

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[1] A chronology of the key dates in IRS history and the negotiations leading to the settlement is found in Schedule "C".

B. RELIEF SOUGHT

8. The Settlement is national in scope, with court approval being sought in Alberta, British Columbia, Manitoba, Northwest Territories, Nunavut, Ontario, Quebec, Saskatchewan, and the Yukon (the "Jurisdictions"). Approval in all Jurisdictions is an essential term of the Settlement, failing which the overall Settlement will be of no force and effect.

9. The parties advance the Settlement in each Jurisdiction, seeking certification to proceed as a class proceeding and approval of the settlement, including the terms for compensating legal counsel. Simultaneously, the parties seek to amend the statements of claim and titles of proceedings used to date in each Jurisdiction, in order to advance one single statement of claim (the "Claim" or the "Amended Statement of Claim") which encompasses the components of all of the underlying class proceedings, with a view to advancing the most comprehensive case, and to ensure the determination of all possible issues.

10. The parties also seek approval of a notice program and other orders ancillary to the approval and implementation of the Settlement (for example, addressing the fact that the settlement is contingent upon approval in all Jurisdictions).

PART II - FACTS

A. SUMMARY OVERVIEW OF THE FACTS

11. After years of silence, the wretched conditions and abuses rampant in the IRS have gradually become public, and been brought into both the litigation and political arenas for redress. After years of pain, struggle and hard work, that redress is now at hand and has been placed before the court for consideration. In order to allow the court to evaluate the Settlement Agreement reached between the parties, the following general issues are addressed:

(a) The action is described, including parties and other stakeholders, causes of action advanced and the Class;

(b) A history of the IRS is provided;

(c) The emergence of the IRS as a political issue for Canada and Aboriginal communities is described;

(d) Previous efforts to resolve IRS claims are considered;

(e) The negotiations leading up to the current Settlement Agreement are described, as are the terms of the Settlement Agreement; and

(f) The contribution of legal counsel is canvassed.

12. This proceeding is no ordinary litigation – it is the culmination of years of negotiation, the resolution of thousands of individual court proceedings and other claims, and the attempt to acknowledge and redress in some way the destruction of both individuals and an entire way of life.

13. The Survivor Class (as defined below) consists of approximately 79,000 individuals, all of whom are entitled to cash compensation under the Settlement Agreement. A great many more people will be affected by the programmatic relief included in the Settlement Agreement. Briefly, the Settlement Agreement consists of:

(a) Compensation for all Survivors of $10,000 for their first year of IRS attendance, plus an additional $3,000 for every year attended thereafter;

(b) Substantial funding for Survivors, their relatives and members of the Aboriginal communities for programs aimed at healing, as well as commemoration initiatives for Survivors and their families;

(c) A process for Survivors to claim compensation for serious physical abuse, sexual assaults and other abuse resulting in serious psychological injury; and

(d) A Truth and Reconciliation Commission to make a public and permanent record of the IRS legacy.

14. The Settlement Agreement, if approved, will relieve courts across the Country of a substantial backlog of current IRS litigation summarized as follows:

Active Litigation and Plaintiffs	**Statements of Claim**	**Plaintiffs**
Alberta	1432	3950
British Columbia	313	830
Manitoba	289	1157
New Brunswick	1	1
NWT	20	29
Nova Scotia	1	582
Nunavut	6	191
Ontario	101	657
Quebec	16	89
Saskatchewan	2112	2949
Yukon	46	103
Total Active	4337	10538

Affidavit of David Russell, sworn July 25, 2006 ("Russell Affidavit"), JMR vol. 4, tab 8, para 43

15. In addition, there exist a further approximately 5,000 IRS claims which have been advanced through an alternative dispute resolution process, approximately 4,000 of which remain outstanding. Accordingly, there are approximately 15,000 individuals currently advancing IRS claims.

Russell Affidavit, JMR vol. 4, tab 8, para 42

16. The numerous stakeholders who negotiated the Settlement Agreement came to the table with a full understanding of the imperative of reaching an agreement. Negotiating parties included the Honourable Frank Iacobucci, the appointed Federal Representative, plaintiffs' counsel, counsel for various religious organizations (who operated various IRS), and members of various Aboriginal organizations, including the AFN, Cree and Inuit organizations, including the

Inuvialuit Regional Corporation, Nunavut Tunngavik Incorporated and Makivik Corporation (the "Inuit Groups").

B. THE CLAIM

17. The Claim is an amalgamation of approximately 19 different class action statements of claim brought in various jurisdictions across Canada, and it represents the distillation of all issues related to IRS attendance which the parties to this proceeding seek to address, in substantially identical format, in each of the Jurisdictions.

Amended Statement of Claim, Supplementary Joint Motion Record ("SMJR), tab 1B, para 2

18. The Claim has been achieved by consent of all parties as part of the extraordinary and unprecedented negotiation to address the unique issues related to IRS. In addition to the class actions, approximately 15,000 individual actions have been commenced against the Defendants in various jurisdictions across Canada, representing a significantly greater number of individual claims and claimants, which has placed an extraordinary burden on Canada's judicial systems and resources.

Amended Statement of Claim, SJMR, tab 1B, para 3
Russell Affidavit, JMR vol. 4, tab 8, paras 42-43

(i) The Parties and other Key Stakeholders

19. The parties set out in the Claim consist of three groups: putative representative plaintiffs, Canada and the Church Entities. There are additional key stakeholders who have been instrumental in forwarding the interests of the Class (both in and out of the litigation arena) and who were actively involved in the negotiations leading to Settlement, including Aboriginal organizations and legal counsel.

20. The Plaintiffs include individuals from all Jurisdictions, many of whom attended IRS, while others have family members who attended. A summary of the proposed representative Plaintiffs is as follows:

Name	**Residence**	**Experience**
Veronica Marten	Alberta	• Mother attended Holy Angels IRS for approximately 16 years, as well as uncles and an aunt • Member of the Mikisew Cree First Nation
Donald Belcourt	Alberta	• Member of the Sucker Creek Indian Band, a Cree and a status Indian • Attended St. Brunos IRS for 8 years
Theresa Ann Larocque	Alberta	• Attended St. Martin's IRS for 10 years • Member of the Bigstone Cree Band and a status Indian
Elizabeth Kusiak	Alberta	• Attended Holy Angels IRS for 8 years • Member of the Athabasca Chipewyan First Nation
Flora Northwest	Alberta	• Member of the Samson First Nation and a status Indian • Attended Hobbema / Ermineskin IRS for 10 years
Adrian Yellowknee	Alberta	• Member of the Bigston Cree First Nation and status Indian • Attended St. Martin IRS for 10 years, and St. Bruno's IRS for 2 years
Michael Carpan	Alberta	• Member of the Slave Lake First Nation and status Indian • Attended St. Mary's IRS for 12 years
Percy Archie	British Columbia	• Attended St. Joseph's IRS for 2 years • Member of the Canim Lake Bank
Peggy Good	British Columbia	• Member of the Nanaimo First Nation and status Indian • Attended Port Alberni IRS for 10 years
Camble Quatell	British Columbia	• Member of the Campbell Riber Indian Band and a status Indian • Attended St. Michael's IRS for 10 years
Pauline Joan Michell	British Columbia	• Member of the Kanaka Bar First Nation • Husband, father, mother and 8 siblings attended IRS
Helen Wildeman	British Columbia	• Member of the Fort Nelson First Nation and status Indian • Attended Lower Post IRS for 5 years

Name	**Residence**	**Experience**
Vincent Bradley Fontaine	Manitoba	• Father attended Fort Alexander IRS for 8 years • Member of the Sagkeeng First Nation
Fred Kelly	Manitoba	• Member of the Ojibways of Onigaming First Nation and status Indian • Attended St. Mary's IRS for 11 years and St. Paul's IRS for 2 years
James Fontaine	Manitoba	• Member of the Sagkeeng First Nation and status Indian • Attended Fort Alexander IRS for 8 years
Stanley Nepetaypo	Manitoba	• Member of the Fox Lake First Nation and status Indian • Attended Norway House IRS for 5 years
Lucy Doctor	Northwest Territories	• Member of the Tulita Dene First Nation • 5 children attended Grollier Hall IRS
Benny Doctor	Northwest Territories	• Member of the Tulita Dene First Nation • Attended Grollier Hall IRS for 5 years
Dana Eva Marie Francey	Northwest Territories	• Member of Inuvialuit society • Mother, aunt and uncles attended IRS, residing at Stringer Hall
Rosemarie Kuptana	Northwest Territories	• Attended IRS for 10 years, as did brother. • Attended Sir Alexander Mackenzie School and Samuel Hearne Secondary School and resided at Stringer Hall hostel (which constitutes an IRS). • Member of the Inuvialuit society. Now actively employed as an IRS consultant with the Inuvialuit Regional Corporation, which represents 5500 Inuvialuit.
Nora Madeline Bernard	Nova Scotia	• Attended Shubenacadie IRS from the age of 9 • Mi'kmaq and a Status Indian • Coordinator of the Association for the Survivors of the Shubenacadie IRS
Michelline Ammaq	Nunavut	• Attended Joseph Bernier Hall IRS for 5 years • Inuk
Janet Brewster	Nunavut	• Mother attended Akaitcho Hall IRS • Stepfather attended Grollier Hall IRS and IRS in

Name	**Residence**	**Experience**
		Forth Smith
Phil Fontaine	Ontario	• Attended IRS for 10 years, as did his parents and many siblings • Executor to mother's estate, Agnes Mary Fontaine, a Survivor who attended Fort Alexander IRS for 9 years • Attended Fort Alexander IRS and Assiniboine IRS • Member of the Sagkeeng First Nation in Manitoba. • Now National Chief of the Assembly of First Nations.
Elijah George Baxter	Ontario	• Attended IRS for 3 years, as did his children. • Attended Pelican Falls IRS • He is an Ojibway and Status Indian.
Charles Baxter, Sr.	Ontario	• Attended IRS for approximately 15 years. • Attended Pelican Falls IRS among others. • Ojibway and Status Indian.
Evelyn Baxter	Ontario	• Mother, grandparents and other relatives attended IRS • Member of the Marten Falls First Nation
Ernestine Caibaisosai-Gidmark	Ontario	• Member of the Sagamok First Nation and status Indian • Attended Spanish Hills IRS for 2 years
John Bosum	Quebec	• Attended La Tuque IRS for 11 years • Cree and Status Indian
Anne Dene	Quebec	• Member of the Mikisew Cree First Nation and status Indian • Attended Holy Angels IRS for 4 years
Edward Tapiatic	Quebec	• Member of the Cree Nation of Chisasibi and status Indian • Attended St. Phillips IRS for 10 years and La Tuque IRS for 2 years
Cornelius McComber	Quebec	• Member of the Mohawk First Nation and status Indian • Attended St. Charles Garnier IRS for 4 years
Dennis Smokeyday	Saskatchewan	• Member of the Kinistin First Nation and status Indian • Attended Muscowegan IRS for 8 years

Name	Residence	Experience
Brenda Joyce Cyr	Saskatchewan	• Member of the Gordon's First Nation • Attended Lebret IRS for 3 years • Attended Muscowequan IRS for 6 years
Jane McCallum	Saskatchewan	• Member of the Peter Ballaytyne First Nation and status Indian • Attended Guy Hill IRS for 9 years
Alvin Saulteaux	Saskatchewan	• Member of the Carry the Kettle First Nation and status Indian • Attended Lebret IRS for 3 years
Norman Pauchay	Saskatchewan	• Member of the Yellow Quill First Nation and status Indian • Attended Gordon's IRS for 2 years
Rhonda Buffalo	Saskatchewan	• Member of the Start First Nation and status Indian • Attended Gordon's IRS for 9 years
Kenneth Sparvier	Saskatchewan	• Member of the Cowessess First Nation and status Indian • Attended Marievel IRS for 12 years
Malcolm Dawson	Yukon	• Attended Whitehorse Baptist Mission IRS for 9 years • Member of the Kwanlin Dun First Nation
Christine Semple	Yukon	• Member of the Grand Rapids First Nation and status Indian • Attended Mackay IRS for 5 years

Affidavit of Larry Philip Fontaine, sworn July 28, 2006 ("Fontaine Affidavit"), JMR vol. 3, tab 6, paras 11-17

Instrument / Name	Date Sworn	Citation
Affidavit of Benny Doctor	**August 3, 2006**	**SJMR, tab 10**
Affidavit of Brenda Cyr	**July 26, 2006**	**JMR vol. 9, tab 51**
Affidavit of Charles Baxter	**June 17, 2006**	**JMR vol. 9, tab 46**
Affidavit of Dana Eva Marie Francey	**August 3, 2006**	**SJMR, tab 9**
Affidavit of Donald Belcourt	**July 14, 2006**	**JMR vol. 5B, tab 11**
Affidavit of Elijah Baxter	**May 12, 2006**	**JMR vol. 9, tab 47**

Affidavit of Elizabeth Kusiak	**July 13, 2006**	**JMR vol. 9, tab 54**
Affidavit of Evelyn Baxter	**July 19, 2006**	**JMR vol. 9, tab 48**
Affidavit of Janet Brewster	**July 21, 2006**	**JMR vol. 9, tab 49**
Affidavit of John Bosum	**July 25, 2006**	**JMR vol. 9, tab 50**
Affidavit of Lucy Doctor	**August 3, 2006**	**SJMR, tab 11**
Affidavit of Malcolm Dawson	**July 24, 2006**	**JMR vol. 9, tab 52**
Affidavit of Michelline Ammaq	**July 17, 2006**	**SJMR, tab 13**
Affidavit of Nora Bernard ("Bernard Affidavit")	**July 10, 2006**	**JMR vol. 5B, tab 12**
Affidavit of Pauline Joan Michell	**August 1, 2006**	**SJMR, tab 15**
Affidavit of Percy Archie	**July 7, 2006**	**JMR vol. 9, tab 45**
Affidavit of Rosemarie Kuptana	**August 3, 2006**	**SJMR, tab 8**
Affidavit of Theresa Ann Larocque	**July 13, 2006**	**JMR vol. 9, tab 55**
Affidavit of Veronica Marten	**July 14, 2006**	**JMR vol. 9, tab 56**
Statutory Declaration of Adrian Yellowknee	**March 16, 2006**	**JMR vol. 9, tab 77**
Statutory Declaration of Alvin Saulteaux	**March 7, 2006**	**JMR vol. 9, tab 71**
Statutory Declaration of Ann Dene	**March 15, 2006**	**JMR vol. 9, tab 61**
Statutory Declaration of Camble Quatell	**March 1, 2006**	**JMR vol. 9, tab 70**
Statutory Declaration of Christine Semple	**March 9, 2006**	**JMR vol. 9, tab 72**
Statutory Declaration of Cornelius McComber	**March 8, 2006**	**JMR vol. 9, tab 66**
Statutory Declaration of Dennis Smokeyday	**February 28, 2006**	**JMR vol. 9, tab 73**
Statutory Declaration of Edward Tapiatic	**March 13, 2006**	**JMR vol. 9, tab 75**
Statutory Declaration of Ernestine Caibaisosai-Gidmark	**March 23, 2006**	**JMR vol. 9, tab 59**
Statutory Declaration of Flora Northwest	**March 6, 2006**	**JMR vol. 9, tab 68**
Statutory Declaration of Fred Kelly	**March 13, 2006**	**JMR vol. 9, tab 64**
Statutory Declaration of Helen Wildeman	**March 6, 2006**	**JMR vol. 9, tab 76**

Statutory Declaration of James Fontaine	**March 9, 2006**	**JMR vol. 9, tab 62**
Statutory Declaration of Jane McCallum	**March 3, 2006**	**JMR vol. 9, tab 65**
Statutory Declaration of Kenneth Sparvier	**June 2, 2006**	**JMR vol. 9, tab 74**
Statutory Declaration of Michael Carpan	**July 7, 2006**	**JMR vol. 9, tab 60**
Statutory Declaration of Norman Pauchay	**March 3, 2006**	**JMR vol. 9, tab 69**
Statutory Declaration of Peggy Good	**March 20, 2006**	**JMR vol. 9, tab 63**
Statutory Declaration of Rhonda Buffalo	**March 20, 2006**	**JMR vol. 9, tab 58**
Statutory Declaration of Stanley Nepetaypo	**March 1, 2006**	**JMR vol. 9, tab 67**
Statutory Declaration of Vincent Fontaine	**July 14, 2006**	**JMR vol. 9, tab 53**

21. Canada is a Defendant in these proceedings, as represented by the Attorney General of Canada.

22. The remaining Defendants are religious groups or entities which were or may have been responsible for the operation of various of the IRS, as particularized in Schedule "A" to the Claim (collectively, the "Church Groups" or "Church Entities"). While a large number of entities are named and referred to, the Church Groups can be broken down into Catholic, Anglican, Presbyterian and United Church Entities, all of which participated in the negotiations leading to the settlement. Those groups are described as:

(a) The Presbyterian Church is an unincorporated association which includes congregations, members and adherents of The Presbyterian Church of Canada who did not become part of the United Church of Canada on June 10, 1925, together with persons who have since that date joined The Presbyterian Church of Canada as members or adherents. The Trustee Board of The Presbyterian Church in Canada is a body corporate per a special act of parliament entitled *The Trustee Board of The Presbyterian Church in Canada* S.C. 1939, c.64, and it holds title to the property of the Church, subject to minor local exceptions. The Presbyterian Church of Canada and The Trustee Board of The Presbyterian Church of Canada are named defendants in these proceedings, as well as related Presbyterian missionary groups, all of which are referred to collectively as the "Presbyterian Church";

Affidavit of Stephen Kendall, sworn June 2, 2006 ("Kendall Affidavit"), JMR vol. 7, tab 23, paras 2-3

(b) The United Church of Canada was founded pursuant to a covenant formed between the members of its founding churches, and was incorporated between 1924 and 1926 by the Parliament of Canada and the legislatures of the various provinces, which legislation is known as *The United Church of Canada Act.* Entities named in this proceeding, which fall within the United Church grouping include The United Church of Canada, the Methodist 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, and the Missionary Society of the Methodist Church of Canada. All such entities are referred to herein collectively as the "United Church";

Affidavit of James Vincent Scott, sworn June 14, 2006 ("Scott Affidavit"), JMR vol. 7, tab 22, paras 2-3

(c) The Anglican Church is an ecclesiastical and not a legal entity comprising the collective body of approximately 800,000 Christian people in Canada who subscribe to the Anglican doctrines of faith and worship. There are approximately 30 separate dioceses which are usually legally incorporated under provincial legislation and thus independent entities. The General Synod of the Anglican Church of Canada and the Missionary Society of the Anglican Church of Canada are both separately incorporated. All such entities are referred to collectively herein as the "Anglican Church";

Affidavit of James Bruce Boyles, sworn June 1, 2006 ("Boyles Affidavit"), JMR vol. 7, tab 21, paras 1, 3, 8-11

Amended Statement of Claim, JMR vol. 3, tab 3A, paras 53-56

(d) The Catholic Church consists of a number of discrete legal entities (as set out in Schedule "A" to the Amended Statement of Claim") constituting the vast majority of Defendants in this proceeding, but are referred to collectively herein as the "Catholic Church";

Amended Statement of Claim, JMR vol. 3, tab 3A, Schedule "A"

Affidavit of Sister Gloria Keylor, sworn May 18, 2006 ("Keylor Affidavit"), JMR vol. 7, tab 27, para 2

23. The AFN is another key stakeholder. It is composed of 633 First Nations represented by their respective elected Chiefs. The AFN is the national representative body of First Nations and the National Chief is democratically elected by the Chiefs of the First Nations of Canada. The AFN mandate is to communicate, advance and protect the legal and political rights of its constituents. AFN National Chief Phil Fontaine has, together with the AFN, been instrumental in fighting for recognition of IRS Survivors and their rights to compensation.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 2, 4

24. The Inuit Groups have been involved in the negotiations and proceedings with a view to presenting the unique perspective of the Inuit.

Affidavit of Rosemarie Kuptana, sworn August 3, 2006 ("Kuptana Affidavit), Supplementary Joint Motion Record ("SJMR"), tab 8, paras 10, 12-13

25. The Aboriginal Healing Foundation ("AHF") is an Aboriginal-run, not-for-profit corporation that provides financial support to community developed and let healing programs that address physical and sexual abuse, as well as the intergenerational aspects of the IRS legacy.

Fontaine Affidavit, JMR vol. 3, tab 6, para 47

26. Plaintiffs' legal counsel were also actively involved in the proceedings. Given the large number of class and individual actions instituted relating to IRS, it is impossible to name all counsel, however for the purposes of negotiations, they were divided into: the National Consortium, Independent Counsel, the Merchant Law Group and counsel to the Aboriginal organizations.

Affidavit of Darcy Merkur, sworn July 28, 2006 ("Merkur Affidavit"), JMR vol. 8, tab 42, para 19

Affidavit of Laura Cabott, sworn July 27, 2006 ("Cabott Affidavit"), JMR vol. 8, tab 44, paras 1-2

27. The National Consortium is made up of 19 separate law firms from 8 provinces and 2 territories, collectively having approximately 5,500 individual retainer agreements in place for unsettled IRS claims. Given the class and representative nature of certain of those retainers, the National Consortium acts for approximately 7,500 individuals.

Merkur Affidavit, JMR vol. 8, tab 42, paras 19-21

Iacobucci Affidavit, JMR vol.3, tab 5, sworn July 28, 2006 ("Iacobucci Affidavit"), JMR vol. 3, tab 5, para 30

28. The Unaffiliated Counsel describes those individual counsel who do not form part of the National Consortium and do not belong to the Merchant Law Group, but who participated in the negotiation process. That group includes the following firms, as signatories to the Settlement Agreement: Fulton & Company (represented by Len Marchand); Lackowicz, Shier & Hoffman (as represented by Dan Shier); Keshen Major (as represented by Greg Rickford); F.J. Scott Hall Law Corporation (as represented by Scott Hall); Peter Grant & Associates (as represented by Peter Grant and Brian O'Reilly); Macdermid Lamarsh Gorsalitz (as represented by Robert Emigh); Rose Keith, Cabott & Cabott (as represented by Laura Cabott); Bilkey, Quinn (as represented by David Bilkey); Heather Sadler Jenkins (as represented by Sandra Staats); Duboff Edwards Haight & Schachter (as represented by Harley Schachter); and MacPherson Leslie & Tyerman LLP (as represented by Maurice Laprairie Q.C.). The Independent Counsel represents over 4,000 individual IRS litigants.

Settlement Agreement, JMR vol. 1, tab 2, p. 91

Affidavit of Sandra Staats, sworn July 27, 2006 ("Staats Affidavit"), JMR vol. 8, tab 43, para 8

Cabott Affidavit, JMR vol. 8, tab 44, paras 6, 8

29. The Merchant Law Group is a law firm which has indicated it acts for a large number of Class members, and was a participant in the Settlement negotiations.

Iacobucci Affidavit, JMR vol.3, tab 5, para 36

(ii) The Proposed Class

30. The "Class" is defined to include all individuals who resided at an IRS during the Class Period (from 1920 to 1997) and their family members, except those who are included in the already certified "*Cloud*" class action in Ontario. The Class consists of the Survivor Class, the Family Class and the Deceased Class, which are defined as follows:

(a) "**Survivor Class**" means:

All persons who resided at an IRS in Canada between January 1, 1920 and December 31, 1997, who are living, or who were living as of May 30, 2005, and who, as of the date hereof, or who, at the date of death resided in:

(i) Alberta, for the purposes of the Alberta Court of Queen's Bench;

(ii) British Columbia, for the purposes of the British Columbia Supreme Court;

(iii) Manitoba, for the purposes of the Manitoba Court of Queen's Bench;

(iv) Northwest Territories, for the purposes of the Supreme Court of the Northwest Territories;

(v) Nunavut, for the purposes of the Nunavut Court of Justice;

(vi) Ontario, Prince Edward Island, Newfoundland, and Labrador, New Brunswick, Nova Scotia and any place outside of Canada, for the purposes of the Ontario Superior Court of Justice;

(vii) Québec, for the purposes of the Quebec Superior Court;

(viii) Saskatchewan, for the purposes of the Court of Queen's Bench for Saskatchewan; and

(ix) Yukon, for the purposes of Supreme Court of the Yukon Territory;

but excepting Excluded Persons.

(b) "**Family Class**" means:

(i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

(ii) the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

(iii) a former spouse of a Survivor Class Member;

(iv) a child or other lineal descendent of a grandchild of a Survivor Class Member;

(v) a person of the same or opposite sex to a Survivor Class Member who cohabited for a period of at least one year with that Survivor Class Member immediately before his or her death;

(vi) a person of the same or opposite sex to a Survivor Class Member who was cohabiting with that Survivor Class Member at the date of his or her death and to whom that Survivor Class Member was providing support or was under a legal obligation to provide support on the date of his or her death;

(vii) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death; and,

(viii) such other persons as the Court recognizes or directs,

and who, as of the date hereof, are resident in:

(i) Alberta, for the purposes of the Alberta Court of Queen's Bench;

(ii) British Columbia, for the purposes of the British Columbia Supreme Court;

(iii) Manitoba, for the purposes of the Manitoba Court of Queen's Bench;

(iv) Northwest Territories, for the purposes of the Supreme Court of the Northwest Territories;

(v) Nunavut, for the purposes of the Nunavut Court of Justice; and

(vi) Ontario, Prince Edward Island, Newfoundland, and Labrador, New Brunswick, Nova Scotia and any place outside of Canada, for the purposes of the Ontario Superior Court of Justice;

(vii) Québec, for the purposes of the Quebec Superior Court;

(viii) Saskatchewan, for the purposes of the Court of Queen's Bench for Saskatchewan;

(ix) Yukon, for the purposes of Supreme Court of the Yukon Territory;

but excepting Excluded Persons.

(c) "**Deceased Class**" means all persons who resided at an IRS in Canada between 1920 and 1997, who died before May 30, 2005, and who were, at their date of death, residents of

(i) Alberta, for the purposes of the Alberta Court of Queen's Bench;

(ii) British Columbia, for the purposes of the British Columbia Supreme Court;

(iii) Manitoba, for the purposes of the Manitoba Court of Queen's Bench;

(iv) the Northwest Territories, for the purposes of the Supreme Court of the Northwest Territories;

(v) Nunavut, for the Nunavut Court of Justice;

(vi) Ontario, Prince Edward Island, Newfoundland, and Labrador, New Brunswick, Nova Scotia and any place outside of Canada, for the purposes of the Ontario Superior Court of Justice;

(vii) Québec, for the purposes of the Quebec Superior Court;

(viii) Saskatchewan, for the purposes of the Saskatchewan Court of Queen's Bench;

(ix) Yukon, for the purposes of the Supreme Court of the Yukon Territory;

but excepting Excluded Persons; and

(d) "**Excluded Persons**" means all persons who attended the Mohawk Institute IRS in Brantford, Ontario, between 1922 and 1969, and their parents, siblings, spouses and children (and are thus subject to the "Cloud" class proceedings, already certified).

31. The size of the Survivor Class is estimated to be 78,994. This estimate was prepared by an independent firm, Siggner & Associates Inc., as part of the information gathered in the negotiating process. The Family Class has not been qualified, but given the broad definition of the Family Class, it is expected to include most of the members of Canada's Aboriginal communities.

Courtis Affidavit, JMR vol. 5, tab 10, para 121
Fontaine Affidavit, JMR vol. 3, tab 6, para 103

(iii) The Causes of Action Advanced

32. The Class advances a number of claims against Canada and the Church Groups including the following:

(a) Breach of non-delegable duty;

(b) Breach of fiduciary duty;

(c) Breach of Statutory duty under the *Indian Act*, R.S.C. 1985, c.I-5;

(d) Breach of common law duties;

(e) Negligence;

(f) Breach of Treaty Rights; and

(g) Loss of Guidance, care and companionship pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3 ("FLA").

Amended Statement of Claim, SJMR, tab 1B, paras 7-12; 81-99

(iv) Relief Sought

33. The parties seek to have this proceeding certified as a class proceeding pursuant to the relevant common law and statutory tests relating to class proceedings in each of the Jurisdictions, which include the following:

(a) In the Province of Alberta: the *Class Proceedings Act*, S.A. 2003, c. C-16.5;

(b) In the Province of British Columbia: the *Class Proceedings Act*, R.S.B.C. 1996, c.50;

(c) In the Province of Manitoba: the *Class Proceedings Act*, C.C.S.M. c. C130;

(d) In the Provinces of Newfoundland and Labrador, Prince Edward Island, New Brunswick, Nova Scotia and Ontario: the *Class Proceedings Act,* 1992 (Ontario), S.O. 1992, c. 6;

(e) In The Northwest Territories: Rule 62 of the *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96;

(f) In Nunavut: Rule 62 of the *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg 010-96, as adopted by the Territory by operation of Section 29 of the *Nunavut Act*, S.C. 1993, c. 28.

(g) In the Province of Québec: Articles 999–1051 of the *Code of Civil Procedure (Québec)*;

(h) In the Province of Saskatchewan: the *Class Actions Act*, S.S. 2001, c.C-12.01; and

(i) In the Yukon Territory: Rule 5(11) of the *Supreme Court Rules (British Columbia.)* B.C. Reg. 220/90 as adopted by the Territory by operation Section 38 of the *Judicature Act (Yukon)* R.S.Y. 2002, c. 128,

(All of which are referred to collectively as the "Class Proceedings Law", or "CPL").

C. THE HISTORY OF IRS - POLICY AND PRACTICE

34. IRS predate Confederation. Canada operated nearly every IRS as a joint venture with various religious organizations, most if not all of whom are included among the Church Entities. The IRS were located in every province and territory except Newfoundland, New Brunswick and Prince Edward Island.

Courtis Affidavit, JMR vol. 5, tab 10, para 4

35. Approximately 130 IRS existed over time, and while most IRS ceased to operate by the mid-1970's, the last federally-run IRS in Canada closed in 1996. A listing of IRS is included in the Settlement Agreement, which also provides for additional institutions to be added if they meet the necessary criteria, which is; "any institution in which a child was placed in residence away from the family or home by or under the authority of Canada for the purposes of education and for which Canada was jointly or solely responsible for the operation of the residence and care of the children resident there"

Courtis Affidavit, JMR vol. 5, tab 10, para 15

Amended Statement of Claim, SJMR, tab 1B. para 6(r)

Settlement Agreement, JMR vol. 1, tab 2, section 12.01

(i) The Development of IRS Policy

36. Canada's IRS policy grew out of the historical shift from military to civil authority occurring in Canada in the 1800's. While various religious orders had established schools for Aboriginal children as early as 1615, it was the shift to civil authority that caused the question of Aboriginal education to come to the fore as a matter of state policy. In 1847, Dr. Egerton Ryerson, Chief Superintendent of Education for Upper Canada, tabled his report on "the best method of establishing and conducting Industrial Schools for the benefit of the Aboriginal Indian Tribes", which solidified the state's role in providing education to Aboriginal children.

Affidavit of Robert Robson, sworn July 25, 2003 and attached as Exhibit "A" to the Affidavit of Robert Robson sworn July 9, 2006 (the "Robson Affidavit 2003"), JMR vol. 4, tab 7A, paras 31-32

37. With confederation in 1867, the *British North American Act* vested Aboriginal affairs with the federal government, and therefore the Aboriginal education issue fell to John A. MacDonald. He charged Nicholas Davin with the responsibility of investigating and reporting on the educational system for Aboriginals adopted in the United States, and the advisability of establishing similar institutions in the North-West. The report back advanced residential, denominational schools to "impart a practical knowledge of the arts of husbandry and mechanics as well as the other useful industries" and to introduce a policy of "aggressive civilization".

Robson Affidavit 2003, JMR vol. 4, tab 7A, para 33

38. IRS policy consisted of: first, removal of children from their communities, disrupting Aboriginal families; second, re-socializing of children in the schools in order to extinguish their Aboriginal character; and third, schemes for integrating graduates into the non-Aboriginal world.

Report on the Royal Commission of Aboriginal Peoples (1998), vol. 1, Part II, Chap. 10, attached as Exhibit "A" to the Fontaine Affidavit (the "RCAP Report"), JMR vol. 3, tab 6A, pg 4

(ii) IRS in Practice

39. The IRS' system's concerted campaign was to "obliterate" Aboriginal languages, traditions and beliefs. In the IRS, children were prohibited from practicing their Aboriginal beliefs, culture, language and rituals. In fact, the entire IRS system was premised on the belief that assimilation would be achieved through destruction of Aboriginal languages: "[w]ith that growing silence would come the dying whisper of Aboriginal cultures".

RCAP Report, JMR vol. 3, tab 6A, pgs. 4, 8

40. The quality of education was indeed woeful, as was the quality of life. IRS were chronically under-funded. The government provided per capita grants which were simply inadequate. As an example, in 1938 the federal government's per capita grant for IRS students was $180, as compared to $642 for the School for the Deaf, $550 for the School for Boys, and St. Norbert's orphanage at $294. By 1941, the IRS per capita grant had sunk to $159.

Robson Affidavit 2003, JMR vol. 4, tab 7A, paras 51-53

41. The per-capita grants for students dropped by approximately 15% during the depression, however these problems were not re-visited by the federal government until after WWII. By 1948, sixty percent (60%) of the Indian school-age population in Canada was enrolled in IRS.

RCAP Report, JMR vol. 3, tab 6A, pgs. 4-6j
Robson Affidavit 2003, JMR vol. 4, tab 7A, para 38

42. A review of Canada's supervisory role of the IRS, based upon historical records, shows a poor performance. The role of the Indian Agent or Superintendent was nominal, although there were occasions where particular issues were reported, providing the Department of Indian Affairs with the opportunity to address issues. A sampling of comments relating to various IRS taken from historic records includes:

(a) The need to replace a principal, as he was perceived to be the cause of "the trouble";

(b) Children were going to the garbage can to get food;

(c) Children were being "cruelly beaten";

(d) Children were "not warmly clad";

(e) The premises were cold;

(f) There was insufficient staff;

(g) The standard of food preparation was low, there were unsanitary conditions and a lack of cleanliness in the food preparation area, and the nature and quality of the food was insufficient with respect to requirements for vitamins and minerals, as well as calories.

Robson Affidavit 2003, JMR vol. 4, tab 7A, paras 58-60

43. The physical infrastructure of the IRS was described as "badly built, poorly maintained and overcrowded". The physical condition of the IRS was described as "a dreadful weight that pressed down on the thousands of children who attended them", and were "undoubtedly chargeable with a very high death rate among the pupils". Problems included design, hygiene, heating and ventilation, fire escapes, windows and doors and wiring, rendering the IRS "totally unsuitable and a disgrace to Indian Affairs".

Robson Affidavit 2003, JMR vol. 4, tab 7A, para 61-63; 81-82

44. In theory, the IRS curriculum was based on useful skills, but in practicality this meant forced labour. The male students did all the work of the institution and the farm, and the girls made clothes for all pupils and carried out all domestic duties. The IRS was likened to a "workhouse" rather than a school – a fact appreciated as early as 1928, in which the violation of child labour laws was considered. In addition, the students were subjected to rigorous religious instruction and ethnocentric lessons on "Indian and white life", patriotism, the evils of Indian isolation, the obligation to work, and the duties of the sexes to labour, home and the public.

Robson Affidavit 2003, JMR vol. 4, tab 7A, paras 61- 63, 76-79

45. Apart from the abysmal living, learning and working conditions at the IRS, and the fatally flawed educational strategies employed, there was a fundamental want of supervision and protection of the students to ensure they were safe. Whether it was general abuses and neglect with respect to the manner of operation of the IRS, or the more specific failures relating to the flourishing of sexual predators, Canada failed in its responsibilities to the children.

Robson Affidavit 2003, JMR vol. 4, tab 7A, para 67-69

46. The nature of the abuses suffered by IRS children include emotional, mental, physical and spiritual. It is impossible to catalogue all of the ways in which the children suffered, but a sampling of abuses includes: being beaten, strapped, confined, burned, chained, shocked, kicked, pushed down stairs, having their heads shaved, being denied food, being forced to eat their own vomit, having needles inserted into various parts of their anatomy, having their faces rubbed in human excrement, having their hair pulled or being forced to stand or kneel for lengthy periods of time. These abuses were often inflicted with "implements" ranging from leather and rubber straps, to straps with tacks, nails or wires embedded, boards, sticks, whips, rawhide, and cat-o-nine tails. Much of these conditions were known to the federal government.

Robson Affidavit 2003, JMR vol. 4, tab 7A, paras 88, 97-98, 101-104

47. Like the physical abuse, the full panoply of sexual abuses is vast, with conduct including voyeurism and fondling, oral, vaginal and anal intercourse, and sometimes pregnancy and forced abortions. Such conduct was committed by various persons in authority, from nuns and priests to supervisors, to doctors present to provide medical attention. One student recalled that following rapes and pregnancies, "we never knew what happened to the babies, but they were always disappearing".

Robson Affidavit 2003, JMR vol. 4, tab 7A, paras 105-109

48. It is trite to observe that the emotional and psychological abuse was extant in the very fact of the IRS policy, with substandard living conditions and cruel and abusive caregivers

merely exacerbating the problem. The goal of driving the native out of the child meant that children were left feeling humiliated, belittled, ridiculed, shamed, discouraged, disconnected, ostracized, scared, abandoned and ashamed. The act of "kidnapping" children out of their homes and into a strange environment is sufficient to devastate a child. Given the forced suppression of spiritual practices, culture and language as part of the "re-socialization" of the children, damage was sure to be done.

Robson Affidavit 2003, JMR vol. 4, tab 7A, paras 116-119; 124-125; 136

49. Canada's IRS policy shifted in the 1960's as a result of 5 different policy papers addressing various aspects of Canada – Aboriginal relations, culminating in the secularization of the IRS on April 1, 1969. This change was also part of an overall strategy of "integration", in which it was intended for Aboriginal children to be schooled with the rest of the population, under the control and at the cost of the provincial governments. Accordingly, the federal government began to close IRS.

Robson Affidavit 2003, JMR vol. 4, tab 7A, paras 39-42

50. Canada's own assessment of the IRS at this time was dismal. In the words of one of its consultants, the IRS provided "a custodial service rather than a child development service", and involved the outdated concept of "combined shelter and education at the least public expense".

Merkur Affidavit, JMR vol. 8, tab 42, para 86

(iii) The IRS Legacy

51. Neither the curriculum nor the pedagogy were appropriate to the culture of the students. While Canada admitted in the 1970s that the curriculum had not been properly cultivated to the students "sociological needs", it did little to rectify that situation.

RCAP Report, JMR vol. 3, tab 6A, pg 2

52. By the late 1990s, it was widely and publicly recognized in Canada that the IRS experience had devastated and continued to devastate communities:

> The schools were, with the agents and instruments of economic and political marginalization, part of the contagion of colonization. In their direct attack on language, beliefs and spirituality, the schools had been a particularly virulent strain of that epidemic of empire, sapping the children's bodies and beings. In later life, many adult survivors, and the families and communities to which they returned, all manifested a tragic range of symptoms emblematic of 'the silent tortures that continue in our communities'.
>
> **RCAP Report, JMR vol. 3, tab 6A, pg 1**

53. Even after the IRS were finally closed, abuse spilled back into the communities, the effects of the IRS program echoing in the lives of subsequent generations of children. A 1989 study conducted by the Native Women's Association of the Northwest Territories determined that eighty percent (80%) of girls under the age of eight (8) had been victims of sexual abuse while fifty percent (50%) of boys of the same age had also suffered from sexual abuse. While the roots of the cycle of sexual violence and abuse are complex, it is "apparent that the destruction of traditional Indian culture [through the residential school system] has contributed greatly to the incidence of child sexual abuse and other deviant behaviour".

> **RCAP Report, JMR vol. 3, tab 6A, pg 3,**
>
> **Indian & Northern Affairs Canada, file E6757-18, volume 13, *A New Justice for Indian Children*, Child Advocacy Project, Children's Hospital, Winnipeg, 1987, pg 24, Plaintiffs' Book of Authorities ("Plaintiffs' Authorities"), vol.3, tab 49**

54. The abuses and living conditions at IRS have given rise to "residential school syndrome", which is cited as a psychological disorder accepted as precipitating many of the contemporary problems in the Aboriginal community.

> **Robson Affidavit 2003, JMR vol. 4, tab 7A, paras 111-113**

55. AFN National Chief Phil Fontaine describes IRS policy as follows:

> The IRS policy attempted to assimilate First Nations people into colonial Canadian culture by annihilating our languages, cultural traditions, spirituality and family and community relations across many generations. Many of us who attended IRS were abused and betrayed on an individual level, but we were also abused as a people. Our children and

> grandchildren who did not attend at the schools continue to suffer from our residential school experiences, and I believe that many generations to come will bear the scars of the residential schools.
>
> **Fontaine Affidavit, JMR vol. 3, tab 6, para 53**

56. The testimonies of the Class members support and reinforce the observations and conclusions of the RCAP. Examples of experiences, as contained in the affidavits of the proposed Representative Class members, speak volumes:

(a) At 9 years of age, Nora was sent to IRS, separated from her siblings and subjected to arbitrary physical punishment and humiliation. She was sexually abused. She was isolated, suffered difficulty communicating, was ridiculed and insulted and prevented from practicing her native traditions. As a consequence, Nora has and continues to suffer.

Bernard Affidavit, JMR vol. 5B, tab 12, paras 13-23

(b) Charles attended several different IRS, however they were almost wholly devoid of an educational component. He was physically and sexually abused by those in authority. He was cut off from his culture and prohibited from speaking his language. He was humiliated, demeaned and shamed, and robbed of his childhood. His IRS experience has been a major contributing force in a life which has involved violent crime.

Affidavit of Charles Baxter Sr., sworn June 17, 2006 ("Charles Baxter Affidavit"), JMR vol. 9, tab 46, paras 12-34

(c) Although Elijah attended IRS approximately 70 years ago, he knows that it has left an indelible mark on his life. His experiences included estrangement from family and isolation from known language and culture, as well as serious and repeated physical and sexual abuse. Elijah suffered the additional pain of having to send his children to IRS after suffering himself.

Affidavit of Elijah George Baxter, sworn May 12, 2006 ("Elijah Baxter Affidavit"), JMR vol. 9, tab 47, paras 9-15

(d) Donald attended an IRS near his home, but was forced to live at the IRS. The food and shelter were substandard and the education was dubious. More significantly however, Donald was subjected to racial slurs, extreme corporal punishment, and sexual assaults.

Affidavit of Donald David Belcourt, sworn July 14, 2006 ("Belcourt Affidavit"), JMR vol.5B, tab 11, paras 10-21

(e) Benny recalls waiting in fear for the plane that was to take him 300 miles away from home, to Grollier Hall IRS. From that point forward, Benny's life was transformed from

the happy boy he had been, to a shamed, withdrawn and scared individual. Benny was a favourite victim of IRS supervisors. He was raped repeatedly by 3 different supervisors during his 5 years in the IRS. He was also demeaned and shamed. One nun in particular would aggressively pull his ear and call him a savage. However, the other children also taunted him, as they knew he was a favourite victim for sexual abuse. Isolated from his siblings, and cut off from his parents (Benny's letters were screened and often not sent), Benny fell into what would become a life long pattern of self-loathing and substance abuse. Benny's IRS experience has and continues to torture him, as well as his family members. The rage he felt at being abandoned by his parents and the effects of his alcoholism destroyed his relationship with his father, and plagued his relationship with his mother. It has only been in the last few years that Benny has been able to share fully the trauma he suffered at IRS.

Affidavit of Benny Doctor, sworn August 3, 2006 ("Doctor Affidavit"), Supplementary Joint Motion Record ("SJMR), tab 10, paras 7-21

(f) Rosemarie attended IRS for 10 years, 400 km away from her family home in Sachs Harbour. Like many Inuit, she lived in a hostel and attended a day school, all under the care of Canada. She suffered physical and sexual abuse. Through the alienation from her culture, she lost touch with her family, and lost her language and ability to relate. As a result, she has experienced severe anxiety and panic attacks.

Affidavit of Rosemarie Kuptana, sworn August 3, 2006 ("Kuptana Affidavit"), SJMR, tab 15, paras 16-18

(g) Phil spent 10 years in IRS, beginning at the age of 6. He was ridiculed and demeaned by the nuns and priests who ran the IRS for being "evil" and a "savage". He was physically and sexually abused. He was denied contact with his siblings, also at the IRS, and the comfort of his native language and customs.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 11-16

(h) Percy spent 2 years in St. Joseph's IRS, and during that time he was physically abused, as well as sexually abused in various ways, including being forced into acts of masturbation. Archie has been permanently, negatively affected by his IRS experience.

Affidavit of Percy Archie, sworn July 7, 2006 ("Archie Affidavit"), JMR vol. 9, tab 45, paras 7-8

(i) John recalls severe sexual abuse from his stay in IRS, including being repeatedly sodomized by a staff member. He also recalls physical abuse and being hit on various parts of his body for breaking the many rules, including speaking his native language.

Affidavit of John Bosum, sworn July 25, 2006 ("Bosum Affidavit"), JMR vol. 9, tab 50, paras 9-10

(j) Brenda attended various IRS herself, for approximately 10 years. 5 of her 6 siblings and 1 of her 4 children also attended IRS. Brenda was traumatized by her IRS experience, and the impact from that experience continues to this day. Brenda was physically assaulted and emotionally abused, and she was sexually molested. Among other sexual assaults, Brenda still recalls the acts of fellatio Father Joyal forced her to perform. Since school, Brenda has struggled with abuse and addiction problems that continue to this day, she has two failed marriages and has been depressed to the point of attempting suicide numerous times. Her health is uncertain, due to contracting Hepatitis "C", probably from intravenous drug use during her life on the street. Now 45 years of age, Brenda has been a grandmother for approximately 7 years, and is responsible for her 3 grandchildren, as her daughter is not able to care for them.

Affidavit of Brenda Cyr, sworn July 26, 2006 ("Cyr Affidavit"), JMR vol. 9, tab 51, paras 5-15

57. The Survivors of the IRS have provided first hand accounts of the loss of language, culture, customs and traditions. These are traditionally passed down by elders, and are vital to the well being of the native community, and it was this cycle of knowledge which was blocked by the IRS. At IRS, children were taught to be ashamed of their heritage, and were punished for any outward demonstrations of it.

Elijah Baxter Affidavit, JMR vol. 9, tab 47, paras 16-21

58. The IRS experience has caused Survivors life long damage, with such ill effects ranging from problems finding work due to deficiencies in education to sleep loss, anxiety, depression, alcoholism, and anger management issues among others.

Belcourt Affidavit, JMR vol. 5B, tab 11, paras 21-27

59. The Family members also suffered greatly. While often it was children of Survivors who had to contend with the emotional problems of the parent(s) (which has been known to manifest itself in a cycle of abuse), parents too suffered as they were forced by law to send their children into an environment of institutional abuse on fear of incarceration. The helplessness and vulnerability of these parents, particularly those who had suffered already at IRS themselves, is palpable.

Elijah Baxter Affidavit, JMR vol. 9, tab 47, paras 25-27

60. For Family Class members who had a parent in IRS, the effects of IRS can be quite striking. For example:

(a) Veronica has been diagnosed with Fetal Alcohol Syndrome. Her mother, who attended IRS for 16 years and suffered physical and sexual abuse, became a substance abuser, and in fact was unable to care for her daughter. Veronica spent most of her childhood in foster care, where she in turn was abused and neglected. Since coming of age, Veronica has sought to reconnect with her mother, and has learned of some of her mother's experiences in IRS. Veronica attributes her mother's addictions and her failure to learn to parent or to relate emotionally with others to her mother's experiences in IRS.

Affidavit of Veronica Marten, sworn July 14, 2006 ("Marten Affidavit"), JMR vol. 9, tab 56, paras 10-29

(b) For Dana, whose mother and aunts and uncles attended IRS, a significant impact of IRS has been how it emotionally damaged her mother, and made it difficult for her mother to show affection to Dana. Dana has watched her mother struggle with depression and loss of self esteem, and has seen how it has influenced her own life.

Affidavit of Dana Eva Marie Francey, sworn August 3, 2006 ("Francey Affidavit"), SJMR, tab 9, paras 8-12

(c) Evelyn's mother and grandparents, among others, attended IRS. She has observed that her mother lacked parenting skills and that their relationship was cold and distant, which factors she attributes to her mother being taken from her family as a child and placed in an IRS where she was neglected.

Affidavit of Evelyn Baxter, sworn May 12, 2006 ("Evelyn Baxter Affidavit"), JMR vol. 9, tab 48, paras 8-12

(d) Vincent's father is an IRS Survivor, and he attributes the difficulties in his relationship with his father to his father's experiences of abuse in IRS

Affidavit of Vincent Bradley Fontaine, sworn July 14, 2006 ("Vincent Fontaine Affidavit"), JMR vol. 9, tab 53, paras 8-14

(e) Janet's mother and stepfather both attended IRS. As a result, neither were able to cope with Janet's education, finding it difficult to support her educational endeavours and specifically difficult to interact or communicate with Janet's teachers. Janet's stepfather committed suicide in 2003. Janet's mother is now a world renowned translator of her native tongue, yet as a result of her IRS experiences, she did not pass her language on to her daughter. Janet has never been able to communicate with family members who speak only Inuktitut, including and in particular her grandmother. Their inability to communicate has frequently driven Janet to tears. Janet has also had to work hard to ensure that the parenting weaknesses her parents displayed (lack of affection, anger at emotion) do not get passed on to her own children

Affidavit of Janet Brewster, sworn July 21, 2006 ("Brewster Affidavit"), JMR vol.9, tab 49, paras 8-18

(f) Pauline's husband, parents and 8 siblings all attended St. George's IRS in Lytton, British Columbia. Pauline has seen how that experience has affected these family members, and in particular has worked with and supported her husband as he endured a painful and public litigation process to obtain redress for the abuses he suffered.

Affidavit of Pauline Joan Michell, sworn August 1, 2006 ("Michell Affidavit"), SJMR, tab 15, paras 3-4; 9-13

(g) Dana's mother, aunt and uncles all attended Samuel Hearne Secondary School and resided at Stringer Hall. Dana's mother was physically and psychologically abused at IRS, and consequently she has struggled with depression and abuse problems. She also suffers from low self esteem, which has contributed to her parenting difficulties. Dana sees how her mother's problems translated into difficulties in Dana's own childhood and upbringing.

Francey Affidavit, SJMR, tab 9, paras 9-14

(h) Lucy's 5 children attended Grollier Hall IRS. Lucy has and continues to suffer the anguish of having her children arbitrarily taken from her and shipped to a distant institution. She remembers the pain of loneliness as her home, once filled with laughter, fell silent and she was left, often, alone. More painful, however, is the knowledge that her children were seriously sexually abused, physically assaulted and emotionally traumatized. Lucy was helpless, unable to end her children's misery – she was forced to watch them withdraw, and in the case of her son Benny, turn to alcohol in what would become a lifelong pattern of substance abuse.

Affidavit of Lucy Doctor, sworn August 3, 2006 ("Lucy Doctor Affidavit"), SJMR, tab 11, paras 10-22

61. Today, Aboriginal communities suffer a myriad of problems, including high rates of incarceration, youth suicide, drug and alcohol abuse, health problems, poverty and social exclusion, which are traced back to the IRS legacy.

Fontaine Affidavit, JMR vol. 3, tab 6, para 86

D. PUBIC AWAKENING TO THE ABUSES OF THE IRS

62. The IRS began evolving into an issue on the Aboriginal agenda, and subsequently the Canadian agenda in the late 1980's. Previously, the issue of IRS was always present in the

communities, but it was not a driving political issue. This began to change in approximately 1989 when Phil Fontaine addressed the National Chiefs Assembly in Whitehorse and told the audience that First Nations people would not be ready to talk about their future until they had addressed the IRS legacy of the past. By then, the first IRS claim had been initiated.

Fontaine Affidavit, JMR vol. 3, tab 6, para 27

Affidavit of Brian O'Reilly, sworn July 27, 2006 ("O'Reilly Affidavit"), JMR vol. 5B, tab 13, para 6

63. Media interest in the personal stories of IRS abuse began to develop, however the IRS story reached a broad, national audience when Fontaine was interviewed by journalists including Peter Mansbridge and Barbara Frum in 1990. Although painful and upsetting, Fontaine shared his personal experiences in the hope that by speaking publicly the issue would become one of national importance.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 28-31

64. In 1991, the government appointed the RCAP, mandated to:

> Iinvestigate the evolution of the relationship among aboriginal peoples (Indian, Inuit and Métis), the Canadian government, and Canadian society as a whole. It should propose specific solutions, rooted in domestic and international experience, to the problems which have plagued those relationships and which confront aboriginal peoples today. The Commission should examine all issues which it deems to be relevant to any or all of the aboriginal peoples of Canada.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 36-37

65. RCAP released a Report in 1996, which included a full chapter on IRS. RCAP recommended: establishing a library to house and archive information on IRS, taking immediate steps to ensure that those suffering from the effects of physical, sexual and psychological abuse obtain access to appropriate methods of healing, and initiating a full public inquiry into the IRS policies and practices.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 38-39

66. On January 7, 1998 Canada provided the Statement of Reconciliation and a $350 million endowment to establish the AHF for the benefit of IRS Survivors. Since 1998, the AHF's work has supported communities and addressed the tragic effects of the government's IRS policy on generations of Aboriginal peoples.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 41-42

67. In the Statement of Reconciliation, the Government of Canada acknowledged and expressed regret for the harms caused in and through IRS. The key statement on IRS was as follows:

> The Government of Canada acknowledges the role it played in the development and administration of these schools. Particularly to those individuals who experienced the tragedy of sexual and physical abuse at residential schools, and who have carried this burden believing that in some way they must be responsible, we wish to emphasize that what you experienced was not your fault and should never have happened. To those of you who suffered this tragedy at residential schools, we are deeply sorry.

Fontaine Affidavit, JMR vol. 3, tab 6, para 42

68. In the late 1990's government officials, plaintiffs' lawyers, academics, mediators, Church Group representatives, Survivors and the AFN worked together to establish principles and guidelines for an out of court resolution process for victims of sexual and physical abuse in IRS. The AFN, among others, fought hard for a process of adjudication which would avoid re-victimization. Individual court cases were becoming more common, with mixed results.

Fontaine Affidavit, JMR vol. 3, tab 6, para 46

69. In 1998, as litigation began blossoming, the AFN established an IRS unit to provide research, support and advocacy for Survivors, as well as to provide public education and awareness activities, facilitate commemoration, coordinate community meetings, send out newsletters and implement traditional healing programs. The AFN database of former students has approximately 17,500 registrants.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 55-56

70. In 2004, a conference was convened by the AFN to evaluate the dispute resolution process then in place for IRS claims (the "ADR Process"). Participants at the conference included Survivors, academics, various plaintiff side lawyers, representatives of Church Entities, the AFN and Canada. That conference focused the criticisms of the ADR Process which had been developed by Canada to stream claims out of the courts and into a more informal process, but which manifested substantial shortcomings, including:

(a) Differential treatment of Survivors, depending on whether they attended a Protestant or Catholic IRS (100% compensation v. 70% compensation);

(b) Differential awards depending on the province where the abuse took place;

(c) Focus on abusive acts as opposed to the consequences from those acts;

(d) No redress for loss of language, culture, emotional abuse, forced labour, etc.;

(e) No redress for student on student abuse; and

(f) Failure to recognize gender inequalities in the abuses suffered.

Fontaine Affidavit, JMR vol. 3, tab 6, para 66

71. As a result of the consensus built on the failings of the ADR Process, Canada agreed to strike a task force to make recommendations to improve the ADR Process. The AFN, which was actively involved in that process, came out with a report in November 2004 which addressed the problems with the ADR Process (the "AFN Report").

Fontaine Affidavit, JMR vol. 3, tab 6, paras 69-70

72. The AFN Report also laid the groundwork for an overall strategy of compensation and healing. Key recommendations in the AFN Report included:

(a) Payment for attendance at IRS, for losses of language and culture, in the amount of $10,000, plus $3,000 for each year of IRS attendance;

(b) The implementation of a healing plan, including truth sharing and reconciliation components accessible locally;

(c) Counselling and related support to Survivors and their families;

(d) Fundamental changes to the dispute resolution program for those suffering physical or sexual abuse, including

(i) Equality among Survivors seeking compensation for additional abuses, regardless of where the abuse took place, or which Church Group operated the IRS;

(ii) Compensation based on proof of events, without reference to fault and legal causation;

(iii) Canada to accept 100% vicarious liability for acts of others present at the IRS; and

(iv) Various steps be taken to stream line and simplify the process.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 72-74

73. Support for change to the process came from other quarters as well. In February 2005, the Canadian Bar Association released its report entitled "The Logical Next Step: Reconciliation Payments for All Indian Residential School Survivors". The report supported the main findings and recommendations of the AFN Report, calling for a reconciliation payment to all former students. Also in February of 2005, the Parliamentary Standing Committee on Aboriginal Affairs and Northern Development issued a report which was very critical of the ADR Process. The Committee's report was approved by the House of Commons on April 12, 2005. It included recommendations to terminate the ADR Process, set-up court-supervised negotiations to settle the claims, and expedite settlement of claims for physical and sexual abuse in a separate process.

Russell Affidavit, JMR vol. 4, tab 8, paras 52-53

E. THE ROLE OF THE CHURCH GROUPS

74. While the Federal Government has had the primary responsibility for the IRS and related policy, the Church Groups were actively involved in operating the IRS as part of their missionary activities and have thus been involved in issues surrounding IRS, from negotiations to litigation to apologies.

(i) The Presbyterian Church

75. From 1886 to 1969, the Presbyterian Church was involved in, or alleged to have been involved in the operation of 11 different IRS in 5 different provinces. Beginning in 1998, the Presbyterian Church began to be named as a defendant in various IRS proceedings, including approximately 140 individual actions (either directly or by way of third party claim by Canada) and in the Baxter Class proceeding.

Kendall Affidavit, JMR vol. 7, tab 23, para 5, 8; Exhibit "A" List of IRS

76. In 2002 the Presbyterian Church and Canada began renewed negotiations to address the apportionment of liability in respect of the litigation, and on February 13, 2003 those parties reached an agreement which provided that the Presbyterian Church would create a settlement fund in the amount of $2.1 million to be drawn upon to cover the Presbyterian Church's 30% contribution to awards payable to successful claimants.

Kendall Affidavit, JMR vol. 7, tab 23, para 9-11; Exhibit "B" Settlement Agreement

77. As at March 10, 2006, a total of $366,894 had been paid out of the Presbyterian Church settlement fund.

Kendall Affidavit, JMR vol. 7, tab 23, para 14

(ii) United Church of Canada

78. The United Church was involved or alleged to have been involved in the operation of approximately 11 different IRS in 4 different provinces from 1925 (when the United Church was formed through the amalgamation of all Methodist, Congregationalist and some Presbyterian congregations in Canada) and 1969.

Scott Affidavit, JMR vol. 7, tab 22, para 10; Exhibit "A" List of IRS

79. Beginning in 1995, the United Church began to be named in IRS litigation. The United Church has now been named in approximately 1,000 individual actions (either as a defendant or third party brought in by Canada) and in class proceedings in Ontario and Saskatchewan.

Scott Affidavit, JMR vol. 7, tab 22, para 11

80. Although the United Church did not have a formal agreement with Canada respecting contribution to compensation payable, those parties did have an informal arrangement in which the United Church contributed 25% to 30% of awards, on a case by case basis. As at March 2006, The United Church of Canada had contributed approximately $5,996,000 to the resolution of IRS claims.

Scott Affidavit, JMR vol. 7, tab 22, para 12-13

81. In 1994, the United Church established The Healing Fund of the United Church of Canada to assist in funding community based healing projects initiated by Aboriginal people and has to date provided over $2.7 million. Such funding is separate and apart from the other funding commitments made in respect of IRS litigation.

Scott Affidavit, JMR vol. 7, tab 22, para 22

(iii) The Anglican Church

82. From 1880 to 1969, the Anglican Church of Canada was involved in or alleged to have been involved in the operation of approximately 36 different IRS in almost every province and territory across Canada.

Boyles Affidavit, JMR vol. 7, tab 21 para 12; Exhibit "A" List of IRS

83. Beginning in 1988, the Anglican Church began to be named in IRS related litigation, either directly as a defendant or as a third party. To date, the Anglican Church is named in approximately 2200 individual actions and two class proceedings in Ontario.

Boyles Affidavit, JMR vol. 7, tab 21, para 13

O'Reilly Affidavit, JMR, vol. 5B, tab 13, para 6

84. Canada and the Anglican Church entered into a liability and cost sharing agreement respecting IRS claims which contemplated the provision of a settlement fund from which payments could be made for the Anglican Church's 30% share of IRS claims. To date, the Anglican Church has paid out approximately $7,698,419 in both litigation and ADR Process claims.

Boyles Affidavit, JMR vol. 7, tab 21, paras 14-16, 19

85. In recognition of the IRS legacy, the Anglican Church has created an Indigenous Healing Fund, which has to date made grants totalling approximately $2,360,717 to assist in the healing of IRS Survivors, their families and their communities. The Anglican Church also offered an apology to Aboriginal people for its involvement in IRS.

Boyles Affidavit, JMR vol. 7, tab 21, para 26
Merkur Affidavit, JMR vol. 8, tab 42, para 85

(iv) The Catholic Church

86. The Catholic Church was involved in, or alleged to have been involved in the operation of a number of IRS across Canada. Various of the distinct entities included in the Catholic Church have faced significant volumes of litigation, such as:

(a) Approximately 150 individuals have made claims against Les Oeuvres Oblates de l'Ontario, which excludes the *Baxter* class proceeding;

(b) Approximately 35 individuals have made claims against Les Residences oblates du Quebec, which excludes the *Baxte*r class proceeding;

(c) Over 1000 individuals have made claims against the Sisters of Charity (Grey Nuns) of Alberta, Montreal, Northwest Territories and Manitoba;

(d) Over 3000 individuals have made claims against Oblats de Marie Immaculee due Manitoba; and

(e) Missionary Oblates – Grandin Province has had over 4000 claims made against it, excluding class proceedings.

Affidavit of Father Jacques L'Heureux, sworn April 8, 2006 ("L'Heureux Affidavit"), JMR vol. 7, tab 28, para 5

Affidavit of Father Jacques Gagne, sworn April 8, 2006 ("Gagne Affidavit"), JMR vol. 7, tab 25, para 5

Affidavit of Sr. Bernadette Poirer, sworn May 11, 2006 ("Poirer Affidavit"), JMR vol. 7, tab 24, para 4

Affidavit of Bernard Pinet, sworn April 19, 2006 ("Pinet Affidavit"), JMR vol. 7, tab 30, para 5

Affidavit of Father Camille Piche, sworn May 18, 2006 ("Piche Afidavit"), JMR vol. 7, tab 29, para 5

87. The Catholic Church has expended considerable time, effort and funds in responding to the litigation.

L'Heureux Affidavit, JMR vol. 7, tab 28, para 5

Gagne Affidavit, JMR vol. 7, tab 25, para 5

Poirer Affidavit, JMR vol. 7, tab 24, para 4

Pinet Affidavit, JMR vol. 7, tab 30, para 5

Piche Affidavit, JMR vol. 7, tab 29, para 5

88. The Catholic Church was involved in negotiations with Canada to address IRS litigation issues from at least 2001, and in earnest from February 2004, however no agreement was reached at that time.

Keylor Affidavit, JMR vol. 7, tab 27, para 3

89. Notwithstanding the ongoing litigation and lack of an agreement with Canada, the oblates, members of the Catholic Church, did provide an apology for their role in IRS.

Merkur Affidavit, JMR vol. 8, tab 42, para 85

F. CANADA'S PERSPECTIVE

90. As set out above, the RCAP was established with a mandate to investigate the evolution of the relationship among Aboriginal peoples, the Canadian government, and Canadian society as a whole. RCAP was charged with proposing specific solutions, rooted in domestic and international experience, to the problems which have plagued those relationships and which continue to confront Aboriginal peoples. Although not established with a focus on IRS, RCAP's Report, released in October 1996, recognized the impacts of IRS on Aboriginal people.

Russell Affidavit, JMR vol. 4, tab 8, paras 8-10

91. The number of IRS abuse claims increased following the release of the RCAP Report. That Report, and the increasing number of IRS claims, also helped to prompt the creation of an IRS unit within the Department of Indian and Northern Affairs in 1996. The unit was specifically designed to address the increasing number of claims relating to IRS. That same year, 1996, the last remaining federally-run IRS closed.

Russell Affidavit, JMR vol. 4, tab 8, paras 11-13

92. Following the release of the RCAP Report, the Government set to work developing a new approach to govern its interactions with Aboriginal peoples. On January 7, 1998, Canada announced *Gathering Strength - Canada's Aboriginal Action Plan its response to the Report of the Royal Commission on Aboriginal Peoples*. The plan called for a renewed partnership with Aboriginal people based on recognizing past mistakes and injustices, the advancement of reconciliation, healing and renewal, and the building of a joint plan for the future. The plan consisted of a four part strategy to restore Canada's relationship with Aboriginal peoples: an apology, a healing strategy, a litigation strategy, and dispute resolution strategy.

Russell Affidavit, JMR vol. 4, tab 8, paras 14-15

93. In accordance with the plan, Canada offered an apology in the form of the Statement of Reconciliation, on January 7, 1998, which acknowledged its role in the development and

administration of IRS and expressed that it was deeply sorry to those who suffered physical and sexual abuse at the IRS.

Russell Affidavit, JMR vol. 4, tab 8, paras 16-17

94. Over the course of 1998 and 1999, the government, the Church Entities, the AFN and Survivors engaged in a process of listening, learning and sharing in a series of meetings across the country to discuss IRS, which process was called the "Dialogues". This was the first time all parties came together to discuss IRS issues. The purpose was to explore approaches that could be used to address the legacy of IRS, including methods to resolve the IRS claims in a safe, reliable and timely manner that would also be sensitive to the needs of the former students.

Russell Affidavit, JMR vol. 4, tab 8, paras 19-20

95. Starting during the Dialogues and continuing forward, the government and the Church Entities discussed apportionment of compensation between them.

Russell Affidavit, JMR vol. 4, tab 8, para 21

96. The Dialogues focused attention on the drawbacks to conventional litigation for IRS claims, and resulted in the development of a series of eleven alternative dispute resolution pilot projects implemented starting in 1999, in the Northwest Territories, British Columbia, Saskatchewan, Manitoba, Ontario, and New Brunswick. They involved over 400 former IRS students and resulted in the settlement of 311 claims for physical and sexual abuse at IRS. However, the pilot projects did not address other claims, including damage to language and culture or claims based essentially on attendance at IRS.

Russell Affidavit, JMR vol. 4, tab 8, paras 22-25

97. As a result of the growing caseload and increased profile of the IRS claims, the Office of Indian Residential Schools Resolution Canada ("OIRSRC") was established on June 4, 2001 as a separate department from the Department of Indian Affairs and Northern Development, in order to focus federal efforts on addressing the legacy of IRS. OIRSRC was given the mandate to

achieve a fair and equitable resolution of abuse claims, to develop and implement means of reliably validating claims in a safe, fair, appropriate and timely fashion, and to carry out negotiations between government and Church Entities.

Russell Affidavit, JMR vol. 4, tab 8, para 26

98. The government announced its 70/30 policy in October, 2001. That policy was based on the government's firmly held position that the Church Groups should be held responsible for their role in IRS and should contribute to individual compensation accordingly. Under the 70/30 policy, Canada paid 70 per cent of agreed-upon compensation to plaintiffs with validated claims of recognized causes of action in instances where both the government and a Church Group were involved in the IRS. The remaining 30 per cent of agreed-upon compensation was attributed to the Church Group. In cases where there was no Church Group involved, Canada paid 100 per cent of the agreed-upon compensation. As with the pilot projects, claims for language and culture losses, or those based essentially on attendance at IRS were not covered.

Russell Affidavit, JMR vol. 4, tab 8, paras 28-30

99. Canada ultimately reached agreements with certain of the Church Groups to accept and pay a portion of the liability for IRS claims. An agreement with the Anglican Church was finalized March 11, 2003, wherein the Anglican Church agreed to pay 30 per cent of estimated liability for individuals abused at Anglican operated IRS, to a total maximum of $25 Million dollars. The government agreed to pay the remaining 70 per cent up to the $25 Million dollar cap and to pay 100 per cent in the event the cap was exceeded. A similar agreement was reached with the Presbyterian Church on February 12, 2003, with a $2.1 million cap. Less comprehensive, informal or case by case agreements were reached with other Church Entities.

Russell Affidavit, JMR vol. 4, tab 8, paras 30-32

100. In 2003 the ADR pilot project expanded into the ADR Process, and the Honourable Ted Hughes, former judge of the Court of Queen's Bench of Saskatchewan, former Deputy Attorney-General of British Columbia, and the Commissioner of Conflict of Interest and Ethics Counsellor

to the Public Service of the Northwest Territories, was appointed as the Chief Adjudicator, supported by a team of 32 full-time independent adjudicators. Applications to process claims under the ADR Process began to arrive in early 2004. Claims were still limited to those involving physical or sexual abuse.

Russell Affidavit, JMR vol. 4, tab 8, paras 39-40

101. Notwithstanding the efforts to produce improved results through the ADR Process, key stakeholders were critical, and ultimately the government itself, through a report issued in the spring of 2005 by the Parliamentary Standing Committee on Aboriginal Affairs and Northern Development was also unhappy with the ADR Process. A renewed commitment to an overall settlement was therefore made.

Russell Affidavit, JMR vol. 4, tab 8, para 51-53

G. HISTORY OF THE LITIGATION ARISING OUT OF IRS

102. As of May 2005, when the Federal Representative was appointed, there were more than 13,500 individual claims filed by former students against Canada and some 11 class proceedings in various provinces, seeking damages as a result of attendance at IRS[2]. Additionally, a number of class proceedings were filed in a variety of provinces and territories during the negotiations between May 2005 and November 2005.

Iacobucci Affidavit, JMR vol.3, tab 5, para 6,
Russell Affidavit, JMR vol. 4, tab 8, para 54

103. The cascade of litigation created substantial pressure on Canada and the Church Groups and materially advanced the interests of the Survivors as a whole. Key litigation included the Alberta Test Cases, the Class proceedings advanced in Ontario, the Nova Scotia Representative proceedings and the mass of individual litigation, which was focused in the provinces of British Columbia, Alberta, Saskatchewan and Manitoba, all of which are discussed below.

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[2] Current litigation figures are found in para 14 above.

Russell Affidavit, JMR vol. 4, tab 8, paras 54-57

(i) The Alberta Test Cases

104. As of 2000 there were about 4,000 claimants, in approximately 1,500 IRS actions in Alberta. Accordingly, the case management judge, Justice McMahon, ordered the plaintiffs to identify up to 30 individual plaintiffs and the defendants to identify up to 20 individuals, whose claims would be expedited and proceed as "test cases". Each group was to represent a cross-section of causes of actions, IRS and time periods and each of the members of the Church Groups was to be represented in at least one case. The plan contemplated pre-trial discovery to be conducted in common, on behalf of all plaintiffs, in addition to the establishment of a common document production system.

Belcourt Affidavit, JMR vol. 5B, tab 11, paras 33-34; Exhibit "C" Proposal of Plaintiffs for the Conduct of Residential School Litigation; Exhibit "D" Reasons for Decision, dated April 26, 2000, McMahon J.

105. In accordance with the plan, each of the chosen 50 plaintiffs then underwent a preliminary examination for discovery, answered a lengthy series of written interrogatories posed by the various defendants and made extensive documentary productions. The Plaintiffs also produced approximately 12 expert reports, comprising thousands of pages. Of the 50 originally selected plaintiffs, Justice McMahon ultimately chose 6 to proceed to trial as test cases.

Belcourt Affidavit, JMR vol. 5B, tab 11, paras 36-37; Exhibit "E" Reasons for Decision, dated May 20, 2003, McMahon J.

106. As the examinations for discovery and documentary production were intended to be applicable to all IRS plaintiffs in Alberta, approximately 4,000 at the time, the productions and examinations were unusually extensive. Between January 2000 and June 2005, the following steps occurred in the "test case" litigation:

(a) Canada produced approximately 105,000 documents relating to IRS;

(b) the plaintiffs conducted 110 days of discoveries of Canada's deponents;

(c) the plaintiffs conducted or participated in 14 days of discoveries of the religious entities' deponents;

(d) the plaintiffs attended at 58 days of discoveries conducted by the defendants;

(e) the plaintiffs appeared at and/or conducted cross-examinations at 11 days of evidence taken *de bene esse*; and

(f) the plaintiffs commissioned and prepared extensive expert reports to be produced at the trial of the "test cases".

Belcourt Affidavit, JMR vol. 5B, tab 11, paras 38-42

107. The test cases were to proceed to trial in January 2006, but were adjourned for the negotiations leading to the Settlement Agreement.

Belcourt Affidavit, JMR vol. 5B, tab 11, paras 43-44

(ii) Ontario Class Proceedings

a. Cloud

108. In October 1998, the *Cloud* class proceeding, *Cloud et al. v. The Attorney General of Canada,* was commenced in Ontario on behalf of former students and the families of former students who attended the Mohawk IRS, located in Brantford, Ontario.

Affidavit of Paul Vogel, sworn July 20, 2006 ("Vogel Affidavit"), SMJR tab 7, paras 2, 7, Exhibit "B" Amended Statement of Claim

109. The plaintiffs moved for certification of the action as a class proceeding in 2001 before Justice Haines. Prior to the motion for certification, extensive cross-examinations were conducted of both the representative plaintiffs and the defendants' deponents. The motion for certification itself lasted 8 days. His Honour ultimately denied the plaintiffs' motion for certification and the plaintiffs appealed to the Divisional Court. While the majority of the Divisional Court dismissed the appeal, Justice Cullity dissented and delivered lengthy reasons. Justice Cullity would have allowed the appeal and certified the action as a class proceeding, finding that a class proceeding was the preferable procedure for the resolution of the common claims raised by the class.

Vogel Affidavit, SJMR tab 7, paras 29–30; Exhibit "F" Reasons of the Divisional Court, dated June 23, 2003

110. Leave to appeal to the Court of Appeal for Ontario was granted in 2003. By reasons dated December 3, 2004, the Court of Appeal unanimously allowed the appeal, agreeing with and adopting, in large measure, the analysis of Justice Cullity. *Cloud* became the first and only certified IRS class proceeding in Canada.

Vogel Affidavit, SJMR tab 7, paras 31-35; Exhibit "H" Reasons of the Court of Appeal, dated December 3, 2004; Exhibit "I" Order of the Court of Appeal, dated December 3, 2004

111. The defendants sought leave to appeal the decision of the Ontario Court of Appeal to the Supreme Court of Canada in January 2005. On May 12, 2005, the Supreme Court of Canada denied the defendants' application for leave. The fact of a certified IRS class proceeding placed significant pressure on the government to seek an overall settlement. Shortly thereafter, negotiations were commenced with all stakeholders, pursuant to the Political Accord reached between Canada and the AFN, for a fair and lasting resolution to the IRS legacy.

Vogel Affidavit, SJMR tab 7, paras 37-39

Russell Affidavit, JMR vol. 4, tab 8, paras 56-58

112. The government requested that all pending litigation, including the *Cloud* proceedings, be placed in abeyance in order to permit the parties to focus on negotiating a pan-Canadian settlement. These plaintiffs agreed to the abeyance, subject to notice to the class and the running of the opt-out period in the proceeding.

Vogel Affidavit, SJMR tab 7, paras 41-42

b. Baxter

113. In June 2000, a class proceeding, *Baxter v. The Attorney General of Canada* ("*Baxter*") was commenced in Ontario on behalf of all IRS Survivors in Canada and their families. The claim was brought on behalf of a national "survivor class" and a "family class".

Courtis Affidavit, JMR vol. 5, tab 10, para 23; Exhibit "I" Amended Statement of Claim

114. Canada defended the action in March 2003 and then commenced a third party claim against more than 85 religious entities in April 2004. The basis for the third party claim was Canada's assertion that the Church Groups were responsible for the daily operations of the IRS and were thereby liable to indemnify Canada in respect of damages resulting from the operation of the IRS through the class period.

Courtis Affidavit, JMR vol. 5, tab 10, at paras 25-27; Exhibit "D", Amended Statement of Defence dated March 7, 2005; Exhibit "E", Amended Third Party Claim dated April 24, 2003

115. Between 2002 and 2004, numerous case conferences were held before Justice Winkler with respect to procedural issues presented by this very complicated litigation. Once the Ontario Court of Appeal's decision in *Cloud* was released in December 2004, the parties reconvened before his Honour to set a timetable for the motion for certification which was scheduled to be heard in May 2005.

Courtis Affidavit, JMR vol. 5, tab 10, paras 29, 32, 37

116. In early 2005, a number of important issues arose including: (1) the ability of the some 85 third parties to bring motions to strike prior to certification, and (2) the extent to which they could, or would be permitted, to participate in the motion for certification. A motion resulted on the issue and an adverse decision for the plaintiffs would have delayed the resolution of the proceedings for years.

Courtis Affidavit, JMR vol. 5, tab 10, para. 38

117. By reasons dated May 30, 2005, Justice Winkler stayed the third parties' motion and directed that the motion for certification be heard first. That was the same day the Political Agreement was signed.

Courtis Affidavit, JMR vol. 5, tab 10, para 39; Exhibit "H", Reasons for Decision of Winkler J., dated May 30, 2005

(iii) Nova Scotia Representative Proceedings: Shubenacadie

118. Survivors of the Shubenacadie IRS formed an association to support each other and to seek compensation for former students. While the group initially had difficulties finding legal counsel who was prepared to take the case on a contingency basis, the group finally secured the services of John McKiggan of the firm of Arnold Pizzo McKiggan in Nova Scotia, who commenced representative proceedings. That firm ultimately became part of the National Consortium.

Bernard Affidavit, JMR vol. 5B, tab 12, paras 5-6
Merkur Affidavit, JMR vol. 8, tab 42, para 28

119. Survivors of Shubenacadie IRS resided all across Canada and in the United States as well, so communication with the group was achieved through regular reporting letters, website updates, a toll free telephone line, visits to reserves and meetings with the group. In addition, the group had set up a system of representatives to facilitate communication within their geographic area.

Merkur Affidavit, JMR vol. 8, tab 42, para 29

120. The representative proceedings were commenced because there was no class legislation in Nova Scotia. The claim advanced sought compensation for both physical and sexual abuse, as well as loss of language and culture. Canada responded by raising various procedural issues, demanding particulars (which resulted in a contested motion), and repeated threats to bring motions to strike the claim.

Merkur Affidavit, JMR vol. 8, tab 42, para 30

121. Frustrated with the procedural roadblocks, counsel engaged in the Dialogues with Canada regarding alternative means of resolving the claims. Those Dialogues lead up to the ADR pilot projects, however given the limitations in the proposed process, the Shubenacadie Survivors were not prepared to participate. Counsel negotiated with Canada for several months in an attempt to find a way of putting the representative proceedings through alternative dispute

resolution mechanisms, but Canada would not allow claims beyond sexual and physical abuse to be addressed, yet it demanded a release of all claims.

Merkur Affidavit, JMR vol. 8, tab 42, paras 31-32

122. After the filing of *Baxter*, the Shubenacadie group agreed to work within that national class action framework, and counsel became part of the National Consortium.

Merkur Affidavit, JMR vol. 8, tab 42, para 34

(iv) Key Individual Proceedings

a. Aleck

123. In 1988, Terry Aleck and six other male plaintiffs commenced proceedings in the British Columbia Supreme Court and the Federal Court of Canada against Canada, the Anglican Church and others for sexual and physical abuse suffered while at St. George's IRS in Lytton, British Columbia, as a result of the acts of a dormitory supervisor at St. George's. This was the first IRS case launched in British Columbia, and likely the first in Canada.

O'Reilly Affidavit, JMR vol. 5B, tab 13, para 6

124. After years of procedural issues, that case came on for trial in March 2000 and although the parties agreed on liability (on the basis of findings made in other IRS litigation), the hearing proceeded on the issues of damages. The trial took 60 days over the spring and fall of 2000, and into February 2001, but ultimately general, aggravated and punitive damages were awarded.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 7-10

125. Both Canada and the Anglican Church appealed the judgment, and the plaintiffs cross-appealed with respect to the findings against loss of income or loss of opportunity damages. The Court of Appeal rendered its judgment on December 5, 2003, and remitted the matter back for a new hearing with respect to, *inter alia*, the denial of the plaintiffs' claims of loss of opportunity.

The Court dismissed Canada and the Anglican Church's appeal that punitive damages were not appropriate, thus setting a precedent that in appropriate cases punitive damages may be awarded.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 11-16, 63(f)

126. The proceedings were eventually settled in 2004, over 16 years after the action was commenced.

O'Reilly Affidavit, JMR vol. 5B, tab 13, para 17

b. Mowatt

127. In 1996, another claim was made by an IRS Survivor, a Mr. Floyd Mowatt, also in respect of St. George's, and in fact relating to the same perpetrator as in the *Aleck* case. The plaintiff was repeatedly sexually assaulted.

O'Reilly Affidavit, JMR vol. 5B, tab 13, para 18

128. By 1998, various Church Entities were being sued with respect to the operation of IRS, and were vigorously defending liability on the basis that they had no decision-making roles in the IRS and, in effect, had no responsibility for what went on in them. The Anglican Church moved for a summary trial on liability, but the court was unable to dismiss the claims against the Anglican Church following that process. The court's reasons strongly suggested that a full trial could well find the Anglican Church liable, given that the role of the Church went well beyond "pastoral care" to the point where the school principal was both a federal government employee and an Anglican clergyman appointed by the diocese.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 20-22

129. As damages had been agreed upon, a full trial proceeded on the issue of liability alone. Canada strenuously argued that the Anglican Church was partially responsible for the operation of the IRS. Following a 21 day trial, the court found the Anglican Church and Canada vicariously liable for the assaults. The court also held that they were both liable in negligence, and the Church was also liable for breach of fiduciary duty.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 23 - 24

130. Both Canada and the Anglican Church appealed the judgment, but then subsequently abandoned those appeals shortly before they were scheduled to be heard.

O'Reilly Affidavit, JMR vol. 5B, tab 13, para 26

131. These early cases made it clear that Canada and the Church Groups could well be found vicariously liable and liable in negligence for the tortious wrongs suffered by thousands of IRS Survivors. It also became apparent that if all of the cases proceeded to court it would take decades for the court systems to address each and every individual claim, given the significant amount of court time taken with each Survivor.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 36-37

c. Blackwater

132. The *Blackwater* case was commenced in 1996 on behalf of 27 plaintiffs who were sexually assaulted by a pedophile at Alberni IRS. The trial proceeded in phases, addressing certain liability issues and damages separately. The first phase, which dealt with vicarious liability, lasted 18 days, and almost all plaintiffs gave explicit and painful testimony about their sexual and physical abuse.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 27-31

133. The court ruled in favour of the plaintiffs in 1998, finding that both Canada and the United Church were vicariously liable for the sexual assaults on the plaintiffs.

O'Reilly Affidavit, JRM vol. 5B, tab 13, paras 29-30

134. The *Blackwater* decision broke new ground. The United Church had made every effort to escape liability, and had employed all available resources to present its case, but to no avail. When the *Blackwater* and *Mowatt* cases began, Canada and the Church Entities argued that incidents of abuse were the exception in otherwise well-run organizations. By the time of the

court's decision in *Blackwater* in June 1998, hundreds of other IRS claimants had come forward with similar stories of abuse.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 34-35

135. In October 1998, the *Blackwater* trial resumed to consider direct liability, breach of fiduciary duty and statutory duties and damages. The Church Groups and Canada had abandoned the theory that the IRS was a benign institution. After the evidence given by the plaintiffs of the extensive physical and psychological abuse suffered, the inadequate food and hunger, as well as the sexual abuse, the defendants could do little but acknowledge that there were horrific conditions.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 36-41

136. Given the strength of the argument that all non-sexual abuse claims were statute barred, the defendants focused on those other abuses to try to reduce potential damages through apportionment. They argued that given the wretched conditions and the physical abuse, the sexual abuse claims were not wholly, or perhaps even significantly, responsible for the plaintiffs' ongoing psychological injuries.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 42-43

137. In the third and final phase of the trial, evidence was led as to the damages suffered by each of the plaintiffs. The plaintiffs argued that the physical abuse, the psychological abuse and the forced loss of language and culture led to serious psychological dysfunctions, alcohol and substance abuse and lack of ability to work and that these damages should be the responsibility of the defendants.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 45-46

138. The trial on the second and third phases proceeded over 92 days between August 1998 and December 2000.

O'Reilly Affidavit, JMR vol. 5B, tab 13, para 47

139. On July 10, 2001, the court ruled, denying liability. Although a fiduciary duty was found, the court held there was no breach. The court also reduced general and aggravated damages by finding that the other tortious and non-tortious behaviour suffered by the plaintiffs while in the care of the defendants was statute barred and, therefore, non-compensable. The court found that, overall, the plaintiffs would have had life-long negative consequences from the non-sexual abuse, even if they had not been sexually assaulted. Loss of opportunity and income claims were also denied.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 49-55

140. The United Church appealed the decision regarding vicarious liability, and the Court of Appeal allowed the appeal and held that the Church was not vicariously liable for the proven sexual assaults. Canada and the plaintiffs appealed that decision to the Supreme Court of Canada which, in December 2005, ruled that the United Church was vicariously liable, thereby reinstating the trial judgment.

O'Reilly Affidavit, JMR vol. 5B, tab 13, para 58

d. Conclusions

141. In the period between the trial judgments and the Supreme Court of Canada's decision in *Blackwater* in 2005, the trial and appeal decisions provided guidance to plaintiffs and defendants alike on issues of vicarious liability, fiduciary duties and negligence, and damages. Those decisions also heightened the profile of IRS claims, and caused plaintiffs to come forward and tell their stories and seek compensation for the wrongs they suffered as children in IRS.

O'Reilly Affidavit, JMR vol. 5B, tab 13, para 62

D. THE POLITICAL AGREEMENT

142. From January 2005 (following the AFN Report of November 2004) to May 2005, the AFN negotiated with Canada to develop a framework for discussions on compensation. The

negotiations culminated in the execution of the Political Agreement dated May 30, 2005 and executed by the AFN and Canada.

Fontaine Affidavit, JMR vol. 3, tab 6, para 76

143. The Political Agreement provided for:

(a) The appointment of the Federal Representative to facilitate negotiations and negotiate on behalf of the federal government to resolve the IRS legacy;

(b) A framework for settlement which would see compensation for all former students, a truth and reconciliation process, community based healing, commemoration and an improved dispute resolution process to deal with claims of physical, sexual and psychological abuse and restricted legal fees; and

(c) A key and central role for the AFN in the negotiations.

Fontaine Affidavit, JMR vol. 3, tab 6, para 79-80; Exhibit "E", Political Agreement

144. By May 2005, at the time of entering into the Political Agreement, there were significant pressures on Canada to come to the negotiating table. Various stakeholders had pushed the IRS agenda in the media, to develop public awareness and obtain support. Pressure was also being brought to bear in the political arena, and of course, there was a significant and increasing volume of litigation, including the first certified IRS class proceeding.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 77-78; 88, 90-91

Russell Affidavit, JMR vol. 4, tab 8, paras 49-60

E. THE NEGOTIATIONS – JUNE TO NOVEMBER 2005

(i) The Federal Representative's Mandate

145. The Honourable Justice Frank Iacobucci, former member of the Supreme Court of Canada, was appointed by the federal government and on its behalf as Federal Representative, to negotiate with legal counsel for former students, various religious and Church Entities, the AFN and various other Aboriginal organizations, including the Inuit Groups, in an effort to arrive at an

agreement which would provide a fair, lasting and national resolution of the IRS legacy in Canada.

Courtis Affidavit, JMR vol. 5, tab 10, para 40
Iacobucci Affidavit, JMR vol.3, tab 5, paras 2-3

146. The Federal Representative's mandate was, generally, to achieve a final and comprehensive settlement of legal claims arising out of attendance at IRS, to recommend truth, reconciliation, commemoration and healing initiatives and to consider improvements that could be made to the ADR Process. Following negotiations on these issues, the Federal Representative was to then make recommendations to Canada for a broad reconciliation package.

Iacobucci Affidavit, JMR vol.3, tab 5, paras 4-5

147. The goal was to bring all litigation in Canada to an end, including all individual proceedings extant at the time, and to provide for other healing initiatives for the Aboriginal communities at large. The negotiations were intended to produce a settlement that would include all former IRS students, whether or not they were currently pursuing claims against Canada.

Iacobucci Affidavit, JMR vol. 3, tab 5, paras 4-5

(ii) Overview of the Negotiations

148. The negotiations occurred between June 2005 and November 2005, and took place at various locations across the country during that time, including Toronto, Saskatoon, Edmonton, Calgary and Vancouver. In advance of each meeting, an agenda was prepared and circulated to all proposed attendees. A broad range of topics were canvassed and negotiated at each meeting, including, but not limited to, the confidentiality of the process, the parameters of the lump sum Common Experience payment ("CEP"), the Independent Assessment Process ("IAP"), healing and reconciliation, eligible IRS, the implementation of any settlement and counsel fees. The parties also produced lengthy position papers on a wide variety of topics including the CEP, implementation and legal fees.

Iacobucci Affidavit, JMR vol.3, tab 5, paras 11-12

(iii) The Parties Involved in the Negotiations

149. During the six months of negotiations, between June 2005 and November 2005, between 40 and 60 individuals were present at each meeting with the Federal Representative. These individuals comprised Class Counsel for the various filed class proceedings, including the National Consortium, lawyers representing individual claimants across the country, members of the AFN, including Survivors, National Chief Phil Fontaine and AFN legal counsel, lawyers for the Inuit Groups, lawyers for the Church Entities, and legal counsel for Canada.

Iacobucci Affidavit, JMR vol.3, tab 5, paras 14-15

150. Various other stakeholders and parties actively participated in these negotiations including counsel and representatives for the Grand Council of the Crees.

Iacobucci Affidavit, JMR vol. 3, tab 5, paras 13-14

151. At each meeting, all counsel and stakeholders were provided with the opportunity to make their positions known, both orally and in writing, on a vast range of issues. Additionally, a number of smaller working groups were formed to consider certain issues. These working groups consisted of counsel or representatives of Canada, the Church Groups, plaintiffs and other stakeholders. For example, a working group was struck to consider and make recommendations to the Federal Representative on a revised and improved ADR Process, or what is now known as the IAP. This working group continues to meet and make recommendations.

Iacobucci Affidavit, JMR vol. 3, tab 5, para.16

Affidavit of Len Marchand, sworn July 27, 2006 ("Marchand Affidavit"), JMR vol. 4, tab 9, paras 7-8

152. The AFN had participants present at all meetings during the negotiations, and it brought to bear its perspective that a holistic reconciliatory response, including an official apology and programmatic relief, were critical goals for a settlement in order to address intergenerational problems the Canadian Aboriginal communities have grappled with as a result of IRS.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 80-84

(iv) Outline of Negotiations and General Topics

153. Given the historical magnitude of the issues and its national nature, the negotiating parties and their constituent interests were extremely diverse, the legal and political issues to be resolved immense and the resolution of these conflicting interests, claims and objectives was a difficult, time consuming and complicated undertaking. In addition to the individual legal claims for personal harm, these negotiations also sought to address the political, social and historical dimensions of the IRS legacy in Canada. Specifically, it was critical to the parties that any negotiated resolution acknowledge the fact that the harm caused by IRS went far beyond specific cases of physical or sexual abuse, that the IRS system was, by its very nature, harmful to Aboriginal persons and their traditions, culture and way of life which had long-lasting and intergenerational consequences.

Merkur Affidavit, JMR vol. 8, tab 42, para 92
Fontaine Affidavit, JMR vol. 3, tab 6, paras 80-84

154. Due to the complexity and sensitivity of the issues to be resolved, in addition to the large number and disparate positions, the negotiations were both arduous and protracted and permitted all issues, legal, social and political, to be thoroughly canvassed by all parties.

Iacobucci Affidavit, JMR vol.3, tab 5, para 18

155. Due to the confidentiality undertaking all parties made in advance of negotiations, the particular positions canvassed cannot be disclosed but generally, the parties negotiated the following issues:

(a) the definition of an IRS, including a listing of institutions agreed to constitute IRS;

(b) verification processes for claimants;

(c) the parameters and quantum of a lump sum CEP;

(d) revising and improving the ADR Process;

(e) Church Groups' contributions,

(f) the advance payment to the elderly;

(g) take up rates and class size estimates;

(h) implementation under a class proceeding framework involving multiple jurisdictions;

(i) surplus considerations;

(j) programmatic relief such as commemoration, truth and reconciliation and healing;

(k) notice program;

(l) co-ordination with provincial governments respecting the tax implications on any CEP;

(m) releases; and

(n) legal fees.

Iacobucci Affidavit, JMR vol. 3, tab5, para 12
Settlement Agreement, JMR vol.1, tab 2

(v) The Agreement in Principle – November 20, 2005

156. On November 20, 2005, the parties concluded the negotiations by executing the Agreement in Principle. The Federal Representative endorsed the Agreement in Principle and recommended to Canada that it should form the basis of a comprehensive settlement package. The Federal Cabinet approved the Agreement in Principle on November 22, 2005.

Iacobucci Affidavit, JMR vol. 3, tab 5, paras 19-20
Agreement in Principle, dated November 20, 2005, JMR vol. 1, tab 1

157. The overarching purposes of the Agreement in Principle were to:

(o) settle the outstanding class proceedings;

(p) provide for payment by Canada of the CEP;

(q) provide for the IAP as an improved version of the ADR Process;

(r) establish a Truth and Reconciliation Commission;

(s) provide for an endowment to the AHF to fund healing programmes addressing the legacy of harms suffered at IRS, including their intergenerational effects; and

(t) provide for funding for commemoration of the legacy of IRS.

Settlement Agreement, JMR vol. 1, tab 2, Recital D, pg. 6

158. Pursuant to the Agreement in Principle, the parties agreed that the plaintiffs would seek an order settling the litigation by issuance of a judgment generally in accordance with the terms set out in paragraphs 3 through 10 of the implementation agreement attached to the Agreement in Principle.

Agreement in Principle, JMR vol. 1, tab 1, Schedule G

159. The Agreement in Principle, once reduced to the Settlement Agreement, was also subject to final Cabinet Approval (granted on May 10, 2006) and approval by the courts in each of the requisite jurisdictions on substantially the same terms and conditions.

Settlement Agreement, JMR vol. 1, tab 2, Article 16.01

F. SUMMARY OF THE TERMS OF SETTLEMENT

160. The Settlement Agreement provides for the CEP, the IAP, Truth and Reconciliation, Commemoration and Healing, all of which are discussed below. Additionally, of course, there are significant provisions relating to the payment of legal fees, and the implementation of the settlement itself.

161. The Settlement Agreement is contingent upon settlement approval in substantially the same form in all Jurisdictions, as well as an opt out threshold of 5000 Survivor Class claims.

Settlement Agreement, JMR, vol. 1, tab 2, Articles 4.05 and 4.14

(i) Common Experience Payment - CEP

162. Each former IRS student will be eligible to receive a CEP as an acknowledgement of the ill effects of attending IRS, quite apart from other abuses. The CEP consists of $10,000 for each student's first year of attendance, and a further $3,000 for each subsequent year of attendance. The government has set aside $1.9 billion dollars to make this payment to each former IRS student living as at May 30, 2005 (ie. each member of the Survivor Class). If that funding

proves insufficient, the government will supplement the funding to ensure full payment for all CEP claims made. If there is a surplus of funds in excess of $40 million from the initial $1.9 billion paid, that surplus will provide former IRS students with personal credits of up to $3,000 each. Additional surplus, or any surplus under $40 million will go to Aboriginal organizations for healing and education initiatives.

Iacobucci Affidavit, JMR vol.3, tab 5, para 23

163. The settlement agreement lists IRS for which the CEP is applicable, but it also provides criteria and a process by which additional institutions may be judged for inclusion.

Courtis Affidavit, JMR vol. 5, tab 10, paras 70-71

164. The CEP claims process will be available once the Agreement, if approved, is implemented, and will accept claims for processing for a period of 4 years, or after, in exceptional circumstances. The claims form is relatively simple and straightforward.

Courtis Affidavit, JMR vol. 5, tab 10, para 49

Settlement Agreement, JMR vol. 1, tab 2, Article 5, para 5.04, and Exhibit "A" Draft Claims Form

(ii) Independent Assessment Process - IAP

165. The ADR Process, now substantially revised pursuant to the Settlement, and renamed the IAP, will address sexual abuse, serious physical abuse and serious psychological abuse claims.

Iacobucci Affidavit, JMR vol.3, tab 5, para 23

Marchand Affidavit, JMR vol. 4, tab 9. paras 20(e), (f)

166. For students who accepts a CEP, the IAP will be the exclusive vehicle through which to resolve claims for sexual abuse and serious physical and psychological abuse. Upon payment of compensation, a full release will be provided to Canada and applicable Church Entities.

Iacobucci Affidavit, JMR vol.3, tab 5, para 23

167. The IAP constitutes a substantial improvement to the ADR Process, as more particularly discussed below. The IAP should operate efficiently and more effectively than the ADR Process, as Canada has committed resources to complete 2500 hearings per year, and it will operate under the oversight of the committees implementing the settlement, as well as the courts. Additionally, all IAP claims are to be processed within approximately 5 years.

Iacobucci Affidavit, JMR vol.3, tab 5, para 23

Settlement Agreement, JMR vol. 1, tab 2, Section 6.03(1)(d)

(iii) Truth and Reconciliation

168. Under the Settlement $60 million has been allocated to a Truth and Reconciliation Commission (the "Commission") to be established to engage in a collective process with the community of Survivors, their families and other affected parties. While the Commission will be established through the appointment of 3 Commissioners, they will be chosen from among a pool of candidates nominated by all stakeholders, including Class members, Aboriginal organizations, Church Entities and Canada.

Iacobucci Affidavit, JMR vol. 3, tab 5, para 23

169. The goals of the Commission are to acknowledge IRS experiences, impacts and consequences; provide a holistic, culturally appropriate and safe setting for truth telling; witness, support and promote truth and reconciliation events locally and nationally; promote broader awareness of the IRS legacy; create a complete historical record of the IRS system; prepare a report with recommendations for Canada; and support commemoration initiatives.

Iacobucci Affidavit, JMR vol. 3, tab 5, para 23

(iv) Commemoration

170. Approximately $20 million is allocated to national and community based commemoration activities to honour and pay tribute to former IRS students and their families through acknowledging their experiences. Commemoration may consist of creating memorials or holding ceremonies. The funds will be placed under the control of the Commission which

will dispense them in response to applications made by Class Members for various commemorative projects.

Iacobucci Affidavit, JMR vol. 3, tab 5, para 23

(v) Healing

171. An initial endowment of $125 million will be made to the AHF to fund culturally appropriate healing programs, with a view to addressing the healing needs of the Class. Further funds will be provided if a surplus exists from the CEP funding.

Iacobucci Affidavit, JMR vol. 3, tab 5, para 23

172. Additionally, the Church Entities have and will continue to fund healing initiatives. The contribution of the Church Entities is based, in part, on the success of fundraising activities, but it is estimated to reach approximately $100 million.

Fontaine Affidavit, JMR vol. 3, tab 6, para 95

(vi) The Church Groups' Contribution

173. The settlement agreement includes separate agreements reached between Canada and the Catholic Church, the Anglican Church, the Presbyterian Church and the United Church. Both the Anglican and the Presbyterian Churches had agreements in place for funding a share of IRS claims, and the United Church had an informal arrangement which was similar. Those agreements provided that they were subject to renegotiation if any other Church Group entered into an agreement on more favourable terms. That occurred as a result of the Settlement Agreement (and in particular, the conclusion of an agreement with the Catholic Church). The funding payable by the Church Groups to Canada to assist in the payment of the overall settlement has been adjusted downwards. The current funding commitments are as follows:

(a) The Anglican Church has committed $15,689,100;

(b) The Presbyterian Church has committed between $900,700 and $1,317,000 depending on the success of the fundraising efforts of the Catholic Church;

(c) The United Church has committed to contribute between $6,455,020 and $6,891,170, depending on the Catholic Church contribution (and inclusive of funding already provided). Of that contribution, the United Church may provide up to $2,180,750 by way of "in kind" contributions to fund eligible programs to assist with healing and reconciliation for the Class; and

(d) The Catholic Church has committed to pay $54 million to $79 million ($25 million of which may be through the delivery of in-kind services, as independently validated), depending on the success of efforts to raise funds.

Boyles Affidavit, JMR vol. 7, tab 21, paras 22-23

Scott Affidavit, JMR vol. 7, tab 22, paras 17-20

Kendall Affidavit, JMR vol. 7, tab 23, paras 16-17, 19

Keylor Affidavit, JMR vol. 7, tab 27, paras 15-16

174. The above-noted funds are to be used to pay each Church Group's contribution to IRS claims arising up to the date of the approval of the Settlement Agreement. Funds remaining shall be used for healing and reconciliation initiatives of the Church Groups (or in the case of the Presbyterian Church, compensation of claims, at its option). Such remaining funds are *in addition* to the funding for healing and reconciliation initiatives provided by Canada under the settlement agreement, and are estimated to amount to approximately $100 million, as noted above.

Boyles Affidavit, JMR vol. 7, tab 21, paras 23

Kendall Affidavit, JMR vol. 7, tab 23, para 17

Fontaine Affidavit, JMR vol. 3, tab 6, para 95

Iacobucci Affidavit, JMR vol.3, tab 5, para 44

175. In addition to funds, the Church Groups have agreed to cooperate with the Truth and Reconciliation Commission and participate in its efforts. Such cooperation relates to the provision of information and documentation which is expected to consume significant resources and person hours.

Scott Affidavit, JMR vol. 7, tab 22, para 18

(vii) Administration and Implementation

176. Canada will administer the Settlement, sharing oversight with various committees established under the Settlement Agreement. Canada will bear the entire cost of the administration of the Settlement. The Class members will not bear the costs of administration or implementation.

Iacobucci Affidavit, JMR vol.3, tab 5, para 23
Courtis Affidavit, JMR vol. 5, tab 10, para 56

177. The Settlement implementation plan is set out in Article 4 of the Settlement Agreement and provides that implementation is to occur through a series of identical class proceedings brought in all Jurisdictions based on identical statements of claim intended to subsume essentially all claims made in all proceedings to date. The parties are to bring motions for consent certification of the Claim and approval of the Settlement Agreement in its entirety, in each of the Jurisdictions.

Settlement Agreement, JMR vol. 1, tab 2, Article 4.09

178. A number of Committees are created by Article 4 to assist in the implementation of the Settlement, including a National Certification Committee ("NCC") as well as a National Administration Committee ("NAC") and three Regional Administration Committees ("RACs"). The membership in these committees is composed of the major stakeholders including Canada, the Church Groups, Plaintiffs' Counsel, the AFN and Inuit Groups' representatives, and the majority of members are Plaintiffs' side.

Courtis Affidavit, JMR vol. 5, tab 10, para 79

179. The NCC is comprised of 7 members, with 1 representative from the following groups: (a) Canada, (b) the Church Groups, (c) the AFN, (d) the National Consortium, (e) the Merchant Law Group, (f) the Inuit Groups and (g) Independent Counsel.

Settlement Agreement, JMR vol. 1, tab 2, Articles 4.01 and 4.02

180. The NCC's role is to designate and instruct counsel to draft the certification and settlement approval motion materials, to review those materials and to instruct counsel with respect to obtaining the necessary court approvals relating to certification and settlement approval. Additional responsibilities include providing input to the Trustee (Canada), and fulfilling certain oversight duties in connection with the IAP. The NCC will be dissolved when the Settlement Agreement is implemented (as defined in the Settlement Agreement).

Settlement Agreement, JMR vol. 1, tab 2, Article 4.09

181. The NAC's role is to, *inter alia*, interpret the court orders approving Settlement, consult with and provide feedback to the Trustee (Canada) with respect to the CEP, work to ensure consistency of implementation in all Jurisdictions including by providing procedures and protocols to standardize post-approval Settlement implementation in all Jurisdictions, act as the appellate forum for the RACs and for references from the Truth and Reconciliation Commission and CEP applicants.

Settlement Agreement, JMR vol. 1, tab 2, Article 4.11

182. There will be 3 RACs to deal with day to day operational issues relating to implementation of the orders approving the Settlement. The need for the RACs will be evaluated after 18 months by the NAC, which may decide to terminate the RACs and take on those responsibilities itself.

Settlement Agreement, JMR vol. 1, tab 2, Articles 4.12 and 4.13

183. Canada has agreed to use its best efforts to obtain the agreement of provincial and territorial governments and any relevant 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 a CEP recipient or IAP claimant. The other parties have agreed to use their best efforts to reach similar results.

Courtis Affidavit, JMR vol. 5, tab 10, para 80

(viii) Legal Fees

184. Legal fees are to be paid by Canada pursuant to the Settlement Agreement and not by the Class. Legal fees are addressed in Article Thirteen of the Settlement Agreement, which contemplates payment for individual counsel, as well as payment to the National Consortium and the Merchant Law Group.

Settlement Agreement, JMR vol. 1, tab 2, Article 13.08

185. Sections 13.05 and 13.06 of the Settlement Agreement establish the fundamental principle for the payment of legal fees under the Settlement Agreement -- 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 any CEP.

Iacobucci Affidavit, JMR vol. 3, tab 5, para 26
Settlement Agreement, JMR vol. 1 tab 2, Articles 13.05 and 13.06
Merkur Affidavit, JMR vol. 8, tab 42, para 17

186. 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 the appointment of the Federal Representative and the existence of the settlement discussions were known. Article 13 requires participating lawyers to waive their existing Retainer Agreements such that they are prohibited from charging fees to any of their clients on the CEP.

Iacobucci Affidavit, JMR vol. 3, tab 5, paras 26-27
Settlement Agreement, JMR vol. 1, tab 2, Articles 13.05 and 13.06
Merkur Affidavit, JMR vol. 8, tab 42, para 17

187. Section 13.07 of the Settlement Agreement 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 Canada 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.

Iacobucci Affidavit, JMR vol. 3, tab 5, para 27
Settlement Agreement, JMR vol. 1, tab 2, Article 13.07

188. Sections 13.02 and 13.03 of the Settlement Agreement 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. Additional fees at a reasonable hourly rate are paid for work by counsel on the NCC, NAC and RAC established to coordinate the certification, approval and administration of the Settlement Agreement.

Iacobucci Affidavit, JMR vol. 3, tab 5, para 28
Settlement Agreement, JMR vol. 1, tab 2, Articles 13.02 and 13.03

189. In recognition of the substantial number of former students represented by the National Consortium and the Merchant Law Group 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.

Iacobucci Affidavit, JMR vol. 3, tab 5, para 29

G. A REVIEW OF THE IAP – THE ONGOING ADJUDICATIVE PROCESS

190. The IAP process requires further examination, as the value associated with it must be understood from the perspective not only of how this adjudicative process is an improvement over regular court proceedings, but also how the IAP process is an improvement over the ADR Process available in connection with IRS claims.

(i) Problems with Litigating IRS Claims

191. Though many IRS plaintiffs have benefited from the litigation process, there are obvious difficulties with that process. These difficulties include:

(a) The harms associated with the experience of attending IRS actually being relied on as a defence in the assessment of damages for individual abuse claims;

(b) Plaintiffs are required to complete lengthy interrogatories, or to submit to lengthy examinations for discovery or both. This is difficult for many plaintiffs given the effect upon them of their years in IRS;

(c) Plaintiffs are obliged to make extensive documentary disclosure. The task is made more difficult by the historic nature of the claims;

(d) The oral examinations for discovery which may last up to several days, often focus on other (i.e. non-IRS) traumatic events in the plaintiffs' lives;

(e) Some plaintiffs must undergo expert psychiatric/psychological assessments and/or vocational assessments, often with one of each performed for the plaintiff and for the defendants;

(f) Despite the joint and several liability of the defendants, plaintiffs are often caught up in apportionment disputes between Canada and certain Church Groups. A number of clients have been faced with the choice of accepting a "70%" offer from Canada or running an apportionment trial; and

(g) Plaintiffs often have to endure listening to lengthy legal arguments made about the most personal aspects of their lives in the context of judicial settlement conferences or mini-trials.

Marchand Affidavit, JMR vol. 4, tab 9, para 9

192. Further, the litigation process is not only lengthy, it can dehumanize and re-victimize the plaintiffs. Some plaintiffs are required to speak about their painful experiences five or six different times.

Marchand Affidavit, JMR vol. 4, tab 9, para 10

193. Even with the highest degree of diligence on the part of all parties, the litigation process often takes several years to complete. As set out above, there are currently 10,538 plaintiffs with active court proceedings, excluding class actions, in the various provinces and territories.

Russell Affidavit, JMR vol. 4, tab 8, para 43

194. For the roughly 2296 settled litigation claims, it took an average of 3.2 years to settle each claim from commencement of the action, although many actions take considerably longer. Of the 36 IRS trials conducted to date, only 13 resulted in judgments in favour of plaintiffs; 13 were dismissed and 10 are still awaiting judgment.

Marchand Affidavit, JMR vol. 4, tab 9, paras 13-14

(ii) The Current ADR Process

195. In November 2003, following the Dialogues and the pilot projects, Canada launched the current ADR Process in an attempt to compensate IRS Survivors and to fulfill the recommendations of the RCAP and the Statement of Reconciliation.

Fontaine Affidavit, JMR vol. 3, tab 6, para 66

196. The ADR Process, which is a process which is currently in place and available to IRS victims, did represent a significant improvement to the litigation model. The main features of the ADR Process include:

(a) The ADR Process is entirely voluntary;

(b) It takes a non-adversarial or "inquisitorial" approach where Claimants are only questioned by an independent adjudicator. Every adjudicator is chosen by the unanimous agreement of the four stakeholders; thus Survivors and their counsel have a veto, and individual claimants can be comfortable that the adjudicator who will hear their case has the appropriate expertise and sensitivity;

(c) All adjudicators are trained according to a curriculum designed by the stakeholders and delivered in concert with all of them;

(d) Claimants are allowed to tell their story in their own way at hearings, generally before they are questioned;

(e) Hearings are held in settings that are both comfortable and convenient to claimants;

(f) Support persons are permitted to be with claimants at all stages of the process including while they give evidence. As well, their travel costs are paid by Canada;

(g) Hearings are private to the participants and parties and decisions are confidential to the extent desired by the claimant;

(h) A transparent and consistent mechanism for assessing compensation allows claimants and their counsel a considerable degree of certainty as to the likely outcome if the claimant is believed. This allows parties to help make informed choices as to the procedural route to take and to avoid dashed expectations;

(i) A faster process with reduced documentary disclosure requirements, and a written application process allow many claimants to complete the process in under a year;

(j) The process offers a relaxed evidentiary standard and Canada contributes 15% of the total award made by the adjudicator to help off-set the claimants' legal fees;

(k) The compensation framework is designed to produce a financial outcome consistent with the ranges used by the courts in like cases;

(l) Canada and the Church Groups accept responsibility for the acts of a wider array of adult perpetrators than would be the case in litigation;

(m) There is no appeal by defendants and very limited power for defendants to seek a review, based on narrowly-defined jurisdictional errors only, but by contrast, claimants have the right of review for palpable and overriding errors of fact;

(n) Claimants are not bound by the decision; they can walk away and resume or start litigation. Moreover, Canada pays for independent legal advice on whether to sign a release, whether or not the release is ultimately signed;

(o) No limitations or laches defences are asserted although crown immunity does apply; and

(p) There is significant investment in claimant safety, including provision of: a crisis line; professional counselling services; resolution support workers at hearings; personal support persons permitted and facilitated; family supports welcome at hearings; cultural ceremonies permitted at hearings; hearings are closed to the public; no confrontation with alleged perpetrator; no cross examination by a party.

Marchand Affidavit, JMR vol. 4, tab 9, para 16

197. Though there are some individual exceptions, overall, claimants find the ADR Process much more humane, less confrontational and more positive than litigation.

Marchand Affidavit, JMR vol. 4, tab 9, para 17

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 73, 77-81

198. Since December 2003, approximately 5000 claims have been made in the ADR Process with approximately 1500 having proceeded to hearings, and approximately 1300 decisions

having been rendered. The processing takes an average of 9 months from the commencement of the application until a decision is rendered.

Marchand Affidavit, JMR vol. 4, tab 9, para 15

199. While the ADR Process is an improvement over litigation, and clearly has its benefits, it also has significant drawbacks. It was intended to be an expedited alternative to traditional litigation for Survivors, however the model was at its core, unequipped to address the magnitude and systemic nature of the abuses and harms suffered by both individual Survivors, their relatives and the Aboriginal community at large, especially with respect to the loss of language and culture and loss of family life. Moreover, the administrative costs of the ADR Process were over 3 times the amount of compensation awarded to Survivors.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 66-68

Marchand Affidavit, JMR vol. 4, tab 9, paras 18-19

200. Under the ADR Process, it was estimated in 2004 that the caseload of claims against Canada would take 53 years to conclude, at a cost of $2.3 billion dollars, not including the value of the actual settlement costs. The time it has taken to schedule and hear claims has been inordinate, and hearings in remote communities have often proceeded in long delayed intervals due to scheduling difficulties.

Fontaine Affidavit, JMR vol. 3, tab 6D, at para 70, Exhibit "D" Assembly of First Nations Report on Canada's Dispute Resolution to Compensate for Abuses in Indian Residential Schools, (2004) (the "AFN Report"), pg. 6

Affidavit of Doug Keshen, sworn July 26, 2006 ("Keshen Affidavit"), JMR vol. 5B, tab 15, paras 3-4

201. The most serious problematic aspects of the ADR Process include the following:

(a) Survivors are treated unequally by compensating some up to 100% of their settlements and others only 70% (because the Catholic Church has only now, through the Settlement Agreement, reached a contribution agreement with Canada which agreement only takes effect if and when the Settlement Agreement is approved and implemented);

(b) Survivors are treated unequally by virtue of the province in which the abuse occurred;

(c) Some institutions considered by Survivors to be IRS are excluded from the process;

(d) In some cases, the compensation grid is low, particularly with respect to pecuniary losses;

(e) More than twice as many compensation points are assigned to abusive acts than to their consequences, restricting compensation to a narrow range of acts;

(f) Persistent physical abuse and its resultant harms are under-valued, and many acts of physical abuse, and even sexual abuse and other serious harms are excluded as insufficiently serious to warrant compensation;

(g) The test for student on student abuse exceeds the usual standard in negligence;

(h) There is no provision for interim awards;

(i) The process is under-resourced and therefore slow, as well as unduly lengthy (which is significant for ill and elderly claimants) and its costs are disproportionately high in relation to the amounts of awards paid out;

(j) The application forms are intimidating, unnecessarily complicated and confusing;

(k) Neither Survivors' healing needs nor gender difference are taken into account;

(l) Available compensation is limited by the "standards of the day";

(m) No compensation for loss of language or culture or loss of family life;

(n) The need for truth-sharing, telling, public awareness and education of non-Aboriginal Canadian with respect to IRS is not addressed; and

(o) The applicable legal concepts are applied in a manner that tended to perpetuate racist stereotypes.

AFN Report, JMR vol. 3, tab 6D, pg. 2-3

Marchand Affidavit, JMR vol. 4, tab 9, para 19

Keshen Affidavit, JMR vol. 5B, tab 15, paras 3-4

202. The Court of Appeal for Ontario also considered the ADR Process in *Cloud* and determined that it was laden with access to justice deficiencies:

> It is a system unilaterally created by one of the respondents in this action and could be unilaterally dismantled without the consent of the appellants. It deals only with physical and sexual abuse. It caps the amount of possible recovery and, most importantly in these circumstances, compared to the class action it shares the access to justice deficiencies of individual actions. It does not compare favourably with a common trial.

Vogel Affidavit, SJMR tab 7, Exhibit H, Reasons of the Court of Appeal for Ontario, dated December 3, 2004, per Goudge J.A., para. 96

203. As identified above, the AFN Report, the Canadian Bar Association Report and the Aboriginal Affairs House Committee Report all included recommendations relating to the ADR Process, many of which were adopted in the Settlement Agreement reached between the parties on May 10, 2006.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 71, 75
Russell Affidavit, JMR vol.4, tab 8, paras 52-53

(iii) Improvements from the ADR Process to the IAP

204. Pursuant to the Settlement Agreement, substantive improvements have been made to the ADR Process in the proposed IAP.

Marchand Affidavit, JMR vol. 4, tab 9, para 20
O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 76-77

a. Standardized Levels of Compensation & Full Payment From Canada

205. Payments pursuant to the IAP have been increased and standardized. Under the current ADR Process, residents of different provinces are subjected to differing compensation grids. For example, residents of British Columbia, Ontario and the Yukon were eligible for higher compensation awards than the residents of other provinces, but now that higher level is adopted across Canada.

Courtis Affidavit, JMR vol. 5, tab 10, para 88
Marchand Affidavit, JMR vol. 4, tab 9, para 20(d)
O'Reilly Affidavit, JMR vol. 5B, tab 13, para 82

206. The IAP increases the overall compensation grid, from a former limit of $245,000.00 to $275,000.00. Additionally, all individuals will receive 100% of their compensation awarded, regardless of the Church Group affiliated with the relevant IRS.

Courtis Affidavit, JMR vol. 5, tab 10, para 89
Marchand Affidavit, JMR vol. 4, tab 9, para 20(a)

b. Expansion of Compensable Harms

207. The IAP alters and expands many compensable harms that were not formerly covered by the purview of the ADR Process. For example, persistent abuse and other wrongful acts which have caused serious psychological consequences are now compensable. Liability for sexual and physical abuse has also been extended to include any adult person lawfully on the premises of the IRS. The IAP may now be used not just by attendees of IRS, but also by persons then under the age of twenty-one (21) permitted by an adult employee to be on the premises to participate in authorized IRS activities.

Courtis Affidavit, JMR vol. 5, tab 10, paras 90-91
Marchand Affidavit, JMR vol. 4, tab 9, paras 20(f), (g)
O'Reilly Affidavit, JMR vol. 5B, tab 13, para 82

208. The list of IRS covered by the IAP has been expanded to include boarding facilities to which students were dispatched to attend local schools. The basis of liability for abuse by other students has been extended from sexual to physical abuse. Where the assaults are serious sexual assaults, there is a reverse onus on Canada and/or the Church Groups to demonstrate that reasonable supervision was in place at the time the offence occurred.

Courtis Affidavit, JMR vol. 5, tab 10, paras 92-93
Marchand Affidavit, JMR vol. 4, tab 9, para 20(j)

209. Actual income loss, which was not compensable under the ADR Process, is now available up to $250,000.00 within the IAP, and in excess of that amount where the Chief Adjudicator refers the matter to the court for determination. If the matter proceeds to court there is no cap on the compensation which may be awarded. Additional aggravating factors which may result in increased compensation have also been added for consideration.

Courtis Affidavit, JMR vol. 5, tab 10, paras 96-97
Marchand Affidavit, JMR vol. 4, tab 9, para 20(c)

c. Lowering the Threshold for Less Serious Sexual Assault

210. With respect to less serious sexual assaults, the IAP establishes a lower test for claimants to meet than that which was required pursuant to the ADR Process. The ADR Process required a claimant to provide that the assault was part of a pattern of sexual assaults which continued after the staff of the IRS had actual knowledge that the sexual assaults were occurring.

Courtis Affidavit, JMR vol. 5, tab 10, paras 94-95
Marchand Affidavit, JMR vol. 4, tab 9, para 20(j)

211. Under the IAP, a claimant must show that an adult employee of Canada or the Church Groups had, or should reasonably have had, knowledge that abuse of the kind alleged to have occurred at the IRS in question, during the time period of the alleged abuse, and failed to take reasonable steps to prevent such abuse.

Courtis Affidavit, JMR vol. 5, tab 10, paras 94-95
Marchand Affidavit, JMR vol. 4, tab 9, para 20(j)

d. *Commitment to Timely Processing & Hearing Dates*

212. After the first 6 months following implementation of the Agreement, Canada has committed to processing a minimum of 2,500 IAP claims per annum and to offering hearing dates within 9 months of the acceptance of an application into the IAP. Additionally, all IAP claims are to be processed within 5 years of the implementation of the Settlement Agreement. Where these timelines are not satisfied, the NAC may apply to the court to assist in their realization.

Marchand Affidavit, JMR vol. 4, tab 9, para 20(h)
Courtis Affidavit, JMR vol. 5, tab 10, para 99
Settlement Agreement, JMR vol. 1, tab 2, Article 6.02(1)(d)

213. Provision has also been made for the settlement of claims without a hearing, which was not possible under the ADR Process.

Courtis Affidavit, JMR vol. 5, tab 10, para 98

e. No Unilateral Modifications to the IAP

214. Of critical significance, particularly in light of the comments made by Court of Appeal Justice Goudge in *Cloud*, Canada cannot modify the IAP unilaterally. Minor modifications may only be made to the IAP by the NAC, the majority of whose members are plaintiffs' side. Where more significant changes to the IAP are contemplated, these may only be made by the court.

Courtis Affidavit, JMR vol. 5, tab 10, para 101

215. Accordingly, the Agreement provides for substantial improvements to the ADR Process and goes some distance in increasing access to justice for claimants. Considering the added cost to Canada of the negotiated improvements embodied in the IAP, the CEP and the amounts committed to programmatic relief, the value of the Settlement has been estimated at $4 billion to $5 billion.

Courtis Affidavit, JMR vol. 5, tab 10, paras 103-109

f. Transition Provisions

216. Survivors who had previously brought and resolved IRS claims will be entitled to make a claim for a CEP. Those Survivors who have initiated IRS claims or have settled IRS claims since May 31, 2005, will be able to transition to the IAP and have an assessment completed under that process, which for previously resolved claims may give rise to additional compensation.

Settlement Agreement, JMR vol. 1, tab 2, Article 15

D. SUPPORT FOR THE SETTLEMENT

(i) Representative Plaintiffs

217. Survivors have provided support for the proposed Settlement. As the people who suffered directly from Canada's IRS policy, having attended the IRS, they know the damage they have suffered personally, and the injuries to the Aboriginal community more generally. The IRS legacy has been recognized as a social problem, a political problem and an Aboriginal problem

(among others), but it is the Survivors' personal lived experience. After a lifetime of shame, guilt, anger and fear, the Survivors have spoken: it is time to focus on reconciliation and rebuilding of communities, and the Survivors wholeheartedly endorse the Settlement as the first step towards moving on.

Instrument / Name	Date Sworn	Citation	Para(s)
Affidavit of Benny Doctor	**August 3, 2006**	**SJMR, tab 10**	**5-21**
Affidavit of Brenda Cyr	**July 26, 2006**	**JMR vol. 9, tab 51**	**5-15**
Affidavit of Charles Baxter	**June 17, 2006**	**JMR vol. 9, tab 46**	**4-47**
Affidavit of Donald Belcourt	**July 14, 2006**	**JMR vol. 5B, tab 11**	**3-47**
Affidavit of Elijah Baxter	**May 12, 2006**	**JMR vol. 9, tab 47**	**3-27**
Affidavit of Elizabeth Kusiak	**July 13, 2006**	**JMR vol. 9, tab 54**	**4-5**
Affidavit of John Bosum	**July 25, 2006**	**JMR vol. 9, tab 50**	**4-17**
Affidavit of Malcolm Dawson	**July 24, 2006**	**JMR vol. 9, tab 52**	**6-8**
Affidavit of Michelline Ammaq	**July 17, 2006**	**SJMR, tab 13**	**4-6**
Affidavit of Nora Bernard	**July 10, 2006**	**JMR vol. 5B, tab 12**	**4-30**
Affidavit of Percy Archie	**July 7, 2006**	**JMR vol. 9, tab 45**	**5**
Affidavit of Rosemarie Kuptana	**August 3, 2006**	**SJMR, tab 8**	**3-19**
Affidavit of Theresa Ann Larocque	**July 13, 2006**	**JMR vol. 9, tab 55**	**4-5**
Statutory Declaration of Adrian Yellowknee	**March 16, 2006**	**JMR vol. 9, tab 77**	**5-6**
Statutory Declaration of Alvin Saulteaux	**March 7, 2006**	**JMR vol. 9, tab 71**	**5-6**
Statutory Declaration of Ann Dene	**March 15, 2006**	**JMR vol. 9, tab 61**	**5-6**
Statutory Declaration of Camble Quatell	**March 1, 2006**	**JMR vol. 9, tab 70**	**5-6**
Statutory Declaration of Christine Semple	**March 9, 2006**	**JMR vol. 9, tab 72**	**5-6**
Statutory Declaration of Cornelius McComber	**March 8, 2006**	**JMR vol. 9, tab 66**	**5-6**
Statutory Declaration of Dennis Smokeyday	**February 28, 2006**	**JMR vol. 9, tab 73**	**5-6**
Statutory Declaration of Edward Tapiatic	**March 13, 2006**	**JMR vol. 9, tab 75**	**5-6**
Statutory Declaration of Ernestine Caibaisosai-Gidmark	**March 23, 2006**	**JMR vol. 9, tab 59**	**5-6**
Statutory Declaration of Flora Northwest	**March 6, 2006**	**JMR vol. 9, tab 68**	**5-6**

Statutory Declaration of Fred Kelly	**March 13, 2006**	**JMR vol. 9, tab 64**	**3-9**
Statutory Declaration of Helen Wildeman	**March 6, 2006**	**JMR vol. 9, tab 76**	**5-6**
Statutory Declaration of James Fontaine	**March 9, 2006**	**JMR vol. 9, tab 62**	**5-6**
Statutory Declaration of Jane McCallum	**March 3, 2006**	**JMR vol. 9, tab 65**	**5-6**
Statutory Declaration of Kenneth Sparvier	**June 2, 2006**	**JMR vol. 9, tab 74**	**5-6**
Statutory Declaration of Michael Carpan	**July 7, 2006**	**JMR vol. 9, tab 60**	**5-6**
Statutory Declaration of Norman Pauchay	**March 3, 2006**	**JMR vol. 9, tab 69**	**5-6**
Statutory Declaration of Peggy Good	**March 20, 2006**	**JMR vol. 9, tab 63**	**5-6**
Statutory Declaration of Rhonda Buffalo	**March 20, 2006**	**JMR vol. 9, tab 58**	**5-6**
Statutory Declaration of Stanley Nepetaypo	**March 1, 2006**	**JMR vol. 9, tab 67**	**5-6**

218. Similarly, members of the Family Class have spoken out and said that while the Survivor Class has borne the brunt of the pain through the direct IRS experience, that legacy has been passed on to children and grandchildren of Survivors and to the wider Aboriginal community. The multi-generational impacts of the IRS policy are undeniable. The Family Class seeks healing and closure on that tragic part of Aboriginal history, and wants to accept the Settlement as the first step towards rebuilding their communities.

Instrument / Name	**Date Sworn**	**Citation**	**Para(s)**
Affidavit of Dana Eva Marie Francey	**August 3, 2006**	**SJMR, tab 9**	**3-14**
Affidavit of Evelyn Baxter	**July 19, 2006**	**JMR vol. 9, tab 48**	**3-12**
Affidavit of Janet Brewster	**July 21, 2006**	**JMR vol. 9, tab 49**	**3-19**
Affidavit of Lucy Doctor	**August 3, 2006**	**SJMR, tab 11**	**3-24**
Affidavit of Pauline Joan Michell	**August 1, 2006**	**SJMR, tab 15**	**6-8**
Affidavit of Veronica Marten	**July 14, 2006**	**JMR vol. 9, tab 56**	**3-36**
Statutory Declaration of Vincent	**July 14, 2006**	**JMR vol. 9, tab 53**	**3-14**

Fontaine

219. The settlement is acknowledged to be beneficial as well for the Deceased Class, as it contains significant commemoration and truth and reconciliation initiatives.

Kuptana Affidavit, SJMR tab 8, para 35
Belcourt Affidavit, JMR vol. 5B, tab 11, para 60
Fontaine Affidavit, JMR vol. 3, tab 6, para 95

220. Each of the proposed Representative Plaintiffs have provided affidavits with reasons why they support the proposed settlement, including the following:

(a) Satisfaction with the compensation offered and the availability of an immediate payment;

(b) Satisfaction with the programmatic redress and healing opportunities which will be available immediately for the Class upon settlement;

(c) The fear of loss relating to ongoing litigation;

(d) The concern that ongoing litigation, likely involving appeals, would be protracted, and members of the Class would die before achieving resolution;

(e) Satisfaction with the claims administration process proposed; and

(f) Satisfaction that the objectives of the litigation have been met, including specifically the objectives of public acknowledgement, reconciliation, commemoration and healing.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 4-9

Instrument / Name	Date Sworn	Citation	Para(s)
Affidavit of Benny Doctor	**August 3, 2006**	**SJMR, tab 10**	**33-37**
Affidavit of Brenda Cyr	**July 26, 2006**	**JMR vol. 9, tab 51**	**27-31**
Affidavit of Charles Baxter	**June 17, 2006**	**JMR vol. 9, tab 46**	**63-71**
Affidavit of Dana Eva Marie Francey	**August 3, 2006**	**SJMR, tab 9**	**26-32**
Affidavit of Donald Belcourt	**July 14, 2006**	**JMR vol. 5B, tab 11**	**58-64**
Affidavit of Elijah Baxter	**May 12, 2006**	**JMR vol. 9, tab 47**	**43-51**
Affidavit of Elizabeth Kusiak	**July 13, 2006**	**JMR vol. 9, tab 54**	**16-18**
Affidavit of Evelyn Baxter	**July 19, 2006**	**JMR vol. 9, tab 48**	**24-29**

Affidavit of Janet Brewster	**July 21, 2006**	**JMR vol. 9, tab 49**	**31-37**
Affidavit of John Bosum	**July 25, 2006**	**JMR vol. 9, tab 50**	**30-38**
Affidavit of Lucy Doctor	**August 3, 2006**	**SJMR, tab 11**	**36-42**
Affidavit of Malcolm Dawson	**July 24, 2006**	**JMR vol. 9, tab 52**	**20-24**
Affidavit of Michelline Ammaq	**July 17, 2006**	**SJMR, tab 13**	**18-22**
Affidavit of Nora Bernard	**July 10, 2006**	**JMR vol. 5B, tab 12**	**41-49**
Affidavit of Pauline Joan Michell	**August 1, 2006**	**SJMR, tab 15**	**25-31**
Affidavit of Percy Archie	**July 7, 2006**	**JMR vol. 9, tab 45**	**22-26**
Affidavit of Rosemarie Kuptana	**August 3, 2006**	**SJMR, tab 8**	**32-35**
Affidavit of Theresa Ann Larocque	**July 13, 2006**	**JMR vol. 9, tab 55**	**16-18**
Affidavit of Veronica Marten	**July 14, 2006**	**JMR vol. 9, tab 56**	**48-52**
Statutory Declaration of Adrian Yellowknee	**March 16, 2006**	**JMR vol. 9, tab 77**	**17-19**
Statutory Declaration of Alvin Saulteaux	**March 7, 2006**	**JMR vol. 9, tab 71**	**17-19**
Statutory Declaration of Ann Dene	**March 15, 2006**	**JMR vol. 9, tab 61**	**17-19**
Statutory Declaration of Camble Quatell	**March 1, 2006**	**JMR vol. 9, tab 70**	**17-19**
Statutory Declaration of Christine Semple	**March 9, 2006**	**JMR vol. 9, tab 72**	**17-19**
Statutory Declaration of Cornelius McComber	**March 8, 2006**	**JMR vol. 9, tab 66**	**17-19**
Statutory Declaration of Dennis Smokeyday	**February 28, 2006**	**JMR vol. 9, tab 73**	**17-19**
Statutory Declaration of Edward Tapiatic	**March 13, 2006**	**JMR vol. 9, tab 75**	**17-19**
Statutory Declaration of Ernestine Caibaisosai-Gidmark	**March 23, 2006**	**JMR vol. 9, tab 59**	**17-19**
Statutory Declaration of Flora Northwest	**March 6, 2006**	**JMR vol. 9, tab 68**	**17-19**
Statutory Declaration of Fred Kelly	**March 13, 2006**	**JMR vol. 9, tab 64**	**20-22**
Statutory Declaration of Helen Wildeman	**March 6, 2006**	**JMR vol. 9, tab 76**	**17-19**
Statutory Declaration of James Fontaine	**March 9, 2006**	**JMR vol. 9, tab 62**	**17-19**
Statutory Declaration of Jane McCallum	**March 3, 2006**	**JMR vol. 9, tab 65**	**17-19**
Statutory Declaration of Kenneth Sparvier	**June 2, 2006**	**JMR vol. 9, tab 74**	**17-19**
Statutory Declaration of Michael Carpan	**July 7, 2006**	**JMR vol. 9, tab 60**	**16-17**

Statutory Declaration of Norman Pauchay	**March 3, 2006**	**JMR vol. 9, tab 69**	**17-19**
Statutory Declaration of Peggy Good	**March 20, 2006**	**JMR vol. 9, tab 63**	**17-19**
Statutory Declaration of Rhonda Buffalo	**March 20, 2006**	**JMR vol. 9, tab 58**	**17-19**
Statutory Declaration of Stanley Nepetaypo	**March 1, 2006**	**JMR vol. 9, tab 67**	**17-19**
Statutory Declaration of Vincent Fontaine	**July 14, 2006**	**JMR vol. 9, tab 53**	**26-32**

221. The settlement is endorsed and supported by the AFN and National Chief Phil Fontaine as providing the best possible resolution available after years of public and political outreach around IRS issues, and approximately 1 year of intense multi-party negotiations. Fontaine acknowledges that this Settlement, which he worked hard to achieve for his people, is not a panacea. Generations of former students have died in pain and poverty, without recognition of their suffering. However, it is those living now who must and can benefit from this resolution.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 6-8

222. National Chief Phil Fontaine, who is put forward as a proposed representative of the Survivor Class and Deceased Class, endorses the Settlement on behalf of both groups. While members of the Deceased Class are, by definition, deceased and therefore unable to enjoy the benefits of compensation, the Settlement provides for commemoration, truth telling and healing, so that the memories of those individuals can be honoured, and their families and beneficiaries healed. The elements of the Settlement relating to commemoration, truth telling and healing are substantial, comprising approximately $300 million (including both Canada's commitment and that of the Church Groups). In addition, the individual Deceased Class members' freedom to participate in, or opt out of the Settlement has been protected by a detailed and comprehensive Notice Program conjoined with a lengthy opt out period (5 months). Representatives of Deceased Class members may choose to opt out without jeopardizing the Settlement itself, since only Survivor Class members are included in the opt-out threshold. Because of the opt out provisions, the estates of the Deceased Class will be able to preserve their current positions if they chose, and will be in no different of a position because of the Settlement.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 18-19, 95-96
Settlement Agreement, JMR vol. 1, tab 2, Article 4.14

(ii) Negotiating Parties

223. The Honourable Justice Frank Iacobucci worked hard as the Federal Representative to craft a settlement acceptable to all parties, and endorses this resolution as a fair and reasonable Settlement for all parties.

Iacobucci Affidavit, JMR vol.3, tab 5, para 39

224. The AFN has endorsed and supported the negotiation and this Settlement Agreement. Similarly, the Church Entities have all sworn affidavits in support of this motion to approve the settlement.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 5-9
Kendall Affidavit, JMR vol.7, tab 23
Scott Affidavit, JMR vol.7, tab 22
Boyles Affidavit, JMR vol.7, tab 21
Keylor Affidavit, JMR vol.7, tab 27
L'Heureux Affidavit, JMR vol.7, tab 28
Gagne Affidavit, JMR vol.7, tab 25
Poirer Affidavit, JMR vol.7, tab 24
Pinet Affidavit, JMR vol.7, tab 30
Piche Affidavit, JMR vol.7, tab 29

225. Various Plaintiffs' legal counsel have sworn affidavits specifically endorsing the Settlement as fair and reasonable and in the best interests of all parties. Independent Counsel have endorsed the Settlement Agreement, describing it as providing the greatest benefit to the greatest number of Survivors.

Courtis Affidavit, JMR vol. 5, tab 10, para 46
Staats Affidavit, JMR vol. 8, tab 43, para 19
Marchand Affidavit, JMR vol. 4, tab 9, para 22
Keshen Affidavit, JMR vol. 5B, tab 15, para 5

Affidavit of Bonnie Reid, sworn July 27, 2006 ("Reid Affidavit"), JMR vol. 5B, tab 14, paras 6-7

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 92-95

226. Support from counsel who have been actively involved in IRS claims, and who know the difficulties presented through continued litigation, is particularly important. Risks of continued litigation for all Classes include the existence of a number of possible defences (which have been advanced in various proceedings) including:

(a) limitations defences under both federal and provincial statutes;

(b) other delay-related defences that arise at both common law and in equity, such as laches, waiver, release, accord and satisfaction and acquiescence;

(c) consent;

(d) with respect to the claim for negligence, that the actions of the crown were policy-driven decisions and not operational decisions and were subject to crown immunity;

(e) that certain, if not all, actions of Canada were authorized by statute, order-in-councils or regulation;

(f) that there is no cause of action in law for loss of culture and language;

(g) that many IRS were operated for some or all of their existence in accordance with the standards of the day and without any breach of applicable standards of care; and

(h) various damages defences.

Courtis Affidavit, JMR vol. 5, tab 10, para 110

227. Additionally, the Family Class claims face particular risks and obstacles as follows:

(a) the absence of a statutory foundation similar to Ontario's FLA in other provinces and territories;

(b) absence of statutory foundation in Ontario prior to 1978 (resulting in the FLA being inapplicable to the vast majority of Family Class claims);

(c) compelling limitation and laches defences without the mitigating factors that applied to the claims of Survivors; and

(d) significant difficulties in the assessment of damages, including evidentiary issues;

Courtis Affidavit, JMR vol. 5, tab 10, para 112

228. The Deceased Class also faces serious additional impediments to successful litigation including;

(a) absence of statues preserving causes of action for deceased;

(b) unique evidentiary issues;

(c) compelling limitations and laches defences; and

(d) significant difficulties in ascertaining damages.

229. Apart from risks inherent in the merits of the claims, continued litigation takes time, and members of the Class would certainly die in the interim, without any compensation or benefits.

Courtis Affidavit, JMR vol. 5, tab 10, para 111

230. As a procedural concern, there always exists the possibility that the class proceeding will not be deemed the preferable procedure on a contested certification motion, given the individual damages issues.

Courtis Affidavit, JMR vol. 5, tab 10, para 114

231. Avoidance of risks aside, counsel have also noted the positive benefits of the Settlement Agreement, one of which is that it brings an opportunity for justice to more Survivors than the court or ADR Process could allow, in particular through the commitment to process claims in a timely manner, and thus provide closure to the Survivors in the foreseeable future.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 92-94

(iii) Conclusions

232. The IRS policy was intended as cultural genocide, and no amount of money paid to individuals today can undo that harm. It is the commemoration, healing and truth and reconciliation aspects of the settlement which are aimed at restoring the dignity of the Class members, as much as the funds payable to individual Survivors will provide some comfort.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 6-7

D. NOTICE

(i) First Stage Notice Program

233. A First Stage Notice Program for these certification and approval hearings was approved by all courts in all Jurisdictions, prior to the current hearing. The First Stage Notice Program was and is comprehensive and highly specialized with a view to reaching a unique, often largely rural audience. The First Stage Notice Program has been fully implemented, particulars of which include:

(a) The website, www.residentialschoolsettlement.ca was posted June 21, 2006, and available in English, French, and Inuktitut. The website has received considerable traffic, particulars of which are as follows:

  (i) From posting through to July 20, 2006, there have been 9,238 website user sessions representing 95,811 page views and 179,502 hits in which 5.48 gigabytes of data have been downloaded;

  (ii) The website usage represents 318 sessions per day since the launch of the First Stage Notice Program, and the average session is 41 minutes long; and

  (iii) Numerous groups have added links to their websites to "click through" to the court website;

(b) The information release announcing the commencement of the Notice Program was released to all major media outlets by wire distribution on June 22, 2006, and by fax to other media outlets;

(c) The toll free inquiries phone number became active June 22, 2006, and callers were able to access service in English, French and various Aboriginal languages. As of July 26, 2006, there have been almost 5000 calls made to this number;

(d) On June 22, 2006, mailings were sent to known class members utilizing lists provided by the AFN, Inuit Groups, legal counsel and government databases. Information was also sent to First Nations offices and Aboriginal and other community organizations. There

were over 7000 mail out packages directed to individuals whose names were provided by legal counsel, over 28,000 individuals whose names were provided by the AFN, and a further approximately 15,000 were sent directly to legal counsel to be further forwarded to clients. Approximately 1400 packages were sent to organizations;

(e) Email and Fax notice dissemination has also occurred in accordance with the Phase I Notice Plan;

(f) Starting with the National Post on June 22, 2006, notice has been published in accordance with the Notice Program, including in 35 newspapers, in press outlets and in approximately 36 Aboriginal newspapers; and

(g) Additionally, Aboriginal print, radio and media outlets have been targeted, with notice provided in approximately 18 different Aboriginal languages. This includes approximately 338 TV notices, and 771 radio notices so far.

Affidavit of Todd Hilsee sworn June 29, 2006 ("Hilsee Affidavit #2"), JMR vol. 6, tab 17, paras 2-12

Affidavit of Todd Hilsee, sworn July 26, 2006 ("Hilsee Affidavit #3"), JMR vol. 6, tab 18, paras 5-9, 12-24

234. The expert who prepared and implemented the Phase I Notice Program, Todd Hilsee, has provided evidence that the Notice has appeared in every province and territory of Canada, in 20 different languages and dialects, reaching many Aboriginal populations.

Hilsee Affidavit #3, JMR vol. 6, tab 18, paras 43, 45

(ii) Second Stage Notice Program

235. Hilsee has also designed a Second Stage Notice Program to be implemented if the Settlement Agreement is approved, to allow Class members to learn of their rights to opt out of the Settlement. Details of the proposed Second Stage Notice Program are outlined in a comprehensive Notice Plan, filed with the court.

Affidavit of Todd Hilsee, sworn May 17, 2006 ("Hilsee Affidavit #1"), JMR vol. 6, tab 16, para 3; Exhibit "A", Notice Plan dated May 17, 2006

236. The Second Stage Notice Program is designed to inform members of the Class of their opt-out rights, as well as their claims-filing rights, if and when the Court approves the Settlement.

Hilsee Affidavit #1, JMR vol. 6, tab 16, para 18

237. The parties have proposed an opt out period of approximately 5 months, which should overcome communications difficulties that may exist for the class.

Fontaine Affidavit, JMR vol. 3, tab 6, para 19

PART III - ISSUES AND THE LAW

238. In order to obtain the relief sought, the parties must establish:

(a) This case meets the tests for certification as a class proceeding, including:

(i) The Claim discloses a cause of action;

(ii) The Class is identifiable;

(iii) There are common issues;

(iv) The class proceeding is the preferable procedure; and

(v) The Representative Plaintiffs are capable of fairly representing the Class;

(b) The settlement is fair and reasonable; and

(c) The Settlement specifically with respect to legal fees is fair and reasonable.

239. In order for the Settlement to take effect, it must be approved in all Jurisdictions, on behalf of all Class members in Canada.

A. APPROVAL OF THIS ACTION AS A CLASS PROCEEDING

(i) The Requirements for Certification of a Class Action

240. A class proceeding may be certified either because it meets the criteria defined by Jurisdiction-specific statutory frameworks, or in Jurisdictions that do not have such statutory frameworks, it may be approved as a representative action in accordance with common law principles, set down by the Supreme Court of Canada.

***Class Proceedings Act (Alberta)* S.A. 2003, c. C-16, s. 5.**

***Class Proceedings Act (British Columbia)* R.S.B.C. 1996, c.50, s.4**

***The Class Proceedings Act (Manitoba)* C.C.S.M., c.C130, s.4**

***Class Proceedings Act (Ontario)* S.O. 1992, c.6, s.5**

***Class Actions Act (Saskatchewan)* S.S. 2001, c.C-12.01, s.6**

***Western Canadian Shopping Centres* v. *Dutton*, [2001] 2. S.C.R. 534, [hereinafter Dutton], Plaintiffs' Authorities, vol.3, tab 46**

241. In this case, certification based on statute is sought in Alberta, British Columbia, Manitoba, Ontario and Saskatchewan, and certification based on common law principles is sought in the Northwest Territories, Nunavut and the Yukon. The overall Class is national in scope, and those individuals not residing within any of the Jurisdictions in which approval is sought, namely those resident in New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, or outside of Canada, form part of the Class in Ontario[3].

a. The Principles Behind Class Proceedings

242. Class proceedings are intended to serve the interests of access to justice, judicial economy and behaviour modification. It is with those goals in mind that the suitability of a matter for certification should be assessed.

***Western Canadian Shopping Centres* v. *Dutton* [2001] 2. S.C.R. 534 at 549-550., Plaintiffs' Authorities, vol.3, tab 46**

***Hollick* v. *Toronto (City)* [2001] 3 S.C.R. 158 at 170, Plaintiffs' Authorities, vol. 2, tab 21**

***Condominium Plan No. 0020701* v. *Investplan Properties Inc.* [2006] A.J. No. 368 (Q.B.) para 30, Plaintiffs' Authorities, vol.1, tab 8**

***Walls* v. *Bayer Inc.* [2004] M.J. No. 4 (Q.B.) para 15, leave to appeal refused [2005] M.J. No.286 (C.A.), Plaintiffs' Authorities, vol.3, tab 43**

***Sorotski* v. *CNH Global N.V.* [2006] S.J. No. 258 (Q.B.) para 79, Plaintiffs' Authorities, vol.2, tab 37**

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[3] Justice Cullity recently reviewed the Ontario Court's approach to the creation of national classes, or including non-residents within Ontario proceedings, in *McCutcheon v. The Cash Store*, [2006] O.J. No. 1860. Ontario Courts have taken a broad interpretation of jurisdiction in connection with class proceedings, largely to ensure consistency of results of similarly situated class members across jurisdictions. The Plaintiffs submit that such an approach is warranted in this case, as comparatively few Class members reside outside the Jurisdictions, and all parties have consented to this approach to jurisdictional issues, by way of the Settlement Agreement.

243. Certification and settlement approval support the goal of judicial economy. Given that there are at present 10,538 claimants in various non-class action court proceedings, and courts have been generally unable to cope and process cases with any speed (the implementation of test cases, case management, etc. are some of the efforts that underscore the problem), removing these claims from the court and expediting the process is essential. Given the advanced age of the Survivor Class members, who are dying at a rate of approximately 1,200 persons per year, a rate which accelerates as the population ages, the need for a resolution independent of protracted litigation is absolutely urgent and in the best interests of the Class.

Courtis Affidavit, JMR vol. 5, tab 10, paras 133-136
Russell Affidavit, JMR vol. 4, tab 8, para 43

244. Certification and settlement approval advances access to justice for the Class because:

(a) Individual litigation is too costly for the vast majority of the Class, many of whom live in poverty;

(b) Determinations of liability and causation have and will require extensive documentary and expert evidence;

(c) It would not be economically rational to bring certain claims, given the high costs of expert evidence and the amount of time required to be expended (even assuming contingency arrangements were generally available for legal fees);

(d) Class members may not be able to access the legal system because:

  (i) They may not be aware that they have a claim;

  (ii) They may be reluctant to consult with legal counsel out of a concern for costs, or simply unable to find a lawyer willing and able to take their case;

  (iii) They may lack confidence in the legal system;

  (iv) They may not be prepared psychologically to re-live their experiences in an adversarial or public forum;

  (v) There may be geographic or language barriers to reaching counsel; and

  (vi) The effects of IRS on the Class member may render him or her unable to cope with or access the legal process (substance abuse, poverty, participation in crime, spiritual and cultural alienation, etc.)

Courtis Affidavit, JMR vol. 5, tab 10, paras 137-142

245. While this case does not cry out for behaviour modification in the narrow sense, given that IRS policy is now thankfully in Canada's past, the Settlement includes the Truth and Reconciliation Commission whose role is to make public and permanent the record of abuse at IRS, which process will no doubt serve to deepen the respect and understanding of the government and all Canadians with respect to Aboriginal peoples, thus serving a broader behavioural modification role.

Courtis Affidavit, JMR vol. 5, tab 10, paras 144-146

246. Class proceedings legislation is remedial, and must be given a broad, liberal and purposive interpretation.

***Bywater* v. *Toronto Transit Commission* [1998] O.J. No. 4913 (S.C.J.) para 22, Plaintiffs' Authorities, vol.1, tab 4**

247. Courts have held that where a consent certification is sought in order to give effect to a proposed settlement, the requirements for certification may be applied less rigorously than where the motion to certify the action is contested.

***Gariepy* v. *Shell Oil Co.*, [2002] O.J. No. 4022 (S.C.J.) para 27, Plaintiffs' Authorities, vol.1, tab 16**

b. Certification Legislation

248. Provincial class proceedings legislation provides that a case should be certified or approved as a class proceeding when the following requirements are met: the pleadings must disclose a cause of action, there must be an identifiable class, there must be common issues, the class proceeding must be the preferable procedure and the representative plaintiffs must be capable of fairly representing the interests of the Class.

***Class Proceedings Act (Alberta)* S.A. 2003, c. C-16, s. 5**
***Class Proceedings Act (British Columbia)* R.S.B.C. 1996, c.50, s.4**
***The Class Proceedings Act (Manitoba)* C.C.S.M., c.C130, s.4,**
***Class Proceedings Act (Ontario)* S.O. 1992, c.6, s.5**
***Class Actions Act (Saskatchewan)* S.S. 2001, c.C-12.01, s.6**

c. Common Law Certification

249. In the Jurisdictions where specific class proceedings legislation is not in force, courts must apply the criteria set out in *Dutton* when asked to assess the suitability of an action for certification as a class proceeding, which criteria is largely the same as that found under the various class proceedings statutes. Specifically, the court must be satisfied that:

(a) The proposed class is capable of clear definition;

(b) There must be issues of fact or law common to all class members;

(c) With regard to common issues, success for one class member must mean success for all; and

(d) The proposed class representative must adequately represent the class.

> ***Western Canadian Shopping Centres* v. *Dutton* [2001] 2. S.C.R. 534 at 554, Plaintiffs' Authorities, vol.3, tab 46**
>
> ***Enge* v. *North Slave Métis Alliance* [2003] N.W.T.J. No. 14 (S.C.), Plaintiffs' Authorities, vol.1, tab 11**

250. As a comparison of the statutory and common law requirements shows, the common law criteria are essentially subsumed in the statutory criteria. Thus, if the statutory criteria are met, certification of the proceedings at common law should follow.

(ii) The Application of Certification Criteria

a. Causes of Action

251. The appropriate test for determining whether the cause of action requirement has been met under class proceedings legislation is whether the pleadings would survive a motion to strike for disclosing no reasonable cause of action.

> ***Kumar* v. *Mutual Life Assurance Company of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.), Plaintiffs' Authorities, vol.2, tab 26**
>
> ***Hoffmann* v. *Monsanto Canada Inc.* [2005] W.W.R. 665 (Sask. Q.B.) at para 27, Plaintiffs' Authorities, vol.2, tab 20**
>
> ***Sorotski* v. *CNH Global N.V.* [2006] S.J. No. 258 (Q.B.) paras 45-46, Plaintiffs' Authorities, vol.2, tab37**

252. The allegations of fact pleaded in the claim must be accepted as proven unless they are patently ridiculous and incapable of proof, and the statement of claim must be read generously, with a view to accommodating inadequacies of form.

> ***Hunt* v. *Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321 (S.C.C.) at 979-, Plaintiffs' Authorities, vol.2, tab 22**
>
> ***Nash* v. *The Queen* (1995), 27 O.R. (3d) 1 (C.A.) pg. 6, Plaintiffs' Authorities, vol.2, tab 31**

253. The Claim outlines various causes of action relating to the operation of the IRS, including negligence and breach of fiduciary duty, which have caused the Class to suffer damages. Full particulars of the various causes of action are set out in the Claim. The plaintiffs submit that the Claim more than adequately satisfies this element of the requirement for certification.

d. Identifiable Class

254. Class proceedings require the existence of an identifiable class of two or more parties, the purpose of which is to identify those with a potential claim, define the parameters of the action and determine those bound by the result, and ensure proper notice of the proceedings is provided to those affected.

> ***Class Proceedings Act (Alberta)* S.A. 2003, c. C-16, s. 5(b)**
>
> ***Class Proceedings Act (British Columbia)* R.S.B.C. 1996, c.50, s.4(b)**
>
> ***The Class Proceedings Act (Manitoba)* C.C.S.M., c.C130, s.4(b)**
>
> ***Class Proceedings Act (Ontario)* S.O. 1992, c.6, s.5(b**
>
> ***Class Actions Act (Saskatchewan)* S.S. 2001, c.C-12.01, s.6(b)**
>
> ***T.L.* v. *Alberta* [2006] A.J. No. 163 (Q.B.), para 62, Plaintiffs' Authorities, vol.3, tab40**
>
> ***Bywater* v. *Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.) para 10, Plaintiffs' Authorities, vol.1, tab 4**

255. The proposed Class is, quite simply, all persons in Canada who resided at IRS from 1920 forward, living or dead, and their family members. It is doubtful that individuals would not be able to identify themselves as Class members in one of the Jurisdictions, given the significance of having attended an IRS.

256. The proposed Class consists of the Survivor Class, the Family Class and the Deceased Class, which are defined as follows:

(a) "**Survivor Class**" means:

All persons who resided at an IRS in Canada between January 1, 1920 and December 31, 1997, who are living, or who were living as of May 30, 2005, and who, as of the date hereof, or who, at the date of death resided in:

(i) Alberta, for the purposes of the Alberta Court of Queen's Bench;

(ii) British Columbia, for the purposes of the British Columbia Supreme Court;

(iii) Manitoba, for the purposes of the Manitoba Court of Queen's Bench;

(iv) Northwest Territories, for the purposes of the Supreme Court of the Northwest Territories;

(v) Nunavut, for the purposes of the Nunavut Court of Justice;

(vi) Ontario, Prince Edward Island, Newfoundland, and Labrador, New Brunswick, Nova Scotia and any place outside of Canada, for the purposes of the Ontario Superior Court of Justice;

(vii) Québec, for the purposes of the Quebec Superior Court;

(viii) Saskatchewan, for the purposes of the Court of Queen's Bench for Saskatchewan; and

(ix) Yukon, for the purposes of Supreme Court of the Yukon Territory;

But excepting Excluded Persons.

(b) "**Family Class**" means:

(i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

(ii) the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

(iii) a former spouse of a Survivor Class Member;

(iv) a child or other lineal descendent of a grandchild of a Survivor Class Member;

(v) a person of the same or opposite sex to a Survivor Class Member who cohabited for a period of at least one year with that Survivor Class Member immediately before his or her death;

(vi) a person of the same or opposite sex to a Survivor Class Member who was cohabiting with that Survivor Class Member at the date of his or her death and to whom that Survivor Class Member was providing support or was under a legal obligation to provide support on the date of his or her death;

(vii) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death; and,

(viii) such other persons as the court recognizes or directs,

and who, as of the date hereof, are resident in:

(i) Alberta, for the purposes of the Alberta Court of Queen's Bench;

(ix) British Columbia, for the purposes of the British Columbia Supreme Court;

(x) Manitoba, for the purposes of the Manitoba Court of Queen's Bench;

(xi) Northwest Territories, for the purposes of the Supreme Court of the Northwest Territories;

(xii) Nunavut, for the purposes of the Nunavut Court of Justice; and

(xiii) Ontario, Prince Edward Island, Newfoundland, and Labrador, New Brunswick, Nova Scotia and any place outside of Canada, for the purposes of the Ontario Superior Court of Justice;

(xiv) Québec, for the purposes of the Quebec Superior Court;

(xv) Saskatchewan, for the purposes of the Court of Queen's Bench for Saskatchewan;

(xvi) Yukon, for the purposes of Supreme Court of the Yukon Territory;

but excepting Excluded Persons.

(c) "**Deceased Class**" means all persons who resided at an IRS in Canada between 1920 and 1997, who died before May 30, 2005, and who were, at their date of death, residents of

(i) Alberta, for the purposes of the Alberta Court of Queen's Bench;

(ii) British Columbia, for the purposes of the British Columbia Supreme Court;

(iii) Manitoba, for the purposes of the Manitoba Court of Queen's Bench;

(iv) the Northwest Territories, for the purposes of the Supreme Court of the Northwest Territories;

(v) Nunavut, for the Nunavut Court of Justice;

(vi) Ontario, Prince Edward Island, Newfoundland, and Labrador, New Brunswick, Nova Scotia and any place outside of Canada, for the purposes of the Ontario Superior Court of Justice;

(vii) Québec, for the purposes of the Quebec Superior Court;

(viii) Saskatchewan, for the purposes of the Saskatchewan Court of Queen's Bench;

(ix) Yukon, for the purposes of the Supreme Court of the Yukon Territory;

but excepting Excluded Persons; and

(d) **"Excluded Persons"** means all persons who attended the Mohawk Institute IRS in Brantford, Ontario, between 1922 and 1969, and their parents, siblings, spouses and children (and are thus subject to the *Cloud* class proceedings, already certified).

Amended Statement of Claim, JMR vol. 3, tab 3A, para 6

257. The proposed Class definition provides objective criteria which can identify those persons who have a potential claim and those who will be bound by the result, as well as those to whom notice need be sent, and accordingly it satisfies the purposes of the CPL.

e. Common Issues

258. The proposed class proceeding must raise issues of fact or law common to the class such that litigating the common issues will decide and dispose of some aspect(s) of the case, and materially advance the case.

***Rumley* v. *British Columbia* [2001] 3 S.C.R. 184 at 198-204, Plaintiffs' Authorities, vol. 2, tab 36**

***Condominium Plan no. 0020701* v. *Investplan Properties Inc.* [2006] A.J. No. 368 (Q.B.) paras 61-63, Plaintiffs' Authorities, vol.1, tab 8**

***Campbell* v. *Flexwatt Corporation* [1997] B.C.J. No. 2477 (C.A.) at para 53, Plaintiffs' Authorities, vol.1, tab 5**

***Carom* v. *Bre-X Minerals Ltd.* [2000] O.J. No. 4014 (C.A.) paras 39-41, Plaintiffs' Authorities, vol.1, tab 6**

***Walls* v. *Bayer Inc.* [2005] M.J. No. 4 (Q.B.) para 45, Plaintiffs' Authorities, vol. 3, tab 43**

***Jameson Livestock Ltd.* v. *Toms Grain & Cattle Co.* [2006] S.J. No. 93 (C.A.) paras 31-35, Plaintiffs' Authorities, vol.2, tab 23**

***Enge* v. *North Slave Métis Alliance* [1999] N.W.T.J. No. 139 (S.C.) para 14, Plaintiffs' Authorities, vol.1 tab 11**

259. The following are the proposed common issues:

(a) By their operation or management of IRS during the Class Period (1920 to 1996), did the Defendants breach a duty of care they owed to the Survivor Class and the Deceased Class to protect them from actionable physical or mental harm?

(b) By their purpose, operation or management of IRS during the Class Period, did the Defendants breach a fiduciary duty they owed to the Survivor Class and the Deceased Class or the Aboriginal or treaty rights of the Survivor Class and the Deceased Class to protect them from actionable physical or mental harm?

(c) By their purpose, operation or management of IRS during the Class Period, did the Defendants breach a fiduciary duty they owed to the Family Class?

(d) If the answer to any of these common issues is yes, can the court make an aggregate assessment of the damages suffered by all Class members of each class as part of the common trial?

260. The above common issues address those matters in common which courts have previously recognized as existing issues for all IRS claims. The active judicial involvement in orchestrating test cases in Alberta and IRS case management in British Columbia is a testament to the fact that large common issues do exist for all IRS claims, and thus IRS cases can be materially advanced through the central determination of those common issues in a class proceeding. Indeed, the certification of Cloud is likewise an indication that common issues do exist in IRS cases.

***Cloud* v. *Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.)**

f. Preferable Procedure

261. In determining whether the class proceeding is a preferable procedure, the inquiry is directed at whether the class proceeding would be a fair, efficient and manageable method of advancing the class, and whether the class proceeding would be preferable to other procedures available.

***Rumley* v. *British Columbia* [2001] 3 S.C.R. 184 at 204, Plaintiffs' Authorities, vol.2 tab 36**

***Ayrton* v. *PRL Financial (Alta.) Ltd.* [2005] A.J. No. 466 (Q.B.) paras 94-98, Plaintiffs' Authorities, vol.1, tab 2**

***Walls* v. *Bayer Inc.* [2005] M.J. No. 4 (Q.B.) paras 65-76, Plaintiffs' Authorities, vol.3, tab 43**

***Vitapharm Canada Ltd, et al.* v. *Degussa-Hüls AG, et al.* [2005] O.J. No. 1118 (S. C. J.) paras 37-41, Plaintiffs' Authorities, vol.3, tab 42**

***Walton* v. *Mytravel Canada Holdings Inc.* [2006] S.J. No. 373 (Q.B.) paras 71-80, Plaintiffs' Authorities, vol.3, tab 45**

262. There is no other procedure which addresses all of the issues raised in the Claim by the Class. The ADR Process as initially implemented and amended, was flawed, and addresses only certain of the claims made by the Class. Moreover, it is subject to change or withdrawal at the choosing of the government, and thus does not present a reliable alternative. Individual litigation has proven to be time consuming, expensive and a burden on the judicial system.

263. Most importantly, however, the preferability of the class proceeding must be recognized within the context of the proposed settlement, which compensates the basic claims and offers up an improved adjudication process in the form of the IAP for more significant injuries.

g. Representative Plaintiffs

264. CPL requires that the representative plaintiffs be capable of fairly and adequately representing the interests of the Class, have a workable plan to proceed with the litigation and of notifying the Class of the proceedings, and have no conflict of interest with other members of the Class.

***Class Proceedings Act (Alberta)* S.A. 2003, c. C-16, s. 5 (e)**

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

***The Class Proceedings Act (Manitoba)* C.C.S.M., c.C130, s.4 (e)**

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

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

***Western Canadian Shopping Centres* v. *Dutton* [2001] 2. S.C.R. 534, Plaintiffs' Authorities, vol.3, tab 46**

265. The proposed representative plaintiffs are capable of representing the Class. The proposed Class representatives have all given evidence of their support for the litigation to date. Such efforts have included:

(a) Retaining legal counsel;

(b) Working with legal counsel in preparation of the litigation and instructing counsel as required;

(c) addressing legal fees with counsel;

(d) discussing with counsel the nature of the litigation, including the risks and costs of same;

(e) obtaining documents and other information at the request of counsel;

(f) participating in or reviewing the plan for the litigation;

(g) providing evidence and swearing an affidavit; and

(h) learning the outline for the conduct of a class proceeding, in order to assist and instruct counsel and properly represent the Class.

Fontaine Affidavit, JMR vol. 3, tab 6, para 97-99

Instrument / Name	Date Sworn	Citation	Para(s)
Affidavit of Benny Doctor	**August 3, 2006**	**SJMR, tab 10**	**28-32**
Affidavit of Brenda Cyr	**July 26, 2006**	**JMR vol. 9, tab 51**	**22-26**
Affidavit of Charles Baxter	**June 17, 2006**	**JMR vol. 9, tab 46**	**53-62**
Affidavit of Dana Eva Marie Francey	**August 3, 2006**	**SJMR, tab 9**	**21-25**
Affidavit of Donald Belcourt	**July 14, 2006**	**JMR vol. 5B, tab 11**	**53-57**
Affidavit of Elijah Baxter	**May 12, 2006**	**JMR vol. 9, tab 47**	**33-42**
Affidavit of Elizabeth Kusiak	**July 13, 2006**	**JMR vol. 9, tab 54**	**11-15**
Affidavit of Evelyn Baxter	**July 19, 2006**	**JMR vol. 9, tab 48**	**19-23**
Affidavit of Janet Brewster	**July 21, 2006**	**JMR vol. 9, tab 49**	**26-30**
Affidavit of John Bosum	**July 25, 2006**	**JMR vol. 9, tab 50**	**23-29**
Affidavit of Lucy Doctor	**August 3, 2006**	**SJMR, tab 11**	**31-35**
Affidavit of Malcolm Dawson	**July 24, 2006**	**JMR vol. 9, tab 52**	**15-19**

Affidavit of Michelline Ammaq	**July 17, 2006**	**SJMR, tab 13**	**13-17**
Affidavit of Nora Bernard	**July 10, 2006**	**JMR vol. 5B, tab 12**	**36-40**
Affidavit of Pauline Joan Michell	**August 1, 2006**	**SJMR, tab 15**	**20-24**
Affidavit of Percy Archie	**July 7, 2006**	**JMR vol. 9, tab 45**	**17-21**
Affidavit of Rosemarie Kuptana	**August 3, 2006**	**SJMR, tab 8**	**24-30**
Affidavit of Theresa Ann Larocque	**July 13, 2006**	**JMR vol. 9, tab 55**	**11-15**
Affidavit of Veronica Marten	**July 14, 2006**	**JMR vol. 9, tab 56**	**43-47**
Statutory Declaration of Adrian Yellowknee	**March 16, 2006**	**JMR vol. 9, tab 77**	**12-16**
Statutory Declaration of Alvin Saulteaux	**March 7, 2006**	**JMR vol. 9, tab 71**	**12-16**
Statutory Declaration of Ann Dene	**March 15, 2006**	**JMR vol. 9, tab 61**	**12-16**
Statutory Declaration of Camble Quatell	**March 1, 2006**	**JMR vol. 9, tab 70**	**12-16**
Statutory Declaration of Christine Semple	**March 9, 2006**	**JMR vol. 9, tab 72**	**12-16**
Statutory Declaration of Cornelius McComber	**March 8, 2006**	**JMR vol. 9, tab 66**	**12-16**
Statutory Declaration of Dennis Smokeyday	**February 28, 2006**	**JMR vol. 9, tab 73**	**12-16**
Statutory Declaration of Edward Tapiatic	**March 13, 2006**	**JMR vol. 9, tab 75**	**12-16**
Statutory Declaration of Ernestine Caibaisosai-Gidmark	**March 23, 2006**	**JMR vol. 9, tab 59**	**12-16**
Statutory Declaration of Flora Northwest	**March 6, 2006**	**JMR vol. 9, tab 68**	**12-16**
Statutory Declaration of Fred Kelly	**March 13, 2006**	**JMR vol. 9, tab 64**	**15-19**
Statutory Declaration of Helen Wildeman	**March 6, 2006**	**JMR vol. 9, tab 76**	**12-16**
Statutory Declaration of James Fontaine	**March 9, 2006**	**JMR vol. 9, tab 62**	**12-16**
Statutory Declaration of Jane McCallum	**March 3, 2006**	**JMR vol. 9, tab 65**	**12-16**
Statutory Declaration of Kenneth Sparvier	**June 2, 2006**	**JMR vol. 9, tab 74**	**12-16**
Statutory Declaration of Michael Carpan	**July 7, 2006**	**JMR vol. 9, tab 60**	**12-15**

Statutory Declaration of Norman Pauchay	**March 3, 2006**	**JMR vol. 9, tab 69**	**12-16**
Statutory Declaration of Peggy Good	**March 20, 2006**	**JMR vol. 9, tab 63**	**12-16**
Statutory Declaration of Rhonda Buffalo	**March 20, 2006**	**JMR vol. 9, tab 58**	**12-16**
Statutory Declaration of Stanley Nepetaypo	**March 1, 2006**	**JMR vol. 9, tab 67**	**12-16**
Statutory Declaration of Vincent Fontaine	**July 14, 2006**	**JMR vol. 9, tab 53**	**21-25**

266. The proposed representative plaintiffs have also given evidence of their willingness and ability to act for the Class, having shared many of the same experiences in relation to their time spent in IRS, or their knowledge of how that has affected their family members who attended, and consequently affected them. There is no impediment to their ability to fairly and adequately represent the interests of the Class, nor is there any indication of a conflict between them and other Class members.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 92-93, 108

267. In addition, the proposed representative plaintiffs have all given evidence in support of the Settlement on the basis that it provides fair compensation and redress for all members of the Class. Given that the under the Settlement Agreement certification can only exist if there is Settlement approval, any litigation plan is merely the implementation of the Settlement Agreement.

Fontaine Affidavit, JMR vol. 3, tab 6, paras 109-112

268. The plan for notifying the Class of certification and settlement approval is set out in the affidavit of the Notice Expert, Todd Hilsee, who has designed a Notice Plan to ensure maximum reach to the Class. Given the significance of the IRS issues to Canada's Aboriginal communities, every effort has been made to put forward a comprehensive plan with multiple methods of communication, and allowing reasonable periods of time for the Class members to

not only find out about this proceeding, but consider their interests in relation to what the Settlement Agreement has to offer.

269. Accordingly, the Plaintiffs submit that the requirements for certification have been amply satisfied in this case.

B. APPROVAL OF A SETTLEMENT

(i) Requirements for Approval

270. In order to approve a settlement, the court must find that it is fair, reasonable and in the best interests of the class.

> ***Class Proceedings Act (Alberta)*** **S.A. 2003, c. C-16, s. 35**
>
> ***Class Proceedings Act (British Columbia)*** **R.S.B.C. 1996, c.50, s.35**
>
> ***The Class Proceedings Act (Manitoba)*** **C.C.S.M., c.C130, s.35 (2)**
>
> ***Class Proceedings Act (Ontario)*** **S.O. 1992, c.6, s.29**
>
> ***Class Actions Act (Saskatchewan)*** **S.S. 2001, c.C-12.01, s.38**
>
> ***Knudsen*** **v.** ***Consolidated Food Brands Inc.*** **[2001] B.C.J. No. 2902 (S.C.) paras 21, Plaintiffs' Authorities, vol.2, tab25**
>
> ***Dabbs*** **v.** ***Sun Life Assurance Co. of Canada*** **(1998), 40 O.R. (3d) 429 at 444 (Gen.Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to the S.C.C. refused, [1998] S.C.C.A. No. 372, Plaintiffs' Authorities, vol.1, tab 9**

271. The resolution of complex litigation through the compromise of claims is encouraged by the courts and supported by public policy.

> ***Amoco Canada Petroleum Co.*** **v.** ***Propak Systems Ltd.*** **[2001] A.J. No. 600 (C.A.) paras 27-28, Plaintiffs' Authorities, vol.1, tab 1**
>
> ***Sparling*** **v.** ***Southam Inc.*** **(1988), 66 O.R. (2d) 225 (H.C.J.), pg. 230, Plaintiffs' Authorities, vol. 2, tab 38**

272. Where a proposed class proceeding settlement was negotiated at arms-length by counsel for the class, there is a strong initial presumption of fairness. To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes.

> ***Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.), paras 113–114, relying also on *Manual for Complex Litigation*, Third ss. 30.42 (1995), Cotton v. Hinton, 559 F. 2d 1326 (5th Cir. 1977) at 1330 and *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 at 440 (Gen.Div.), Plaintiffs' Authorities, vol.3, tab 42**

273. In assessing a proposed settlement, the court must consider the impact on the class as a whole, and not from the perspective of individual class members:

> In the context of a class proceeding, this requires the Court 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 member.
>
> ***Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) para 69, Plaintiffs' Authorities, vol. 2, tab 35**

274. Courts have confirmed that the applicable test of whether a particular settlement agreement is "fair" is based on the recognition of the realities of negotiation and compromise:

> [A]ll settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.
>
> ***Dabbs* v. *Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen.Div.), at para. 30, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to the S.C.C. refused, [1998] S.C.C.A. No. 372, Plaintiffs' Authorities, vol.1, tab 9**

275. It is not the court's role to dissect the settlement. To be approved, a settlement must simply fall within "a zone or range of reasonableness".

> ***Knudsen* v. *Consolidated Food Brands Inc.* [2001] B.C.J. No. 2902 (S.C.) at para 25, Plaintiffs' Authorities, vol.2, tab 25**
>
> ***Ontario New Home Warranty Program et al* v. *Chevron Chemical Co.* [1999] O.J. No. 2245 (S.C.J.) at para 89, Plaintiffs' Authorities, vol.2, tab 33**
>
> ***Nunes* v. *Air Transat* [2005] O.J. No. 2527 (S.C.J.) at para 7, Plaintiffs' Authorities, vol.2, tab 32**

276. On a settlement approval motion, the court is required to balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes which fall within the "zone or range of reasonableness" as all settlements are the product of compromise and fairness is not a standard of perfection.

> ***Vitapharm Canada Ltd.* v. *F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.), at para. 115, relying also on H.B.Newberg, *Newberg on Class Actions*, 3d. ed. (1992) at 11-104 and *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 at 440 (Gen.Div.), Plaintiffs' Authorities, vol.3, tab 42**

277. The court must remain flexible when presented with a settlement proposal for approval. The "zone or range of reasonableness" test is not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which permits for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is intended to provide compensation.

> ***Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) para 70, Plaintiffs' Authorities, vol.2, tab 35**

278. While it is not open to the court to merely "rubber-stamp" a settlement proposal, it is not the court's function to substitute its own judgment for that of the negotiating parties nor is it the court's function to litigate the merits of the action.

> ***Sparling* v. *Southam Inc.* (1988), 66 O.R. (2d) 225 at 230 (H.C.J.), Plaintiffs' Authorities, vol.2, tab 38**

279. In determining whether a settlement should be approved, courts have taken the following factors into consideration:

(a) the likelihood of recovery or success;

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

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

(d) the recommendation and experience of counsel;

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

(f) the recommendation of any neutral parties;

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

(h) the presence of arms-length bargaining and the absence of collusion;

(i) the information conveying to the court the dynamics of and the positions taken by the parties during the negotiations; and

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

> ***Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen.Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to the S.C.C. refused, [1998] S.C.C.A. No. 372, Plaintiffs' Authorities, vol.1, tab 9**
>
> ***Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572, paras 71-72 (S.C.J.), Plaintiffs' Authorities, vol.2, tab 35**
>
> ***Haney Iron Works Ltd.* v. *Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565 (B.C.S.C.), para 23, Plaintiffs' Authorities, vol.1, tab 18**

280. Where there is a significant risk involved for class members in establishing liability during the class period and such litigation would be protracted and complex, "it is in the best interests of the class members to have a timely and prompt payment".

> ***McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.J.), para 18, Plaintiffs' Authorities, vol.2, tab 28**

(ii) The Application of Settlement Approval Criteria

a. The Likelihood of Recovery or Success

281. The Plaintiffs submit that the Settlement Agreement is clearly reasonable. The CEP provides compensation to all Survivors without proof of individual injury. The CEP essentially corresponds to loss of language and culture claims arising from forced removals from homes and communities, and claims based essentially on attendance at IRS, which constitute novel causes of action.

282. With respect to Class members with claims for physical and sexual abuse, the Plaintiffs are cognizant of the limitation issues and litigation realities, which present significant hurdles to

recovery in a litigation context. Those factors, coupled with the difficulties associated with obtaining legal counsel and accessing the court system lead to the conclusion that Class members with such claims will be significantly better off under the IAP which is included in the Settlement.

283. As will be more particularly discussed below, the likelihood of recovery for the Family and Deceased Class members is significantly lower than the Survivor Class, as the former face a myriad of problems from novelty to evidentiary issues, to statutory limitations.

b. The Amount and Nature of Discovery or Investigation

284. This criteria focuses on the question of whether the parties to the proceeding have done sufficient due diligence to know their case, and therefore are able to compromise their claims by way of settlement in a reasonable manner. In this proceeding, there is ample evidence to show that hundreds of legal counsel from various stakeholders have focussed on IRS claims for over 15 years, and in so doing have exchanged tens of thousands of documents, completed months of discovery, and spent many more months before various courts, arguing IRS claims. There is no want of understanding relating to IRS claims, and it is with this scope of knowledge that the parties have reached the Settlement Agreement.

c. The Merits of the Settlement

285. The Class has obtained many benefits under the Settlement Agreement, including (a) the CEP for Survivors; (b) an improved process for compensation for serious physical and sexual abuse in the IAP; and (c) funding for healing, truth and reconciliation and commemoration initiatives.

286. The CEP is payable to all Survivors regardless of the nature of their experience at IRS, however it is tied to length of attendance so that those who were separated from their families for longer periods of time will be provided with increased compensation.

287. The government has committed $1.9 billion to CEP payments, with any surplus funds going to fund healing and educational initiatives as discussed below. Additionally, if $1.9 billion

is not sufficient to pay all CEP claimants, the Federal Government will provide further funds as may be necessary.

288. It is estimated that the Survivor Class consists of almost 80,000 individuals. It is further estimated that the average CEP will be approximately $23,000. If all members of the Survivor Class seek a CEP, the total payout will be in the range of the allotted $1.9 billion.

289. The ADR Process is flawed, as set out in detail in the above submissions. The Settlement Agreement, and in particular the combination of the CEP and the IAP constitute a substantial improvement to the ADR Process.

d. Recommendation of Counsel

290. As noted above, ample counsel-hours have been spent on IRS matters. Experienced counsel sat around the negotiating table, on and off, for almost 12 months in order to reach this Settlement Agreement. Those counsel have signed their names to the Settlement Agreement, and many have also sworn affidavits providing the court with the basis upon which they endorse the Settlement.

e. Litigation Risks and Expenses

291. When the vast majority of respective class actions were commenced, such litigation was novel across Canada. In addition to being novel, it also presented extreme risk for plaintiffs in light of the decisions of Justice Haines and the Divisional Court in *Cloud et al. v. The Attorney General of Canada* in 2001 and 2003, among others. There was also significant costs' exposure for unsuccessful plaintiffs.

292. Accordingly, at the time the majority of the class proceedings were commenced across Canada, the plaintiffs faced serious litigation risks. The novel nature of the actions and the theories pursued created the risk that many of the class actions would not be certified. Similar risks existed for most of the individual claims as well. Some of the litigation risks and concerns are as follows:

(a) Many of the causes of action advanced have not yet been sustained by the court;

(b) There remain significant defences to the claims; and

(c) Given the large number of Church Entities running a large number of IRS in various regions of the country, there existed a risk of a lack of commonality precluding certification, or at the very least a degree of complexity which would prevent a class proceeding from being seen as a preferable procedure.

293. The litigation process to determine liability would be extremely complicated and protracted. No Class member would be paid until the entire litigation process had come to an end. As such, one of the practical considerations in favour of the Settlement "includes the potential that a case such as this one would take considerable expense and many more years to reach trial and exhaust all appeals". Expedited recovery is a significant factor for consideration in the settlement approval process.

> ***Dabbs* v. *Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen.Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to the S.C.C. refused, [1998] S.C.C.A. No. 372, Plaintiffs' Authorities, vol.1, tab 9**
>
> ***Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.), at para 147, Plaintiffs' Authorities, vol.3, tab 42**

294. As has already been observed with respect to IRS litigation, a "reasonable inference can be drawn that there are elderly potential class members for whom further delay represents significant prejudice".

> ***Baxter v. Canada (Attorney General)*, [2005] O.J. No. 2165 (C.A.), para 13, Plaintiffs' Authorities, vol.1, tab 3**

295. There are significant risks to continued litigation which make it prudent from the perspective of all parties to achieve finality and certainty through the Settlement Agreement.

f. Objectors

296. The court may not consider an objection based on extra-legal concerns as the settlement approval process does not include an assessment of the proposed settlement from a social or political context. While extra-legal concerns may be valid in a social or political context, they "remain extra legal and outside the ambit of the court's review on the settlement".

> ***Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572, at para 77, (S.C.J.), Plaintiffs' Authorities, vol.2, tab 35**

297. The Plaintiffs acknowledge that there are objectors to this Settlement. However given the historic and political nature of IRS issues, and the vast number of people who have been touched by them, objectors to any settlement would be inevitable. The objections put forward tend to suggest that the Settlement could have been better. For those individuals responsible for negotiating this Settlement Agreement, such objections are misinformed – the negotiations were tough and compromises had to be made to ensure that a settlement was achieved.

298. It is not the few objectors who tell the story, but rather the majority of Class members who have come out in support of the Settlement Agreement and who are looking forward to seeing the Settlement implemented.

g. The Negotiations and Participation of the Class

299. While detail relating to the negotiations remains confidential, the parties have placed before the court significant detail of the duration of the negotiations, the matters addressed, the participation of counsel and Aboriginal organizations and the difficulties in achieving consensus in such a complex case.

300. Fundamentally, the basis for the negotiations and the Settlement Agreement itself was borne out of a long process of consultation between various stakeholders. The AFN Report and the community consultation conducted by the AFN both reflect the participation of the Class in the settlement discussions and support the reasonableness of the Settlement Agreement.

h. Notice and Opt Out Period

301. The existence of an opt out period means class members who are dissatisfied with the settlement may elect to pursue their own claim in their own way:

> The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The CPA [the Act] mandates that class members retain for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgment that is tailored more to the individual's circumstances.
>
> ***Parsons* v. *Canadian Red Cross Society* [1999] O.J. No. 3572 (S.C.J.) at para 79, Plaintiffs' Authorities, vol.2, tab 35**

302. In this case, the Class will be informed about the Settlement Agreement and provided a lengthy opt out period. Thus, dissatisfied parties will have ability to seek their own redress.

i. Conclusions

303. The value of the Settlement Agreement is self evident from the perspective of the Class – they will readily get compensation and support where before every step towards recovery was a hard fought battle.

304. The Survivor Class will enjoy the benefits of the CEP, which is designed to compensate for the mere fact of attendance at IRS as well as access to IAP for claims of sexual or serious physical abuse. No IRS claim made to date has been successful in recovering damages for "loss of language and culture", which is essentially the compensation provided by the CEP.

305. The Family Class, consisting of people who have watched their Survivor loved ones suffer, will have the benefit of seeing direct compensation become available to the Survivor Class. Additionally, the Family Class will benefit from the truth and reconciliation, healing and commemoration aspects of the Settlement Agreement. Given the size of the Family Class (all near relations of the approximately 80,000 Survivor Class, and untold numbers of individuals belonging to the Deceased Class), and the weaknesses of the Family Class claims, individual

compensation for Family Class members, as opposed to programmatic relief, was simply not a realistic outcome of the negotiations.

306. It is important when evaluating the Settlement Agreement from the perspective of the Family Class that the risks inherent in the Family Class claims be considered. Concerns include:

(a) It is arguable that no duty of care was owed to the Family Class in relation to the Survivors and Deceased's attendance at IRS. Moreover, a good number of Family Class members now living, namely the children and grandchildren of those Class members, would not have been alive at the time their parents or grandparents attended IRS, and thus could not have been within the contemplation of the Defendants as persons to whom a duty is owed;

(b) With respect to the FLA claims:

(i) Those claims exist only for residents of Ontario, which most Class members are not;

(ii) The FLA only came into existence in 1978, and the FLA does not apply retroactively, so claims arising from IRS attendances before this date may not make use of the FLA.

(iii) The FLA relates only to relationships in existence at the time of the injury, such that children, grandchildren and spouses cannot make use of the legislation; and

(iv) The FLA has a strict 2 year limitation period; and

(c) The Family Class claims are subject to defences of crown immunity and limitation periods, among others.

307. As a result of the above issues, the claims of the Family Class members must be acknowledged to be weak and novel, and the redress found for the Family Class within the Settlement Agreement is therefore fair and reasonable.

308. With respect to the Deceased Class, it is tragic that so many have died as the fight for acknowledgement and compensation has carried on. However, it is now the family members and beneficiaries of the Survivors who will focus on recovery through commemoration, truth and reconciliation and other healing initiatives.

309. The Deceased Class will not recover individual compensation, either through the CEP or through the IAP. Given that the members of this Class are dead, the practical significance is that

the estates of these individuals, and indirectly, most probably their friends and family members, will not be able to enjoy the funds which may have gone to that Class member if he or she had been alive. While not ideal, the compromise of these Deceased claims in order to achieve an overall settlement is endorsed by the parties to the Settlement Agreement. That compromise is clearly in favour of the living, and must be weighed against the value of the potential claims of the Deceased Class. On that issue, the Plaintiffs submit:

(a) In most Jurisdictions, claims of the Deceased Class died with them. All but 4 Jurisdictions preclude recovery for damages for pain and suffering by deceased;

(b) In a national class and settlement, differential treatment based on province of residence is to be avoided (as was done in the IAP);

(c) While the *Baxter* Class Action may have tolled the limitation for all claims (although certain sexual abuse claims have no limitation period), the value of those tolled claims in respect of the Deceased Class must be carefully scrutinized. In order for those claims to have value, the representatives of the estates would still have to institute proceedings and lead evidence, but without the direct evidence of the IRS attendee. It is doubtful whether many estates could afford counsel for this exercise, and further doubtful that any counsel would act on a contingency basis in respect of such claims where proof of abuse may be impossible without the deceased person's evidence;

(d) If litigating, the personal representatives of the Deceased Class members would also face the weaknesses of the claims themselves. The loss of language and culture claim, which is essentially the claim met by the CEP, is entirely unproven and the decision to impose IRS attendance on the Aboriginal communities has been defended by Canada as a policy decision beyond scrutiny of the courts. Indeed, it is only those cases involving physical and sexual abuse which have been received by the courts with success, and unfortunately it is those claims which founder without a victim to give evidence;

(e) If litigating, the personal representatives of the Deceased Class members would face all of the defences previously advanced by Canada and the Church Entities;

(f) The May 30, 2005 cut off date between Survivors and Deceased was selected because that was the date when the Federal Representative was appointed to negotiate a resolution, so that all of those living as at that date could reasonably have expected to receive the CEP or some form of compensation. A date had to be chosen, as the negotiating parties were concerned that the lengthy and complex negotiating process would result in unknown delays which would inadvertently prejudice those who had legitimately come to have expectations with respect to the provision of compensation;

(g) A large number of IRS attendees are deceased. IRS have been around since the 1880's, with a policy of mandatory attendance from 1920 forward, so it is simply a fact of the passage of time that a significant proportion of individuals (who would otherwise have viable claims) are now deceased. This Settlement prefers the interests of the living to the claims of the deceased. If there was no distinction made between the living and the dead, the number of potential claimants would be prohibitive of settlement, as well as an

administrative quagmire, therefore as a matter of practicality, the compromise of the deceased claims are rational; and

(h) Members of the Deceased Class that are dissatisfied with the Settlement Agreement are substantially protected by the Notice Program and the extended opt out period, and the representatives of members of the Deceased Class may simply opt out (and such opt-outs do not contribute to the opt-out threshold and therefore potentially jeopardize the settlement).

310. The Plaintiffs' counsel submit that the benefits to settlement vastly outweigh the potential loss of entitlement by some estates of persons who died between June 13, 1998 (when the *Baxter* Class action may have tolled limitation periods) and May 30, 2005 (when all persons then living are included in the Survivor Class).

311. The proposed Settlement is fair and reasonable, and is deserving of approval by the court.

C. THE APPROVAL OF LAWYERS' COMPENSATION

(i) The Legal Fees are part of the Overall Settlement

312. The CPL directs the approval of retainer agreements by the court in order to ensure that legal fees payable to class counsel pursuant to those agreements are appropriate. Additionally, there is a substantial body of case law which has considered the reasonableness of legal fees, usually in the context of approving a retainer agreement to sanction the payment of legal fees out of the compensation to the class. However, this case does not fall within that line of cases as the payer is a settling defendant, and not the Class. In that respect, this case is a typical. In this case, the parties seek to approve compensation to legal counsel as part of the overall Settlement. The parties are not seeking to have the court approve payment under the Retainer Agreements. Indeed, as part of the overall Settlement the payment terms of, the many thousands of Retainer Agreements held by the Plaintiffs' counsel are surrendered in so far as they relate to the CEP, in exchange for payment terms found in the Settlement. Most importantly, compensation for legal counsel does not come out of the funds available to the Class – it is and remains an entirely separate component of the Settlement Agreement, which of course, requires the court's approval.

313. The distinction between approving legal fees as part of a settlement, and approving a retainer agreement under which fees would be paid, was set out by the court in *Gariepy v. Shell*

Oil Co., which was heard in Ontario, and the companion action in British Columbia, *Furlan v. Shell Oil. Co.*. In those cases, the fees payable to legal counsel did not come from the funds available to the Class under the settlement, but had been determined as a separate part of the settlement agreement. In the Ontario proceedings, Justice Nordheimer stated:

> 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.
>
> In such circumstances, I do not believe 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.

After determining that it was not necessary to approve of the payment of legal fees pursuant to the retainer agreement, Justice Nordheimer proceeded to evaluate the reasonableness of the proposed fees in accordance with established principles, and by using the fees which would have been payable under the retainer agreements as a guide to reasonableness.

> ***Gariepy v. Shell Oil Co.*, [2003] O.J. No. 2490 (S.C.J.), at paras 11-13, 21, Plaintiffs' Authorities, vol.1, tab 17**
>
> ***Furlan v. Shell Oil Co.*, [2003] B.C.J. No. 1411 (S.C.), Plaintiffs' Authorities, vol.1, tab 14**

314. The Plaintiffs submit that this Settlement is akin in format to the settlement with *Shell Oil*. Legal fees are not being paid by the Class, and compensation to the Class will not be affected by the payment of legal fees. Rather, compensation to counsel has been addressed as part of the overall Settlement. Given the thousands of individual, active legal files (whether proceeding by way of court or ADR Process), the many class proceedings, some of which have been aggressively pursued, and the hundreds of legal counsel involved in advocating for the Class, a simple determination of fees was not an option.

315. For those cohesive groups of counsel at the bargaining table, namely the National Consortium and the Merchant Law Group, both of which were active in class proceedings, discussions were able to be undertaken relating to the overall amount of work accomplished by those groups. Specific fee agreements were reached (the payment of $40 million to each), subject to verification processes. The National Consortium has completed its verification process and has satisfied the Federal Representative of its entitlement to the $40 million, and it seeks now to obtain that same approval from the court. The Federal Representative has not completed its verification process related to the Merchant Law Group.

316. For the Independent Counsel, a process rather than a fixed fee was necessary, given the many thousands of individual actions advanced to various stages. Rather than attempt to quantify the appropriate payment up front, and without adequate information (and indeed without knowing how many lawyers would participate in the Settlement in addition to those within the loose coalition of Independent Counsel), the parties agreed to the payment of work-in-progress to a maximum of $4,000 per client, and the payment of disbursements pursuant to Article 13.06 of the Settlement Agreement. Article 13.02 also provides for payment of negotiation fees based on reasonable hourly rates. Article 13.07 provides a process by which such fees can be sought, and verified, for lawyers who have individual Retainer Agreements with Class members.

317. Accordingly, this court is asked to approve as reasonable the compensation to the National Consortium, and the *method* for determining the compensation for other legal counsel, all of which is part of the overall Settlement – rather than review and approve Retainer Agreements which have now been superceded.

(ii) General Principles behind Approving Legal Compensation

318. Court approval of an agreement regarding the fees and disbursements between a solicitor and representative plaintiff is required, pursuant to the CPL, as is approval of any settlement. The purpose of such approval is to ensure that the fees charged to the class are fair and reasonable, having regard to the work done and the risk undertaken.

***Class Proceedings Act (Alberta)* S.A. 2003, c. C-16, ss. 35, 37-39.**

***Class Proceedings Act (British Columbia)* R.S.B.C. 1996, c.50, ss. 35, 37, 38.**

***The Class Proceedings Act (Manitoba)* C.C.S.M., c.C130, ss. 35, 38.**

***Class Proceedings Act (Ontario)* S.O. 1992, c.6, ss. 29, 32, 33.**

***Class Actions Act (Saskatchewan)* S.S. 2001, c.C-12.01, ss. 38, 40, 41.**

***McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.J.), at paras 23–24, Plaintiffs' Authorities, vol.2, tab 28**

319. The foundational 1982 Ontario Law Reform Commission *Report on Class Actions* recognized that it was essential that fee awards provide risk premiums to successful class counsel. Otherwise, capable counsel would decline such work and the goal of class proceedings legislation, to provide access to justice, might go unrealized. The report stated:

> Under the kind of fee arrangement permitted by the Act, the class lawyer will receive a fee only in the event of success. If he agrees to act on this basis, the class lawyer will be assuming a risk that, after the expenditure of time and effort, no remuneration may be received. It is essential that the successful lawyer be compensated for accepting the risk of non-payment. Otherwise, lawyers very likely will refuse to act for classes on this basis and will insist on the usual solicitor and client cost arrangements, in which case potential representatives may be unable or unwilling to retain them.

Ontario Law Reform Commission, *Report on Class Actions*, (Toronto: Publications Ontario, 1982) Vol III at 737, cited with approval in *Vitapharm Canada Ltd., et al.* v. *Degussa Hüls AG, et al.*, [2005] O.J. No. 1117 (S.C.J.) at para 60, Plaintiffs' Authorities, vol.3, tab 41

320. The Ontario Court of Appeal echoed those comments, emphasizing the need to provide an incentive to counsel to take on the risk associated with class proceedings:

> Another fundamental objective is to provide 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 to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope.

***Gagne* v. *Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C. A.), pgs. 422-23, Plaintiffs' Authorities, vol.1, tab 15**

321. In evaluating the reasonableness legal fees, the court has well established factors for consideration. Indeed, these are the same factors Justice Nordheimer turned to following his determination in *Shell Oil* that his role was to assess the reasonableness of legal fees, rather than make an assessment of the contingency agreements (which were superceded by the settlement). Those factors are:

(a) time expended by the solicitor;

(b) the legal complexity of the matters;

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

(d) the monetary value of the matters at 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 the amount of the fees.

Fischer v. _Delgratia Mining Corp._, [1999] B.C.J. No. 3149 (S.C.) at para 22, Plaintiffs' Authorities, vol.1, tab 13

Killough v. _Canadian Red Cross Society_, [2001] B.C.J. No. 2631 (S.C.) at paras 22-23, Plaintiffs' Authorities, vol.2, tab 24

Knudsen v. _Consolidated Food Brands Inc._, [2001] B.C.J. No. 2902 (S.C.) at para 38, Plaintiffs' Authorities, vol.2, tab 25

Windisman v. _Toronto College Park_ (1996), 3 C.P.C. (4th) 369 (Ont. Gen.Div.), para 8, Plaintiffs' Authorities, vol.3, tab 47

Gariepy v. _Shell Oil Co._, [2003] O.J. No. 2490 (S.C.J.) at para 13, Plaintiffs' Authorities, vol.1, tab 17

322. In cases subject to contingency fee agreements, docketed fees will often be subject to a "multiplier" to compensate for the risk inherent in the undertaking. Given the broad range of factors which are employed to determine the "reasonableness" of fees and the variables inherent in complicated litigation, the fixing of an appropriate multiplier is largely discretionary and incapable of mathematical precision, however multipliers tend to range between slightly greater than 1, at the low end, and 3-4 in the most difficult cases.

> ***Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), paras 24–25, Plaintiffs' Authorities, vol.2, tab 34**
>
> **M. Eizenga et al., *Class Actions Law & Practice* (2006) at §13.12, Plaintiffs' Authorities, vol.3, tab 48**
>
> ***Gagne v. Silicorp Ltd.* (1998), 41 O.R. (3d) 417 at 423 (C.A.) per Goudge J.A., Plaintiffs' Authorities, vol.1, tab 15**

323. For example, where the action did not proceed very far before a settlement was achieved and the settlement was not the result of counsel's efforts, the court applied a multiplier of 1.5. Conversely, where counsel has assumed "enormous financial burden and risk" and litigated an action through judgment which was novel, as the first judgment in the world that addressed an infringement of the rights of lesbians and gay men, the court applied a multiplier of 4.8.

> ***Maxwell v. MLG Ventures Ltd.* (1996), 3 C.P.C. (4th) 360 at para. 20 (Ont. Gen.Div.), Plaintiffs' Authorities, vol. 2, tab 27**
>
> ***Hislop v. Canada (Attorney General)*, [2004] O.J. No. 1867 (S.C.J.) at paras 23-26, Plaintiffs' Authorities, vol.1, tab 19**

324. While multipliers are common, other methods exist for determining fees, such as percentage based fees or lump sum amounts per class member. For example, in *Nantais*, the fee agreement provided for the fixed sum of $5,000.00 per implanted class member. This is not dissimilar to the fees for Independent Counsel (and other lawyers interested in participating in the Settlement) in this case, in the maximum amount of $4,000.00 per client for work-in-progress where the Retainer Agreement existed prior to May 30, 2005.

> ***Nantais v. Telectronics Proprietary (Canada) Ltd.* [1996] O.J. No.5386 (Gen.Div.) at para 7, Plaintiffs' Authorities, vol.2, tab 30**

325. Regardless of the whether a multiplier or other measure is used to come up with legal compensation, the ultimate criteria is that the compensation must be fair and reasonable:

> ...[T]he court must still adhere to the principles discussed in Gagne in assessing the fairness and reasonableness of the counsel fee, whether that fee is calculated on a lump sum basis or otherwise.
>
> ***Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), para 14, Plaintiffs' Authorities, vol.2, tab 34**

(iii) The Activities of Legal Counsel

326. While individual Class members were active participants in the litigation, negotiations and political campaigns, legal counsel also played a key role in forwarding the interests of the Class in these arenas, shouldering risk and providing guidance when a successful resolution was a long way off. The unique participation of legal counsel in this case was recognized in the Settlement Agreement with respect to the National Consortium and the Merchant Law Group in particular, as well as the Independent Counsel, and accordingly it is important to review their respective contributions.

a. <u>The National Consortium</u>

327. The $40 million payable to the National Consortium is intended to compensate the National Consortium members for their work completed up to November 20, 2005 and their agreement to waive their individual contingency Retainer Agreements as they relate to the CEP, and not to charge fees to their current and future clients on the CEP. These concessions are significant, given that the contingency agreement was the mechanism intended to compensate counsel for carrying so much risk for so long, and that the pool of potential future clients was an estimated 60,000 unrepresented Survivor Class members entitled to a CEP.

> **Merkur Affidavit, JMR vol. 8, tab 42, para 17**

328. Under the National Consortium Agreement entered into by the National Consortium's 19 law firms in May 2002, the parties agreed to jointly endorse and pursue the *Baxter* class proceeding while at the same time continuing to assist and support each other in the pursuit of the other major litigation initiatives which were designated as parallel proceedings:

(a) the *Blackwater* Appeal before the Supreme Court of Canada in 2005;

(b) the *Cloud* Appeal, and the action, if certified;

(c) intervention in the B.C. *Trilogy* before the Supreme Court of Canada; and

(d) a Saskatchewan class proceeding commenced by Docken & Company.

Merkur Affidavit, JMR vol. 8, tab 42, paras 19, 75

329. As the National Consortium understood Canada's position to be that it would not engage in negotiations aimed at an overall national settlement, its members continued to vigorously pursue litigation and the parallel proceedings. At the same time, the National Consortium also pursued alliances with organizations concerned with IRS issues and sought to provide a voice for Survivors in the public and political debate that was occurring.

Merkur Affidavit, JMR vol. 8, tab 42, paras 76-77

(i) Work Undertaken by the National Consortium Prior to the Negotiations

330. Between 2002 and 2003, National Consortium members continued to urge a universal and national resolution to the IRS claims in addition to forging a dialogue with the AFN which intensified following the election of Phil Fontaine as National Chief. The National Consortium also advocated against the proposed ADR Process in 2003 which limited claims to only sexual and physical abuse. Members of the National Consortium initiated the involvement of the Canadian Bar Association which issued a resolution urging Canada to reconsider its approach to IRS claims.

Merkur Affidavit, JMR vol. 8, tab 42, paras 79-81

331. Throughout 2004 and early 2005, the National Consortium was involved in significant events which preceded Canada's appointment of the Federal Representative:

(a) the Ontario Court of Appeal decision in *Cloud*, released December 3, 2004, certifying the action as a class proceeding and the Supreme Court of Canada's subsequent denial of Canada's application for leave in May 2005;

(b) follow-up to the AFN Report in November 2004, proposing compensation for all IRS Survivors which was followed by a series of bilateral meetings between the AFN and the National Consortium, aimed at pressuring Canada into adopting such an approach;

(c) hearings before the Parliamentary Committee on Aboriginal Affairs in February 2005, at which a number of National Consortium counsel and their clients appeared as witnesses to give evidence concerning the shortcomings of Canada's approach to IRS claims; and

(d) the scheduling decision in the *Baxter* proceeding in May 2005.

Merkur Affidavit, JMR vol. 8, tab 42, paras 84, 62

332. The decision on certification in *Cloud* was finally resolved on May 12, 2005, when the Supreme Court of Canada denied Canada's application for leave to appeal the decision of the Ontario Court of Appeal. At that time, counsel in *Baxter* immediately requested a timetable for the hearing of its certification motion. Shortly thereafter, the Federal Representative was appointed to attempt to negotiate a resolution of all IRS issues and claims. Further to the request of the Federal Representative, the National Consortium agreed to an abeyance of their existing actions to permit the parties of focus on the negotiations.

Merkur Affidavit, JMR vol. 8, tab 42, paras 63-64

333. Members of the National Consortium began representing IRS Survivors as early 1994. Since that time, all National Consortium members accepted their retainers on a contingency basis, agreeing to receive compensation for their work only in the even that they succeeded in recovering compensation for their clients. Almost without exception, the financial circumstances

of the plaintiffs did not permit them to retain counsel in any other fashion. In representing Survivors, National Consortium members also faced unique challenges presented by geography, language, literacy and the volume of clients.

Merkur Affidavit, JMR vol. 8, tab 42, paras 23-25

334. A detailed outline of the work undertaken by National Consortium members is enumerated in the evidence tendered before this court, however a brief breakdown by region is as follows:

Nova Scotia

- Arnold Pizzo & McKiggan ("APM") was retained in 1996 on behalf of the Association for Survivors of Shubenacadie IRS;
- APM commence a representative action (Nova Scotia did not have provincial class proceedings legislation);
- The representative constitution of the action was vigorously challenged by Canada;
- APM participated in the Dialogues in 1998 with Canada, intended to explore alternative means for resolving IRS claims;
- The Dialogues resulted in Canada's attempt to establish a series of alternative dispute resolution pilot projects across Canada;
- While APM negotiated extensively with Canada to find a means of advancing the Shubenacadie claims through a pilot project, ultimately such participation was rejected given the scope of claims Canada was prepared to consider;
- Given the difficulties posed by the Nova Scotia rules and lack of class proceedings legislation, the Shuebenacadie claims were subsumed by the national class proceeding in *Baxter* once filed in June 2000;

Merkur Affidavit, JMR vol. 8, tab 42, paras 28-34

British Columbia

- David Paterson ("Paterson") was retained by IRS Survivors in 1994 as counsel in *Blackwater,* which concerned the liability of the United Church and Canada to students who attended IRS between 1940s through the 1960s, and the appropriate apportionment of liability and damages;

- The trial in *Blackwater* lasted 115 days, over three (3) years, and ultimately ended in the Supreme Court of Canada in 2005;

- Paterson was also involved in the Dialogues at both the regional and national levels, was involved in the pilot projects and forged relationships with the First Nations Summit, the Provincial Residential Schools Project, the AFN, the United Native Nations, Mothers of the Red Nations and the Indian Residential School Survivors Society;

Merkur Affidavit, JMR vol. 8, tab 42, paras 35-37

Manitoba

- National Consortium members Troniak Law Office ("Troniak") and Thompson Dorfman & Sweatman ("Thompson") began representing IRS Survivors in 1996 and 1998 respectively;

- Since that time, Troniak and Thompson have, collectively, issued claims on behalf of approximately 600 plaintiffs;

- Troniak and Thompson played critical roles in addressing the significant obstacles posed by Manitoba's limitation of actions regime;

- With Aboriginal organizations and Survivors, Troniak and Thompson mounted a campaign which led to negotiation with the provincial government aimed at amending Manitoba's limitations legislation;

Merkur Affidavit, JMR vol. 8, tab 42, paras 38-40

Alberta

- 8 of the 19 National Consortium firms are based in Alberta or are representing Alberta residents;

- Due to the lack of class proceedings legislation until very recently, claims were advanced on behalf of Survivors by way of individual or group claims;

- Given the multitude of claims, a case management program for IRS litigation in Alberta was established in 1999;

- A number of National Consortium members participated in a variety of preliminary applications and motions during 1999 and 2000 in the case managed proceedings;

- In 2000, a common document production system and "test" case track was approved by the court;

- Between 2001 and 2005, counsel participated in approximately 245 days of examinations for discovery, in addition to preparing and answering extensive interrogatories and making significant document production;

- The test cases trials were scheduled to commence in January 2006 but were adjourned following the appointment of the Federal Representative to permit the parties to focus on negotiations;

Merkur Affidavit, JMR vol. 8, tab 42, paras 41-51

Ontario

- *Cloud* was commenced in 1998, the first class proceeding launched on behalf of IRS Survivors;

- The action was vigorously defended by Canada;

- The 8 day motion for certification was denied in the Superior Court of Justice;

- The appeal to the Divisional Court was also dismissed in 2003;

- The Court of Appeal allowed the appeal in 2004, and the Supreme Court of Canada denied leave to appeal in 2005;

- *Baxter* was commenced in 2000 on behalf of a national class of Survivors and their families;

- Canada third partied 85 religious entities in *Baxter*, which threatened to visit significant and serious delays of the resolution of the plaintiffs' claims;

- The plaintiffs brought a motion to certify the proceedings, and the third parties sought to participate in same; and

- The court held that certification could proceed prior to a determination of the third party issues, and without their participation.

Merkur Affidavit, JMR vol. 8, tab 42, paras 52-65

335. Collectively, the National Consortium membership:

(a) represented some 5,500 named individual IRS Survivors together with approximately 500 Shubenacadie Survivors and 1500 *Cloud* class members, now totalling approximately 7,500 clients;

(b) docketed a total of 107,500 hours up to October 2005; and

(c) incurred nearly $2.5 million in disbursements in advancing the *Baxter* class proceeding, the parallel proceedings and individual IRS files.

Merkur Affidavit, JMR vol. 8, tab 42, para 120

(ii) National Consortium's Time and Work in Process

336. The National Consortium provided Canada with detailed information on a continuing basis throughout the negotiations, including the number of individual Retainer Agreements and a detailed breakdown amongst various types of work, including work by lead counsel in *Baxter* and *Cloud*, work done by others in support of the class proceedings, work on the Alberta test cases and work on other parallel proceedings.

Merkur Affidavit, JMR vol. 8, tab 42, paras 132-135

337. Section 13.08(1) of the Settlement Agreement provides 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 payment of negotiation fees for the July 2005 to November 20, 2005 period as this is subsumed entirely in the $40 million global fee allocation made to the National Consortium under the Settlement Agreement.

Iacobucci Affidavit, JMR vol. 3, tab 5, para 31
Settlement Agreement, JMR vol. 1, tab 2, Article 13.08

338. The National Consortium has submitted evidence on this motion 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. The Federal Representative has reviewed that evidence and is satisfied that the payment of $40 million in fees (plus taxes and disbursements) to the National Consortium is fair and reasonable.

Iacobucci Affidavit, JMR vol. 3, tab 5, para 32

Merkur Affidavit, JMR vol. 8, tab 42, paras 132, 135

339. The distribution of the $40 million payment as between National Consortium members is based on the following factors:

(a) the amounts to be attributed to individual files as some firms had many such retainers while other had few or none;

(b) the multipliers to be applied to class proceedings time as some firms had much time in this category, others had very little;

(c) the valuation to be applied to time spent in parallel proceedings such as the Alberta test cases, where there was no class multiplier but the outcome was expected to affect hundreds of other proceedings; and

(d) the value to be applied to time spent on negotiations.

Merkur Affidavit, JMR vol. 8, tab 42, para 139

(iii) Analysis of the National Consortium's Efforts

Result Achieved

340. The Agreement results in significant lump sum compensation to all living IRS Survivors, the CEP. This universal lump sum compensation approach, which was proposed by the National Consortium in 2003, was one which Canada actively opposed for many years and argued could only be achieve through successful litigation, taken to the highest levels of appeal. Canada has allocated $1.9 billion for the CEP. If additional funds are required to make payment to each Survivor, Canada has agreed to make such funds available.

Merkur Affidavit, JMR vol. 8, tab 42, para 97

341. The Agreement will also result in substantial improvements to the ADR process for resolving claims for individual abuse. These improvements, discussed at length above, reflect the multitude of complaints and concerns expressed by legal counsel, the AFN and the Canadian Bar Association, about the original ADR Process. Most importantly:

(a) the types of abuses for which compensation is available under the IAP have been expanded;

(b) the amounts of compensation have been increased;

(c) a national compensation standard replaces the individual standards, replacing the individual standards scheme which resulted in claimants in different regions receiving different awards for the same harms;

(d) the process has been simplified, streamlined and placed under the supervision of the court; and

(e) guarantees with respect to timeliness have been provided by Canada, with the processing of 2,500 claims per year and each claimant will be offered a hearing within nine (9) months of being accepted into the process.

Merkur Affidavit, JMR vol. 8, tab 42, para 98

342. Additionally, the Agreement provides programmatic relief designed to address the broader effects of IRS on Survivors and their families, as well as on communities and peoples, in a more holistic fashion than could be achieved by individual compensation alone.

Merkur Affidavit, JMR vol. 8, tab 42, para 99

343. The Agreement includes substantial funding that will ensure the continuation of the AHF which was established to provide services to IRS Survivors and their families. The Agreement further established a truth and reconciliation process and a commemoration process which is intended to record, honour and preserve the memories and experiences of Survivors and their families. These processes will assist in promoting an understanding of the impacts of IRS on Survivors and their families, as well as upon Aboriginal communities, cultures and traditions.

Merkur Affidavit, JMR vol. 8, tab 42, para 99

Risks Assumed by the National Consortium pre-Negotiations

344. When the majority of the National Consortium began representing IRS Survivors, the notion that an individual who had attended an IRS had a legally compensable claim was considered novel. In fact, the National Consortium counsel understood Canada's position to be that such a claim would only be recognized once the Supreme Court of Canada pronounced on the issue in its favour. Accordingly, the National Consortium counsel who pursued these claims

had to prepare themselves financially for a legal battle that would only be decided after many years, and in the highest court.

Merkur Affidavit, JMR vol. 8, tab 42, para 101

345. As the circumstances of the Survivor plaintiffs prohibited them from bearing their own costs of these legal proceedings, the National Consortium counsel, both in the class proceedings and individual claims, assumed the entire burden of legal fees and disbursements. The National Consortium counsel would only be compensated for their efforts if and when the claims were successful. By providing representation without compensation for many years, the National Consortium counsel assumed the risk that if the litigation was unsuccessful, they, and not their clients, would bear the financial burden.

Merkur Affidavit, JMR vol. 8, tab 42, para 102

346. Furthermore, a number of potentially valid defences existed, filed in *Baxter*, *Cloud*, the Alberta Test Cases, and others, such as limitations defences under both federal and provincial statutes, delay related defences arising at equity and common law, consent, the policy-operational distinction of Canada's decisions, the novelty of the loss of language and culture claims, in addition to various damages defences.

Courtis Affidavit, JMR vol. 5, tab 10, para 110

347. If Canada and/or the Church Groups were successful in establishing any of these defences, the plaintiffs would not succeed, at least in the entirety, at any trial of the common issues and such defences would clearly limit recovery. There was also the risk that a national class proceeding such as *Baxter* would not be certified on a contested basis.

Courtis Affidavit, JMR vol. 5, tab 10, para 114

348. The risks of litigation were further heightened by the highly political nature of the IRS issue and Canada's response to it. The political nature further increased uncertainty by raising the spectre that Canada might seek a political solution thereby undermining the legal claims. For the

National Consortium counsel, this also meant that they could not expect Canada to respond to their claims in the fashion of an ordinary litigant.

Merkur Affidavit, JMR vol. 8, tab 42, para 74

Risks Assumed by the National Consortium post-May 2005

349. Where protracted and complicated negotiations are entered into between parties, the time and resources necessary to commit to such negotiations by class counsel mean that "the risk was increasing rather than decreasing as the negotiations continued".

***Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at para. 38, Plaintiffs' Authorities, vol. 2, tab 34**

350. The appointment of the Federal Representative in May 2005 gave rise to new risks for the National Consortium. As a condition of the negotiations, the Federal Representative required that all major litigation be placed in abeyance during the course of the negotiations. For the National Consortium, this resulted in the suspension of the *Cloud* common issues trials, a delay in the schedule and timetable for the *Baxter* certification motion and the adjournment of the trial date for the Alberta test cases. This reduced the litigation pressure they could bring to bear in the negotiations in addition to delaying any litigation solution in the event that the negotiations failed.

Merkur Affidavit, JMR vol. 8, tab 42, para 107

351. The risk of failure in the negotiations was real throughout as the very nature of a pan-Canadian settlement required agreement of a multiplicity of parties with diverging interests of a legal, social and political nature. Moreover, the National Consortium's efforts and investment of time and financial resources were always at risk of being lost if any politician in authority decided, as a matter of expediency or policy, not to settle the class proceedings or decided to unilaterally institute a no-fault compensation program, thereby by-passing counsel and the litigation.

Merkur Affidavit, JMR vol. 8, tab 42, paras 108-109

352. The risks that are inherent in such a complicated undertaking were only exacerbated by the political dynamics underlying Canada's position in the discussions and the danger that the Liberal minority government could fall, leaving the Federal Representative without anyone to instruct him. The corollary risk was that a new government could issue different instructions, raising the significant risk that the negotiations might not lead to settlement. As events unfolded, the Agreement in Principle was reached only days before the Liberal minority government fell in November 2005.

Merkur Affidavit, JMR vol. 8, tab 42, paras 109-111

353. The ensuing election then carried the risk that it might result in a change in government which could further delay or even vitiate completion of a final agreement. The Agreement in Principle reached in November 2005 was to be reduced to a final agreement which required much additional work on all sides.

Merkur Affidavit, JMR vol. 8, tab 42, para 116

354. This litigation and its consequent protracted negotiations were redolent with risk. This risk assumed by the National Consortium should be considered at the high end of any such scale.

Merkur Affidavit, JMR vol. 8, tab 42, para 117

b. Merchant Law Group

355. Section 13.08(2) of the Settlement Agreement establishes a distinct set of fees provisions for the Merchant Law Group, 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").

Iacobucci Affidavit, JMR vol.3, tab 5, para 33
Settlement Agreement, JMR vol. 1, tab 2, Article 13.08

356. The amount of fees to be paid to the Merchant Law Group is set at $40 million, subject to the following four-part verification process set out in the Merchant Fees Verification Agreement reached by the Merchant Law Group and the Federal Representative:

(a) First, the Merchant Law Group's dockets, computers records of Work in Progress and any other evidence relevant to the Merchant Law Group's claim for legal fees will be made available for review and verification by a firm to be chosen by the Federal Representative;

(b) Second, the Federal Representative will 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";

(c) Third, if the Federal Representative is not satisfied that the $40 million is a fair and reasonable amount in light of this test, the Merchant Law Group and the Federal Representative will make reasonable efforts to agree on another amount; and

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

Iacobucci Affidavit, JMR vol. 3, tab 5, para 35

Merchant Fees Verification Agreement, JMR vol. 2, tab 3V

357. Although there is disagreement as to the extent to which verification pursuant to the Merchant Fees Verification Agreement has been completed, the Federal Representative is satisfied that the verification process agreed to between the parties is a fair and reasonable basis upon which to determine appropriate fees.

Iacobucci Affidavit, JMR vol. 3, tab 5, para 36

c. Independent Counsel

358. The Independent Counsel represent well over 4,000 Survivors. As indicated above, the Independent Counsel group consists of 19 member firms, of which 17 signed the Settlement Agreement. The most senior individual counsel is Robert Emigh, who was called to the bar in

1961. Other counsel's calls range between 1974 and 2005, and a majority have several years experience in IRS claims.

Cabott Affidavit, JMR vol. 8, tab 44, paras 6-8

359. Independent Counsel have for many years actively pursued litigation on behalf of their clients, both in court (which includes negotiations, mediations and mini-trials) and through the ADR Process. Their cases include both test cases, and some of the early, ground-breaking decisions.

Marchand Affidavit, JMR vol. 4, tab 9, para 3
Keshen Affidavit, JMR vol. 5B, tab 15, paras 1-3
Reid Affidavit, JMR vol. 5B, tab 14, paras 3-5

360. For example, Independent Counsel Laura Cabott of Cabott & Cabott (who has personally represented well over 100 Survivors) represented 19 plaintiffs in the first completed ADR pilot project, relating to Grollier Hall in the Northwest Territories. The process took 4 years to complete, and was part of Canada's effort to test various dispute resolution models across Canada in connection with IRS claims. The success of the ADR pilot project in Laura Cabott's case contributed to the government's move to offer the ADR Process across the board.

Cabott Affidavit, JMR vol. 8, tab 44, paras 10-14

361. Similarly, Bonnie Reid of MacPherson Leslie & Tyerman, who has 22 years at the bar and has practiced almost exclusively in the area of IRS claims for the last 3-4 years, was integrally involved in 3 key Saskatchewan Superior Court IRS test cases. Each of these cases took approximately 4 years to process and were run at significant cost and risk to her firm.

Reid Affidavit, JMR vol. 5B, tab 12, paras 2-5

362. The firm Peter Grant & Associates (formerly Hutchins Grant & Associates) lead the way with individual claims in British Columbia, as outlined above, referred to as the *Aleck*, *Mowatt* and *Blackwater* cases, among others. All of those cases involved trial decisions arising from

lengthy hearings, and there were also many issues which were appealed to the British Columbia Court of Appeal and even the Supreme Court of Canada.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 57, 63

363. Independent Counsel have collaborated in order to better serve their clients, undertaking such endeavours as developing a "Modified Litigation Plan" for British Columbia, which was designed with the assistance of crown counsel, Church Groups' counsel and other plaintiffs' counsel to expedite the resolution of IRS claims in British Columbia. The B.C. Supreme Court also provided settlement conference judges to facilitate settlement, which became an increasingly common method of claims resolutions.

Marchand Affidavit, JMR vol. 4, tab 9, para 4
O'Reilly Affidavit, JMR vol. 5B, tab 13, para 68

364. Independent Counsel also formed the Plaintiffs' Counsel Advisory Network, with which Canada has consulted on a monthly basis on issues of national and mutual interest relating to the efficient and principled resolution of IRS claims.

Marchand Affidavit, JMR vol. 4, tab 9, para 5

365. Independent Counsel have also participated in a working group with the Chief Adjudicator, Mr. Ted Hughes who has responsibility for the current ADR Process established by Canada in December, 2003. This group is made-up of plaintiffs' counsel, Church Groups' counsel and former students. The purpose of this group is to assist Mr. Hughes in overseeing the efficient operation of the ADR Process.

Marchand Affidavit, JMR vol. 4, tab 9, para 6

366. The ADR Process, in place since 2003, has been heavily utilized by the Independent Counsel on behalf of their clients. Certain of the limitations associated with court proceedings have been addressed through the ADR Process, however as noted above, certain significant limitations remain.

O'Reilly Affidavit, JMR vol. 5B, tab 13, paras 72-75

367. Independent Counsel participated in the negotiations with the Federal Representative leading up to the Agreement in Principle, and in order to finalize the Settlement Agreement. Pursuant to the Settlement Agreement, Independent Counsel are to be paid for their time spent negotiating and finalizing the Settlement Agreement at their regular hourly rates, but only upon the full implementation of the Settlement. Given that most Independent Counsel are in small firms and have incurred significant disbursements in order to participate in the negotiations, the delay of payment concession from Independent Counsel is not insignificant.

Staats Affidavit, JMR vol. 8, tab 43, para 5, 9-10
Marchand Affidavit, JMR vol. 4, tab 9, para 7
Cabott Affidavit, JMR vol. 8, tab 44, para 1
O'Reilly Affidavit, JMR vol. 5B, tab 13, para 84

368. Following the signing of the Agreement in Principle, an IAP Working Group was struck in order to finalize the terms of the IAP. Representatives from the National Consortium, Merchant Law Group, the AFN, the Church Groups, Canada and the Independent Counsel were all represented on the Working Group.

Marchand Affidavit, JMR vol. 4, tab 9, para 8

369. The Independent Counsel have ongoing roles respecting the implementation of the Settlement Agreement relating to the NCC, NAC and RACs.

Settlement Agreement, JMR vol. 1, tab 2, articles 4.09-4.12

370. Pursuant to Articles 13.05 and 13.06 of the Settlement Agreement, Independent Counsel agreed not to charge any legal fees against the CEP. With CEP payments reaching $40,000 or more, and contingency agreements in place to recover fees of 30% or more, the waiver of a right to receive a portion of the CEP is significant. Instead of contingency fees under the Retainer Agreements, Independent Counsel agreed that they would only be paid the amount of their work-in-progress, up to a maximum of $4,000.00 per client.

Staats Affidavit, JMR vol. 8, tab 43 paras 11-12

371. Furthermore, the agreement to be paid the work-in-progress up to $4,000.00 per client only applies to those clients for which there was a Retainer Agreement or existed as of May 30, 2005, in order to avoid providing wind-falls.

Staats Affidavit, JMR vol. 8, tab 43, para 13
Iacobucci Affidavit, JMR vol. 3, tab 5, para 26

372. Collectively, Independent Counsel have worked with several thousand individuals. The cumulative effect of Article 13.05 and 13.06 of the Settlement Agreement is that Independent Counsel have agreed to waive significant potential fees by reducing the maximum fees per client to $4,000, all of which must be verified based upon work-in-progress.

Staats Affidavit, JMR vol. 8, tab 43, para 16

373. Additionally, like other counsel on the NCC, NAC and RACs, Independent Counsel will be paid for their participation in these roles at their regular hourly rates, subject to the maximum fee allocations set out in the Settlement Agreement.

Staats Affidavit, JMR vol. 8, tab 43, para 25

374. From the beginning, the Independent Counsel have been actively involved in taking a leadership role to seek justice for Survivors. This has meant, for many in the Independent Counsel group, significant risk. It is common ground that in the early days of IRS litigation, the government and Church Groups fought the Survivors, and fought hard. Everybody understood that with many thousands of potential claimants out there, the success or failure of the early cases would bear significantly on the overall cost to the Defendants. For that reason, early plaintiffs, and their counsel, often had to wage a fight that was disproportionate to the potential recovery, as the government employed the same strategy.

375. The months spent litigating the *Aleck* case is a good example of litigation to exhaustion. In that case almost every possible issue was disputed, and plaintiffs' counsel had no choice but to

respond to the defendants – to put in the hours, days, weeks and months required to review documents, complete discoveries and carry on a trial in a proceeding that took years to conclude, and all in the hope of payment on success. This was a necessary step to protect the Survivors, but also an expensive, time consuming and exceedingly risky method of litigating.

376. Most of the members of the Independent Counsel group are small firm practitioners. The weight of significant contingency litigation, especially that with dubious prospects of significant costs recovery, has been financially burdensome to the Independent Counsel. Yet, this has been the only realistic method for bringing individual claims forward.

377. Over the years, as case law developed, the risks associated with the IRS litigation have become more known. Certain defences have developed and many have succeeded, so while the need to litigate every aspect of every case has diminished, the risks remain significant. Additionally, while the ADR Process has provided greater efficiencies, its weaknesses are still significant, and court proceedings are often still the most appropriate choice for Survivors.

378. The Independent Counsel have shown commitment to their IRS clients over many years. They have pursued justice in the face of legal, practical and financial impediments, from the early IRS cases all the way to the last year of difficult and demanding multi-party negotiations. In exchange, the Independent Counsel are to be compensated based on the time spent on their individual proceedings, to a maximum of $4,000 per client. These counsel have foregone their contingency agreements, and given up any share of their clients' CEP, in exchange for payment of their time. This compensation resolution cannot be regarded as unreasonable.

(iv) Overall Reasonableness of the Terms Governing Compensation to Counsel

379. The factors outlined above used to assess the reasonableness of legal fees were set forth as;

(a) time expended by the solicitor;

(b) the legal complexity of the matters;

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

(d) the monetary value of the matters at 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 the amount of the fees. The following is a discussion of the application of those factors to this case.

380. With respect to the first factor, counsel laboured prodigiously over an extended period of time. The details relating to the work done by different counsel has been outlined above. The fees sought are reasonable in light of the work completed and the time and financial resources expended by counsel.

381. With respect to the second factor, counsel demonstrated skill and experience in pursuing the litigation. There were formidable procedural, substantive and evidentiary roadblocks which required many senior and eminently capable counsel to overcome by means of litigation, negotiation and political action.

382. With respect to the third factor, this matter was complex. It involved multiple parties in all Jurisdictions with disparate vested interests. It required the development of an understanding of different fact situations and legal analysis applied to conduct occurring over approximately 100 years. The litigation presented an unprecedented challenge, and its Settlement constitutes closure of a long chapter of Canadian history. It was no small feat for the parties to negotiate and innovative and flexible Settlement Agreement to resolve these historical issues.

383. Fourth, the monetary value of the matters at issue is great. Every one of the Survivor Class members (approximately 79,000 individuals) will be entitled to a minimum of $10,000,

with some payments of $40,000 or more. Additionally, substantial funds are available for the IAP, healing, truth telling and commemoration. The monetary value of the Settlement is very significant, in the $4 to $5 billion range, and the risks faced by plaintiffs and their counsel were equally significant.

384. With respect to the fifth factor, this matter is of importance to the Class. The IRS issues have scarred generations. For most Class members, their IRS experience was a definitive one which has defined the balance of their journeys through life.

385. With respect to the sixth factor, the degree of skill and competence of counsel was commensurate with the challenge presented by these claims. The dedication and perseverance shown by such counsel was a significant factor in bringing the IRS issue onto the federal government's agenda, and in ultimately achieving the Settlement.

386. Seventh, an excellent result was achieved in this litigation. Many Class members will receive compensation who would otherwise have been left behind. Class members will receive more compensation through the Settlement than they would if the status quo were maintained.

387. The eighth factor, the ability of the client to pay, is not relevant in this case as the fee award does not reduce recoveries and the Class is not being called upon to pay or contribute to legal fees.

388. The ninth factor, namely the client's expectation relating to the amount of fees is similarly obviated by the fact that clients are not paying the fees. Additionally, realistically many members of the Class have individual retainers and did not contemplate a global settlement through a class proceeding. In those cases however, a payment of a maximum of $4,000 towards work-in-progress does not compare unfavourably to standard retainer agreements of 30% to 40% of recovery.

389. For those clients who did enter into retainer agreements contemplating Class proceedings, a review of reasonableness must consider the use of multipliers and percentage based recovery. As noted by Justice Nordheimer in *Shell Oil*, even where the retainer agreement is not being

approved, reference to recovery under the agreement is a valid indicator of reasonableness. Given the value of the CEP portion of the Settlement alone ($1.9 billion), legal fees of $80 million ($40 million for the National Consortium and $40 million for the Merchant law Group, Independent Counsel, unknown) constitute less than 5% of the overall Settlement. Using the contingency agreement in place in the *Baxter* case as a comparison, which provides for legal fees in the amount of 15% of the recovery, and assuming the recovered sum is only the amount set aside for the CEP, legal fees would be more than $285 million for the National Consortium alone. Thus, the Settlement substantially reduces compensation to the National Consortium.

Merkur Affidavit, JMR vol. 8, tab 42, para 129

390. An additional important factor in assessing the reasonableness of legal compensation in this case must be the lengthy political scrutiny to which this Settlement has been subjected. The Federal Representative's mandate required that the portion of any settlement allocated for legal fees be restricted. Accordingly, the decision of the Federal Representative to recommend and enter into the Settlement, with its subsequent ratification by both the former Liberal and present Conservative federal administrations indicates that this requirement was achieved, and that the legal compensation is a "fair and reasonable" component of the Settlement.

Merkur Affidavit, JMR vol. 8, tab 42, para 10

391. The trade off of compensation for services and risk is acknowledged in the Agreement in Principle, which states:

> 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 ...

Agreement in Principle, JMR vol. 1, tab 1

392. In sum, however one looks at the proposed compensation for counsel, it is reasonable. Expressed either as a multiplier or as percentage, the fees charged fall squarely within the range

approved by courts in other class actions. Seen in terms of the results achieved, the risk involved, and the skill and experience brought to action, the fees are fair and reasonable.

393. The terms governing compensation for counsel form part of the Settlement Agreement, which must be approved in its entirety. The Plaintiffs submit that the compensation for counsel provided in the Settlement is fair and reasonable and thus ought to be approved.

C. CONCLUSIONS

394. All stakeholders to the IRS negotiations (which have consumed the better part of the last year) come to court seeking approval of a hard fought, complex and innovative Settlement Agreement. It is the product of compromise and controversy, but it does provide a better way forward for Canada's Aboriginal peoples who have been shackled with the IRS legacy for generations. These stakeholders are asking the court to recognize what hangs in the balance, to appreciate the remedial nature of class proceedings, to compensate for the suffering of Canada's Aboriginal peoples and to make an historical contribution to those communities.

395. The Class members have spoken – it is time to heal and move forward, and that means offering up the benefits of the Settlement Agreement, working towards individual and community recovery and focusing on the future. The Class has waited a long time for this resolution. Members die daily. The Class can wait no longer. It is time for Canada to deliver what it owes to its Aboriginal population.

PART IV - ORDER REQUESTED

396. The Plaintiffs respectfully request an order:

(a) that this action be certified as a class proceeding;

(b) that the settlement agreement be approved for implementation;

(c) that waiver of strict compliance with the Rules of Court to the extent that the materials filed on this motion do not strictly comply;

(d) that leave to amend the Statement of Claim, including the addition of parties, as set out in the materials filed;

(e) that the Class shall consist of the Survivor Class, the Family Class and the Deceased Class as defined herein;

(f) that the Representative Plaintiffs are adequate representatives of the Class and that they be appointed as representatives of the Class;

(g) that the common issues are certified as:

(i) By their operation or management of IRS during the Class Period, did the Defendants breach a duty of care they owed to the Survivor Class and the Deceased Class to protect them from actionable physical or mental harm?

(ii) By their purpose, operation or management of IRS during the Class Period, did the Defendants breach a fiduciary duty they owed to the Survivor Class and the Deceased Class or the Aboriginal or treaty rights of the Survivor Class and the Deceased Class to protect them from actionable physical or mental harm?

(iii) By their purpose, operation or management of IRS during the Class Period, did the Defendants breach a fiduciary duty they owed to the Family Class?

(iv) If the answer to any of these common issues is yes, can the court make an aggregate assessment of the damages suffered by all Class members of each class as part of the common trial?

(h) that following the opt-out period, the claims by the Class Members be dismissed; and

(i) that notice of the certification and settlement approval be provided to the Class in accordance with the proposed notice submitted in the materials.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of August 2006

Kirk Baert,

On Behalf of All Plantiffs', Counsel

SCHEDULE "A"
LIST OF AUTHORITIES

Amoco Canada Petroleum Co. v. *Propak Systems Ltd.*, [2001] A.J. No. 600 (C.A.)

Ayrton v. *PRL Financial (Alta.) Ltd.*, [2005] A.J. No. 466 (Q.B.)

Baxter v. *Canada (Attorney General)*, [2005] O.J. No. 2165 (S.C.J.)

Bywater v. *Toronto Transit Commission*, [1998] O.J. No. 4913 (S.C.J.)

Campbell v. *Flexwatt Corporation* (1997), 15 C.P.C. (4th) 1 (B.C.C.A.)

Carom v. *Bre-X Mineral Ltd.* (2000), 51 O.R. (3d) 236 (C.A.)

Condominium Plan 0020701 v. *Investplan Properties Inc.*, [2006] A.J. No 368 (Q.B.)

Cloud v. *Canada (Attorney General)*, [2004] O.J. No. 4927 (C.A.)

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

Endean v. *Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.)

Enge v. *North Slave Métis Alliance*, [1999] N.W.T.J. No. 139 (S.C.)

Fischer v. *Delgratia Mining Corp.*, [1999] B.C.J. No. 3149 (S.C.)

Furlan v. Shell Oil Co., [2003] B.C.J. No. 1411 (S.C.)

Fakhri et al v. Alfalfa's Canada Inc. cba Capers, [2005] B.C.J. No. 1723 (S.C.)

Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417 (C.A.)

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

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

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

Hislop v. *Canada (Attorney General)*, [2004] O.J. No. 1867 (S.C.J.)

Hoffmann v. *Monsanto Canada Inc.*, [2005] 7 W.W.R. 665 (Sask. Q.B.)

Hollick v. *Toronto (City)*, [2001] 3 S.C.R. 158

Hunt v. *Carey Canada Inc.* (1990), 47 D.L.R. (4th) 321 (S.C.C.)

Jameson Livestock Ltd. v. *Toms Grain & Cattle Co.*, [2006] S.J. No. 93 (C.A.)

Killough v. *Canadian Red Cross Society*, [2001] B.C.J. No. 2631 (S.C.)

Knudsen v. *Consolidated Food Brands Inc.*, [2001] B.C.J. No. 2902 (S.C.)

Kumar v. *Mutual Life Assurance Company of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.)

Maxwell v. *MLG Ventures Ltd.* (1996), 3 C.P.C. (4th) 360 (Ont. Gen. Div.)

McCarthy v. *Canadian Red Cross Society* ,[2001] O.J. No. 2474 (S.C.J.)

McCutcheon v. The Cash Store, [2006] O.J. No. 1860 (S.C.J.)

Nantais v. *Telectronics Proprietary (Canada) Ltd.*, [1996] O.J. No. 5205 (Gen. Div.)

Nash v. *The Queen* (1995), 27 O.R. (3d) 1 (C.A.)

Nunes v. Air Transat (2005), 20 C.P.C. (6th) 93 (Ont. S.C.J.)

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

Parsons v. *Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.)

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

Rumley v. *British Columbia,* [2001] 3 S.C.R. 184

Sorotski v. *CNH Global N.V.,* [2006] S.J. No. 258 (Q.B.)

Sparling v. *Southam Inc.* (1998), 66 O.R. (2d) 225 (H.C.J.)

Sawatzky v. *Societé Chirugicale Instrumentarium Inc.,* [1999] B.C.J. No. 1814 (S.C.)

T.L. v. *Alberta,* [2006] A.J. No. 163 (Q.B.)

Vitapharm Canada Ltd, et al. v. *Degussa-Hüls AG, et al.,* [2005] O.J. No. 1117 (S.C.J.)

Vitapharm Canada Ltd., et al. v. *Degussa-Hüls AG, et al.*, [2005] O.J. No. 1118 (S.C.J.)

Walls v. *Bayer Inc.,* [2005] M.J. No. 4 (Q.B.)

Walls v. *Bayer Inc.,* [2005] M.J. No. 286 (C.A.)

Walton v. *Mytravel Canada Holdings Inc.,* [2006] S.J. No. 373 (Q.B.)

Western Canadian Shopping Centres. v. *Dutton,* [2001] 2 S.C.R. 534

Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369

Secondary Sources

M. Eizenga et al., *Class Actions Law & Practice* (2006) at §13.12

Indian & Northern Affairs Canada, file E6757-18, volume 13, *A New Justice for Indian Children*, Child Advocacy Project, Children's Hospital, Winnipeg, 1987

SCHEDULE "B"
RELEVANT STATUTES

1. ALBERTA LEGISLATION

***Class Proceedings Act,* S.A. 2003, c. C-16.5, sections 5, 17, 35, 37, 38 and 39.**

Class certification

5**(1)** In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the court must be satisfied as to each of the following:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the court,

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

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

(iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:

(a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;

(b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

(3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

(4) The Court may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e).

(5) Notwithstanding subsection (3), where an application is made to certify a proceeding as a class proceeding for the purposes of binding members of a settlement class, the Court may not certify the proceeding unless the Court has approved the settlement.

Opting in and opting out

17**(1)** For determining, with respect to a class proceeding, whether a person is a class member or remains a class member, the following applies:

(a) a person who is a resident of Alberta and who meets the criteria to be a class member in respect of the class proceeding is a class member in the class proceeding unless that person, in the manner and within the time provided for in the certification order made in respect of the class proceeding, opts out of the class proceeding;

(b) subject to clause (d), a person who is not a resident of Alberta may, in the manner and within the time provided for in the certification order made in respect of the class proceeding, opt into the class proceeding if that person would have been included under clause (a) as a class member in the class proceeding had that person been a resident of Alberta;

(c) a person referred to in clause (b) who opts into a class proceeding is, effective from the time that the person opts in, a class member in the class proceeding for every purpose of this Act;

(d) a person who is a prospective subclass member may not opt into a class proceeding under clause (b) unless a representative plaintiff who satisfies the requirements of section 7 has been or will have been appointed for the subclass in which the person is to become a subclass member at the time that the person becomes a class member;

(e) a person who is a class member may, if permitted to do so by this Act, the certification order or the Court, opt out of the class proceeding subject to any terms or conditions imposed under the certification order or by the Court;

(f) a person referred to in clause (e) who opts out of the class proceeding ceases, effective from the time the person opts out and subject to any terms or conditions referred to in clause (e), to be a class member in the class proceeding.

(2) If a subclass is created as a result of persons opting into a class proceeding under subsection (1)(b), the representative plaintiff for that subclass must ensure that the certification order for the class proceeding is amended, if necessary, to comply with section 9(2).

(3) Notwithstanding anything in this section, where the Court certifies a proceeding pursuant to an application by a defendant, a class member is prohibited from opting out of the class proceeding other than with leave of the Court.

(4) If the Court grants leave under subsection (3) for a person to opt out of a class proceeding, that person has, as a matter of right, the right to apply to the Court to be added, on any terms or conditions that the Court considers appropriate, as a named plaintiff for the purposes of allowing that plaintiff to conduct the plaintiff's own case.

(5) Notwithstanding anything in this section, the Court may at any time determine whether or not a person is a class member or subclass member subject to any terms or conditions the Court considers appropriate.

Settlement, discontinuance, abandonment and dismissal

35**(1)** A class proceeding may be settled, discontinued or abandoned, but only with the approval of the Court and subject to any terms or conditions that the Court considers appropriate.

(2) A settlement may be concluded in relation to the common issues affecting a subclass but only with the approval of the Court and subject to any terms or conditions that the Court considers appropriate.

(3) A settlement to which this section applies is not binding unless approved by the Court.

(4) A settlement of a class proceeding that is approved by the Court binds every class member who has not opted out of the class proceeding, but only to the extent provided by the Court.

(5) A settlement in relation to the common issues affecting a subclass that is approved by the Court binds every subclass member who has not opted out of the class proceeding, but only to the extent provided by the Court.

(6) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment of a class proceeding, the Court must consider whether notice should be given under section 21 and whether the notice should include any one or more of the following:

(a) an account of the conduct of the proceeding;

(b) a statement of the results of the proceeding;

(c) a description of any plan for distributing any settlement funds.

Costs

37 With respect to any proceeding or other matter under this Act, the Court may award costs as provided for under the Rules of Court.

Contingency fee agreements

38**(1)** A lawyer may in respect of a proceeding under this Act enter into a contingency fee agreement with a representative plaintiff respecting the amount and manner of payment for services provided or to be provided and respecting any fees or disbursements in relation to those services and may provide for that payment to be by a gross sum, commission, percentage, salary or otherwise and at the same rate as or at a greater or lesser rate than the rate at which the lawyer would otherwise be entitled to be paid.

(2) A contingency fee agreement

(a) must be in writing, and

(b) must be signed by the lawyer and the representative plaintiff.

(3) A contingency fee agreement must be in precise and understandable terms and must set out at least the following:

(a) the name and address of the representative plaintiff;

(b) the name and address of the lawyer;

(c) the nature of the claim;

(d) the event or contingency on which fees are to be paid to the lawyer;

(e) the manner in which the contingency fee is to be calculated;

(f) the maximum fee payable, or the maximum rate to be used to calculate the fee, after deducting disbursements;

(g) whether the representative plaintiff is responsible to pay disbursements and, if so, a general description of types of disbursements likely to be incurred, other than relatively minor disbursements;

(h) a statement that, if the representative plaintiff gives notice in writing to the lawyer within 5 days after the representative plaintiff's copy of the contingency fee agreement is served on the representative plaintiff, the representative plaintiff may terminate the contingency fee agreement without incurring any liability for fees, but the representative plaintiff is liable to reimburse the lawyer for reasonable disbursements.

(4) The contingency fee agreement must be witnessed by a person who sees the representative plaintiff actually sign the agreement, who must then swear an affidavit of execution.

(5) The representative plaintiff must be served with a copy of the signed contingency fee agreement within 10 days after the date on which the agreement is signed, and an affidavit of service to that effect must be executed by the person who serves the copy of the agreement.

(6) Subject to subsection (7), a representative plaintiff may terminate a contingency fee agreement on giving written notice of the termination to the lawyer and the payment of the fees and disbursements owing at the time of the termination or as otherwise agreed on by the representative plaintiff and the lawyer.

(7) A representative plaintiff may terminate a contingency fee agreement without incurring liability for payment of any fees related to or arising from the agreement, but is liable to pay reasonable disbursements, if the representative plaintiff, within 5 days after being served with the copy of the agreement, gives written notice of the termination to the lawyer.

(8) If a representative plaintiff terminates a contingency fee agreement,

(a) the lawyer must give notice to the class members or subclass members for whom the representative plaintiff was appointed, and

(b) any class member or subclass member may apply to the Court to act as the representative plaintiff for the purposes of bringing or continuing an action.

(9) This section applies whether or not a class member or subclass member is appointed as the representative plaintiff.

Court approval of contingency fee agreement

39**(1)** A contingency fee agreement respecting fees and disbursements between a lawyer and a representative plaintiff is not enforceable unless,

(a) on the application of the lawyer made prior to or at the time of applying for certification of the proceeding, the agreement was approved by the Court, and

(b) after

(i) the common issues have been resolved, in the case of a trial of the common issues, or

(ii) a settlement agreement has been approved, in the case of a class proceeding being settled,

the judge who presided over the trial of the common issues or approved the settlement agreement has, on the application of the representative plaintiff or, if the

representative plaintiff fails to apply, on the application of the lawyer, reviewed the contingency fee agreement for the purposes of ensuring that the fees and disbursements payable under the agreement are fair and reasonable in the circumstances.

(2) An application under subsection (1) may,

(a) unless the Court otherwise orders, be brought without notice to the defendant, or

(b) if notice to the defendant is required, be brought subject to any terms or conditions respecting disclosure of the whole or any part of the agreement relating to any fees and disbursements as the Court may order.

(3) Unless the Court otherwise directs, an application under subsection (1)(b) may only be brought if the notice of the application sets out at least the following:

(a) the actual amount of the fees and disbursements as calculated;

(b) the right of any class member or subclass member to object;

(c) the time and place at which the application is to be heard;

(d) those steps or procedures that a class member or subclass member must take or carry out in order to be heard.

(4) Interest payable on fees under a contingency fee agreement approved under subsection (1) must be calculated in the manner set out in the agreement or, if not so set out,

(a) at the interest rate prescribed under the *Judgment Interest Act* for pecuniary damages, or

(b) at any other rate that the Court considers appropriate.

(5) Interest payable on disbursements under a contingency fee agreement approved under subsection (1) must be calculated in the manner set out in the agreement or, if not so set out,

(a) at the interest rate prescribed under the *Judgment Interest Act* for pecuniary damages, or

(b) at any other rate that the Court considers appropriate,

on the balance of disbursements incurred as totalled at the end of each 6-month period following the date of the agreement.

(6) Amounts owing under a contingency fee agreement that is enforceable pursuant to this section are a first charge on any settlement funds or monetary award.

(7) If a contingency fee agreement is not approved by the Court or the Court determines that the agreement should not be followed, the Court may

(a) determine the amount owing to the lawyer in respect of fees and disbursements,

(b) direct that an inquiry, assessment or accounting under the Rules of Court be carried out to determine the amount owing, or

(c) direct that the amount owing be determined in any other manner not referred to in clause (a) or (b).

(8) Representative parties may seek funding of their costs and disbursements from other persons and organizations, including persons who are not members of the class.

2. BRITISH COLUMBIA LEGISLATION:

***Class Proceedings Act*, R.S.B.C. 1996, c.50, sections 4, 16, 35, 37 and 38.**

Class certification

4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a representative plaintiff who

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

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

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

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Opting out and opting in

16 (1) A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

(2) Subject to subsection (4), a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.

(3) A person referred to in subsection (2) who opts in to a class proceeding is from that time a member of the class involved in the class proceeding for every purpose of this Act.

(4) A person may not opt in to a class proceeding under subsection (2) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements of section 6 (1) (a), (b) and (c).

(5) If a subclass is created as a result of persons opting in to a class proceeding under subsection (2), the representative plaintiff for that subclass must ensure that the certification order for the class proceeding is amended, if necessary, to comply with section 8 (2).

Settlement, discontinuance, abandonment and dismissal

35 (1) A class proceeding may be settled, discontinued or abandoned only

(a) with the approval of the court, and

(b) on the terms the court considers appropriate.

(2) A settlement may be concluded in relation to the common issues affecting a subclass only

(a) with the approval of the court, and

(b) on the terms the court considers appropriate.

(3) A settlement under this section is not binding unless approved by the court.

(4) A settlement of a class proceeding or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class proceeding, but only to the extent provided by the court.

(5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice should be given under section 20 and whether the notice should include

(a) an account of the conduct of the proceeding,

(b) a statement of the result of the proceeding, and

(c) a description of any plan for distributing any settlement funds.

Costs

37 (1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2 (2) or 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.

(2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding

(a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,

(b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or

(c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.

(3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.

(4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.

Agreements respecting fees and disbursements

38 (1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must

(a) state the terms under which fees and disbursements are to be paid,

(b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding, and

(c) state the method by which payment is to be made, whether by lump sum or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.

(3) An application under subsection (2) may,

(a) unless the court otherwise orders, be brought without notice to the defendants, or

(b) if notice to the defendants is required, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.

(4) Interest payable on fees under an agreement approved under subsection (2) must be calculated

(a) in the manner set out in the agreement, or

(b) if not so set out, at the interest rate, as that term is defined in section 7 of the *Court Order Interest Act,* or at any other rate the court considers appropriate.

(5) Interest payable on disbursements under an agreement approved under subsection (2) must be calculated

(a) in the manner set out in the agreement, or

(b) if not so set out, at the interest rate, as that term is defined in section 7 of the *Court Order Interest Act,* or at any other rate the court considers appropriate, on the balance

of disbursements incurred as totalled at the end of each 6 month period following the date of the agreement.

(6) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(7) If an agreement is not approved by the court or if the amount owing to a solicitor under an approved agreement is in dispute, the court may

(a) determine the amount owing to the solicitor in respect of fees and disbursements,

(b) direct an inquiry, assessment or accounting under the Rules of Court to determine the amount owing,

(c) direct that the amount owing be determined in any other manner, or

(d) make any other or further order it considers appropriate.

3. MANITOBA LEGISLATION:

***The Class Proceedings Act*, C.C.S.M. c.C130, sections 4, 16, 35, 37 and 38.**

Certification of class proceeding

4 The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and

(e) there is a person who is prepared to act as the representative plaintiff who

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

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

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

Opting out of class proceeding

16 A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

Settlement, Discontinuance and Abandonment

35(1) A class proceeding may be settled, discontinued or abandoned only

(a) with the approval of the court; and

(b) on the terms the court considers appropriate.

Court approval of settlement

35(2) A settlement may be concluded in relation to the common issues affecting a subclass only

(a) with the approval of the court; and

(b) on the terms the court considers appropriate.

Settlement not binding unless approved

35(3) A settlement is not binding unless approved by the court.

Settlement binding on class members

35(4) A settlement of a class proceeding or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class proceeding, but only to the extent provided by the court.

Notice to class members

35(5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice of the dismissal or approval should be given under section 20 and whether the notice should include

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing any settlement funds.

Costs

37(1) Subject to this section, no costs may be awarded against any party with respect to any stage of a class proceeding, including a motion for certification under subsection 2(2) or section 3, or any appeal arising from a class proceeding.

Considerations re costs

37(2) The Court of Queen's Bench or The Court of Appeal may only award costs to a party in respect of a motion for certification or in respect of all or any part of a class proceeding or an appeal arising from a class proceeding if

(a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party;

(b) at any time that the court considers that an improper or unnecessary motion or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose; or

(c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive another party of costs.

Assessment of costs

37(3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.

Class members not liable for costs

37(4) Class members, other than a person appointed as a representative plaintiff, are not liable for costs except with respect to the determination of their own individual claims.

Agreements respecting fees and disbursements

38(1) An agreement respecting fees and disbursements between a lawyer and a representative plaintiff must be in writing and must

(a) state the terms under which fees and disbursements are to be paid;

(b) give an estimate of the expected fee, whether or not the fee is contingent on success in the class proceeding; and

(c) state the method by which payment is to be made, whether by lump sum or otherwise.

Approval of agreements

38(2) An agreement respecting fees and disbursements between a lawyer and a representative plaintiff is not enforceable unless approved on motion to the court.

Motion for approval of agreements

38(3) A motion under subsection (2) may,

(a) unless the court otherwise orders, be brought without notice to a defendant; or

(b) if notice to a defendant is required by the court, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.

Interest

38(4) Interest payable on fees under an agreement approved under subsection (2) must be calculated in the manner set out in the agreement or, if it is not so set out, must be charged

(a) at the prejudgment rate, as defined in *The Court of Queen's Bench Act*; or

(b) at any other rate the court considers appropriate.

Calculation of interest

38(5) Interest payable on disbursements under an agreement approved under subsection (2) must be calculated in the manner set out in the agreement or, if it is not set out in the agreement,

(a) at the prejudgment rate, as defined in *The Court of Queen's Bench Act*; or

(b) at any other rate the court considers appropriate, on the balance of disbursements incurred as totalled at the end of each 6 month period following the date of the agreement.

First charge

38(6) Amounts owing under an agreement approved by the court under subsection (2), are a first charge on any settlement funds or monetary award.

Power of court to determine fees

38(7) If an agreement is not approved by the court or if the amount owing under an approved agreement is in dispute the court may, on motion,

(a) determine the amount owing to the lawyer in respect of fees and disbursements;

(b) direct a reference under the *Queen's Bench Rules* to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner.

4. SASKATCHEWAN LEGISLATION:

***Class Actions Act*, S.S. 2001, c. C-12.01, sections 4, 6, 18, 38, 40 and 41.**

Plaintiff's class action

4(1) One member of a class who resides in Saskatchewan may commence an action in the court on behalf of the members of that class.

(2) The member who commences an action pursuant to subsection (1) shall:

(a) apply to the chief justice of the court for the designation of a judge to consider an application mentioned in clause (b); and

(b) apply to the judge designated pursuant to clause (a) for an order:

(i) certifying the action as a class action; and

(ii) subject to subsection (4), appointing the member as the representative plaintiff for the class action.

(3) An application pursuant to clause (2)(b) must be made:

(a) within 90 days after the later of:

(i) the date on which the statement of defence was delivered; and

(ii) the date on which the time prescribed by The Queen's Bench Rules for delivery of the statement of defence expires without it being delivered; or

(b) with leave of the court at any other time.

(4) Where it is necessary to do so in order to avoid a substantial injustice to the class, the court may appoint a person who is not a member of the class as the representative plaintiff for the class action.

2001, c.C-12.01, s.4.

Class certification

6 The court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class;

(c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;

Opting out and opting in

18(1) A class member involved in a class action may opt out of the action in the manner and within the time stated in the certification order.

(2) A person who does not reside in Saskatchewan may opt into a class action, in the manner and within the time stated in the certification order, if the person would otherwise, but for non-resident status, be a member of the class involved in the class action.

(3) A person mentioned in subsection (2) who opts into a class action is from that time a member of the class involved in the class action for the purposes of this Act.

(4) A person may not opt into a class action pursuant to subsection (2) unless the subclass of which the person is to become a member has or will have, at the time

the person becomes a member, a representative plaintiff who satisfies the requirements of clauses 8(1)(a), (b) and (c).
(5) If a subclass is created as a result of persons opting into a class action pursuant to subsection (2), the representative plaintiff for that subclass shall ensure that the certification order for the class action is amended, if necessary, to comply with subsection 10(2).

Settlement, discontinuance, abandonment and dismissal

38(1) A class action may be settled, discontinued or abandoned only:
(a) with the approval of the court; and
(b) on the terms the court considers appropriate.
(2) A settlement may be concluded in relation to the common issues affecting a subclass only:
(a) with the approval of the court; and
(b) on the terms the court considers appropriate.
(3) A settlement pursuant to this section is not binding unless approved by the court.
(4) A settlement of a class action or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class action, but only to the extent provided by the court.
(5) In dismissing a class action or in approving a settlement, discontinuance or abandonment, the court shall consider whether notice should be given pursuant to section 22 and whether the notice should include:
(a) an account of the conduct of the action;
(b) a statement of the result of the action; and
(c) a description of any plan for distributing any settlement funds.

2001, c.C-12.01, s.38.

Costs

40(1) Subject to subsection (2), neither the Court of Queen's Bench nor the Court of Appeal may award costs to any party to an application for certification pursuant to subsection 4(2) or section 5, to any party to a class action or to any party to an appeal arising from a class action at any stage of the application, action or appeal.
(2) A court mentioned in subsection (1) may award costs to a party respecting an application for certification or respecting all or any part of a class action or an appeal from a class action if the court considers that:
(a) there has been vexatious, frivolous or abusive conduct on the part of any party;
(b) an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose; or

(c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.
(3) A court that orders costs may order that those costs be assessed in any manner that the court considers appropriate.

(4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.

Agreements respecting fees and disbursements

41(1) An agreement respecting fees and disbursements between a lawyer and a representative plaintiff must be in writing and must:

(a) state the terms under which fees and disbursements are to be paid;

(b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class action; and

(c) state the method by which payment is to be made, whether by lump sum or otherwise.

(2) An agreement respecting fees and disbursements between a lawyer and a representative plaintiff is not enforceable unless approved by the court, on the application of the lawyer.

(3) An application pursuant to subsection (2) may:

(a) unless the court orders otherwise, be brought without notice to the defendants; or

(b) if notice to the defendants is required, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.

(4) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(5) If an agreement is not approved by the court, the court may:

(a) determine the amount owing to the lawyer respecting the fees and disbursements;

(b) direct an inquiry, assessment or accounting pursuant to The Queen's Bench Rules to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner.

5. ONTARIO LEGISLATION:

***Class Proceedings Act, 1992*, S.O. 1992, c. 6, sections 5, 9, 29, 32 and 33.**

Opting out

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

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

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

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

Opting Out

9. Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order. 1992, c. 6, s. 9.

Discontinuance, abandonment and settlement

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29(1).

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

Fees and disbursements

32. (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).

Court to approve agreements

(2) 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. 1992, c. 6, s. 32 (2).

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. 1992, c. 6, s. 32 (3).

Determination of fees where agreement not approved

(4) If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

Agreements for payment only in the event of success

33. (1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).

Interpretation: success in a proceeding

(2) For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some or all class members; and

(b) a settlement that benefits one or more class members. 1992, c. 6, s. 33 (2).

Definitions

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraires de base")

"multiplier" means a multiple to be applied to a base fee. ("multiplicateur") 1992, c. 6, s. 33 (3).

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).

Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end

of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).

Idem

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8).

Idem

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

CLASS PROCEEDINGS AND OTHER REPRESENTATIVE RULE 12 PROCEEDINGS

DEFINITIONS

12.01 In rules 12.02 to 12.06,

"Act" means the *Class Proceedings Act, 1992*; ("Loi")

"Foundation" means The Law Foundation of Ontario; ("Foundation")

"Fund" means the Class Proceedings Fund of the Foundation. ("Fonds") O. Reg. 770/92, s. 5; O. Reg. 465/93, s. 2 (2).

CONTENTS OF JUDGMENTS AND ORDERS

12.05 (1) A judgment in a class proceeding or an order approving a settlement, discontinuance or abandonment of a class proceeding under section 29 of the Act shall contain directions with respect to,

(a) the distribution of amounts awarded under section 24 or 25 of the Act, and the costs of distribution;

(b) the payment of amounts owing under an enforceable agreement made under section 32 of the Act between a solicitor and a representative party;

(c) the payment of the costs of the proceeding; and

(d) the payment of any levy in favour of the Fund under clause 59.5 (1) (g) of the *Law Society Act*. O. Reg. 770/92, s. 5.

(2) An order certifying two or more proceedings as a class proceeding under section 3 of the Act or decertifying a class proceeding under section 10 of the Act

shall contain directions with respect to pleadings and other procedural matters. O. Reg. 770/92, s. 5.

SCHEDULE "C"

CHRONOLOGY OF EVENTS

1920-00-00	The Federal Government made IRS attendance mandatory for all Aboriginal children aged 7-15
1990-00-00	Phil Fontaine went public with his personal IRS experiences
1996-00-00	Last federally run IRS closed
1996-10-00	Release of the Royal Commission on Aboriginal Peoples
1998-00-00	The Dialogues take place between Canada, the AFN, Survivors and their counsel
1998-00-00	The Aboriginal Healing Foundation was established to promote community based healing initiatives
1998-01-07	Canada issued a "Statement of Reconciliation" which included an apology to those victimized at IRS
1998-01-07	Statement of Reconciliation
1998-10-05	The *Cloud* class action is launched in Ontario (relating to a single IRS)
1998-10-05	AHF was established, Cloud commenced
2000-06-13	National Class Action launched in Ontario (*Baxter*)
2001-06-00	Canada creates the Department of Indian Residential Schools Resolution Canada (01RSRC)

2004-04-00	AFN and University of Calgary Law School hold a national conference on the IRS ADR process
2004-04-00	AFN U of C conference
2004-11-00	AFN publishes a report on a Plan to Compensate for IRS abuses
2004-12-03	The Court of Appeal in Ontario allowed certification of the *Cloud* class action
2004-12-03	Court of Appeal decision in Cloud
2005-02-00	CBA issues it's Report on Indian Residential School Resolution
2005-04-00	House of Commons Committee on Aboriginal Affairs issues report critical of the Dispute Resolution Process
2005-05-12	SCC dismisses Canada's application for leave to appeal the decision of the Ontario Court of Appeal in Cloud Feb. 2005
2005-05-30	Canada and the AFN sign the Political Agreement which appoints the Honourable Frank Iacobucci to develop an agreement to resolve IRS claims based on the AFN Report, and with the AFN playing a key and central role
2005-11-20	Agreement in Principle reached
2006-05-08	Parties conclude Final Settlement Agreement
2006-05-10	The Federal Cabinet approved the Final Settlement Agreement

SCHEDULE "D"

KEY DEFINED TERMS

DEFINITIONS

"ADR Process" means the alternative dispute resolution process for IRS claims implemented by the federal government in 2003, which remains in place today;

"AFN" means the National Indian Brotherhood and the Assembly of First Nations;

"AFN Report" means the report prepared by the AFN on IRS issues in December 2004;

"AHF" means the Aboriginal Healing Foundation

"CEP" means the Common Experience Payment available to the Survivor Class

"Church Groups" or "Church Entities" means the Anglican Church, the Catholic Church, the United Church and the Presbyterian Church, as defined within the factum;

"Claim" or "Amended Statement of Claim" means the Amended Statement of Claim, which consolidates proceedings for the purposes of carrying out settlement;

"Class" or "Class Members" means all members of the Survivor Class, the Deceased Class and the Family Class;

"Class Period" means January 1, 1920 to December 31, 1997;

"Class Proceedings Law" or "CPL" " means:

in respect of the Alberta Court of Queen's Bench, the *Class Proceedings Act*, S.A. 2003, c. C-16.5;

in respect of the British Columbia Supreme Court, the *Class Proceedings Act*, R.S.B.C. 1996, c.50;

in respect of the Manitoba Court of Queen's Bench, the *Class Proceedings Act*, C.C.S.M. c. C130;

in respect of the Supreme Court of the Northwest Territories, Rule 62 of the *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96;

in respect of the Nunavut Court of Justice: Rule 62 of the *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg 010-96, as adopted by the Territory by operation of Section 29 of the *Nunavut Act*, S.C. 1993, c. 28;

in respect of the Ontario Superior Court of Justice, the Class Proceedings Act, 1992 (Ontario) S.O. 1992, c. 6;

the Province of Québec, Articles 999–1051 of the *Civil Code of Procedure (Québec)*;

in respect of the Saskatchewan Court of Queen's Bench, the *Class Actions Act,* S.S. 2001, c.C-12.01;

in respect of Supreme Court of the Yukon Territory: Rule 5(11) of the *Supreme Court Rules (British Columbia)* B.C. Reg. 220/90 as adopted by the Territory by operation Section 38 of the *Judicature Act (Yukon)* R.S.Y. 2002, c. 128;

"*Cloud*" means the certified Ontario class proceedings relating to the Mohawk IRS in Ontario;

"Commission" means the Truth and Reconciliation Commission contemplated in the Settlement Agreement;

"Deceased Class" means all persons who resided at a Residential School in Canada between 1920 and 1997, who died before May 30, 2005, and who were, at their date of death, residents of

Alberta, for the purposes of the Alberta Court of Queen's Bench;

British Columbia, for the purposes of the British Columbia Supreme Court;

Manitoba, for the purposes of the Manitoba Court of Queen's Bench;

the Northwest Territories, for the purposes of the Supreme Court of the Northwest Territories;

Nunavut, for the Nunavut Court of Justice;

Ontario, Prince Edward Island, Newfoundland, and Labrador, New Brunswick, Nova Scotia and any place outside of Canada, for the purposes of the Ontario Superior Court of Justice;

Québec, for the purposes of the Quebec Superior Court;

Saskatchewan, for the purposes of the Saskatchewan Court of Queen's Bench;

Yukon, for the purposes of the Supreme Court of the Yukon Territory;

but excepting Excluded Persons.

"Excluded Persons" means all persons who attended the Mohawk Institute Residential School in Brantford, Ontario, between 1922 and 1969, and their parents, siblings, spouses and children;

"Family Class" means:

the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

a former spouse of a Survivor Class Member;

a child or other lineal descendent of a grandchild of a Survivor Class Member;

a person of the same or opposite sex to a Survivor Class Member who cohabited for a period of at least one year with that Survivor Class Member immediately before his or her death;

a person of the same or opposite sex to a Survivor Class Member who was cohabiting with that Survivor Class Member at the date of his or her death and to whom that Survivor Class Member was providing support or was under a legal obligation to provide support on the date of his or her death;

any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death; and,

such other persons as the Court recognizes or directs,

and who, as of the date hereof, are resident in:

(i) Alberta, for the purposes of the Alberta Court of Queen's Bench;

(ii) British Columbia, for the purposes of the British Columbia Supreme Court;

(iii) Manitoba, for the purposes of the Manitoba Court of Queen's Bench;

(iv) Northwest Territories, for the purposes of the Supreme Court of the Northwest Territories;

(v) Nunavut, for the purposes of the Nunavut Court of Justice; and

(vi) Ontario, Prince Edward Island, Newfoundland, and Labrador, New Brunswick, Nova Scotia and any place outside of Canada, for the purposes of the Ontario Superior Court of Justice;

(vii) Québec, for the purposes of the Quebec Superior Court;

(viii) Saskatchewan, for the purposes of the Court of Queen's Bench for Saskatchewan;

(ix) Yukon, for the purposes of Supreme Court of the Yukon Territory;

but excepting Excluded Persons.

"Federal Representative" is the Honourable Frank Iacobucci, the negotiator appointed May 30, 2005, by and on behalf of the Federal Government to carry out negotiations with IRS stakeholders;

"FLA" means Ontario's Funding Law Act;

"IAP" means the Independent Assessment Process set out in the Settlement Agreement for the adjudication of physical and sexual abuse claims;

"Independent Counsel" refers to those legal counsel who participated in the negotiation of the Settlement Agreement and are signatories to same, but who do not form part of the National

Consortium or Merchant Law Group, namely: Fulton & Company (represented by Len Marchand); Lackowicz, Shier & Hoffman (as represented by Dan Shier); Keshen Major (as represented by Greg Rickford); F.J. Scott Hall Law Corporation (as represented by Scott Hall); Peter Grant & Associates (as represented by Peter Grant and Brian O'Reilly); Macdermid Lamarsh Gorsalitz (as represented by Robert Emigh); Rose Keith, Cabott & Cabott (as represented by Laura Cabott); Bilkey, Quinn (as represented by David Bilkey); Heather Sadler Jenkins (as represented by Sandra Staats); Duboff Edwards Haight & Schachter (as represented by Harley Schachter); and MacPherson Leslie & Tyerman LLP (as represented by Maurice Laprairie Q.C.)

"Inuit Groups" means the Innuvialuit Regional Corporation, Nunavut Junngavik Incorporated and Makiuik Corporation;

"IRS" means those institutions attached as Schedules to the Settlement Agreement; and any other institution in which a child was placed in residence away from the family or home by or under the authority of Canada for the purposes of education and for which Canada was jointly or solely responsible for the operation of the residence and care of the children resident there;

"Jurisdictions" means the Alberta Court of Queen's Bench, the British Columbia Supreme Court, the Manitoba Court of Queen's Bench, the Supreme Court of the Northwest Territories, the Nunavut Court of Justice, the Ontario Superior Court of Justice, the Quebec Superior Court, the Court of Queen's Bench for Saskatchewan and the Supreme Court of the Yukon Territory;

"National Consortium" refers to the group of 19 law firms who have worked in concert with each other to advance IRS claims, and includes: Thomson Rogers, Richard W. Courtis Law, Field LLP, David Paterson Law Group, Docken & Company, Arnold, Pizzo, McKiggan, Cohen Highly LLP, White Ottenheimer & Baker, Thompson Dorman Sweatman, Ahlstrom Wright Oliver & Cooper, Troniak Law Office, Koskie Minsky, Leslie R. Meiklejohn Law Office, Huck Birchard, Ruston Marshall, Rath & Company, Levene Tadman Gutkin Golub, Coller Levine and Adams Gareau.

"Representative Plaintiffs" means those Plaintiffs referred to in the title of proceedings of the Amended Statement of Claim;

"Survivor Class" means:

> All persons who resided at a Residential School in Canada between January 1, 1920 and December 31, 1997, who are living, or who were living as of May 30, 2005, and who, as of the date hereof, or who, at the date of death resided in:
>
> Alberta, for the purposes of the Alberta Court of Queen's Bench;
>
> British Columbia, for the purposes of the British Columbia Supreme Court;
>
> Manitoba, for the purposes of the Manitoba Court of Queen's Bench;
>
> Northwest Territories, for the purposes of the Supreme Court of the Northwest Territories;

Nunavut, for the purposes of the Nunavut Court of Justice; and

Ontario, Prince Edward Island, Newfoundland, and Labrador, New Brunswick, Nova Scotia and any place outside of Canada, for the purposes of the Ontario Superior Court of Justice;

Québec, for the purposes of the Quebec Superior Court;

Saskatchewan, for the purposes of the Court of Queen's Bench for Saskatchewan;

Yukon, for the purposes of Supreme Court of the Yukon Territory;

But excepting Excluded Persons.

SCHEDULE "E"

LIST OF AFFIDAVITS

NATIONAL BACKGROUND AND ISSUES
Affidavit of the Honourable Frank Iacobucci, Q.C. (Federal Representative)
Affidavit of National Chief Larry Phillip Fontaine (AFN National Chief)
Affidavit of Robert Robson (Academic)
Affidavit of David Russell (01RSRC)
Affidavit of Len Marchand (Independent Counsel)

REGIONAL HISTORIES
Affidavit of Richard Courtis (Counsel)
Affidavit of Donald Belcourt (Representative Plaintiff)
Affidavit Nora Bernard (Representative Plaintiff)
Affidavit of Brian O'Reilly (Counsel)
Affidavit of Bonnie Reid (Counsel)
Affidavit of Doug Keshen (Counsel)
Affidavit of Paul Vogel (Counsel)

NOTICE PROGRAM
Affidavit of Todd Hilsee (May 17, 2006)
Affidavit of Todd Hilsee (June 29, 2006)
Affidavit of Todd Hilsee (July 26, 2006)
Affidavit of Kerry Eaton

THE CHURCH DEFENDANTS
Affidavit of James Bruce Boyles (Anglican Church)
Affidavit of James Vincent Scott (United Church Entities)
Affidavit of Stephen Kendall (Presbyterian Entities)
Affidavit of Sister Bernadette Poirer s.g.m. (Catholic)
Affidavit of Father Jacques Gagné (Catholic)
Affidavit of Archbishop Joseph Edmond Emilius Goulet (Catholic)
Affidavit of Sister Gloria Keylor s.p. (Catholic)
Affidavit of Father Jacques L'Heureux (Catholic)
Affidavit of Father Camille Piche (Catholic)
Affidavit of Father Bernard Pinet (Catholic)
Affidavit of Father Cécil Fortier (Catholic)
Affidavit of Bishop Gary Gordon (Catholic)
Affidavit of Sister Dorothy Jean Beyer (Catholic)
Affidavit of Sister Pauline Phaneuf (Catholic)
Affidavit of Sister Suzanne Tremblay (Catholic)
Affidavit of Sister Robéa Duguay (Catholic)
Affidavit of Sister Pearl Goudreau (Catholic)
Affidavit of Sister Denise Brochu (Catholic)
Affidavit of Sister Suzanne Bridet (Catholic)
Affidavit of Sister Diane Beaudoin (Catholic)
Affidavit of Sister Gloria Paradis (Catholic)

LEGAL FEES
Affidavit of Darcy Merkur (Counsel)
Affidavit of Sandra Staats (Counsel)
Affidavit of Laura Cabott (Counsel)
Affidavit of Frank Iacobucci
Affidavit of Edward Nagel
Affidavit of Donald Outerbridge
Affidavit of Ruth Anne Flear

INDIVIDUAL REPRESENTATIVE PLAINTIFFS
Affidavit of Percy Archie
Affidavit of Charles Baxter
Affidavit of Elijah Baxter
Affidavit of Evelyn Baxter
Affidavit of Janet Brewster
Affidavit of John Bosum
Affidavit of Brenda Cyr
Affidavit of Malcolm Dawson
Affidavit of Vincent Bradley Fontaine
Affidavit of Elizabeth Kusiak
Affidavit of Theresa Ann Larocque
Affidavit of Veronica Marten
Statutory Declaration of Michelline Ammaq
Statutory Declaration of Rhonda Buffalo
Statutory Declaration of Ernestine Caibaisosai-Gidmark
Statutory Declaration of Michael Carpan
Statutory Declaration of Ann Dene
Statutory Declaration of James Fontaine
Statutory Declaration of Peggy Good
Statutory Declaration of Fred Kelly
Statutory Declaration of Jane McCallum
Statutory Declaration of Cornelius McComber
Statutory Declaration of Stanley Nepetaypo
Statutory Declaration of Flora Northwest
Statutory Declaration of Norman Pauchay
Statutory Declaration of Camble Quatell
Statutory Declaration of Alvin Saulteaux
Statutory Declaration of Christine Semple
Statutory Declaration of Dennis Smokeyday
Statutory Declaration of Kenneth Sparvier
Statutory Declaration of Edward Tapiatic
Statutory Declaration of Helen Wildeman
Statutory Declaration of Adrian Yellowknee
Affidavit of Rosemarie Kuptana
Affidavit of Dana Eva Marie Francey
Affidavit of Benny Doctor

Affidavit of Lucy Doctor
Affidavit of Deanna Cyr
Affidavit of Michelline Ammaq
Affidavit of Janet Brewster
Affidavit of Pauline Joan Michell

SCHEDULE "F"

SUMMARY OF KEY PARTIES AND PARTICIPANTS

Aboriginal Healing Foundation ("AHF")	The AHF is an Aboriginal-run, not-for-profit corporation that provides financial support to community developed and let healing programs that address physical and sexual abuse, as well as the intergenerational aspects of the IRS legacy.
Assembly of First Nations ("AFN")	The AFN is composed of 633 First Nations represented by their respective elected Chiefs. The AFN is the national representative body of First Nations and the National Chief is democratically elected by the Chiefs of the First Nations of Canada.
Baert, Kirk	Legal Counsel representing the National Consortium, and counsel for the National Certification Committee, from Koskie Minsky LLP
Brown, Craig	Legal Counsel representing the National Consortium, from Thomson Rogers
Carroll, Dan	Legal Counsel representing the National Consortium, of Field LLP
Coughlan, Catherine	Legal Counsel for Canada
Donlevy, Rod	Legal Counsel for the Catholic Church, from McKercher McKercher Whitmore LLP
Faulds, Jon	Legal Counsel for the National Consortium, Field LLP
Fontaine, Phil	Elected National Chief of the AFN
Gareau, Gilles	Legal Counsel for National Consortum, Adams Gareau
Grant, Peter	Legal Counsel representing the Independent Counsel, from Peter Grant & Associates
Iacobucci, Frank	Appointed as the Federal Representative to lead the negotiations
Independent Counsel	Counsel with individual IRS clients who participated in the negotiation of the Settlement Agreement, but were not members of the National Consortium or Merchant Law Group. That group includes the following firms, as signatories to the Settlement Agreement: Fulton & Company (represented by Len Marchand); Lackowicz, Shier & Hoffman (as represented by Dan Shier); Keshen Major (as represented by Greg Rickford); F.J. Scott Hall Law Corporation (as represented by Scott Hall); Peter Grant & Associates (as represented by Peter Grant and Brian O'Reilly); Macdermid Lamarsh Gorsalitz (as represented by Robert Emigh); Rose Keith, Cabott & Cabott (as represented by Laura Cabott); Bilkey, Quinn (as represented by David Bilkey); Heather Sadler Jenkins

	(as represented by Sandra Staats); Duboff Edwards Haight & Schachter (as represented by Harley Schachter); and MacPherson Leslie & Tyerman LLP (as represented by Maurice Laprairie Q.C.).
McKiggan, John	Legal Counsel representing the National Consortium, Arnold Pizzo, McKiggan LLP
Merchant Law Group	A law firm with offices across Canada consisting of approximately 50 lawyers.
Merchant, Tony	Legal Counsel representing the Merchant Law Group
National Consortium	The National Consortium consists of the following law firms: Thomson Rogers, Richard W. Courtis Law, Field LLP, David Paterson Law Group, Docken & Company, Arnold, Pizzo, McKiggan, Cohen Highly LLP, White Ottenheimer & Baker, Thompson Dorman Sweatman, Ahlstrom Wright Oliver & Cooper, Troniak Law Office, Koskie Minsky, Leslie R. Meiklejohn Law Office, Huck Birchard, Ruston Marshall, Rath & Company, Levene Tadman Gutkin Golub, Coller Levine and Adams Gareau.
OIRSRC	Office of Indian Residential Schools Resolution Canada
Page, John	Legal Counsel for the non-Catholic Church Groups, from Cassels Brock & Blackwell LLP
Payne, Janice	Legal Counsel representing the Nunavut Tunngavik Inc., from Nelligan O'Brien Payne
Phillips, John	Legal Counsel representing the AFN, from Doane Phillips Young LLP
Raikes, Russell	Legal Counsel presenting the National Consortium and the Cloud Class Action, of Cohen Highley, LLP
Terry, John	Legal Counsel for Canada, Torys LLP
Vickery, Paul	Legal Counsel for Canada

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

JOINT FACTUM
(Motion for Settlement Approval returnable August 29, 30 and 31, 2006)

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