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 DIOCESE OF THE SYNOD 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 WESTMINSTER, THE SYNOD OF THE DIOCESE 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 IN CANADA, THE BOARD OF THE HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNTIED 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 BISHOP OF VANCOUVER, THE ROMAN CATHOLIC BISHOP OF VICTORIA, THE ROMAN CATHOLIC BISHOP OF NELSON, THE CATHOLIC EPISCOPAL CORPORATION OF WHITEHORSE, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD-McLENNAN, THE CATHOLIC ARCHDIOCESE OF EDMONTON, LA DIOCESE DE SAINT-PAUL, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF MacKENZIE, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, THE ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT-BONIFACE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF SAULT STE. MARIE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE MISSIONARY OBLATES OF MARY IMMACULATE-GRANDIN PROVINCELES PERES MONTFORTAINS (also known as THE COMPANY OF MARY), JESUIT FATHERS OF UPPER CANADA, THE MISSIONARY OBLATES OF MARY IMMACULATE-PROVINCE OF ST. JOSEPH, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (also known as LES REVERENDS PERES OBLATS DE L'IMMACULEE CONCEPTION DE MARIE), THE OBLATES OF MARY IMMACULATE, ST. PETER'S PROVINCE, LES REVERENDS PERES OBLATS DE MARIE IMMACULEE DES

TERRITOIRES DU NORD OUEST, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (PROVINCE DU CANADA-EST), THE SISTERS OF SAINT ANNE, THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS), THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERT (also known as THE SISTERS OF CHARITY (GREY NUNS) OF ALBERTA), THE SISTERS OF CHARITY (GREY NUNS) OF THE NORTHWEST TERRITORIES, THE SISTERS OF CHARITY (GREY NUNS) OF MONTREAL (also known as LES SOEURS DE LA CHARITÉ (SOEURS GRISES) DE L'HÔPITAL GÉNÉRAL DE MONTREAL), THE GREY SISTERS NICOLET, THE GREY NUNS OF MANITOBA INC. (also known as LES SOEURS GRISES DU MANITOBA INC.), THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE, LES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE and INSTITUTE DES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE LES SOEURES 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 DE COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY), MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEARTS AND MARY IMMACULATE or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE), LES SOEURS DE LA CHARITE D'OTTAWA (SOEURS GRISES DE LA CROIX) (also known as SISTERS OF CHARITY OF OTTAWA - GREY NUNS OF THE CROSS), SISTERS OF THE HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDERS OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE),THE SISTERS OF THE CHARITY OF ST. VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX), LES SOEURS DE NOTRE DAME AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, SISTERS OF THE PRESENTATION OF MARY (SOEURS DE LA RESENTATION DE MARIE), THE BENEDICTINE SISTERS, INSTITUT DES SOEURS DU BON CONSEIL, IMPACT OF NORTH MINISTRIES, THE BAPTIST CHURCH IN CANADA.

Third Parties

ISSUES

a. Whether the amendment to the title of the proceedings is really a joininder of new parties and a merger and whether it should be amended before the Implementation Date;

b. MLG legal fees;

c. Striking of the affidavit (which on the authorities, if successful, would result in an adjournment); and

d. Adherence with the strict terms of the Settlement Agreement. This issue relates to the timing of the coming into effect of all of the terms of the Settlement Agreement. Concurrent coming into effect of all of the terms of the Settlement Agreement is specifically required by various terms of the Settlement Agreement and the Agreement in Principle.

FACTS

1. Class proceedings of this complexity, and with negotiations that go back for a year and litigation that goes back to the middle of the 1990's, create myriad facts which are of significance. We do not attempt to outline all the significant facts. These submissions do emphasize facts related to specific timing because specific timing is important to the issue of a change in the style of cause (which is really much more than that) and specific timing relates to issues concerning lawyers fees.

2. The parties agreed to specific timing. Timing was an important part of the Settlement Agreement. It is helpful to set out the definitions in Article 1.01 of the Settlement Agreement which deal with timing:

> **1.01 Definitions**
> **"Approval Date"** means the date the last Court issues its Approval Orders;
> **"IAP Application Deadline"** means the fifth anniversary of the Implementation Date;
> **"Implementation Date"** means the latest of:
> (1) the expiry of thirty (30) days following the expiry of the Opt-Out Periods;
> (2) the day following the last day on which a Class Member in any jurisdiction may appeal or seek leave to appeal any of the Approval Orders; and
> (3) the date of a final determination of any appeal brought in relation to the Approval Orders;
> **"Opt Out Periods"** means the period commencing on the Approval Date as set out in the Approval Orders;

3. A motion is before the Court which asks that the title of the Proceedings in the Baxter class action be amended. The Draft Order is found at Tab 3B of the Joint Motion Record Volume III:

> **ORDER**
>
> **THIS MOTION,** for an amendment to the title of proceedings, made by the Plaintiffs this day at the Court House, 361 University Avenue, Toronto, Ontario, in the presence of counsel for the parties.
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> **ON READING** the notice of motion, the joint motion record of the parties, the Settlement Agreement and the facta of the parties,
>
> **AND UPON HEARING** the submissions of counsel for the Plaintiffs and the Defnedants,
>
> 1. **THIS COURT ORDERS** that leave is granted to amend this claim in the form attached as Schedule "A" as an Amended Statement of Claim (without underling) and that the title of proceedings is hereby so amended, including the addition of the third parties as party defendants.
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> 2. **THIS COURT ORDERS** that all defendants listed in Schedule "A" of the Amended Statement of Claim are added, on consent, and solely for the purpose of the approval by this Court of the Agreement and the issuance of this Judgment, and by such consent to be added as defendants are not attorning to the jurisdiction of this Court for any purpose other than the approval by this Court of the Agreement and issuance of this Judgment.
>
> _____
> Regional Senior Justice Warren K. Winkler

4. Merchant Law Group ("MLG") does not consent to this order which is contrary to the Settlement Agreement. MLG submits that any changes to the title of the proceedings and parties can happen only on the Implementation Date.

5. We submit respectfully that the proposed order goes beyond what was agreed to. We submit respectfully that it is not in the interests of the class. We submit that it could have devastating effect upon the class if the settlement fails. MLG does not agree to this further change and while MLG need not establish why as class counsel and a party to the agreement as well as a party to this litigation, MLG does not agree to the change. Nonetheless, the reasons for not agreeing are substantial and significant.

6. Even regarding the proposed Court Order it is notable that there is nothing in the Settlement Agreement which calls for paragraph 2 of the Draft Order. What the Defendants want to do in paragraph 2 is make sure that they are not drawn into a merged action in Ontario if the settlement goes sideways. But if the settlement goes sideways for reasons discussed later in these submissions and if the Court orders a change in the title of the proceedings and the parties, contrary, we submit, to the agreement, there will be an action in Ontario which involves 18 MLG plaintiffs and clients, and there will be a combination of counsel, who will not be able to proceed on behalf of the class. We do not agree to this new term which is contrary to the Settlement Agreement.

7. The Settlement Agreement is clear in this regard. Just from that agreement, first, there is nothing in the Settlement Agreement which calls for paragraph 2 of the Draft Order and second, additional plaintiffs are added who are not Plaintiffs to the class actions which, by Article 4.01 of the Settlement Agreement are to be merged.

8. There are 41 plaintiffs named in the proposed amended title of the proceedings. 18 are MLG clients, 3 are Baxters, and the other 20 are new Plaintiffs. New plaintiffs may not be added who are not in the "original claims". MLG asserts that MLG is not agreeable to being a joint solicitor of record in one monster of complexity which was not contemplated by the Settlement Agreement.

This action, the Baxter Action, must remain the Baxter Action until the implementation date. The other 20 new named plaintiffs may not be included in the title of proceedings until the implementation date.

9. There are scores of new defendants in the amended title of proceedings. MLG did not join any church defendant in any of its class proceedings. Multiple defendants tend to work conjunctively to delay. Each defendant is entitled to an examination for discovery. Each defendant is entitled to be heard on every motion. Defendants are entitled to be heard on the issue of certification. Third parties are not entitled to be heard on the issue of certification. MLG had worked hard to avoid having church defendants clutter up its class proceedings. MLG does not even join church defendants in individual proceedings although the government often joins them as third parties.

10. Not only doe MLG strenuously oppose a change in the list of plaintiffs, in its proceedings, strenuously oppose the amalgamation of the class actions launched by MLG in Ontario and elsewhere, but MLG submits respectfully that it would be a disaster for the class to have this plethora of church defendants added to the proceedings making it impossible for class counsel to make any progress in moving the case through certification *if certification were subsequently opposed.*

11. MLG will cooperate in some new title for management purposes after the implementation date because then no damage may be done to the class but we will not agree to something which is not in the Settlement Agreement which potentially would have a devastatingly negative effect upon the class. We will emphasize other facts, particularly from the agreements, as the various issues including this issue of the changes to the title of the proceedings and parties are discussed in these submissions. These facts are a part of the case law which must also be considered.

12. Even if all of the parties agreed to a change in the title of proceedings, it is our respectful submission that this Honourable Court ought to consider the possibility of the Settlement failing and ought to consider the impact upon the class if there is a settlement and the title to the proceedings is amended in this unorthodox matter which as will be developed is so called "merger" under the

Settlement Agreement which is not a word which exists in the Rules of Court. This issue of the title of the proceedings, which amounts to a joinder, amounts to a change of the parties to the proceedings, is one of the issues which affects not just the class but also MLG and we return to a discussion of this issue after submissions regarding the law generally as it would apply in this case.

LAW

General Law relating to approval of settlement agreements

13. In support of the argument that follows, three categories of legal sources are set out:

(1) law dealing with approval of settlement agreements;
(2) Settlement Agreement provisions; and
(3) other statutory and procedural materials.

(1) law dealing with approval of settlement agreements

Pre-requisite - certification

14. The plaintiff's action must be certified as a class proceeding in order for the settlement agreement to be approved: *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612 at paragraph 11.

statute

15. Relevant portions of section 29 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 are:

> **29.**(2) A settlement of a class proceeding is not binding unless approved by the court.
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
> (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.

16. In *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612, at paragraph 15, Gropper J. described the purpose of the statutory provision as "to ensure that the rights of absent class members are protected, given that they are not a party to the agreement."

Evidentiary Burden

17. The proponents of a settlement agreement have an evidentiary burden. They must come forward with "sufficient information". In *Ford v. F. Hoffman - La Roche Ltd.*, 2005 CanLII 8751 (ON S.C.):

> [123] A court "need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation. At minimum, a court must possess sufficient information to raise its decision above mere conjecture." The parties proposing the settlement have an obligation to provide **sufficient information** to permit the court to exercise its function of independent approval. Newberg, *supra*, at 11-100 & 11-101; *Dabbs v. Sun Life Assurance Co. of Canada, supra,* O.J. No. 1598, at para. 15.
>
> [124] While the court requires **sufficient evidence** to be able to exercise an objective, impartial and independent assessment of the fairness of the settlement in all of the circumstances, it is not necessary that formal discovery have occurred at the time of settlement. It is clear that settlements reached at an early stage of proceedings are appropriate. *Dabbs v. Sun Life Assurance Co. of Canada, supra,* O.J. No. 1598 at paras. 15 and 24.

Defendant gets no say

18. On the matter of legal fees, a Defendant has no right to make submissions unless provided for in the settlement agreement. In *Wilson v. Servier Canada Inc.*, 2005 CanLII 7128 (ON S.C.); (2005), 252 D.L.R. (4th) 742, Cumming J. wrote:

> [20] Given the reversionary interests of Servier in respect of the settlement monies, defendants' counsel asked to make submissions relating to the determination of the question of approved class counsel fees.
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> [21] The Court welcomed this submission. In the usual course of events, a court is left alone when it comes to considering the reasonableness of the requested class counsel fees. Defendants have agreed to a settlement and want it approved in the interest of their own clients and are indifferent to the fees paid to class counsel by class members.
>
> [22] Given the reversionary interest of Servier in the instant situation, defendants seek the Court's determination of "reasonable" class counsel fees that accord with their own view of reasonableness.
>
> [23] While the Court welcomes the submission of the defendants on this matter as a positive, constructively critical aid, **this Court does not view the intervention of the defendants as a "right."** The defendants have a clear "interest" in the outcome of the motion for the approval of class counsel fees. They are permitted to make submissions for that reason. But, in my view, **they do not have the "right" to intervene** in the determination of class counsel fees.
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> [24] In *Parsons v. Canadian Red Cross Society*, [2001] O.J. No. 214 (C.A.), leave to appeal to Supreme Court of Canada denied, [2001] S.C.C.A. No. 190, the Court of Appeal found at para. 13 that "[t]he settlement agreement... was the place where the defendants, if they intended to participate in the subsequent fixing of the fees and disbursements of class counsel, could have reserved their rights in this regard. There is no provision in the settlement agreement to this effect." The present case differs slightly in that paragraph 11(c) of the Settlement Agreement provides that the defendants are entitled to notice of a motion to determine "any further amount of Class Counsel Fees." The defendants submit that paragraph 11(c), on its face, clearly permits them to participate fully at the hearing of the motion to approve Class Counsel Fees. I disagree. On its face, the provision entitles them to reasonable notice of the hearing. **That provision should not be extended to include a *right* to make submissions.** As in *Parsons*, the defendants could have, but did not, ensure their right to make submissions by specifically including words to that effect in paragraph 11(c).

> [25] The defendants further submit that to **deny them full participation in the hearing** would be contrary to fundamental principles of justice and fairness, given their interest in the issue. They submit that theirs is the only interpretation of paragraph 11(c) that is consistent with the Settlement Agreement. The Settlement Agreement does not require that paragraph 11(c) be interpreted to include a right to standing and a right to make submissions. A contractual right to notice can be consistent with the **lack of a corresponding right to full participation**. Under various provisions of the Claims Administration Procedures, the defendants have a right to review all information and correspondence regarding approved claims, but no standing with regard to their determination by the claims adjudicators. I note that the defendants cannot challenge a claims adjudicator's determination. The defendants' various rights to information and notice reflect their role in the overall implementation of the settlement, but **do not automatically include full participation rights in every hearing.**
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> [26] In *Parsons, supra* the Ontario Court of Appeal found at para. 12 that having made submissions to assist Winkler J. in approving counsel fees did not mean that the defendants were parties to the motion since they did not seek, and were not granted, party status. While finding that the defendants were not parties, the court went on to say at para. 19 that **"[n]othing we have said, of course, is intended to reflect a view on whether or not defendants in some class proceedings should have the right to participate as parties with rights of appeal in fee-fixing motions or applications. Much will depend on the facts of the particular case."** In this case, the defendants attempt to distinguish *Parsons* based on the fact that they have "a clearly-defined contractual" interest in any residual Settlement Funds, and control of the Additional Settlement Funds. At para. 17 of *Parsons* the Court of Appeal recognized that the defendants had an interest in the fund surplus, but that the interest was "highly speculative and contingent." In my view, and I so find, the defendants' interest in the present case is similarly contingent and speculative. That the contingent, speculative interest is a contractual one does not sufficiently distinguish the facts of *Parsons*.
>
> [80] As an aside, it is noted that defendants' counsel do not volunteer their own docketed time, fees and disbursements in support of this class action. They are, of course, under no obligation to do so. Yet their own fees would offer an additional rough standard by which to measure the reasonableness of class counsel's base fee and requested counsel fees.

19. Having signed the Settlement Agreement by which the government is required to support all the provisions of the Agreement, the government now purports to state that they do not support legal fees as agreed for payment to MLG. The government may not do that. The Court if adopting the Settlement Agreement must adopt all of the Settlement Agreement which includes the support of the government for MLG fees.

20. The Settlement Agreement does not even permit the government to make submissions on MLG legal fees. They have no right to oppose or even make submissions respecting MLG legal fees. In *Endean v. CRC et al.*, 2005 BCSC 1396, the Honourable Mr. Justice Pitfield wrote:

> [10] The Federal Government takes no position in relation to this application. In doing so, counsel points to the fact that **the Federal Government was told that it had no standing to challenge the fees that were to be paid to counsel consequent upon settlement of the class actions.** Counsel cites the decision of the Court of Appeal in *Endean v. Canadian Red Cross Society* 2000 BCCA 638 (CanLII), (2000), 82 B.C.L.R. (3d) 287, 2000 BCCA 638, an appeal from the decision of the learned

chambers judge approving fees payable under the *Class Proceedings Act* in respect of work on behalf of the class. At para. 10, the Court of Appeal said the following:

> **The governments have no basis for complaint under the settlement agreements. The settlement agreements make no other provision for government involvement in the determination of counsel fees and there is nothing in the settlement agreements that give the governments standing to appeal the approval orders.**

[11] In the parallel Ontario action, *Parsons v. Canadian Red Cross Society* 2001 CanLII 24094 (ON C.A.), (2001), 140 O.A.C. 348, 11 C.P.C. (5th) 16, the Ontario Court of Appeal said the following at para. 16 in respect of a Federal Crown appeal in relation to fees:

> Canada has submitted that it has an interest in the surplus in the trust fund provided for in the settlement, the amount of which would be affected by the amount of counsel fees and disbursements approved, and that this interest gives it the right to participate in the fixing of counsel fees. In the context of the proceeding as a whole, and on the facts, we are not persuaded by the submission. It is based on the implicit contention that the government has a legal interest in the administration of the plan in so far as it bears on what may be returned to it at the end of its administration some eighty years in the future, but it is focussed entirely on that portion of the fund relating to counsel fees (2.3%) and not on any part of the balance of the fund. As we have said, with respect to this balance, none of the defendant appellants reserved any rights in the settlement agreement to protect this possible interest. In light of this, it is difficult to think that there was any contemplation of legal rights with respect to any possible surplus relating to that small portion of the fund that related to counsel fees.

[12] Applying the reasoning of both the Ontario and British Columbia Courts of Appeal that **the governments had no standing to oppose the award of aggregate counsel fees of $52.5 million payable** upon execution of the 1986-1990 Settlement Agreement, the Federal Crown claims that it can have no role in scrutinizing the reasonableness of accounts rendered by Joint Committee members in relation to the administration of the Fund.

Plaintiff's Counsel recommendations

21. On the appropriateness of the Settlement Agreement, the recommendations of experienced counsel will be accorded considerable weight. In *Ford v. F. Hoffman - La Roche Ltd.*, 2005 CanLII 8751 (ON S.C.):

> [141] The burden of proving that a settlement ought to be approved rests with the proponents, however, the recommendation of capable counsel is significant. The recommendation of class counsel is clearly not dispositive as class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputations for integrity and diligent effort on behalf of their clients is also at stake. *Dabbs* (Gen. Div.), *supra*, at 440.
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> [142] In the absence of evidence to the contrary, the recommendation of experienced counsel should be accorded considerable weight, as stated in *Manual for Complex Litigation, supra,* at §30.42:
>
> > [T]he judge should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms length negotiations between experienced, capable counsel after meaningful discovery.

> [143] In the normal course, once a court is satisfied that a settlement is the product of arm's length bargaining by experienced counsel, the settlement will be approved:
> As a practical matter, the overwhelming majority of proposed settlements are approved when the Court is satisfied that arms- length bargaining took place during settlement negotiations and experienced class counsel has recommended approval of the settlement. Newberg, *supra,* at 11-42.
>
> [144] Class Counsel and defence counsel have a unique ability to assess the potential risks and rewards of litigation. Class Counsel recommend approval of the proposed settlement. They have extensive experience in class action litigation and price-fixing litigation. In the absence of evidence to the contrary, the recommendation of these experienced counsel should be given considerable weight.

presumption of reasonableness - arm's length

22. When parties negotiate a settlement at arm's length, reasonableness is presumed. A consent certification and settlement approval occurred in *Gilbert v. Canadian Imperial Bank of Commerce*, 2004 CanLII 34176 (ON S.C.):

> [9] There is a presumption of fairness when a proposed class settlement negotiated at arms length by class counsel is presented to the court for approval. A court will only reject a proposed settlement when it finds that the settlement does not fall within a range of reasonableness.

23. *Ford v. F. Hoffman - La Roche Ltd.*, 2005 CanLII 8751 (ON S.C.)

> [113] There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval. *Manual for Complex Litigation,* Third §30.42 (1995). See *Cotton v. Hinton,* 559 F.2d 1326 (5th Cir. 1977) at 1330; *Dabbs* (Gen. Div.), *supra,* at 440.

Closely scrutinized

24. But because the rights of unrepresented class members are at stake, the terms of the settlement should be closely scrutinized by the Court. Ratushny J. for the Ontario Superior Court of Justice in *Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada Ltd*, 2004 CanLII 10552 (ON S.C.):

> [36] In *Dabbs No. 2* at pages 439-440, Sharpe J. said:
>
> > In my previous ruling I indicated that the standard to be met by the parties seeking approval of the settlement is whether in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to **scrutinize the proposed settlement closely** to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be **seriously scrutinized** by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

But not too closely

25. At the same time, the Court is not to be too picky. There is a public interest in settlement. In *Scott v. Ontario Business College (1977) Ltd.*, 2004 CanLII 12288 (ON S.C.), Shaunessy, R.S.J.:

> [15] The *Dobbs* case also cites a passage from the judgment of Callaghan, A.C.J.H.C. in *Sparling v. Southam Inc.*, (1988), 66 O.R. (2d) 225 at 230-1, as being equally applicable to class action proceedings:
>
> > In approaching this matter, it should be observed at the outset that the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement....
> >
> > .... In deciding whether or not to approve a proposed settlement....the court must be satisfied that the proposal is fair and reasonable.... In considering these matters, the court must recognize that settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of upper and lower limits.
> >
> > In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber stamp the proposal.

26. This theme was emphasized in *Ford v. F. Hoffman - La Roche Ltd.*, 2005 CanLII 8751 (ON S.C.)

> [111] The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy. As observed in *Amoco Canada Petroleum Co. v. Propak Systems Ltd.* 2001 ABCA 110 (CanLII), (2000), 200 D.L.R. (4th) 667 at 677 (Alta. C.A.):
>
> > In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice.
>
> [112] Similar sentiments have been expressed by Cronk. J.A., in *J.M. v. W.B.*, [2004] O.J. No. 2312 at para. 65 (C.A.) :
>
> > Finally, there is an additional, and powerful, reason to support the implementation of the Agreements in this case: the **overriding public interest** in encouraging the pre-trial settlement of civil cases. This laudatory objective has long been recognized by Canadian courts as fundamental to the proper administration of civil justice...Furthermore, the promotion of set0tlement is especially salutary in complex, costly, multi-party litigation.

Give and Take

27. Courts recognize that settlements are compromises, and a settlement may be approved if it falls within a range or zone of reasonable outcomes. In *Gilbert v. Canadian Imperial Bank of Commerce*, 2004 CanLII 34176 (ON S.C.) at paragraph 10:

> [10] The test to be applied is whether the settlement is fair and reasonable and in the best interests of the class as a whole. This allows for a range of possible results and there is no perfect settlement. Settlement is a product of compromise, which by definition, necessitates give and take. It is a question

of weighing the settlement in comparison to the alternative of litigation with its inherent risks and associated costs.

28. The record before the Court illustrates that MLG and other lawyers have given up their contractual rights under the contingency agreement in exchange for payments under the Settlement Agreement. In this settlement, MLG gave, and the government took. MLG gets in return. The Class gets. But only if MLG gets what it is to get. **The giving and taking must occur together. The class is not to get CEP payments without having to pay on their contingency arrangements with lawyers unless lawyers receive legal fees that are to be paid pursuant to the Settlement Agreement and in exchange for surrendering contractual contingency rights against their clients.**

29. **MLG, we submit respectfully, is entitled to get at the same time that it gives. At the same time that MLG loses its right to one third of CEP payments, MLG is entitled to have fees pursuant to the Settlement Agreement and the AIP awarded pursuant to court order. We submit respectfully that this Honourable Court may not take away MLG's entitlement to payment on the contracts which MLG has with its clients, except in accordance with the strict terms of the Settlement Agreement. Those terms strictly provide that if MLG gives up its entitlement to receive approximately 1/3 of the CEP payments then MLG in return will receive payment in accordance with the Settlement Agreement which in term provides for payment pursuant to the Agreement in Principle (AIP).**

30. The Court, we submit respectfully, may not create a new agreement. The Court may not put into effect the term from the Settlement Agreement which takes away MLG's entitlement to 1/3 of the CEP payments of our clients without at the very same time putting into effect the terms of the Settlement Agreement by which MLG receives payment. This Honourable Court, we submit respectfully, no court, may ignore the terms of the Settlement Agreement by which all of the terms are to come into effect and force at the same time.

fair and reasonable and in the best interests of those affected by it

31. The overriding criteria is whether the settlement is fair and reasonable and in the best interests of the class as a whole and not any particular class member. In *Scott v. Ontario Business College (1977) Ltd.*, 2004 CanLII 12288 (ON S.C.), Shaunessy, R.S.J.:

> **The Law**
> [12] The law to be applied in determining whether a settlement ought to be approved is whether the settlement is, in all the circumstances, fair, reasonable and in the best interests of the class as a whole. Section 29 of the *Class Proceedings Act*, 1992 provides that a "settlement of a class proceeding is not binding unless approved by the court."

32. See also: *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612 (CanLII) at paragraph 16; *Fakhri et al. v. Alfalfa's Canada, Inc. cba Capers*, 2005 BCSC 1123 (CanLII) at paragraph 8; *Killough v. Can. Red Cross*, 2001 BCSC 1060 (CanLII); (2001), 91 B.C.L.R. (3d) 309 at paragraph 20; *Ford v. F. Hoffman - La Roche Ltd.*, 2005 CanLII 8751 (ON S.C.) at paragraph 10; *Wilson v. Servier Canada Inc.*, 2005 CanLII 7128 (ON S.C.); (2005), 252 D.L.R. (4th) 742 at paragraph 39; *Kanagaratnam v. Li*, 2005 CanLII 5342 at paragraph 33; *Kelman v. Goodyear Tire and Rubber Co.*, 2005 CanLII 803 (ON S.C.) at paragraph 11; *Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada Ltd*, 2004 CanLII 10552 (ON S.C.) at paragraph 35.

33. The focus on the best interests of "the class as a whole" is appropriate in some settlements. But **in this settlement, MLG submits that the proper standard is "those affected by it"**. An example of why that standard is appropriate for this settlement is that an order respecting legal fees is submitted for approval even though many individual lawyers are not before the Court but whose interests will be affected. Not only is MLG a party to the Settlement Agreement, not only is MLG a party to this litigation, (and we will present the holding of Mr. Justice Ball in that regard) but MLG is very much effected by the disposition by this Honourable Court. MLG is losing the benefit of retainer agreements agreed to by thousands of its clients. Retainer agreements are in writing. They are binding. MLG in some instances has worked for clients for close to a decade in reliance upon the retainer agreements. MLG is very much affected by whatever decisions are made by this Honourable Court.

34. In reality the government bought out lawyers' contractual contingency fee rights. They bought these contractual contingency fee rights for good purposes. These purposes were a part of the discussions leading up to the execution of the AIP. The Court must be satisfied that the Agreement overall is fair and reasonable but the Court is not setting legal fees in the ordinary way that often occurs when a class action has been settled.

35. Normally class action lawyers have no legal agreement with clients. They may have an agreement in writing with one or two of the members of the class who are presented as representative plaintiffs. In this instance MLG, and other lawyers, have contractual rights which have nothing to do with the class proceedings. Those contractual rights, to a share of the CEP, have been bargained way by MLG and MLG is entitled to receive the benefit of the Settlement Agreement at the same time as the government receives the benefit, as the government perceived it, of the Settlement Agreement.

36. **This phraseology of "those affected by it" has been endorsed repeatedly**: *Kanagaratnam v. Li*, 2005 CanLII 5342 recently endorsed that principle without any qualification at paragraph 33:

> **Should the Settlement be Approved?**
> [33] A settlement of a class proceeding must be fair and reasonable and in the best interests of **those affected by it.**

37. This was the original phraseology in the leading decision of *Dabbs v. Sun Life Assurance Co. of Canada*, (1998), 40 O.R. (3d) 429 (Gen. Div.) at page 440. In Ontario, **Ratushny J.** for the Ontario Superior Court of Justice in *Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada Ltd*, 2004 CanLII 10552 (ON S.C.) **also approved the "those affected by it" terminology without qualification** at paragraph 35, relying on the leading authority of *Dabbs, supra*:

> [34] The criteria to be applied on a motion for approval of a settlement have been set out in various cases: *Dabbs v. Sun Life Assurance Co. of Canada,* [1998] O.J. No. 1598 (Gen. Div.) ("*Dabbs No. 1*"); *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572 (S.C.J.); *Ontario Colleges of Applied Arts and Technology v. Ontario Public Service Employees Union,* [2003] O.J. No. 4153 (S.C.J.); *Dabbs v. Sun Life Assurance Co. of Canada,* (1998), 40 O.R. (3d) 429 (O.C.G.D.) ("*Dabbs No. 2*"); *Gariepy v. Shell Oil Co.,* [2002] O.J. No. 4022 (S.C.J.); *Fraser v. Falconbridge Ltd.,* [2002] O.J. No. 2383 (S.C.J.).

[35] As stated by Sharpe J. in *Dabbs No. 1* at paragraph 9, the Court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of **those affected by it**.

[36] In *Dabbs No. 2* at pages 439-440, Sharpe J. said:

> In my previous ruling I indicated that the standard to be met by the parties seeking approval of the settlement is whether in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. **A settlement of the kind under consideration here will affect a large number of individuals who are not before the court**, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those **affected by it** when compared to the alternative of the risks and costs of litigation.

38. The reason why the focus is not solely on the best interests of the class as a whole in this settlement is apparent on a review of the Settlement Agreement and affidavit evidence filed. In this Settlement Agreement, MLG and other lawyers are Parties to the Settlement Agreement and Parties to the litigation. Emphasizing this fact, Ball J. has already held, which by *res judicata* is binding on the government, "First, I am not persuaded that MLG is not a party to this litigation..." Other lawyers for the AFN and Inuit were present in the negotiations to guard the interests of the class as MLG and other lawyers bargained as separate entities outside of the traditional role of class counsel.

39. The focus away from the sole criterion of the "class as a whole" is also appropriate given the class members will be notified of the settlement and certification process and given a right to opt out. The normal procedure is for a contested certification hearing, followed by notice of the relief sought and an opt-out period. Settlement is arrived at after it is too late to opt out.

40. The focus away from the sole criterion of the "class as a whole" must occur, we submit respectfully, in this instance because this Honourable Court is dealing with MLG and other lawyers, both as class counsel. The Court is dealing with the Baxter and Cloud National Consortium (BNC) as class counsel. The court is dealing with MLG as class counsel. Additionally, in the case of MLG

and the BNC, and also other lawyers who have contractual rights which have been bargained away in exchange for payment by the government, there is both a class counsel component to the appearance of lawyers before the Court (as regards MLG and BNC) and another component for all lawyers in that they bargained away their contingency rights in exchange for benefits to be ordered by each court. The criterion of the "class as a whole" has no application whatsoever to dealing with the right of MLG to receive payment for loss of benefits of MLG's contingency fee agreements with its thousands of clients.

41. In this unique settlement, class members will be notified and given a right to opt out and not be bound by the relief awarded, in exchange for release of present and future litigation rights. The opt-out right protects those who want individually tailored remedies. Quoting Winkler RSJ, Ratushny J. for the Ontario Superior Court of Justice in *Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada Ltd*, 2004 CanLII 10552 (ON S.C.):

> [37] In *Parsons* at paragraphs 79-80, Winkler J. wrote:
>
> > It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscient wisdom to which neither this Court nor the parties have ready recourse. 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 mandates the class members retain, for a certain time, the right to opt out of the 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 circumstances. In this case, there is the added advantage in that a class member will have the choice to opt out while in full knowledge of the compensation otherwise available by remaining a member of the class.
> >
> > This settlement must be reviewed on an objective standard, taking into account the need to provide compensation for all of the class members while at the same time recognizing the inherent difficulty in crafting a universally satisfactory settlement for a disparate group. In other words, the question is does the settlement provide a reasonable alternative for those Class Members who do not wish to proceed to trial?

A good trade

42. The Court may nevertheless embark on an analysis of whether the surrender of litigation rights is fairly compensated by the relief awarded and each party including MLG must receive the benefits of its bargain. In *Ford v. F. Hoffman - La Roche Ltd.*, 2005 CanLII 8751 (ON S.C.):

> [128] In reviewing the terms of a settlement, a court must be assured that the settlement secures an adequate advantage for the class in return for the compromise of litigation rights; Newberg, *supra*, at 11-46.

43. Public pressure was an important part of bringing the government to decide that settlement was needed. The litigation process was an important part of bringing the government to conclude that settlement was needed. These are issues related to whether the settlement is fair and reasonable and whether the fees were fair and reasonable.

Three Objectives

44. A settlement agreement should also promote the three objectives of class proceedings legislation. In *Ford v. F. Hoffman - La Roche Ltd.*, 2005 CanLII 8751 (ON S.C.):

> [145] The proposed settlement achieves the legislative goals of the *CPA* and affords significant judicial efficiency and economy, while allowing access to justice through an efficient and cost effective distribution mechanism. To the extent that civil damages are paid to or for the benefit of the class over and above the criminal fines and penalties which have been paid by some Settling Defendants, there will be an incentive for these Settling Defendants, and others, to refrain from engaging in the type of behaviour complained of in the future.
>
> ...
>
> [186] In approving the settlement in *Hoechst,* this Court recognized that such settlements and payments "serve the important policy objective of general and specific deterrence of wrongful conduct through price-fixing." *Hoechst, supra*, at para. 16.
>
> [187] The *CPA* is remedial and is to be given a generous, broad, liberal and purposive interpretation. The three goals of a class action regime, as recognized by the 1982 Ontario Law Reform Commission's *Report on Class Actions* (vol. 1 (Toronto: Ministry of the Attorney General, 1982)), by the Attorney General's Advisory Committee on Class Action Reform and by the Supreme Court of Canada, are judicial efficiency, improved access to the courts and behaviour modification. *Interpretation Act*, R.S.O. 1990, c. I-11, s. 10; *Hollick, supra,* at para. 15; *Western Canadian Shopping Centres, supra,* at paras. 27-29.

45. In *Wilson v. Servier Canada Inc.*, 2005 CanLII 7128 (ON S.C.); (2005), 252 D.L.R. (4th) 742, Cumming J. wrote:

> [60] The efficacy of the underlying three policy objectives to the *CPA* are seen in the litigation at hand. The first policy objective is 'access to justice.' The individual class members most certainly could not realistically have had access to justice if forced to pursue their claims individually. The short answer, in effect, of the defendants throughout the course of the litigation to the Canadian class members' claims (in respect of allegedly defective drugs marketed by the defendants in Canada) was that each claimant should come to France and individually sue the defendants.
>
> [61] The second policy objective is to achieve 'efficiency in the use of resources' necessary to the litigation process. By combining all claimants in one class action there is obvious greater efficiency and economy for all participants (including the courts) in the adjudication of common issues. One cannot realistically imagine a nine-month trial for each of a vast multitude of claimants to determine issues common to all, in particular, whether the defendants' Products cause VHD or PPH.
>
> [62] Finally, the third policy objective is 'behaviour modification.' There are limited public resources available to ensure that defective drugs are not brought into or maintained in the Canadian market upon it being realized there are possible problems. The public regulator is assisted greatly by the

> private sector through the *CPA* enabling class actions. In exchange for the possibility of sizeable legal fees through a class action on behalf of a private group of claimants, class counsel indirectly serves a public purpose. The drug industry knows that it is more likely to be held accountable for unlawful behaviour in the marketplace. Hence, it is more likely that drug companies will act responsibly in the first instance in researching, manufacturing and marketing drugs and in advising and disclosing to the public known risk factors in using drugs.

all or nothing

46. A court may not redraft the agreement for the parties. It may either accept it or reject it, not change it, nor cherry pick some parts for approval but not other parts. In *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612, the Honourable Madam Justice M. Gropper:

> [16] The test for approval is whether the settlement is fair and reasonable and in the best interests of the class as a whole (*Dabbs v. Sun Life Assurance Co. of Canada*, (1998) 40 O.R. (3d) 429, 5 C.C.L.I. (3d) 18 (Gen. Div.) at para. 9; *Haney Iron Works Ltd. v. Manulife Financial*, 1998 CanLII 3085 (BC S.C.), (1998) 169 D.L.R. (4th) 565, 9 C.C.L.I. (3d) 253 (S.C.) at para. 27; *Fakhri v. Alfalfa's Canada*, 2005 B.C.S.C 1123, at para. 8). **The court has the power to approve or reject a settlement, but may not modify or alter a settlement** (*Haney Iron Works, supra* at para. 22; *Dabbs, supra* at para. 10). The settlement is judged by a standard of reasonableness, not perfection (*Haney Iron Works, supra* at para. 22; *Dabbs, supra*; *Fakhri, supra* at para. 9).

47. And in *Ford v. F. Hoffman - La Roche Ltd.*, 2005 CanLII 8751 (ON S.C.):

> [127] The function of a court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of possibly improving the terms of the settlement. It is within the power of the court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. **However, the court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement.** *Dabbs v. Sun Life Assurance Co. of Canada, supra*, O.J. No. 1598 at para. 10; *Manual for Complex Litigation, supra*, at §30.42.

48. In *Wilson v. Servier Canada Inc.*, 2005 CanLII 7128 (ON S.C.); (2005), 252 D.L.R. (4th) 742, Cumming J. using the same words wrote:

> [49] The function of the Court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of possibly improving the terms of the settlement. It is within the power of the Court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. **However, the Court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement.** See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 at para. 10 (Gen. Div.); *Manual for Complex Litigation*, Third §30.42 (1995).

49. There is an exception where counsel agrees before the Court as to terms that are not in the settlement agreement. In *Kanagaratnam v. Li*, 2005 CanLII 5342, M.A. Sanderson J. of the Ontario Superior Court of Justice considered a consent certification and settlement approval:

> [44] Ordinarily a court must either approve or reject the settlement proposed by the parties. I make this order on the understanding that the parties are prepared to agree to include the additional terms specified. If they are not prepared to do so, counsel may make further submissions.

50. In the present case, MLG does not agree to anything other than what is in the Settlement Agreement. MLG makes no submissions about the possible situation before a court where the case had been a pure class action. Submissions about such a situation are irrelevant to the case at bar. **The affidavit of the Honourable Frank Iacobucci, Q.C. talks of the settlement of legal fees with MLG being a "hybrid" situation.** The evidence is clear. **MLG has a class action entitlement in connection with its class action in Ontario and elsewhere. MLG also has an entitlement flowing from the agreements with the government that MLG will give up its contractual rights under its contingency agreement with its clients in exchange for payment by the government.** The fact that the payment by the government is included with the class action entitlement does not make the payment by the government a class action payment. It remains a hybrid payment. And **the payment maintains its character of consideration flowing to MLG in exchange for MLG giving up contractual rights with thousands of clients** which would have paid to MLG far more than $40 million.

51. **Because this is a hybrid payment, payment for class action work and for individual work, and secondly because the form of payment for the individual work is by the Settlement Agreement and the AIP based upon MLG giving up its contractual rights to a share of the contingency agreements which has with its clients, the usual case law by which judges may defer decisions about legal fees has no application.**

52. Flowing 1- from the specific and repeated references in the Settlement Agreement which in essence say, 'All terms must come into effect at once', flowing 2- from the hybrid nature of the issue of fees, and flowing 3- from the give and get by MLG giving up its contingency fee entitlement for a payment to be awarded at the same time, is we submit respectfully without any power by this Honourable Court, to make an order bringing into effect other terms of the Settlement Agreement without at the same time bringing into effect an order for the payment of legal fees, disbursements, and tax to MLG.

53. These submissions discuss ordinary class proceedings and the jurisprudence related to approval of settlement agreements within ordinary class proceedings. But as regards legal fees to MLG, and also to the BNC, the Court is not just dealing with class proceedings and the authorities regarding class proceedings in some ways have no application.

Range of reasonableness

54. The Court may approve a settlement that falls within a range or reasonableness. In *Scott v. Ontario Business College (1977) Ltd.*, 2004 CanLII 12288 (ON S.C.), Shaunessy, R.S.J.:

> [15] The *Dobbs* case also cites a passage from the judgment of Callaghan, A.C.J.H.C. in *Sparling v. Southam Inc.*, (1988), 66 O.R. (2d) 225 at 230-1, as being equally applicable to class action proceedings:
>
> > In approaching this matter, it should be observed at the outset that the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement....
> >
> > .... In deciding whether or not to approve a proposed settlement....the court must be satisfied that the proposal is fair and reasonable.... In considering these matters, the court must recognize that settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of upper and lower limits.
> >
> > In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber stamp the proposal.

55. In *Wilson v. Servier Canada Inc.*, 2005 CanLII 7128 (ON S.C.); (2005), 252 D.L.R. (4th) 742, Cumming J. wrote:

> [40] In general terms, the Court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the Court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a "zone or range of reasonableness":
>
> > all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation: *Dabbs v. Sun Life Assurance Co. of Canada, supra*, at 440 (Gen. Div.); H. Newberg, A. Conte, *Newberg on Class Actions*, 3d ed., looseleaf (Colorado: Shepard's/McGraw-Hill Inc., 1992) at 11-104.

56. A measure of perfection is not required. Ratushny J. for the Ontario Superior Court of Justice in *Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada Ltd*, 2004 CanLII 10552 (ON S.C.):

> [37] In *Parsons* at paragraphs 79-80, Winkler J. wrote:
>
> > It is well established that settlements need not achieve a standard of perfection...the class members retain, for a certain time, the right to opt out of the class proceeding. ... In this case, there is the added advantage in that a class member will have the choice to opt out while in full knowledge of the compensation otherwise available by remaining a member of the class.

Factors for settlement approval

57. A series of factors have been employed in measuring the fairness and reasonableness of a settlement. In *Scott v. Ontario Business College (1977) Ltd.*, 2004 CanLII 12288 (ON S.C.), Shaunessy, R.S.J.:

> [13] In the decision of *Dobbs v. Sun Life Assurance Co. of Canada,* [1998], O.J. No. 1598 (Para 13), Mr. Justice Sharpe of the Ontario Court of Appeal cited with approval a number of factors to be considered for approval of the settlement agreement as follows:
>
> 1. Likelihood of recovery, or likelihood of success;
> 2. Amount and nature of discovery evidence;
> 3. Settlement terms and conditions;
> 4. Recommendation and experience of counsel;
> 5. Future expense and likely duration of litigation;
> 6. Recommendation of neutral parties, if any;
> 7. Number of objectors and nature of objections;
> 8. The presence of good faith and the absence of collusion.
>
> [14] The above referenced criteria are simply guidelines and do not constitute a rigid set of criteria for assessing the reasonableness of a settlement. In *Tesluk v. Boots Pharmaceutical PLC,* 2002 CarswellOnt 1266, (Para 11), Justice Winkler held that risk and cost factors were important issues in assessing the reasonableness of a settlement.

58. See also: *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612 at paragraphs 17 and 18; *Fakhri et al. v. Alfalfa's Canada, Inc. cba Capers*, 2005 BCSC 1123 at paragraphs 8 and 9. At paragraph 10 of *Fakhri, supra,* the purpose of the factors was stated:

> [10] The purpose of applying the various factors that have been enunciated by the courts is to determine whether a settlement is fair and reasonable and in the best interests of the class as a whole by balancing the benefits of the settlement against the potential risks and benefits of continuing with the litigation. In assessing settlement courts have also looked at how the settlement was negotiated to ensure the settlement agreement is the product of good faith bargaining between the parties. After considering all of the circumstances the court must be satisfied that the settlement is fair, reasonable and in the best interests of those affected by it. *Haney Iron Works Ltd., supra,* at ¶ 24 – 27.

59. See also *Killough v. Can. Red Cross*, 2001 BCSC 1060 (CanLII); (2001), 91 B.C.L.R. (3d) 309 at paragraph 20; *Ford v. F. Hoffman - La Roche Ltd.*, 2005 CanLII 8751 (ON S.C.) at paragraph 117 and 118; *Wilson v. Servier Canada Inc.*, 2005 CanLII 7128 (ON S.C.); (2005), 252 D.L.R. (4th) 742; *Kanagaratnam v. Li*, 2005 CanLII 5342, M.A. at paragraph 37. Sanderson J. of the Ontario enumerated the following list of factors in the context of a consent certification and settlement approval:

> [37] Factors to be considered include:
> (a) the likelihood of recovery or success;
> (b) amount and nature of discovery evidence;
> (c) settlement terms and conditions;
> (d) recommendation and experience of counsel;
> (e) future expense and likely duration of litigation;
> (f) recommendation of neutral parties, if any;
> (g) the presence of good faith and the absence of collusion;
> (h) the degree and nature of communications between counsel and the representative plaintiff, with class members during the litigation; and
> (i) the dynamics of, and the positions taken by the parties during the negotiation.
> *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.)

60. The factors are not to be given equal weight. In *Gilbert v. Canadian Imperial Bank of Commerce*, 2004 CanLII 34176 (ON S.C.):

> [11] There are a number of factors, not all to be given equal weight, which are to be considered in determining whether to approve a settlement. These include likelihood of success, degree of discovery, the terms of the settlement, recommendation of counsel, expense and duration of litigation, number of objectors, presence of arms length bargaining, extent of communications with the class and the dynamics of the bargaining. See: *Dabbs v. Sun Life Assurance Co. of Canada,* 40 O.R. (3d) 429; *Parsons v. The Canadian Red Cross Society,* 40 C.P.C. (4th) 151.

61. In this case, the specific terms of the Settlement Agreement are paramount and receive binding weight. All or none may be approved. We submit respectfully that it would be open to the Court to inquire of the parties concerning an issue or issues, and it might be possible for one of the nine courts to indicate that unless there were unanimous agreement on a change then the Court might refuse to grant an order of approval, but it would not, we submit, be open to the Court to change in the slightest any of the terms of the Settlement Agreement.

Factors for approval of legal fees

62. **The factors to be considered in approving a settlement agreement are distinct from the factors to be considered in approving an agreement respecting fees and disbursements between a lawyer and a representative plaintiff.** In class actions where a motion is brought to approve legal fees various factors are considered. In *Fischer v. Delgratia Mining Corp.*, [1999] B.C.J. No.3149 (Q.L.) at para. 22). These include:

1. the results achieved;
2. the risks undertaken;
3. the time expended;
4. the complexity of the matter;
5. the degree of responsibility assumed by counsel;
6. the importance of the matter to the client;
7. the quality and skill of counsel;
8. the ability of the class to pay;
9. the client and the class' expectation; and
10. fees in similar cases.

On the adjournment of motion

63. The government has raised the purview of an adjournment of the motion in two ways. First, the government may not commit to terms of an agreement and then renege on one of the terms. The government in the Settlement Agreement is required to approve of all the terms. MLG may not agree and then take the position it does not approve of the CEP payment or $20 Million being paid for commemoration. The AFN may not take the position that negotiations with the churches have gone poorly and the AFN now opposes parts of the Settlement Agreement regarding the churches. We submit the government may not change its mind about agreeing to the entire Settlement Agreement. But if the government were permitted to withdraw its support for one term of the Settlement Agreement, rather than having its support deemed to be continued regarding all the terms, then that would raise the purview of an adjournment of the motion in its entirety.

64. Second, the government seeks to strike all or part of the affidavit filed on behalf of MLG. The authorities which will be discussed later in these submissions indicate that if such an order were made, the procedure would be to adjourn the motion to allow for new affidavit evidence.

65. And last regarding the purview of a possible adjournment we reiterate our submission that this is not a standard application with the usual three stages which occurs in class proceedings.

66. This is not a standard three stage application. In Ontario and elsewhere, a standard three stage application consists of (1) certification (2) settlement approval and (3) fee approval.

67. This is not a standard application because the approval is a part of the overall process given that MLG and others negotiated away contractual rights in exchange for the agreement regarding fees. This is not a standard application as regards MLG fees because, as the affidavit of the Honourable Frank Iacobucci points out, fees to MLG are paid on a "hybrid basis".

68. This is also different from ordinary class proceedings because of the oddities of the way this agreement is to come before the Courts and come into effect.

69. **This settlement is odd in the extreme** and truly **bizarre** in that (1) **legal fees are** determined as a component of the settlement approval motion as part of the Settlement Agreement and **not a separate application to approve legal fees** [which had to be the case because lawyers bargained away their contingency fee entitlement], (2) the **certification order**, usually a pre-requisite to approval of a settlement agreement, **may only issue if the settlement approval order is granted** first, (3) the Settlement Agreement is **binding** on the parties **only after all appeals** are dealt with **and the opt-out** figure is less than 5,000, but the Settlement Agreement calls for the obligations to consent to the certification order and payment of legal fees pursuant to an agreement which is as yet unapproved, and (4) there is to be for the first time in Canada (and likely the last time here or anywhere) **nine court orders**, and **one "no" trumps** every "yes". **The government chose, indeed insisted upon this bizarre procedure**, and now seeks to avoid the consequences which flow from their choice. There is no obligation, therefore, on a strict reading of the Settlement Agreement *vis-a-vis* the statute and case law, to even apply for the certification of the action as a class action with an omnibus statement of claim:

> **4.05 Consent Certification**
>
> (1) The Parties agree that concurrent with the applications referred to in Section 4.03, applications will be brought in each of the Courts **for consent certification of each of the Class Actions** for the purposes of Settlement in accordance with the terms of this Agreement.
>
> (2) **Consent certification will be sought on the express condition that each of the Courts,** pursuant to the applications for consent certification under Section 4.05(1), **certify on the same terms and conditions,** including the terms and conditions set out in Section 4.06 save

> and except for the variations in class and subclass membership set out in Sections 4.02 and 4.04 of this Agreement.
>
> **4.09 National Certification Committee**
> (1) The Parties agree to the establishment of **a NCC with a mandate to:**
> (c) obtain consent certification and approval of the Approval Orders in the Courts on the express condition **that the Courts all certify on the same terms and conditions.**

70. In short, **the Court is asked to approve an agreement under which the parties have no obligations unless and until the Court approves the Settlement Agreement, unless and until nine judges approve, and even then, no obligations truly arise until the Implementation Date,** which arises after appeals are dealt with and after the Opt-Out Period has expired.

71. For the sake of convenience, however, in the context of the statutory and procedural scheme in Ontario, and because of the terms of the Settlement Agreement which does not contemplate a separate application for the approval of legal fees, this motion is in two parts:

(1) certification; and

(2) settlement approval.

72. This two stage procedure flows from the definition of "Approval Order", which does not make reference to a separate motion being brought for the payment of legal fees. But while the motion is in two parts, the Settlement Agreement mandates that all three components are one.

73. In some motions for approval of a settlement, the Court might approve the settlement for the class and then hear an application for fee approval at some other date. Some examples illustrate this. One example was the decision of Winkler RSJ in *Kelman v. Goodyear Tire and Rubber Co.*, 2005 CanLII 803 (ON S.C.):

> **Nature of the Motion**
> [1] This action was certified by this court as a class proceeding for the purposes of effecting a settlement on November 17, 2003. On November 2, 2004, the plaintiffs brought motions for approval of the settlement and class counsel fees. I approved the settlement, with reasons to follow, and reserved on the motion relating to fees pending delivery of further materials from class counsel. On November 24, 2004, class counsel filed the additional materials requested regarding the fees. My reasons for approval of the settlement and class counsel fees follow.

74. The government was not prepared to agree to such a settlement, the *standard* sort of settlement because the government did not want to find itself certified into litigation if the settlement went unaccepted by the nine courts. The lawyers were not prepared to agree to the usual stages one and two without certainty of stage three (fee approval). This is because the lawyers, in the Settlement Agreement, bargained away the benefit of their contingency retainer agreements which would be lost in stage two in normal proceedings with an uncertain result in stage three. Hence, the parties agreed that for giving up their contingency rights, and for the Baxter/Cloud and Merchant lawyers giving up class counsel fee entitlement, the Settlement Agreement as to fees is a part of the Settlement Agreement and must be approved at the same time as stages one and two.

75. The government, indeed none of the parties, may bargain for a certain result, an unusual result, an unusual procedure, and the government insisted on this unusual procedure, and then when it suits one or more of the parties, take from MLG or any party, the benefits of a strict application of the Settlement Agreement.

76. The Honourable Mr. Justice K.J. Smith in *Killough v. Can. Red Cross*, 2001 BCSC 1060 (CanLII); (2001), 91 B.C.L.R. (3d) 309:

> [2] As well, the hearing concerned Mr. Manson's application on behalf of the Public Guardian and Trustee for standing to make submissions in relation only to the application for approval of plaintiffs' class-counsel legal fees and disbursements, which will be heard at a date yet to be fixed. Mr. Underhill advised that he appeared on a watching brief for his client, the Canadian Hemophilia Society, and that he anticipated that the issues with which his client is concerned would be worked out by agreement. I assume that they have been.

77. Other examples of adjourning the approval of legal fees include *Mura v. Archer Daniels Midland Co.*, 2003 BCSC 1164; (2003), 18 B.C.L.R. (4th) 194. In a parallel class actions national settlement in *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2002 BCSC 379, the British Columbia Supreme Court found it appropriate to hear an application for approval of legal fees following the approval of a settlement even though Ontario and Quebec Courts had already approved the settlement and legal fees. The settlement agreement, by inference, did not call for the same legal fees to be awarded by each Court:

INTRODUCTION

[1] This application arises out of class action litigation relating to allegations of price fixing in connection with the sale of citric acid and products, containing or derived from citric acid, between July 1, 1991, and June 27, 1995. I approved settlement of the action in British Columbia on November 9, 2001, when I certified the claims under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. Settlement had earlier been approved in Ontario by Mr. Justice Winkler on October 23, 2001.

[2] Class counsel in British Columbia now seeks an order approving their fees and disbursements. They seek approval of class counsel legal fees in the amount of $190,000 plus applicable taxes. Mr. Justice Winkler approved the fees and disbursements of Ontario class counsel. The fees and disbursements of the Quebec Class Counsel have recently been approved.

[3] Counsel for the defendants oppose the quantum of the proposed fees. They say that a fee, in the range of $30,000 to $50,000 at the most, would be reasonable and appropriate.Å

BACKGROUND

[4] In 1999, class actions were commenced in Ontario against the same defendants as here, alleging price fixing and market share allocations. Prior to the commencement of those proceedings, the defendants had all entered guilty pleas to a charge of conspiracy to fix prices of citric acid pursuant to s. 45 of the *Competition Act*, R.S.C. 1985, c. C-34.

[5] The Ontario action was commenced by Siskinds, Cromatie, Ivey and Dowler on November 8, 1999. They were the lead counsel overall.

[6] On November 10, 2000, the parties signed an agreement in principle setting out the basic parameters of the settlement. Earlier, on October 25, 2000, Siskinds wrote to the defendants' counsel, suggesting that:

> In terms of providing as complete a release as possible, we would like to discuss whether the defendants would like an action to be commenced in British Columbia. J.J. Camp is ready, willing and able to commence such an action if we deem it advisable. Our view is that this action should be commenced sooner rather than later in order to ensure that an action is commenced by someone who thinks differently than us.

[7] The British Columbia action was commenced on November 27, 2000. The representative of the British Columbia plaintiffs, Sun-Rype, executed a contingency fee agreement, as of January 2, 2001, which provided that British Columbia counsel would pay all expenses associated with the litigation and would only be paid in the event of success. The applicable percentage depended on when the litigation was settled. In this case, given approval of the settlement by the Court on November 9, 2001, the applicable percentage under the contract was 20 percent.

[8] Under the final settlement agreement, the defendants agreed to pay the British Columbia, Ontario and Quebec class members the amount of $6,918,208, plus notice and administration expenses, party and party costs of $800,000 and interest at 5 percent, annually, on unpaid amounts.

[9] The defendants' obligation under the settlement agreement was to be reduced only if a distributor or manufacturer who had purchased citric acid opted out of the settlement. There was no reduction if intermediaries or consumers opted out. Although there was no specific portion of the settlement amount designated for British Columbia, the Ontario class counsel and the British Columbia class counsel agreed amongst themselves, that based on population statistics, the value of the settlement attributable to British Columbia was $1,780,000.

> [10] According to the British Columbia class counsel's time records filed as of November 20, their time cost at their normal hourly rates was slightly under $90,000, plus disbursements of $2,863.56, which disbursements they propose bearing as part of their fee.

78. **These cases have no application in the case at bar because MLG and other lawyers bargained away their contingency fee entitlement in exchange for the benefit to be received from the Settlement Agreement. These cases have no application in the case at bar because of the hybrid nature, payment for individual work on behalf of clients, as well as class action payment, to be paid to MLG.**

Relevant provisions of this Settlement Agreement

Settlement Agreement

79. Relevant Provisions of the Settlement Agreement do not permit the amendments proposed to the title of the proceeding, the change in parties, or the change of class counsel, *at this time.* **Any amendment to the title of proceedings may only be effected following the Implementation Date. The changes in the title of proceedings constitute far more than simply a changed name of the proceedings.**

80. The Settlement Agreement does not expressly or implicitly call for an amendment to the title of the proceedings before the Implementation Date. Clause 4.03 records the agreement to "amend" and "merge" without specifying when.

> **4.03 Consent Order**
> (1) The Parties will consent to an order in each of the Courts amending and merging the original claims as set out in Section 4.01 and 4.02 of this Agreement.
> (2) For greater certainty, the order consented to in the Ontario Superior Court of Justice will not amend or merge the Cloud Class Action.

81. Likewise, Clause 4.01 requires all plaintiffs from all the actions to be named as Plaintiffs in the title of proceedings without any specification as to timing:

> **4.01 Class Actions**
> The Parties agree that all existing class action statements of claim and representative actions, except the Cloud Class Action, filed against Canada in relation to Indian Residential Schools in any court in any Canadian jurisdiction except the Federal Court of Canada (the "original claims") will be merged into a uniform omnibus Statement of Claim in each jurisdiction (the "Class Actions"). The omnibus Statement of Claim will name all plaintiffs named in the original claims and will name as Defendants, Canada and the Church Organizations.

82. Clause 4.02 provides:

> **4.02 Content of Class Actions**
>
> (1) The Class Actions will assert common causes of action encompassing and incorporating all claims and causes of action asserted in the original claims.
>
> (2) Subject to Section 4.04, the Class Actions will subsume all classes contained in the original claims with such modification as is necessary to limit the scope of the classes and subclasses certified by each of the Courts to the provincial or territorial boundaries of that Court save and except the Aboriginal Subclass as set out and defined in the *Fontaine v. Attorney General of Canada* (05-CV-294716-CP) proposed class action filed in the Ontario Superior Court of Justice on August 5, 2005 which will not be asserted in the Class Actions.

83. In the proposed amended title of the proceedings, all plaintiffs are not named in the proposed additions and deletions are not contemplated by the Settlement Agreement. Many are removed. Further, contrary to the Settlement Agreement, fresh and new plaintiffs appear. Clause 4.02 does not allow the 20 newly named plaintiffs in the proposed amended title of the proceedings and who are not part of the "original claims".

84. There are even more than 20 new defendants. New defendants are also a significant problem. Every defendant would be entitled to a discovery. MLG would find itself with unmanageable proceedings, in which MLG is one of six class counsel, and the defendants could work conjunctively, like a hundred peg team wrestlers, delaying the process through examinations for discovery, speaking to motions, objecting to certification, or whatever might arise.

85. Neither new plaintiffs nor new defendants are permitted under clause 4.02. It will not matter once implementation comes into effect. It will matter to the class and to MLG a great deal if the settlement becomes unsettled.

86. The Whereas clauses imply that the title of the proceedings is to be amended, at the earliest, after each court has issued an Approval Order. "E" and "F" of the Whereas clauses, which are found on page 7 of the Settlement Agreement, provide:

> E. The Parties, **subject to the Approval Orders**, have agreed to amend and merge all of the existing proposed class action statements of claim to assert a common series of Class Actions for the purposes of settlement;
>
> **1.01 Definitions**
>
> In this Agreement, the following terms will have the following meanings:

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

87. In Articles 1.07 and 2.01, the Settlement Agreement is clear that no rights and obligations are had until a certain time, which clearly is not now:

> **1.07 When Order Final**
> For the purposes of this Agreement a judgment or order becomes final when the time for appealing or seeking leave to appeal the judgment or order has expired without an appeal being taken or leave to appeal being sought or, in the event that an appeal is taken or leave to appeal is sought, when such appeal or leave to appeal and such further appeals as may be taken have been disposed of and the time for further appeals as may be taken have been disposed of and the time for further appeal, if any, has expired.
>
> **2.01 Date when Binding and Effective**
> This Agreement will become effective and be binding on and after the Implementation Date on all the Parties including the Class Members and Cloud Class members subject to Section 4.14. The Cloud Class Actions Approval Order and each Approval Order will constitute approval of this Agreement in respect of all Class Members and Cloud Class Members residing in the province or territory of the Court which made the Approval Order, or who are deemed to be subject to such Approval Order pursuant to Section 4.04 of this Agreement. No additional court approval of any payment to be made to any Class Member or Cloud Class Member will be necessary.

88. Articles 1.07 and 2.01 apply equally as much to the obligation regarding changes to the title of the proceedings amendment in the omnibus statement of claim as they apply to coming into effect of the Individual Assessment Process or the requirement by the government to pay the CEP. We can not make this respectful submission to often. Neither the government nor any of the other parties may cherry pick the Settlement Agreement.

89. Article 2.02 provides that the obligations under the Settlement Agreement do no arise unless the Court approves **each and every term** of the Settlement Agreement.

> **2.02 Effective in Entirety**
> None of the provisions of this Agreement will become effective unless and until the Courts approve **all** the provision of this Agreement, except that the fees and disbursements of the NCC will be paid in any event.

90. We submit respectfully that this Honourable Court must approve "all the provisions of this agreement" which must all come into effect at the same time and that applies to clause that claims "will be merged" just as it applies terms regarding legal fees.

91. Indeed regarding MLG legal fees, there is a specific and redundant term which says just that.

92. It is open to each Court to decline to grant approval but a Court may not grant approval of other terms and not at the same time grant approval of the payment to MLG. This is not to say that each Court must grant approval of $40 Million, the amount shown in the Agreement in Principle. But the Agreement in Principle, adopted into the Settlement Agreement makes it redundantly and explicitly clear that no court may grant an approval order or certification without ordering all the terms which includes a term regarding payment to MLG.

93. MLG's legal payment is to be paid pursuant to the Agreement in Principle of November 20, 2006, which is incorporated by reference in part into the final settlement by 13.08(2) and the Agreement in Principle states in Schedule G.

> 11. Certification and approval of the final settlement agreement **will be sought in each jurisdiction on the express condition that each jurisdiction referred to in paragraph 6 certifies on the same terms and conditions.**
>
> 12. **All terms** of the final settlement agreement will be incorporated by reference into judgments of the courts.
>
> 19. **The judgments will order that the agreed fees and disbursements of all counsel participating in the final settlement agreement, are to be approved by the court on the basis provided in the final settlement agreement.**

94. The government insisted on this term. The government entered into the Agreement in Principle, then got the BNC to agree to a different arrangement regarding the payment of legal fees, disbursements, and taxes, to the BNC, but for MLG the government, and all parties, are stuck with the Agreement in Principle and schedule G which is incorporated into the Settlement Agreement.

95. There are a number of events even after the Approval Orders are granted that would have the effect of preventing any obligations from arising under the Settlement Agreement. Article 4.06 makes references to the unusual 5,000 opt-outs clause:

> **4.06 Approval Orders**
> Approval Orders will be sought:
> (a) incorporating by reference **this Agreement in its entirety;**
> (e) ordering and declaring that in the event the number of Eligible CEP Recipients opting out or deemed to have opted out under the Approval Orders exceeds five thousand (5000), this Agreement will be rendered void and the Approval Orders set

aside in their entirety subject only to the right of Canada, in its sole discretion, to waive compliance with Section 4.14 of this Agreement.

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

96. In our submissions **we keep moving back and forth between the change in the title of proceedings and the issue of MLG fees, but they are both brought together by the requirement under Settlement Agreement and the Agreement in Principle for all terms to come into effect at the same time.** There is no authority in the agreement for the title of proceedings change, new parties, and new class counsel, to take effect before the Implementation Date. The obligations and rights under the agreement do not "crystallize" until the conditions precedent have been fully satisfied or waived: each Court must approve the settlement and consent certification on the same terms; the opt-out threshold must not exceed 5,000, appeals must be concluded, etc. The Settlement Agreement must be followed.

Relevant Statutory Provisions

97. Similarly, sources of law outside of the Settlement Agreement do not permit the changes to the title of proceedings, new parties, or counsel changes. Rule 4.02 of the *Rules of Court* provides:

General Heading
4.02 (1) Every document in a proceeding shall have a heading in accordance with Form 4A (actions) or 4B (applications) that sets out,

(a) the name of the court and the court file number; and
(b) the **title of the proceeding** in accordance with rule 14.06 (action or application), **but in** a document other than an originating process, pleading, record, order or report, **where there are more than two parties to the proceeding, a short title showing the names of the first party on each side followed by the words "and others" may be used.**

(1.1) Clause (1) (b) does not apply to documents in proceedings under Rules 74 and 75.

98. Rule 14.06 of the *Rules of Court* provides:

TITLE OF PROCEEDING
14.06 (1) Every originating process shall contain a **title of the proceeding** setting out the names of all the parties and the capacity in which they are made parties, if other than their personal capacity.

(2) In an action, the title of the proceeding shall name the party commencing the action as the plaintiff and the opposite party as the defendant.
(3) In an application, the title of the proceeding shall name the party commencing the application as the applicant and the opposite party, if any, as the respondent and the notice of application shall state the statutory provision or rule, if any, under which the application is made.
(4) Subrules (1), (2) and (3) do not apply to proceedings under Rules 74 and 75.

99. In the context of a class action, Rule 12.01 of the *Rules of Court* add the following requirement regarding the "title of the proceeding":

TITLE OF PROCEEDING
12.02 (1) In a proceeding commenced under subsection 2 (1) of the Act, the **title of the proceeding** shall include, after the names of the parties, "Proceeding under the *Class Proceedings Act, 1992*".
(2) In a proceeding referred to in section 3 or 4 of the Act, the notice of motion for an order certifying the proceeding, the order certifying it and all subsequent documents shall include, after the names of the parties, "Proceeding under the Class Proceedings Act, 1992".

Joinder, Consolidation, Merger, or something else?

100. The application to amend the title of the proceedings as contemplated in this application with scores of new parties, is in effect, a substantive application and not a simple procedural motion.

101. Articles 4.01, 4.03 and "E" of the whereas clauses use the word "merger" of the existing class action statements of claim. What does the word mean? The words "consolidation" and "joinder" exist under the Ontario and various Rules of Court. The word "merger" does not.

102. In the present consent certification, amending the title of the proceeding is much more than a simple amendment. It is tantamount to a joinder or consolidation of all Indian Residential School litigation throughout Canada involving multiple schools, in multiple provinces, involving multiple perpetrators who have impacted their victims in various ways, and over a hundred year class period. To undo the "merger" would, in practical terms, be impossible. We submit respectfully that MLG as a party to the agreement, MLG as a party to this litigation, and MLG as class counsel, does not have to satisfy the Court as to why we oppose the "merger" but the reason is that it will be impossible in the nine courts and it would be impossible even in one court, to undo such an unusual agglomeration. Class members will be prejudiced without purpose if the settlement does not proceed as planned. MLG would be combined with counsel in circumstances where the views of MLG may be different from the views of other counsel. MLG would be able to work effectively

with the class counsel within the BNC but the combination of counsel has many lawyers involved from many provinces. And even in the interim, even if the settlement does proceed, in this combined litigation, how does MLG or any group of plaintiffs appeal?

103. This Court may procedurally accommodate changes in parties and counsel by consent, but there is no consent here, and the Court must abide by the Settlement Agreement, by the Rules of Court, and by the enacting legislation of the Court.

104. The *Courts of Justice Act*, R.S.O. 1990, c. C.43, section 107 provides:

> 107. (1) **Where two or more proceedings are pending in two or more different courts, and the proceedings,**
>
> (a) have a question of law or fact in common;
>
> (b) claim relief arising out of the same transaction or occurrence or series of transactions or occurrences; or
>
> **(c) for any other reason ought to be the subject of an order under this section,**
>
> an order may, on motion, be made,
>
> (d) **transferring any of the proceedings to another court and requiring the proceedings to be consolidated**, or to be heard at the same time, or one immediately after the other; or
>
> (e) requiring any of the proceedings to be,
>
> (i) stayed until after the determination of any other of them, or
>
> (ii) asserted by way of counterclaim in any other of them.

105. Rule 5 sets out separate considerations where a "joinder" of parties or claims is the subject of a motion on notice. The *Rules of Court* provide:

> **PARTIES AND JOINDER**
> **RULE 5 JOINDER OF CLAIMS AND PARTIES**
>
> **JOINDER OF PARTIES**
>
> **Multiple Plaintiffs or Applicants**
>
> **5.02** (1) Two or more persons who are represented by the same **solicitor of record** may join as plaintiffs or applicants in the same proceeding where,
>
> (a) they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
>
> (b) a common question of law or fact may arise in the proceeding; or
>
> (c) it appears that their joining in the same proceeding may promote the convenient administration of justice.
>
> **Multiple Defendants or Respondents**
>
> (2) Two or more persons may be joined as defendants or respondents where,
>
> (a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding;
(c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;
(d) damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or
(e) it appears that their being joined in the same proceeding may promote the convenient administration of justice.

JOINDER OF NECESSARY PARTIES
General Rule
5.03 (1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

Power of Court to Add Parties
(4) **The court may order that any person** who ought to have been joined as a party or **whose presence as a party is necessary to enable the court to adjudicate effectively and completely** on the issues in the proceeding **shall be added as a party.**

Party Added as Defendant or Respondent
(5) A person who is required to be joined as a party under subrule (1), (2) or (3) and who does not consent to be joined as a plaintiff or applicant shall be made a defendant or respondent.

Relief Against Joinder of Party
(6) The court may by order relieve against the requirement of joinder under this rule.

106. Rule 5.04 deals with prejudice created when a joinder is ordered. The court may not make an order that would result in prejudice to those class members who are not parties to the proceeding:

MISJOINDER, NON-JOINDER AND PARTIES INCORRECTLY NAMED
Proceeding not to be Defeated
5.04 (1) No proceeding shall be defeated by reason of the misjoinder or non-joinder of any party and **the court may**, in a proceeding, determine the issues in dispute so far as they affect the rights of the parties to the proceeding and pronounce judgment without **prejudice to the rights of all persons who are not parties.**

Adding, Deleting or Substituting Parties
(2) At any stage of a proceeding **the court may by order add**, delete or substitute **a party** or correct the name of a party incorrectly named, on such terms as are just, **unless prejudice would result** that could not be compensated for by costs or an adjournment.

Adding Plaintiff or Applicant
(3) **No person shall be added as a plaintiff or applicant unless the person's consent is filed.**

107. Rule 5.05 deals further with prejudice. The Court has a wide discretion to impose terms to appropriately deal with the prejudice to parties:

RELIEF AGAINST JOINDER
5.05 **Where it appears that the joinder of multiple claims or parties in the same proceeding may** unduly complicate or delay the hearing or **cause undue prejudice to a party, the court may,**

(a) order separate hearings;
(b) require one or more of the claims to be asserted, if at all, in another proceeding;
(c) order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest;
(d) stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or
(e) **make such other order as is just.**

108. The concept of consolidation in Ontario is dealt with in Rule 6:

RULE 6 CONSOLIDATION OR HEARING TOGETHER
WHERE ORDER MAY BE MADE
6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,

(a) they have a question of law or fact in common;
(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
(c) for any other reason an order ought to be made under this rule,

the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
(e) any of the proceedings be,
(i) stayed until after the determination of any other of them, or
(ii) asserted by way of counterclaim in any other of them.

(2) **In the order, the court may give such directions as are just to avoid unnecessary costs or delay** and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.

DISCRETION OF PRESIDING JUDGE
6.02 Where the court has made an order that proceedings be heard either at the same time or one immediately after the other, the judge presiding at the hearing nevertheless has discretion to order otherwise.

CONTENTS OF JUDGMENTS AND ORDERS
12.05(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.**

109. With respect to the latter rule, Section 3 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 provides:

Defendant's class proceeding
3. A defendant to two or more proceedings may, at any stage of one of the proceedings, make a motion to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff.

110. Other relevant portions of the *Class Proceedings Act,* 1992, S.O. 1992, c. 6 include:

> **Court may determine conduct of proceeding**
> **12.** The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
>
> **Court may stay any other proceeding**
> **13.** The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

111. The Court may only join parties where no prejudice would result.

112. Moreover there is an issue of notice. Along with everything else that is unusual about these proceedings, will it be advanced that the Court should deem that there has been service upon litigants represented by MLG in various class actions from Quebec to British Columbia, without any notices of motion having been served in the styles of cause of the various actions launched by MLG across Canada and regarding the Ontario matters without applications having been made to transfer the extant Ontario class proceedings launched by MLG into Toronto.

113. There has been no notice served regarding the two Ontario class proceedings of MLG much less proceedings in other provinces. MLG knows of the intended joinder of actions throughout Canada, but that is not the same as notice. A motion for joinder or consolidation must be on notice with affidavit evidence in support and fully engaged legal debate. Neither is present here. Joinder of actions from the judicial center of Ottawa without transfer applications, joinder which in substance is a carriage order, may not in any event occur.

114. Whether the amendment to the title of the proceedings is a joinder, consolidation, merger, or something else, the Settlement Agreement by clear implication is that the proceedings are to be "merged" only when the Implementation Date arrives.

115. In any event, what is to be gained? What benefit flows to members of the class? The prejudice is potentially profound.

116. MLG asks the Court to order and adjudge that the settlement is fair, reasonable, adequate, and in the best interests of the classes, and to approve it on the terms set out in the Settlement Agreement, all of which must be incorporated by reference into the various judgments, which would include the amendment to the various existing Statements of Claim, but ordered to come into effect at an appropriate time, but such amendment to the style of cause, to the parties, and a conjoining of counsel, may not take place in advance of consideration by the Court and the Implementation Date.

117. The Court must have regard to the huge prejudice that would be done to members of the various classes, if orders were made by the various Courts bringing all of the litigation and litigants together and the consent settlement failed and did not proceed. The Court must have regard to the prejudice that could be done to the parties, certainly potential prejudice to MLG, even if the settlement did not fail.

III. Legal Argument

118. Two submissions have been embodied in the foregoing combination of fact and law:

(1) The amendment to the title of the proceedings can not take effect until the Implementation Date arrives;

(2) The Court may not defer or refer the issue of MLG legal fees but approve the rest of the Settlement Agreement.

Amendment to the title of proceedings to take effect on Implementation Date

119. MLG submits that the amendment to the title of the proceedings and the "merger" of the actions, may not take effect until the Implementation Date. MLG need not present arguments on why something not in keeping with the statute and Rules and contrary to the Settlement Agreement may not be done. But as well as it may not be done, it should not be done.

120. If the amendment to the title of the proceedings take place, two monsters will be created.

121. The first monster is a six headed solicitor of record. This conjoined group of counsel will be unable to act and be unable to advance the bests interests of the class if the settlement breaks down as a result of one or more Courts failing to order terms set out in the Settlement Agreement, if the 5,000 opt-out threshold is met, or if a party appeals and has an order overturned. MLG as a party, the BNC as a party, the AFN as a party, and each of the six sets of counsel, appearing in their own right as parties, having independent rights as parties to the Settlement Agreement, and in the case of MLG and the BNC, appearing as class counsel, will be unable to appeal without the agreement of a group of parties with different views. This is not in the best interests of the class and it is not a situation in which MLG as a party to the agreement and as a party to this litigation, agrees.

122. The second monster is the monster of complexity involving all residential schools in one putative class action which would almost certainly be refused a certification order if the government or churches contested a certification order if the settlement breaks down. Hence, if the settlement breaks down, counsel and the courts will be starting over. All of our work will have been lost, to the great disservice to the classes or class.

123. "Merger" is of no benefit to the class. It is perfect for the government. All the existing class actions in Canada, having been combined in on unworkable action with one group of counsel who have never worked together and who have different views and theories underlying their actions will be "merged". That in effect will end all those actions. In some provinces, Alberta for example, the time under the statute of limitations has run out. Merger may be desirable for counsel other than the BNC and MLG. They have no class proceedings now. It gives them some stake in the future even if the proceedings would be hopelessly unworkable but it is not in the interests of the class. This is not an objection by MLG to potentially working with some of the counsel in the merged first monster, the six headed solicitor of record. MLG is already partnered with some of the BNC firms in various class actions. MLG could work with all of the various lawyers involved in this first monster. But not in this kind of a case and not without any prior understanding. The six solicitor of record approach contemplates that implementation come into effect. Lawyers do not enter a partnership to represent the best interests of a class, and work out the details later. They work out the details in advance.

124. MLG submits that the Court ought to grant the order which "will subsume all classes"; that the Court ought to grant an order "amending and merging the original claims"; but this must take effect, as agreed, pursuant to Article 2.01. MLG submits that the amendment to the title of proceedings cannot take effect until on or after the Implementation Date.

125. This is consistent with fairness and reasonableness and the best interests of those affected by the order. The best interests of the class is paramount, and an early "merger" of the claims would result in disastrous consequences if the settlement came unstuck. The best interests of other parties including MLG, and the capacity of MLG to appeal, both as a party, and as class counsel, must be protected. Do to otherwise is not in the best interests of the class.

The first monster Solicitors of Record - a non-entity

126. In addition to having two Ontario class actions, MLG is counsel for the class in a number of other matters. Those other class proceedings are as follows:

Federal Court				Norman Pauchey	2 of 2002
	Kenneth Sparvier	T 848-05		George Laliberte	1653 of 2005
	George Laliberte	T 1620-05		Elizabeth Aubichon	2036 of 2005
Quebec			Alberta		
	Clifford House	550-06-000021-056		George Laliberte	0501-14216
	Morris Cardinal	500-06-000308-052		Flora Northwest	0501-09167
Manitoba			British Columbia		
	Christine Semple	C1-05-01-43585		Camble Quatell	L051875
			Ontario		
				Joan Van Heet	05-CV-032248
Saskatchewan				Kenneth Sparvier	05-CV-3152
	Kenneth Sparvier	816 of 2005			

127. MLG agreed in the settlement to combine all of the MLG class actions and the class actions launched by the BNC in Ontario and in Quebec but not to include the *Cloud* class action. The BNC launched *Cloud* as well as the within Baxter proceedings and also launched a residential school class action in Quebec. MLG consents to the amalgamation of the Ontario action launched by MLG with actions #00-CV-192059CP in the event of the coming into effect of the consent settlement and

certification pursuant to clauses 4.03(1), 4.02(2), 4.01, 2.01, and 2.02 but not in any preliminary way or other circumstance.

128. Paragraph 4.05 of the Settlement Agreement provides that if all nine courts grant certification, then the consent certification and agreement will come into effect.

> 4.05(2) Consent Certification will be sought on the express condition that each of the Courts . . . . certify on the same terms and conditions . . . .

129. If the title of proceeding is amended as sought, making it very likely impossible for MLG or the BNC to do anything to serve class members (if the settlement fails), MLG would be forced into a partnership with other Plaintiffs' lawyers with whom MLG has no relationship. The following law firms are listed at page 60 of the omnibus statement of claim:

- Thomson, Rogers
- Koskie Minsky LLP
- Doane Phillips Young LLP (AFN)
- Merchant Law Group
- Nelligan O'Brien Payne
- Peter Grant & Associates (Independent)

130. These firms have no relation to each other. No agreement has been put before the Court to show what kind of entity known to law this six headed creation might be. There is no decision making procedure except for the consensus of the NCC. But this is not the NCC. The NCC has defendants' counsel on it. And the NCC ends if the settlement fails. There is no agreement before the Court or at all as to how this non-entity solicitor of record is to be run or how decisions are to be made in the best interests of the class.

131. This six figure non-entity is not the NCC. Members of the NCC are:

- Canada
- Church Organizations
- Assembly of First Nations
- The National Consortium
- Merchant Law Group
- Inuit Representatives
- Independent Counsel

132. Article 4.09 provides:

> **4.09 National Certification Committee**
> (1) The Parties agree to the establishment of a NCC with a mandate to:
> a) designate counsel having carriage in respect of drafting the consent certification documents and obtaining consent certification and approval of this Agreement;
> ...
> c) obtain consent certification and approval of the Approval Orders in the Courts, on the express condition that the Courts all certify on the same terms and conditions;

133. The process of NCC decision making is described in Article 4.09:

> (2) The NCC will have seven(7) members with the intention that decisions will be made by consensus.
> (3) Where consensus can not be reached, a majority of five(5) of the seven(7) members is required.

134. The NCC is to be dissolved on the Implementation Date when it is to be replaced by the National Administration Committee. Although Article 9 does not contemplate the NCC making appeals, the NCC is in existence during the period when appeals may be taken.

Appeals

135. This issue of appeals bears further analysis. How would appeals be taken by those whose interests are affected by the Approval Orders? There is a possibility that a Court might make an order that contains terms which do not accord with an interested party's views on the terms of the Settlement Agreement as incorporated into the Approval Orders.

136. If the present order which amends the title of the proceedings were granted, MLG would be forced into a relationship with other lawyers with whom they do not want to be associated on this matter. The personal relationships are good and MLG is partnered with BNC counsel on some matters, but in this case, the interests are divers and diverse. How can that possibly be workable? And all the independent class actions where MLG is sole solicitor of record will be lost. MLG wants separate class proceedings because the MLG lawyers believe that separate class proceedings have a better chance of being certified than one national class proceeding involving all the schools in Canada, multi-generations, hundreds of perpetrators, scores of churches, and different issues. For example one of the four proceedings by MLG in Saskatchewan is purely a cultural claim. MLG has

serious doubts that a court without consent, would certify the kind of overarching class action which may be certified by this Court and eight other Courts because of the consent of the defendants.

137. If the settlement does not come unstuck and all Approval Orders are granted on substantially similar terms, but there is a debate as to whether the Approval Orders have properly implemented all terms of the Settlement Agreement, the NCC will not be disbanded, but MLG will be in a relationship with them that is set out in the Article 4.09. Article 4 describes how the NCC makes decisions. Who would control the appeal of the orders if they do not incorporate all the terms of the Settlement Agreement as contemplated?

138. The importance of MLG independence has to do with the second concern, that of **the right of MLG clients to appeal**. This is of concern to the best interests of the class as a whole. For MLG to appeal on behalf of its clients, it would presumably have to seek consent of the group of six co-counsel including those who represent parties with interests if not adverse in interest to MLG clients, certainly different from the interests of MLG clients.

139. MLG clients have a right to appeal an order under the Settlement Agreement. Indeed, the Implementation Date, the date on which the Settlement Agreement pursuant to Article 2.01 becomes effective and binding, does not occur until after appeal process has been completed. Article 1.01 provides:

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

140. With respect to the certification order, the comprehensive class actions legislation in the provinces provide rights of class members and others to appeal an order. In Ontario, the *Class Proceedings Act, 1992,* S.O. 1992, c. 6, provides:

> **Appeals**
> **30.**(2) A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court.

> (4) If a representative party does not appeal or seek leave to appeal as permitted by subsection (1) or (2), or if a representative party abandons an appeal under subsection (1) or (2), any class member may make a motion to the court for leave to act as the representative party for the purposes of the relevant subsection.

141. This agreement and court process selected by the government, are unique in having the matter go before nine Courts, unique by way of the involvement of dozens of law firms who are all parties to the agreement, and unique because even if approved by nine Courts and not overturned on appeal, the Government of Canada, if 5,000 people opt out, may in essence uncertify the certified.

142. Counsel represent clients who will have interests which conflict with the interests of the Government of Canada if there is a settlement. Because of the way the IAP will function, counsel who represent clients with claims beyond the CEP will have an interest contrary to the Government of Canada if the settlement is approved.

143. If the court approved settlement is later is 'unapproved' through the 5,000 opt out process, the importance of MLG protecting its clients will be even more important. Class counsel face the prospect of potential carriage fights if the approved agreement comes unstuck eight months hence. Class counsel may be back before this very Court, seeking what may be opposed certification if what gets approved by nine Courts becomes 'unapproved' by the choice of the government, eight or ten months in the future. How can that occur if counsel have been thrust together.

MLG's rights to appeal

144. MLG as a distinct party has rights to appeal. MLG is a party to the Settlement Agreement and this litigation. The Settlement Agreement provides:

> **1.01 Definitions**
> **"Parties"** means collectively and individually the signatories to this Agreement.

145. The judgment of the Honourable Mr. Justice Ball provides:

> [13] I do not accept the proposition that Canada has applied for a final order for three reasons. First, I am not persuaded that Merchant Law Group is not a party to this litigation....

146. MLG is one of the signatories to the final Settlement Agreement and to the AIP. As a party and as class counsel, MLG asserts its rights which include reliance upon the certainty which was intended, flowing from the Settlement Agreement, that all of the terms of the Settlement Agreement would be included in the orders of each of the nine judges and none of the terms would be deferred or referred.

147. MLG has contractual rights which are surrendered in exchange for $40 million. In Saskatchewan, MLG was held to be a party to the proceeding by the Honourable Mr. Justice Ball. MLG has a right to appeal the certification and settlement and fee approval orders. The consent order must incorporate all the terms of the Settlement Agreement. MLG is a party to the agreement and accordingly a party affected by the Approval Orders. MLG has a right to appeal as a separate party. . An Unconsented "merger" takes from MLG its right of appeal as a party and its right of appeal on behalf of its clients.

Appeal for Class

148. Class members also have the right to appeal in certain circumstances. Suppose in the Ontario Court or in the Saskatchewan Court, one party or another, or an objector, decided to appeal over the BNC or MLG payment, or any other term. If there is an amalgamated action MLG has become one of many counsel on behalf of this amalgamated but uncertified class. How in practical terms does MLG launch an appeal? How does MLG defend an appeal?

149. The example makes the point for an immediate appeal and also regarding issues in the future. After the proceedings have been "merged", MLG becomes one of many counsel for class representatives, many of whom may not even be aware that MLG exists as a law firm. The current class plaintiffs in the MLG actions, in most cases, have been individually represented by MLG for almost ten years. Currently MLG has direct and personal contact with the named plaintiffs in its class actions. In the planned "merger", 18 MLG plaintiffs will be joined with the Baxters and new named plaintiffs.

150. From whom does MLG get instructions to appeal after amalgamation? May MLG simply appeal because Ball J. has determined that MLG is a party? MLG in that regard is both counsel and a party. MLG would not be able to get the concurrence of other counsel to launch an appeal. In the future, if disputes arose, how do all of these law firms, thrust together by order of the Court, resolve disputes? This is a prescription for paralysis by the Plaintiffs.

151. Of course the government and churches support this proposition. Paralysis by plaintiffs is good for defendants. Equally, law firms other than MLG and the BNC, which have not been a part of the class proceedings are giving up no capacity to move forward on behalf of the class because they have no capacity now.

152. The government chose to demand various escape entitlements. They can uncertify the certified. They can unsettle the settled. They demanded nine courts. The government has agreed on fees. And "merger", if granted immediately, ends any right of action for MLG and destroys rights of the class regardless of whether the settlement comes into effect.

153. One need only look at the style of cause in these Baxter proceedings 00-CV-192059CP to have an example of how difficult it will be for the class, even if the change only took place in the Baxter proceedings! The very title of the proceedings makes the point of the huge difficulties created for class counsel on behalf of the plaintiffs in Baxter if all of the third parties, which counsel for Baxter and the class fought to keep from becoming defendants, now with others which were not third parties become defendants, and if new plaintiffs and defendants are added that problem would be compounded by having all the plaintiffs, defendants, and third parties, from all of the causes, and from all of the provinces, united in one unworkable monster of complexity.

154. MLG opposes amalgamation taking effect before the Implementation Date, as it would prejudice the interest and right of the plaintiffs and proposed classes under the claim and claims filed by MLG in Ontario, as well as the claims filed by MLG in other provinces. If amalgamation were to take effect before the Implementation Date, particularly if the proposed settlement fails to obtain

initial approval from the superior courts of other jurisdictions or the number of class members who opt-out of the settlement exceeds the threshold acceptable to the government, and other events occur between now and the Implementation Date which lead to a failure to settle, then amalgamation of the Ontario claims would be premature, undesirable, and prejudicial.

Terms of the Agreement

155. The suggested order regarding the title of the proceedings is contrary to the terms of the Settlement Agreement. Clause 16.01 of the Settlement Agreement provides that none of the provisions of the Settlement Agreement has any effect until all the other Courts issue Approval Orders on the same terms, a process which will not be complete until October, 2006 at the earliest:

> **16.01 Agreement is Conditional**
> This Agreement will not be effective unless and until it is approved by the Courts, and if such approvals are not granted by each of the Courts on substantially the same terms and conditions save and except for the variations in membership contemplated in Sections 4.04 and 4.07 of this Agreement, this Agreement will thereupon be terminated, and none of the parties will liable to any of the other Parties hereunder, except that the fees and disbursements of the members of he NCC will be paid in any event.

156. Further, Article 4.06 contemplates that the Approval Orders might be set aside and the steps taken will have to be untangled and rewound:

> **4.06 Approval Orders**
> Approval Orders will be sought:
> (a) incorporating by reference this Agreement in its entirety;
> (e) ordering and declaring that in the event the number of Eligible CEP Recipients opting out or deemed to have opted out under the Approval Orders exceeds five thousand (5000), this Agreement will be rendered void and **the Approval Orders set aside** in their entirety subject only to the right of Canada, in its sole discretion, to waive compliance with Section 4.14 of this Agreement.

157. It is not in the interests of the class to put the 80,000 Indian Residential School survivors at the risk that, should this settlement come unstuck, Residential School survivors and class counsel will be faced with a problem eight or twelve months hence of having no extant viable class proceedings, no means to force the government quickly to certification, no class counsel with the capacity to act, and it will be a disaster for members of the class.

Second Monster - Uncertifiable Action

158. For example, the claim by Plaintiffs Norman Pauchay, Alvin Barney Saulteaux, and Earl Kenneth Cote which was launched on January 3, 2002, being Q.B. No. 2 of 2002 in the Judicial Centre of Yorkton Saskatchewan, is a class action purely related to cultural loss, forced assimilation, loss of language, and inadequate education. MLG has four class actions in the province of Saskatchewan. MLG, as class counsel, asserts the view that it is not in the interests of these various proceedings to be amalgamated, even in the same province, and even under the same law firm. Separate actions were launched for specific reasons. *Cloud, supra* may in part have been certified because it was a manageable class regarding one school. Certification regarding specific issues and interests might be appropriately certified on a contested basis.

159. Certification of one mega monster would almost certainly not be certified. The insurance cases provide an example of a lesser standard for certification on a settlement.

160. Two of the insurance cases which were certified on consent are *Dabbs v. SunLife Assurance of Canada* (1998) 40 O.R. (3d) 429 and *McCrow v. Manufacturers Life Insurance* (1998), 28 C.P.C. (4th) 104.

161. Subsequently, in the cases where the Defendant opposed certification in the insurance cases, **on the same issues,** certification was refused. One such example is *Williams v. Mutual Life Assurance Co. Of Canada* (2000) 51 O.R. (3d) 54. Cumming J held that, in such a case, the claims of the class members did not raise common issues as required by Section 5(1)(c) of *The Class Proceedings Act*, 1992. The reason was that negligent misrepresentation was a cause of action that is problematic in seeking certification of a common issue for class members.

162. Another insurance case where certification was refused was *Zitroman v. Equitable Life Insurance Company* (2000) O.J. 5144. The Honourable Mr. Justice Ferrier refused to certify a claim relating to "premium offset" insurance. Relying in large part on Cumming J's decision.

163. However, the Honourable Mr. Justice Cumming did certify two vanishing premium cases or premium offset cases where settlement approval was sought and certification was unopposed. These cases include *Gibbs v. Jarvis* (2001), 10 C.P.C. 5th 332, and *Direct Right Cartage Ltd. v. London Life Insurance Co.* (2001) C.O. 3658.

164. In *Cloud, supra* there was a common issue because certification of a common issues related to the systemic operation of a single school. Where there are multiple schools over multiple time periods involving multiple Defendants and multiple nuns, certification might be refused, particularly on a national basis. Quebec, Ontario, and Manitoba are "opt out provinces". MLG has launched a number of class proceedings in these three jurisdictions. British Columbia, Alberta, Saskatchewan, Newfoundland, (and the bill has Royal assent but has not come into force in New Brunswick), are all opt-in jurisdictions. Amalgamating opt in and opt out contributes to the dilemma of the Gordian's knot. Even within the same law firm, of the related class actions launched by MLG, it is, we submit, not in the interests of the members of the classes that they be forced into one huge potentially uncertifiable and unmanageable law suit.

Special Duty on the Court

165. Regardless of submissions of counsel, the nature of class proceedings put a special duty on judges of the Court. Class counsel do not receive instructions from the members of the class in the same way that class counsel receive instructions from ordinary clients. Class counsel have some individuals from within the class who give instructions, but the nature of the instructions is nothing like the instructions that are received in ordinary litigation.

166. The legislation regarding class proceedings puts a positive duty and special duty upon judges of the Court to have regard to the best interests of the class. Even if all counsel for the various parties, and even if both class counsel, were agreed to this unusual procedure of an amalgamation, the Court, in exercising its duty to the class, would have to be satisfied that the provision was fair and reasonable. The legislation requires that the Court determine that provisions are fair and reasonable. Even if MLG as class counsel consented, and MLG does not consent, the Court we respectfully submit ought to see that this is a prescription for potential disaster for members of the class and not permissible under the Rules of Court because it would do prejudice.

167. Regardless of the urgings of litigants who believe the matter is settled and that everything will be concluded and that the opt out rate will be low, in the interests of the class, the Court should take into consideration the possibility of one of the judges not making an order of the sort urged upon the Court, of a successful appeal, and of 5,000 opt outs. Additionally, the Court should preserve the right of appeal by MLG for its clients and the right of appeal of each party, including MLG.

168. We submit, with the greatest of deference to this Honourable Court, that there is no authority to force counsel and litigants together in one action where there is an absence of consent. We submit that just as every other section from the Settlement Agreement is, pursuant to the agreement, required to be ordered specifically as agreed, so too this term must, we submit, be ordered specifically as agreed. Even with full consent, the Court, we submit respectfully, would still have to consider whether such an amalgamation at this time is fair and reasonable and whether such an amalgamation at this time is in the interests of the class.

169. We are indifferent as to the names in the combined proceedings, which include names from actions in six provinces where MLG is counsel for the proposed class. The names as proposed are acceptable, within the ambit of our respectful submission that there is no authority without consent to take any steps concerning "merger" except at the end of the process. The names as proposed are acceptable, within the ambit of our respectful submission, that the Court must consider what is in the best interests of the class regardless of the submissions or consent of counsel and regardless of the submissions or consent of the parties.

170. The judiciary, without full consent, we submit respectfully, would be visiting upon some 80,000 potential class members the certain result that if the settlement did not proceed, the Courts would have *in effect* put 80,000 plaintiffs out of Court without any effective remedy.

(2) May not defer, may not refer

171. (i) By the terms of the Settlement Agreement, all courts must approve all terms. (ii) This has the consequence, we submit respectfully, that (a) this Honourable Court, **may not defer** the issue of MLG legal fees, that is, this Honourable Court may not approve the Settlement Agreement except

for the issue of MLG legal fees, and then adjourn the issue of MLG legal fees, and (b) the Ontario Superior Court **may not refer** the issue of MLG legal fees to the Saskatchewan Court of Queen's Bench.

(i) all courts, all terms

172. By the terms of the Settlement Agreement, each court must approve all terms. Or a Court may approve none. Each Court must bat .1000. That is what the government has required in the Settlement Agreement.

(ii) may not defer, may not refer

(a) defer

173. The requirement that all courts approve all the terms of the Settlement Agreement has the consequence that this Honourable Court, we submit respectfully, may not approve the Settlement Agreement except for the issue of MLG legal fees, and then adjourn the issue of MLG legal fees.

174. There is a consequence which flows from the fact that the settlement involves a requirement that all nine Courts in essence make the same order. No part of the agreement may be deferred or ignored. Both the Settlement Agreement and caselaw make this an "all-or-nothing" application. Approval of terms of the Settlement Agreement may not be done in slices.

175. There is only one exception to the "all or nothing" nature of the agreement and that is the payment of the NCC legal fees in any event in 2.02 and 16.01. If it were not obvious in any event the Settlement Agreement makes it all the more explicit that even inconsequential issues may not be deferred or considered separately from the entire agreement by way of the term which refers to NCC legal fees being paid. Even the most specific of issues regarding fees has been agreed. There are repeated references to Schedule "Q" which require that NCC, NAC, RAC, and other lawyers traveling may only get economy tickets, may only get $11.25 for breakfast, may only get specified hotel rates; and all of this indelibly makes a simple point. Everything was agreed. Nothing may be deferred. Issues related to fees were specifically addressed at length.

176. The Settlement Agreement does not contain the standard severance clause. If the Courts would not order precisely what the parties agreed to, then the Courts may not act and may not make any order whatsoever.

177. This consequence also flows from the discretionary nature of a decision to approve a settlement agreement pursuant to Section 29 of the *Class Proceedings Act, 1992. Delagare non potest est* has application. There is authority to refer a decision regarding legal fees if a retainer between class counsel and a representative plaintiff is not approved. But legal fees are a key term of the Settlement Agreement which has to be approved in its entirety or not be approved at all.

Delegatus non potest delagare

178. The Court may not, we submit respectfully, defer a decision about MLG fees. The Court we submit respectfully also may not refer the decision. Ontario legislature, by section 29 of *The Class Proceedings Act, 1992*, has been given a discretionary decision to make regarding whether to approve a settlement agreement. But this Settlement Agreement requires each judge to make the same order which incorporates all the terms of the Settlement Agreement. This Honourable Court may not defer the decision to approve MLG legal fees to another judge.

179. *Delegatus non potest delagare* applies. The Court may not order that payment to MLG will be whatever payment is ordered by the Court in Saskatchewan. This is nothing expressly or implicitly in the *Class Proceedings Act, 1992,* which would allow the Court to refer the approval of a key term of the Settlement Agreement to the Saskatchewan Court of Queen's Bench but go on to approve the rest of the Settlement Agreement.

180. The Supreme Court of Canada referred to the article "*Delegatus Non Potest Delegare*", (1943), 21 Can. Bar Rev. 257 at p. 264 in *The Queen v. Harrison*, [1977] 1 S.C.R. 238. In that article, Professor Willis states, at pages 257-58, that delegation "does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself" and at page 263-64 ""[the maxim *delegatus non potest delegare*] applies "to all types of authority, central, local, or professional, and all types of discretion, legislative, judicial, quasi-judicial and administrative."

181. The court may not simply rubber stamp approval of a term of the settlement: per Callaghan, A.C.J.H.C. in *Sparling v. Southam Inc.*, (1988), 66 O.R. (2d) 225 at 230-1 as approved in *Dabbs, supra. A fortiori,* a Court may not rubber stamp an order of the Saskatchewan Court which has not yet been made.

182. Each Court, Ontario included, must order all of the provisions into effect in the judgment by each Court so that individuals may know whether they will opt out, so that objectors will have the opportunity to appeal in Ontario, on other similar matters. This Court, we submit respectfully, may not render a partial decision which does not include an order regarding the payment of fees to MLG.

183. In *Carlton Augustus Masters v. R. In Right of Ontario, and Tory, Tory, Deslauriers & Binnington, Lorne Morphy, Mary Eberts, Mark Hemingway, Lillian Pan and Mayo Moran (Intervernors)* 27 Admin. L.R. (2d) 152, 18 O.R. (3d) 551, 72 O.A.C. 1, 115 D.L.R. (4th) 319 (Ont. Ct (Gen. Div))

> The most troublesome point is that several members of the board did not have all the papers. Four of them had only the summary of a "clearly predictable case" of 1 1/2 pages and a recommendation that the committee should form the opinion of no unlawful discrimination. It may reasonably be inferred that these four were not in a position to form an opinion of their own. They must have gone by the opinion of the other members who had received all the papers and had read them.
>
> If this had been a judicial body, I do not think this would be right. Every member of a judicial body must have access to all the evidence and papers in the case, he must have heard all the arguments, and he must come to his own conclusion. **The maxim *delegatus non potest delegare* applies strictly to judicial functions.** But it is different with a body which is exercising administrative functions or which is making an investigation or conducting preliminary enquiries, especially when it is a numerous body.

184. In *Gail Snider v. Manitoba Association of Registered Nurses* [2000] 4 W.W.R. 130, 142 Man. R. (2d) 308, 212 W.A.C. 308, 4 W.W.R. 130, [2000] M.J. No. 59 (Man. C.A.)

> 9 The extent of participation is, in my opinion, limited by the rules of natural justice, the applicable rule being that "he who decides must hear." This rule relates to several other principles of natural justice, as described in Jones and de Villars, *Principles of Administrative Law*, 2d ed. (Carswell, Toronto: 1994), at p. 288:
>
> > It is a rule of natural justice that "he who decides must hear". Several considerations justify the rule. First, it is based on statutory intention and the maxim *delegatus non potest delegare* [A delegate cannot delegate.] Second, it is based on the need for independence. Natural justice requires that decisions be made without inappropriate influences upon the decision-makers. Third, it reinforces the rule that parties must be given the chance

> to address the points raised against them. It is an aspect of the *audi alteram partem* rule. Allowing persons to participate as decisions-makers when they have not participated in whatever hearing may have been held raises the obvious possibility that new matters will be introduced without an opportunity for a response.
>
> In general, **the person upon whom the statutory power to decide has been conferred shall make the decision. No delegation of this power is allowed** ....

185. In order to comply with 2.02, the Court in Ontario must make an order which covers all the components including the component of fees for MLG. Potential appellants in Ontario must know all the terms of the order. Someone considering opting out must know all the terms of the order. The Court may not distinguish between terms. The Court may not subconsciously hold that an individual would be unable to decide whether to appeal if the decision about the CEP were deferred but would be able to decide to appeal if the decision about MLG fees were deferred.

186. Not only, we submit, may the Court not defer the decision to another court by saying 'I order whatever Saskatchewan orders' but from the perspective of people who might chose to appeal or opt out, they need to know all the terms of the Ontario Court Order and no term may be a term to be decided later much less to be decided by others.

187. The parties have attorned to the jurisdiction of the Ontario and Saskatchewan Courts. But this Court must still decide the issue of MLG fees. The filing of a certified copy of the judgment from the Saskatchewan Court could be the evidence upon which this Court decides the issue of payment to MLG pursuant to good faith and credit, but this Court must still decide.

188. An example emphasizes the point. The parties agreed, including First Nations organizations, that a certain length of time was required as a fair and appropriate opt out period. That was a matter of considerable dispute. First Nations people, particularly in the north, lartely do not function in a written society. They are not subscribers to the National Post and the Globe and Mail. Many are engaged in hunting and fishing which takes them away from their communities for lengthy periods of time. There is a seasonality to their lives. Agreement having been reached, and evidence of experts being before the Court concerning the appropriate length and nature of notice and the

appropriate length for opting out, no Court, we submit respectfully, may shorten the time for opting out by deferring some term.

189. The Court may not attempt to distinguish one term from another on some qualitative basis. The opt out period would be obviously inappropriate if every issue were decided but the amount of the CEP was deferred. Everyone would see that no Judge could hold that he approved all of the terms of the Settlement Agreement but wanted extra time to consider where the CEP was appropriate. The opt-out time could not run. The time to appeal could not run. Everyone would see that every term including the amount of the CEP had to be decided by every judge. The same applies to payment to lawyers. Members of the class are entitled to know the full order before the opt out period begins. Individuals considering appeals are entitled to know the full order before the time for the launching of an appeal begins to run.

190. We submit the Court must with absolute certainty order that the BNC and MLG receive a specific sum to include fees, disbursements, and tax. For the BNC it is agreed. Appellants, an objector, someone deciding to opt out, are entitled to know all the terms of the order which includes the terms regarding payment to the BNC. There may not be a deferred term of the order or a referred term of the order. The time for an appellant or someone considering opting out begins to run from the day when there is a certain and full order.

191. We submit respectfully it is not open to the Court regarding the BNC, for example, to direct a decision about payment based on some taxation or assessment. For example, the Court could not order that 'my judgment is XYZ and regarding payment to the BNC, it will be whatever flows from a taxation which I direct. This is not a situation where section 32 applies. The BNC and MLG bargained for a specific sum as a separate party and not as counsel for a certified class. MLG like the BNC bargained away its rights under contingency agreements.

192. **An order or certification with fee decisions deferred is common. Why, then, is it not legally permissible in the case at bar?** In ordinary circumstances, a judge is deciding. A judge is determining the law and applying the law to the facts as the judge determines those facts to be. Our case is distinguished for four reasons,

193. **First**, on our facts, the Court is **approving an entire agreement**, all of the provisions, or not.

194. The **second** distinction is that the BNC and **MLG** are **parties**.

195. The **third** distinction is that legal fees have been set, subject to the usual provision which always arises in class proceedings, that the legal fees are found to be fair and reasonable. But nonetheless the **legal fees have been set. They are a term.**

196. **Fourth**, MLG and the BNC are not just receiving class action fees but are being paid for their contingency entitlements which they negotiated away. **MLG is giving up** by the Settlement Agreement **the right to very substantial sums.** MLG has thousands of contingency agreements. Assuming an average CEP of $28,500 and contingency fees of one third, MLG is giving up in the Settlement Agreement $9,500 multiplied by thousands and thousands of clients. The Court we submit respectfully may not make an order taking from MLG its rights by those thousands of contracts to one third of the CEP payments and not at the same time order payment to MLG of the fees it is to receive by the Settlement Agreement. The taking by the Settlement Agreement must occur at the same time as the giving.

197. We submit the Court must with absolute certainty order that the BNC and MLG receive a specific sum to include fees, disbursements, and tax. Appellants, an objector, people deciding to opt out, are entitled to know all the terms of the order which includes the terms regarding payment both to MLG and the BNC, and there may not be a deferred term of the order or a referred term of the order. The time for an appellant or someone considering opting out begins to run from the day when there is a certain, full, and entire order.

198. This Honourable Court, we submit respectfully, may not delegate, which amounts to deferring and may not delegate because the Court may not refer. To defer we submit respectfully is not permissible. **To refer we submit respectfully is doubly wrong because it is both a deferral as well as a breach of the principle of *delagatus*.** . A comparison may be drawn to the situation in *Endean v. Canadian Red Cross Society*, 1999 CanLII 6357 (BC S.C.); (1999), [2000] 1 W.W.R. 688; (1999), 68 B.C.L.R. (3d) 350. The Honourable Mr. Justice K. Smith:

> [8] The agreement provides that the settlement will not be effectual unless it should be approved not only by this court but also by the courts in Quebec and Ontario in similar proceedings brought in those provinces in *Honhon v. The Attorney General of Canada et al.* and in *Parsons et al. v. The Canadian Red Cross Society et al.*; *Krepner et al. v. The Canadian Red Cross Society et al.* respectively. The decision of Madame Justice Morneau of the Superior Court of Quebec in Honhon was handed down on September 21, 1999, and that of Mr. Justice Winkler of the Superior Court of Justice of Ontario in *Parsons* on September 22, 1999. I had by then reached my decision but was not yet in a position to publish my reasons. As delay was not acceptable in the circumstances, I advised counsel by memorandum on September 23, 1999, as follows:
>
> > . . . I agree with the decision of Mr. Justice Winkler as set out in his reasons released yesterday. In particular, I agree with his comments concerning modifications in respect of opting-out claimants and concerning the provision for surplus and I adopt his remarks in paragraphs 129 to 133 inclusive of his reasons
> > . . . .
> > My written reasons will follow in due course.
> > These are my written reasons.

199. This Court may render an interim decision, briefly as did Smith J., in the decision above, or at length, but the final decision may not issue without dealing with all terms, which include MLG's legal fees and other payments.

200. Regional Senior Justice Winkler did this in the tainted blood case and so did his British Columbia counterpart, the Honourable Mr. Justice K.J. Smith, in *Killough v. Can. Red Cross*, 2001 BCSC 1060 (CanLII); (2001), 91 B.C.L.R. (3d) 309:

> [15] The trust fund is comprised, in part, of $8.975 million contributed by what are described as "Plan Participants", that is, certain pharmaceutical companies, hospitals, physicians, and insurers who are exposed to potential liability through claims made against them in litigation by infected claimants. Although the relative merit of their contribution was not apparent, counsel advised that no information was available as to the composition of the contribution or of the reasons motivating the contributors. However, on February 20, 2001, while I had this matter under reserve, Mr. Justice Winkler of the Ontario Superior Court of Justice **dismissed the parallel application** for settlement approval in Ontario, in *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 567 (Q.L.) (O.S.C.J.), with liberty to renew the application on **further evidence** of the fairness and reasonableness of the contribution to be made by the Plan Participants. As well, he concluded that the initial proposal to pay nothing to family members and relatives of infected persons – described as "derivative claimants" - was not satisfactory.

> [16] As a result, counsel asked me to **withhold judgment on this application until those issues should be resolved in Ontario**. Further evidence was filed and submissions made in Ontario and, as well, the proposed settlement was amended to provide for modest payments to derivative claimants. Consequently, on June 22, 2001, Winkler J. approved the proposed settlement: see *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (Q.L.) (O.S.C.J.).

201. Hence, we submit respectfully, Ontario may not render its **final** decision until Saskatchewan decides. It may be an inconvenience to some and lead to increased cost for the government, but that is the bizarre result of the Settlement Agreement which the government has put before the Court. **The government will argue the sins of delay but their unusual agreement with the requirement to go before nine courts is the cause of any delay which may result.**

202. Payment to tainted blood victims also mattered as to timing. People were dying. But the Courts still took the time to consider carefully the proposed agreement and the Ontario Court refused certification because the Court knew that doing it right was more important than just doing it quickly. In the case at bar, the government settled on November 20, 2005 and almost a year later will likely press the courts to move on some speeded up timetable. The first cases were launched in about 1995 and by MLG in 1997. A few weeks to do things according to statute and case law, a few weeks not to ride roughshod over *delagatus*, is we submit in the best interests of the class and in keeping with the best interests and integrity of the system of justice.

My One and Only

203. Why did the parties agree that all of the provisions of the Settlement Agreement had to be approved but the parties addressed their minds to the only exception. The only exception [2.02 and 16.01] is "except that the fees and disbursements of the NCC will be paid in any event".

204. The parties addressed their minds to specifics of fees and disbursements and the only exception, and now the only exception is the payment of NCC and IAP legal fees. The government may not change the Settlement Agreement or seek to enforce part but not all of it.

205. The parties, by way of Article 2.02, Schedule G to the AIP, Article 4.06, and Article 16.01, have stated to the Courts on four occasions that there will be only one exception, and but for that one exception (assuming that one exception is approved by the Court), the Courts must deal with all issues and may not leave one issue behind or approve any issue unless they approve all issues.

206. There might be small issues, for example that the churches are required to cooperate with the AFN in providing information in the future. The Court may not except even such a small issue. Where an agreement specifies the one and only exception that will be permitted, "except that the fees and disbursements of the NCC will be paid", emphasizes to the Court that there will be no other exceptions of any kind. In this instance, the one and only exception is a minor, almost insignificant exception. That emphasizes all the more that significant exceptions, payment of legal fees to, the BNC and MLG, organizations which are both parties to the agreement, as well as class counsel, could not possibly be an exception.

(b) refer

207. The Ontario and other courts must decide MLG payment. However, Saskatchewan has jurisdiction in resolving the dispute arising from implementation of the AIP and Schedule "V" as it relates to MLG. The parties, pursuant to contract, have consented to have the Saskatchewan Court of Queen's Bench decide the approval and disputes arising from MLG's legal fees and disbursements: Articles 13.08(2), 13.08(4).

208. The Saskatchewan Court of Appeal in *First City Capital Ltd. v. Lupul*, (1987), 44 D.L.R. (4th) 301, [1987] 6 W.W.R. 212, (1987), 61 Sask. R. 153 held that a clause where the parties agree to attorn to a jurisdiction is binding between them. At page 216 Mr. Justice Vancise said:

> The parties have agreed in clear and unmistakable terms that the courts of Alberta have jurisdiction over all disputes, and that of necessity implies that the parties will submit themselves to the jurisdiction of the court for the resolution of those disputes. That is an express agreement to submit to the jurisdiction: see *Bank of Montreal v. Snoxell* (1982), 143 D.L.R. (3d) 349, 44 A.R. 224 (Q.B.), and *C.I.B.C. v. Kabat*, [1985] N.W.T.R. 1 (S.C.)

209. Logically, therefore, Ontario may only make a complete order which implements all the terms of the Settlement Agreement after Saskatchewan determines the amount of MLG legal fees.

210. In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, (1990), 76 D.L.R. (4th) 256; (1990), [1991] 2 W.W.R. 217; (1990), 52 B.C.L.R. (2d) 160, Mr. Justice LaForest discussed the issue of the recognition to be given by the courts in Canadian provinces to a judgment of a sister superior court from another province. He stated as follows:

> ...The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges -- who also have superintending control over other provincial courts and tribunals -- are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments...
>
> The integrating character of our constitutional arrangements as they apply to interprovincial mobility is such that some writers have suggested that a "full faith and credit" clause must be read into the Constitution and that the federal Parliament is, under the "Peace, Order and Good Government" clause, empowered to legislate respecting the recognition and enforcement of judgments throughout Canada; see, for example, Black, op. cit., and Hogg, op. cit. The present case was not, however, argued on that basis, and I need not go that far. For present purposes, it is sufficient to say that, in my view, the application of the underlying principles of comity and private international law must be adapted to the situations where they are applied, and that in a federation this implies **a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation.** In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.

211. The rule formulated was "the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action." Courts will properly assume jurisdiction if they meet the constitutional requirements of order and fairness, a component of which is that a court decline to assume jurisdiction unless it has a real and substantial connection to the parties or the subject matter of the dispute. The principles in *Morguard, supra* were brought to constitutional status in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, (1993), 109 D.L.R. (4th) 16; (1993), [1994] 1 W.W.R. 129; (1993), 85 B.C.L.R. (2d) 1.

212. Unfortunately, "good faith and credit", while allowing Ontario to decide fees, disbursements, and tax for the BNC, knowing that other jurisdictions have the power to incorporate the Ontario disposition into their orders, and Ontario having the power under good faith and credit to incorporate a Saskatchewan disposition of fees, disbursements, and tax for MLG, Ontario, we submit with respect, may not defer that decision. Ontario, we submit respectfully, may not render a 'fill in the blank' judgment. Because of the terms of the Settlement Agreement and the real and substantial

connection between Saskatchewan and the issue of legal fees, regarding MLG, if the Honorable Mr. Justice Ball approved MLG's fees in Saskatchewan such that it became a binding judgment of the Saskatchewan Court, other superior courts throughout Canada would be constitutionally obliged to recognize and enforce it.

213. But how does the Ontario Court receive proof of the disposition in the Saskatchewan Court. In the ordinary course of litigation, a certified copy of the judgment would be filed. Section 38 The *Evidence Act*, R.S.O. 1990, c. E.23 provides:

> **Foreign judgments, etc., how proved**
> **38.** A judgment, decree or other judicial proceeding recovered, made, had or taken in the Supreme Court of Judicature or in any court of record in England or Ireland or in any of the superior courts of law, equity or bankruptcy in Scotland, or in any court of record in Canada, or in any of the provinces or territories in Canada, or in any British colony or possession, or in any court of record of the United States of America, or of any state of the United States of America, may be proved by an exemplification of the same under the seal of the court without any proof of the authenticity of such seal or other proof whatever, in the same manner as a judgment, decree or other judicial proceeding of the Superior Court of Justice may be proved by an exemplification thereof.

214. A copy of the judgment of Saskatchewan must be proved in Ontario respecting MLG legal fees before Ontario can render judgment on legal fees for MLG. That is what the Settlement Agreement calls for. The Settlement Agreement also requires that MLG legal fees be proved and that an Approval Order can not be rendered from Ontario unless MLG's legal fees are ordered.

All or Nothing

215. Approval of a final sum of legal fees was adjourned because it was pegged to the amount of take-ups in *Wilson v. Servier Canada Inc.*, 2005 CanLII 7128 (ON S.C.); (2005), 252 D.L.R. (4th) 742. The terms of that settlement permitted that. Cumming J. wrote:

> **Disposition**
> [98] In my view, and I so find, class counsel fees in the amount of $10 million plus applicable G.S.T. of $700,000 plus $2,619,536 (inclusive of any taxes on disbursements) are approved and to be paid at this time. (The disbursement calculation includes $619,699 allocated for Rochon Genova, $203,566 for Klein Lyons and $1,796,271 to Rochon Genova on account of Lieff Cabraser.) (The party and party costs awarded throughout the litigation process, about $700,000, are apart from, and over and above, the $10 million in fees awarded. However, the $4 million in partial indemnity costs paid as part of the settlement are credited to the global Fund (or considered otherwise, are credits against the $10 million in fees and $2,619,536 for disbursements hereby awarded.)
>
> [99] It is appropriate for the Court to know how the claims process has worked for claimants, the actual take-up by claimants, and the overall achievement of the settlement for class members before determining with finality the full and final amount of class counsel fees.

> [100] Without implying any appropriate overall final quantum of class counsel fees at this time, I will remain seized of the motion for approval of class counsel fees. The hearing is adjourned for a continuance to a date to be fixed by the Court. A further hearing on the matter is appropriate after the Settlement Administrator, Crawford Class Action Services, has provided a comprehensive report on the implementation of the settlement. Such report should not be provided until after at least a year following the expiry of the Claim Period *i.e.*, until after at least a full year has been completed in the Administration Period. Given the reversionary interest of Servier in respect of the settlement monies, the defendants are permitted to make such submissions as they consider appropriate at the continued hearing to assist the Court in its determination of the appropriate overall final quantum of class counsel fees.

216. But this Settlement Agreement is not an application to approve legal fees. The Court in Ontario may not include a provision in its disposition by which an undecided issue regarding a party, MLG, will remain for disposition at some future time. The Court in Ontario could give good faith and credit to the disposition in Saskatchewan, but may only do that after Saskatchewan decides.

217. During negotiations, the majority of law firms opposed utilization of class proceedings. The BNC opposed the utilization of multiple courts. The government sought the additional protection which is thought to flow from having multiple courts decide the same issue. This avoids the risk, as the government saw it, of one superior court, and probably it would have been Ontario, making a national opt out order, which could be subject to constitutional challenge. That part of the negotiations is behind us.

218. But procedural problems flow from the decision to utilize nine courts. The point is that the government gets some benefits of greater certainty, but it may not then expect judges of the nine courts to ignore the jurisdictional cinctures which flow from nine different courts deciding on the same issues and the nine courts are all dealing with agreements which very specifically and repeatedly say that all terms of the Settlement Agreement must be given effect or no terms may be given effect. No part of the agreement may be deferred or ignored. This is one of the consequences flowing from the fact that the settlement specifies that all nine Courts make the same order.

219. The words of Article 2.02, **"Effective in Entirety"** bear analysis. The Court should remember that not just 80,000 Residential School survivors are affected, but also the millions of adherents of the church organizations. From Article 2.02, first, the heading is obvious and it is the same as the words which follow. The first clause "None of the provisions ... will become effective unless *and until* the Courts approve all of the provisions" are clear.

Nothing Wrong with the Affidavit

220. The Affidavit of Donald Outerbridge is sustainable.

Source

221. The government also objects that, in portions of the affidavit, the source of the information is not identified.

222. The Rules of Court allow Donald Outerbridge to swear an affidavit, not as Donald Outerbridge, but as Merchant Law Group.

AFFIDAVITS

Format

4.06 (1) An affidavit used in a proceeding shall,

(a) be in Form 4D;

(b) be expressed in the first person;

(c) state the full name of the deponent and, if the deponent is a party or a solicitor, officer, director, member or employee of a party, shall state that fact;

(d) be divided into paragraphs, numbered consecutively, with each paragraph being confined as far as possible to a particular statement of fact; and

(e) be signed by the deponent and sworn or affirmed before a person authorized to administer oaths or affirmations.

Contents

(2) An affidavit shall be confined to the statement of facts within the **personal knowledge** of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.

For a Corporation

(5) Where these rules require an affidavit to be made by a party and the party is a corporation, the affidavit may be made for the corporation by an officer, director or employee of the corporation.

For a Partnership

(6) Where these rules require an affidavit to be made by a party and the party is a partnership, the affidavit may be made for the partnership by a member or employee of the partnership.

223. Merchant Law Group, LLP makes the affidavit, not Donald Outerbridge. Donald Outerbridge went through, in careful detail, to indicate the various sources of his information, far beyond other instances of affidavits where directors of corporations or heads of firms are entitled to depose as or on behalf of the firm. Wilkinson J. in *TD Canada Trust v. Mosiondz*, 2005 SKQB 540:

> [25] *Alberta (Treasury Branches) v. Leahy*, 1999 ABQB 185 (CanLII), 1999 ABQB 185, (1999) 234 A.R. 201 (Q.B.) reviews the common law principles regarding the manner in which a corporation may speak with personal knowledge in court and the sufficiency of that evidence. Citing a line of decisions, the Court begins with *Advance Rumely Thresher Co. v. LaClair* (1917), 1 W.W.R. 87 (Alta C.A.) where the Court of Appeal held it was not necessary that the manager of a corporation be personally involved in a transaction in question in order to give evidence of them in support of an application for summary judgment on a debt. It has been consistently held that **an authorized person may obtain the requisite personal knowledge by reviewing documents, and speaking to the activities in issue. Such evidence is admissible as "personal knowledge" on a final application.** Accordingly, the defendant's objections to the sufficiency of the evidence here are not well maintained. The case referred to, *Alberta Treasury Branches v. Leahy*, 1999 ABQB 185:
>
> [50] However, as noted above, the WEM Applicants assert that the Hiebert Affidavit is comprised of hearsay because Hiebert was not personally involved in the transactions reflected in the ATB books and records exhibited to and referenced in her affidavit. This assertion cannot stand in light of the line of Alberta authorities commencing with *Advance Rumely Thresher Co. v. Laclair,* [1917] 1 W.W.R. 87 (Alta. C.A.).
>
> [51] In *Advance Rumely*, the manager of a company swore an affidavit in support of a summary judgment on a debt. The defendant objected to this evidence on the basis that the manager had no personal knowledge of the matters deposed to. The Alberta Court of Appeal rejected the defendant's argument, finding that as manager of the company, the deponent had access to all the relevant business records and that **it was not necessary that the manager be personally involved in the transactions in question in order to give evidence of them.**
>
> [52] Similarly, as the person principally responsible for the WEM Loans, Hiebert has had access to the relevant books and records of ATB (and has specifically deposed she has had such access). This is sufficient to show her means of knowledge and justifies her taking the affidavit. I find that Hiebert's position at ATB and her review of ATB's books and records makes her knowledge of the transactions relating to the WEM Applicants "personal knowledge" within the contemplation of Rule 305(1).
>
> [53] A similar result was reached by Master Funduk in *Alberta (Treasury Branches) v. Wenley Enterprises & Sales Ltd.* (1985), 66 A.R. 232 (M.C.). In that case, a branch manager of the Treasury Branches named O'Farrell gave evidence of loans and guarantees that were put in place before he became the branch manager. Master Funduk rejected an argument that O'Farrell's evidence was hearsay, relying on *Advance Rumely*. He found that statements based on the business records of the company amounted to personal knowledge.[4]
>
> [54] In *Bank of Montreal v. Beacon Industrial Development Corp. Ltd. et al* (1986), 70 A.R. 218 (M.C.) the Plaintiff sought summary judgment on a promissory note and a debt. An employee of the plaintiff's division office who dealt with the defendant's accounts swore the supporting affidavit. Master Funduk rejected the defendant's argument that the deponent had no personal knowledge, stating at page 221:
>
> > ...the question is - what exactly is meant by personal knowledge? - to use the terminology of Stuart, J.A. in *Advance Rumely Thresher v. Laclair*, [1971] 1 W.W.R. 875 (Alta. C.A.). For the reasons given by me in *Alberta v. Wenley Enterprises & Sales Ltd.* (1985), 66 A.R. 232, I would consider the evidence

> satisfactory. The witness is with the plaintiff; he handles defaulted loans and he obviously has access to the records of the plaintiff and can depose to what is in the records.

[55] Finally, a similar objection was made in respect to evidence given by the liquidator of a trust company in *Principal Savings & Trust (Liquidator of) v. Bowlen* (1991) 1 C.P.C. (3d) 206 (Alta. Q.B.) Master Quinn stated at pages 210 and 211:

> Counsel for the defendants does not take the position that anything said in these affidavits is not true. His objection is that the affidavits are not admissible in evidence because the deponent cannot really swear that he has personal knowledge. That is the same argument that was made by the defendant in *Advance Rumely Thresher Co. v. Laclair* (1916), [1917] 1 W.W.R. 875...(Alta. C.A.), but it was rejected by the Court of Appeal.

...

In the present case, the affidavits were made by Mr. Frazier, who is something more than a *mere employee* of the liquidator B.I. Robertson & Associates Ltd. In my opinion, his affidavits should be accepted as valid evidence in support of the plaintiff's application. Although he does not purport to have direct first-hand knowledge of the matters he deposes to, he had personal knowledge in the qualified sense that he obtained that knowledge from obtaining and perusing the records of the company in liquidation (the plaintiff company). In my opinion, his affidavits are within the scope of the *Advance Rumely Thresher* case.

[56] The WEM Applicants submit that the above line of authorities establish only that an authorized person may obtain sufficient knowledge from review of corporate records to demonstrate the existence of a debt. I disagree that these cases should be given that restricted interpretation. To the extent that activities of a corporation are recorded in reliable documents, an authorized person may obtain the requisite personal knowledge by reviewing these and then speak to those activities, subject to compliance with the other rules of evidence. The deponent need not be the most senior officer of the corporation, but someone whose background experience and employment responsibilities allows him or her to review and describe the corporation's documents with sufficient scope in which to set out the corporation's position based on those documents. As Master Quinn stated in *Federal Business Development Bank v. Caskey*, (1992), 1 Alta. L.R. (3d) 58 (Q.B.) 58:

> ...R. 305(2) of the *Rules of Court* does not mandate that the authority of the deponent must be shown. Rather, it says that any affidavit required by the rules to be made by a corporate party "may be made by an officer, servant or agent of the corporation having knowledge of the facts required to be deposed to, who shall state therein that he has that knowledge." (page 70)

[57] As noted above, Hiebert has deposed that she is principally responsible for the management of the WEM Loans. She states that she has reviewed ATB's files relating to the WEM Loans. She does not purport to have been personally involved in the transactions relating to the WEM Applicants; she deposes that she did not join ATB until April 1997, which post-dates the transactions in question. In many paragraphs of the Hiebert Affidavit, Hiebert specifically identifies the ATB file documents she has reviewed to make her sworn statement. In other paragraphs, it is obvious that her statements have been gleaned from ATB records and paragraph 7 of the Hiebert Affidavit establishes that one of the sources of her knowledge is those records. I am satisfied that such evidence is admissible as "personal knowledge" on a final application.

[58] **I question how else a corporation can give evidence under these circumstances, other than through a representative such as Hiebert who has the requisite position and authority and who has reviewed the records of the corporation; a corporation is incapable of personally comprehending facts.** Further, prior to obtaining her law degree, Hiebert worked for several years in the financial industry in various positions including loans officer, account manager, senior account

> manager and investment manager. In carrying out these positions, Hiebert gained considerable experience in reviewing, analysing and managing large, complex commercial loans and their restructuring. Hiebert is in a suitable position to put ATB's records of these transactions before the court and provide descriptions of those records to assist the court, provided this is done to provide a narrative as to the position of the corporation based on its records and does not go further into opinion and argument. ATB's selection of its deponent is not unreasonable and I do not see it as an attempt to put forward a "straw man" who cannot be effectively cross-examined as the WEM Applicants suggest.

224. Donald Outerbridge, on these matters, is anything but a straw man. The beginning of Donald Outerbridge's affidavit states that he has personal knowledge of the matter, except when he indicates otherwise. The natural inference is that where he does not identify a source, he has personal knowledge of the matter. That includes the following paragraphs which the government had objected to. Ball J. held that Donald Outerbridge could testify as to the financial pressures that MLG faced, and his affidavit indicates this anyway. The following are examples, but there are many, of Donald Outerbridge's obviously personal information where the government objects that no source is indicated:

> 8 I also have been designated to swear this affidavit in part because I have been with the firm since 1993, and been intricately involved in all management decisions and various partners discussions where residential school issues were handled; and I am therefore in a good position to provide an overview on behalf of the entire firm as to the history of its work with regard to residential schools. I have also been selected to proffer affidavit information on behalf of the firm due to the concern, particularly for the western provinces, that it would be seen as inappropriate for a lawyer from within the firm to swore an affidavit in proceedings where lawyers from the firm also intend to appear as counsel.
>
> 11. Numerous other lawyers and staff in the firm have also worked on Residential School litigation. Some of our lawyers have worked almost exclusively on Residential School cases for most of the past decade. Since 1997, MLG's Residential School litigation efforts have been constant, including handling thousands of discoveries and pre-trial hearings, handling half the Residential School trials and approximately 2/3 of all appeals in Canada.
>
> 48. MLG also contributed behind the scenes. Tony Merchant spoke over time with numerous Cabinet Ministers and Prime Minister Chrétien about Residential School litigation issues as well as speaking with a number of Senators, people within the Prime Minister's offices of both Prime Minister Chrétien and Prime Minister Martin, and speaking briefly with individuals in the Conservative Party, one of whom is now a Cabinet Minister. The BNC also saw the need for pressure and Darcy Merkur and Tony Merchant spoke about this from time to time as their work and ours proceeded. Our sense was that they also were doing good work in this regard although Tony Merchant's level of access was different. A lot of work went into this process which was the repeated expressions of the need for justice for First Nations people, expressed both in terms of the politics of why that would be better and fairer and expressed in terms of the injustice on a substantive and non political level. 2. 3. 4. 7.
>
> 49. The proposed settlement establishes the National Certification Committee ("NCC") of seven individuals and contemplates the establishment after certification of a National Administration Committee ("NAC") of seven persons. Tony Merchant is a member of the NCC and, if certification

and the requested court orders are granted in all jurisdictions, he will be a member of the NAC. Michael Troy and Williams Slater have worked on the IAP subcommittee, and attended meetings and worked to make sure that the IAP program is effective and fair to victims.

55. The BNC did an excellent job in the discussions with the Federal Government which, in themselves, were time consuming and formed a major part of the work by MLG and the BNC in achieving this settlement with the Federal Government. In those discussions, MLG sometimes had as many as seven representatives present for meetings and eleven different lawyers appeared at the negotiations, which would often involve two or three day meetings at a time. Preparation and attendance for these negotiations were very time consuming. 2. 3. 4. 6. 7.

72. The government insisted upon a settlement involving many unusual factors and placing unusual burdens. MLG supports a settlement in keeping with the terms of AIP and SA. MLG seeks for it and for its clients as well as members of the class all of the benefits that flow from specifics of the AIP and SA.

Relevancy

225. There are suggestions of irrelevancy. There is no perfect formula to determine relevancy and courts would only strike on that ground in the coarsest of circumstances. There is also a formula:

IRRELEVANCE+INFLAMMATORY= ABUSE ON THE PROCESS

226. There is nothing inflammatory about the Affidavit of Donald Outerbridge. There is nothing which comes close to constituting an abuse of process. On the issue of determining whether an agreement is fair and reasonable, the courts take a wide and inclusive view of what would conceivably be relevant and what might be considered by one of the parties or indeed objectors to have potential for relevance and significance, particularly on a discretionary order such as this is.

227. Allegations of irrelevancy often reflect opposing counsel's unawareness of what the statements are relevant to. Although there is an allegation that "the vast majority of the affidavit speaks to matters which are entirely irrelevant to and have no bearing on the issues before the Court.", no attempt is made to identify "the issues before the Court." Again, as was cited above, the following issues are relevant:

Settlement Approval

(a) the likelihood of recovery or success;
(b) amount and nature of discovery evidence;
(c) settlement terms and conditions;
(d) recommendation and experience of counsel;
(e) future expense and likely duration of litigation;
(f) recommendation of neutral parties, if any;

(g) the presence of good faith and the absence of collusion;
(h) the degree and nature of communications between counsel and the representative plaintiff, with class members during the litigation; and
(i) the dynamics of, and the positions taken by the parties during the negotiation.

Legal Fees (if that body of law applies to this particular settlement

1. the results achieved;
2. the risks undertaken;
3. the time expended;
4. the complexity of the matter;
5. the degree of responsibility assumed by counsel;
6. the importance of the matter to the client;
7. the quality and skill of counsel;
8. the ability of the class to pay;
9. the client and the class' expectation; and
10. fees in similar cases.

228. These motions tend to devolve to a factors based approach. The portions the government says are irrelevant are indeed relevant to, and organized around, the factors upon which the evidence must touch:

(a) the likelihood of recovery or success;

229. Evidence of the litigation battles is relevant. Evidence of difficulties on behalf of Residential School survivors is relevant. Since this was a settlement with the Government of Canada, an institution led by people elected by Canadians, political issues about MLG and about the government are relevant. The cost and difficulties of litigation are relevant regarding whether MLG fees are fair and reasonable. The fact of various class proceedings, the litigation plan, the differences in the litigation and the differences in the class proceedings launched in various jurisdictions, all has relevance.

(b) amount and nature of discovery evidence;

230. Evidence of prior government attempts to settle fits in this category. Evidence by Donald Outerbridge about the litigation process is a part of this category. The government's archivists and the comments made in the Court of Appeal of Saskatchewan are a part of this category.

(c) settlement terms and conditions;

231. Parts of the Affidavit of Donald Outerbridge seek to assist the Court by focusing attention on terms and conditions of the Settlement Agreement and the AIP which merit focus by the Court in determining issues related to what is fair and reasonable, both as regards the settlement terms unrelated to legal fees and the settlement terms related to legal fees. Focus on timing is important.

232. Although the Settlement Agreement speaks for itself, the Affidavit of Donald Outerbridge highlights certain portions which are relevant to the risk to MLG even at this late stage of the settlement process:

> 50. If the settlement is approved by the Courts including potential appeals, and if 5,000 class members do not opt out, the settlement will come into effect in an estimated eight months.
>
> 51. This is an unusual settlement proposal requiring the approval of 9 Courts, with the right of the government, in the event of $5,000 opt outs, to back away from the settlement.

233. The terms of the Settlement Agreement also provide relief for cultural loss which was claimed in MLG class actions:

> 61. The CEP compensation is exactly the kind of compensation that MLG sought in its class proceedings: compensation for attending a Residential School, losing culture, getting an inappropriate education, and being subjected to verbal and personal abuse.
>
> 62. The issues of culture and loss of education were anticipated to require significant development through experts and case authority. Experts in these areas had been engaged and considerable time spent in working their evidence forward towards anticipated applications for certification and proof at trial. 2. 4. 6. 7.
>
> 63. We have a case before McIntyre J. of the Saskatchewan Court which is a pure culture case. The case had, in essence, begun, to the extent that there have been a whole series of pre-evidentiary meetings. Expert evidence has been prepared and exchanged at considerable expense. A lot of time has gone into the case which I will describe as "*R.R.*", although there is no order that the case be described by way of initials. It is a pure case of loss of culture. As Tony put it in a speech to a law conference in Toronto in February, 2006:
>
> > Surely, all Canadians, because of the importance of the Francophone issue in our nation, understand that the loss of the capacity to communicate in a language affects the loss of culture and affects the loss of one's sense of self. Some thoughtful residential school clients have described the issue to me as one by which their grandparents speak a Native language and some English and they speak English and little of their Native language so that between the generations they are able to talk about buying a coca cola but not really able to communicate about the beauty of a sunset or emotions of a marital breakdown. The aim of Canada is expressed through our politicians has been accomplished and the generations have been cut off from each other. 2.

234. After describing the efforts and expenses that MLG had expended in preparing a case for the recovery the cultural loss, Donald Outerbridge describes:

> 64. We will not be proceeding with that case. All of that work and preparation for a test case is lost. The work on cases where we did not succeed is lost. We are giving up our right to a share of the CEP for all of these individuals even if we were receiving our percentage portion of the CEP, and generally our retainer agreements would result in a payment of about 1/3rd of the CEP to MLG. In many instances we did substantially more work than 1/3rd of the CEP would justify.
>
> 69. The BNC and MLG contributed very significantly throughout the settlement negotiations with the government which began in June of 2005, and continued more or less to the end of May of 2006.
>
> 70. Under the government of Prime Minister Stephen Harper, MLG has had visited upon it ongoing negotiations and 27 different drafts of a settlement agreement, and every draft included various changes, many of which were substantial. Risk continued, and risk grew that a final settlement would not be reached. 2. 3. 4. 6. 7.

(d) recommendation and experience of counsel;

235. Donald Outerbridge presents the views of MLG, which is comprised of experienced lawyers who have careers of experience in residential schools litigation. The following paragraphs are relevant to the views of experienced counsel:

> 57. Work by the BNC was also important. The success by the BNC in *Cloud* was profound in its impact. The good work by the BNC in the Alberta collective case management process was influential. Our lawyers, particularly Jane Ann Summers, Tim Turple, Mike Mantyka, Graham Neill, Tom Stepper, Peter Manousos, Tony Merchant, and others, also took part meaningfully in the Alberta case management process. 2. 3. 4. 5. 6.
>
> 58. The BNC did far less on individual cases than MLG, in terms of ADR and individual trials but these comparisons are only important in relation to the fact that the BNC is to receive a $40M fixed fee and MLG is to receive a $40M fixed fee. 2. 3. 4.
>
> 59. Comparisons of effort are only necessary to determine whether the relative payments are fair. MLG lawyers who attended the discussions not only think payment to BNC is fair to the payor, but think it undervalues the work of the BNC. In relation to the risk taken by BNC, and the wonderful result achieved by BNC, MLG, and other counsel, a settlement in the range of $5B with total legal fees of less than 2%, means MLG believes payment to BNC is fully and absolutely justified. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.

(e) future expense and likely duration of litigation;

236. Evidence about difficulties with negotiations, evidence about the nature of the Settlement Agreement, the right of the government to unsettle the settled, if 5,000 class members opt out, are all a part of assisting the Court to see what we assert is obvious, namely that this is continuing to be a long struggle both for Residential School survivors and for counsel. The Honourable Frank Iacobucci, Q.C., Darcy Merkur, other affidavits before the Court, all put evidence of a similar nature

forward because on the issue of relevance in determining "fair and reasonable" a narrative must be provided and the view of counsel, here expressed by Donald Outerbridge on behalf of key counsel in the process, is relevant:

> 42. In a letter of December 1, 2005, now produced and shown to me and marked as Exhibit "E" to this my affidavit, from Paul Vickery, which from the accompanying distribution list received wide distribution indicates that until the contemplated SA and court proceedings come into effect, litigation would continue and litigation on behalf of various clients whose accounts are sought for disclosure is continuing. The letter reads in part:
>
> > ... the Agreement in Principle ... requires that the final settlement be approved by courts.... It provides that the agreement **will be implemented following those approvals, and the expiry of an opt out period**,....
> >
> > Pending ... implementation ... **litigation is expected to continue in the normal course through discoveries, and to settlement, ...**
>
> 43. On our clients' ongoing cases, just as Paul Vickery indicates, there is an ongoing litigation interest to be advanced. For our clients, now and in the future, whether the settlement is approved or not, and whether clients' claims are resolved in litigation, in ADR, under the new Independent Assessment Process ("IAP"), or in the Courts (for serious clients who opt out even if the settlement succeeds), the release of information (particularly information which is solicitor-client privilege or subject to client confidentiality) would have a devastating effect upon their rights and would have a profound effect upon the class. Our clients will be adversely effected even if the settlement is approved and leads to a settlement by way of the Common Experience Payment ("CEP") and the IAP process (and they do not opt-out of the settlement). 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.

237. Strangely, there is a risk that the implementation of the Settlement Agreement might lead to lengthy and prolonged litigation. The Affidavit of Donald Outerbridge is directly pertinent to this possibility. Portion of Donald Outerbridge's affidavit were in direct response to what Frank Iacobucci, Q.C. had deposed to. If Frank Iacobucci, Q.C.'s opinions are relevant and may be received about Schedule "V" and whether it has been performed, so too are MLG's through Donald Outerbridge:

> 65. Merchant Law Group has thus far been provided, by e-mail, with only the affidavits of Darcy Merkur (sworn July 28, 2006) and Frank Iacobucci, Q.C. (Sworn July 28, 2006). We have been advised that the full materials filed before this Honorable Court are expected to arrive at our offices on Tuesday, August 8, 2006. As this is a process where the parties seek initial approval of a settlement, we are reluctant to controvert facts and opinions offered which we do not agree with or share. However, specific exception must be taken with paragraphs 33 to 38 inclusively of the affidavit of Frank Iacobucci, Q.C. The information stated in the same paragraphs is specifically denied and controverted, other than paragraph 35 (d).
>
> 66. At the time of this affidavit being sworn, MLG has over $40M worth of unbilled work-in-progress fees on individual client files and our class work file. There is a difference of view between MLG and the government whether the verification process has been accomplished. Representatives of the federal government spent 8 days in our offices and were provided various information before leaving over a dispute concerning solicitor-client privilege and client confidentiality.

67. The work, expense, and turmoil within the firm of assembling files in our Regina office from every MLG office across Canada was enormous. In my estimate, from measuring the size and counting of the banker's boxes, I believe if all the files had been piled one on top of another, they would have gone 900 feet in the air.

68. The information concerning MLG fees and disbursement which will be put before the Saskatchewan Court in September will be well detailed.

(f) recommendation of neutral parties, if any;

238. There is no evidence specifically of the views of neutral parties although evidence regarding the views of the Canadian public including the implicit views of the media are relevant and fit in this category. Where there is a wide diversity of media coverage on an issue it would allow a court to gain a sense of the public view of an issue and the media articles have relevance for this and other reasons. Newspaper articles are not hearsay when they are introduced for the purposes of establishing the views of the community and the press and are not relied on for the truth of their contents.

(g) the presence of good faith and the absence of collusion;

239. The entire affidavit speaks to the difficulties of settlement, the divergent views, the litigation battles and problems, and the entire affidavit speaks to the determination of MLG on behalf of its clients and on behalf of the class which addresses the absence of collusion.

240. The affidavit of Donald Outerbridge is relevant to this factor at paragraph 19:

19. Residential School litigation became a crusade for many lawyers within our firm. MLG saw a huge injustice to be resolved. MLG lawyers cared a great deal about this work and took the trust of victims personally. Prosecuting claims was expensive for MLG because MLG represented such a large number of Residential School clients, and our lawyers were committed to moving their cases forward. MLG was determined that our clients would not be victims of the 'deep pockets' defence strategy of denying every claim. The government was spending $4.00 on their lawyers and administration, for every $1.00 being paid in settlements or judgments for victims.

47. We contributed significantly through the media and the public sense of injustice. A significant part of the pressure that was on the government comes as a result of the repeated contact of the media with members of our firm which resulted in the public awareness of the huge and wasteful spending by the government on lawyers and administration. Through the media, we also contributed to the judiciary becoming increasingly impatient with what they saw as a process of delay. There was general support among Canadians, from what we understood to be information from polls conducted by the Government of Canada, for an overall settlement of Residential School litigation and our lawyers told from time to time that support for a comprehensive settlement ran in the range of 70% of Canadians. But nothing ever seemed to happen. 2. 3. 4. 7.

(h) the degree and nature of communications between counsel and the representative plaintiff, with class members during the litigation; and

241. The affidavit discusses the relationship between MLG and its representative plaintiffs going back in some instances for almost ten years. Evidence of relationships with First Nations leadership speaks to this issue. Evidence of the seeming approval of many within First Nations leadership, for example the award on two occasions of eagle feathers to one of the leaders of MLG, the reporting process by MLG to First Nations and First Nations leadership, are all a part of this issue of communications between counsel and the class. With many class proceedings really constituting one class action, with many thousands of individual clients constituting a mass tort as well as a class tort, all of the evidence of the relationship of MLG with the First Nations community, with the media, with the political world of the Government of Canada, with representative plaintiffs, speaks to issues which have been recognized in case law to be significant.

(i) the dynamics of, and the positions taken by the parties during the negotiation.

242. The Affidavit of Donald Outerbridge speaks to the absence of negotiations, the direction of the government, that this was the government pressing its position, and the whole affidavit focuses on the dynamics of this multi-faceted conclusion to the Residential School problem which goes back many decades.

243. Much of the Affidavit of Donald Outerbridge also addresses the issue of the settlement sessions, just as the other affidavit filed do:

> 52. MLG, as did the BNC, attended various meetings with a number of lawyers, did significant preparation for meetings, and in working through the reams of proposals and documents and emails, all of the decisions, because they were hugely significant for members of the class and our clients, were made with significant levels of discussion and idea exchanges in person, by telephone, and in written communications, between the various lawyers within MLG. It is common in resolving class disputes for a great deal of time and effort to go into discussions and negotiations, in this case successful negotiations.
>
> 53. MLG, the BNC, the AFN, sometimes the independent counsel group, and sometimes the churches, often had positions that they advanced in writing.
>
> ...
>
> 56. The discussions were more time consuming than would normally be the case because there was not one view expressed by class counsel in the discussions with the payor, but rather a variety of views expressed by BNC and MLG as class counsel, with valued and diverse views expressed by the Assembly of First Nations (the "AFN"), other representatives of First Nations organizations, and a wide variety of independent lawyers who had a few dozen or sometimes some hundreds of individual clients. These lawyers also attended with expressions of view which often were valuable. There were

also multiple payors and the views of the churches were expressed. Four church organizations were represented. Almost all of the First Nations organizations, the churches, and as was the case with the government, MLG, and the BNC, came with multiple representatives. Sometimes there were in the neighbourhood of 100 representatives attending for meetings all of whom would, from time to time, express views, the vast majority of which were useful, interesting and moved the agenda, but also made the process time consuming and expensive for MLG. 2. 3. 4. 5. 6. 7. 11.

Legal fees

1. the results achieved;

244. MLG won significant battles on the long road. *H.L.* was a major success which contributed to the government caving in to settlement. This is described in Donald Outerbridge's affidavit:

> 34. These issues are significant in relation to risk. These issues are significant in relation to the fact that MLG carried more than half the litigation load, and MLG was taking half the cases in Canada to trial and handled more than half of cases on appeal.
>
> 39. Even on successful cases, for example *H.L.*, which went to the Supreme Court of Canada, we spent in terms of the value of our time far more time than the compensation that we can achieve by way of a percentage of the amount of damages flowing from our success in the Supreme Court of Canada. Notwithstanding our success in the Supreme Court of Canada, 1/3rd of what will be in the range of $350,000 will not come close to satisfying our unbilled hourly fees accumulated on the H.L. file. The same has been true with a number of our successes, which have not be successful for MLG, except in the sense of maintaining pressure upon the government.
>
> 40. Included in Exhibit "A" is an editorial from the Saskatoon StarPhoenix dated April 30, 2005, one month to the day prior to the government announcement of the negotiations that let to this settlement. The StarPhoenix writes that *H.L.* "should serve to speed up a claims settlement process that's dragged on for too long". The Lawyers Weekly of May 13, 2005, included in Exhibit "A", began with the headline "SCC decision on *H.L.* may impact far and wide". The Canadian Lawyer article in 2006 includes, "Tony Merchant, QC, all but feels his firms monumental settlement after a 2005 Supreme Court of Canada win on behalf of one such client, which ruled Ottawa was liable to the tune of $350,000.00 for abuse suffered by that individual in a residential school". Mass and Class torts are often by necessity handled similarly. Work for one client creates impact for others (which is demonstrated by the impact of individual Vioxx trials which have occurred in the United States). *H.L.* was very impactful, as was *Cloud*, and the thousands of individual cases making their way through the Courts, primarily in the Western provinces.

245. Several landmark decisions were effected by Merchant Law Group in all levels of Court throughout Canada. The most important of these was the *H.L.* decision, which, in addition to providing the man H.L. with a handsome damages award, had the additional effect of inducing this settlement one month later.

> 87. The government, on more than one occasion prior to this settlement, presented packages which were half-hearted and unsuccessful in ending Residential School litigation and dealing fairly with victims. For example, on December 6, 2002, the government announced that $1.7B was budgeted for an Alternative Dispute Resolution system. Most survivors did not opted for that process because of the limits on payouts and the structural weaknesses of the ADR program as defined by the government (although the ADR adjudicators and people involved were fair).

88. The question remains, "What brought the government to negotiation the settlement which is now before the court?" In April, 2005, *H.L.* was decided on appeal from the Court of Appeal of Saskatchewan (where the Appellate Court had reduced H.L.'s damages to about $120,000.00), with the Supreme Court of Canada largely restoring a trial award. The Trial Judge had awarded H.L. a total of $80,000.00 in non-pecuniary damages, $296,527.00 in pecuniary damages, and $30,665.00 in estimated pre-judgment interest, an award the Supreme Court upheld, although directing recalculations which would moderately reduce the size of the award. *H.L.* was a case of moderate sexual abuse but confirmed you can get damages for loss of earnings flowing from your abuse in Residential School. Hence, for all moderate to serious cases from then on, the government could have found themselves facing $250,000.00 or more in damages.
reached.

91. The combination of these factors, with the weight of ongoing litigation (much of it being pressed forward by MLG), lead to the settlement before this Honourable Court.

2. the risks undertaken;

246. Almost every paragraph in the affidavit touches on the issue of the risk to MLG. Paragraphs 9 and 10 talk about all the lawyers who have worked on the matter. Paragraph 11 states that almost every lawyer in MLG since 1997 has done some work regarding Residential School litigation. Paragraphs 12 through 26 talk about the relationship with First Nations leadership, the relationship with media, the work involved, the numbers of clients, and the numbers of clients relate to the risk to MLG. Paragraphs 27 to 72 all talk about the huge number of cases undertaken by MLG, the difficulty in dealing with the government, the difficulty of negotiations, the contribution of MLG through the media, through the courts, publicly in the political world of dealing with the Government of Canada and privately, and also talk about the similar contribution by the BNC. The paragraphs address, with prior paragraphs, the relationship with the First Nations leadership, issues of negotiation, and cases that were before the Court. Every one of these issues relate to the risk undertaken by MLG. Paragraphs 73 to 76 discuss the class actions undertaken by MLG. Paragraphs 77 to 91 address in part the reasons for settlement, the joint contribution of both groups of class action counsel. And all of this in combination, including evidence of the difficulties faced by MLG, address risk. MLG was doing a huge amount of work. MLG carried the gamble of thousands of individual cases. MLG lawyers were working for almost a decade with a huge outlay of disbursements and effort by lawyers, a huge outlay of sums for salaries, both to lawyers and staff, a huge outlay of funds for stamps, space, computers, all of which addresses risk. The entire Affidavit of Donald Outerbridge is relevant on the basis of this issue alone concerning the risks undertaken by MLG.

247. We submit respectfully that this affidavit speaks to "bet the firm".

82. Partners' meetings which I attended were often fixated on the legal issues we were encountering with Residential School litigation (and the financial pressures which beset the firm as a result). MLG lost many lawyers over the past ten years who became frustrated working on Residential School files and the sense that the work would never be concluded. MLG lost many lawyers who thought Residential School litigation was far to risky and unlikely to succeed (and that the firm would not be financial sustainable as a result). In the affidavit of Darcy Merkur, paragraph 37 states:

> The residential school claims became "bet the firm" litigation for DP whose practice since 1994 has come to focus primarily on residential school claims.

83. As it is true for David Patterson (who I believe is a sole practitioner), so too did Merchant Law Group "bet the firm" on residential school litigation, and the Patterson comments have put succinctly the tremendous amount of risk taken by many firms in pursuing residential school claims, and the unending amount of work and cost involved in prosecuting these claims against the Federal Government . Merchant Law Group bet a large firm and has been pursuing thousands of individual claims since 1997. In fact, the risk was so great and the prospect for success thought by some to be so uncertain, that MLG has seen many lawyers and even partners leave the firm, citing to me that their main reason for leaving the firm was concerns over the financial risks of the residential school litigation that could bankrupt the firm, consume it financially, in terms of work load and lawyer productivity, and a stated view that the litigation required would be unending and would consume endless hours, with little prospect of succeeding in most cases.

84. Pressure on people within the firm was very real. We are still under that kind of pressure. I have frequently not known whether we will be able to make bi-monthly staff payroll. We have often come close to having our telephones cut off and on one occasion did have telephones cut off. We were always under pressure from our bank, for being unable to make the interest payment for loans. Judging from what they said to me, and the pressures they have placed on MLG, they were extremely concerned about MLG's financial stability. We did completely "bet the firm". MLG undertook huge risks.

248. The Affidavit of Donald Outerbridge touches upon the risk to MLG in many excerpts:

54. The negotiations carry the same risk of any other negotiations. They could fail. The payor could back away. It almost did. The discussions in this instance were far more time consuming because of travel, principally to Toronto for meetings, notwithstanding the fact that this was primarily a western issue. The discussions carried huge disbursements for travel, accommodations, and living expenses for MLG lawyers.

249. Statements about risks are found throughout the Affidavit of Donald Outerbridge:

78. Residential School litigation has been very meaningful for MLG. The risks of the huge personal and financial commitment undertaken by MLG cost the firm dearly. A former senior partner of the firm, Ian Meikle, used to describe it as the "Residential School disaster". Many partners and lawyers left our firm because Residential School litigation created such a huge financial drain for our firm as we continued to do huge amounts of work without payment and run up disbursements which might not be recovered.

3. the time expended;

250. For almost exactly the same reasons, the entire Affidavit of Donald Outerbridge is relevant on the issue of the time expended. Everything in the affidavit speaks to the effort and, we submit respectfully, the dedication demonstrated by MLG lawyers on behalf of Residential School clients. The determination of the lawyers of MLG with files that "would have gone 900 feet in the air" (paragraph 67) speak to this issue of the time expended.

4. the complexity of the matter;

251. Evidence by Donald Outerbridge about the various legal issues which needed to be addressed, the complexity of those legal issues, the variety of those legal issues, the fact that different legal issues arose in different jurisdictions, is relevant both in a determination of whether the settlement is fair and reasonable, and a determination regarding legal fees.

252. The very fact that MLG had so many cases, was engaged in an almost public requirement for a reporting process to the First Nations leadership and through the media to the thousands of clients represented by it directly and the members of the class which MLG hoped to represent after certification, and the fact that the government was determined in its defences, all of which is addressed in the Affidavit of Donald Outerbridge, speaks to this question of complexity. Paragraph 79 addresses complexity directly, "Residential School litigation was complex as to facts and extremely complex as to the law". This sentence was an introduction to the factual material which follows. Examples of the complexity in the legal issues that arise are raised. Paragraph 77 to 91 address complexity and what led to the matter being settled. Paragraphs 52 to 59 discuss the complexity of the negotiations. Paragraphs 62 and 63 deal specifically with a case of a complex nature. The entire affidavit would be justified on the basis proving the complexity of the litigation and the complex facts and legal issues that arose.

253. The legal complexity of the matter is deposed to by Donald Outerbridge. The legal complexity also has relevance, by implication, on the time expended and the quality and skill of counsel:

> 79. Residential School litigation was complex as to facts and extremely complex as to the law. During the years of assisting in the development of the law, MLG lawyers were dealing with many

nuances of vicarious liability, non-delegatable authority, limitation periods, *Public Officers' Protection Act* (a limitation issue that arose specifically and separately in Saskatchewan and Manitoba), thin skull, crumbling skull, past and future earnings, causation, comparative filial relationships, cultural genocide, deprivation, and inadequate education. All of this related to psychological issues which are more difficult to prove both by way of causation and damages as well as using experts in a wide variety of genre, psychologists, occupational utilization experts, earnings loss and actuaries, and fitting the facts as they emerged in individual cases into this complex web of legal principles had a significant effect upon MLG work. Third party claims added to the complexity. What was the role and responsibility of the churches? In some cases, the government added First Nations as third parties. There were many files where the government added half a dozen church organizations and also added Gordon's First Nation and other First Nations. All of these issues added to risk and complexity. All of these issues required sophisticated legal analysis and a great deal of work. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.

81. Additionally, the law was developing and changing. Our firm went to the Supreme Court of Canada with *H.L.* but within Residential School litigation there was a whole series of other cases that also went to the appellate level, many taken by MLG and some taken by other firms, and we fought very complex and important cases, which laid down legal principles which had broad forward application but were time consuming in their development and pursuit. 2. 3. 4. 6. 7. 8.

82. Partners' meetings which I attended were often fixated on the legal issues we were encountering with Residential School litigation (and the financial pressures which beset the firm as a result). MLG lost many lawyers over the past ten years who became frustrated working on Residential School files and the sense that the work would never be concluded. MLG lost many lawyers who thought Residential School litigation was far to risky and unlikely to succeed (and that the firm would not be financial sustainable as a result). In the affidavit of Darcy Merkur, paragraph 37 states:

> The residential school claims became "bet the firm" litigation for DP whose practice since 1994 has come to focus primarily on residential school claims.

5. the degree of responsibility assumed by counsel;

254. MLG took a lead role in keeping residential schools in the media spotlight. This work by counsel put pressure on the government to settle. It may have been possible because one of the leaders of MLG had strong political roots and by implication criticism from MLG was criticism by Liberals of a Liberal government. This is a settlement with the Government of Canada. Politics matter. Both the BNC and MLG took action on a political level, on a small "p" political level, to make contact with members of parliament and others who had influence with the government defendant. Both with the church third parties and defendants as well as with the government, public opinion was extremely important. The fact that MLG represented and represents, approximately half of the people who have gone to lawyers to date, was also important in effecting a settlement and is important in a determination of class counsel fees as well as in a determination of the portion of hybrid fees which should go to MLG for acting on behalf of individual residential school survivors. Why so many individuals went to MLG is a part of the narrative which would be important to a court in determining whether the fees as agreed for payment to MLG are fair and reasonable.

20. The determination of MLG was also noted by the media. Media coverage was significant in MLG becoming the focus of attention for Residential School survivors. Now produced and shown to me, and marked as Exhibit "A" to this my affidavit, are a number of print media articles. There were many, many others published over the years.

21. Tony Merchant, Henri Chabanole, Gerald Heinrichs, Josh Merchant, Norm Rosenbaum, Jane Ann Summers, Evatt Merchant, Mike Mantyka, Tim Turple, and others, have from time to time (and in the case of many of these individuals repeatedly) been interviewed by the media about Residential School litigation, and by the First Nations media on television, radio, and in the First Nations print media.

22. In addition, MLG is well known in western Canada from other litigation, and had the advantage of offices all over western Canada. MLG offices all over western Canada tend not to be in locations which would be off putting to First Nations people. The MLG Winnipeg office is easily accessible and on Broadway, a well known street. In Yorkton, the MLG office is in a stand alone building owned by Rick Yaholnitsky, located in a city in the midst of a number of First Nations. In Saskatoon, the MLG offices are in a building owned by the Yellow Quill First Nation known as the First Nations Bank Building.

23. The determination of MLG on behalf of First Nations people is also noted by the First Nations community. Our lawyers speak to Residential School victims at any time of day. None of our lawyers have non-published home telephone numbers. All of our lawyers take calls at home, in the evening, and on weekends. Many of our lawyers regularly give their cellular numbers to Residential School clients. Victims call often. Being available helped earn our clients' trust. 2. 3. 4. 6. 7. 8. 9. 11. 12.

24. Litigation efforts by MLG was continuing from its commencement in the late 1990s. We believe maintaining the pressure of litigation by thousands of victims was a fundamental reason why the government eventually appointed Frank Iacobucci, Q.C., and sought to reach a comprehensive settlement. A great deal of work was being done based on the contingency retainer agreements in place with MLG clients.

25. The issues which arose in the public media were, in the view of MLG, part of the work to continue to focus public attention on Residential School injustice.

26. The electronic media was also very important in a public attention and pressure role. There have been frequent appearances on television both nationally and in various markets. As recent examples, in July and August, 2006, Tony Merchant was interviewed extensively by CBC Radio in Saskatchewan which broadcasts into northern Saskatchewan, and by Missinippi Radio which has small repeaters all over the north, regarding Residential School matters. 2. 4. 6.

6. the importance of the matter to the client;

255. The affidavit addresses not only the importance of the matter to the thousands of individual clients represented by MLG, not only the importance of the matter to the class, but the importance of the matter to Canada and our sense of justice. The public view is reflected in the media articles. The public view is reflected in the interest of the Government of Canada and the relationship between MLG and the BNC with the political masters of the bureaucracy in Ottawa. The importance to the client is addressed by the reporting process to the broader First Nations community and to the

First Nations leadership all of which is discussed in the affidavit.

7. the quality and skill of counsel;

256. The relationship of MLG with the First Nations community is relevant. The political relationship between MLG and the leadership of the First Nations community and the leadership of the Government of Canada is relevant. All of these things are tied together in connection with public impact, back channels communications, settlement issues, work noted in the public media, work done in private, litigation efforts, public perceptions of the appropriateness of the proposed settlement and public perceptions which led the Government of Canada to settle.

MLG FIRST NATIONS HISTORY & WORK

12. MLG has acted for First Nations and First Nations people during all of my years with MLG. The personal history of our lawyers' involvement with First Nations people, and First Nations causes, long predates the beginnings of MLG, which began as a two lawyer firm on March 31, 1986, then bearing a different name. 2. 3. 4.

13. For several years, MLG has acted for or acts now for numerous Chiefs, members of Band Councils numbering in the hundreds, and on behalf of four former Grand Chiefs of the Federation of Saskatchewan Indian Nations. From Tony Merchant's very early years of practice, he represented First Nations people and extensively argued First Nations causes. Politics, trust, friendship, and fellowship, all have a relationship to the task of working with First Nations people. Politics and the law were conjoined regarding First Nations. Tony was elected to the Legislature of Saskatchewan in 1975. His mother has previously been a member of the Saskatchewan Legislature. His grandfather has previously been a member of the Saskatchewan Legislature. His great uncle was a long time conservative Member of Parliament from Nova Scotia. From 1968 to 1979, one of his brothers-in-law served as a Cabinet Minister from Saskatchewan in the Cabinets of Pierre Elliot Trudeau; and another, then friend who subsequently became his brother-in-law, served in the same Cabinet from 1968 to 1977 as a senior Cabinet Minister from Ontario and later as High Commissioner to London. Throughout those years, Tony Merchant became a friend of a number of Grand Chiefs in Saskatchewan including David Ahenakew and Sol Sanderson, and other aboriginal leaders. 2. 4. 7.

14. Our law firm has acted for approximately ten First Nations over the past decade and for a wide variety of councillors and chiefs dealing with their legal needs, and sometimes issues related to Band Councils. MLG lawyers have appeared before the courts in four provinces and often in the Federal Court, to argue causes on behalf of First Nations, attended sweats and sentencing circles, and a variety of our lawyers have worked for First Nations, worked on business development projects for a variety of First Nations, and acted for individuals of First Nations heritage on hundreds of occasions. Patrick Alberts, Gerald Heinrichs, Rick Yaholnitsky and others, have all worked for First Nations from time to time, and a wide variety of the members of our firm have worked for Band Councillors and individual First Nations people regarding Residential School matters and also regarding many other legal issues over many decades. 2. 3. 4. 6. 7.

15. Our commencement of work on Residential School litigation began in 1997. One of the Chiefs represented by our firm was in our Regina office meeting with Tony and asked him if MLG were interested in doing Residential School litigation, and he agreed. By coincidence, a few days later two band council members from a different First Nation were in Mr. Merchant's office and made the same suggestion. Again Mr. Merchant agreed. After the two people left, Mr. Merchant walked down the hall and spoke with Patrick Alberts and told him about the conversations. Mr. Alberts took the

lead in doing work for Carry-the-Kettle, one of the largest First Nations in Saskatchewan. Mr. Alberts told Mr. Merchant he already had a Residential School case. 2.

16. A number of First Nations began to send clients to MLG. A number of individuals in First Nations institutions, band offices, healing centres, were known to us to be recommending that individuals with Residential School claims contact our firm. 2. 3. 4. 5. 8. 10. 11.

17. As an example, Flora Northwest, one of our representative plaintiffs in Alberta, held various counselling positions in the Hobbema area and based on her recommendations alone, MLG has about 300 or 400 Residential School clients in that area.

18. On two occasions, Tony Merchant has been awarded eagle feathers by First Nations (once where two First Nations came together with their Band Councils and membership for the ceremony), and this recognition of our work regarding First Nations seems to result in additional clients coming to our firm.

257. MLG also had a role in creating public pressure on the government settle in an appropriate way. MLG kept the injustice alive in the attention of the media and through the media in the minds of Canadians who effect the political will of the Government of Canada, which we assert was a part of the settlement which is now before the Court.

258. MLG demonstrated great skill and effort in battling against the government. MLG was up against difficult opposition with Defendants, and particularly the Government of Canada, which was prepared to waste money needlessly defending claims:

35. According to press reports, the Government of Canada was spending $4.00 defending claims for every $1.00 that went to victims by way of judgments and settlements. An example of the battle, whereby the Government of Canada would spend no end of money fighting what was in large part our law firm and what was perceived by us as an attempt to break us as a law firm and break our will to succeed for victims, a suspicion expressed in my presence often in partnership meetings can be seen in an exchange for Cameron J.A. which Tony recounted to me.

36. Tony Merchant was before Mr. Justice Cameron on an application for leave to appeal by the government on a low damages case. MLG was already in the Court of Appeal over a preliminary motion, and the government lawyer told the judge that the reason for delay by the government was that the archivists were searching for information in order to effectively defend. 2.

37. To make the point of how much work had been done by the archivists, explaining the delay, the government lawyer said, 'The cost to date for archivists has been $212,000.' The judge asked quizzically, "How much did you say?". $212,000 was repeated. Judge Cameron sort of cocked his head and said almost wistfully 'I think I am starting to see the nature of the problem'. 2.

38. MLG ran these trials and fought these battles to bludgeon the Government of Canada into being fair to Residential School survivors. It was a rare trial in which we got as much as our ordinary hourly rates. Usually, we lost money in relation to ordinary hourly rates.

8. the ability of the class to pay;

259. This factor is not relevant in this case in that the settlement provides for separate payment by the Government of Canada of legal fees but the Court might still examine the issue to be sure that there is an absence of collusion. The Court might still examine the issue holistically to be satisfied that the government did not buy off the law firms to the disadvantage of the class. Legal fees total less than 2% of the overall settlement.

> 59. Comparisons of effort are only necessary to determine whether the relative payments are fair. MLG lawyers who attended the discussions not only think payment to BNC is fair to the payor, but think it undervalues the work of the BNC. In relation to the risk taken by BNC, and the wonderful result achieved by BNC, MLG, and other counsel, a settlement in the range of $5B with total legal fees of less than 2%, means MLG believes payment to BNC is fully and absolutely justified. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.

9. the client and the class' expectation; and

260. Evidence from the Affidavit of Donald Outerbridge of the litigation battles, the significant and considerable success are all relevant in this inquiry. The test of "the client and the class' expectation" does not really fit the case at bar. There were many representative clients. The class should be taken to be represented in part by the First Nations leadership and in large part by the many thousands of clients individually represented by MLG. Those individual clients agreed that MLG would receive a percentage of any recovery which ranged from 20% to 40%, depending upon the stage of proceedings. This is an indication of expectation of legal fees that the class would think appropriately ought to go to MLG and the BNC. The litigation struggles by inference speak to the expectations of the class.

> 29. Since the late 1990s, MLG has represented approximately half of all Residential Schools survivors seeking compensation from the government for Residential School abuse. Most of MLG clients were pursuing litigation before the Superior Courts of Saskatchewan, Alberta, and B.C.; although MLG also had a significant number of clients in Manitoba and Ontario; with some clients from other provinces and territories, and even the U.S.A. As demonstrated by the government own statistics (which are now produced and shown to be and marked as Exhibit "B" to this my affidavit, being a true copy of page 9 of IRSRC 2001-2002 Departmental Performance Report), approximately 70% of the Residential School claims being advanced in Canada were in Alberta and Saskatchewan, where MLG represented about 60% of all claimants.
>
> 30. MLG has issued more than half of the claims that are before the court in the province of Alberta. We have issued more than half of the claims that are before the court in the province of Saskatchewan. We have issued a high percentage of the claims or ADR claims that are before the courts or in the ADR system in the provinces of British Columbia and Manitoba. We have some claims from the province of Ontario and Quebec.
>
> 31. Further, the amount of litigation work being done in Saskatchewan far outpaced the other provinces. Now produced and shown to be and marked as Exhibit "C" to this my affidavit, is an Access to Information report, dated October 12, 2005, which shows on pages 4 and 5 that the number

of lawyers and the cost alone of their salaries (along with their assistants) were far greater that any other province in Canada; as Saskatchewan (followed by B.C. and Alberta) were the provinces in which Residential School litigation was being most aggressively pursued, while litigation in provinces like Ontario and Quebec was less active. (It should be noted that the figures in the same Access to Information report do not reflect the total annual spending of the government on defending Residential School claims. Now produced and shown to be and marked as Exhibit "D" to this my affidavit, is a true copy of page 15 of IRSRC Planned Spending Estimates, demonstrating additional spending costs of the government concerning Residential School litigation).

32. Various MLG Residential School cases have proceeded to trial in Saskatchewan and British Columbia. MLG initiated the cases management process in Alberta, although there have been no cases in Alberta. No cases moved forward to a conclusion in Manitoba because the Manitoba limitations legislation until the provincial government, to its great credit, passed legislation which resuscitated Residential School litigation. Hence, Manitoba claims were some years behind the claims in other jurisdictions. In Ontario, MLG concluded many cases through work handled mainly by Jane Ann Summers, who is a long standing member of the Law Society of Upper Canada. Tony Merchant argued a number of cases in the Appellate Courts and with Graham Neill from our Edmonton office and Eugene Meehan, Q.C., successfully argued *H.L.*, the first of the two Residential School cases that have gone to the Supreme Court of Canada. 2. 3. 4. 6. 7. 8. 9. 11. 12.

33. The Government of Canada made it very difficult to bring cases to a conclusion. Through demands for document disclosure, examinations for discovery, on many occasions examining the same client more than once and sometimes three times, through the use of experts where clients moving forward to trial would be sent to experts by the government, usually psychologists, retained by the government, and other means. Sometimes they would succeed in having our clients sent on as many as three interviews by experts. Even getting the government to file a Statement of Defence to a claim often took years and several written requests. The government would delay proceedings and make it very difficult for our clients, as well as making it expensive and difficult for us as a law firm. 2. 3. 4. 5. 6. 7.

34. These issues are significant in relation to risk. These issues are significant in relation to the fact that MLG carried more than half the litigation load, and MLG was taking half the cases in Canada to trial and handled more than half of cases on appeal.

35. According to press reports, the Government of Canada was spending $4.00 defending claims for every $1.00 that went to victims by way of judgments and settlements. An example of the battle, whereby the Government of Canada would spend no end of money fighting what was in large part our law firm and what was perceived by us as an attempt to break us as a law firm and break our will to succeed for victims, a suspicion expressed in my presence often in partnership meetings can be seen in an exchange for Cameron J.A. which Tony recounted to me.

38. MLG ran these trials and fought these battles to bludgeon the Government of Canada into being fair to Residential School survivors. It was a rare trial in which we got as much as our ordinary hourly rates. Usually, we lost money in relation to ordinary hourly rates.

39. Even on successful cases, for example *H.L.*, which went to the Supreme Court of Canada, we spent in terms of the value of our time far more time than the compensation that we can achieve by way of a percentage of the amount of damages flowing from our success in the Supreme Court of Canada. Notwithstanding our success in the Supreme Court of Canada, 1/3rd of what will be in the range of $350,000 will not come close to satisfying our unbilled hourly fees accumulated on the H.L. file. The same has been true with a number of our successes, which have not be successful for MLG, except in the sense of maintaining pressure upon the government.

41. MLG contributed in a variety of ways to bringing the government to a decision that a settlement and this settlement in particular was needed and appropriate. We contributed through our pursuit of litigation, which amounted to 50% of the litigation pressure upon the government. There are many examples of our ongoing legal work. We are continuing to conduct Examinations for Discovery, moving cases to pre-trial and trial, dealing in ADR. All of this pressure contributed to achieving the settlement which is before the court.

44. The SA governs amalgamation of the claims. Pursuant to the agreement, amalgamation of the Ontario claims may occur, as of the Implementation Date. Merchant Law Group does not agree to amalgamation taking effect before the Implementation Date, as it would prejudice the interest and right of the Plaintiffs and proposed classes under the Ontario claims.

45. In relation to determining approval of counsel fees and what may be appropriate, there are many factors which must be considered. In this case, there were the usual risks. When this litigation began, many in the legal profession and government asserted that there was no legal foundation for a 'Residential School claim'. Leaving aside sexual abuse claims in some provinces, there were statute of limitation issues and generally, this was an entirely risky and new form of litigation. MLG and other firms ventured into this area of law accepting great risks in a effort to win justice for its clients.

46. By way of comparisons between the work of MLG and the BNC, they moved forward mainly in Ontario with *Cloud*, and work conjunctively with us in regards to Alberta case management. We issued class proceedings first in Quebec and Alberta, and have issued the only class proceedings in Manitoba and B.C., under which the SA is being brought forward in those jurisdictions. We had many more individual actions than the BNC and many more individuals with whom we had to interface and organizations to which we reported and with which we had dealings since 1997. They had greater responsibilities in some areas than we did, and we had greater responsibilities in some areas than they did. We do not criticize the entitlement of the BNC to a fixed fee of $40M. Indeed, MLG lawyers believe this is a modest, if anything inappropriately low award of fees to the BNC for their innovative and effective work which formed an important part of achieving this historic resolution of Residential School wrongdoing. 2. 3. 4. 6. 7.

10. fees in similar cases.

261. MLG's fees can be compared to BNC's fees here. That is what Frank Iacobucci, Q.C. wanted to do. The following relates to the comparison between MLG's $40 million and the BNC's $40 million:

MLG'S PROPORTION OF CASES

27. In the attached articles, marked as Exhibit "A" to this my affidavit, there are references from time to time to the number of clients represented by MLG in relation to the total number of claims that were known to have been brought against the government and churches. From the early years of Residential School litigation onward, MLG always seemed to have half, or slightly more than half, of the clients that were known and reported in the media. When we had 2,000 Residential School clients, the media would report that from talking to the government they knew there were 3,860 claims. When we had 3,500 clients, the media would be reporting 6,700 claims or 7,000 claims.

28. For example, in the attached June 17, 2000, Saturday Night article, it reads, MLG had taken on "over 3,000 cases". In the January 8, 2001, LeaderPost article it reads, "The Merchant Law Firm represents 4,300 of the 6,000 former Indian Residential School students who are suing the federal government...". In the March 9, 2001, National Post article it reads, "Merchant Law Group represents about 4,300 native people who say they were abused". In the StarPhoenix on November 2, 2004, ran an article stating "Regina lawyer, Tony Merchant, whose firm represents some 6,800 Residential School claims". The Lawyers Weekly on December 2, 2005, said "Merchant Law Group ... represents

half of all individual law suits by former students against the federal government...". On November 20, 2006, we had 8,099 Residential School client files.

29. Since the late 1990s, MLG has represented approximately half of all Residential Schools survivors seeking compensation from the government for Residential School abuse. Most of MLG clients were pursuing litigation before the Superior Courts of Saskatchewan, Alberta, and B.C.; although MLG also had a significant number of clients in Manitoba and Ontario; with some clients from other provinces and territories, and even the U.S.A. As demonstrated by the government own statistics (which are now produced and shown to be and marked as Exhibit "B" to this my affidavit, being a true copy of page 9 of IRSRC 2001-2002 Departmental Performance Report), approximately 70% of the Residential School claims being advanced in Canada were in Alberta and Saskatchewan, where MLG represented about 60% of all claimants.

30. MLG has issued more than half of the claims that are before the court in the province of Alberta. We have issued more than half of the claims that are before the court in the province of Saskatchewan. We have issued a high percentage of the claims or ADR claims that are before the courts or in the ADR system in the provinces of British Columbia and Manitoba. We have some claims from the province of Ontario and Quebec.

31. Further, the amount of litigation work being done in Saskatchewan far outpaced the other provinces. Now produced and shown to be and marked as Exhibit "C" to this my affidavit, is an Access to Information report, dated October 12, 2005, which shows on pages 4 and 5 that the number of lawyers and the cost alone of their salaries (along with their assistants) were far greater that any other province in Canada; as Saskatchewan (followed by B.C. and Alberta) were the provinces in which Residential School litigation was being most aggressively pursued, while litigation in provinces like Ontario and Quebec was less active. (It should be noted that the figures in the same Access to Information report do not reflect the total annual spending of the government on defending Residential School claims. Now produced and shown to be and marked as Exhibit "D" to this my affidavit, is a true copy of page 15 of IRSRC Planned Spending Estimates, demonstrating additional spending costs of the government concerning Residential School litigation).

32. Various MLG Residential School cases have proceeded to trial in Saskatchewan and British Columbia. MLG initiated the cases management process in Alberta, although there have been no cases in Alberta. No cases moved forward to a conclusion in Manitoba because the Manitoba limitations legislation until the provincial government, to its great credit, passed legislation which resuscitated Residential School litigation. Hence, Manitoba claims were some years behind the claims in other jurisdictions. In Ontario, MLG concluded many cases through work handled mainly by Jane Ann Summers, who is a long standing member of the Law Society of Upper Canada. Tony Merchant argued a number of cases in the Appellate Courts and with Graham Neill from our Edmonton office and Eugene Meehan, Q.C., successfully argued *H.L.*, the first of the two Residential School cases that have gone to the Supreme Court of Canada. 2. 3. 4. 6. 7. 8. 9. 11. 12.

262. Exhibiting the change in the Settlement Agreement as proposed, between draft 24 and Draft 25 also speaks to the issue of MLG fees and the difference in the payment structure which applies to MLG as opposed to the payment structure which applies to the BNC. This is relevant and appropriately before the Court.

263. Criticism of opinion evidence is also mounted by the government. The affidavit is not an "opinion" affidavit. And it would be permitted in class proceedings in any event.

264. A recent review of the law dealing with situations in which laymen may give opinions is contiained in *Toronto-Dominion Bank v. Cambridge Leasing Ltd.*, 2006 NBQB 134:

> [4] The defendants submit that they are lay opinion evidence and refer to the leading case of *R. v. Graat* 1982 CanLII 33 (S.C.C.), [1982] 2 S.C.R. 819 where Dickson, J., as he then was, discussed the admissibility of the opinion evidence of two police officers who were not qualified as experts as to whether or not the accused was impaired. Dickson, J. after reviewing the law in various jurisdictions stated at paragraph 52:
>
> > I accept the following passage from Cross as a good statement of the law as to the cases in which non-expert opinion is admissible.
> >
> > **When, in the words of an American judge, "the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated", a witness may state his opinion or impression. He was better equipped than the jury to form it,** and it is impossible for him to convey an adequate idea of the premises on which he acted to the jury:
> >
> > > "Unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical senses were treated in the law of evidence as if they were mere statements of fact, witnesses would find themselves unable to communicate to the judge an accurate impression of the events they were seeking to describe."
>
> [5] The defendants also rely on the following statement from *The Law of Evidence in Canada* by Sopinka, Lederman and Bryant, 2d ed. (Butterworths, Toronto) where the authors considered the effect of *R. v. Graat*, supra. at paragraph 12.11, they stated:
>
> > Courts now have greater freedom to receive lay witnesses' opinions if: (1) the witness has personal knowledge; (2) the witness is in a better position than the trier of fact to form the opinion; (3) the witness has the necessary experiential capacity to make the conclusion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about ... As the testimony shades towards a legal conclusion, resistance to admissibility develops.

265. Donald Outerbridge, if his evidence in portions is opinion, is admissible and reliable opinion. As is evident from his affidavit and supported by the order of Ball J. Donald Outerbridge, as the Executive Director, and the center of the firm is in a better position to provide this evidence than any one lawyer. He has spoken with almost every lawyer involved to inform the Court of these matters. If every lawyer with personal knowledge had to be called to swear an affidavit, the Court's already voluminous record would be multiplied. There is no need to make a transaction by transaction

analysis, or a file by file analysis in this application. It would be unreasonable to require such precision and no other lawyer or law firm or consortium of law firms has gone into that detail. The Court was not at MLG to observe the matters about which Donald Outerbridge offers views. Donald Outerbridge's are of assistance. His experience as a thirty year manager of law firms set out the necessary experiential capacity to provide lay opinion.

266. Every portion of Donald Outerbridge's affidavit is broadly relevant. Some portions have significant and specific relevance under a number of the indicia noted above. The affidavit is similar to other affidavits, creating a picture for the Court of MLG's work, MLG as an institution, MLG's contribution, and MLG's entitlement to fees, all of which are a part of the Court's determination of what is fair and reasonable.

267. There is a naturally occurring phenomenon known in the evidence cases called "multiple relevance". Certain paragraphs may be relevant to two, three, four or more issues as well as a dozen non-issues. Political activities for example, may be relevant to a whole series of matters, relevant for example to matters in this application, such as what brought the government to negotiations. The nature and good faith of the negotiations is relevant. And so is the prologue to the negotiations.

scraps of snippet lead to an adjournment

268. If the government's application to strike succeeds, the Affidavit of Donald Outerbridge, once a 27 page document, would be the following scraps of snippet:

AFFIDAVIT OF DONALD I. M. OUTERBRIDGE
(Sworn August 7, 2006)

I, Donald I. M. Outerbridge, Executive Director, of the City of Regina, in the Province of Saskatchewan, **MAKE OATH AND SAY AS FOLLOWS:**

BACKGROUND

1. I am the Executive Director of Merchant Law Group ("MLG") and as such I have personal knowledge of the matters and facts about which deposition is made herein except where stated to be on information and belief, and whereso stated I verily believe the same to be true.

2. I have a Bachelor of Arts from the University of Western Ontario and a Bachelor of Commerce (Honours) from the University of Windsor.

3. All of my working career has been dedicated to law office management. I was the Office Manager of Outerbridge, Barristers and Solicitors, in Toronto, Ontario, a firm of 18 lawyers, from 1982 to 1987.

4. I was the General Manager of Simkin Gallagher, Barristers and Solicitors, in Winnipeg, Manitoba, a firm of 35 lawyers, from 1988 to 1992.

5. I joined MLG in February 1993 and have been the Executive Director of MLG since 1993.

6. We are a firm of approximately 50 lawyers and articling students. MLG has offices in Montreal, Winnipeg, Yorkton, Regina, Saskatoon, Calgary (two offices), Edmonton, Kelowna, Surrey, and Victoria (as well as some smaller satellite offices). MLG is a law firm with individual lawyers who are called to the Bar in Quebec, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia (and additionally Tony Merchant is a practising member of the State Bar of Arizona). Over the years, the partners and associates of MLG, in order of their seniority at the Bar have been Bill Purdy, Gordon Neill, Q.C., Garry Wilson, Q.C., Ian Meikle, Anthony Boryski, Tom Doré, E.F.A. Merchant, Q.C., and also of significant seniority are Satnam Aujla, Tim Turple, Henri Chabanole, Patrick Alberts, David Halvorsen, Jane Anne Summers, Howard Tennenhouse, Gerald Heinrichs, and others.

...

10. In addition, other MLG lawyers who have been particularly active with Residential School work and litigation over the years are:

Jonathan Abrametz	Jolene Horejda
Patrick Alberts	Jennifer Jamieson
Drew Belobaba	Christian Johnson
Gavin Bentley-Fisher	Mark Lancaster
Jordan Bienert	Matia Matkovic
Tyler Bond	Bruce Neill
Sylvie Bourassa	Graham Neill
Dwayne Braun	Mike Nolin
Jeremy Caissie	James Purdy
Henri Chabanole	Brendan Pyle
Charlene DeLuca	J. D. Roberts
Jeff Deagle	Norm Rosenbaum
Tom DeCoteau	Earl Shaw
Tom Doré	Tom Stepper
Ron Dumonceaux	Steven Summers
Owen Falquero	Chris Tahn
Hong Go	Eric Wagner
Steve Haichert	Brian Warrington
Gerald Heinrichs	Rick Yaholnitsky
Steve Hill	Lennard Young

...

88 I make this affidavit for no improper purpose.

SWORN BEFORE ME at Municipality of Kincardine, in the Province of Ontario, this _____ day of August, 2006.

_____
A COMMISSIONER FOR OATHS in and for the Province of Ontario;
My Commission expires:

_____
Donald I. M. Outerbridge

269. If this is all that remained, then there would not be the "sufficient information" needed to support the application to approve the Settlement Agreement. The proper remedy is that leave will be granted to file a new affidavit and an adjournment be granted.

Adjourning the motion

270. The possibility of the motion being adjourned is related to the Affidavit of Donald Outerbridge and also related to a second factor.

271. The government may not withdraw its support for a term of the agreement. It must be deemed to support the entire agreement. The government signed that it would support the entire agreement. If the government were permitted to withdraw its support for a term of the agreement, the payment to MLG, then the application would have to be adjourned. MLG would be entitled to reconsider its position and supplement the affidavit material which was filed on the assumption that the government would be required to comply with the terms of the agreement.

272. If this Honourable Court allowed the government to withdraw its support for a term of the Settlement Agreement, MLG and other parties might want to withdraw their support for one or more terms of the Settlement Agreement.

273. We submit respectfully that the Court may not allow a party to an agreement to withdraw support for a term of the agreement. But in any event, if that were permitted then an adjournment in fairness ought to be granted.

274. If anything significant were struck from the affidavit of Donald Outerbridge, then the authorities are clear that an adjournment is granted. Again, in a justice system which exists to allow fairness to all the parties, if the Court held that the Donald Outerbridge affidavit were struck then MLG as a significant party to the agreement, MLG as a significant party in the litigation, and MLG as class counsel, would be, on the authorities, afforded an opportunity to file an affidavit to replace the affidavit which had been struck.

275. This is what would result in an ordinary court application and we submit respectfully that this Honourable Court must not think of this application as being different from an ordinary application, in the sense that adjective law, effects fairness to parties.

276. If the government's application were granted, then there would not be sufficient information before the Court to determine if the agreement were fair and reasonable and approve the settlement agreement. If the Affidavit of Donald Outerbridge were struck, the evidence proffered on behalf of the law firm with the largest number of members of the class, some half of the individuals who have come forward, would not be before the Court and the evidence from class counsel on proceedings all across Canada would not be before the Court. The remedy, we submit respectfully, would be to grant leave to MLG to file a new affidavit.

277. Both the cases cited by the government and additional cases noted below support the proposition that an adjournment would have to be granted. **From the government cases cited:**

- *Csak v. Mokos,* [1995] O.J. No. 4027 at paragraph 50: **"In the result, an order will go striking out the Boutet affidavit with leave to deliver a fresh affidavit provided such fresh affidavit is delivery within 10 days from the entry of the order...."**
- *Chopik v. Mitsubishi Paper Mills Ltd.,* [2002] O.J. No. 2780: **"Counsel for the Plaintiff shall either deliver a fresh Affidavit in support of the motion for certification or amend the existing Affidavits as determined by these Reasons..."**

278. Other cases provided similar relief:

- *Webber v. Wallace,* 1994 CanLII 1583 (BC S.C.) in the penultimate paragraph: **"As so much of the plaintiff's affidavit is improper, the affidavit should be removed from the file and replaced with an affidavit complying with Rule 51 and the rules of evidence."**
- *K.L.C. v. J.C.,* 2000 BCSC 798: "I have indicated the excluded portions in the body of the affidavit by underlining them in pencil, for quick reference. The affidavit should be removed from the court file, and a new affidavit should be filed to replace it."

All of which is respectfully submitted this 21st day of August, 2006

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