Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CHARLES BAXTER SR., and ELIJAH BAXTER

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

- and -

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

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

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

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I. OVERVIEW AND NATURE OF MOTION

1. The parties present a consent application for certification of this action as a class proceeding and approval of the Settlement Agreement for the purpose of achieving a fair, comprehensive and lasting resolution of Indian Residential School claims in Canada.

2. To achieve this proposed national settlement, applications for certification and settlement approval will be brought in the superior courts of nine jurisdictions: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nunavut, the Yukon and the Northwest Territories ("the Courts"). The applications are bought pursuant to the following laws:

> ***Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 4, 35***
>
> ***Class Proceedings Act, S.A. 2003, c. C-16.5, ss. 5, 35***
>
> ***The Class Actions Act, S.S. 2001, c. C-12.01, ss. 6, 38***
>
> ***The Class Proceedings Act, C.C.S.M. c. C130, ss. 4, 35***
>
> ***Class Proceedings Act, 1992, S.O. 1992, c.6, ss. 5, 29***
>
> ***Code of Civil Procedure (Québec), Articles 1003, 1016, 1025***
>
> ***Rule 62 of the Rules of the Supreme Court of the Northwest Territories, N.W.T. Reg. 010-96***
>
> ***Rule 62 of the Rules of the Supreme Court of the Northwest Territories, N.W.T. Reg. 010-96, as adopted by Nunavut pursuant to section 29 of the Nunavut Act, S.C. 1993, c. 28***
>
> ***Rule 5(11) of the British Columbia Supreme Court Rules B.C. Reg 220/90 as adopted by the Yukon pursuant to section 38 of the Judicature Act (Yukon), R.S.Y. 2002, c. 128***

3. The applications in relation to proposed Class Members resident in Newfoundland and Labrador, Prince Edward Island, New Brunswick and Nova Scotia or abroad are, by the parties' agreement, subsumed in the Ontario proceeding. This means that the substantive law of Ontario, including the *Class Proceedings Act,* 1992, S.O. 1992, c. 6 applies to those Class Members.

"Class Membership" in section 4.04 of the Settlement Agreement, p. 27
Joint Motion Record ("JMR"), Vol. I, p. 00101

4. The applications for certification and settlement approval are scheduled to be heard by the Courts on the following dates:

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

5. To realize this national settlement, the Courts must grant the applications on "substantially the same terms and conditions". It is a condition precedent of the settlement that it does not become effective unless and until it is approved by all of the Courts.

"Date when Binding and Effective" in section 2.01 of the Settlement Agreement, p. 21
JMR, Vol. I, p. 00095

"Effective in Entirety" in section 2.02 of the Settlement Agreement, p. 22
JMR, Vol. I, p. 00096

"Consent Certification" in section 4.05 of the Settlement Agreement, p. 28
JMR, Vol. I, p. 00102

"Agreement is Conditional" in section 16.01 of the Settlement Agreement, p. 79
JMR, Vol. I, p. 00153

6. The proposed settlement embraces an extensive class of members, reaching not only former students but also their family members. The array of benefits is equally extensive, ranging from direct monetary compensation to commemorative events. It is anticipated that the settlement will, if approved and implemented, largely end all existing and impending Residential School litigation in every jurisdiction in Canada. It is further anticipated that the distribution of all settlement benefits to Class Members will be substantially completed within 6 years of its implementation. In this way, the settlement offers a measure of closure for Class Members within a comparatively short period time.

7. Given that the Courts are asked to approve the settlement on substantially the same terms and conditions, Canada and the plaintiffs are providing uniform written submissions and substantially the same materials and evidentiary record to each of the Courts. Uniform written submissions are also appropriate given the uniformity of class proceedings law across the country. The settlement stipulates that the proposed class proceeding before each of the Courts will be a uniform and all-inclusive Statement of Claim that pleads all common causes of action and all claims and causes of action advanced to date in any other Indian Residential School claim.

"Content of Class Actions", s. 4.02 of the Settlement Agreement, p. 26
JMR, Vol. I, p. 00100

II. FACTS

A. TERMS OF THE PROPOSED SETTLEMENT

8. The main components of the Settlement Agreement are as follows:

1. Compensation for Residential School Experience: The Common Experience Payment

9. A Common Experience Payment ("CEP") is provided to former students who were alive as at May 30, 2005 and who resided at an Indian Residential School prior to December 31, 1997.

> ***"Eligible CEP Recipient" in section 1.01 of the Settlement Agreement, pp. 12-13***
> ***JMR, Vol. I, pp. 00086-00087***

10. Eligible CEP Recipients receive $10,000 for their first year of residence or part thereof. They receive an additional $3,000 for each year of residence or part thereof, thereafter.

> ***"Amount of CEP" in section 5.02 of the Settlement Agreement, p. 44***
> ***JMR, Vol. I, p. 00118***

11. The CEP is intended to recognize the common experience of all former students. Any former student who accepts the CEP is deemed to have released Canada and the Church Organizations from all claims. An exception is made for Claimants alleging serious physical abuse, sexual abuse or other wrongful acts as defined.

> ***"Releases" in Article 11 of the Settlement Agreement, pp. 58-62***
> ***JMR, Vol. I, pp. 00132-00136***
>
> ***Schedule "D" of the Settlement Agreement, pp. 2-4***
> ***JMR, Vol. I, pp. 00236-00237***

12. Canada has set aside a "Designated Amount" of $1.9 billion to fund the CEP. Significantly, Canada agrees to remedy any deficiency in the Designated Amount to ensure that all those entitled to receive a CEP will, in fact, receive it.

In other words, Canada alone bears the risk of any insufficiency of the Designated Amount Fund.

> ***"Designated Amount" in section 1.01 of the Settlement Agreement, p. 12***
> ***JMR, Vol. I. p. 00086***
>
> ***"Insufficiency of Designated Amount" in section 5.06 of the Settlement Agreement, p. 47***
> ***JMR, Vol. I, p. 00121***
>
> ***Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 23***
> ***JMR, Vol. III, pp. 00948-00951***
> ***Joint Compendium of Documents ("JCD"), Vol. I, pp. 00008-00011***

13. Once all Common Experience Payments are made, any surplus in the Designated Amount Fund is not returned to Canada but is, rather, applied for the purpose of advancing Aboriginal education. The amount of the surplus dictates how and to whom the surplus is distributed.

> ***"Excess Designated Amount" in section 5.07 of the Settlement Agreement, p. 47***
> ***JMR, Vol. I. p. 00121***

14. If the surplus exceeds $40 million, Eligible CEP Recipients receive a *pro rata* distribution in the form of Personal Credits of up to $3,000. These Personal Credits can be used to obtain personal or group education services. Any remainder is then distributed to the National Indian Brotherhood Trust Fund and the Inuvialuit Education Foundation to be used for educational programs for all Class Members.

15. If the surplus in the Designated Amount Fund is less than $40 million, there is no *pro rata* distribution. Instead, it is exclusively distributed to the National Indian Brotherhood Trust Fund and the Inuvialuit Education Foundation for the same purposes. Canada, therefore, agrees to forego any right to recover any ultimate surplus remaining in the fund.

> ***"Personal Credits" in section 1.01 of the Settlement Agreement, p. 16***
> ***JMR, Vol. I, p. 00090***

Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 23
JMR, Vol. III, pp. 00948-00951
JCD, Vol. I, pp. 00008-00011

16. Canada also assumes the cost of verifying CEP claims, and the related administrative costs pertaining to Personal Credits and their distribution.

"CEP Administrative Costs" in section 5.08 of the Settlement Agreement, p. 49
JMR, Vol. I, p. 00123

Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 23
JMR, Vol. III, pp. 00948-00951
JCD, Vol. I, pp. 00008-00011

17. Nothing less than the entire Designated Amount of $1.9 billion will be distributed for the benefit of Class Members by way of the CEP, and possibly by way of Personal Credits or funds for education programs.

2. Compensation for Abuse: Independent Assessment Process

18. Class Members and other Claimants may seek additional compensation for certain serious physical abuse, sexual abuse and "other wrongful act" claims through an Independent Assessment Process ("IAP"). The "other wrongful acts" category focuses on the effects of abuse rather than the acts of abuse. It consists of acts leading to serious psychological harm, where those acts might not otherwise be legally compensable. The "other wrongful act" category contemplates two scenarios: (1) where an adult singled out a Claimant for physical abuse that was grossly excessive in duration and frequency; and (2) where an adult did any other wrongful act that caused the Claimant serious psychological harm. Collectively, serious physical abuse, sexual abuse and "other wrongful act" claims are called "Continuing Claims".

"Eligible IAP Claimants" and "Non-resident Claimants" in section 1.01 of the Settlement Agreement, at pp. 13 and 15, respectively
JMR, Vol. I, pp. 00087, 00089

Schedule "D" of the Settlement Agreement at pp. 2-4
JMR, Vol. I, pp. 00235-00237

19. The IAP is the exclusive means by which Claimants, who are eligible for a CEP, can pursue their Continuing Claims. Where compensation is paid under the IAP, a Release is executed by the Claimant in favour of Canada and the various Church Organizations.

Schedule "D" of the Settlement Agreement at p. 7
JMR, Vol. I, p. 00240

Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 23
JMR, Vol. III, p. 00949
JCD, Vol. I, p. 00009

20. The IAP uses an inquisitorial, as opposed to an adversarial, process to adjudicate claims and award compensation. An Adjudicator conducts the IAP hearings. The Adjudicator is generally responsible for questioning witnesses, although the parties may suggest lines of questioning. The parties are responsible for calling witnesses and adducing evidence. Expert witnesses are engaged by, and provide a report for, the Adjudicator. Where an expert witness is engaged, he or she may be questioned by the parties or their counsel.

Schedule "D" of the Settlement Agreement, pp. 9-10
JMR, Vol. I, pp. 00242-00243

21. IAP Claimants must establish both the alleged acts and consequential harms of abuse on a balance of probabilities. If the claim is made out, compensation is measured by way of a point system. Separate points are allocated for proven acts, including any aggravating factors, loss of opportunity and consequential harm. In most cases, points for loss of opportunity and consequential harm are awarded where a "plausible link" is proven between the compensable acts of abuse and the alleged loss or harm.

Schedule "D" of the Settlement Agreement, pp. 3-6, 10, 12
JMR, Vol. I, pp. 00236-00239, 00243, 00245

22. The IAP addresses a number of shortcomings identified in Canada's initial DR Model launched in 2003. To start with, the level of compensation in the IAP

is increased and, with the use of only one grid, standardized across Canada. For validated claims, Canada now pays 100% of the compensation awarded. As a result, compensation levels are comparable to the quantum available at law in all jurisdictions and, arguably, more favourable than the quantum provided at law in some jurisdictions. For example, the IAP awards up to $275,000 for proven acts and harm. A further award of up to $250,000 is available for proven actual income loss.

Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 23
JMR, Vol. III, p. 00949
JCD, Vol. I, p. 00009

Affidavit of Leonard Marchand, sworn on July 27, 2006, para. 20
JMR, Vol. IV, pp. 01470-01474
JCD, Vol. III, pp. 00857-00861

Schedule "D" of the Settlement Agreement, pp. 3-6
JMR, Vol. I, pp. 00236-00239

23. Next, the IAP extends the grounds for which Canada will compensate a Claimant for abuse. First, Canada not only will compensate for the abusive acts of "employees" of an Indian Residential School; it will now also compensate for the abusive acts of "any adult person lawfully on the premises". Second, the IAP now compensates for sexual and physical abuse by other students, and not simply sexual abuse. In addition, in cases involving abuse by other students, where the alleged abuse is of a serious sexual nature, the onus shifts to Canada and the Churches to show that reasonable supervision was in place. Clearly, these features of the IAP are more favourable to IAP Claimants than what the law otherwise provides.

Affidavit of Leonard Marchand, sworn on July 27, 2006, para. 20(k)
JMR, Vol. IV, p. 01472
JCD, Vol. III, p. 00859

Schedule "D" of the Settlement Agreement, pp. 2-3
JMR, Vol. I, pp. 00235-00236

24. The IAP consists of a "standard track", a "complex issues track" and, for certain Continuing Claims, a means to access the Courts. The standard track is used for all Continuing Claims except those designated for the complex issues track or those referred to the Courts. The standard track requires Claimants to prove the acts, consequential harms and consequential loss of opportunity on a balance of probability and then that these harms and losses are *plausibly linked* to one or more proven acts. The plausible link standard is much less onerous than legal causation. In the standard track, if Canada and the Claimant agree, the parties can try to settle the claim without a hearing.

25. The complex issues track is used in two cases: (1) for claims alleging actual income loss as a result of a Continuing Claim; and (2) for other wrongful act claims. Like in the standard track, Claimants in the complex issues track must prove the acts, consequential harms and consequential loss of opportunity on a balance of probabilities. Unlike the standard track, Claimants in the complex issues track must then prove that these harms and losses are *caused* by one or more proven acts. A preliminary hearing is held to assess credibility and to ensure that the claim is suitable as a complex issues track case. If satisfied in these respects, the Adjudicator can arrange for any required expert assessments. Thereafter, Canada and the Claimant can try to settle the claim without a hearing or the claim may proceed to a hearing.

26. IAP Claimants can access the Courts in three circumstances as determined by the Adjudicator: (1) where the evidence suggests that the claim for actual income loss or consequential loss of opportunity may exceed the maximum compensation permitted by the IAP; (2) where the evidence indicates that the Claimant suffered catastrophic physical harms for which the Courts could award greater compensation than the maximum permitted by the IAP; and (3) in an other wrongful act claim, where the complexity and extent of evidence required to address the alleged harms makes recourse to the Courts more appropriate.

27. The IAP provides for the timely resolution of Continuing Claims. For example, each IAP Claimant is offered a hearing date within 9 months of his or her application being screened into the process. Moreover, all Continuing Claims will be resolved no later than 6 years after the Settlement Agreement is implemented. To achieve this, Canada has committed sufficient resources to the IAP to ensure a minimum of 2500 IAP hearings per year. In addition to providing these resources, Canada bears the costs of administering the IAP.

"Resources" in section 6.03 of the Settlement Agreement
JMR, Vol. I, pp. 00125-00127

Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 23
JMR, Vol. III, p. 00949
JCD, Vol. I, p. 00009

"IAP Funding" in section 3.05 of the Settlement Agreement, p. 24
JMR, Vol. I, p. 00098

28. The foregoing sets out a number of advantages to the IAP over the existing DR Model and a court action. Some additional advantages include:

(1) An expanded list of compensable acts, such as the "other wrongful acts" category for cases of persistent physical abuse and other sexually abusive acts;

(2) A decreased threshold for harms from "extreme and consistent" to "lasting and significant";

(3) For claims resolved prior to the IAP without a church contribution, a 30% top-up where less than 100% of the assessed compensation was paid;

(4) For claims resolved in the DR Model after May 30, 2005, a means to ensure Claimants receive the benefit of the higher national compensation grid;

(5) For claims referred to the Courts, a waiver of available limitation defences by Canada;

(6) A means to compensate non-student invitees for abuse suffered up to the age of 21;

(7) An independent screening process for IAP claims; and

(8) In some cases, a means for Claimants to give evidence by video conference and a means to preserve a Claimant's evidence in cases of failing health.

Affidavit of Leonard Marchand, sworn on July 27, 2006, para. 20
JMR, Vol. IV, pp. 01470-01473
JCD, Vol. III, pp. 00857-00861

3. Truth and Reconciliation, Commemoration and Healing

29. In addition to the monetary compensation provided by the CEP and the IAP, the proposed settlement provides three other benefits: a Truth and Reconciliation Process, with a budget of $60 million for a 5 year mandate; a number of Commemorative initiatives at both a national and community level, with a budget of $20 million; and a $125 million endowment to fund Aboriginal Healing programs over a five year period.

"Healing Funding", "Truth and Reconciliation" and "Commemoration Funding" in sections 3.02, 3.03 and 3.04 of the Settlement Agreement, pp. 23-24
JMR, Vol. I, pp. 00097-00098

Schedules "J", "M", "N" of the Settlement Agreement
JMR, Vol. I, pp. 00320-00321; Vol., II, pp. 00448-00501

30. With respect to Truth and Reconciliation, a Commission will be established from a number of candidates nominated by former students, Aboriginal organizations, churches and Canada.

Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 23
JMR, Vol. III, p. 00950
JCD, Vol. I, p. 00010

31. The goals of the Truth and Reconciliation Commission are to:

(1) Acknowledge Residential School experiences, impacts and consequences;

(2) Provide an appropriate and safe setting for individuals to address the Commissions;

(c) Witness, promote and facilitate truth and reconciliation events at both national and community levels;

(d) Educate the Canadian public about the IRS system and its impacts;

(e) Create and make publicly available an historical record of the IRS system for future study and use;

(f) Produce a report on the IRS system, its effects and ongoing legacy; and,

(g) Support commemorative events.

Schedule "N" of the Settlement Agreement at pp. 1-2
JMR, Vol. II, pp. 00490-00491

Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 23
JMR, Vol. III, p. 00950
JCD, Vol. I, p. 00010

32. There are three essential event components to the Truth and Reconciliation Commission: National Events, Community Events and Individual Statement-Taking/Truth Sharing. A publicly accessible National Research Centre will also be established.

Schedule "N" of the Settlement Agreement at pp. 8-11
JMR, Vol. I, pp. 00497-00500

33. With respect to Commemoration, former students, their families, their communities and other groups may submit proposals for regional or national commemorative projects such as the creation of memorials or ceremonies that address the Residential School experience.

Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 23
JMR, Vol. III, p000951
JCD, Vol. I, p. 00011

Schedule "J" of the Settlement Agreement, pp. 1-2
JMR, Vol. I, pp. 00320-00321

34. With respect to Healing, the funding provided to the Aboriginal Healing Foundation will be used for the healing needs of former students and their families affected by physical and sexual abuse in Residential Schools, including the intergenerational impacts of this abuse.

Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 23
JMR, Vol. III, p. 00951
JCD, Vol. I, p. 00011

Schedule "M" of the Settlement Agreement
JMR, Vol. II, pp. 00448-00489

35. The Aboriginal Healing Foundation is an Aboriginal-run, non-profit corporation operating at arm's length from Canada. It funds proposals from First Nations, Inuit and Métis affected by the legacy of physical and sexual abuse in the Residential School system.

Affidavit of David Russell, sworn on July 25, 2006, para. 17
JMR, Vol. IV, p. 01448

4. In-Kind Services Provided by Church Organizations

36. The Church Organizations collectively have agreed to provide cash and in-kind services to a maximum of $102.8 million to develop new programs or initiatives for Class Members and their families. This is in addition to the funding provided by Canada under the Settlement Agreement.

> ***Schedule "O-1", The Presbyterian Church Agreement; Schedule "O-2", The Anglican Entities Agreement; Schedule "O-3", The Catholic Entities Agreement; and, Schedule "O-4", The United Church of Canada Agreement to the Settlement Agreement***
> ***JMR, Vol. II, pp. 00502-00671***

5. Payment of Legal Fees Out of Separate Fund

37. Canada will also pay counsel's legal fees out of a separate fund. It is a significant benefit to Class Members that legal fees are not deducted from the settlement funds and benefits available to them.

38. Legal fees for all counsel are based on the number of former students they represented as at May 30, 2005.

> ***"Retainer Agreement" in section 13.06 of the Settlement Agreement, pp. 66-67***
> ***JMR, Vol. I, pp. 00140-00141***
>
> ***Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 27***
> ***JMR, Vol. III, p. 00953***
> ***JCD, Vol. I, p. 00013***

39. The legal fees of all counsel are subject to various verification processes.

> ***"Proof of Fees" in section 13.07 of the Settlement Agreement, pp. 67***
> ***JMR, Vol. I, p. 00141***
>
> ***"The National Consortium and the Merchant Law Group Fees" in section 13.08(2), (3) and (4) of the Settlement Agreement, at pp. 68-69***
> ***JMR, Vol I, pp. 00142-00143***
>
> ***Schedule "V" of the Settlement Agreement***
> ***JMR, Vol. II, p. 00839***
>
> ***Affidavit of Frank Iacobucci, sworn on July 28, 2006, paras. 27, 29, 33, 35***
> ***JMR, Vol. III, pp. 00953-00956***
> ***JCD, Vol. I, pp. 00013-00016***

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

> ***"No Fees on CEP Payments" in section 13.05 of the Settlement Agreement, p. 66***
> ***JMR, Vol. I, p. 00140***
>
> ***Affidavit of Frank Iacobucci, sworn on July 28, 2006, paras. 24, 25, 26***
> ***JMR, Vol. III, pp. 00952-00953***
> ***JCD, Vol. I, pp. 00012-00013***

41. The Settlement Agreement identifies three groups of counsel: Independent counsel; National Consortium counsel; and Merchant Law Group counsel. The fees for each group are addressed in different ways. It is helpful to delineate the different periods during which legal work was done. Negotiations anytime between July 2005, when talks began, and November 20, 2005, when the Agreement in Principle was executed, are captured and compensated in the Settlement Agreement as "Negotiation Fees". Negotiations anytime between November 20, 2005 and the date when the Settlement Agreement was executed are captured and compensated in the Settlement Agreement as "Fees to Complete Settlement Agreement" (hereafter "Completion Fees").

(a) Independent Counsel

42. For each client as at May 30, 2005, Independent counsel receive the lesser of either (1) the amount of outstanding Work-in-Progress as of the date of the Agreement in Principle (i.e. as at November 20, 2005), or (2) $4,000, plus reasonable disbursements and taxes.

> ***"Fees Where Retainer Agreement" in section 13.06 of the Settlement Agreement, pp. 66-67***
> ***JMR, Vol. I, pp. 00140-00141***

Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 26
JMR, Vol. III, p. 00952
JCD, Vol. I, p. 00013

Affidavit of Sandra Staats, sworn on July 15, 2006, para. 12
JMR, Vol. VIII, p. 02408

43. Independent counsel provide a statutory declaration attesting to the number of clients each had as at May 30, 2005 and the amount of outstanding Work-in-Progress per client. If needed, the Settlement Agreement permits Canada to further verify fees.

"Proof of Fees" in section 13.07 of the Settlement Agreement, p. 67
JMR, Vol. I, p. 00141

Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 27
JMR, Vol. III, p. 00953
JCD, Vol. I, p. 00013

Affidavit of Sandra Staats, sworn on July 15, 2006, para. 13
JMR, Vol. VIII, p. 02409

44. Canada also pays Independent counsel's Negotiation Fees and Completion Fees at an hourly rate.

"Negotiation Fees (July 2005 – November 20, 2005)" and "Fees to Complete Settlement Agreement (November 20, 2005 – Execution of Settlement Agreement)" in sections 13.02 and 13.03 of the Settlement Agreement, respectively, pp. 64-66
JMR, Vol. I, pp. 00139-00140

Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 28
JMR, Vol. III, p. 00953
JCD, Vol. I, p. 00013

Affidavit of Sandra Staats, sworn on July 15, 2006, paras. 5, 10
JMR, Vol. VIII, pp. 02407-02408

(b) National Consortium Counsel

45. National Consortium counsel, comprised of counsel from 19 law firms and formed to coordinate the efforts of counsel engaged in Residential School litigation, will be paid $40 million, plus reasonable disbursements and taxes. This amount compensates National Consortium counsel for the substantial number of

former students they represent and the class actions advanced on their behalf. It also includes the National Consortium counsel's "Negotiation Fees". In addition, National Consortium counsel will receive Completion Fees at an hourly rate.

> ***"The National Consortium and Merchant Law Group Fees" in section 13.08 of the Settlement Agreement, p. 68***
> ***JMR, Vol. I, p. 00142***
>
> ***Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 29***
> ***JMR, Vol. III, p. 00953***
> ***JCD, Vol. I, p. 00013***
>
> ***"Fees to Complete Settlement Agreement (November 20, 2005 – Execution of Settlement Agreement) in section 13.03 of the Settlement Agreement, p. 65***
> ***JMR, Vol. I, p. 00139***

(c) Merchant Law Group Counsel

46. Subject to verification, Merchant Law Group may receive up to $40 million, plus reasonable disbursements and taxes. Like the National Consortium's legal fees, this amount recognizes the substantial number of former students it purports to represent, the class action work purportedly carried out and Negotiation Fees. Merchant Law Group counsel will also receive Completion Fees. Canada has filed a separate factum which addresses the agreement respecting the legal fees of the Merchant Law Group.

> ***"The National Consortium and Merchant Law Group Fees" in section 13.08 of the Settlement Agreement***
> ***JMR, Vol. I, pp. 00142-00144***
>
> ***Schedule "V" of the Settlement Agreement***
> ***JMR, Vol. II, p. 00839***
>
> ***Affidavit of Frank Iacobucci, sworn on July 28, 2006, paras. 34-36***
> ***JMR, Vol. III, pp. 00955-00956***
> ***JCD, Vol. I, pp. 00015-00016***
>
> ***"Fees to Complete Settlement Agreement (November 20, 2005 – Execution of Settlement Agreement)" in section 13.03 of the Settlement Agreement, p. 65***
> ***JMR, Vol. I, p. 00139***

6. *Contribution to Claimants' Legal Fees in IAP*

47. The extent of compensation for counsel representing Claimants in the IAP will be a matter between the IAP Claimant and their counsel.

48. However, Canada will pay an additional 15% of any compensation awarded in the IAP as a contribution toward the Claimants' legal fees as well as all amounts for reasonable disbursements.

Schedule "D" of the Settlement Agreement, p. 7
JMR, Vol. I, p. 00240

B. IMPLEMENTATION OF THE PROPOSED SETTLEMENT

1. *Conditions for Implementation*

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

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

"Implementation Date" in section 1.01 of the Settlement Agreement, p. 13
JMR, Vol. I, p. 00087

"Date when Binding and Effective" in section 2.01 of the Settlement Agreement, p. 21
JMR, Vol. I, pp. 00095-00096

"Effective in Entirety" in section 2.02 of the Settlement Agreement, p. 22
JMR, Vol. I, p. 00096

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

> ***"Opt Out Threshold" in section 4.14 of the Settlement Agreement, p. 42***
> ***JMR, Vol. I, p. 00116***
>
> ***"Agreement is Conditional" in section 16.01 of the Settlement Agreement, p. 79***
> ***JMR, Vol. I, p. 00153***

51. If these conditions are met, the terms and benefits of the settlement will be implemented. This section describes the mechanisms in place to ensure the benefits are actually delivered to Class Members.

2. Notice Plan

52. The proposed settlement provides a comprehensive Notice Plan that was designed by, and will be executed by, Hilsoft Notifications. This firm has designed and implemented large-scale consumer class action notice plans. Its President, Todd Hilsee, is a recognized class action notice expert. The firm's *curriculum vitae* is attached as Schedule I to the Notice Plan, and it contains judicial comments recognizing its expertise.

> ***Schedule "K" of the Settlement Agreement, Schedule I***
> ***JMR, Vol. I, pp. 00322-00445***

53. The objective of the Notice Plan is to

> Notify the greatest practicable number of former residential school students and their family members, and provide them with opportunities to see, read, or hear notice and understand their rights, and respond if they choose.
>
> ***Schedule "K" of the Settlement Agreement, p. 7***
> ***JMR, Vol. I, p. 00328***

54. The Notice Plan will ensure that prospective Class Members receive adequate notice of two key phases of the proposed settlement: Phase I includes notice of the approval hearings and Phase II includes notice of the claims and opt-out process.

Schedule "K" of the Settlement Agreement, p. 4
JMR, Vol. I, p. 00325

Affidavit of Todd Hilsee, sworn on May 17, 2006, para. 12
JMR, Vol. VI, p. 01996

55. Phase I of the Notice Plan commenced on June 21, 2006 by way of a "Hearing Notice". The purposes of the Hearing Notice were to announce the proposed settlement, the hearing dates and locations, how to obtain more information and how to object.

Schedule "K" of the Settlement Agreement, p. 6
JMR, Vol. I, p. 00327

56. Phase II of the Notice Plan is triggered once the settlement is approved. It extends the notice coverage to ensure that notice reaches as many prospective Class Members as possible prior to the final opt-out deadlines and the start of the claims process. The "Claims/Opt Out Notice" serves to (1) announce the settlement's approval; (2) outline its benefits; (3) describe how and when various legal rights, such as the right to opt out, must be exercised; and (4) explain how to register for, and obtain additional information about, the claims process.

Schedule "K" of the Settlement Agreement, p. 6
JMR, Vol. I, p. 00327

57. To achieve its objective, the plan sets out a number of "Notice Tactics" which include: (1) individual mailings; (2) organizational outreach; (3) Aboriginal television; (4) Aboriginal radio; (5) Aboriginal publications; (6) mainstream

newspapers; (7) mainstream television (Phase II only); (8) informational news release; (9) internet activities; (10) a toll-free call centre.

Schedule "K" of the Settlement Agreement, pp. 9-11
JMR, Vol. I. pp. 00330-00332

58. The proposed notices are offered in Native languages, English and French, as appropriate to each media vehicle. They are designed to provide a clear, concise, plain language statement of the legal rights and options open to prospective Class Members and other affected persons.

Schedule "K" of the Settlement Agreement, pp. 11-12
JMR, Vol. I, pp. 00332-00333

59. By these means, Hilsoft Notifications estimates that

> [c]ombined, the notice efforts will reach approximately 91.1% of Aboriginal people 25+, and therefore a similar percentage of both former students and family members, an average of 6.3 times throughout the Phase I and Phase II programmes.

Schedule "K" of the Settlement Agreement, p. 8
JMR, Vol. I, p. 00329

60. Notwithstanding this extensive Notice Plan, some Class Members may not receive notice of the settlement and their rights and options. However, the proposed settlement safeguards their rights. If within five years after the settlement is implemented, a Class Member has never (1) commenced an action, other than a class action; (2) participated in specified dispute resolution projects; or (3) applied to the IAP, he or she may commence a court action for any of the Continuing Claims.

"Approval Orders" in section 4.06(i) of the Settlement Agreement, pp. 30-31
JMR, Vol. I, pp. 00104-00105

3. Opting Out

61. Class Members have the right to opt out of the class proceeding as well as the settlement in order to pursue conventional litigation. The right to opt out must be exercised before the Opt Out Period expires, proposed to be approximately five months after the last Court issues its Approval Order.

> ***"Approval Orders" in section 4.06 of the Settlement Agreement, p. 28***
> ***JMR, Vol. I, p. 00102***
>
> ***"Approval Date" in section 1.01 of the Settlement Agreement, p. 9***
> ***JMR, Vol. I, p. 00083***
>
> ***"Opt Out Periods" in section 1.01 of the Settlement Agreement, p. 15***
> ***JMR, Vol, I, p. 00089***

62. Information outlining how and when to opt out will be provided in Phase II of the Notice Plan.

4. Implementation Committees: NCC, NAC and RAC

63. The Settlement Agreement creates several committees with mandates concerning the implementation of the settlement: the National Certification Committee ("NCC"), the National Administration Committee ("NAC") and three Regional Administration Committees ("RAC" or "RACs").

64. The NCC is comprised of one counsel representative from each of the following seven key stakeholders:

(1) Canada;

(2) Church Organizations;

(3) Assembly of First Nations;

(4) National Consortium;

(5) Merchant Law Group;

(6) Inuit Representatives; and,

(7) Independent Counsel group.

65. The NCC's role – expressly limited to the consent certification and settlement approval hearings – is to instruct counsel, review hearing documents, and give input to the Trustee administering the "Designated Amount Fund" of $1.9 billion. If the settlement is approved, the NCC is to dissolve on the Implementation Date of the settlement.

> ***"National Certification Committee" in section 4.09 of the Settlement Agreement, p. 33***
> ***JMR, Vol. I, p. 00107***
>
> ***"Implementation Date" in section 1.01 of the Settlement Agreement, p. 13***
> ***JMR, Vol. I, p. 00087***

66. The NAC, like the NCC, is made up of one counsel representative from each of the same seven stakeholders listed above. The NAC is the chief administrative body that oversees the programs and claims processes. Specifically, the NAC will have the power and mandate, *inter alia,* to

(1) Interpret and implement the Approval Orders and create policy protocols and operations procedures to ensure they are implemented in a consistent way across Canada;

(2) Provide input to the Trustee delivering the CEP;

(3) Hear appeals from Eligible CEP Recipients;

(4) Apply to the Courts to resolve disputes over adding an institution to the list of Indian Residential Schools;

(5) Hear appeals from the RACS; and

(6) Request additional funding for the IAP from Canada, with recourse to the Courts.

"National Administration Committee" in section 4.11 of the Settlement Agreement, pp. 35-40
JMR, Vol. I, pp. 00109-00114

67. Three RACs will be created for the following regions: (1) British Columbia, Alberta, Northwest Territories and the Yukon Territory; (2) Saskatchewan and Manitoba; and (3) Ontario, Quebec and Nunavut.

"Regional Administration Committees" in section 4.12 of the Settlement Agreement, p. 40
JMR, Vol. I, p. 00114

68. Each RAC is comprised of three members. These members will be selected from the following plaintiff groups: (1) the National Consortium; (2) the Merchant Law Group; (3) the Inuit Representatives; and (4) the Independent Counsel group.

69. Each RAC will deal with day to day operational issues that arise in their regions, excluding IAP-related issues. Their decisions may be appealed to the NAC. The need for the RACs will be re-evaluated after 18 months, with the NAC possibly taking over from one or more of the RACs.

"Regional Administrative Committees" in section 4.12 of the Settlement Agreement, pp. 40- 42
JMR, Vol. I, pp. 00114-00116

5. Common Experience Payment

70. The CEP program will be created, administered and paid for entirely by Canada. A Trust Agreement, entered into between the parties, establishes a Trust to fund and distribute the Common Experience Payment. The Trust *res* is comprised of, *inter alia*, the Designated Amount Fund of $1.9 billion and accumulated income.

Schedule "I" of the Settlement Agreement
JMR, Vol. I, pp. 00308-00319

71. The Trustee is obliged to review the sufficiency of the Trust Fund from time to time and Canada agrees to pay the Trustee the amount required to remedy any deficiency to ensure the payment of the CEP. The Trustee will distribute any surplus in accordance with the Settlement Agreement, as described in paragraphs 13-15 above. Canada agrees to pay the administrative costs of the Trust from a source outside the fund.

72. The Trustee will maintain proper records and financial statements to document the Trust assets and transactions. The Trustee will provide an annual written statement of account to the NAC until the Trust terminates.

Schedule "I" of the Settlement Agreement
JMR, Vol. I, p. 00315

"Trustee" in section 10.01 of the Settlement Agreement, p. 56
JMR, Vol. I, p. 00130

73. The Trust terminates on the earlier of (1) the date on which Canada meets its obligations under Article 5 of the Settlement Agreement, in particular, its obligation to make a CEP to every Eligible CEP Recipient; or (2) January 1, 2015.

74. The process for distributing the CEP is as follows:

(1) Eligible CEP Recipients receive information on how to apply for a CEP through the Notice Plan.

(2) Service Canada and partner organizations provide the CEP application form along with information on the CEP process. Service Canada centres can be located by calling a 1-800 number or by checking their website at www.servicecanada.gc.ca. CEP application forms are simple and easy to

use. A sample CEP Application form is attached as Schedule A to the Settlement Agreement.

Schedule "A" of the Settlement Agreement
JMR, Vol. I, pp. 00214-00223

(3) Eligible CEP Recipients apply for the CEP by (a) attending in person at one of the 320 Service Canada centres located in urban and rural and remote areas across the country; (b) by meeting with an outreach officer in the person's community; or (c) by mail to Service Canada.

(4) Service Canada dates the receipt of the application and reviews it for completeness.

(5) Service Canada verifies the applicant's identification, and confirms the statement of attendance against data provided by the Office of Indian Residential Schools Resolution Canada ("OIRSRC").

(6) Service Canada pays the CEP on valid claims within 35 days of receipt, with 80% expected to be paid within 28 days.

(7) Where Service Canada determines that an application is not valid, it provides written reasons for that decision and how to appeal it to the NAC; and,

(8) Service Canada maintains records on the number of valid, partly valid and invalid claims and reports this information to the OIRSRC and the NAC monthly.

Schedule "L" of the Settlement Agreement, containing Flowchart of the CEP process and document entitled "Processing of Common Experience Payment ("CEP")
JMR, Vol. II, pp. 00446-00447

75. Eligible CEP Recipients must apply for a CEP within four years after the Implementation Date. After this date, their right to apply generally ends.

6. Independent Assessment Process

76. The IAP will replace Canada's current DR Model. The IAP will be the exclusive means to resolve Continuing Claims for Class Members and certain other Claimants.

77. The Notice Plan will advise potential Claimants on how to register their IAP claims. The IAP application form is a simple and straightforward document.

> ***Schedule "D" of the Settlement Agreement, pp. 50-67***
> ***JMR, Vol. I, pp. 00283-00300***

78. The timely and effective resolution of IAP claims is an important feature of the proposed settlement. This is seen in Canada's twin obligations of offering a hearing date within nine months and, processing 2500 IAP claims each year.

> ***"Resources" in section 6.03 of the Settlement Agreement, p. 51***
> ***JMR, Vol. I, p. 00125***

79. If these targets are not met, the NAC may call on Canada for more funding. If Canada fails to respond in a timely manner, the NAC may seek the assistance of the Courts.

> ***"National Administration Committee" in section 4.11(12) of the Settlement Agreement, p. 3***
> ***JMR, Vol. I, p. 00111***

80. IAP applications may be submitted any time between the Implementation Date and the 5th anniversary of that date. IAP applications submitted outside of this time period will not be accepted. Resources will be provided to ensure all IAP applications are processed within 6 years of implementation.

"Implementation Date" and "IAP Application Deadline" in section 1.01 of the Settlement Agreement, p. 13
JMR, Vol. I, p. 00087

"Resources" in section 6.03 of Settlement Agreement, p. 51
JMR, Vol. I, p. 00125

81. Reasonable travel costs are provided for support persons to enable them to attend the hearings with IAP Claimants. Counsellors or access to counselling services are available at the hearings. IAP Claimants may request that cultural ceremonies be incorporated into the IAP hearing.

Schedule "D" of the Settlement Agreement, p. 9
JMR, Vol. I, p. 00242

7. Transition Issues

82. The transition from the present DR Model to the CEP/IAP systems is covered by Article 15, "Transition Provisions", of the Settlement Agreement.

83. Several 'no prejudice' provisions exist. Class Members are able to:

(1) Receive a CEP despite having earlier released Canada and/or the Church Organizations;

(2) Receive a top-up of their previous DR award to reflect the higher compensation levels in the IAP;

(3) Receive a top-up of a previous settlement of an abuse claim to reflect the church portion of the damages (i.e. 30%) that Canada notionally assessed in the settlement but did not pay;

(4) If eligible for the IAP, to re-open their hearing in order to revisit two kinds of issues, namely, opportunity loss and severe sexual abuse by students.

"No Prejudice" in section 15.01 of the Settlement Agreement, p. 76
JMR, Vol. I, p. 00150

84. Timing, the nature of the claim and personal choice determine whether or not applications to the existing DR Model are accepted into that system or are transferred into the IAP. However, applications to the existing DR process will not be accepted after the Approval Date. Claimants who applied to the DR process before the Approval Date will by default remain in the existing DR process if they advance a physical abuse claim only. However, they may elect to have their claim transferred to the IAP. On the other hand, where the claimant advances a sexual abuse claim, the reverse occurs. Claimants will by default be transferred to the IAP but they may elect to have their matter moved back to the DR process.

"Approval Date" in section 1.01 of the Settlement Agreement, p. 9
JMR, Vol. I, p. 00083

85. Finally, any Eligible IAP Claimant who received, but rejected, an award under the DR process or a Pilot Project may apply to the IAP to have their claim reconsidered. All evidence from the prior proceeding is transferred to the IAP.

"Acceptance and Transfer of DR Model Claims" in section 15.02 of the Settlement Agreement, pp. 78-79
JMR, Vol. I, pp. 00152-00153

III. ISSUES AND LAW

86. There are two issues before the Court:

(1) Whether or not this action should be certified as a class proceeding; and,

(2) Whether or not the proposed settlement should be approved as fair, reasonable and in the best interests of the Class as a whole.

A. TEST FOR CERTIFICATION FOR THE PURPOSE OF SETTLEMENT

87. The plaintiffs' Factum identifies the legal requirements for certification for the purpose of settlement under both provincial legislative regimes and the common law. For the purpose of settlement only, Canada adopts the plaintiffs' statement of law in this regard and its application to this action.

88. Accordingly, Canada will not readdress the requirements for certification, except to note that where certification is sought for the purpose of settlement, the requirements for certification can be relaxed. This is because the prospect of settlement removes concerns about the manageability of the litigation, provides a measure of certainty about the outcome and offers early recovery not available in the context of contested litigation.

> ***Bona Foods Ltd. v. Ajinomoto USA Inc., [2004] O.J. No. 908 (S.C.J.) at paras. 9 – 11, [TAB 1]***
>
> ***Haney Iron Works Ltd. v. Manufacturers Life Insurance Co., [1998] B.C.J. No. 2936 (S.C.) at para. 15, [TAB 2]***

89. On this basis, Canada respectfully submits that the requirements for certification of this action as a class proceeding are met.

90. Canada reserves its right to contest certification, as well as the merits of the action, if approval of the settlement is not granted. Canada's consent to

certification is conditional on the Courts' approval of the settlement and without prejudice to its right to contest certification if approval is withheld.

B. TEST FOR SETTLEMENT APPROVAL

91. Settlements in class proceedings must be approved by the court.

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 35

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

The Class Actions Act, S.S. 2001, c. C-12.01, s. 38

The Class Proceedings Act, C.C.S.M. c. C130, s. 35

Class Proceedings Act, 1992, S.O. 1992, c.6, s. 29

Book IX (Articles 999-1051) of the Québec Code of Civil Procedure, Article 1016

Rule 5(11) of the British Columbia Supreme Court Rules

Rule 62 of the Rules of the Supreme Court of the Northwest Territories

92. The test for approval of a class settlement is whether it is fair, reasonable and in the best interests of the class as a whole.

Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 (Gen. Div.) at para. 11, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. ref'd [1998] S.C.C.A. No. 372, [TAB 3]

93. Settlements are compromises of the parties' positions. As such, they are not required to meet a standard of perfection but should, rather, fall within a range of reasonableness having regard to the risks and uncertainties of litigation.

McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474 (S.C.J.), para. 14, [TAB 4]

Ontario New Home Warranty Program v. Chevron Chemical Co., [1999] O.J. No. 2245 (S.C.J.), para. 89, [TAB 5]

Sawatzky v. Societe Chirurgicale Instrumentarium Inc., [1999] B.C.J. No. 1814 (S.C.), paras. 21-22, [TAB 6]

94. These principles are especially apposite here where the proposed settlement reconciles the diverse interests of multiple parties including the plaintiffs, the Inuit representatives, the Church Organizations and the Assembly of First Nations.

Affidavit of Donald Belcourt, proposed representative plaintiff for Survivor Class, sworn on July 14, 2006, para. 58
JMR, Vol. V, p. 01909

Affidavit of Veronica Marten, proposed representative plaintiff for the Family Class, sworn on July 14, 2006, para. 8
JMR, Vol. IX, p. 02521

Affidavit of Frank Iacobucci, sworn on July 28, 2006, paras. 14-17
JMR, Vol. III, pp. 00946-00947
JCD, Vol. I, pp. 00006-00007

C. FACTORS RELEVANT TO ASSESSING THE PROPOSED SETTLEMENT

95. To assess whether a proposed settlement meets the test for approval, the following factors are considered:

(1) Likelihood of recovery or success;

(2) Amount and nature of discovery evidence;

(3) Settlement terms and conditions;

(4) Recommendation and experience of class counsel;

(5) Future expense and likely duration of litigation;

(6) Recommendation of neutral parties;

(7) Number of objectors and nature of objections; and,

(8) Presence of good faith and absence of collusion.

Dabbs v. Sun Life Assurance Co. of Canada, supra, [TAB 3]

96. Each of these factors will be addressed below.

1. Likelihood of Recovery or Success

97. This factor does not entail an assessment of the legal merits of the case but, rather, the legal risks raised by the case. Whether a settlement is fair, reasonable and in the best interests of the class is relative to the legal risks of the case. For example, if the legal risks of a case make recovery unlikely, then even modest settlement benefits may be entirely fair, reasonable and in the best interests of the class. In *Haney Iron Works Ltd., supra*, Brenner J., citing the First Circuit Court in *Greenspun v. Bogan*, explains that (at para. 25):

> ...any settlement is the result of a compromise – each party surrendering something in order to prevent unprofitable litigation, and the risk and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial... (Citations omitted)... It is only when one side is so obviously correct in its assertions of law and fact that it would be clearly unreasonable to require it to compromise in the extent of the settlement, that to approve the settlement would be an abuse of discretion.
>
> ***Haney Iron Works Ltd. v. Manufacturers Life Insurance Co., supra, [TAB 2] citing Greenspun v. Bogan, 492 F. 2d 375 (1974) at 381***

98. Class counsel have recognized some of the legal risks faced by Class Members.

> ***Affidavit of Paul Vogel, sworn on July 20, 2006, at para. 86(c)***
> ***JMR (Cloud), Vol. V, p. 001810***
>
> ***Affidavit of Richard Courtis, sworn on July 27, 2006, para. 110***
> ***JMR, Vol. V, p. 01503***
> ***JCD, Vol. II, p. 00404***
>
> ***Affidavit of Leonard Marchand, sworn on July 27, 2006, para. 14***
> ***JMR, Vol. IV, p. 01466***
> ***JCD, Vol. III, p. 00853***

99. These and other legal risks, canvassed below, demonstrate that Class Members would face considerable legal risks if they advanced their claims in the Courts.

(a) Limitations

Ultimate or Fixed Limitation Periods

100. Limitations are an issue that all Class Members – Survivor Class, Family Class and Deceased Class Members - would have to overcome. Meeting a limitations defence is particularly difficult where it is an ultimate or fixed limitation period. The plaintiffs face the risk that many of their claims would not survive the challenge these ultimate limitation periods pose:

> ***Limitations Act, R.S.B.C. 1996, c. 266, s. 8(1)(c)***
>
> ***Limitations Act, R.S.A. 2000, c. L-12, s. 3(1)(b)***
>
> ***The Limitations Act, S.S. 2004, c. L-16.1, s. 7(1)***
>
> ***The Limitation of Actions Act, C.C.S.M. c. L150, s. 14(4)***
>
> ***Limitations Act, S.O. 2002, c. 24, s. 15(2)***
>
> ***Limitation of Actions Act, R.S.N.W.T. 1988, c. L-8, s. 45(2)***
>
> ***Limitation of Actions Act, R.S.Y. 2002, c. 139, s. 46(2)***

101. At other relevant times, various provincial limitations statutes barred the right of persons under a disability to take proceedings after a fixed period of time, regardless of their knowledge of the claim.

> ***Limitations of Actions Act, R.S.A. 1935, c. 8, s. 47(2), as am., R.S.A. 1942, c.133, s. 48(2), as am., R.S.A. 1955, c. 177, s. 46(3) as am., R.S.A. 1980, c. L-15, s. 46(3)***
>
> ***Limitations of Actions Act, 1931, S.M. 1931, c. 30 as am., S.M. 1932, c. 24, s. 40A(1), as am., R.S.M. 1940, c. 121, s. 41, as am., R.S.M.1954, c. 145, s. 48, as am., R.S.M. 1970, c.L150, s. 58***
>
> ***An Ordinance Respecting the Limitation of Actions, S.N.W.T. 1948, c. 6, as am., R.S.N.W.T. 1956, c. 59, as am,. R.S.N.W.T. 1974, c. L-6 as am., Limitation of Actions Act, R.S.N.W.T. 1988, c. L-8, s. 45(2)***
>
> ***An Ordinance Respecting Limitations of Actions in Certain Cases, C.O.Y.T. 1914, c. 55, s. 8, as am., An Ordinance Respecting Limitations of Actions, R.O.Y.T. 1958, c. 66, s. 45(2) as am., Limitations of Actions Ordinance, R.O.Y.T. 1971, c. L-7, s. 45(2), as am., Limitations of Actions Act, R.S.Y. 1986, c. 104, s. 46(2), as am., R.S.Y. 2002, c. 139, s. 46(2)***

102. These ultimate limitation periods would apply to the claims of Class Members. Any alleged wrong advanced by Class Members could not have occurred after the last date of attendance at a Residential School. When Survivor Class Members attended Residential Schools, they were minors and therefore "persons under a disability" within the meaning of these ultimate limitation provisions.

103. The common law, also codified in many provincial *Interpretation Acts,* preserves vested rights acquired under statutes later repealed. This means that a defendant retains the right to plead these ultimate limitation periods, if that right vested before the statutes were repealed.

104. In *Gustavson Drilling (1964) Ltd., infra,* the Court established that a defendant's right to immunity to a time-barred claim is a substantive right. Further, if that right vests prior to the enactment of a subsequent Act that purports to retrospectively govern the claim, that Act will not operate to deprive the defendant of its vested right to immunity from that time-barred claim.

> ***Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, [1977] 1 S.C.R. 271, [TAB 7]***
>
> ***Martin v. Perrie, [1986] S.C.J. No. 1, [TAB 8]***

105. The Manitoba Court of Appeal applied these principles in *M.M., infra,* a Residential School case. In *M.M.,* the defendant acquired a right to immunity to the plaintiff's action under a 30-year ultimate limitation period in a 1931 statute. The 1931 statute was in force when the plaintiff's causes of action accrued and when, 30 years later, the defendant's right to immunity vested. The Manitoba Court of Appeal found that the limitations statute in force at the time the plaintiff commenced her action did not apply retrospectively to interfere with the defendant's vested right to immunity acquired under the 1931 statute.

106. On this basis, the Court held that the plaintiff's claim for damages, allegedly caused during her attendance at an Indian Residential School more than 30 years earlier, was time barred under the 30-year ultimate limitation period that was in force at the time the causes of action accrued.

> ***M.M. v. Roman Catholic Church of Canada, [2001] M.J. No. 401 (C.A.), var'd [2002] M.J. No. 5 (C.A.), leave to appeal to the S.C.C. dismissed [2002] S.C.C.A. No. 8, [TAB 9]***

107. Canada and its servants can engage these provincial ultimate limitation periods by virtue of the *Crown Liability and Proceedings Act*, and its previous enactments, which applies provincial limitation laws to proceedings against Canada.

> ***Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 32***
>
> ***Markevich v. Canada, [2003] S.C.J. No. 8, [TAB 10]***

108. Further, the "discoverability rule" is a rule of statutory construction and does not apply where it is clear that time runs from a fixed event or date, regardless of the claimant's knowledge. As such, discoverability cannot extend ultimate or fixed limitation periods.

> ***Peixeiro v. Haberman, [1997] S.C.J. No. 31, citing Twaddle J.A. in Fehr v. Jacob, [1993] M.J. No. 135 (C.A.), at para. 22, [TAB 11]***

Public Officers' Protection Acts

109. Fixed limitation periods are also contained in provincial public officers' protection Acts. These Acts bar proceedings against public officers *for any alleged wrong* done in pursuance, execution or intended execution of a public duty or authority more than twenty-four months, and in some cases six months, after the alleged wrong occurred.

> ***Public Officers' Protection Act, R.S.A. 1921, c. 9, as am. R.S.A. 1922, c. 91, as am., R.S.A. 1942, c. 138, as am. R.S.A. 1955, c. 262, s. 2***

The Public Officers' Protection Act, S.S. 1923, c. 19, as am., S.S. 1930, c. 16, s. 2, as am. R.S.S. 1978, c. P-40, s. 2

The Public Officers' Act, R.S.M. 1940, c. 173 as am., R.S.M. 1954, c. 213, as am., R.S.M. 1970, c. P230, as am., R.S..M. 1987, c. P230, s. 21

110. The purpose of this protection for public officers is to prevent public authorities from being "...unduly prejudiced by the passage of time."

Des Champs v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell, [1999] S.C.J. No. 53, [TAB 12]

111. Defendants have successfully raised Saskatchewan's *The Public Officers' Protection Act* against plaintiffs in Residential School cases.

R.J.G. v. Canada (Attorney General), [2004] S.J. No. 468 (C.A.), leave to appeal to S.C.C. dismissed sub nom Gardypie v. Canada (Attorney General), [2004] S.C.C.A. No. 425, [TAB 13]

S.M. v. Canada (Attorney General), [2005] S.J. No. 584 (Q.B.), [TAB 14]

112. Even if these short limitation periods were suspended during the time when the plaintiffs were minors, it is clear that Canada's right to plead the limitation period and acquire immunity to the plaintiffs' claims vested long before the plaintiffs commenced their actions. On this basis, Canada respectfully submits that many of the plaintiffs' claims would be barred.

113. Even where these Acts have been repealed, Canada's vested rights are preserved pursuant to the principles discussed above.

Gustavson Drilling (1964) Ltd. v. Minister of National Revenue , supra, [TAB 7]

M.M. v. Roman Catholic Church of Canada, supra, [TAB 9]

114. These public officers' protection Acts are available to Canada by virtue of the *Crown Liability and Proceedings Act* and its predecessors. Further, Canada itself and its servants are "public officers or authorities" within the meaning of

these Acts and are captured by their "protective net". The discoverability rule does not extend the limitation period set out in these Acts.

> ***R.J.G. v. Canada (Attorney General), supra, [TAB 13]***
>
> ***F.P. v. Saskatchewan, [2004] S.J. No. 251 (C.A.), leave to appeal to the S.C.C. dismissed, sub nom Plotnikoff v. Saskatchewan, [2004] S.C.C.A. No. 311, [TAB 15]***
>
> ***S.M. v. Canada (Attorney General), supra, [TAB 14]***

Limitation Issues in Class Proceedings

115. Limitation periods, subject to discoverability or postponement, can prevent the certification of certain common issues or can significantly limit the definition of a class. For example, the following common issue,

> (d) ...can the court make an aggregate assessment of the damages suffered by all Class members of each class as part of the common trial?

can not be certified unless it is clear that Class Members have brought their claim within applicable limitation periods. This issue can prevent certification of these kinds of common issues because their resolution requires an individual assessment of the circumstances of each plaintiff.

> ***Knight v. Imperial Tobacco Canada Ltd., [2006] B.C.J. No. 1056 (C.A.), [TAB 16]***

116. In *Knight, supra*, the Court of Appeal refused to certify a similar issue and limited the class to only those members who clearly brought their claims within the time prescribed by the British Columbia *Limitations Act*. The court stated (at para. 34):

> ...limitation issues clearly arise in the instant actions for transactions occurring prior to May 1997. The chambers judge observed in her reasons, correctly in my opinion, that the limitations defence as a whole cannot be tried as a common issue. If that is so, I am of the view that it is not possible to decide on an award of damages to the class as certified since the composition of the class would be unknown. It could be possible for a class of individuals who entered into transactions after May 8, 1997, to be certified as a class, but I fail to see how claims related to transactions prior to that time could be litigated in the class

proceeding. That is so because in order to have valid claims, individuals would have to be able to establish postponement of the limitation period: *Novak, supra.*

117. Pursuant to *Knight*, where discoverability or postponement are in issue and engaged by a common issue, it is highly unlikely that that common issue could be certified. Alternatively, it could be certified but only by limiting the class to those who clearly satisfy the applicable limitation period.

C.f. Cloud v. Canada (Attorney General), [2004] O.J. No. 4924 (C.A.), at para. 61, [TAB 17]

118. Raising the foregoing limitation issues highlights the significant benefits provided to Class Members under the settlement. Under the settlement, the set of Class Members that will receive benefits is markedly larger than the set of former students or family members whose claims are not barred by provincial limitation statutes.

(b) Canada's Immunity and Liability in Tort

119. Canada's immunity and liability in tort pose two further significant risks for all Class Members. First, the nature of Canada's liability in tort is a vicarious liability only and, second, Canada is immune to intentional tort claims that arose prior to May 14, 1953.

Liability in Tort is Vicarious Only

120. At common law, the Crown could not be sued in tort. As a result, Canada's liability in tort is based entirely in statute. Pursuant to Crown liability statutes, Canada's liability in tort is limited to a vicarious liability only. Consequently, any tort claim that purports to enforce a direct liability against Canada is not a cause of action recognized in law.

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 3

Al's Steak House and Tavern Inc. v. Deloitte & Touche, [1997] O.J. No. 3046 (C.A.), [TAB 18]

The C.S.L. Group Inc. v. Canada, [1996] F.C.J. No. 1618 (T.D.), aff'd [1998] F.C.J. No. 989 (C.A.), leave to appeal to S.C.C. dismissed [1998] S.C.C.A. No. 420, [TAB 19]

121. Moreover, there are other statutory conditions on Canada's tort liability that must be satisfied. First, it must be shown that there is a servant of Canada that would be personally liable to the plaintiff if an action were brought against that servant. This is expressly codified in section 10 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50:

> 10. No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown **unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant**... (Emphasis added)

MacLean v. The Queen (1972), 27 D.L.R. (3d) 365 (S.C.C.), [TAB 20]

Hill v. Hurst (2001), 203 D.L.R. (4th) 749 (B.C.S.C.) at para. 50, [TAB 21]

The CSL Group Inc. v. Canada, supra, [TAB 19]

Immunity to Intentional Torts Before 1953

122. Prior to May 14, 1953, Canada's tort liability was based in the *Exchequer Court Act*, S.C. 1938, c. 28. That Act limited Canada's liability to a vicarious liability for the negligence of its servants occurring within the scope of their employment. Canada was not liable for the intentional torts of its servants. Canada first became vicariously liable for the intentional torts of its servants on May 14, 1953.

Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(1), as am., S.C. 1938, c. 28, s. 1

Crown Liability Act, S.C. 1952-1953, c. 30, s. 3(1)(a)

123. This liability is confined to acts occurring after the Act was assented to on May 14, 1953 by virtue of section 24(1) which provided that:

> 24.(1) No proceedings shall be taken against the Crown under this Act in respect of any act, omission, transaction, matter or thing occurring or existing before the day on which this Act was assented to.

124. The *Crown Liability Act* does not, then, operate retrospectively to remove the Crown's immunity to intentional torts that occurred before May 14, 1953. As a result, the Crown could plead its pre-1953 immunity from liability for the intentional torts of its servants as an absolute bar against any such claim that arose prior to May 14, 1953.

> ***A.K. v. Attorney General of Canada and Les Oblats de Marie Immaculée du Manitoba, [2003] S.J. No. 49 (Q.B.), [TAB 22]***
>
> ***Daniels v. Canada (Attorney General), [2003] S.J. No. 73 (Q.B.), leave to appeal to S.C.C. dismissed [2003] S.C.C.A. No. 223, [TAB 23]***

125. These issues highlight the significant benefit provided to former students by way of the IAP. The settlement does not limit the set of Eligible IAP Claimants to those whose abuse claims arose after May 14, 1953. By contrast, in the absence of this settlement, plaintiffs whose abuse claims arose prior to May 14, 1953 have no cause of action against Canada.

(c) Standards of the Day

126. The notion of "standards of the day" is legally relevant to the plaintiffs' claim in negligence. Standards of the day are relevant to assessing the standard of care on many issues including, *inter alia*, the provision of child care, the qualification of teaching and supervisory staff, the quality of accommodations and diet, and the provision of education. Standards of the day are also relevant to assessing whether a standard of care has been breached, and whether damages were reasonably foreseeable.

127. The plaintiffs' claims concern the operation of Residential Schools many decades ago and therefore face the risk that (1) the operation of the schools was within the standard of care of the day and (2) no breach of the duty of care could be, as a result, made out.

> ***Blackwater v. Plint, [2005] S.C.J. No. 59, at paras. 13-15, [TAB 24]***
>
> ***D.W. v. Canada (Attorney General) and Starr, [1999] S.J. No. 742 (Q.B.), [TAB 25]***

(d) Standard of Proof

128. The plaintiffs' physical and sexual abuse claims attract a heightened evidentiary standard or degree of proof "commensurate with the occasion". This principle has been applied in Residential School claims.

C.A.B. v. Canada (Attorney General), [2003] S.J. No. 445 (Q.B.), [TAB 26]

D.B. v. Canada (Attorney General), [2000] S.J. No. 770 (Q.B), [TAB 27]

H. F. v. Canada (Attorney General), [2002] B.C.J. No. 436 (S.C.), [TAB 28].

129. While IAP Claimants face a similar burden of proof in the IAP with respect to alleged acts, they do not face the cost consequences that otherwise would flow from a failure to meet this burden.

(e) Statutory Authority under the Indian Act

130. In *Re Indian Residential Schools, infra*, Nation J. struck out the plaintiffs' claim for wrongful confinement because such claims were bound to fail against the defence of statutory authority. In particular, the claim could not be maintained given the *Indian Act* provisions concerning mandatory attendance at school. At all relevant times, the *Indian Act* provided for mandatory attendance at school, where "school" was defined to include "residential school". As a result, Class Members' claims for wrongful confinement are equally bound to fail. Nation J. did preserve wrongful confinement claims based on negligent implementation of the *Indian Act.*

Re Indian Residential Schools, [2000] A.J. No. 638 (Q.B.), [TAB 29]

Indian Act, R.S.C. 1927, c. 98, ss. 9, 10

Indian Act, R.S.C. 1952, c. 149, ss. 115(1), 122(b)

Indian Act, R.S.C. 1970, c. I-6, ss. 116(1), 123

Indian Act, R.S.C. 1985, c. I-5, ss. 116(1), 122

131. Further, it is settled law that there is no right to damages for actions taken in good faith under a statute later declared to be unconstitutional. These wrongful confinement claims cannot be maintained by challenging the constitutional validity of the *Indian Act* which forms the basis of Canada's defence of statutory authority. At the time plaintiffs attended Residential Schools, these sections of the *Indian Act* had the full force and effect of law, and remain so. Even if these provisions were declared *ultra vires* now, past actions taken under them are unassailable.

> ***Mackin v. New Brunswick (Minister of Finance), [2002] S.C.J. No. 13, [TAB 30]***
>
> ***Guimond v. Quebec (Attorney General), [1996] S.C.J. No. 91, [TAB 31]***
>
> ***Central Canada Potash Co. v. Government of Saskatchewan, [1979] 1 S.C.R. 42, [TAB 32]***

(f) Policies are not Justiciable

132. The plaintiffs' claim that refers to "the purpose" of Residential Schools is an attempt to challenge the merits of the policy of Residential Schools. Such a claim is not an issue as it is contrary to the doctrine of the supremacy of Parliament.

133. In *Papaschase Indian Band No. 136, infra,* Slatter J. applied this doctrine in relation to a challenge to the policy of Métis Scrip provided for in the *Dominion Lands Act* and concluded (at para. 96):

> Whatever the merits of the policy, it was authorized by Parliament. The courts have no ability to examine legislation in the pre-Charter era to see if it is good policy or bad. Such issues are simply not justiciable.
>
> ***Papaschase Indian Band No. 136 v. Canada (Attorney General), [2004] A.J. No. 999 (Q.B.), [TAB 33]***
>
> ***Cooper v. Hobart, [2001] S.C.J. No. 76, [TAB 34]***
>
> ***Edwards v. Law Society of Upper Canada, [2001] S.C.J. No. 77, [TAB 35]***

(g) Limits of Vicarious Liability

134. In *E.B., infra,* the Court recently reiterated the scope of a defendant's vicarious liability for the tortious conduct of its employees in the Residential School context. The plaintiffs face the risk that Canada would not be vicariously liable for the acts of every employee.

E.B. v. Order of the Oblates of Mary Immaculate, [2005] S.C.J. No. 61, [TAB 36]

135. By contrast, under the compensation rules of the IAP, Canada has accepted vicarious liability for a significantly larger set of tortfeasors for which it otherwise would not be, in law, responsible. This is a significant benefit to Class Members with Continuing Claims.

(h) Canada Not Responsible for All Students

136. Many plaintiffs would confront the argument that Canada was responsible for the establishment and operation of Residential Schools for status Indian students only, as defined by the relevant *Indian Act.* Canada was not responsible for the placement, residence, education or care of non-status Indian or Aboriginal students who also attended Residential Schools.

Indian Act, R.S.C. 1927, c. 98, ss. 2(d), 3

Indian Act, R.S.C. 1952, c. 149, ss. 2(1)(g), 4

Indian Act, R.S.C. 1970, c. I-6, ss. 2(1), 4

Indian Act, R.S.C. 1985, c. I-5, ss. 2(1), 4

137. Under the Settlement Agreement Canada does not distinguish Class Members by reference to the *Indian Act.* In this way, all former Residential School students are accounted for in the proposed settlement in a way that would otherwise not occur in litigation.

(i) Family Class Claims

138. The proposed Family Class does not receive direct monetary compensation. Rather, the Family Class receives the programmatic benefits of Truth and Reconciliation, Commemoration and Healing set out above in paragraphs 29 - 35. Also, some Family Class members may benefit from the distribution of Personal Credits to Eligible CEP Recipients, since those credits are transferable. These benefits strike a fair balance with the significant risks inherent in the Family Class claims. The Family Class claims face risks in addition to those set out above in (a) to (h).

139. The proposed Family Class advances the following claims:

(1) Breach of Non-Delegable Duty

(2) Breach of Fiduciary Duty

(3) Breach of Statutory Duty Under the *Indian Act*, R.S.C. 1985, c. I-5

(4) Breach of Common Law Duties

(5) Negligence

(6) Breach of Treaty Rights

(7) Loss of Guidance, Care and Companionship, *inter alia*, Pursuant to Section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3

140. The Family Class is defined broadly. The definition encompasses not only the Survivor Class members' parents, children, spouses and siblings but also, amongst others, sons and daughters-in-law, former spouses and great grandchildren. Many of the alleged family relationships encompassed by the definition would not have standing or entitlement in law to advance a claim of any kind.

141. The Family Class' claims can be characterized in two ways: derivative and original. In either case, the Family Class seeks primarily damages for the loss of care, guidance and companionship of a wrongfully injured family member. To the extent that these claims are derivative, they do not disclose a viable cause of action recognized at common law.

142. There are, however, conflicting authorities on whether or not the Supreme Court of Canada in *Ordon Estate, infra,* reformed the common law to permit claims for damages for the loss of care, guidance and companionship for, *inter alia*, a wrongfully injured family member. If it did, the court restricted its reforms to cases where the injuries are so gravely serious that the injured person is rendered incapable of providing care, guidance and companionship, for example, where the injury is "serious and permanent brain damage". The nature of the injuries claimed by Survivor Class Members are not sufficiently serious, within the meaning of *Ordon Estate*, to maintain the Family Class' claims.

Ordon Estate v. Grail, [1998] S.C.J. No. 84, [TAB 37]

Porpaczy v. Truitt (1990), 73 D.L.R. (4th) 712 (B.C.C.A.), [TAB 38]

Re Residential Schools, [2000] A.J. No. 47 (Q.B.), [TAB 39]

Springer v. Thiede, [2001] A.J. No. 977 (Q.B.), [TAB 40]

Holan Estate v. Stanton Regional Health Board, [2002] N.W.T.J. No. 24 (S.C.), [TAB 41]

143. The statutory exception set out in section 61 of Ontario's *Family Law Act*, R.S.O. 1990, c. F.3, which provides a right of action where a family member has been wrongfully injured, is highly tentative in this case because:

(1) The language of the Act clearly indicates that only certain family members are granted the statutory right of action. For example, former spouses are not contemplated by the Act. The Act would also not be available to Family Class Members who reside outside of Ontario.

(2) Most of the relevant family relationships did not exist at the time of the tortious conduct: *Bonaparte, infra; Pole, infra; Ficht et al, infra.*

(3) Section 61 was enacted in 1978 and the Act does not operate retroactively. This means that where tortious conduct occurred before 1978, Family Class Members have no right to damages under the Act. Only where the relevant Survivor Class Member attended a Residential School on or after 1978 can a claim be maintained under the Act.

(4) From 1978 to 2002, the Act had a fixed two year limitation period and the claims are now out of time.

Bonaparte v. Canada (Attorney General), [2003] O.J. No. 1046 (C.A.), [TAB 42]

Pole v. Hendery et al., [1987] O.J. No. 921 (C.A.), [TAB 43]

Ficht et al. v. Kitchen et al. (1984), 47 O.R. (2d) 495 (H.C.J.), [TAB 44]

Cloud v. Canada (Attorney General), [2004] O.J. No. 4924 (C.A.), [TAB 17]

144. For these reasons, the Family Class' derivative claims are exceptionally weak or non-existent.

145. With respect to the Family Class' claims as "original" claims, the claim for breach of a non-delegable duty is bound to fail pursuant to *Blackwater, infra.* The Supreme Court of Canada held there that the language in the *Indian Act* falls short of imposing a non-delegable duty of care in respect of former students. *A fortiori*, this result follows in relation to the Family Class.

Blackwater v. Plint, supra, [TAB 24]

146. The claim for breach of statutory duty does not disclose a cause of action recognized in law pursuant to *Saskatchewan Wheat Pool, infra.* Since that case, it is settled law in Canada that there is no nominate tort of statutory breach.

Rather, evidence of a breach of statutory duty is to be subsumed under the law of negligence not as *prima facie* negligence, but as evidence of negligence.

The Queen in right of Canada v. Saskatchewan Wheat Pool (1983), 143 D.L.R. (3d) 9 (S.C.C.), [TAB 45]

147. The claim in negligence would be very difficult to make out for a number of reasons. First, the Family Class Members were not, in contemplation of law, in a relationship of sufficient proximity to Canada so as to give rise to a duty of care. *Edwards, infra,* held that "[f]actors giving rise to proximity must be grounded in the governing statute when there is one...". The *Indian Act* does not reveal any legislative intention to impose a private law duty of care on Canada in respect of Family Class Members.

Edwards v. Law Society of Upper Canada, supra, para. 9, [TAB 35]

148. Second, Canada is immune to claims that it is directly liable in negligence. To the extent, the Family Class' claim is one of direct liability, it does not disclose a cause of action recognized in law.

Al's Steak House and Tavern Inc. v. Deloitte & Touche, supra, [TAB 18]

The C.S.L. Group. Inc. v. Canada, supra, [TAB 19]

149. Even on the assumption that the issues of standing and interpretation of Treaties could be overcome, the claim for breach of Treaty rights is tentative because, before the enactment of s. 35 of the *Charter*, Treaty rights could be abrogated by validly enacted federal legislation.

R. v. Sikyea, [1964] S.C.R. 642, [TAB 46]

150. The claim for breach of fiduciary duty will be difficult to make out for a number of reasons. First, while *Cloud, infra,* held that the Family Class' claim for breach of fiduciary duty discloses a cause of action, it did so only on the standard

relevant on a motion to strike: that it was not plain and obvious that such a cause of action would inevitably fail.

Cloud v. Canada (Attorney General), supra, [TAB 17]

151. Second, looking at the claim in the private law context, it will be difficult to show that there was a fiduciary relationship between Canada and Family Class Members. In particular, there is nothing in the *Indian Act* that confers a discretion on Canada in relation to any Family Class Members' legal or practical interests as is required to establish a fiduciary relationship.

Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] S.C.J. No. 83, [TAB 47]

152. Third, even on the assumption of a fiduciary relationship, the Family Class will have difficulty establishing fault. Pursuant to *K.L.B., infra,* the Family Class would have to show that the management and operation of Residential Schools "...constituted a betrayal of trust, of loyalty and of disinterest". There is no known Residential School case which has found, in relation to a Survivor Class Member or a Family Class Member, a breach of fiduciary duty. Where these claims have been tried, the plaintiffs have failed to demonstrate the requisite fault.

K.L.B. v. British Columbia, [2003] S.C.J. No. 51, [TAB 48]

153. Looking at the claim in the context of Canada's fiduciary duty to Aboriginal peoples, the Family Class will have difficulty showing, first, that there is an independent legal interest over which Canada assumed total discretionary control. Moreover, Canada's fiduciary duty to Aboriginal people has been confined to its dealings with Aboriginal lands and title – a pre-existing and independent legal right.

Guerin v. Canada, [1984] 2 S.C.R. 335, [TAB 49]

Wewaykum Indian Band v. Canada, [2002] S.C.J. No. 79, [TAB 50]

154. Second, even on the assumption that the Family Class could point to an independent legal interest that was affected by the management and operation of Residential Schools, they could not demonstrate that Canada had sufficient discretionary control so as to give rise to a fiduciary duty. The *Indian Act* prescribes the establishment, management and operation of Residential Schools. Canada (as the Crown) is obliged to enforce the *Indian Act*. These propositions are inconsistent with Canada having discretionary control.

155. Third, even on the assumption that the Family Class could point to an independent legal interest, and show sufficient discretionary control, it will be difficult for the Family Class to demonstrate the requisite fault; namely, that Canada acted in an unconscionable or unreasonable way inconsistent with the interests of the Family Class.

Papaschase Indian Band No. 136 v. Canada (Attorney General), supra, [TAB 33]

156. In relation to any alleged breach of duty, the injuries, losses and damages claimed by the Family Class are, arguably, only remotely connected to the Survivor Class Members' experiences at Residential Schools.

See for example, the Affidavit of Veronica Marten, sworn on July 14, 2006, at paras. 9, 12-36
JMR, Vol. IX, pp. 02521-02526

157. As a result, even if the Family Class could advance a viable basis of liability, they would have an extraordinarily difficult time proving causation.

158. The number of viable legal issues and defences available to Canada indicate that the legal risk to the Family Class is a significant one. Indeed, it is fair

to say that the likelihood of recovery or success for the Family Class is speculative at best.

159. Relative to the legal risks faced by the Family Class, the settlement benefits conferred on them ought to be regarded as fair, reasonable and in the best interests of the Family Class as a whole.

(j) Deceased Class Claims

160. Deceased Class Members are former Residential School students who died before May 30, 2005. By definition, Deceased Class members do not receive a Common Experience Payment.

> ***"Eligible CEP Recipient" in Section 1.01 of the Settlement Agreement, p. 12***
> ***JMR, Vol. I, p. 00086***

161. The stipulation that former students be alive as at May 30, 2005 in order to be eligible for a CEP is justified by both legal considerations and those that arose during negotiations.

162. The CEP is a payment to recognize the common, presumably negative, experience of former students who resided at Indian Residential Schools. The CEP is intended to compensate claimants for the claims of pain and suffering, and non-pecuniary damages, they experienced at the schools. The law in many jurisdictions, including Alberta and Saskatchewan, where the bulk of the claims to date are situated, does not support the survival of a claim for damages for pain and suffering.

> ***Estates Administration Act, R.S.B.C. 1996, c. 122, s. 59(2)***
>
> ***Survival of Actions Act, R.S.A. 2000, c. S-27, s. 5***
>
> ***The Survival of Actions Act, S.S. 1990-91, c. S-66.1, s. 6***

Survival of Actions Act, R.S.Y. 2002, c. 212, s. 5

163. Even where claims for damages for pain and suffering survive the death of a claimant, Canada is not aware of any successful claim brought on behalf of a deceased former student's estate. This is indicative of the very low probability that the estates of deceased former students would have brought claims or that, if they did, they could prove damages in the circumstances.

164. The considerations that arose during negotiations that lead to the stipulation that former students be alive as at May 30, 2005 in order to be eligible for a CEP, include:

(1) A general preference that payment to living former students take precedence over payment to deceased former students.

(2) A recognition that, in many jurisdictions, claims for damages for pain and suffering are extinguished upon the death of the claimant.

(3) A general preference to avoid differential treatment based upon province of residence given the national scope of the settlement.

(4) A recognition that the Cloud Class Members were in a different legal position than others because their claim was certified and the classes defined.

(5) An uncertainty whether or not the claims of deceased claimants had been uniformly preserved against provincial limitation periods.

(6) A recognition that Canada had raised claimants expectations by its announcement of May 30, 2005;

(7) An urgency to arrive at a resolution given the death rate among Survivor Class Members.

Affidavit of Richard Courtis, sworn on July 27, 2006, para. 122
JMR, Vol. V, p. 01508
JCD, Vol. II, p. 00409

2. Amount and Nature of Discovery Evidence

165. The plaintiffs' Factum provides a history of the litigation related to Indian Residential Schools across Canada. The history of this litigation has involved significant oral and documentary discovery of Canada, many Church Organizations, and numerous plaintiffs. This permitted Class counsel to have an informed perspective on the merits of the proposed settlement.

166. However, if litigation resumed, further discovery of all parties would be required given the particularity of each former student, each Residential School and time period. Continued litigation under such circumstances would be lengthy, protracted, expensive, and uncertain.

3. Settlement Terms and Conditions

167. In assessing the settlement, the court's role is not to substitute its own business judgment for that of the parties but, rather, to satisfy itself that the settlement is fair on its face. Looking at the settlement broadly, Canada respectfully submits that it is fair, reasonable and in the best interest of the Class as a whole.

168. The CEP, comprised of a fund of $1.9 billion, will provide fair monetary compensation to all eligible former Residential School students for simple residency. The CEP is meant to compensate for the common, presumably negative, experience of this residency. The quantum of the CEP is logically and fairly tied to the duration of residence.

169. The IAP provides a fair, efficient and reasonable mechanism to resolve certain serious abuse claims. The IAP was forged by many parties over a considerable period of time. The IAP manifests this planning and deliberation by its ability to provide timely and generous compensation to Claimants, and in some cases where there may be no legal basis for same.

170. The programmatic benefits, designed to address the legacy of Residential Schools and healing of Class Members, will benefit all Aboriginal people with any connection, past or present, to Residential Schools.

171. The proposed settlement reaches not only former students, but also their family members, their communities, and the rest of the Canadian public. The array of benefits not only provides direct compensation to former students but also provides the means to closure for all affected Aboriginal people through the Truth and Reconciliation Commission, Commemorative events and Healing initiatives. Moreover, the proposed settlement offers this closure within a comparatively short period of time.

4. Recommendation and Experience of Counsel

172. The Class counsel in this matter support the proposed settlement. Given the experience of Class counsel, this support ought to be given some weight.

Affidavit of Frank Iacobucci, sworn on July 28, 2006, paras. 39-46
JMR, Vol. III, pp. 00957-00958
JCD, Vol. I, pp. 00017-00018

Affidavit of Darcy Merkur, sworn on July 28, 2006, paras. 1, 19-65
JMR, Vol. VIII, pp. 02353, 02361-02374
JCD, Vol. III, pp. 00796, 00804-00817

Affidavit of Paul Vogel, sworn on July 29, 2006, para. 86
JMR (Cloud), Vol. V, p. 001810

Affidavit of Richard Courtis, sworn on July 27, 2006, paras. 46-103
JMR, Vol. V, pp. 01489-01502
JCD, Vol. II, pp. 00390-00403

5. Future Expense and Likely Duration of Litigation

173. Absent a settlement, the risk is that Residential School litigation in Canada would be protracted and expensive. With respect to the class actions, there is the spectre of contested certification motions, complex and lengthy trials of the common issues and the possibility of appeals and the expense associated with these steps.

> ***Affidavit of Charles Baxter, Sr., sworn on June 17, 2006, paras. 64-66***
> ***JMR, Vol. IX, pp. 02436-02437***
>
> ***Affidavit of Elijah Baxter, sworn on May 12, 2006, paras. 44-46***
> ***JMR, Vol. IX, pp. 02449-02450***

174. Similar concerns about protracted and expensive litigation apply equally to the non-class action cases across the country. For example, under Alberta's test case procedure, examinations for discovery and document production were unusually extensive since they were intended to apply to all approximately 4000 Residential School plaintiffs.

> ***Affidavit of Donald Belcourt, sworn on July 14, 2006, paras. 38 – 40***
> ***JMR, Vol. V, pp. 01902-01903***

175. Even when claims are settled within litigation, the settlement process can take anywhere from a few years up to six and a half.

> ***Affidavit of Leonard Marchand, sworn on July 27, 2006, para. 13***
> ***JMR, Vol. IV, p. 01466***
> ***JCD, Vol. III, p. 00853***

176. The concerns about the duration of litigation or resolution are particularly significant in Residential School litigation given the advancing age of former students. For example, it has been estimated that over a thousand former students will die between 2005 and 2006.

> ***Affidavit of Richard Courtis, sworn on July 27, 2006, para. 121 and Exhibit "M" attached thereto***
> ***JMR, Vol. V, pp. 01508, 01780-01804***
> ***JCD, Vol. II, pp. 00409, 00680-00705***

6. Recommendation of Neutral Parties

177. In November 2004, the Assembly of First Nations released its report entitled "Assembly of First Nations Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools" ("AFN Report"). One of the central criticisms levelled against Canada's DR Model was its narrow scope. In particular, its failure to recognize the impacts of the Indian Residential School experience itself, such as separation from family and community, impacts on personal identity, emotional abuse and the loss of language and culture.

> ***Affidavit of David Russell, sworn on July 25, 2006, para. 50***
> ***JMR, Vol. IV, p. 01457***
>
> ***"Assembly of First Nations Report on Canada's Dispute Resolution Plan to compensative for Abuses in Indian Residential Schools", [TAB 51]***

178. The key recommendation of the AFN Report was that a lump sum payment be made to each former student in recognition of his or her experience in the Indian Residential School system. The report recommended the retention of a modified DR Model to deal with abuse claims, but also urged the implementation of truth-telling, healing and reconciliation initiatives.

> ***Affidavit of David Russell, sworn on July 25, 2006, paras. 51***
> ***JMR, Vol. IV, p. 01458***
>
> ***"Assembly of First Nations Report on Canada's Dispute Resolution Plan to compensative for Abuses in Indian Residential Schools", [TAB 53]***

179. The recommendations in the AFN Report are essentially adopted in the proposed settlement. The proposed settlement is, in fact, supported by the AFN.

> ***Affidavit of Larry Philip Fontaine, sworn on July 28, 2006, para. 4***
> ***JMR, Vol. III, p. 01022***

180. Further, in February 2005, the Canadian Bar Association released a submission entitled *"The Logical Next Step: Reconciliation Payments for All Indian Residential School Survivors"* ("CBA Submission"). The CBA Submission

supported the main findings and recommendations of the AFN Report, calling for a reconciliation payment to all former students.

Affidavit of David Russell, sworn on July 25, 2006, para. 50
JMR, Vol. IV, p. 01457

Canadian Bar Association, Aboriginal Law and Alternative Dispute Resolution Sections, "The Logical Next Step: Reconciliation Payments for All Indian Residential School Survivors", (CBA, February, 2005), online: www.cba.org/CBA/submissions/pdf/05-12-01-eng.pdf [TAB 52]

181. The CBA Submission's call for a "reconciliation payment" is essentially adopted in the proposed settlement by the provision of the CEP. On this basis, it is fair to infer that the CBA would recommend that this aspect of the settlement be approved.

7. Number of Objectors and Nature of Objections

182. Canada is aware of a number of objections. These will be addressed at the Approval Hearings.

8. Presence of Good Faith and Absence of Collusion

183. More than one party has deposed to the lengthy and difficult nature of the negotiations leading up to the Agreement in Principle and the Final Settlement Agreement. The number of parties involved in these negotiations, the diversity of the interests at play and the arduous nature of these negotiations support the view that the proposed settlement was reached in good faith and without collusion.

Affidavit of the Honourable Frank Iacobucci, sworn on July 28, 2006, para. 18
JMR, Vol. III, p. 00947
JCD, Vol. I, p. 00007

Affidavit of Donald Belcourt, sworn on July 14, 2006, para. 58
JMR, Vol. V, p. 01909

Affidavit of Richard Courtis, sworn onJuly 27, 2006, paras. 40-42
JMR, Vol. V, p. 01488
JCD, Vol. II, p. 00389

Affidavit of Darcy Merkur, sworn on July 28, 2006, para. 94
JMR, Vol. VIII, p. 02383
JCD, Vol. III, p. 00826

Affidavit of Paul Vogel, counsel for Cloud class proceeding, sworn on July 20, 2006, para. 51
JMR (Cloud), Vol. V, p. 001799

D. PROPOSED SETTLEMENT IS FAIR, REASONABLE AND IN THE BEST INTERESTS OF THE CLASS AS A WHOLE

1. Objectives of Class Proceedings are Met by Proposed Settlement

184. The objectives of class proceedings legislation are well known: to serve judicial economy, to improve access to justice and to deter wrongdoing and facilitate behaviour modification.

Hollick v. Toronto (City), [2001] S.C.J. No. 67 at para. 15, [TAB 53]

Western Canadian Shopping Centres Inc. v. Dutton, [2000] S.C.J. No. 63 at paras. 27-29, [TAB 54]

185. In class proceedings, the objectives serve as a guide in determining both whether certification should be granted and whether settlement should be approved.

186. In principle, when a class action settles, these objectives are actually realized. This is true of the present settlement.

(a) Access to Justice

187. The proposed settlement meets the objective of access to justice for many Aboriginal persons who otherwise would not bring or effectively advance their Residential School claims for various reasons including language barriers, geographic remoteness and lack of financial resources.

188. The proposed settlement also promotes access to justice in that, absent the settlement, litigation would continue for many years and, in that interim period, many more former Residential School students would die without any resolution.

Affidavit of Donald Belcourt, sworn on July 14, 2006, paras. 56, 64
JMR, Vol. V, pp. 01908, 01910-01911

Affidavit of Veronica Marten, sworn on July 14, 2006, paras. 46, 52
JMR, Vol. IX, pp. 02527, 02530

Affidavit of Elizabeth Kusiak, sworn on July 13, 2006, para. 14
JMR, Vol. IX, p. 02510

Affidavit of Theresa Ann Larocque, sworn on July 13 2006, para. 14
JMR, Vol. IX, pp. 02516-02517

Affidavit of Charles Baxter, Sr., sworn on June 17, 2006, paras. 44, 45, 60
JMR, Vol. IX, pp. 02432, 02435-02436

Affidavit of Elijah Baxter, sworn on May 12, 2006, para. 40
JMR, Vol. IX, p. 02449

Affidavit of Richard Courtis, sworn on July 27, 2006, paras. 137-143
JMR, Vol. V, pp. 01511-01513
JCD, Vol. II, pp. 00412-00414

Affidavit of Larry Philip Fontaine, sworn on July 28, 2006, para. 107
JMR, Vol. III, p. 01055
JCD, Vol. I, p. 00115

(b) Judicial Economy

189. Judicial economy is realized by the comprehensive resolution of thousands of claims. Without the settlement there would be a multiplicity of proceedings straining judicial resources and, possibly, resulting in inconsistent adjudications.

Affidavit of Richard Courtis, sworn on July 27, 2006, paras. 133-136
JMR, Vol. V, pp. 01510-101511
JCD, Vol. II, pp. 00411-00412

190. Even if it is assumed that a national class action was certified, only the common issues would be tried in that proceeding. Other claims requiring individual assessment would remain outstanding and, again, could result in a multiplicity of proceedings.

(c) Behaviour Modification

191. Residential Schools largely ceased to operate in the early 1970s. While specific deterrence is not, therefore, engaged, general deterrence may be served in relation to others responsible for operating schools and residential facilities for children.

2. Factors Favour Settlement Approval

192. The following factors, amongst others, weigh heavily in favour of approving the proposed settlement as fair, reasonable and in the best interests of all Class Members:

(1) The unprecedented value of the benefits conferred on Class Members;

(2) The significant litigation risks faced by all Class Members;

(3) The number of interests reconciled under the proposed settlement;

(4) The national scope of the resolution if the proposed settlement is approved;

(5) The extensive and arduous nature of the negotiations;

(6) The complex and protracted nature of litigation in the absence of a settlement;

(7) The multiplicity of proceedings and concomitant strain on judicial resources in the absence of a national settlement;

(8) The difficulty many Class Members would have advancing claims by reason of language barriers or geographic remoteness; and

(9) The importance of a timely resolution of Residential School claims, given the advancing age of many Class Members.

193. Canada respectfully submits that the proposed settlement is fair, reasonable and in the best interests of the Class as a whole and that it therefore meets the test for approval.

E. LEGAL FEES ARE REASONABLE

1. The Test: Whether Legal Fees Are Reasonable

194. There is a separate fund dedicated to the payment of Class counsel's legal fees. As a result, the payment of Class counsel's legal fees do not directly affect the interests of Class Members.

195. The test for approval of legal fees in such a case is, simply, whether the fees sought are reasonable.

Bonanno. v. Maytag Corp., [2005] O.J. No. 3810 (S.C.J.) at para. 20, [TAB 55]

Gariepy v. Shell Oil Co., [2003] O.J. No. 2490 (S.C.J.), [TAB 56]

Furlan v. Shell Oil Co., [2003] B.C.J. No. 1411 (S.C.) at para. 4, [TAB 57]

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

(1) Time expended by the solicitor;

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

(3) Degree of responsibility assumed by the solicitor;

(4) Monetary value of the matters in issue;

(5) Importance of the matter to the client;

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

(7) The results achieved.

McArthur v. Canada Post Corp., [2004] O.J. No. 1406 (S.C.J.) at para. 11, [TAB 58]

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

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

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

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

Gariepy v. Shell Oil Co., supra, para. 21, [TAB 56]

198. In *McCarthy, supra,* Winkler J. also calculated the cost of the fees sought per class member based on the number of class members estimated to exist at the time. This method showed that "[t]he total fees sought will average approximately $865 per infected class member based on the numbers of those class members currently estimated to exist."

McCarthy v. Canadian Red Cross Society, supra, para. 26, [TAB 4]

199. Class counsel have deposed facts relevant to a number of these factors and tests.

Affidavit of Darcy Merkur, sworn on July 28, 2006
JMR, Vol. VIII, Tab 42
JCD, Vol. III, Tab 4

Affidavit of Richard Courtis, sworn on July 27, 2006, paras. 81-84
JMR, Vol. V, pp. 01497-01498
JCD, Vol. II, pp. 000398-000399

Affidavit of Sandra Staats, sworn on July 15, 2006
JMR, Vol. VIII,

200. In all of the circumstances of this case, Canada respectfully submits that the National Consortium counsel's fees and the Independent counsel's fees, and the methods for verifying those fees, are reasonable.

Affidavit of Frank Iacobucci, sworn on July 28, 2006, para. 25
JMR, Vol. III, p. 000952
JCD, Vol. I, p. 00012

201. Regarding the fees claim by the Merchant Law Group, until such time as it permits the verification process provided for by Schedule "V" of the Settlement Agreement to take place, Canada is unable to support its claim for fees and disbursements. Canada submits, however, that the Schedule "V" process is sufficient to ensure that any fees ultimately found to be payable to Merchant Law Group will meet the standard of reasonableness. As indicated earlier, Canada has filed a separate Factum respecting the agreement as to legal fees for Merchant Law Group.

IV. ORDER REQUESTED

202. The Crown respectfully asks this Honourable Court to certify this action as a class proceeding, to approve the settlement of this class proceeding as fair, reasonable and in the best interests of the Class Members as a whole, to grant the Approval Orders set out in section 4.06 of the Settlement Agreement, and to grant such further and other Orders to give effect to this proposed settlement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17TH DAY OF AUGUST, 2006.

Attorney General of Canada

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

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

V. SCHEDULE "A"

LIST OF AUTHORITIES

Tab No.

Tab No.

Tab No.

Tab No.

52 Canadian Bar Association, Aboriginal Law and Alternative Dispute Resolution Sections, *The Logical Next Step: Reconciliation Payments for All Indian Residential School Survivors*, (CBA, February, 2005), online: www.cba.org/CBA/submissions/pdf/05-12-01-eng.pdf

53 *Hollick v. Toronto (City),* [2001] S.C.J. No. 67

54 *Western Canadian Shopping Centres Inc. v. Dutton,* [2000] S.C.J. No. 63

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

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

57 *Furlan v. Shell Oil Co.,* [2003] B.C.J. No. 1411 (S.C.)

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

VI. SCHEDULE "B"

EXCERPTS OF STATUTORY AUTHORITIES

CLASS PROCEEDINGS LEGISLATION: CERTIFICATION AND SETTLEMENT APPROVAL

1. BRITISH COLUMBIA LEGISLATION

***Class Proceedings Act*, R.S.B.C. 1996, c. 50, ss. 4(1), 4(2) and 35**

Class certification

4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a representative plaintiff who

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

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

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

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Settlement, discontinuance, abandonment and dismissal

35(1) A class proceeding may be settled, discontinued or abandoned only

(a) with approval of the court, and

(b) on the terms the court considers appropriate.

(2) A settlement may be concluded in relation to the common issues affecting a subclass only

(a) with approval of the court, and

(b) on the terms the court considers appropriate.

(3) A settlement under this section is not binding unless approved by the court.

(4) A settlement of a class proceeding or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class proceeding, but only to the extent provided by the court.

(5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice should be given under section 20 and whether notice should include

(a) an account of the conduct of the proceeding,

(b) a statement of the result of the proceeding, and

(c) a description of any plan for distributing any settlement funds.

2. ALBERTA LEGISLATION

***Class Proceedings Act*, S.A. 2003, c. C-16.5, ss. 5 and 35**

Class certification

5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,

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

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

(iii) does not have, in respect of the common issues, an interest that is in conflict with the interest of other prospective class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:

(a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;

(b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

(3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

(4) The Court may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e).

(5) Notwithstanding subsection (3), where an application is made to certify a proceeding as a class proceeding for the purposes of binding members of a settlement class, the Court may not certify the proceeding unless the Court has approved the settlement.

Settlement, discontinuance, abandonment and dismissal

35(1) A class proceeding may be settled, discontinued or abandoned, but only with the approval of the Court and subject to any terms or conditions that the Court considers appropriate.

(2) A settlement may be concluded in relation to the common issues affecting a subclass but only with the approval of the Court and subject to any terms or conditions that the Court considers appropriate.

(3) A settlement to which this section applies is not binding unless approved by the Court.

(4) A settlement of a class proceeding that is approved by the Court binds every class member who has not opted out of the class proceeding, but only to the extent provided by the Court.

(5) A settlement in relation to the common issues affecting a subclass that is approved by the Court binds every subclass member who has not opted out of the class proceeding, but only to the extent provided by the Court.

(6) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment of a class proceeding, the Court must consider whether notice should be given under section 21 and whether the notice should include any one or more of the following:

(a) an account of the conduct of the proceeding;

(b) a statement of the results of the proceeding;

(c) a description of any plan for distributing any settlement funds.

3. SASKATCHEWAN LEGISLATION

***The Class Actions Act,* S.S. 2001, c. C-12.01, ss. 6 and 38**

Class certification

6 The court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class;

(c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;

(d) a class action would be the preferable procedure for the resolution of the common issues; and

(e) there is a person willing to be appointed as a representative plaintiff who:

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

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

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

Settlement, discontinuance, abandonment and dismissal

38 (1) A class action may be settled, discontinued or abandoned only:

(a) with the approval of the court; and

(b) on the terms the court considers appropriate.

(2) A settlement may be concluded in relation to the common issues affecting a subclass only:

(a) with the approval of the court; and

(b) on the terms the court considers appropriate.

(3) A settlement pursuant to this section is not binding unless approved by the court.

(4) A settlement of a class action or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class action, but only to the extent provided by the court.

(5) In dismissing a class action or in approving settlement, discontinuance or abandonment, the court shall consider whether notice should be given pursuant to section 22 and whether the notice should include:

(a) an account of the conduct of the action;

(b) a statement of the result of the action; and

(c) a description of any plan for distributing any settlement funds.

4. MANITOBA LEGISLATION

The Class Proceedings Act, C.C.S.M. c. C130, ss. 4 and 35

Certification of class proceeding

4 The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and

(e) there is a person who is prepared to act as the representative plaintiff who

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

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

(iii) does not have, on the common issues, an interest that conflicts with the interest of other class members.

Settlement, discontinuance and abandonment

35(1) A class proceeding may be settled, discontinued or abandoned only

(a) with the approval of the court; and

(b) on the terms the court considers appropriate.

Court approval of settlement

35(2) A settlement may be concluded in relation to the common issues affecting a subclass only

(a) with the approval of the court; and

(b) on the terms the court considers appropriate.

Settlement not binding unless approved

35(3) A settlement is not binding unless approved by the court.

Settlement binding on class members

35(4) A settlement of a class proceeding or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class proceeding, but only to the extent provided by the court.

Notice to class members

35(5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice of the dismissal or approval should be given under section 20 and whether the notice should include

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing any settlement funds.

5. ONTARIO LEGISLATION

***Class Proceedings Act*, 1992, S.O. 1992, c. 6, ss. 5(1) and 29**

Certification

5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more person that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

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

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

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

Discontinuance, abandonment and settlement

29(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

29(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

29(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

29(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.

6. QUEBEC LEGISLATION

Code of Civil Procedure, Articles 1003, 1016, 1025

Authorization to Institute a Class Action

1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

(a) the recourses of the members raise identical, similar or related questions of law or fact;

(b) the facts alleged seem to justify the conclusions sought;

(c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and

(d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

1016. The representative cannot amend a proceeding, or discontinue, in whole or in part, the action, a proceeding or a judgment, without the permission of the court and except on the conditions it deems necessary.

1025. Transaction, acceptance of a tender or acquiescence, except where it is unconditional in the whole of the demand, is valid only if approved by the court. This approval cannot be given unless a notice has been given to the members.

The notice must state

(a) that the transaction will be submitted to the court for approval, specifying the date and place of such proceeding;

(b) the nature of the transaction and the method of execution;

(c) the procedure to be followed by the members to prove their claims; and

(d) that the members have the right to present their arguments to the court as regards the transaction and the distribution of any balance remaining.

7. NORTHWEST TERRITORIES LEGISLATION

Rule 62 of the *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96

62. Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

8. NUNAVUT LEGISLATION

Rule 62 of the *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, as adopted by Nunavut pursuant to s. 29 of the *Nunavut Act*, S.C. 1993, c. 28

62. Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

9. YUKON LEGISLATION

Rule 5(11) of the *British Columbia Supreme Court Rules*, B.C. Reg 220/90 as adopted by the Yukon pursuant to s. 38 of the *Judicature Act (Yukon)* R.S.Y. 2002, c. 128

Representative proceeding

5(11) Where numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (17), the proceeding may be commenced and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them.

LIMITATIONS:
CURRENT ULTIMATE LIMITATION PERIODS

1. BRITISH COLUMBIA LEGISLATION

***Limitation Act*, R.S.B.C. 1996, c. 266, s. 8(1)(c)**

Ultimate limitation

8(1) Subject to section 3(4) and subsection (2) of this section but despite a confirmation made under section 5, a postponement or suspension of the running of time under section 6 or 11(2) or a postponement or suspension of the running of time under section 7 in respect of a person who is not a minor, no action to which this Act applies may be brought

...

(c) in any other case, after the expiration of 30 years from the date on which the right to do so arose.

2. ALBERTA LEGISLATION

***Limitations Act*, R.S.A. 2000, c. L-12, section 3(1)(b)**

3(1) Subject to section 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known [that they could seek a remedial order],

or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

3. SASKATCHEWAN LEGISLATION

***The Limitations Act*, S.S. 2004, c. L-16.1, s. 7(1)**

Ultimate limitation periods

7(1) Subject to subsections (2) to (4), with respect to any claim to which a limitation period applies, no proceeding shall be commenced after 15 years from the day on which the act or omission on which the claim is based took place.

4. MANITOBA LEGISLATION

***The Limitation of Actions Act*, C.C.S.M. c. L150 s. 14(4)**

Ultimate limitation

14(4) The court shall not grant leave

(a) to begin an action; or

(b) to continue an action that has been begun;

more than 30 years after the occurrence of the acts or omissions that gave rise to the cause of action.

5. ONTARIO LEGISLATION

***Limitations Act*, S.O. 2002, c. 24, s. 15(2)**

General

5(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

6. NORTHWEST TERRITORIES LEGISLATION

***Limitations of Actions Act*, R.S.N.W.T. 1988, c. L-8, s. 45(2)**

45(2) Notwithstanding subsection (1), no proceedings shall be taken by a person under disability at the time the right to do so first accrued to the person or by any person claiming through him or her, except within 30 years after that time.

7. NUNAVUT LEGISLATION

***Limitations of Actions Act*, R.S.N.W.T. 1988, c. L-8, s. 45(2), as adopted by Nunavut pursuant to s. 29 of the *Nunavut Act*, S.C. 1993, c. 28**

45(2) Notwithstanding subsection (1), no proceedings shall be taken by a person under disability at the time the right to do so first accrued to the person or by any person claiming through him or her, except within 30 years after that time.

8. YUKON LEGISLATION

***Limitation of Actions Act*, R.S.Y. 2002, c. 139, s. 46(2)**

46(2) Despite anything in this section, no proceedings shall be taken by a person under disability at the time the right to do so first accrued to them or by any person claiming through them, but within 30 years next after that time.

ULTIMATE LIMITATION PERIODS: "PERSONS UNDER DISABILITY"

1. ALBERTA LEGISLATION

***The Limitation of Actions Act*, S.A. 1935, c. 8, s. 47(2), as am., R.S.A. 1942, c. 133, as am., R.S.A. 1955, c. 177, s. 46(3), as am., R.S.A. 1970, c. 209, s. 46(3), as am., R.S.A. 1980, c. L-15, s. 46(3)**

46(3) Notwithstanding anything in this section no proceedings may be taken by a person who was under disability at the time the right to take proceedings first accrued to him or by a person claiming through him except within thirty years next after that time.

2. MANITOBA LEGISLATION

***The Limitations of Actions Act, 1931*, c. 30, s. 40A(1), as am., S.M. 1932, c. 24, as am., R.S.M. 1940, c. 121, s. 41, R.S.M. 1954, c. 145, s. 48, as am., R.S.M. 1970, c. L150, s. 58**

40A.(2) Notwithstanding anything in this section, no proceedings shall be taken by a person under disability at the time the right to do so first accrued to him, or by any person claiming through him, but within thirty years next after that time.

***The Limitation of Actions Act*, C.C.S.M. c. L150 s. 7(5)**
Ultimate Time

7(5) Notwithstanding anything in this section, but subject to section 7.1, no action to which this section applies shall be brought by a person who is or has been under a disability or for or on his behalf by another after the expiration of 30 years after the occurrence of the act or omission that gave rise to the cause of action.

3. NORTHWEST TERRITORIES LEGISLATION

An Ordinance Respecting the Limitation of Actions, S.N.W.T. 1948, c. 6, as am., R.S.N.W.T. 1956, c. 59, as am,. R.S.N.W.T. 1974, c. L-6 as am., Limitation of Actions Act, R.S.N.W.T. 1988, c. L-8, s. 45(2)

45(2) Notwithstanding subsection (1), no proceedings shall be taken by a person under disability at the time the right to do so first accrued to the person or by any person claiming through him or her, except within 30 years after that time.

4. YUKON LEGISLATION

An Ordinance Respecting Limitations of Actions in Certain Cases, C.O.Y.T. 1914, c. 55, s. 8, as am., An Ordinance Respecting Limitations of Actions, R.O.Y.T. 1958, c. 66, s. 45(2) as am., Limitations of Actions Ordinance, R.O.Y.T. 1971, c. L-7, s. 45(2), as am., Limitations of Actions Act, R.S.Y. 1986, c. 104, s. 46(2), as am., R.S.Y. 2002, c. 139, s. 46(2)

46(2) Despite anything in this section, no proceedings shall be taken by a person under disability at the time the right to do so first accrued to them or by any person claiming through them, but within 30 years next after that time. *R.S., c.104, s.46.*

CROWN LIABILITY AND PROCEEDINGS ACT: PROVINCIAL LIMITATION LAWS APPLY TO CANADA

1. FEDERAL LEGISLATION

***Crown Liability and Proceedings Act,* R.S.C. 1985, c. C-50, s. 32**

32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and the proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

PUBLIC OFFICER PROTECTION ACTS

1. ALBERTA LEGISLATION

Public Officers' Protection Act, R.S.A. 1921, c. 9, as am. R.S.A. 1922, c. 91, as am., R.S.A. 1942, c. 138, as am. R.S.A. 1955, c. 262, s. 2

2(1) Notwithstanding anything in any Act or in the Consolidated Rules of the Supreme Court, where an action, prosecution or other proceeding is commenced in the Province against a person

(a) for an act done in pursuance or execution of intended execution of his duty as a public officer, or

(b) in respect of an alleged neglect or default in the execution of his duty or authority as a public officer,

the provisions of this Act apply.

(2) An action, prosecution or proceeding mentioned in subsection (1), does not lie and shall not be instituted

(a) unless it is commenced within six months after the act, neglect or default complained of, or

(b) where there is a continuance of injury or damage, within six months after the ceasing thereof.

2. SASKATCHEWAN LEGISLATION

The Public Officers' Protection Act, S.S. 1923, c. 19, as am., S.S. 1930, c. 16, s. 2, as am. R.S.S. 1978, c. P-40, s. 2

2(1) No action, prosecution or other proceedings shall lie or be instituted against any person for an act done in pursuance or execution or intended execution of a statute, or of a public duty or authority, or in respect of an alleged neglect or default in the execution of a statute, public duty or authority, unless it is commenced:

(a) within twelve months next after the act, neglect or default complained of or, in case of continuance of injury or damage, within twelve months after it ceases; or

(b) within such further time as the court or a judge may allow.

3. MANITOBA LEGISLATION

The Public Officers' Act, R.S.M. 1940, c. 173 as am., R.S.M. 1954, c. 213, as am., R.S.M. 1970, c. P230, as am., R.S..M. 1987, c. P230, s. 21

21(1) No action, prosecution, or other proceeding lies or shall be instituted against a person for an act done in pursuance or execution or intended execution of a statute or of a rule or regulation made thereunder, or of a public duty or authority, or in respect of an alleged neglect or default in the execution of the statute, rule, regulation, duty or authority, unless it is commenced within two years next after the act, neglect or default complained of, or in the case of continuance of injury or damage, within two years next after the ceasing thereof.

CANADA'S IMMUNITY AND LIABILTY IN TORT: VICARIOUS TORT LIABILITY ONLY SERVANT MUST BE PERSONALLY LIABLE

1. FEDERAL LEGISLATION

***Crown Liability and Proceedings Act*, R.S.C. 1985 c.C-50 as am, ss. 3, 10**

3 The Crown is liable for the damages for which, if it were a person, it would be liable

(a) in the Province of Quebec, in respect of

(i) the damage caused by the fault of the servant of the Crown, or

(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and

(b) in any other province, in respect of

(i) a tort committed by a servant of the Crown, or

(ii) a breach or duty attaching to the ownership, occupation, possession or control of property.

10 No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission or a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.

CANADA'S IMMUNITY TO INTENTIONAL TORTS BEFORE 1953

1. FEDERAL LEGISLATION

Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(1)©, as am. S.C. 1938, c. 28, s. 1

19(1) The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

...

(c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

***Crown Liability Act,* S.C. 1952 – 1953, c. 30, s. 3(1)(a) and s. 24**

3(1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable

(a) in respect of a tort committed by a servant of the Crown...

24(1) No proceedings shall be taken against the Crown under this Act in respect of any act, omission, transaction, matter or thing occurring or existing before the day on which this Act was assented to.

STATUTORY AUTHORITY UNDER THE INDIAN ACTS: MANDATORY ATTENDANCE AND DEFINITION OF "SCHOOL"

1. FEDERAL LEGISLATION

Indian Act R.S.C. 1927, c. 98, s. 10, 9

9 The Governor in Council may establish

(a) day schools in any Indian reserve for the children of such reserve;

(b) industrial or boarding schools for the Indian children of any reserve or reserves or any district or territory designated by the Superintendent General.

10 Every Indian child between the ages of seven and fifteen years who is physically able shall attend such day, industrial or boarding school as may be designated by the Superintendent General for the full periods during which such school is open each year.

Indian Act, R.S.C. 1952, c. 149, ss. 115(1), 122(b)

115(1) Subject to section 116, every Indian child who has attained the age of seven years shall attend school.

122 In sections 113 to 121

...

(b) "school" includes a day school, technical school, high school and residential school.

Indian Act, R.S.C. 1970, c. I-6, ss. 116(1), 123

116(1) Subject to section 117, every Indian child who has attained the age of seven years shall attend school.

123 In sections 114 to 122

...
"school" includes a day school, technical school, high school and residential school.

Indian Act, R.S.C. 1985, c. I-5, ss. 116(1), s. 122

116(1) Subject to section 117, every Indian child who has attained the age of seven years shall attend school.

122 In sections 114 to 121,

> "school" includes a day school, technical school, high school and residential school;

NOT RESPONSIBLE FOR ALL STUDENTS: DEFINITION OF "INDIAN" AND "APPLICATION OF ACT"

***Indian Act* R.S.C. 1927, c. 98, s. 2(d), 3**

2(d) "Indian" means

(i) any male person of Indian blood reputed to belong to a particular band,

(ii) any child of such person,

(iii) any women who is or wars lawfully married to such person;

3 The Governor in Council may, by proclamation, from time to time, exempt from the operation of this Part, or from the operation of anyone or more of the sections of this Part. Indians or non-treaty Indians, or any of them, or any band or irregular band of them, or the reserves or special reserves, or Indian lands, or any portions of them, in any province or in the territories, or in any of them; and may again, by proclamation from time to time, remove such exception.

***Indian Act* R.S.C. 1952, c. 149, ss. 2(1)(g), 4(1)**

Interpretation

2(1)(g) "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

Application of Act

4(1) This Act does not apply to the race or aborigines commonly referred to as Eskimos.

***Indian Act* R.S.C. 1970, c. I-6, sections 2(1), 4(1)**

Interpretation – Definitions

2(1) "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

Application of Act

4(1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Eskimos.

***Indian Act*, R.S. 1985, c. 1-5, ss. 2, 4**

Interpretation

2(1) In this Act,

"Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

Application of Act

4(1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit.

FAMILY CLASS CLAIMS

1. ONTARIO LEGISLATION

Family Law Act, R.S.O. 1992, c. F-3, s. 61

Right of dependants to sue in tort

61. (1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction. R.S.O. 1990, c. F.3, s. 61 (1); 1999, c. 6, s. 25 (25); 2005, c. 5, s. 27 (28).

Damages in case of injury

(2) The damages recoverable in a claim under subsection (1) may include,

(a) actual expenses reasonably incurred for the benefit of the person injured or killed;

(b) actual funeral expenses reasonably incurred;

(c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;

(d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and

(e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred. R.S.O. 1990, c. F.3, s. 61 (2).

Contributory negligence

(3) In an action under subsection (1), the right to damages is subject to any apportionment of damages due to contributory fault or neglect of the person who was injured or killed. R.S.O. 1990, c. F.3, s. 61 (3).

DECEASED CLASS CLAIMS: SURVIVAL OF ACTIONS

1. BRITISH COLUMBIA LEGISLATION

***Estate Administration Act*, R.S.B.C. 1996, c.122, s.59(2)(3)**

59(2) Subject to subsection (3), the executor or administrator of a deceased person may continue or bring and maintain an action for all loss or damage to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, including an action in the circumstances referred to in subsection (6).

59(3) Recovery in an action under subsection (2) must not extend to the following:

(a) damages in respect of physical disfigurement or pain or suffering caused to the deceased;

(b) if death results from the injuries, damages for the death, or for the loss of expectation of life, unless the death occurred before February 12, 1942;

(c) damages in respect of expectancy of earnings after the death of the deceased that might have been sustained if the deceased had not died.

2. ALBERTA LEGISLATION

***Survival of Action Act*, R.S.A. 2000, c. S-27, s.5**

5(1) If a cause of action survives under section 2, only those damages that resulted in actual financial loss to the deceased or the deceased's estate are recoverable.

5(2) Without restricting the generality of subsection (1), the following are not recoverable:

(a) punitive or exemplary damages;

(b) damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities;

(c) damages in relation to future earnings, including damages for loss of earning capacity, ability to earn or chance of future earnings.

5(3) Subsection (2)(c) applies only to causes of action that arise after the coming into force of this section.

3. SASKATCHEWAN LEGISLATION

The Survival of Actions Act, S.S. 1990-91, c. S-66.1, s.6

6(1) Subject to subsection (3), if a cause of action survives pursuant to section 3, only those damages that resulted in actual pecuniary loss to the deceased or the deceased's estate are recoverable.

6(2) Aggravated damages or damages for:

(a) the loss of expectancy of life;

(b) the loss of expectancy of earnings subsequent to death;

(c) pain and suffering;

(d) physical disfigurement; or

(e) loss of amenities

are not recoverable as a result of this Act.

6(3) If a cause of action survives pursuant to this Act, punitive or exemplary damages are only recoverable from:

(a) in the case of a cause of action that survives pursuant to section 3, the person against whom the cause of action exists;

(b) in the case of a cause of action that survives pursuant to section 4, the estate of the deceased person against whom the cause of action survives, but only if the award of damages is with respect to a gain by the deceased as a result of the deceased's wrongful conduct.

4. YUKON LEGISLATION

Survival of Actions Act, R.S.Y. 2002, c. 212. s. 5

5 If a cause of action survives for the benefit of the estate of a deceased person, only damages that have resulted in actual pecuniary loss to the deceased person or the estate are recoverable and, without restricting the generality of the foregoing, the damages recoverable shall not include punitive or exemplary damages or damages for loss or expectation of life, for pain and suffering, or for physical disfigurement.

BAXTER, et al. v. ATTORNEY GENERAL v. ANGLICAN CHURCH OF CANADA, et al. Court File No: 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF THE ATTORNEY GENERAL OF CANADA MOTION FOR CERTIFICATION AND SETTLEMENT APPROVAL

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