Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CHARLES BAXTER, SR. AND ELIJAH BAXTER

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

- and -

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

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

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

Third Parties

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF DARCY MERKUR
(sworn July 28, 2006)

I, DARCY MERKUR, Barrister and Solicitor, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a partner with the law firm of Thomson, Rogers located in Toronto, Ontario. I have been extensively involved in residential school litigation since the commencement of the *Baxter* national class proceedings in June, 2000, in the work of the group of residential school Plaintiffs' counsel known as the National Consortium of which my firm is a leading member and in the settlement negotiations resulting in the Agreement in Principle of November 20, 2005 (the "Agreement in Principle" or "AIP") and the final Settlement Agreement dated May 10, 2006 arising therefrom (the "Settlement Agreement"). I therefore have personal knowledge of the matters deposed to below, except where those matters are stated to be based on information and belief, and where so stated, I believe them to be true.

INTRODUCTION

2. In this motion the Court is asked to approve the Indian Residential Schools Settlement Agreement, including its provisions respecting compensation for lawyers. The settlement agreement is also being presented for approval to other courts throughout Canada.

3. This Affidavit is primarily concerned with section 13.08 of the Settlement Agreement as it relates to the National Consortium. This section sets forth the agreement made between Canada and the National Consortium (supported by all parties to the settlement) concerning compensation for work done by National Consortium members up to and including November 20, 2005. It provides for global compensation of $40 million, plus applicable taxes, payable by Canada to the 19 member firms of the National Consortium for the Consortium's years of work on residential school cases and in lieu of the Consortium relying upon, and charging their clients pursuant to, their various retainer agreements upon the payment of the Common Experience Payment (the "CEP"). This Affidavit is intended to assist the court in its consideration of those provisions by setting out circumstances and factors which informed the decision of the parties to agree upon these terms.

4. Other affidavits filed in support of the settlement approval motions also contain information pertinent to the compensation for legal counsel agreed to in the Settlement Agreement, including those of:

- the Honourable Frank Iacobucci;
- Richard Courtis;
- Paul Vogel (re: the *Cloud* action);
- Charles Baxter;
- Donald Belcourt; and
- Larry Philip Fontaine.

BACKGROUND

5. The residential school litigation was not ordinary litigation. The individual legal claims for compensation for personal harm suffered at residential schools were brought in a context of political, social and historical dimensions. The litigation pursued by the National Consortium members through individual claims, two class actions and one representative proceeding sought to establish conclusively in the legal forum what aboriginal persons (and we as their lawyers), their organizations and leaders were asserting in other political and public arenas -- that the harms caused by residential schools went far beyond specific cases of physical or sexual abuse, that the residential school system was by its very nature harmful to aboriginal persons and their traditions, culture and way of life and that such harms had lasting and intergenerational consequences. The National Consortium forced these issues by advancing them as legal claims to which Canada and the churches were obliged to respond, and which would if necessary have been ultimately decided by the Courts.

6. Because of its political, social and historical overtones, the resolution of the residential school litigation became a matter of political and public consequence engaging the attention of politicians, aboriginal organizations including most notably the AFN, the press and the public. As a consequence, plaintiffs' counsel found that adequately representing survivors required them to go beyond the traditional scope of counsel. Some examples of such initiatives are described below.

7. The Settlement Agreement brings to a conclusion more than 10 years of litigation, negotiation and advocacy on behalf of aboriginal Canadians who were placed in Indian Residential Schools. All of the individual, class and representative proceedings brought across the country are resolved, with compensation payable to each and every residential school claimant living as at May 30, 2005. At the same time the Settlement Agreement goes beyond individual compensation and promises to allow aboriginal persons and Canada to turn the page on the residential school legacy.

8. The settlement has been aptly described by Phil Fontaine, national chief of the Assembly of First Nations as "an agreement for the ages". Its announcement was the subject of intense and extensive coverage by the Canadian media that reflected its importance not just to the aboriginal community but to all Canadians. Such a settlement would not have

occurred without the pressure created by thousands of individual legal actions and more than a dozen class actions.

THE TERMS OF THE AGREEMENT CONCERNING LEGAL COMPENSATION

9. The negotiations giving rise to the Settlement Agreement were governed by terms of reference included in the political agreement of May 30, 2005, between Canada and the Assembly of First Nations. That agreement authorized the federal representative to negotiate with legal counsel for the residential school claimants a comprehensive settlement which would include compensation for legal counsel.

10. The mandate of the federal representative required that "the portion of any settlement allocated for legal fees will be restricted". The decision of the federal representative to recommend and enter into the settlement, and its subsequent ratification by both the former Liberal and present Conservative administrations indicates that this requirement was achieved to the satisfaction of Canada as well as the other parties.

11. The Agreement in Principle that resulted from the negotiations expressed its approach to compensation for lawyers as follows:

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

This was the subject of the following comment by the federal representative, the Honourable Frank Iacobucci, at the press conference announcing the Agreement in Principle:

> "May I also thank my - my colleagues who worked so hard, the lawyers who negotiated with us, who had spent many hours, personal sacrifice and so on working on these issues for years. Often at great personal and financial sacrifice and financial risk."

12. The Agreement in Principle set out the terms for compensation of lawyers which, with minor modification, are now found in section 13 of the Settlement Agreement, as follows:

"ARTICLE THIRTEEN
LEGAL FEES

13.01 Legal Fees

Canada agrees to compensate legal counsel in respect of their legal fees as set out herein.

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

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

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

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

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

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

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

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

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

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

13.05 No Fees on CEP Payments

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

13.06 Fees Where Retainer Agreements

Each lawyer who had a retainer agreement or a substantial solicitor-client relationship (a "Retainer Agreement") with an Eligible CEP Recipient as of May 30, 2005, will be paid an amount equal to the lesser of:

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

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

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

13.07 Proof of Fees

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

13.08 The National Consortium and the Merchant Law Group Fees

(1) The National Consortium will be paid forty million dollars ($40,000,000.00) plus reasonable disbursements, and GST and PST, if applicable, in recognition of the substantial number of Eligible CEP Recipients each of them represents and the class action work they have done on behalf of Eligible CEP Recipients. Any lawyer who is a partner

of, employed by or otherwise affiliated with a National Consortium member law firm is not entitled to the payments described in Section 13.02 and 13.06 of this Agreement.

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

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

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

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

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

to fix such amount.

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

Thomson Rogers	**Troniak Law Office**
Richard W. Courtis Law	**Koskie Minsky**
Field LLP	**Leslie R. Meiklejohn Law Office**
David Paterson Law Group	**Huck Birchard**
Docken & Company	**Ruston Marshall**
Arnold, Pizzo, McKiggan	**Rath & Company**
Cohen Highley LLP	**Levene Tadman Gutkin Golub**
White Ottenheimer & Baker	**Coller Levine**
Thompson Dorman Sweatman	**Adams Gareau**
Ahlstrom Wright Oliver & Cooper	

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

13.09 Cloud Class Action Costs, Fees and Disbursements

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

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

13. These terms concerning compensation for legal work apply both to counsel who represented claimants on an individual basis and counsel who advanced claims through class proceedings. The National Consortium includes some counsel primarily representing claimants on an individual basis, some counsel primarily involved in advancing class actions and some counsel doing both.

14. The settlement seeks to ensure that as far as possible the $1.9 billion allocated in the Settlement Agreement for the CEP will be paid to claimants without being subject to the payment of legal fees—so that those with individual legal counsel do not receive less of the common experience payment than those without individual legal counsel. The National Consortium and all other Plaintiffs' counsel participating in the negotiations together with all other counsel who accept the terms of Article 13 will waive their existing retainer agreements and charge no fee to their clients on the CEP, in order to ensure that the full compensation will flow to the survivors they represented, without deduction. This waiver of fees extends not only to existing clients but to future or potential clients as well.

15. In return, Canada will pay compensation to legal counsel as set out above in connection with the work, performed by them to the date of the Agreement in Principle. The Settlement Agreement recognizes three main groups of counsel:

- The National Consortium, comprising 19 identified law firms;
- The Merchant Law Group; and
- Unaffiliated counsel.

16. Different approaches to this compensation were negotiated with these different groups. In the case of the National Consortium, Canada agreed to a global payment of $40 million and disbursements, plus applicable taxes.

17. The $40 million, plus applicable taxes, payable by Canada to the National Consortium is intended to compensate Consortium members for the work they have done to November 20, 2005 and their agreement to waive their individual contingency retainer agreements by not charging fees to their clients on the CEP. It also compensates for their agreement not to charge fees on the CEP to any future or prospective clients, a substantial consideration given that there are an estimated 60,000 potential CEP clients who are not presently represented.

18. The Settlement Agreement also recognizes that some counsel will be performing future work on behalf of individual clients who pursue further compensation through the Individual Assessment Process established by the Settlement Agreement (the "IAP"). With respect to such future work, the Settlement Agreement takes a hand's off approach to whatever retainer agreements might exist between counsel and client. However, it does provide that Canada shall pay a further 15% of any IAP award to help defray lawyer's fees. This is a continuation of the approach taken by Canada under the IAP's predecessor, the Dispute Resolution process established in November, 2003 (the "DR process").

MEMBER FIRMS OF THE NATIONAL CONSORTIUM

19. The 19 member firms of the National Consortium comprise firms practicing in 8 provinces and two territories. The majority of member firms represent significant numbers of individual residential school plaintiffs and collectively, as of May 30th, 2005, the National Consortium represented some 4,826 named individual residential school survivors, as set out in the chart below:

#	Firm Name	# of pre May 30th, 2005 retainers for unsettled claims
1	Thomson Rogers*	38
2	Richard Courtis*	642
3	Field LLP	715
4	David Paterson Law Corp.	250
5	Docken & Company	117
6	Arnold Pizzo McKiggan	21
7	Cohen Highley LLP	149
8	White Ottenheimer & Baker	235
9	Thompson Dorfman Sweatman	373
10	Ahlstrom Wright Oliver & Cooper	345
11	Troniak Law Office	505
12	Koskie Minsky	0
13	Leslie Meiklejohn Law Office	255
14	Huck Birchard	428
15	Ruston Marshall	413
16	Rath & Company	30
17	Levene Tadman Gutkin Golub LLP	133
18	Coller Levine/Jacqueline Levesque	177
19	Adams Gareau	0
	TOTALS	**4,826**

* Note that Thomson, Rogers and Richard Courtis are co-counsel on all individual files.

20. In addition to these individual retainers, as counsel for the Association for the Survivors of the Shubenacadie Indian Residential School, the firm of Arnold Pizzo McKiggan represents a further approximately 580 survivors while as counsel for the *Cloud* class action, Cohen Highley LLP represents a certified class of approximately 1,500 residential school survivors and their family members. Accordingly, as of May 30th, 2005 the National Consortium represented approximately 7,000 residential school survivors.

21. During the course of the settlement negotiations Consortium members continued to be retained by residential school survivors and by November of 2005 the Consortium represented approximately 7,500 residential school survivors. Since November of 2005, National Consortium members have been retained by a further additional approximately 500 residential school survivors, bringing the total number of claimants represented by the National Consortium to approximately 8,000.

22. Many National Consortium members have pursued their clients' claims through individual or group lawsuits against Canada. Others have elected to advance their claims through class proceedings including the *Baxter* Action and *Cloud* Action. In some cases Consortium members have elected to have their clients' claims addressed as potential class members in the *Baxter* Action.

23. Members of the National Consortium began representing residential school survivors as early as 1994. For example David Paterson Law Corp was retained in October, 1994 by claimants who had attended the Kuper Island Residential School, while Arnold, Pizzo McKiggan was retained in 1995 on behalf of Shubenacadie Indian Residential School survivors. Most other Consortium firms, including White Ottenheimer & Baker, Ruston Marshall, Thompson Dorfman Sweatman, Field LLP, Richard Courtis, Ahlstrom Wright Oliver & Cooper, and Huck Birchard began representing residential school plaintiffs between 1996 and 1999.

24. National Consortium members accepted their retainers on a contingent basis, meaning that they would receive compensation for their work only in the event they succeeded in recovering compensation for the client. Almost without exception the financial circumstances of the Plaintiffs were such that it was impossible for them to retain counsel in any other way.

25. Representing and making legal representation available to Indian Residential School plaintiffs presents unique challenges due to issues of geography, language, volume of clients and client unfamiliarity with legal processes. For example Consortium member Les Meiklejohn describes the challenges of representing 255 residential school plaintiffs in Alberta as follows:

> "Contacts are maintained in a variety of ways - by mass mailings, by huge numbers of telephone calls including the introduction of a toll-free number with dedicated IRS (Indian Residential School) information lines, personal attendances in and out of the office and numerous meetings encompassing about 12 bands throughout Northern and Central Alberta. My clients are scattered all over the province and represent about 24 schools. Many are unsophisticated, about 40% of those still alive are seniors many of whom have problems with English comprehension. Obviously in our earlier stages there were many more elderly clients who passed away during the history of these claims. Many clients are also in significantly poor health with cancer, diabetes and heart problems."

David Patterson, a National Consortium member from British Columbia who began representing residential school plaintiffs in 1994 describes similar problems:

> "I represent claimants in B.C., NWT, Alberta, Washington, Oregon, California and Alaska. The vast majority are in B.C. ... Many clients live in remote areas which are accessible only by float plan or four-wheel drive. About 10% of my clients require translation. At last 30% are functionally illiterate. About 30% are not accessible by telephone (significantly overlapping the above). Many clients have no permanent residence and simply live with others. These persons frequently move from place to place, often hundreds of miles distant, without advising this office.
>
> ...
>
> I represent clients in 12 communities west of Hwy 97 (which runs north to Prince George). One of these communities is well served by hotels and restaurants. Two of them have airport access. Several are more than 100 km distant from the nearest airport. 5 are accessible only by gravel roads, some of which are virtually impassible at times of the year. 10 of the communities have no public accommodations and one has a lodge open 6 months of the year. Two communities have a restaurant. Communities may be more than 100 km distant from their nearest neighbour. None have cell phone or blackberry access. Private homes must often be used for accommodation and meals. I travel within these communities 3 or 4 times a year. Most of my clients lack transportation and these communities are not served by public carriers."

My own firm's experience is similar. Both Thomson, Rogers and Richard Courtis, our co-counsel, have toll free numbers that our client can call. In a typical week we will field some 50 calls from residential school survivors. We have found that many of our clients have literacy problems that make it extreme difficulty for them to fully understand our regular update correspondence, even when written with such limitations in mind. Our clients often call us for clarification of certain points set out in our letters and we spend much time doing this. Because of the geographic dispersion of our clients it is often difficult if not impossible to visit regularly with them in person. A further problem is miscommunication spread within the Aboriginal communities caused by false rumours about settlements and funds received.

26. Because of these challenges the process of making legal representations available to residential school claimants is more time consuming and difficult than with most other types of clients. Gathering information from clients in order to prepare pleadings and respond to

motions, and meetings with clients in order to get ready for examinations for discovery and other litigation steps are more difficult than in conventional litigation.

PROCEEDINGS BY INDIVIDUAL CONSORTIUM COUNSEL

27. Members of the National Consortium have taken various approaches to the representation of their individual clients some examples of which follow.

Nova Scotia

28. John McKiggan of Arnold Pizzo McKiggan ("APM") was first retained by survivors of the Shubenacadie Indian Residential School in 1995. In 1996, following the creation of the Association for Survivors of Shubenacadie Indian Residential School, APM was retained by Nora Bernard on behalf of that Association. Ms. Bernard had previously approached a number of other firms to represent the Association but none had been prepared to accept such a retainer other than on a pay-as-you-go basis.

29. The Association consisted of survivors from the Shubenacadie Indian Residential School now living not only in the Atlantic provinces but also Quebec, Ontario, B.C. and several of the United states. APM communicated with this widespread group through regular report letters, website updates, a toll free telephone line, visits to reserves where some of the clients resided, regular meetings with the Association leadership, one on one meetings with clients and a system of geographic representatives in different parts of the country.

30. As Nova Scotia did not have class action legislation, the Association instructed the commencement of a representative action pursuant to Nova Scotia's rules. This action sought compensation on behalf of all survivors of the Shubenacadie School on a variety of bases including the injury caused by the school to their language and culture. Canada vigorously challenged this approach on procedural grounds making repeated Demands for Particulars resulting in a contested application for particulars, and threatening repeated Motions to Strike the claim.

31. In an effort to find a way around such procedural roadblocks, APM participated in the "exploratory dialogues" convened by Canada in 1998 that were intended to explore the possibility of alternate means for the resolution of residential school.

32. These "dialogues" were carefully structured meetings held in different parts of the country with survivors, legal counsel such as APM, aboriginal organizations and both legal and non-legal representatives of Canada and various church organizations. The "dialogues" resulted in Canada's attempt to establish a series of Alternative Dispute Resolution Pilot Projects in various locations across Canada. These pilot projects were intended to address residential school claims on a group basis, but were limited to claims of sexual and physical abuse.

33. The pilot project did not encompass the range of claims advanced by APM in their representative action. APM engaged in several months of discussion and negotiation with Canada in an attempt to find an acceptable way of advancing the Shubenacadie claims through a pilot project but the Association eventually rejected participation due to the limited scope of the claims that Canada would allow to be considered. This was an insurmountable hurdle because while Canada would only consider compensation for limited claims it demanded a release from all claims as a precondition to settlement.

34. Following the filing of the *Baxter* national class proceedings the Association concluded its members claims were best advanced through that vehicle rather than continuing to contest their right to pursue a representative action under the Nova Scotia rules. The Association instructed APM to in effect "roll" their claim into *Baxter*.

British Columbia

35. David Patterson ("DP") was first retained by residential school survivors in October 1994 and now represents claimants living in B.C., Northwest Territories, Alberta, Washington, Oregon, California and Alaska. The challenges faced in representing this group are described above.

36. His representation of his clients involved the vigorous exploration and pursuit of every available avenue including litigation, public advocacy, consultation and dialogue with

Canada and church organizations and negotiation. DP summarizes that involvement as follows:

> "I was involved in an AFN work group on residential schools in 1994. I was involved in the exploratory dialogues at both the regional and national levels. I was involved in the pilot projects to the extent of an unsuccessful attempt to initiate one in Alberni. I was involved in the Canadian Residential School Plaintiffs' Counsel Association and took part in repeated meetings with Canada and the Churches in that capacity seeking compensation in particular for the loss of language and culture claims. I had relationships with the First Nations Summit, the Provincial Residential Schools Project, the AFN, the United Native Nations, Mothers of the Red Nations and the Indian Residential School Survivors Society in a variety of initiatives ...
>
> I was counsel in *Blackwater* which was 115 days at trial over three years, 8 days in the Court of Appeal, and ultimately in the Supreme Court of Canada. I was counsel for the Residential School Interveners in the trilogy in the Supreme Court of Canada."

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

Manitoba

38. Consortium members Dennis Troniak of Troniak Law Office ("TLO") and Bill Percy of Thompson Dorfman Sweatman ("TDS") became involved in representing residential school plaintiffs in 1996 and 1998 respectively. Since that time TLO has issued statements of claim on behalf of approximately 350 plaintiffs and TDS has issued about 250 claims.

39. Those claims were met with significant procedural and substantive challenges including motions to strike out multiple plaintiff claims and a serious limitations defence. Both TDS and TLO played key roles in addressing the significant obstacle presented by Manitoba's limitation of actions regime. Together with aboriginal organizations and residential school survivors they mounted a campaign which led to negotiations with the Government of Manitoba aimed at amending Manitoba's limitations legislation.

40. TLO and TDS both pressed their clients' claims on a variety of fronts. TDS participated in the "exploratory dialogues" in 1998 and in a Manitoba pilot project which was

largely unsuccessful. TLO helped to organize and acted as counsel to Spirit Wind, a Manitoba grassroots residential school survivor's organization which lobbied the government on behalf of survivors and which subsequently entered into a Memorandum of Understanding with the National Consortium to support the *Baxter* national class action.

Alberta

41. Alberta contains the largest concentration of National Consortium Counsel with 8 of the 19 member firms either based in that province or representing clients there. Because Alberta until recently had no Class Proceedings legislation, claims were advanced on behalf of residential school plaintiffs by way of individual or group Statements of Claim.

42. Due to the very large number of persons bringing Residential School claims, the Chief Justice of the Court of Queen's Bench of Alberta directed that all Residential School cases be placed in case management, and appointed two Justices to manage all Residential School claims in common. The first case management meeting was held in Calgary on July 6, 1999. A copy of the Order establishing the universal case management program for residential school litigation in Alberta is attached to the Affidavit of Donald Belcourt as Exhibit A.

43. Throughout 1999 and 2000, various preliminary applications were brought before the case management Judge. These motions were of a significant nature and directly involved many of the National Consortium members in Alberta and included:

(a) an application by the Defendants to sever claims brought by more than one Plaintiff. This resulted in an Order directing that multi-Plaintiff claims be broken down by school;

(b) an application by Defendants for further and better particulars, some of which were ordered and some of which were denied;

(c) an unsuccessful application by Church Defendants to strike out breach of treaty claims plead against them;

(d) a successful application by Defendants to strike out certain causes of action based upon allegations of genocide; and,

(e) an application brought by certain Defendants to strike out the Defendant "The Roman Catholic Church". This application was denied by the case management Justice. Her decision was appealed to the Alberta Court of Appeal, which struck out The Roman Catholic Church as a party.

Throughout this time, regular case management meetings were held throughout the Province in Edmonton, Calgary and Lethbridge to address issues relating to the timing of pleadings, production of documents and other pre-trial matters. Most Alberta National Consortium members were participants in these meetings which sometimes occupied one or two full days of court hearing.

44. In April, 2000 a plan to move the Alberta residential school litigation ahead in an organized fashion by means of pre-trial discovery to be conducted in common on behalf of all Plaintiffs, the establishment of a common document production system and the selection of a number of "sample" or "test" cases to be fast tracked towards trial was approved by the Court.

45. Fifty Plaintiffs were selected from the pool of all Alberta Plaintiffs to undergo a preliminary examination for discovery of between two and five days by counsel for the Defendants. In addition each of the fifty Plaintiffs, was to answer a lengthy series of written interrogatories posed by the Defendants and to produce extensive documentation. Out of this group, following submissions from all parties and a contested application, the case management Judge directed that six cases go forward as test cases.

46. Because examination for discoveries and document production were intended to be applicable to all residential school Plaintiffs in Alberta document production and examinations for discovery were unusually extensive. Between January of 2000 and June, 2005, Canada produced approximately 105,000 documents relating to residential schools. Various church defendants had produced thousands more documents. The organization and review of these materials was an enormous undertaking.

47. The preparation for these discoveries was arduous, involving the review of thousands of documents for each session some of which spanned a period of almost a century. Because of the enormous range of issues and material to be covered, examinations were conducted on a topic-by-topic basis agreed to in advance to permit both the deponent and counsel to prepare.

48. Between January, 2001 and June of 2005, examinations for discovery and other evidence was taken as follows:

- 110 days of examination for discovery of Canada's deponents;
- 14 days of examination for discovery of church defendants' representatives;
- approximately 110 days of examination for discovery conducted by Canada and the church defendants of test case or prospective test case plaintiffs; and,
- 11 days of evidence taken *de bene esse.*

In addition extensive interrogatories for both Plaintiffs and Defendants were prepared and answered.

49. In order to pursue litigation of these massive proportions, National Consortium firms typically relied upon senior counsel. For example Field LLP assembled a team that involved two senior partners, two senior associates, a number of junior and mid-level associates, three paralegals, articling and summer students as well as contract clerical support. Other National Consortium firms also dedicated their most senior lawyers including Clint Docken Q.C., Rhonda Ruston Q.C., Vaughn F.G. Marshall and Leslie Meiklejohn.

50. Extensive expert reports for the test case trial were obtained that included the following expert opinions:

- Dr. Richard Berry, clinical psychologist, who performed psychological assessments of the test case Plaintiffs;
- Gordon Smith, C.A., who prepared assessments of the financial impact of residential schools upon the test case plaintiffs;
- Dr. Joel Spring, professor of education at City University of New York and himself of aboriginal descent who stated that the institutional conditions and "de-culturalizing" intent of Residential Schools involved a denial of proper education and alienation from Aboriginal cultural values causing severe impacts on the plaintiffs' ability to develop self-identity;

- Dr Jean LaFrance, professor of social work at the University of Calgary who gave the opinion that Canada's residential school policy was one of assimilation and was a calculated attempt to destroy Aboriginal societies. Canada provided inadequate financial support to residential schools, was unfettered by any sense of responsibility for the quality of the child care services they purchased, and were consistently content to delegate responsibility for the care of these children to other entities. In his opinion Canada failed to meet then prevailing child care standards in almost every respect;
- Dr. Rick Enns, professor of social work at the University of Calgary. Dr. Enns describes residential schools as "total institutions" that regulated every aspect of the lives of the children placed in them and that were capable of enormous impact on the lives of those children, including loss of identity, that was particularly harmful to aboriginal children. He found: admissions policies were not being complied with, either by Canada or by the Church management; adequate and competent care was not being provided to Aboriginal children; staff members did not receive effective training to carry out their child care and welfare responsibilities; no policies were developed to guide and promote child care and welfare practices within the schools; and no administrative structures were put in place to ensure adequate levels of care and oversight;
- Bob Beal, historian and teacher at Athabasca University. Mr. Beal expresses the opinion that the residential school system violated the education promises contained in Treaties 6, 7 and 8 which contemplated Indian children being educated at local schools upon their reserves rather than being removed to residential institutions;
- Dr. Robert Robson, associate professor of history at Lakehead University, who reviewed the overall history of the residential school system. Dr. Robson's opinion is that Residential Schools were primarily intended to execute Canada's policy of assimilation, a policy that was carried out in a collaborative venture between Canada and the Churches. Canada's financial control over the school system, and the inadequate funding provided to support that system, led to its deficiencies and outright failures. Both Canada and the Churches were well aware of the chronic underfunding, as well as its ramifications, but took no meaningful steps to rectify the problem. The result was a system designed to fail, at the expense of the Aboriginal children caught within it; and,
- Dr. Brian Titley, professor of education at the University of Lethbridge who gave the opinion that education at residential schools was governed by missionary principles which failed to deliver an acceptable standard of education. Many school principals lacked educational training, and few of the teachers (who were drawn primarily from religious Orders) were properly qualified. The religious ideals of the Churches, combined with Canada's chronic underfunding, led to a deficient education for the plaintiffs.

51. Following the completion of these steps, an extensive pre-trial brief was filed on behalf of the Plaintiffs in April 2005, and a trial date for the test cases of January 2006 was assigned. After the appointment of Frank Iacobucci as Federal Representative the trial date was adjourned to allow the parties to focus on negotiations.

Ontario

52. The majority of residential school activity by the National Consortium in Ontario has been on the class action front.

53. The first residential school class action launched in Canada was by the Cohen Highley firm, a member of the National Consortium. Cohen Highley was first retained in May, 1997 to launch a class action on behalf of victims of the Mohawk Institute, a residential school located in Brantford, Ontario. On October 5, 1998, the *Cloud* Action was issued in the Ontario Superior Court of Justice. The history of the *Cloud* Class Action is set out in detail in the Affidavit of Paul Vogel.

54. The second residential school class action launched in Canada and the first national class action filed was filed by our firm (Thomson, Rogers) in conjunction with Richard Courtis as co-counsel (the "*Baxter* Action"). The *Baxter* Action was filed on June 13, 2000 in the Ontario Superior Court of Justice.

55. The *Baxter* Action raised similar residential school issues to those raised in the *Cloud* Action except the *Baxter* Action, as a national class action, was much larger in scope. Logic dictated that it would be extremely difficult to get the *Baxter* Action certified if the smaller *Cloud* Action was unable to get certified.

56. As set out in the Affidavit filed by Paul Vogel, the *Cloud* Action was denied certification on October 9, 2001. An appeal by the plaintiffs in the *Cloud* Action was brought and in March, 2002, the Koskie Minsky firm was retained by Cohen Highley to act as co-counsel and to assist with the appeal.

57. Recognizing the need for those advancing residential school class actions and those advancing residential school claims to work together to support our common goals, in May, 2002 the National Consortium was formed. As set out below the Consortium provided support to both the *Baxter* Action and the *Cloud* Action. Koskie Minsky became a member of the National Consortium working to advance both *Baxter* and *Cloud*.

58. Notwithstanding the uncertainty of the outcome of the appeals in the *Cloud* Action, it was important to continue to move the *Baxter* Action forward so if and when the *Cloud* Action was certified, the certification hearing in the *Baxter* Action would follow as quickly as possible. Accordingly, numerous case conferences were held in the *Baxter* Action with the Honourable Mr. Justice Winkler of the Ontario Superior Court of Justice to address procedural and scheduling issues. As set out in the Affidavit of Richard Courtis, case conferences were held with Justice Winkler in the *Baxter* Action on the following dates: April 15, 2002; October 24, 2002; January 7, 2003; February 24, 2003; May 22, 2003; June 17, 2003; September 9, 2003; October 21, 2003 and November 27, 2003. Minutes of these case conferences are attached to the Affidavit of Richard Courtis.

59. During the course of these case conferences and in an effort to move the *Baxter* Action forward, in July 2003, with the assistance of the National Consortium the plaintiffs filed our certification motion materials. The certification materials included a detailed litigation plan (which has been attached as an exhibit to Richard Courtis' affidavit) and a detailed Affidavit by Dr. Robert Robson, an associate professor of history at Lakehead University (which has been attached as an exhibit to Dr. Robson's Affidavit), reviewing the overall history of the residential school system.

60. On June 23, 2003, in a 2:1 decision the majority of the Ontario Divisional Court upheld the lower court decision and denied certification of the *Cloud* Action. A dissent was written by Cullity J.

61. The plaintiffs in the *Cloud* Action sought and were ultimately granted leave to appeal the decision to the Ontario Court of Appeal and on December 3, 2004, the Ontario Court of Appeal overturned the decision of the Divisional Court and certified the *Cloud* Action.

62. Immediately following release of the decision of the Ontario Court of Appeal in the *Cloud* Action, the plaintiffs in the *Baxter* Action sought a case conference to schedule a date for the *Baxter* certification motion.

63. On December 14, 2004, the parties to the *Baxter* action attended another case conference with Mr. Justice Winkler. A schedule for the certification motion in *Baxter* was set at the case conference, with the certification motion hearing date set down for May 2005. The minutes from this case conference are attached to Richard Courtis' Affidavit. Ultimately this timetable was revised to allow time for the parties to monitor the defendants' motion in the *Cloud* Action for leave to appeal to the Supreme Court of Canada and to address procedural issues raised by the third parties in the *Baxter* Action.

64. The defendants' motion in the *Cloud* Action for leave to appeal to the Supreme Court of Canada was dismissed on May 12, 2005. Thereafter the negotiations giving rise to the Settlement Agreement immediately ensued.

65. Additional details of the history of the *Baxter* Action have been set out in the Affidavit of Richard Courtis and additional details of the history of the *Cloud* Action have been set out in the Affidavit of Paul Vogel.

THE NATIONAL CONSORTIUM

66. The National Consortium (the "Consortium") is the successor to an earlier association of residential school plaintiffs' counsel, the National Association of Indian Residential School Plaintiffs' Counsel (the "Association"). The Association was organized in 1998 and brought together plaintiffs' counsel from across Canada who wished to co-operate in advancing their claims on behalf of residential school survivors through litigation, negotiation and public advocacy. In May, 2002, members of the Association entered into a co-operation and co-counsel agreement with Thomson Rogers, lead counsel in the *Baxter* proceedings, resulting in the formation of the National Consortium.

67. The Association comprised approximately 24 plaintiffs' counsel from across Canada representing thousands of residential school plaintiffs. It included: Cohen Highley, counsel in the *Cloud* class proceeding; David Paterson, counsel in the *Blackwater* proceedings in

British Columbia; Arnold Pizzo McKiggan, counsel for the Shubenacadie School representative action; and Field LLP, lead counsel in the Alberta Test Case Litigation.

68. The overall objective of the Association was to form a common front among residential school counsel to push for an early resolution to residential school claims on the basis that compensation would be paid to any aboriginal person who had attended a residential school. For the most part, the Association was chaired by Russell Raikes of Cohen Highley, lead counsel for the plaintiffs in the *Cloud* Action. The Association communicated regularly by email and had teleconferences as needed every few months.

69. In addition to litigation, the Association pursued a wide variety of initiatives to achieve a resolution of the residential school claims. Some of its members were involved in the discussions with Canada known as "the Exploratory Dialogues" which took place at various locations throughout the country in 1998. Following those discussions Canada decided to pursue a number of dispute resolution "pilot projects". Those pilot projects, which were conducted on a group basis and did not contemplate compensation for all residential school survivors, did not succeed as a model for resolution of the residential school claims.

70. As the lack of success of the pilot project process became apparent, the Association sought to engage Canada in negotiations aimed at achieving an overall resolution to the claims. A series of meetings were held in Toronto in: September, 2000; June, 2001 and January, 2002, at which the Association urged Canada to enter into discussions of an approach that would provide compensation to all survivors.

71. While Canada was prepared to negotiate claims involving sexual or physical abuse it consistently adopted the position that other claims could only be resolved through litigation. Canada was not prepared to meet with representatives of the Association to discuss the other claims and declined to enter into any negotiation that would include consideration of compensation for all survivors. It was Canada's position that compensation for all survivors would only be achieved if the claimants could make out their claim through litigation. Canada officially maintained this position until May, 2005.

72. In May, 2002, members of the Association met with counsel in *Baxter* to discuss ways in which their respective litigation could be coordinated for the benefit of all residential school claimants. As a result of that meeting, a cooperation and co-counsel agreement between the Association and Thomson, Rogers was made, creating the Consortium.

73. All parties agreed to jointly endorse and pursue the *Baxter* Action while continuing to assist and support each other in the pursuit of the other major litigation initiatives which were designated as parallel proceedings. A five firm Consortium Steering Committee was appointed. The Steering Committee was made up of Thomson, Rogers, Field LLP, Docken & Company, David Paterson Law Corp and Arnold Pizzo McKiggan (with Cohen Highley as the alternate for Arnold Pizzo McKiggan).

74. Since the inception of the Consortium, Thomson, Rogers has been in charge of coordinating Consortium communications. In that regard, Thomson, Rogers set up and established an email communication address and was responsible for circulating all relevant residential school information. I would estimate that an average of some 10 emails were circulated per day. In addition, Thomson, Rogers coordinated regular update conference calls with all Consortium members. These update calls generally occurred monthly but at crucial times during the litigation or negotiations these calls would often take place on an as needed or weekly basis. The majority of Consortium members would participate in the calls and the calls were on average an hour in length. Thomson, Rogers would customarily circulate a draft agenda for the calls and the calls were generally chaired by the Field LLP firm. On a number of occasions, Consortium meetings were held (most commonly at our offices in Toronto) and the majority of Consortium members attended at these meetings.

75. Under the Consortium Agreement, the following cases were designated as parallel proceedings:

(a) The *Blackwater* Appeal;

(b) The Alberta test cases;

(c) The *Cloud* Appeal and the action, if certified;

(d) The Intervention in the B.C. Trilogy that was then before the Supreme Court of Canada; and,

(e) A Saskatchewan Class Action commenced by Docken & Company.

76. The National Consortium understood Canada's position to be that it would not engage in negotiations aimed at an overall settlement. As a result Consortium members vigorously pursued the litigation and the parallel proceedings on behalf of their clients as previously described.

77. The National Consortium members also pursued alliances with organizations that were concerned with the residential school issue and sought to provide a voice for survivors in the public and political debate that was occurring with respect to the residential school litigation.

78. In July, 2002, members of the Consortium accepted an invitation to attend a conference on residential schools sponsored by the Assembly of First Nations at the University of British Columbia. The conference was attended by representatives of Canada, survivors, aboriginal organizations and plaintiffs' counsel. Consortium counsel continued to urge a universal resolution to the residential school claims which at that time had not yet been endorsed by the AFN.

79. Further meetings involving the National Consortium and the AFN occurred in August of 2002, and February and August of 2003. Discussions and co-operation between the AFN and the National Consortium intensified following the election of Phil Fontaine as National Chief, who took a leading role on behalf of residential school survivors.

80. In December, 2002, Canada announced its intention to establish a Dispute Resolution Model (the "DR process") to address residential school claims involving sexual or physical abuse. Due to the limited nature of this process and the disproportionate proportion of the budget dedicated to overhead, the Consortium publicly advocated against the Government plan and urged Canada to pursue an overall resolution instead.

81. In August, 2003, while the proposed DR process was still under design, the Consortium met with the Deputy Minister for Indian Residential School Resolution Canada -- the department responsible for responding to residential school claims -- and urged that Canada pursue an overall settlement based on compensation for all survivors. However

when Canada announced the start-up of the DR process in November, 2003, the process was limited to claims for sexual and physical abuse.

82. The Consortium again publicly advocated against this approach, warning that it would become a money pit with most of the money being spent on overhead costs rather than the settlement of claims. Members of the Consortium initiated the involvement of the Canadian Bar Association in the issue; the CBA issued a resolution that urged the government to reconsider its approach to the residential school claims. It subsequently issued a report urging compensation for all residential school survivors.

83. In March 2004, the AFN convened a conference at the University of Calgary at which the DR process and the government's approach to residential school claims was roundly criticized by survivors, academics and others including two National Consortium legal counsel.

84. Throughout 2004 and early 2005, the Consortium was involved in many of the events that preceded Canada's decision to appointment the Honourable Frank Iacobucci as Canada's representative with a mandate to negotiate an overall resolution to the residential school claims. Those events included:

(a) The decision of the Ontario Court of Appeal released December 3, 2004, certifying the *Cloud* Action and the Supreme Court of Canada's subsequent denial of Canada's application for leave to appeal;

(b) Follow-up to the AFN report in November, 2004, proposing compensation for all residential school survivors. This report was followed by a series of bilateral meetings between the Consortium and the AFN aimed at pressuring Canada into adopting such an approach while the AFN conducted concurrent discussions with Canada; and,

(c) The hearings before the Parliamentary Committee on Aboriginal Affairs and Northern Development in February, 2005, at which a number of Consortium Counsel and their clients appeared as witnesses in order to give evidence concerning the shortcomings of Canada's approach to the residential school claims.

85. Throughout this time the National Consortium's litigation efforts intensified. The Consortium's approach to the litigation and the legal issues was reflected in the following

passages from the extensive pre-trial brief filed in the Alberta test case litigation in April, 2005:

> "6. Rarely have Plaintiffs in such stoutly-defended proceedings as this residential school litigation been armed with so many public acknowledgements of wrong-doing by the Defendants in relation to the subject matter of their claims. The Oblates:
>
> > "We apologize for the existence of the schools themselves, recognizing that the biggest abuse was not what happened in the schools but that the schools themselves happened."
>
> The Anglicans:
>
> > "I am sorry more than I can say that we were part of a system which took you and your children from home and family...I am sorry more than I can say that in our schools so many were abused physically, sexually, culturally and emotionally."
>
> And Canada:
>
> > "This system separated many children from their families and communities and prevented them from speaking their own languages and from learning about their heritage and cultures. In the worst cases, it left legacies of personal pain and distress that continue to reverberate in Aboriginal communities to this day."
>
> 7. But while acknowledging the harm they caused, the Defendants in the Alberta residential school litigation (and residential school litigation throughout the country) deny they are legally responsible to the individual persons who suffered that harm, other than for proven physical and sexual abuse.
>
> 8. The purpose of this proceeding is to test that stance. In this brief, the Plaintiffs set out how they intend to proceed with that task.
>
> ...
>
> 49. Previous Residential School litigation has largely focused upon individual physical and sexual abuse that occurred in the schools. While such abuses are part of these claims, this case is also concerned with the broader issue of liability for confining children in such institutions.
>
> 50. The Plaintiffs claim that the defendants are liable to them for wrongfully placing them in these institutions, separating them there from home, family, community and culture, subjecting them to the total institutional regime that residential Schools entailed, depriving them of ordinary care and nurture that children require and to which they are entitled, exposing them to substandard housing, food,

clothing, care, supervision, and education. At the schools the Plaintiffs faced at best the risk and at worst the fact of physical and sexual mistreatment. At the schools the Plaintiffs were subjected to an attack on their very identity as aboriginals."

The brief summarized the evidence of the experts identified above and described the profound failing of and harms caused by the system.

86. The documents and evidence developed during the extensive pre-trial proceedings in the Alberta test cases lent support to the National Consortium's position that all persons who attended residential school should receive compensation. As stated in the Plaintiffs' pre-trial brief:

> "47. In 1969, as the era of the church-run residential school system drew to a close, the history of that system was summed up by Canada's head of Indian education, R.F. Davey, in the following words:
>
> > "These are the institutions which were formerly referred to as Residential Schools and the problems related to their operation have been many and varied. As you are no doubt aware, these were originally established by one or other of the various religious denominations with the prime purpose of christianizing the Indian population and with the secondary purpose of providing a rudimentary education. For 100 years or more they offered a static program, financed in part from federal funds under an iniquitous per capita grant system. Neither the church nor the Department gave any leadership in the matter of adapting the program to changing circumstances until 1958, when a new system of financing was introduced which was related to the maintenance of certain standards particularly in respect to food, clothing and staff.
> >
> > ...
> >
> > I am convinced that over the period of the next five years it should be possible to close an additional 25 of these [schools]. **There is no question but that the admission of a child to such an institution, when he does not need to be there, is harmful to both the child and the family from which he is withdrawn. The benefits of these exclusions and the reduction of the number of these institutions by 25 are immeasurable..."** (emphasis added)

It was Mr. Davey who had commissioned the Caldwell Report. That report criticized the Residential School program for treating children "en masse in every significant activity of daily life" and went on to say:

> "His sleeping, eating, recreation, academic training, spiritual training and discipline are all handled in such a regimented way as to force conformity to the institutional pattern. The absence of emphasis on the development of the individual child as a unique person is the most disturbing result of the whole system. The schools are providing a custodial service rather than a child development service. The physical environment of the daily living aspects of the residential school is overcrowded, poorly designed, highly regimented and forces a mass approach to children. The residential school reflects a pattern of child care which was dominant in the early decades of the 20th century, a concept of combined shelter and education at the least public expense."

48. It is disturbing to observe that the Caldwell report appears to have merely confirmed what Canada had known for decades about the residential school. Canada's continued acceptance of this shoddy, archaic, and harmful approach to Indian education and the care of Indian children throughout this time appears to have been motivated by fear of the Churches' political clout at the expense of the welfare and well-being of Indian children. As Davey observed in an unusually candid letter, issues concerning residential schools were a hot political issue:

> "...in matters as far reaching politically as any changes in the organization of a residential school I want you to refer the proposal to me before you open negotiations with church and provincial authorities. As you know, my superiors expect me to keep them informed on all matters of political importance and residential schools are political 'hot potatoes'.""

87. The National Consortium's approach to the resolution of the residential school litigation can be seen from the Litigation Plan forming a part of the Certification Materials filed in the *Baxter* Action. That approach involved a program of compensation for all survivors based on their time at the schools, coupled with a streamlined alternative hearing process to address claims of abuse. The litigation plan is described in greater detail in the Affidavit of Richard Courtis and is attached thereto.

THE NEGOTIATIONS

88. The appointment on May 30, 2005 of the Honourable Frank Iacobucci as Canada's representative to negotiate an overall settlement, which would include compensation to all residential school survivors, held the possibility of fulfilling the National Consortium's key objectives on behalf of residential school survivors. The National Consortium recognized that a successful negotiation could render further litigation unnecessary. The National Consortium also recognized that continuation of the litigation represented the ultimate recourse for claimants and provided Canada with a significant incentive for settlement on favourable terms.

89. The Consortium played a key and central role in the preliminary discussions and subsequent negotiations with the Honourable Frank Iacobucci which commenced in June, 2005, resulted in the Agreement in Principle of November 20, 2005 and continued until the finalization of the Settlement Agreement on May 10, 2006.

90. In order to be able to present a unified, coherent and effective position at the negotiations, the National Consortium members engaged in extensive preparations. Meetings of the Consortium were convened in Toronto at which subcommittees were formed to work on position papers concerning the various issues expected to arise. A seven person negotiating committee was struck and began developing strategy. A liaison group continued to maintain relations with the Assembly of First Nations in anticipation of the commencement of discussions.

91. These preparations and the ensuing negotiations occupied the members of the negotiating committee and the partners, associates and support staff working with them virtually full-time from the beginning of June 2005 until the Agreement in Principle was reached on November 20, 2005.

92. The negotiations themselves were difficult. The number of parties involved, the diverging interests of those parties, the need to address and resolve both legal and social aspects of the residential school legacy, the urgency of achieving resolution and the political uncertainty which existed at the federal level during the negotiations all made the task of arriving at a settlement exceptionally difficult.

93. The National Consortium sought to advance the process by preparing position papers and detailed memoranda on the agenda items for each negotiating session. These papers and memoranda formed the basis for much of the discussion at the main negotiating table. The National Consortium was the only group at the table to consistently present such material for discussion.

94. While the members of the negotiating committee were most actively involved in the negotiations, it was necessary for all Consortium members to be informed and consulted throughout the negotiations and to obtain their approval on all critical positions. All members of the negotiating committee spent substantial time in consultation and discussion with Consortium members to ensure the positions taken were acceptable to the Consortium as a whole.

95. The negotiations did not turn to the issue of legal fees until the end of August, 2005 at which time a day-long discussion about the principles applicable to this topic was held in a plenary session attended by all parties. Thereafter, the topic of legal fees was one of the topics addressed at all subsequent negotiating sessions including:

- Calgary – September 12/13;
- Toronto – September 27;
- Toronto – October 11-14;
- Toronto – November 3-4; and,
- Toronto – November 16-20.

The National Consortium legal fees were the subject of detailed and specific bilateral discussions with Canada during a number of these meetings resulting in the agreement reflected in paragraph 13.08 of the Settlement Agreement. Those discussions are addressed in greater detail below.

COMPENSATION FOR LEGAL COUNSEL

96. While this motion does not only entail approval of fees in the traditional sense contemplated by the *Class Proceedings Act, 1992* (the "CPA"), the factors considered under the CPA are likely relevant to the court's assessment of section 13 of the settlement agreement. Those factors include the risk undertaken by counsel in conducting the litigation, the effort expended and the degree of success or result achieved.

SUCCESS

97. The result reflected in the Settlement Agreement is unarguably a great success for residential school survivors. As stated above, the settlement will result in significant compensation payable to all living residential school survivors (the "Common Experience Payment"). This is an approach which Canada actively opposed for many years and said could only be achieved through successful litigation taken to the highest level of appeal. The amount allocated for the Common Experience Payment is $1.9 billion. If more is required to make payment to each survivor, it will be made available by Canada.

98. Second, the settlement will result in very substantial improvements to the alternative process for resolving claims for individual abuse. These improvements reflect the multitude of complaints and concerns voiced by legal counsel and others, including the AFN and the CBA, about the original DR process. The types of abuse for which compensation can be awarded have been expanded, the amounts of compensation have been increased and a national compensation standard replaces the individual standards which resulted in claimants from different parts of the country receiving different awards for the same harms. The process has been simplified, streamlined and placed under court supervision. Guarantees are given that individual claims will be dealt with in a timely way; the settlement provides that resources will be allocated to ensure that individual compensation claims will be processed at the rate of 2,500 claims per year and that any individual claim will be offered a hearing within nine months from being accepted into the system.

99. Third, the settlement provides programs designed to address the broader effects of residential schools on survivors, their families and their communities. The settlement

includes substantial funding that will ensure the continuation of the Aboriginal Healing Foundation which provides services to residential school survivors and their families. The settlement also establishes a truth and reconciliation process and a commemoration process which amongst other activities will record, honour and preserve the memories and experiences of survivors and their families and will promote understanding of the impacts of residential schools on survivors and their families, as well as upon aboriginal communities, cultures and traditions.

100. A settlement of this magnitude and breadth is unparalleled in Canadian legal history. It has been described as a turning point in Canada's relations with its aboriginal peoples.

RISK

101. At the time most counsel in the National Consortium began representing residential school clients, the concept that anyone who had attended a residential school had a legally compensable claim was considered novel. Plaintiffs' counsel understood Canada's position to be that such a claim would be recognized only if and when the Supreme Court of Canada pronounced in its favour. Accordingly, Plaintiffs' counsel pursuing such claims anticipated and were required to prepare for a legal battle that would only be decided after years, and in the highest court.

102. The circumstances of the survivor-claimants were and are such that they could not bear the costs of such legal proceedings. Accordingly, Plaintiffs' counsel both in class proceedings and individual claims assumed the entire burden of legal fees and disbursements and pursued the claims with the understanding that they would be compensated for their efforts only if and when the claims succeeded. Most members of the National Consortium provided representation without compensation for at least seven years. In doing so, they assumed the risk that if the litigation was not successful they, and not their clients, would bear the burden.

103. This risk was amplified by the highly political nature of the residential school issue and Canada's response to it. This political dimension created increased uncertainty and raised the specter that Canada might seek to impose a political solution that would undermine

the legal claims. It also meant that Plaintiffs' counsel could not expect Canada to respond to the claims in the manner of an ordinary litigant, as political considerations were capable of outweighing litigation factors in determining Canada's response to the claims.

104. The history of the application to certify *Cloud* as a class action illustrates the risk and uncertainty as well as the effort involved in attempting to advance residential school claims as a class proceeding. The motion to certify *Cloud* was first brought in the Ontario Superior Court of Justice in 2001 where it was vigorously contested by the Defendants. The hearing of the motion took eight days and resulted in a judgment in October, 2001 that rejected certification.

105. The Plaintiffs appealed that decision to the Divisional Court where a two-day hearing ensued in January, 2003. The Divisional Court also ruled against the Plaintiffs, rejecting the appeal (Cullity JJ dissenting) in June 2003. The Plaintiffs appealed yet again, to the Ontario Court of Appeal resulting in a two-day hearing in May, 2004. Only then did the Plaintiffs prevail when the Court of Appeal ruled in their favour in a decision dated December 3, 2004.

106. That was not the end of it. The Defendants exercised their right to apply for leave to appeal the certification order to the Supreme Court of Canada. Only when the Supreme Court of Canada denied that motion, on May 12, 2005 – some four years after the certification motions was first brought – was the Plaintiffs' right to proceed as a class action confirmed.

107. Canada's decision to appoint the Honourable Frank Iacobucci to negotiate on its behalf in May, 2005, gave rise to new risk factors. As a condition of the negotiations, Mr. Iacobucci required that all major litigation be suspended either by agreement or court direction. This resulted in the suspension of certain steps in the *Cloud* Action, a delay in the schedule for the certification motion in the *Baxter* Action and the adjournment of the trial date in the Alberta test cases. In addition to reducing the litigation pressure which the Plaintiffs could bring to bear in the negotiations, this meant that any litigation solution would be further delayed in the event the negotiations failed.

108. The risk of failure in the negotiations was real. Hard bargaining is a fact of life in any high stakes negotiation. Outright capitulation from either side of the table is not a realistic

expectation. While recognizing that the victims had suffered a tragedy, the Government, as litigants, always had to bear in mind that they were the representatives of all of the people and the keeper of the public purse. The tension created by these two concerns obviously complicated matters for the Government and for the negotiating parties.

109. There was always the inherent danger that the pan-Canadian settlement would be impossible to achieve, either because of a reluctance on the part of a particular Government in power or a class in a particular action to approve an agreement. Counsel's efforts and investment of time and money were at risk of loss if any politician in authority decided as a matter of expediency or policy not to settle the class proceedings or decided to attempt to unilaterally institute a no-fault compensation program and thereby bypass class counsel and the litigation.

110. Other factors were also in play. The negotiating parties were diverse, including class counsel, counsel for individual and groups of claimants, counsel for aboriginal organizations both local and national, representatives of such organizations including most notably the AFN and representatives of church organizations. The resolution of their conflicting interests, claims and objectives was a difficult and complex undertaking.

111. The political dynamics underlying Canada's position in the discussions, the risk that Canada's minority government might fall leaving Mr. Iacobucci with no-one to instruct him and the associated risk that a different government might issue different instructions also raised the significant risk that the negotiations might not lead to a settlement.

112. Early on in the negotiation process, Canada advised us that success in the negotiations was contingent upon the agreement of at least one party, a group of Church organizations that declined to be at the table for a large part of the process and that engaged Canada in a separate track of discussions. Plaintiffs' counsel had no ability to either participate in or control the outcome of those discussions and was thus entirely exposed to that risk of failure.

113. The negotiations almost foundered in early November over a substantial difference between the parties concerning the nature of the Individual Assessment Process. The negotiations were suspended and it was unclear whether they would resume.

114. No sooner had that impasse been resolved by means of a compromise approach proposed by the National Consortium than the negotiations were threatened by the widely anticipated fall of the minority government and the call for another election. It was uncertain that a settlement could be approved by the Cabinet before the election. As events unfolded, the Agreement in Principle was reached just days before the government fell.

115. The risk did not end with the Agreement in Principle. As in any class proceeding, settlement is also contingent upon court approval. Counsel may find themselves in the position of having committed time and resources to the negotiation of a settlement that they believe is in the best interests of the class, only to find that the court will not concur and approve the settlement achieved. In this case the commitment of time and resources to the negotiation process has already lasted more than a year and the approval of courts in nine jurisdictions is required. Moreover, the entire settlement could still be undermined by opt outs by class members that exceed the opt out threshold, resulting in yet another element of risk.

116. The election also carried risk in that it might result in a change in government which might delay completion of the final agreement. The Agreement in Principle reached in November 2005 was to be reduced to a final agreement which required much additional work on all sides.

117. This litigation, notwithstanding the fact that it was conducted at its latter stages as a protracted negotiation, was redolent with risk. The risk assumed by counsel in these actions should be considered to be at the very high end of any such scale.

EFFORT

118. At the same time, the traditional litigation efforts of Plaintiffs' counsel were a central factor in Canada's ultimate decision to attempt to negotiate a resolution. Canada's appointment of the Honourable Frank Iacobucci did not occur until a class proceeding had been certified in *Cloud*. It followed by less than a month the Supreme Court of Canada's refusal to grant leave to appeal that decision, which paved the way for the certification of a national class encompassing all those persons in the rest of Canada in the *Baxter* Action. It

also followed by about a month the decision of the Alberta Court of Queen's Bench to set down the Alberta test cases for trial.

119. I was personally responsible for preparing an accurate inventory of the time, disbursements and number of individual retainers for each member of the National Consortium to be used in the negotiations, and in any settlement approval hearings. For that purpose I received and reviewed summaries of total docketed time and disbursements from each Consortium member, I conducted detailed telephone interviews with each member of the Consortium and prepared a form of declaration which was completed and signed by each Consortium member concerning their fees, disbursements and retainers. Following the signing of the Agreement in Principle I obtained updated information on retainers, fees and disbursements to the date of the AIP.

120. The information I assembled at that time indicated that the Consortium membership:

(a) represented some approximately 5,500 named individual residential school survivors (4,826 prior to May 30, 2005 and several hundred thereafter) together with the estimated 580 Shubenacadie survivors and the approximately 1,500 alumni survivors from the Mohawk Institute covered by the *Cloud* Action, and their family members, resulting in total Consortium representation of about 7,500 residential school survivors at that time (note that since that time this figure has grown to an approximate total of 8,000);

(b) collectively docketed a total of approximately 107,500 hours up to Sept/Oct of 2005; and,

(c) collectively incurred more than $2.4 million in outstanding disbursements in advancing the *Baxter* Action, the parallel proceedings and individual residential school files.

These figures provide further indication of the extent of the effort and scope of the risk undertaken by Consortium counsel in advancing residential school claims on behalf of survivors.

121. The Consortium's efforts were also evident throughout the negotiations. The Consortium prepared and circulated position papers on each of the major issues which provided a focus for discussion throughout the negotiations. The Consortium also prepared detailed written commentary, again circulated, on the agenda items for each meeting. These

commentaries were used as the framework for discussion on these items. Throughout the negotiations, the Consortium pursued a carefully considered and consistent strategy whose clearly stated objective was to obtain a settlement that would provide the maximum benefit to the maximum number of residential school survivors.

THE AGREED AMOUNT

122. The negotiations with Canada concerning compensation for legal counsel took place over a period of about three months in parallel with the negotiation of the main issues. This aspect of the negotiations involved both plenary sessions of all stakeholders as well as bilateral sessions between Canada and individual counsel groups including the Consortium.

123. The negotiations concerning legal compensation began with a discussion of the general principles. As with other issues, the Consortium provided Canada and other parties with a detailed analysis of the underlying principles in a position paper.

124. The Consortium's position paper set out the fact that the Consortium understood from Mr. Iacobucci's terms of reference (as set out in Canada's Political Accord with the AFN) that plaintiffs' counsel would be looking chiefly to Canada and not their clients for compensation, the amount of which would be limited. The Consortium also recognized that the circumstances were novel as they involved compensation for class action counsel as well as for counsel representing a significant number of individual clients.

125. The Consortium itself represented a unique blend of both types. Its membership included many counsel representing substantial numbers of individual clients as well as a number of pure class action counsel. The Consortium agreement called for all members to work together in support of the *Baxter* national class proceedings, and recognized the value of different kinds of contributions towards that goal. These included the advancement of specific proceedings such as the *Blackwater* appeal and the Alberta test case litigation, which were seen as major building blocks towards a successful outcome in *Baxter*, as well as the continuation of the multitude of individual actions which added to the litigation pressure upon Canada. The goal remained to achieve a settlement that provide the maximum amount to the maximum number of residential school survivors.

126. The creation of a pan-Canadian counsel group comprising members of the bars of 8 of the provinces and 2 of the territories was intended to, and in my opinion did, give heightened legitimacy to a national class action solution to the residential school litigation. The continued viability of the Consortium depended upon regular and detailed communication amongst its members and consultation and consensus on all questions of litigation and strategy.

127. As negotiations between Canada and the Consortium unfolded it was recognized on both sides that the circumstances described above particularly lent themselves to a global approach to compensation for the Consortium and negotiations proceeded on that basis taking into account specific fee information supplied by the Consortium.

128. Marked as Exhibit A to this my Affidavit, is a true copy of the class action retainer agreement between lead counsel in the *Baxter* Action and our representative Plaintiffs, Charles Baxter, Sr. and Elijah Baxter. This class action retainer agreement replaced an earlier version with the representative Plaintiffs (before the class action was commenced) and was entered into after the National Consortium was created, to reflect the then current reality of the class action proceeding. The financial terms of both agreements were the same.

129. As National Consortium members pointed out during the negotiating sessions, fees based on the existing contingency agreements could be very substantial, particularly in the case of class proceedings. For example, based on the contingency fee arrangement set out in the *Baxter* retainer agreement the representative Plaintiffs' expectation would have been that counsel recover, as fees, 15% of the amount recovered by the class under any Judgment, Order or Settlement, plus party and party costs and taxes. This would produce a fee based only on the amount of the CEP of $285 million plus party and party costs and taxes.

130. The member firms in the National Consortium also had retainer agreements with their individual clients and with representative clients in either representative actions or class proceedings. I am advised by my fellow members in the National Consortium that those agreements would, if enforced, have entitled consortium member firms to recover, on average, about 25% of the amounts recovered by their clients.

131. As of May 30th, 2005, the National Consortium had 4,826 signed individual retainer agreements with survivor class members, exclusive of and not including any persons who attended the Mohawk Institute or the majority of survivors of the Schubenacadie Residential School in Nova Scotia. Conservatively calculated, at an average value of only $1,875 per file, the dollar value of the work in process on individual claims was $9,048,750.00.

132. In the course of negotiations and to assist the Federal Representative in assessing the value of legal work performed by members of the National Consortium, Consortium members categorized their time, exclusive of time spent on individual claims, supporting the *Baxter* Action and other key proceedings, all calculated at normal hourly rates. The resulting information was provided to the Federal Representative as follows as of October 15, 2005:

- Value of Lead Counsel's time in active class actions: $3,952,533.75;
- Value of Consortium time in support of the *Baxter* Action: $3,009,495.19;
- Value of Consortium time in support of the Alberta test cases: $5,461,896.85;
- Value of Consortium time in other class actions (Dieter/Bosum/Belcourt): $42,239.75;
- Value of Consortium time in other Parallel Proceedings and representative actions: $1,101,147.48;

Between October 15, 2005 and November 20, 2005, Consortium Members docketed a further $708,660.00.

133. The National Consortium member firms took significant risk in advancing this litigation on all of the fronts described in this Affidavit. They financed the litigation for impecunious Plaintiffs who would not otherwise have been able to pursue such actions. They carried (and continue to carry) that work in progress in some cases for more than a decade. They carried well in excess of $2,000,000 in disbursements again in some cases for more than a decade. In agreeing to waive their contingency fee agreements in relation to the CEP, Consortium members gave up the mechanism intended to compensate them for carrying such a large risk for such a long time.

134. In its negotiations with Canada, the National Consortium initially sought fees greatly in excess of those ultimately negotiated with Canada. In doing so the National Consortium pointed to the contingency agreements and the significant multipliers generally allowed in class action litigation based on the complexity of the case, the risks involved, the duration of the litigation and the ultimate result achieved for the benefit of all class members.

135. In mid-October, 2005, the Consortium provided Canada with calculations of the total fees of its members based upon existing contingency retainer agreements and projections of class action fees based on generally accepted multipliers. These calculations suggested total Consortium fees would lie in the range of $72.75 million to $92.5 million based upon a reasonable (and ultimately accurate) prediction of the terms of the final settlement.

136. Ultimately, and in order to conclude this settlement agreement with Canada and the other parties, the National Consortium compromised its position on legal fees and agreed to accept the all-inclusive sum of forty million dollars plus disbursements and taxes on account of its entitlement to legal fees.

137. In addition to the information provided by the Consortium throughout the course of the negotiations, Canada had some independent knowledge of the nature and scope of the Consortium's residential school litigation efforts by virtue of Canada's role as a Defendant in all Consortium proceedings. Canada was ultimately prepared to resolve the Consortium fees as set out above subject to a verification agreement entered into by the Consortium and Canada, a copy of which is attached as Exhibit B.

138. In accordance with the verification agreement, Canada has been provided in a timely fashion with this Affidavit and all Consortium Affidavits filed in support of Consortium legal fees including the Affidavit of Richard Courtis and Paul Vogel. Canada has reviewed these affidavits and Canada's views upon them have been communicated to and considered by the Consortium in satisfaction of the terms of the verification agreement.

139. The distribution of Consortium legal fees to its 19 law firm members involved a delicate balancing of factors including: the amount to be attributed to individual files where some firms had many such retainers and others had few or none; the multipliers to be applied to class action time where some firms had much time in this category and others had little;

the valuation to be applied to time spent in parallel proceedings such as the *Alberta Test Cases*, where there was no class multiplier but the outcome was expected to affect hundreds of other proceedings; as well as the outcome of any class litigation and the value to be applied to time spent in negotiations. The agreed upon distribution amongst Consortium members is set out below, and includes a contingency fund of $433,864 to compensate Consortium members for any non-assessable Consortium disbursements and for Consortium work and effort that has not otherwise been addressed:

#	Firm Name	Total Fees under Settlement (excludes applicable taxes & disbursements)	# of pre May 30th, 2005 retainers for unsettled claims
1	Thomson, Rogers	$6,593,035	38
2	Richard Courtis	$2,457,013	642
3	Field LLP	$7,898,963	715
4	David Paterson Law Corp.	$2,354,174	250
5	Docken & Company	$826,561	117
6	Arnold Pizzo McKiggan	$2,010,352	21
7	Cohen Highley LLP	$4,202,790	149
8	White Ottenheimer & Baker	$2,237,402	235
9	Thompson Dorfman Sweatman	$1,164,558	373
10	Ahlstrom Wright Oliver & Cooper	$1,122,850	345
11	Troniak Law Office	$1,398,394	505
12	Koskie Minsky	$2,325,898	0
13	Leslie Meiklejohn Law Office	$798,688	255
14	Huck Birchard	$946,050	428
15	Ruston Marshall	$2,180,625	413
16	Rath & Company	$164,632	30
17	Levene Tadman Gutkin Golub LLP	$417,900	133
18	Coller Levine/Jacqueline Levesque	$369,865	177
19	Adams Gareau	$96,388	0
	TOTALS	**$39,566,136**	**4,826**

140. Various provincial taxes and GST are payable by Consortium members on the fee amounts set out above. The chart below sets out the amount of taxes payable by Consortium members. As set out the total amount of fees payable by Canada to the Consortium, inclusive of all taxes, is $43,213,048.99:

#	Firm Name	Total Fees under Settlement (excludes applicable taxes & disbursements)	GST (at 6%)	Applicable PST/HST	Total Fees under Settlement (inclusive of all taxes)
1	Thomson Rogers	$6,593,035.00	$395,582.10	$0.00	$6,988,617.10
2	Richard Courtis	$2,457,013.13	$147,420.79	$0.00	$2,604,433.91
3	Field LLP	$7,898,962.50	$473,937.75	$0.00	$8,372,900.25
4	David Paterson Law Corp.	$2,354,173.75	$141,250.43	$164,792.16	$2,660,216.34
5	Docken & Company	$826,561.25	$49,593.68	$0.00	$876,154.93
6	Arnold Pizzo McKiggan	$2,010,352.47	$120,621.15	$160,828.20	$2,291,801.82
7	Cohen Highley LLP	$4,202,790.00	$252,167.40	$0.00	$4,454,957.40
8	White Ottenheimer & Baker	$2,237,401.75	$134,244.11	$178,992.14	$2,550,638.00
9	Thompson Dorfman Sweatman	$1,164,558.13	$69,873.49	$81,519.07	$1,315,950.68
10	Ahlstrom Wright Oliver & Cooper	$1,122,850.00	$67,371.00	$0.00	$1,190,221.00
11	Troniak Law Office	$1,398,393.75	$83,903.63	$97,887.56	$1,580,184.94
12	Koskie Minsky	$2,325,897.63	$139,553.86	$0.00	$2,465,451.48
13	Leslie Meiklejohn Law Office	$798,687.71	$47,921.26	$0.00	$846,608.98
14	Huck Birchard	$946,050.00	$56,763.00	$66,223.50	$1,069,036.50
15	Ruston Marshall	$2,180,625.00	$130,837.50	$0.00	$2,311,462.50
16	Rath & Company	$164,631.80	$9,877.91	$0.00	$174,509.71
17	Levene Tadman Gutkin Golub LLP	$417,900.00	$25,074.00	$29,253.00	$472,227.00
18	Coller Levine/Jacqueline Levesque	$369,865.00	$22,191.90	$25,890.55	$417,947.45
19	Adams Gareau	$96,387.50	$5,783.25	$7,662.81	$109,833.56
	TOTALS	$39,566,136.36	$2,373,968.18	$813,048.99	$42,753,153.53
	Contingency Fund	$433,863.64	$26,031.82	$0.00	$459,895.46
	GRAND TOTALS	$40,000,000.00	$2,400,000.00	$813,048.99	$43,213,048.99

141. The Contingency Fund was agreed to by Consortium Members as a holdback of approximately 1% of total fees to be apportioned on a quantum meruit basis for work done by Consortium Members post November 20, 2005 which is not otherwise compensable under the SA and for reimbursement of disbursements not otherwise compensable under the SA. The Consortium will assume any liability for Provincial taxes relating to the Contingency Fund.

142. The mandate of Mr. Iacobucci required that "the proportion of any settlement allocated for legal fees will be restricted" and Canada negotiated vigorously to that end. Having regard particularly to the contents of paragraph 135 of this Affidavit, that objective was realized. I note that Mr. Iacobucci in his affidavit describes the negotiated terms as "fair and reasonable".

143. As previously described, the National Consortium members incurred significant expenses for disbursements up to the time of the Agreement in Principle. As set out in paragraph 119, prior to the signing of the Agreement in Principle I assembled information regarding the Consortium's estimated disbursement total. At that time, it was estimated that the Consortium's total disbursements, inclusive of taxes, would total approximately $2.5 million. The AIP required further discussion between Canada and the Consortium to try to come to agreement on a precise disbursement total for approval by the Court, failing which the Court would be asked to resolve any disbursement dispute.

144. Since the signing of the AIP, I have collected more detailed and accurate disbursement information from all Consortium members. The assembled information and particulars were provided to Canada for review and I have had a number of meetings and discussions with representatives of Canada and members of the Consortium regarding specific issues identified by Canada with respect to the Consortium disbursements. As a result of this cooperation by the parties an agreement has been reached with respect to each Consortium members' respective disbursement total, inclusive of all taxes. The total agreed disbursement total, inclusive of all taxes, is $2,402,173.56.

145. When adding the total all inclusive disbursement total of $2,402,173.56 to the total all inclusive fee total of $43,213,048.99, the total all inclusive fee and disbursement figure payable by Canada to the Consortium is $45,615,222.55.

146. Below is a table showing the agreed total amount of disbursements, inclusive of taxes, for all Consortium members:

#	Firm Name	Final Agreed Disbursement Totals (inclusive of all taxes)
1	Thomson Rogers	$332,776.48
2	Richard Courtis	$71,255.81
3	Field LLP	$1,216,029.03
4	David Paterson Law Corp.	$88,833.77
5	Docken & Company	$18,642.81
6	Arnold Pizzo McKiggan	$28,957.12
7	Cohen Highley LLP	$132,106.64
8	White Ottenheimer & Baker	$26,311.72
9	Thompson Dorfman Sweatman	$47,175.58
10	Ahlstrom Wright Oliver & Cooper	$173,826.41
11	Troniak Law Office	$39,520.89
12	Koskie Minsky	$20,496.85
13	Leslie Meiklejohn Law Office	$20,180.40
14	Huck Birchard	$88,865.54
15	Ruston Marshall	$27,785.43
16	Rath & Company	$25,963.11
17	Levene Tadman Gutkin Golub LLP	$28,244.74
18	Coller Levine/Jacqueline Levesque	$14,159.28
19	Adams Gareau	$1,041.95
	TOTALS	***$2,402,173.56***

147. I swear this affidavit in good faith and for no improper purpose in connection with the approval of the Settlement Agreement.

SWORN BEFORE ME at the City of Toronto, at the Province of Ontario on July 28, 2006.

Commissioner for Taking Affidavits
Marcia Pritcker Schmitt

DARCY MERKUR

Court File No. 00-CV-192059 CP

ONTARIO

SUPERIOR COURT OF JUSTICE

This is Exhibit A referred to in the affidavit of Darcy Merkur sworn before me, this 28th day of July 20 06.

A COMMISSIONER FOR TAKING AFFIDAVITS
Marcia Pritzker Schmitt

B E T W E E N:

CHARLES BAXTER, SR.
and ELIJAH BAXTER

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under the Class Proceedings Act, 1992

CLASS ACTION RETAINER AGREEMENT

Retainer

1 Charles Baxter, Sr. and Elijah Baxter (the "Clients") hereby retain and employ the law firms of Richard W. Courtis, Barrister and Solicitor, and Thomson, Rogers, Barristers and Solicitors (hereinafter referred to as the "Consortium") as our solicitors with respect to a consolidated class action on behalf of the Clients and other members of the relevant class against the Attorney General of Canada with respect to damages for physical and sexual assault, physical, sexual, emotional and cultural abuse, damages for educational malpractice and damages for breach of fiduciary duty, resulting from events which occurred while the Clients were pupils in residential schools for aboriginal children administered by and under the authority of the Attorney General of Canada, in conjunction with various religious orders and organizations at various locations throughout Canada between January 1, 1920 and December 31, 1996.

Consortium may appoint co-counsel

2. The Clients expressly authorize the Consortium to enter into co-counsel agreements with other lawyers and/or law firms as they in their sole discretion

see fit to assist in the advancement of this class action. These lawyers and/or law firms will, upon signing any document reflecting their role as co-counsel in this class action, fall within the definition of the "Consortium" in this retainer agreement and the Consortium fee, as defined below, will be distributed in accordance with this retainer agreement and in accordance with any such co-counsel agreements.

Terms of Payment of Fees and Disbursements

3. The provisions of this agreement regarding fees and disbursements are subject to court approval as provided in s.32(2) of the *Class Proceedings Act*. The Consortium shall seek court approval as soon as possible. If the court does not approve such provisions, the Consortium shall not be obliged to continue to act in the class action.

4. Legal Fees shall be paid only in the event the class action is successful in whole or in part. The fees shall be paid by a lump sum payment or payments out of the proceeds of any judgment or order awarding damages, interest or costs to the class or any settlement which includes payments in favour of the class or a class member, or otherwise as may be directed by the court.

5. The Consortium's fee shall be:

(a) 15% of the amounts recovered by the class under any judgment(s), order(s) or settlement(s) (including damages and interest but excluding party and party costs); or such lesser percentage as to the court deems just; plus

(b) all party and party costs recovered (except any party and party costs relating to work done by non-Consortium lawyers regarding a class member's individual claim).

6. The Consortium and the Clients acknowledge it is difficult to estimate what the expected fee will be however the following are examples:

(a) If the class action results in a recovery of $1 million for damages and interest and $100,000 for party and party costs then the Consortium's fee shall be ($1,000,000 x 15%) + $100,000 = $250,000; or

(b) If the class action results in a recovery of $3 million for damages and interest and $100,000 for party and party costs then the Consortium's fee shall be ($3,000,000 x 15%) + $100,000 = $550,000; or

(c) If the class action results in a recovery of $20 million for damages and interest and $500,000 for party and party costs then the Consortium's fee shall be ($20,000,000 x 15%) + $500,000 = $3,500,000.

7. The Consortium may seek an Order from the Court that up to a four times multiplier be applied to the fees charged to the Class where success in the conduct of the litigation and the amount of the settlement warrant such an application. Such a multiplier would have the effect of increasing the amount of the fees charged to the Class. Applied to the examples set out in paragraph 5, a two times multiplier would result in fees of $500,000, $1,100,000 and $7,000,000 respectively. These numbers would change with the multiplier which is approved by the Court. Disbursements may be paid out of any amounts awarded by the Class Proceedings Committee and out of any amounts raised from members of the class. The Clients shall not be obliged to fund any disbursements. The Consortium will incur disbursements to an aggregate of $10,000 without immediate reimbursement but shall not be obliged to incur disbursements beyond that amount although they may do so in their discretion. Ultimately, if the action is successful the disbursements will be paid out of the proceeds of judgment or settlement.

8. If during the course of the class action the court awards costs to the Clients on a motion or other interlocutory proceeding and such costs are paid by the defendant, the Consortium may apply such costs on account of its fees.

Class Proceedings Committee Application

9. In the event the Consortium deems it advisable to apply for financial support to the Class Proceedings Committee, the Consortium will represent the Clients in such application.

Change of Solicitors

10. The Clients acknowledge that the Consortium is incurring a significant financial risk in agreeing to be paid only in the event the action is successful and that the Consortium is doing so on the basis that it will have carriage of the lawsuit. If the Clients change solicitors (or otherwise end the Consortium's employment) the Clients agree:

    (a) in the event the action is successful the Consortium will be entitled to be paid a fee calculated pursuant to paragraph 4;

    (b) in the event the lawsuit is unsuccessful (which shall include the event the lawsuit is not certified or is decertified as a class proceeding) and the change of solicitors was not for just cause, the Clients will be personally liable to the Consortium for the amount of its docketed time at its usual hourly rates notwithstanding paragraph 3. Any dispute as to whether just cause exists shall be determined by a single arbitrator to be mutually agreed and the *Arbitration Act 1991* shall apply.

Disagreement regarding Settlement

11. If (a) the defendant makes an offer to settle the claims of the class, (b) the Consortium considers the proposed settlement to be in the best interests of the class, (c) the Consortium recommends acceptance of such offer to the Clients,

and (d) the Clients do not consider the proposed settlement to be acceptable, then a counteroffer to settle shall be made to the defendant upon such terms as the Clients consider to be appropriate. If, within 14 days, such counteroffer is not accepted by the defendant and no improved defendant's offer is made which is acceptable to the Clients, then the Consortium is hereby irrevocably authorized to conditionally accept the defendant's offer or the improved defendant's offer, as the case may be. The condition of acceptance shall be a ruling by the court that the proposed settlement is in the best interests of the class and on the motion for such court approval an affidavit fully disclosing Clients' concerns about the proposed settlement shall be filed with the court.

Class Members' Individual Claims and Personal Lawyers

12. (a) It is acknowledged that the court will likely require separate individual damage assessments for class members who sustained serious damages. Further, the court could (i) provide for an "aggregate" assessment of damages for class members who sustained less serious damages and then distribute shares to the individual members or (ii) require separate individual damage assessments even for class members with less serious damages.

(b) It is acknowledged that every class member is entitled (i) to retain a personal lawyer to deal with individual issues affecting the class member (e.g. the quantum of damages for the individual class member)and/or (ii) to opt out of the class action, in the manner prescribed by the court, and sue separately or not sue at all.

(c) Class members who sustained serious damages as a result of perpetrated abuse may require a personal lawyer to work on the class member's individual damage claim. Such class members may retain one of Richard W. Courtis or Thomson Rogers to work on the individual issues affecting the class member (e.g. damages) and shall not be charged legal fees in addition to the fee set out in paragraph 4 plus any party and party costs relating to the class member's individual claim. For greater certainty, such a class member will be required to pay for any disbursements (e.g. cost of medical reports) relating to such individual claim. If a class member who has sustained serious damages chooses to retain a personal lawyer outside the Consortium, the financial arrangements with such a lawyer is a matter to be agreed between the individual class member and the personal lawyer and is not affected by this agreement, however unless such class member duly opts out of the class action, 15% of the class member's recovery plus party and party costs shall be paid to the consortium pursuant to paragraph 4. A class member retaining one of the Consortium members pursuant to this clause shall be required to sign an individual retainer agreement providing, *inter alia*, if a conflict develops between the class member and the class, the Consortium member may continue to act for the class and may cease to act for the class member.

(d) To the extent practical, the Consortium will endeavour to conduct the class action (i) to minimize the number of class members compelled to retain personal lawyers and (ii) to co-operate with any personal lawyers retained by various class members.

Confidentiality

13. The Clients acknowledge being advised that the communications between the Consortium and the Clients relating to the claims of the class are legally privileged but that such privilege may be lost if the Clients were to disclose such information to third persons and that the interests of the class could thereby be adversely affected. The Clients agree to protect the confidentiality of such information and to discuss the matter with the Consortium prior to disclosing such information to any third person.

Clients to Act in Best Interests of the Class

14. (a) The Clients acknowledge the obligation to act in the best interests of the Class and that the Consortium is not obliged to follow instructions from the Clients which are not in the best interests of the class. In the event of a disagreement (other than one subject to paragraph 10 between the Clients and the Consortium concerning whether certain instructions are in the best interests of the class, the matter shall be submitted for arbitration to a retired judge of the Superior Court of Justice. The arbitrator shall resolve the matter summarily with as little formality as possible.

(b) In the event it is necessary or prudent to take steps in the lawsuit (e.g. filing a notice of appeal) before the arbitration has resolved the dispute, the Consortium shall take such steps as it considers to be in the best interests of the class.

Negotiations

15. (a) The Clients hereby authorize the Consortium, in its discretion, to enter into negotiations with the defendant and/or appropriate related persons or entities for the purpose of reaching a settlement. The Clients understand that any settlement affecting the class is subject to approval by the court. The Clients agree and acknowledge that any negotiations are for the purpose of reaching a settlement of the claims of the class, not simply the individual claims of the Clients.

(b) In the event the Clients choose to settle their individual claims without settling the claims of the class, the Clients expressly agree and acknowledge that the Consortium is permitted to be retained by another representative of the class to continue the lawsuit on behalf of the class. In such event privileged communications between the Consortium and the Clients made for the purpose of advancing the claims of the class and the Consortium's work product created for the purpose of advancing the claims of the class shall be disclosed to the new class representative and may be used on behalf of the class.

Severability

16. Subject to the last sentence in paragraph 2, in the event that any particular provision or provisions or a part of one is found to be void, voidable, or

unenforceable for any reason whatever, then the particular provision or provisions or part of the provision shall be deemed severed from the remainder of this agreement and all other provisions shall remain in force.

Entire Agreement

17. It is agreed there is no representation, warranty, collateral agreement, or condition affecting this agreement except as expressed in it.

Counterparts

18. This agreement may be executed in counterpart.

DATED at Toronto this 5th day of December, 2002.

Charles Baxter, Sr.

Elijah Baxter

Richard W. Courtis

Thomson Rogers

Per:

02404

This is Exhibit B referred to in the affidavit of Daisy Menkus sworn before me, this 28 day of July 20 06

A COMMISSIONER FOR TAKING AFFIDAVITS
Maria Patzker Schmitt

Verification Agreement

The National Consortium confirms and agrees that it will provide the Federal Representative in a timely way all materials including affidavits which it proposes to file in seeking Court approval of the legal fees payable to the National Consortium pursuant to the Legal Fees provisions of the Agreement in Principle. The Federal Representative reserves the right to comment and communicate his views to the National Consortium on the materials and affidavits provided.

The Federal Representative and the National Consortium agree that the foregoing shall constitute the further verification process referred to in paragraph 5 of the Legal Fees provisions.

Dated at the City of Toronto in the Province of Ontario this 20th day of November, A.D. 2005.

Federal Representative

National Consortium

CHARLES BAXTER, SR., ET AL - and - ATTORNEY GENERAL OF CANADA ET AL

Court File No. 00-CV-192059 CP

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

AFFIDAVIT OF DARCY MERKUR
SWORN JULY 28, 2006

THOMSON, ROGERS
Barristers and Solicitors
Suite 3100
390 Bay Street
Toronto, Ontario
M5H 1W2

L. CRAIG BROWN
L.S.U.C. No. 20151Q
416-868-3163
Fax No. 416-868-3134

Solicitors for the Plaintiffs

(89/622 AAF/srj)

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