

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE REGIONAL SENIOR)
JUSTICE WARREN K. WINKLER)
)

FRIDAY, THE 15TH
DAY OF DECEMBER, 2006

**MARLENE C. CLOUD, GERALDINE ROBERTSON, RON DELEARY,
LEO NICHOLAS, GORDON HOPKINS, WARREN DOXTATOR, ROBERTA HILL,
J. FRANK HILL, SYLVIA DELEARY. WILLIAM R. SANDS,
ROSEMARY DELEARY and SABRINA YOLANDA WHITEYE**

Plaintiffs

- and -

**THE ATTORNEY GENERAL OF CANADA, THE GENERAL SYNOD OF
THE ANGLICAN CHURCH OF CANADA, THE INCORPORATED SYNOD
OF THE DIOCESE OF HURON and THE NEW ENGLAND COMPANY**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

JUDGMENT

THIS MOTION, made by the plaintiffs for judgment approving the settlement of the action, in accordance with the terms of the Settlement Agreement, was heard on August 29, 30 and 31, 2006, at the Court House, 361 University Avenue, Toronto, Ontario, judgment having been reserved until this day.

ON READING the joint motion record of the parties, the facts of the Plaintiffs and the Defendants and upon hearing all interested parties, including all objections, written and oral, and upon being advised of the consent and support of this motion of all of the parties to the Settlement Agreement dated May 10th, 2006,

AND WITHOUT ADMISSION OF LIABILITY on the part of any of the Defendants who deny liability,

AND UPON HEARING the submissions of counsel for the Plaintiffs and the Defendants, and for written reasons delivered this day,

AND WITH REGARD FOR the orders of:

- (a) the Court of Appeal for Ontario dated December 3rd, 2004;
- (b) the Supreme Court of Canada dated May 12th, 2005;
- (c) the Honourable Mr. Justice Haines of the Ontario Superior Court of Justice, dated July 21st, 2005; and
- (d) the Honourable Mr. Justice Winkler of the Ontario Superior Court of Justice dated May 24th, 2006.

1. **THIS COURT ORDERS AND DECLARES** that for the purpose of this judgment, the following definitions apply:

2. DEFINITIONS

- (a) "Act" means the *Class Proceedings Act, 1992*, S.O., 1992, c. 6;
- (b) "Action" means this action, court file number 29762 (London);
- (c) "Agreement" means the Settlement Agreement entered into by the parties on May 10, 2006, with schedules, attached hereto as Schedule "A";
- (d) "Approval Date" means the date the last court issues its approval order;
- (e) "Approval Orders" means the judgment or orders of the Courts in the various For a certifying the Class Actions and approving the Agreement as fair, reasonable and in the best interests of the Class Members for the purposes of settlement of the Class Actions pursuant to the applicable class proceedings legislation or common law;
- (f) "Canada" means the Defendant, the Government of Canada, as represented in this proceeding by the Attorney General of Canada;
- (g) "Class" or "Class Members" means each and every person, wherever resident, who attended the Mohawk Institute Residential School between 1922 and 1969 and their parents, siblings, spouses and children;

- (h) "Class Counsel" means the law firms of Cohen Highley LLP and Koskie Minsky LLP;
- (i) "Class Period" means the period from 1922 to 1969;
- (j) "Common Experience Payment" means a lump sum payment made to an Eligible CEP Recipient in the manner set out in Article Five (5) of the Agreement;
- (k) "Contributing Parties" means Canada and the Defendants, The General Synod of the Anglican Church of Canada and The Incorporated Synod of the Diocese of Huron;
- (l) "Court" means the Ontario Superior Court of Justice and the Honourable Mr. Justice Winkler, or such other judge appointed by him in his capacity as Regional Senior Justice;
- (m) "Defendants" means Canada, The General Synod of the Anglican Church of Canada, The Incorporated Synod of The Diocese of Huron and The New England Company
- (n) "Eligible CEP Recipient", for the purposes of this judgment, means any former Mohawk Institute Residential School student who resided at the Mohawk Institute Residential School prior to December 31, 1969 and who was alive on October 5, 1996;
- (o) "Forum" means the Alberta Court of Queen's Bench, the British Columbia Supreme Court, the Manitoba Court of Queen's Bench, the Supreme Court of the Northwest Territories, the Nunavut Court of Justice, the Ontario Superior Court of Justice, the Quebec Superior Court, the Court of Queen's Bench for Saskatchewan and the Supreme Court of the Yukon Territory, and "Fora" refers to them all;
- (p) "Implementation Date" means the latest of:
 - i. the expiry of thirty (30) days following the expiry of the Opt-Out Period;
 - ii. the date following the last day on which a Class Member in any jurisdiction may appeal or seek leave to appeal any of the Approval Orders; and
 - iii. the date of a final determination of any appeal brought in relation to the Approval Orders.
- (q) "Mailing Costs" means the cost of mailing a notice to the Class Members as described in *infra*, below;

- (r) "Notice Costs" means the cost of publishing the Notice at Schedule "B" of this Judgment;
- (s) "Opt Out Deadline" means the period commencing on the Approval Date and ending on August 20, 2007 during which an individual may opt out of this class proceeding without leave of the Court, as set out in the Approval Orders;
- (t) "Releasees" means, jointly and severally, individually and collectively, the defendants in the Class Actions and each of their respective past and present parents, subsidiaries and related or affiliated entities and their respective employees, agents, officers, directors, shareholders, principals, members, attorneys, insurers, subrogees, representatives, executors, administrators, predecessors, successors, heirs, transferees and assigns and also the entities listed in Schedules "G" and "H" of the Agreement;
- (u) "Residential School" means the Mohawk Institute Residential School, located in Brantford, Ontario;
- (v) "Spouse" includes a person of the same or opposite sex to a Survivor Class Member who cohabited for a period of at least one year with that Survivor Class Member immediately before his or her death or a person of the same or opposite sex to a Survivor Class Member who was cohabiting with that Survivor Class Member at the date of his or her death and to whom that Survivor Class Member was providing support or was under a legal obligation to provide support on the date of his or her death; and
- (w) "Trustee" means Her Majesty in right of Canada as represented by the incumbent Ministers from time to time responsible for Indian Residential Schools Resolution and Service Canada. The initial Representative Ministers will be the Minister of Canadian Heritage and the Status of Women and the Minister of Human Resources Skills and Development, respectively.

3. **THIS COURT DECLARES THAT** this Action has been certified as a Class Proceeding by the order of the Court of Appeal of Ontario dated December 3rd, 2004.

4. **THIS COURT DECLARES THAT** the Class has been defined as the following:

- (a) all persons, wherever resident, who attended the Residential School between 1922 and 1969;
- (b) all parents and siblings, wherever resident, of all persons who attended the Residential School between 1922 and 1969; and
- (c) all spouses and children, wherever resident, of all persons who attended the Residential School between 1922 and 1969.

5. **THIS COURT DECLARES** that Marlene C. Cloud, Geraldine Robertson, Ron Deleary, Leo Nicholas, Gordon Hopkins, Roberta Hill, Sylvia Deleary, William R. Sands, Rosemary Deleary and Sabrina Yolanda Whiteye have been appointed as the representative plaintiffs of the Class in the Action.

6. **THIS COURT DECLARES** that the common issues in the Action are the following:

- (a) by their operation or management of the Residential School from 1953 to 1969, did the Defendants breach of duty of care owed to the students of the Mohawk Institute Residential School to protect them from actionable physical or mental harm?
- (b) by their purpose, operation or management of the Residential School from 1922 to 1969, did the Defendants breach a fiduciary duty owed to the students of the Mohawk Institute Residential School to protect them from actionable physical or mental harm, or the aboriginal rights of those students?
- (c) by their purpose, operation or management of the Residential School from 1922 to 1969, did the Defendants breach a fiduciary duty owed to the families and siblings of the students of the Residential School?
- (d) if the answer to any of the above common issues is yes, can the court make an aggregate assessment of the damages suffered by all class members of each class as part of the common trial?
- (e) if the answer to any of these common issues is yes, were the Defendants guilty of conduct that justifies an award of punitive damages?
- (f) if the answer to common issue (e) is yes, what amount of punitive damages is awarded?

7. **THIS COURT ORDERS** that the Agreement, which is attached hereto as Schedule "A", and which is expressly incorporated by reference into this judgment, is hereby approved and shall be implemented, subject to any further order of this court.

8. **THIS COURT ORDERS AND DECLARES** that the settlement of the Action as particularized in this judgment and the Agreement is fair, reasonable, adequate and in the best interests of the Class Members.

9. **THIS COURT ORDERS AND DECLARES** that the approval of the settlement of the Action is without prejudice to the Defendants' right to contest the common issues trial in the future should the settlement fail.

10. **THIS COURT DECLARES** that pursuant to section 17 of the Act, Regional Senior Justice Winkler shall supervise the implementation of the Agreement and this judgment and, without limiting the generality of the foregoing, may issue such orders from time to time as are necessary to implement and enforce the provisions of the Agreement and this judgment.

11. **THIS COURT ORDERS** that the Trustee is hereby appointed, until further order of the Court, on the terms and conditions and with the powers, rights, duties and responsibility set out in the Agreement and this judgment.

12. **THIS COURT DECLARES** that Canada will fund the costs associated with the Agreement, as set out in the Agreement.

13. **THIS COURT ORDERS** that each Class Member and who is eligible pursuant to the terms of the Agreement and this judgment, shall be paid a Common Experience Payment by Canada in accordance with the Agreement and this judgment.

14. **THIS COURT DECLARES** that each Class Member and his or her heirs, personal representatives and assigns or its past and present agents, representatives, executors, administrators, predecessors, successors, transferees and assigns, have released and shall be conclusively deemed to have fully, finally and forever released the Defendant and each of their respective past and present parents, subsidiaries and related or affiliated entities and their respective employees, agents, officers, directors, shareholders, partners, principals, members,

attorneys, insurers, subrogees, representatives, executors, administrators, predecessor, successors, heirs, transferees and assigns from any and all actions, causes of action, common law and statutory liabilities, contracts, claims and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including for damages, contribution, indemnity, costs, expenses and interest which they ever had, now have or may have hereafter have, directly or indirectly or any way relating to or arising directly or indirectly by way of any subrogated or assigned right or otherwise or in any way relating to or arising from the Residential School or the operation generally of the Residential School and this release includes any such claim made or that could have been made in any proceedings including claims that belong to the Class Member or personally, whether asserted directly by the Class Member or by any other person, group or legal entity on behalf of or as a representative for the Class Member.

15. **THIS COURT ORDERS** for greater certainty that the Releases referred to in paragraph 14 above bind each and every Class Member, whether or not he or she submits a claim to the Administrator, whether or not he or she is eligible under the Agreement or whether the claim is accepted in whole or in part.

16. **THIS COURT ORDERS AND DECLARES** that any individual action brought by a Class Member, in relation to the subject matter hereof, shall be dismissed on implementation of the Agreement.

17. **THIS COURT ORDERS** that the Defendants and their heirs, legal representatives and assigns or its past and present parents, subsidiaries and related or affiliated entities, employees, agents, officers, directors, shareholders, partners, attorneys, insurers,

representatives, executors, administrators, predecessors, successors, transferees and assigns have released and shall be conclusively deemed to have fully, finally and forever released each other and each of their respective past and present parents, subsidiaries and related or affiliated entities and their respective employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, subrogees, representatives, executors, administrators, predecessors, successors, heirs, transferees and assigns from any and all actions, causes of action, common law and statutory liabilities, contracts, claims and demands of every nature or kind available asserted or which could have been asserted whether known or unknown including for damages, contribution, indemnity, costs, expenses and interest which they ever had, now have or may have hereafter have, directly or indirectly or any way relating to or arising directly or indirectly by way of any subrogated or assigned right or otherwise or in any way relating to or arising from the Releases.

18. **THIS COURT ORDERS** that each Class Member and each of their respective past and present agents, principals, attorneys, insurers, subrogees, heirs, executors, administrators, personal representatives, transferees, predecessors, successors and assigns are deemed to agree that they will not make any claim or demand or take any actions or proceedings against any Releasee for damages, contribution and indemnity or other relief pursuant to the provisions of the *Negligence Act*, R.S.O. 1990, c. N-3, as amended, or its counterpart, the common law or any other statute of Ontario or any other jurisdiction in relation to the Residential School or the operation generally of the Residential School.

19. **THIS COURT ORDERS AND DECLARES** that on the consent of the parties and notwithstanding the order of the Honourable Mr. Justice Haines, dated July 21, 2005, Class Members shall have until August 20, 2007, to opt out of this class proceeding.

20. **THIS COURT ORDERS** that the Administrator shall, on or before a date to be fixed by the court, report to this court and advise as to the names of those persons who have opted out of this class proceeding.

21. **THIS COURT ORDERS** that commencing on or before March 22, 2007, the Class Members shall be given notice of this judgment and the approval of the Agreement in accordance with the terms of the Notice Plan designed by Hilsoft Notifications attached as Schedule "B" and at the expense of Canada, as set out in the Notice Plan. Hilsoft Notifications is authorized by this Court to carry out the Notice Place in accordance with its terms.

22. **THIS COURT DECLARES** that the notice provided in paragraph 21 above, satisfies the requirements of section 17(6) of the Act and is the best notice practicable under the circumstances.

23. **THIS COURT ORDERS** that forthwith after the publication and delivery of the notice required by paragraph 21 of this judgment, Canada shall serve upon Class Counsel and the Administrator and file with the Court affidavits confirming that the required notice has been given in accordance with the Notice Plan, the Agreement and this judgment.

24. **THIS COURT ORDERS AND DECLARES** that this judgment and the Agreement are binding upon each Class Member who has not opted out, including those persons who are minors or are mentally incapable and the requirements of Rule 7.08(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, with respect to this judgment are dispensed with.

25. **THIS COURT ORDERS THAT** the Honourable Ted Hughes Q.C. be approved as Chief Adjudicator until further order of this court, with the duties and responsibilities as set out in the Agreement.

26. **THIS COURT ORDERS AND DECLARES** that no person may bring any action or take any proceedings against the Trustee, the Chief Adjudicator, the IAP Oversight Committee, the National Certification Committee, the National Administration Committee, the Chief Adjudicator's Reference Group, the Regional Administration Committees, as defined in the Agreement, or the members of such bodies, the adjudicators, or any employees, agents, partners, associates, representatives, successors or assigns, of any of the aforementioned, for any matter in any way relating to the Agreement, the administration of the Agreement or the implementation of this judgment, except with leave of the Court on notice to all affected parties.

27. **THIS COURTS DECLARES** that the Representative Plaintiffs, Defendants, Released Church Organizations, Class Counsel, the National Administration Committee or the Trustee, or such other person or entity as this Court may allow, after fully exhausting the dispute resolution mechanisms contemplated in the Agreement, may apply to this court for directions in respect of the implementation, administration or amendment of the Agreement or the implementation of this judgment, on notice to all affected parties, all in conformity with the terms of the Agreement.

28. **THIS COURT DECLARES** that the consent and Agreement were entered into by the Defendants and that this judgment is issued by this court, without any admission of liability, that the Defendants deny liability and that the consent to the settlement is not an admission of

liability by conduct by the Defendants and that this judgment is deemed to be without prejudice settlement for evidentiary purposes.

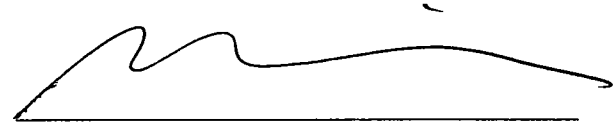
29. **THIS COURT ORDERS** that the provisions of the *Class Proceedings Act, 1992* apply to the supervision, operation and implementation of the Agreement and this judgment.

30. **THIS COURT ORDERS AND DECLARES** that in the event that the number of Eligible CEP Recipients who opt out of this class proceeding and the *Fontaine et. al. v. The Attorney General of Canada*, Ontario Court File No. 00-CV-192059CP, collectively exceeds five thousand (5,000), the Agreement will be void and this judgment will be set aside in its entirety subject only to the right of Canada, at its sole discretion, to waive compliance with section 4.14 of the Agreement. For greater certainty, the words “Eligible CEP Recipients” in section 4.14 of the Agreement shall be deemed to read “Persons who would otherwise be Eligible CEP Recipients”.

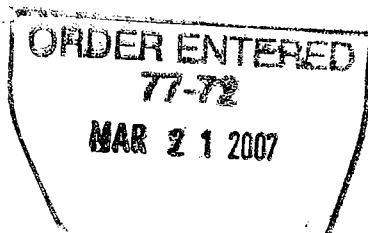
31. **THIS COURT ORDERS** for greater certainty, the word “the Court” in section 4.12(4) of the Agreement shall be deemed to read “the NAC”.

32. **THIS COURT DECLARES** that, subject to further order of this court, this judgment will be rendered null and void in accordance with the terms of the Agreement, in the event that the Agreement is not approved in substantially similar terms by way of order or judgment of the court at settlement approval hearings in all of the Fora.

33. **THIS COURT ORDERS** that, with the consent of The New England Company, this action be and hereby is discontinued against the New England Company and that the other defendant shall not seek any contribution shall not seek any contribution from The New England Company, with respect to costs, or otherwise.



Regional Senior Justice Warren K. Winkler



**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at London

JUDGMENT

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