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FOR INFORMATION

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MEMORANDUM FOR THE MINISTER

Indian Residential Schools Settlement Agreement – Settlement of Litigation Between Canada and the Catholic Entities

ISSUE

Articles appearing in *The Globe and Mail* between April 17 and April 21, allege that the Catholic Church was released from its financial obligations for residential schools compensation when Canada abandoned an appeal of a controversial ruling letting the Church out of any further fundraising obligations. The articles also question whether Department of Justice counsel's communications with Church counsel were a misstep.

BACKGROUND

The Indian Residential Schools Settlement Agreement was negotiated to reflect the parties' desire for reaching a fair, comprehensive, and lasting resolution of the legacy of Indian Residential Schools. As part of this agreement, the parties also expressed their desire for the promotion of healing, education, truth and reconciliation, and commemoration. The IRSSA includes within it an agreement among Canada, the Catholic Entities, and the Corporation of Catholic Entities Party to the Indian Residential Schools Settlement ("the Catholics"), a corporation established by the Catholic Entities to administer their obligations under this part of the agreement.

The three financial obligations of the Catholics are:

- (i) a cash contribution of \$29 million (with an adjustment for compensation previously paid for Indian Residential Schools Abuse Claims), which amount they paid;
- (ii) in-kind services worth \$25 million to support healing and reconciliation programs, which they say they did; and
- (iii) use of "best efforts" to raise \$25 million through a seven year Canada-wide fundraising campaign, with proceeds used to support healing and reconciliation programs.

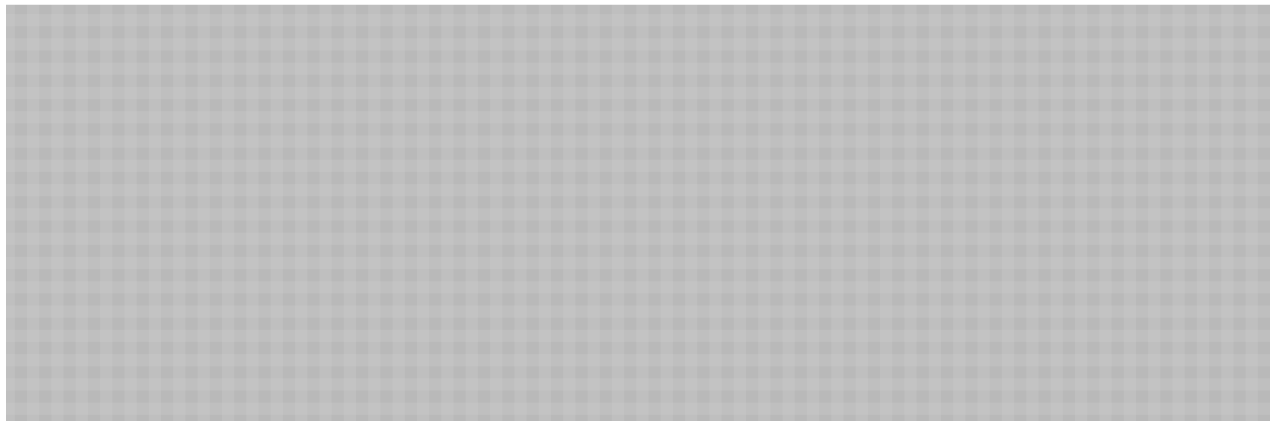
To fulfil the second obligation, the Catholic Entities sought to provide in-kind services through a Catholic Healing Committee (with representatives from the Catholics, Assembly of First Nations, and Canada), which identified projects for healing and reconciliation. For the first obligation, they made a \$29 million cash contribution which was to be used as capital for healing and reconciliation programs associated with the Aboriginal Healing Fund. The Catholics permitted to use the interest from that capital to cover administration costs. If the interest amounts were insufficient to cover these costs, the Catholics were permitted to deduct the excess from the capital amount in this account if Canada so consented. The Catholics sought to deduct \$2 million in administration costs, including legal fees, from the capital amount. Canada refused to consent

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to the deduction of legal fees, given that it appeared that the associated legal work was not related to the operation of the Catholics' Corporation and that it was Canada's position that legal fees were not "reasonable administration costs" under the IRS settlement terms.

In December 2013, Canada sought direction from the Court as to whether the amounts deducted by the Catholics for legal costs were reasonable administration costs. Canada and the Catholics sought to negotiate a settlement of this dispute and, although agreement was reached on quantum, there was disagreement on the terms of the Release. When Canada refused to grant a broad release to the Catholics they commenced litigation seeking an order that a settlement had been reached between the parties.

On 16 July 2015, Justice Gabrielson of the Court of Queen's Bench for Saskatchewan rendered a decision finding that a reasonable bystander would conclude that an agreement had been reached between Canada and the Corporation releasing "all matters" between the Catholic Entities and Canada. Justice Gabrielson based his decision on certain communications by Justice counsel to the Catholics counsel which to him suggested that counsel for Canada and the Catholics had reached agreement.



Following instructions from the Minister of INAC in September 2015, Justice negotiated a settlement with the Catholics, agreeing to release them of the three financial obligations noted above in return for payment of \$1.2 million. As part of this settlement, Canada abandoned its appeal. The Deputy Minister of Indigenous and Northern Affairs Canada signed the release on 30 October, 2015. The funds were provided by the Catholics to the Legacy of Hope Foundation in January, 2016 and Canada provided the signed release to the Catholics immediately thereafter.

Media coverage continues on this issue with some focus on the "miscommunication" by Justice counsel, though more recent coverage has focused on the responsibilities of the Catholic Entities. A Question Period note was prepared for the Minister earlier this week.



Several media commentators who have reviewed Justice Gabrielson's decision support the Justice view that a broad release was not intended or given .

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client, was that there would be a low likelihood of success of an appeal from factual findings and conclusions, and even if successful, an even lower chance of success in finding legal levers to force the Catholics to relaunch a moribund fundraising campaign.

CONSIDERATIONS

With regard to the fundraising campaign, the Catholic Entities' obligation was to use best efforts to raise \$25 million within a seven-year period. The Catholic Entities initially hired a fairly expensive for-profit fundraiser and raised very little, targeting corporate donors rather than parish collection plates. Amounts raised were paid annually to the Catholics for awarding grants on an annual basis for healing and reconciliation of survivors and their families. Conditions for grants were defined in the agreement with the Catholic Entities. The seven-year period ended in September 2014 with the Catholic Entities raising only \$3.7 million. [REDACTED]

[REDACTED]

In finalizing the IRSSA, all parties agreed to support the promotion of healing, education, truth and reconciliation, and commemoration. While Canada can expect that the parties will be guided by these intentions, Canada cannot prevent other parties from taking a narrow view of their legal obligations. [REDACTED]

CONCLUSION

Media coverage of the fundraising efforts by the Catholic Entities and of the settlement reached between Canada and the Catholics continues.

ANNEXES

Annex 1: Catholic Entities and the Indian Residential Schools Settlement Agreement

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Annex

CATHOLIC ENTITIES AND THE INDIAN RESIDENTIAL SCHOOLS SETTLEMENT AGREEMENT

Background

The Indian Residential Schools Settlement Agreement (“Settlement Agreement” or “IRSSA”) includes, as schedules, agreements between Canada and entities representing each of the four religious denominations that were involved in the operation of Indian Residential Schools – the Roman Catholic Church of Canada, the Anglican Church of Canada, the United Church of Canada, and the Presbyterian Church of Canada. All of the parties to the IRSSA agreed that these Agreements would be included in the Settlement Agreement (Article 9.01).

Schedule O-3 of the Settlement Agreement is an agreement among Canada, the Catholic Entities, and the Corporation of Catholic Entities Party to the Indian Residential Schools Settlement (“the Corporation” or “CCEPIRSS”), a corporation established by the Catholic Entities to administer their obligations under Schedule O-3. The Schedule O-3 Agreement sets out, *inter alia*, certain financial obligations of the Catholic Entities in relation to the Settlement Agreement, specifically:

- (i) a cash contribution of \$29 million (with an adjustment for compensation previously paid for IRS Abuse Claims);
- (ii) in-kind services worth \$25 million to support healing and reconciliation programs; and
- (iii) use of “best efforts” to raise \$25 million through a seven year Canada-wide fundraising campaign, with proceeds used to support healing and reconciliation programs.

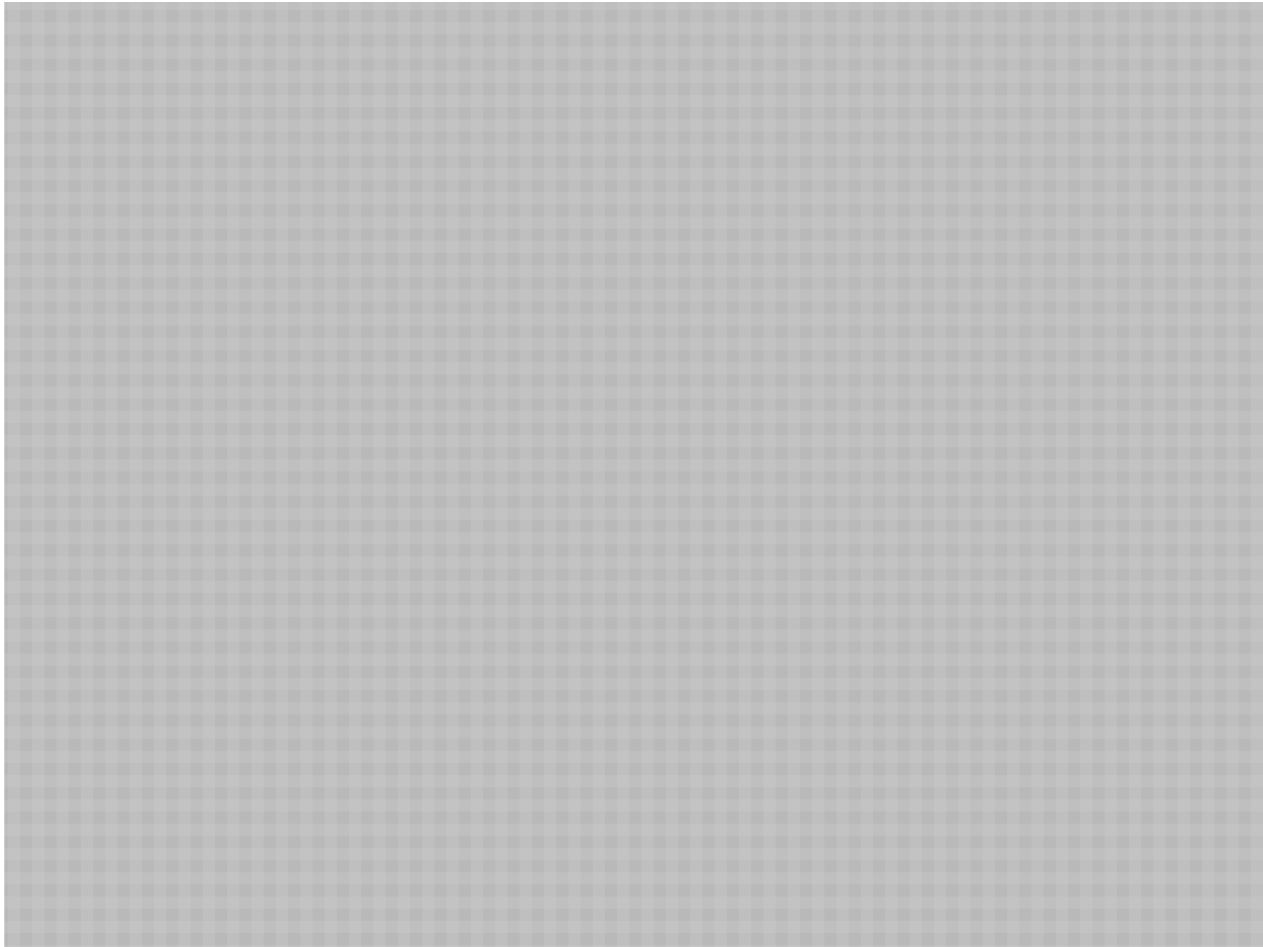
Schedule O-3 also indicates that:

Best efforts shall be deemed to have been made where the fund-raising campaign demonstrates on a Canada-Wide level in each of the seven years an approach and means that is consistent with the approach and means used by professionally managed national fundraising campaigns, including those operated by universities and hospital foundations.

The cash contribution required by Schedule O-3 was to be paid to the Aboriginal Healing Foundation as per the Agreement. Any interest earned from that amount prior to payment to the Aboriginal Healing Foundation could be used by CCEPIRSS for its reasonable administration costs. If the interest amounts were insufficient to cover these costs, CCEPIRSS was permitted to deduct the excess from the capital amount in this account if Canada so consented. CCEPIRSS sought to deduct \$2 million in administration costs, including legal fees, from the capital amount. Canada refused to consent to the deduction of legal fees, given that it appeared that the associated legal work was not related to the operation of the Corporation and that it was Canada’s position that legal fees were not “reasonable administration costs” under Schedule O-3.

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On **24 December 2013**, Canada filed a Request for Direction with the Court of Queen's Bench for Saskatchewan seeking clarification as to whether CCEPIRSS could deduct legal fees as "reasonable administration costs". While the issues before the Court were limited to these costs, the affidavit filed by Canada and subsequent cross-examinations of Canada's affiant extended into issues related to the other financial obligations under Schedule O-3 and Canada's position with regard to those obligations. Statements by Canada's affiant indicated that Canada was satisfied that the in-kind services obligation was met and that Canada was not in a position to enforce whether best efforts were made in the fundraising campaign.



On **18 November 2014**, CCEPIRSS filed a Request for Direction with the Court of Queen's Bench for Saskatchewan seeking a determination that a settlement had been reached between Canada and the Corporation. In support of its position, CCEPIRSS relied on the statements made by Canada's affiant in the original Request for Direction filed by Canada and the communications between counsel attempting to settle that original Request. A hearing date was set for 06 June 2015.


On **06 May 2015**, CCEPIRSS provided a draft General Release to Canada in an effort to resolve the dispute. That Release was still beyond the scope of the original Request for Direction.





On **06 June 2015**, oral submissions were presented to Justice Gabrielson of the Court of Queen's Bench for Saskatchewan.

On **16 July 2015**, Justice Gabrielson rendered his decision finding that “a reasonable bystander [would] conclude that there was no controversy over including general releases and indemnities in accordance with ss. 4.5 and 4.6 of Schedule O-3 to the Settlement Agreement. Nor would a reasonable bystander conclude that there was controversy over releasing “all matters” between CCEPIRSS, the Catholic Entities and Canada.”



On **19 August 2015**, Canada filed a Notice of Appeal with the Saskatchewan Court of Appeal.

Further discussions between Canada and CCEPIRSS resulted in a settlement whereby CCEPIRSS would pay \$1.2 million to the Legacy of Hope Foundation (successor to the Aboriginal Healing Fund) and Canada would provide a release of CCEPIRSS' financial obligations outlined above and would withdraw its Notice of Appeal.

On **12 January 2016**, CCEPIRSS delivered a cheque for \$1.2 million to the Legacy of Hope Foundation. Upon receipt of confirmation, Canada provided CCEPIRSS with a signed Release as agreed.