

2007 01T4955 CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION (GENERAL)

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER and JOYCE WEBBER  
PLAINTIFFS/DEFENDANT

-and-

THE ATTORNEY GENERAL OF CANADA  
DEFENDANT/APPLICANT

Brought under the *Class Actions Act*, S.N.L. 2001, c. C-18.1

THIRD PARTY NOTICE

2008 01T0845 CP

BETWEEN:

SARAH ASIVAK and JAMES ASIVAK  
PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA  
DEFENDANT  
2008 01T0844 CP

BETWEEN:

SELMA BOASA and REX HOLWELL  
PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA  
DEFENDANT  
2008 01T0846 CP

BETWEEN:

EDGAR LUCY and DOMINIC DICKMAN  
PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA  
DEFENDANT  
2007 01T5423 CP

BETWEEN:

TONY OBED, WILLIAM ADAMS AND MARTHA BLAKE  
PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA  
DEFENDANT

AND:

HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR

THIRD PARTY

Filed 2008. 21/12 DP

**TO THE THIRD PARTY:**

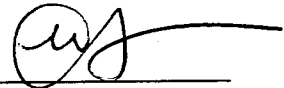
**TAKE NOTICE** that this proceeding has been brought by the plaintiff against the defendant and by the defendant against you as a third party. In the proceeding, the plaintiff claims against the defendant the Attorney General of Canada as appears from the originating documents, a copies of which are attached thereto as Schedule A.

**AND TAKE NOTICE** that the defendant also claims against you in respect of the claim set out in the statement of claim attached hereto as Schedule B.

**AND TAKE NOTICE** that you will be deemed to admit the plaintiff's claim against the defendant and the defendant's claim against you, and the defendant may enter judgment against you in accordance with the defendant's claim attached hereto as Schedule B without further notice to you, unless within 10 days after the service of this third party notice upon you, excluding the day of service,

- (a) you or your solicitor cause your defence to the statement of claim to be filed in the Registry of this Court by either delivering or mailing the defence to the Registry; and
- (b) within the same time, you or your solicitor cause a copy of your defence to be served upon the defendant or the defendant's solicitor at the address given in the statement of claim for service either by delivering a mailing the copy to him or her at that address.

**DATED** at Halifax, Nova Scotia, this 16<sup>th</sup> day of November, 2012.



**Jonathan Tarlton  
Mark Freeman  
Melissa Grant**

Department of Justice Canada  
Suite 1400, 5251 Duke Street  
Halifax, NS B3J 1P3

*Counsel for the Defendant/Plaintiff by 3<sup>rd</sup> Party Claim,  
The Attorney General of Canada*

**ISSUED AT** St. John's, Newfoundland and Labrador, this 21<sup>st</sup> day of November, 2012.

*Sgd Debbie Power*  
**Registrar**  
*Court Clerk*

**SCHEDULE "A"**

leave granted  
R 7 A 0 8  
Apr 12/11  
Wm

2008 01T0844CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION

BETWEEN:

SELMA BOASA and RITA CHIDO REX  
HOLWELL

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Brought under the *Class Actions Act*, S.N.L. 2001, c. C-18.1

AMENDED STATEMENT OF CLAIM

A. RELIEF SOUGHT BY THE PLAINTIFFS AGAINST CANADA

1. The Representative Plaintiffs, on their own behalf, and on behalf of the members of the Survivor Class and Family Class claim:

- (a) an Order certifying this proceeding as a Class Action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 and appointing Selma Boasa and Rita Chido Rex Holwell as Representative Plaintiffs for the Survivor Class and any appropriate subgroup thereof;
- (b) a Declaration that Canada owed ~~and was in breach of~~ exclusive non-delegable, fiduciary, and ~~statutory and common law~~ duties of care to the Plaintiffs and the other Survivor Class Members in relation to the ~~establishment; funding, oversight, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the St. Anthony Orphanage and Boarding School in St. Anthony, Newfoundland and Labrador (the "School");
- (c) a Declaration that Canada was negligent in the ~~establishment, funding, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

Filed	Apr 18/12	mw
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- (d) a Declaration the Canada was or is in breach of its exclusive and non-delegable fiduciary obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its ~~establishment, funding, operation, supervision, control, maintenance, oversight, confinement in, transport of Survivor Class Members, to obligatory attendance at the School of the School;~~
- ~~(e) a Declaration that Canada was or is in breach of its statutory duties pursuant to the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act") and its Treaty obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;~~
- ~~(f) a Declaration that the School caused cultural, linguistic and social damage and irreparable harm to the Survivor Class;~~
- (g) a Declaration that Canada is liable to the Plaintiffs and other Survivor Class Members for the damages caused by its breach of non-delegable, fiduciary and, statutory and common law duties of care and for negligence in relation to the establishment, funding, operation, supervision, control, maintenance, oversight, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;
- (h) non-pecuniary general damages for negligence, ~~loss of language and culture, breach of non-delegable~~ exclusive fiduciary and duties of care, ~~statutory, treaty and common law duties~~ in the amount of \$500 million or such other sum as this Honourable Court finds appropriate;
- (i) pecuniary general damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, breach of non-delegable exclusive fiduciary and, statutory, treaty and common law duties of care in the amount of \$500 million or such other sum as this Honourable Court ~~deems just~~ finds appropriate;
- (j) exemplary and punitive damages in the amount of \$100 million or such other sum as this Honourable Court deems just ~~finds appropriate;~~
- (k) damages in the amount of ~~\$100 million or such other sum as this Honourable Court deems just, pursuant to the *Family Law Act*, R.S.N., 1990, and its predecessors;~~
- (l) prejudgment and postjudgment interest pursuant to the provisions of the *Judicature Act*, R.S.N. 1990, c. J-4 ; and
- (m) the costs of this action on a substantial indemnity scale.

## B. DEFINITIONS

2. The following definitions apply for the purposes of this Claim:

- (a) "Aboriginal", "Aboriginal People(s)" or "Aboriginal Person(s)" means a person whose rights are recognized and affirmed by the *Constitution Act, 1982*, s. 35, being Schedule "B" to the *Canada Act, 1982* (U.K.), 1982. c. 11, specifically, members of the Metis and Inuit nations;
- (b) "Aboriginal Right(s)" means rights recognized and affirmed by the *Constitution Act, 1982*, s. 35, being Schedule "B" to the *Canada Act, 1982* (U.K.), 1982. c. 11;
- (c) "Agents" mean the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of the School;
- (d) "Canada" means Her Majesty the Queen in Right of Canada, as represented in this proceeding by the Attorney General of Canada;
- (e) "Class" or "Class Members" means all members of the Survivor Class and the Family Class;
- (f) "Class Period" means March 31, 1949 to December 31, 1996 and the date of closure of the St. Anthony Orphanage and Boarding School;
- (g) "Excluded Persons" means all persons who attended an Eligible Indian Residential School as defined by the Indian Residential Schools Settlement Agreement dated May 10, 2006 (the "Agreement") and all persons who are otherwise eligible, pursuant to the Agreement, to receive a Common Experience Payment or pursue a claim through the Individual Assessment Process, as defined by the Agreement;
- (h) "Family Class" means:
  - (i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;
  - ~~(ii) the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;~~
  - (iii) a former spouse of a Survivor Class Member;
  - (iv) a child or other lineal descendent of a grandchild of a Survivor Class Member;

- (v) 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;
- (vi) 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;
- (vii) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death;
- (i) "School" means the St. Anthony Orphanage and Boarding School, located in St. Anthony, Newfoundland and Labrador;
- (j) "Survivor Class" means:

All persons who attended the School between March 31, 1949 and ~~December 31, 1996~~ the date of the closure of the St. Anthony Orphanage and Boarding School.

## C. THE PARTIES

### i. Representative Plaintiffs

3. The Plaintiff, Selma Boasa ("Boasa"), resides in Hopedale, Newfoundland and Labrador ("Newfoundland") and is an Inuit. Boasa attended the School in Northwest River, Newfoundland for one (1) year between 1956 and 1957. Boasa is a ~~proposed~~ representative plaintiff for the Survivor Class.

4. The Plaintiff, Rex Holwell ("Holwell"), resides in Goose Bay, Newfoundland and was born on September 21, 1950. His wife, Rosina, attended the School for a number of years. Holwell is the representative plaintiff for the Family Class.

~~4. The Plaintiff, Rita Chido ("Chido"), resides in Carson, California (U.S.A.) and was born on October 2, 1933. Her brother, Archibald Rumbolt, attended the School for a~~

~~number of years between 1947 and 1952. Chido is a proposed representative plaintiff for the Family Class.~~

5. The proposed Representative Plaintiffs do not purport to advance claims on behalf of any persons who are otherwise entitled to compensation pursuant to the terms of the Agreement.

6. Neither, the proposed Representative Plaintiffs' claim nor the classes they propose to represent overlap with the terms of the order issued by Regional Senior Justice Winkler of the Ontario Superior Court of Justice, dated March 8, 2007.

ii. The Defendant

7. The Defendant, Her Majesty the Queen in Right of Canada, is represented in this proceeding by the Attorney General of Canada ("Canada"). Canada represents the interests of the Minister of the Department of Indian Affairs Canada, who was, at all material times, responsible for the maintenance, funding, oversight or management and operation of the School, either on its own or in combination with other of its governmental agents or servants.

8. Once the Province of Newfoundland and Labrador entered Confederation in 1949, Canada assumed and possessed exclusive Legislative and executive responsibility over aboriginal persons, including the Classes. As aboriginal persons in the 'new' province in 1949 were legally "Indians" for the purposes of section 91(24) of the *British North America Act, 1867*, they were proper subjects of federal jurisdiction.



9. Canada's participation in the funding and operation of the School breached its exclusive duty of care owed to the Classes which was also in breach of its non-delegable fiduciary obligations and constitutional obligations owed to aboriginal persons.

10. Alternatively, even if Canada did not materially operate or manage the school, it nevertheless breached its fiduciary duties by failing to properly do so and protect the Class as it alone possessed singular and exclusive legal jurisdiction over aboriginal persons.

**D. RESIDENTIAL SCHOOL SYSTEM – OPERATION OF THE SCHOOL**

i. Background - Residential School History Generally

11. Residential Schools were established by Canada as early as 1874, for the education of Aboriginal children. These children were taken from their homes and their communities and transported to Residential Schools where they were confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them.

12. Commencing in 1911, Canada entered into formal agreements with various Churches and other philanthropic organizations (collectively the "Churches") for the operation of such schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of the Residential Schools. The Churches assumed the day-to-day operation of the Residential Schools under the control, supervision and direction of Canada, for which the Canada paid the Churches a per capita grant calculated to cover part of the cost of the Residential School operation.

13. As of 1920, the Residential School Policy included compulsory attendance at Residential Schools for all Aboriginal children aged 7 (seven) to 15 (fifteen). This approach to the control and operation of the Residential Schools system continued until April 1, 1969, at which time Canada assumed the sole operation and administration of the Residential Schools from the Churches, excepting certain cases where Churches continued to act as agents of Canada.

14. Canada removed Aboriginal Persons, usually young children, from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. Canada controlled all aspects of the admission of Aboriginal Persons to the Residential Schools including arrangements for the care of such persons over holiday periods and the methods of transporting children to and from Residential Schools.

15. ~~The same Similar Residential Schools policy was implemented and effected in~~ existed in Newfoundland, which joined Canada on March 31, 1949. Accordingly, the claim against Canada is limited temporally to the time when the Canada became legally responsible for Aboriginal Persons residing in Newfoundland, or 1949, and beyond.

16. Aboriginal Persons were often taken from their families without the consent of their parents or guardians. While the stated purpose of the Residential Schools from their inception was the education of Aboriginal children, their true purpose was the complete integration and assimilation of Aboriginal children into mainstream Canadian society and the obliteration of their traditional language, culture and religion. Many children attending Residential Schools were also subject to repeated and extreme physical, sexual

and emotional abuse, all of which continued until the year 1996, when the last Residential School operated by Canada was closed.

17. During the Class Period, children at the school were subjected to systemic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

18. The accommodation was crowded, cold, and sub-standard. Aboriginal children were underfed and ill nourished, forbidden to speak their native languages or to practice the customs and traditions of their culture. They were deprived of love and affection from their families and of the support that a child would normally expect to have from those in positions of trust and authority. Aboriginal children were also subjected to corporal punishment, assaults, including physical and sexual, and systematic child abuse.

**E. CANADA'S ASSUMPTION OF DUTIES WHEN NEWFOUNDLAND  
JOINED CONFEDERATION IN 1949**

19. Around the time of Confederation, two separate legal opinions commissioned by the Federal Department of Justice confirmed that the Federal Crown possessed exclusive legislative and executive responsibility in relation to Aboriginal persons, including the Inuit and Eskimo, living in Newfoundland and Labrador.

20. The records of the Federal departments, agencies, ministers and bureaucrats responsible for negotiating the *Terms of Union* show that from 1946 the Federal Government recognized that under the terms of the *British North America Act*, section

91(24), it would have to assume full responsibility for the native people of the new province.

21. As Canada's legal responsibility to Aboriginals was constitutional in nature, it was prohibited from attempting to cede or delegate such duties to any other entity, including the Province itself. Given the broad duties owed by Canada to Aboriginal persons, the welfare and education of Aboriginal children cannot be said to have resided with the Crown in right of the Province of Newfoundland after March 31, 1949.

22. The entry of Newfoundland and Labrador into Confederation brought its Aboriginal population fully within exclusive federal jurisdiction. At the time of Confederation, Canada was aware that any union with Newfoundland and Labrador would have had an Aboriginal component and legal responsibility associated with it.

23. In 1947, in advance of preparing for the *Terms of Union* negotiations, the Federal Government prepared a document for the Newfoundland delegation which outlined the nature of Federal involvement with and for Aboriginal peoples. Amongst other things, under classes of subjects in which the Federal Parliament exercised exclusive jurisdiction, 'Indians and lands reserved for Indians' was listed and when outlining the responsibilities that the various Federal departments would have for Newfoundland, 'Indian Affairs' was listed under the Department of Mines and Resources.

24. The function of the Indian Affairs Branch was described as administering the "affairs of the Indians of Canada [which] included the control of their education". The Federal Department of Mines and Resources stated, at that time, that the Dominion

assumes full responsibility for the welfare, including education, of Indians and Eskimos, a response which went on at length to describe the day and residential school system.

25. In and around the time of Confederation, a number of Federal legal opinions on the question were prepared, most of them acknowledging sole federal responsibility for Newfoundland's Aboriginal people. Under Term 3 of the *Terms of Union*, for matters not specifically referred to, things were deemed to be as if Newfoundland had joined under the terms of the *Constitution Act, 1867*.

26. When Canada sent its official version of the proposed *Terms of Union* to the National Convention in Newfoundland in October 1947, it had already acknowledged that under the terms of the *British North America Act* it had exclusive jurisdiction in the area of Aboriginal peoples. By deleting the reference to native people in the proposed draft *Terms of Union* and writing in Federal responsibility, as outlined in the *British North America Act*, the Federal Government acknowledged *de facto* jurisdiction for the Indians, Inuit and Eskimos of Newfoundland and Labrador.

27. At the time of Confederation, the Premier, Joseph Smallwood, actually refused to sign an agreement with Canada which would have transferred federal responsibility for native persons to the Province. The Province maintained that the fiduciary obligations for Aboriginal persons remained, and belonged to the federal government.

28. Following Confederation, in December 1949, Canada established an Interdepartmental Committee on Labrador Indians and Eskimos which requested another legal opinion from the Justice Department which stated that in the matter of Newfoundland "Indians and Eskimos":

“...the federal Parliament has exclusive legislative authority in relation to Indians ... which, of course, means that the provincial legislature has no authority to enact legislation directed at or dealing with [matters] in relation to Indians.... It is the responsibility of the federal government to formulate and carry out all policies that are directed at dealing with Indian or Indian problems. Such policy is to be formulated by Parliament and the executive. This responsibility carries with it the responsibility or providing money to be devoted to the carrying of our policies in relation to the Indians.”

29. This opinion provided by the Justice Department is consistent with the assumptions made during the pre-Confederation talks: Aboriginal persons, pursuant to the *British North America Act*, were Canada’s responsibility. Even before Newfoundland’s entry into Confederation, various federal departments had included in their departmental estimates sizeable amounts towards relief, services and expenditures for the native populations in Newfoundland and Labrador. This demonstrates that the federal government believed it had a responsibility to fulfill in regard to the Eskimo and Inuit in Labrador and that it would be called upon to provide programs and assistance, funding, oversight and implementation of certain programs, including education.

30. In fact, the *Terms of Union* indirectly provided that the then Aboriginal population in Newfoundland fell under federal jurisdiction. Section three of the *Terms of Union* affirms that: “[t]he *Constitution Acts, 1867 to 1940* apply to the Province of Newfoundland in the same way, and to the like extent as they apply to the provinces heretofore comprised in Canada”.

31. The *Constitution Act, 1867* itself states that “the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say ... Indians, and Lands reserved for the Indians”.

32. Following Confederation in 1949, and by 1951, Canada had agreed to pay the bills submitted by Newfoundland for "Indians and Eskimos" for the period 1949-1950. At that same time, Newfoundland also provided Canada with an estimate of provincial expenditures with respect to Eskimo and Inuit in Labrador for which it expected payment. Throughout the 1950's and 1960's, programs for aboriginal education in Newfoundland and Labrador were paid for by Canada at the rate of 90% for Indian communities and 40% in Inuit communities.

33. A 1951 memorandum prepared by the Chairman of the Inter-departmental Committee on Newfoundland Indians and Eskimos formed the basis of much of Canada's position for the future:

"Section 3 of the *Terms of Union* stipulates that the provisions of the *BNA Act* shall apply to Newfoundland except insofar as varied by the Terms. Since the Terms of Union do not refer to Indians and Eskimos and since head 24 of section 91 of the *BNA Act* places 'Indians and lands reserved for Indians' exclusively under Federal jurisdiction, it seems clear that the Federal Government is responsible for the native population resident in Labrador."

34. By 1954, Newfoundland requested that Canada provide both operating and capital expenditures towards education for Eskimos and Inuit. The 1954 Agreement between Newfoundland and Canada stipulated that Canada would assume 66% of capital expenditures on behalf of Eskimos in Newfoundland and 100% of capital expenditures on behalf of Indians in the fields of health, welfare and education. This agreement reached between the Premier of Newfoundland and Canada in 1954 provided for the re-assumption of federal constitutional responsibility over aboriginal persons in the new province of Newfoundland and Labrador.

35. Just four years into this Agreement, Newfoundland requested further funds from Canada to provide education and housing for both Indians and Inuit. Shortly thereafter, in 1964, the Premier of Newfoundland asked Prime Minister Pearson, to either have Canada assume sole and full responsibility for Indians and Inuit or to at least increase funding to the level of support being provided by Canada to other provinces in Canada.

36. At the same time, the Pearson government requested a second legal opinion from the Justice Department. On November 23, 1964, the Deputy Attorney General provided that opinion and determined that:

“...there is no provision in the *Indian Act* excluding any portion of Canada from its application. Mr. Varcoe’s opinion [the 1950 Justice Department opinion] as to the constitutional position is, in my opinion, correct. The fact that there is no mention of Eskimos or Indians in the *Terms of Union* means only that the constitutional position with respect thereto has not changed with regard to Newfoundland.”

37. As a result, by 1965, Canada had agreed to provide the same resources and programs to Indians, Inuit and Eskimos in Labrador as were provided to similar groups elsewhere in Canada. The proposed agreements were to be: (a) renegotiated and reviewed every five years; (b) a Federal-Provincial committee was to be established to monitor expenditures and propose budgets for approval by both governments; (c) Newfoundland would be reimbursed for 90% of the Provinces’ capital expenditures for Indians and Eskimos for the period 1954 – 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments.

38. Amongst other things, this “Contribution Agreement” was designed to provide services to the communities of Sheshatshit and Davis Inlet, including education. The Contribution Agreement identified the amount of funding available as (a) 90% from



Canada; and (b) 10% from Newfoundland. The Contribution Agreement also established a management committee composed of federal officials, provincial officials and representatives of the Davis Inlet and Sheshatshit communities.

39. At the same time, the then Prime Minister also proposed certain increases in Canadian contributions for "Indians and Eskimos" in Newfoundland and Labrador which ultimately constituted an agreement between Canada and Newfoundland, providing, amongst other things, for:

- (a) Canada to pay Newfoundland up to \$1,000,000.00 per annum for 90% of the Province's Innu and Inuit expenditures (except where otherwise covered under other federal-provincial agreements);
- (b) establishment of a federal-provincial committee to monitor provincial expenditures;
- (c) continuation of federal funding for Inuit communities in Labrador; and
- (d) agreements to be reviewed and renegotiated every five years to "ensure that they continued to meet the changing circumstances and needs of the Eskimo and Indian residents in Labrador.

40. A Royal Commission on Labrador was convened in 1973 with a mandate to conduct a full inquiry into the economic and sociological conditions in Labrador. In addition to recommending to Newfoundland that it immediately renegotiate its funding agreements with Canada, given that amounts paid there under were inadequate and insufficient, the Commission also made the following determination:

"The Commission finds itself unable to determine a sound rationale for the practice under this Agreement of having the Province pay a percentage of cost for services to Indians and Eskimos. This is not the practice in other parts of Canada. In the view of the Commission, the Federal Government, as it does elsewhere, should be prepared to accept full fiscal responsibility unless the Province wishes to ensure its continued direct involvement in the program for Indians and Eskimos through sharing part of the cost..."

41. Many of the recommendations of the Royal Commission were implemented through the Federal-Provincial funding agreements which were ratified in the years following publication of the Commission Report. For example, an interim agreement was in place between 1976 and 1981 and funded projects which were valued at \$22 million in Labrador. Negotiations between the Province and Federal government led to the signing of two agreements in July 1981:

- (i) Canada-Newfoundland Community Development Subsidiary Agreement, valued at \$38,996,000.00, payable by the Federal government; and
- (ii) Native People's of Labrador Agreement, valued at \$38,831,000.00 federal payments/contributions.

42. The Labrador Agreement covered the following Indian and Inuit communities: Davis Inlet, Northwest Rivet, Nain, Hopedale, Makkovik, Rigolet and Postville. Pursuant to that Agreement, between 1981 and 1986, Canada contributed 90% of the costs of the programs and services in these Indian communities and 60% of the costs of those delivered in the Inuit communities. In total, Canada contributed \$29,135,100.00 in this respect between 1981 and 1986.

43. In August 1985, Canada entered into a further contribution agreement with Newfoundland and Labrador, "for the benefit of native peoples in Labrador", recognizing Canada's "special interest in the social and economic development of Inuit and Indian People." The operation of education was the largest budget allocation item pursuant to this Agreement, for a total of \$1,530,000.00 (1985/1986 fiscal year), 71% of which was Canada's responsibility.

44. Fiduciary obligations are and were owed by Canada to Aboriginal persons, peoples who, pursuant to section 35(2) of the *Constitution Act 1982* include the Indian, Inuit and Metis. This fiduciary relationship between Canada and Aboriginal persons was and is *sui generis* in nature. Accordingly, a fiduciary duty between Canada and Aboriginal persons in Newfoundland and Labrador arose at the moment of Confederation in 1949.

45. Canada has acknowledged its own sole singular responsibility over Indians and Inuit in Newfoundland by accepting its obligation to financially assist or contribute. In any event, Canada has always assumed some level of legal responsibility for aboriginal persons in Newfoundland and Labrador. Having undertaking discretionary control over a cognizable Indian interest, a fiduciary duty existed between Canada and the Class in these circumstances.

46. As the nature of Canada's relationship with Aboriginal persons gives rise to a non-delegable duty to preserve, protect and promote welfare and education of Aboriginal children, the responsibility for its execution rested solely with Canada.

47. In the alternative, if Canada failed to properly assume those common law and constitutional obligations, it breached its, fiduciary and common law duties owed to the class by failing to do so.

ii. Canada's Operation of the School in Newfoundland

48. The School was located in St. Anthony, Newfoundland. It was first established in the 1940's and ceased operation as a residential school for Aboriginal children in the 1950's.

49. The purpose of the School was to provide education to Aboriginal children between the ages of 6 and 16 years who attended the School from various First Nations bands and communities in Newfoundland. The School eventually became a vehicle for assimilating Aboriginal children through the eradication of their native languages, cultures and spiritual beliefs.

50. The School was initially founded and established by the International Grenfell Association. Once Confederation occurred in March 1949 and Newfoundland joined Canada, the International Grenfell Association began ceasing its involvement, funding and role in the School. ~~At all material times, the staff members at the School were employees, servants and/or agents of Canada.~~ The funding provided by Canada following Confederation was inadequate to meet the costs of operating and maintaining the School, and in particular, to meet the daily and educational needs of the students at the School. As a result, the care provided to the students and the conditions at the School were poor, the staff hired were unskilled and/or unsuitable for dealing with children and the conditions at the School were unsuitable and inappropriate for an educational facility for children.

51. ~~In many cases, the Aboriginal children were forced to attend the School by representatives, agents or servants of Canada. The Aboriginal children who attended the School were separated from their families, uprooted and taken to the School, where they were placed within the control of Canada. For all intents and purposes, the children who attended the School, were wards of the School and Canada.~~

52. ~~Canada participated in the funding, oversight carried out that operation~~ and administration of the School until the late 1950's. These operative and administrative responsibilities, carried out on behalf of Canada or by its agents included:

- (a) the operation and maintenance of the School during the Class Period;
- (b) the care and supervision of all members of the Survivor Class, and for supplying all the necessities of life to Survivor Class members *in loco parentis*;
- (c) the provision of educational and recreational services to the Survivor Class while in attendance at the School and control over all persons allowed to enter the School premises at all material times;
- (d) the selection, supply and supervision of teaching and non-teaching staff at the School and reasonable investigation into the character, background and psychological profile of all individuals employed to teach or supervise the Survivor Class;
- (e) inspection and supervision of the School and all activities taking place therein, and for full and frank reporting to Canada respecting conditions in the School and all activities taking place therein;
- (f) transportation of Survivor Class members to and from the School; and
- (g) communication with and reporting to the Family Class respecting the activities and experiences of Survivor Class members while attending the School.

53. Attempts to provide educational opportunities to children confined in the School were ill-conceived and poorly executed by inadequately trained teaching staff. The result was to effectively deprive the Aboriginal children of any useful or appropriate education. Very few survivors of the School went on to any form of higher education.

54. The conditions and abuses in the School during the Class Period were well-known to Canada.

55. Any attempt by Canada to delegate its duties, responsibilities or obligations to the Class to the Province of Newfoundland is unlawful and in breach of its exclusive and non-delegable fiduciary duties owed to the class.

**F. CANADA'S BREACHES OF DUTIES TO THE CLASS MEMBERS**

56. Canada has a fiduciary relationship with Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled and regulated the School during the Class Period, either on its own or in conjunction with the Province.

57. Canada, and its respective servants and agents compelled members of the Survivor Class to leave their homes, families and communities, and forced members of the Survivor Class to attend (and sometimes live in) the School, all without lawful authority or the permission and consent of Survivor Class members or that of their parents. Such confinement was wrongful, arbitrary and for improper purposes.

58. Survivor Class members were systematically subjected to the institutional conditions, regime and discipline of the School without the permission and consent of Survivor Class members or that of their parents, and were also subjected to wrongful acts at the hands of Canada while confined therein.

59. In particular, Boasa experienced severe physical abuse and verbal abuse during their time at the School by teachers, "caregivers" and other students. Boasa also suffered from serious verbal abuse during her time at the School from both teachers and students. In particular, Boasa was prevented from speaking her native language Inuktitut. Many of

the children at the School also experienced sexual physical or verbal abuse, perpetrated against them by teachers, adults in positions of authority or from other students.

60. Holwell Chido, as a member of the Family Class, has experienced emotional abuse and trauma due to ~~her brother's~~ his wife's inability to participate in normal family life as result of the physical harm ~~he~~ she suffered during ~~his~~ her attendance at the School.

61. All persons, including Boasa, who attended the School ~~did so as wards of Canada, with Canada as their guardian,~~ and were persons to whom Canada owed the highest non-delegable, fiduciary, ~~moral, statutory~~ and common law duties, which included, but were not limited to, the duty to ensure that reasonable care was taken of the Survivor Class while at the School, the duty to protect the Survivor Class while at the School and the duty to protect the Survivor Class from intentional torts perpetrated on them while at the School. These non-delegable ~~and~~ fiduciary duties were performed negligently and tortuously by Canada, in breach of its special responsibility to ensure the safety of the Survivor Class while at the School.

62. Canada was responsible for:

- ~~(h) the administration of the Act and its predecessor statutes as well as any other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;~~
- (i) the promotion of the health, safety and well being of Aboriginal Persons in Newfoundland during the Class Period;
- (j) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessor ministries and departments during the Class Period;
- (k) decisions, procedures, regulations promulgated, operations and actions taken by the Department of Indian Affairs and Northern Development and,

its employees, servants, officers and agents in Canada during the Class Period;

- (l) overseeing the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the School and for the creation, design and implementation of the program of education for Aboriginal Persons confined therein during the Class Period;
- (m) the selection, control, training, supervision and regulation of the designated operators and their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons confined in the Residential School during the Class Period;
- (n) the provision of all educational services and opportunities to the Survivor Class members, pursuant to the provisions of the Act and any other statutes relating to Aboriginal Persons during the Class Period;
- ~~(o) transportation of Survivor Class Members to and from the School and to and from their homes while attending the School during the Class Period;~~
- ~~(p) preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities;~~
- (q) the care and supervision of all members of the Survivor Class while they were in attendance at the School during the Class Period and for the supply of all the necessities of life to Survivor Class Members, *in loco parentis*, during the Class Period;
- (r) the provision of educational and recreational services to the Survivor Class while in attendance at the School during the Class Period;
- (s) inspection and supervision of the School and all activities that took place therein during the Class Period and for full and frank reporting to Canada and to the Family Class Members with respect to conditions in the School and all activities that took place therein during the Class Period; and
- ~~(t) communication with and reporting to the Family Class with respect to the activities and experiences of Survivor Class Members while attending the School during the Class Period.~~

63. During the Class Period, male and female Aboriginal children, including Boasa, was subjected to gender specific, as well as non-gender specific, systematic child abuse, neglect and maltreatment. They were forcibly confined in the School and were



systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

64. At all material times, the children who attended the School were within the knowledge, contemplation, power or ~~and~~ control of Canada and were subject to the unilateral exercise of Canada's (or its delegates') power or discretion. By virtue of the relationship between the children and Canada, being one of trust, reliance and dependence, by the Aboriginal children, Canada owed a fiduciary obligation to ensure that the students who attended the School were treated fairly, respectfully, safely and in all other ways, consistent with the obligations of a parent or guardian to a child under his care and control.

65. At all material times, Canada owed a fiduciary obligation to the students who attended the School to act in the best interests of those students and to protect them from any abuse, be it mental, emotional, physical, sexual or otherwise. The children at the School relied upon Canada, to their detriment, to fulfill its fiduciary obligations.

66. Through its servants, officers, employees and agents, Canada was negligent and in breach of its non-delegable fiduciary, ~~moral, statutory,~~ and common law duties of care to the Survivor Class and the Family Class during the Class Period. Particulars of the negligence and breach of duty of Canada include the following:

- (u) it systematically, negligently, unlawfully and wrongfully delegated its fiduciary and other responsibility and duties regarding the education of and care for Aboriginal children to others;
- (v) it systematically, negligently, unlawfully and wrongfully admitted and confined Aboriginal children to the School;

- ~~(w) it acted without lawful authority and not in accordance with any statutory authority pursuant to or as contemplated by the provisions of the Act or any other statutes relating to Aboriginal Persons as:~~
- ~~(i) said provisions are and were *ultra vires* the Parliament of Canada and of no force and effect in law;~~
  - ~~(ii) the conduct of Canada in placing the Aboriginal children in the School, confining them therein, and treating or permitting them to be treated there as set forth herein was in breach of Canada's fiduciary obligations to the Survivor Class and Family Class Members, which was not authorized or permitted by any applicable legislation and was, to the extent such legislation purported to authorize such fiduciary breach, of no force and effect and/or *ultra vires* the Parliament of Canada; and~~
  - ~~(iii) Canada routinely and systematically failed to act in accordance with its own laws, regulations, policies and procedures with respect to the confinement of Aboriginal children in the School, which confinement was wrongful.~~
- (x) it delegated to and contracted with the Churches and other Religious organizations and the Province to implement its program of forced integration, confinement and abuse;
- (y) it failed to adequately screen and select the organizations and individuals to which it delegated the implementation of its Residential School program;
- (z) it failed to adequately supervise and control the School and its agents operating same under its jurisdiction;
- (aa) it deliberately and chronically deprived the Survivor Class Members of the education they were entitled to or were led to expect from the School or of any adequate education;
- (bb) it designed, constructed, maintained and operated the School buildings which were sub-standard, inadequate to the purpose for which they were intended and detrimental to the emotional, psychological and physical health of the Survivor Class;
- (cc) it failed to provide funding for the operation of the School that was sufficient or adequate to supply the necessities of life to Aboriginal children confined to them;
- (dd) it failed to respond appropriately or at all to disclosure of abuses in the School during the Class Period;

- (ee) ~~it conspired with the operators of the schools to suppress information about abuses taking place in the School during the Class Period;~~
- (ff) ~~it assaulted and battered the Survivor Class Members and permitted them to be assaulted and battered during the Class Period;~~
- (gg) it permitted an environment which permitted and allowed student-upon-student abuse;
- (hh) ~~it forcibly confined the Survivor Class Members and permitted them to be forcibly confined during the Class Period;~~
- (ii) it was in breach of its fiduciary duty to its Wards the Survivor Class Members by reason of the misfeasances, malfeasances and omissions set out above;
- (jj) it failed to inspect or audit the School adequately or at all;
- (kk) it failed to implement an adequate system of evaluation, monitoring and control of teachers, administrators and non-teaching staff of the School during the Class Period;
- (ll) it failed to periodically reassess its regulations, procedures and guidelines for the School when it knew or ought to have known of serious systemic failures in the School during the Class Period;
- (mm) it failed to close the School and otherwise protect and care for those persons confined therein when it knew or ought to have known that it was appropriate and essential to do so in order to preserve the health, welfare and well being of the Survivor Class Members;
- (nn) it delegated, attempted to delegate, continued to delegate and improperly delegated its non delegable duties and responsibility for the Survivor Class when it was incapable to do so and when it knew or ought to have known that these duties and responsibilities were not being met;
- (oo) it failed to recognize and acknowledge harm once it occurred, to prevent additional harm from occurring and to, whenever and to the extent possible, provide appropriate treatment to those who were harmed;
- (pp) ~~it undertook a systematic program of forced integration and assimilation of the Aboriginal Persons through the institution of the School when it knew or ought to have known that doing so would cause profound and permanent cultural, psychological, emotional and physical injury to the members of the Survivor Class during and following the Class Period; and~~
- (qq) ~~it was in breach of its obligations to the Survivor Class Members and Family Class Members as set out in the Act and its Treaties with various~~

~~First Nations providing a right to education at a school to be established and maintained by Canada and which implicitly included the right to education in a safe environment free from abuse and the right to an education which would recognize Aboriginal beliefs, traditions, culture, language and way of life in a way that would not denigrate or eliminate these beliefs, traditions, culture, language and way of life.~~

67. Canada, through its employees, agents or representatives also breached its duty of care to protect the Survivor Class Members from sexual abuse by the student perpetrators while those particular Plaintiffs and the Survivor Class Members were attending and residing at the School with the result that the student perpetrators did in fact commit sexual abuse upon certain Plaintiffs and the Survivor Class Members.

68. Canada breached its fiduciary duties to the Plaintiffs and the Class and their families by failing to take any steps to protect the Survivor Class Members from sexual abuse.

68. In breach of its ongoing fiduciary duty to the Class, Canada failed and continues to fail, to adequately remediate the damage caused by its failures and omissions set out herein. In particular, Canada ~~has failed to take adequate measures to ameliorate the cultural, linguistic and social damage suffered by the class, and further has failed to~~ provide compensation for the physical, sexual and emotional abuse suffered by the Class.

69. ~~The Plaintiffs plead that Canada was in breach of its various treaty obligations set out through the establishment and operation of the School and are liable for such breaches. In contravention of the Treaties between the Government and First Nations and in contravention of the *United Nations Genocide Convention*, particularly Article 2(e) thereof to which Canada is a signatory, the Plaintiffs and other Aboriginal children were to be systemically assimilated into white society. In pursuance of that plan, they were~~

~~forced to attend the School and contact with their families was restricted. Their cultures and languages were taken from them with sadistic punishment and practices.~~

~~70. The systemic child abuse, neglect and maltreatment sustained by the children at the School during the Class Period, the effect and impact of which is still being felt by Survivor Class Members and Family Class Members, was in violation of the rights of children, specifically, but not limited to, the following rights set out in the *United Nations Convention on the Rights of the Child*, adopted by the United Nations in 1989, and ratified by Canada in December of 1991.~~

**G. DAMAGES SUFFERED BY CLASS MEMBERS**

71. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Survivor Class Members, including Boasa, suffered injury and damages including:

- (rr) isolation from family and community;
- ~~(ss) prohibition of the use of Aboriginal language and the practice of Aboriginal religion and culture and the consequential loss of facility and familiarity with Aboriginal language, religion and culture;~~
- (tt) forced confinement;
- (uu) assault and battery;
- (vv) sexual abuse;
- (ww) emotional abuse;
- (xx) psychological abuse;
- (yy) deprivation of the fundamental elements of an education;

- (zz) an impairment of mental and emotional health amounting to a severe and permanent disability;
- (aaa) a propensity to addiction;
- (bbb) an impaired ability to participate in normal family life;
- (ccc) alienation from family, spouses and children;
- (ddd) an impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;
- (eee) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the School experience;
- (fff) depression, anxiety and emotional dysfunction;
- (ggg) suicidal ideation;
- (hhh) pain and suffering;
- (iii) deprivation of the love and guidance of parents and siblings;
- (jjj) loss of self-esteem and feelings of degradation;
- (kkk) fear, humiliation and embarrassment as a child and adult, and sexual confusion and disorientation as a child and young adult;
- (lll) loss of ability fulfill cultural duties;
- (mmm) loss of ability to live in community; and
- (nnn) constant and intense emotional, psychological pain and suffering.

72. The foregoing damages resulted from Canada's breach of fiduciary duty, and/or negligence, assault, battery and/or breach of Aboriginal treaty rights.

73. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Family Class Members, including Chide Holwell, suffered injury and damages including:

- (ooo) they were separated and alienated from Survivor Class Members for the duration of their confinement in the School;
- (ppp) their relationships with Survivor Class Members were impaired, damaged and distorted as the result of the experiences of Survivor Class members in the School;
- (qqq) they suffered abuse from Survivor Class members as a direct consequence of their School experience;
- (rrr) they were unable to resume normal family life and experience with Survivor Class Members after their return from the Schools;
- ~~(sss) their culture and language was undermined and in some cases eradicated by, amongst other things, as pleaded herein, the forced assimilation of Survivor Class Members into non-aboriginal culture through the School.~~

74. Canada knew, or ought to have known, that as a consequence of its mistreatment of the children at the School, these Plaintiffs and class members would suffer significant mental, emotional, psychological and spiritual harm which would adversely affect their relationships with their families and their communities. ~~In fact, one of the purposes behind the operation of the School was to eliminate and damage relationships within families and communities with a view to promoting the assimilation of Aboriginal children into non-Aboriginal society.~~

#### H. PUNITIVE AND EXEMPLARY DAMAGES

75. The Plaintiffs plead that Canada, including its senior officers, directors, bureaucrats, ministers and executives, had specific and complete knowledge of the widespread physical, psychological, emotional, cultural and sexual abuses of Survivor Class Members which were occurring at the School during the Class Period. Despite this knowledge, Canada continued to operate the School and permit the perpetration of grievous harm to the Survivor Class Members.

~~76. In addition, Canada deliberately planned the eradication of the language, religion and culture of Survivor Class Members and Family Class Members. Their actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.~~

77. Full particulars respecting the daily care, operation and control of the School are within the Defendant's knowledge, control and possession.

78. The Plaintiffs plead and rely upon the following:

~~Canadian Charter of Rights and Freedoms, ss. 7, 15 and 24;~~

*Class Actions Act*, S.N.L. 2001, c. C-18.1.

*Constitution Act, 1982*, s. 35(1), being Schedule "B" to the *Canada Act, 1982* (U.K.), c. 11.

~~*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, ss. 3, 21, 22, and 23;~~

*The Indian Act*, S.C. 1951, c. 29, ss. 113-118;

~~*The Indian Act*, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122.~~

*The Newfoundland Act*, 1949 (U.K.), c. 22.

79. The Plaintiffs propose this action be tried in the City of St. John's, in the Province of Newfoundland.



**Dated** at St. John's, in the Province of Newfoundland and Labrador, this 19<sup>th</sup> day of April, 2012.

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leave granted  
R 7A08  
Apr 12/11  
Wmm

2008 01T0846 CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION

BETWEEN:

EMILY DICKMAN EDGAR LUCY and  
DOMINIC DICKMAN

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Brought under the *Class Actions Act*, S.N.L. 2001, c. C-18.1

AMENDED STATEMENT OF CLAIM

A. RELIEF SOUGHT BY THE PLAINTIFFS AGAINST CANADA

48. The Representative Plaintiffs, on their own behalf, and on behalf of the members of the Survivor Class and Family Class claim:

- (a) an Order certifying this proceeding as a Class Action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 and appointing Emily Dickman Edgar Lucy and Dominic Dickman as Representative Plaintiffs for the Survivor Class and any appropriate subgroup thereof;
- (b) a Declaration that Canada owed ~~and was in breach of exclusive~~ non-delegable, fiduciary, and ~~statutory and common-law~~ duties of care to the Plaintiffs and the other Survivor Class Members in relation to the establishment, funding, oversight, operation, supervision, control, maintenance, ~~confinement in;~~ ~~transport of Survivor Class Members to;~~ ~~obligatory attendance of Survivor Class Members at~~ and support of the Makkovik Boarding School in Makkovik, Newfoundland and Labrador (the "School");
- (c) a Declaration that Canada was negligent in the establishment, funding, oversight, operation, supervision, control, maintenance, ~~confinement in;~~ ~~transport of Survivor Class Members to;~~ ~~obligatory attendance of Survivor Class Members at~~ and support of the School;

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- (d) a Declaration the Canada was or is in breach of its exclusive and non-delegable fiduciary obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its ~~establishment, funding, operation, supervision, control, maintenance, oversight, confinement in, transport of Survivor Class Members, to obligatory attendance at the School of the School;~~
- (e) ~~a Declaration that Canada was or is in breach of its statutory duties pursuant to the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act") and its Treaty obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;~~
- (f) ~~a Declaration that the School caused cultural, linguistic and social damage and irreparable harm to the Survivor Class;~~
- (g) a Declaration that Canada is liable to the Plaintiffs and other Survivor Class Members for the damages caused by its breach of exclusive non-delegable fiduciary and, statutory and common law duties of care and for negligence in relation to the ~~establishment, funding, operation, supervision, control, maintenance, oversight, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;~~
- (h) non-pecuniary general damages for negligence, ~~loss of language and culture, breach of non-delegable~~ exclusive fiduciary and duties of care, statutory, treaty and common law duties in the amount of \$500 million or such other sum as this Honourable Court finds appropriate;
- (i) pecuniary general damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, breach of non delegable exclusive fiduciary and, statutory, treaty and common law duties of care in the amount \$500 million or such other sum as this Honourable Court deems just finds appropriate;
- (j) exemplary and punitive damages in the amount of \$100 million or such other sum as this Honourable Court deems just;
- (k) damages in the amount of ~~\$100 million or such other sum as this Honourable Court deems just, pursuant to the *Family Law Act*, R.S.N., 1990, and its predecessors;~~
- (l) prejudgment and postjudgment interest pursuant to the provisions of the *Judicature Act*, R.S.N. 1990, c. J-4 ; and
- (m) the costs of this action on a substantial indemnity scale.

## B. DEFINITIONS

49. The following definitions apply for the purposes of this Claim:

- (a) "Aboriginal", "Aboriginal People(s)" or "Aboriginal Person(s)" means a person whose rights are recognized and affirmed by the *Constitution Act, 1982*, s. 35, being Schedule "B" to the *Canada Act, 1982* (U.K.), 1982. c. 11, specifically members of the Metis and Inuit nations;
- (b) "Aboriginal Right(s)" means rights recognized and affirmed by the *Constitution Act, 1982*, s. 35, being Schedule "B" to the *Canada Act, 1982* (U.K.), 1982. c. 11;
- (c) "Agents" mean the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of the School;
- (d) "Canada" means Her Majesty the Queen in Right of Canada, as represented in this proceeding by the Attorney General of Canada;
- (e) "Class" or "Class Members" means all members of the Survivor Class and the Family Class;
- (f) "Class Period" means March 31, 1949 to ~~December 31, 1996~~ and the date of closure of the Makkovik Boarding School;
- (g) "Excluded Persons" means all persons who attended an Eligible Indian Residential School as defined by the Indian Residential Schools Settlement Agreement dated May 10, 2006 (the "Agreement") and all persons who are otherwise eligible, pursuant to the Agreement, to receive a Common Experience Payment or pursue a claim through the Individual Assessment Process, as defined by the Agreement;
- (h) "Family Class" means:
  - (i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;
  - ~~(ii) the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;~~
  - (iii) a former spouse of a Survivor Class Member;
  - (iv) a child or other lineal descendent of a grandchild of a Survivor Class Member;

- (v) 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;
- (vi) 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;
- (vii) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death;
- (i) "School" means the Makkovik Boarding School, located in Makkovik, Newfoundland and Labrador;
- (j) "Survivor Class" means:

All persons who attended the School between March 31, 1949 and ~~December 31, 1996~~ the date of closure of the Makkovik Boarding School.

### C. THE PARTIES

#### i. Representative Plaintiffs

~~50. The Plaintiff, Emily Dickman ("Emily"), resides in Goose Bay, Newfoundland and Labrador ("Newfoundland"). Emily was born on March 26, 1942 and attended the School in Makkovik, Newfoundland for two (2) years between 1950 and 1952. Emily attended three (3) Residential Schools in Newfoundland, in total, between 1949 and 1957. Emily is a proposed representative plaintiff for the Survivor Class.~~

3. The Plaintiff, Edgar Lucy ("Edgar"), resides in Goose Bay, Newfoundland and Labrador ("Newfoundland"). Edgar was born on June 6, 1942 and attended the School in Makkovik, Newfoundland for five (5) years between 1949 and 1954. Edgar is a the representative plaintiff for the Survivor Class.

51. The Plaintiff, Dominic Dickman ("Dominic") resides in Goose Bay, Newfoundland. Dominic was born on January 20, 1968 and his mother, Emily Dickman, attended the School

in Newfoundland for two (2) years between 1950 and 1952. Dominic is a ~~proposed~~ the representative plaintiff for the Family Class.

52. The ~~proposed~~ Representative Plaintiffs do not purport to advance claims on behalf of any persons who are otherwise entitled to compensation pursuant to the terms of the Agreement.

53. Neither, the ~~proposed~~ Representative Plaintiffs' claim nor the classes they propose to represent overlap with the terms of the order issued by Regional Senior Justice Winkler of the Ontario Superior Court of Justice, dated March 8, 2007.

ii. The Defendant

54. The Defendant, Her Majesty the Queen in Right of Canada, is represented in this proceeding by the Attorney General of Canada ("Canada"). Canada represents the interests of the Minister of the Department of Indian Affairs Canada, who was, at all material times, responsible for the maintenance, funding, oversight or management and ~~operation~~ of the School, either on its own or in combination with other of its governmental agents or servants..

55. Once the Province of Newfoundland and Labrador entered Confederation in 1949, Canada assumed and possessed exclusive Legislative and executive responsibility over aboriginal persons, including the Classes. As aboriginal persons in the 'new' province in 1949 were legally "Indians" for the purposes of section 91(24) of the *British North America Act, 1867*, they were proper subjects of federal jurisdiction.

56. Canada's participation in the funding and operation of the School breached its exclusive duty of care owed to the Classes which was also in breach of its non-delegable fiduciary obligations and constitutional obligations owed to aboriginal persons.

57. Alternatively, even if Canada did not materially operate or manage the school, it nevertheless breached its fiduciary duties by failing to properly do so and protect the Class as it alone possessed singular and exclusive legal jurisdiction over aboriginal persons.

#### **D. RESIDENTIAL SCHOOL SYSTEM – OPERATION OF THE SCHOOL**

##### i. Background - Residential School History Generally

58. Residential Schools were established by Canada as early as 1874, for the education of Aboriginal children. These children were taken from their homes and their communities and transported to Residential Schools where they were confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them.

59. Commencing in 1911, Canada entered into formal agreements with various Churches and other philanthropic organizations (collectively the "Churches") for the operation of such schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of the Residential Schools. The Churches assumed the day-to-day operation of the Residential Schools under the control, supervision and direction of Canada, for which the Canada paid the Churches a per capita grant calculated to cover part of the cost of the Residential School operation.

60. As of 1920, the Residential School Policy included compulsory attendance at Residential Schools for all Aboriginal children aged 7 (seven) to 15 (fifteen). This approach to

the control and operation of the Residential Schools system continued until April 1, 1969, at which time Canada assumed the sole operation and administration of the Residential Schools from the Churches, excepting certain cases where Churches continued to act as agents of Canada.

61. Canada removed Aboriginal Persons, usually young children, from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. Canada controlled all aspects of the admission of Aboriginal Persons to the Residential Schools including arrangements for the care of such persons over holiday periods and the methods of transporting children to and from Residential Schools.

62. ~~The same Similar Residential Schools policy was implemented and effected in~~ existed in Newfoundland, which joined Canada on March 31, 1949. Accordingly, the claim against Canada is limited temporally to the time when the Canada became legally responsible for Aboriginal Persons residing in Newfoundland, or 1949, and beyond.

63. Aboriginal Persons were often taken from their families without the consent of their parents or guardians. While the stated purpose of the Residential Schools from their inception was the education of Aboriginal children, their true purpose was the complete integration and assimilation of Aboriginal children into mainstream Canadian society and the obliteration of their traditional language, culture and religion. Many children attending Residential Schools were also subject to repeated and extreme physical, sexual and emotional abuse, all of which continued until the year 1996, when the last Residential School operated by Canada was closed.



64. During the Class Period, children at the school were subjected to systemic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

65. The accommodation was crowded, cold, and sub-standard. Aboriginal children were underfed and ill nourished, forbidden to speak their native languages or to practice the customs and traditions of their culture. They were deprived of love and affection from their families and of the support that a child would normally expect to have from those in positions of trust and authority. Aboriginal children were also subjected to corporal punishment, assaults, including physical and sexual, and systematic child abuse.

**E. CANADA'S ASSUMPTION OF DUTIES WHEN NEWFOUNDLAND JOINED CONFEDERATION IN 1949**

66. Around the time of Confederation, two separate legal opinions commissioned by the Federal Department of Justice confirmed that the Federal Crown possessed exclusive legislative and executive responsibility in relation to Aboriginal persons, including the Inuit and Eskimo, living in Newfoundland and Labrador.

67. The records of the Federal departments, agencies, ministers and bureaucrats responsible for negotiating the *Terms of Union* show that from 1946 the Federal Government recognized that under the terms of the *British North America Act*, section 91(24), it would have to assume full responsibility for the native people of the new province.

68. As Canada's legal responsibility to Aboriginals was constitutional in nature, it was prohibited from attempting to cede or delegate such duties to any other entity, including the Province itself. Given the broad duties owed by Canada to Aboriginal persons, the welfare and education of Aboriginal children cannot be said to have resided with the Crown in right of the Province of Newfoundland after March 31, 1949.

69. The entry of Newfoundland and Labrador into Confederation brought its Aboriginal population fully within exclusive federal jurisdiction. At the time of Confederation, Canada was aware that any union with Newfoundland and Labrador would have had an Aboriginal component and legal responsibility associated with it.

70. In 1947, in advance of preparing for the *Terms of Union* negotiations, the Federal Government prepared a document for the Newfoundland delegation which outlined the nature of Federal involvement with and for Aboriginal peoples. Amongst other things, under classes of subjects in which the Federal Parliament exercised exclusive jurisdiction, 'Indians and lands reserved for Indians' was listed and when outlining the responsibilities that the various Federal departments would have for Newfoundland, 'Indian Affairs' was listed under the Department of Mines and Resources.

71. The function of the Indian Affairs Branch was described as administering the "affairs of the Indians of Canada [which] included the control of their education". The Federal Department of Mines and Resources stated, at that time, that the Dominion assumes full responsibility for the welfare, including education, of Indians and Eskimos, a response which went on at length to describe the day and residential school system.

72. In and around the time of Confederation, a number of Federal legal opinions on the question were prepared, most of them acknowledging sole federal responsibility for Newfoundland's Aboriginal people. Under Term 3 of the *Terms of Union*, for matters not specifically referred to, things were deemed to be as if Newfoundland had joined under the terms of the *Constitution Act, 1867*.

73. When Canada sent its official version of the proposed *Terms of Union* to the National Convention in Newfoundland in October 1947, it had already acknowledged that under the terms of the *British North America Act* it had exclusive jurisdiction in the area of Aboriginal peoples. By deleting the reference to native people in the proposed draft *Terms of Union* and writing in Federal responsibility, as outlined in the *British North America Act*, the Federal Government acknowledged *de facto* jurisdiction for the Indians, Inuit and Eskimos of Newfoundland and Labrador.

74. At the time of Confederation, the Premier, Joseph Smallwood, actually refused to sign an agreement with Canada which would have transferred federal responsibility for native persons to the Province. The Province maintained that the fiduciary obligations for Aboriginal persons remained, and belonged to the federal government.

75. Following Confederation, in December 1949, Canada established an Interdepartmental Committee on Labrador Indians and Eskimos which requested another legal opinion from the Justice Department which stated that in the matter of Newfoundland "Indians and Eskimos":

"...the federal Parliament has exclusive legislative authority in relation to Indians ... which, of course, means that the provincial legislature has no authority to enact legislation directed at or dealing with [matters] in relation to Indians.... It is the responsibility of the federal government to formulate and carry out all policies that are directed at dealing with Indian or Indian problems. Such policy is to be formulated by Parliament and the executive. This

responsibility carries with it the responsibility of providing money to be devoted to the carrying of our policies in relation to the Indians.”

76. This opinion provided by the Justice Department is consistent with the assumptions made during the pre-Confederation talks: Aboriginal persons, pursuant to the *British North America Act*, were Canada’s responsibility. Even before Newfoundland’s entry into Confederation, various federal departments had included in their departmental estimates sizeable amounts towards relief, services and expenditures for the native populations in Newfoundland and Labrador. This demonstrates that the federal government believed it had a responsibility to fulfill in regard to the Eskimo and Inuit in Labrador and that it would be called upon to provide programs and assistance, funding, oversight and implementation of certain programs, including education.

77. In fact, the *Terms of Union* indirectly provided that the then Aboriginal population in Newfoundland fell under federal jurisdiction. Section three of the *Terms of Union* affirms that: “[t]he *Constitution Acts, 1867 to 1940* apply to the Province of Newfoundland in the same way, and to the like extent as they apply to the provinces heretofore comprised in Canada”.

78. The *Constitution Act, 1867* itself states that “the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say ... Indians, and Lands reserved for the Indians”.

79. Following Confederation in 1949, and by 1951, Canada had agreed to pay the bills submitted by Newfoundland for “Indians and Eskimos” for the period 1949-1950. At that same time, Newfoundland also provided Canada with an estimate of provincial expenditures with respect to Eskimo and Inuit in Labrador for which it expected payment. Throughout the

1950's and 1960's, programs for aboriginal education in Newfoundland and Labrador were paid for by Canada at the rate of 90% for Indian communities and 40% in Inuit communities.

80. A 1951 memorandum prepared by the Chairman of the Inter-departmental Committee on Newfoundland Indians and Eskimos formed the basis of much of Canada's position for the future:

"Section 3 of the *Terms of Union* stipulates that the provisions of the *BNA Act* shall apply to Newfoundland except insofar as varied by the Terms. Since the Terms of Union do not refer to Indians and Eskimos and since head 24 of section 91 of the *BNA Act* places 'Indians and lands reserved for Indians' exclusively under Federal jurisdiction, it seems clear that the Federal Government is responsible for the native population resident in Labrador."

81. By 1954, Newfoundland requested that Canada provide both operating and capital expenditures towards education for Eskimos and Inuit. The 1954 Agreement between Newfoundland and Canada stipulated that Canada would assume 66% of capital expenditures on behalf of Eskimos in Newfoundland and 100% of capital expenditures on behalf of Indians in the fields of health, welfare and education. This agreement reached between the Premier of Newfoundland and Canada in 1954 provided for the re-assumption of federal constitutional responsibility over aboriginal persons in the new province of Newfoundland and Labrador.

82. Just four years into this Agreement, Newfoundland requested further funds from Canada to provide education and housing for both Indians and Inuit. Shortly thereafter, in 1964, the Premier of Newfoundland asked Prime Minister Pearson, to either have Canada assume sole and full responsibility for Indians and Inuit or to at least increase funding to the level of support being provided by Canada to other provinces in Canada.

83. At the same time, the Pearson government requested a second legal opinion from the Justice Department. On November 23, 1964, the Deputy Attorney General provided that opinion and determined that:

"...there is no provision in the *Indian Act* excluding any portion of Canada from its application. Mr. Varcoe's opinion [the 1950 Justice Department opinion] as to the constitutional position is, in my opinion, correct. The fact that there is no mention of Eskimos or Indians in the *Terms of Union* means only that the constitutional position with respect thereto has not changed with regard to Newfoundland."

84. As a result, by 1965, Canada had agreed to provide the same resources and programs to Indians, Inuit and Eskimos in Labrador as were provided to similar groups elsewhere in Canada. The proposed agreements were to be: (a) renegotiated and reviewed every five years; (b) a Federal-Provincial committee was to be established to monitor expenditures and propose budgets for approval by both governments; (c) Newfoundland would be reimbursed for 90% of the Provinces' capital expenditures for Indians and Eskimos for the period 1954 – 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments.

85. Amongst other things, this "Contribution Agreement" was designed to provide services to the communities of Sheshatshit and Davis Inlet, including education. The Contribution Agreement identified the amount of funding available as (a) 90% from Canada; and (b) 10% from Newfoundland. The Contribution Agreement also established a management committee composed of federal officials, provincial officials and representatives of the Davis Inlet and Sheshatshit communities.

86. At the same time, the then Prime Minister also proposed certain increases in Canadian contributions for "Indians and Eskimos" in Newfoundland and Labrador which ultimately

constituted an agreement between Canada and Newfoundland, providing, amongst other things, for:

- (a) Canada to pay Newfoundland up to \$1,000,000.00 per annum for 90% of the Province's Innu and Inuit expenditures (except where otherwise covered under other federal-provincial agreements);
- (b) establishment of a federal-provincial committee to monitor provincial expenditures;
- (c) continuation of federal funding for Inuit communities in Labrador; and
- (d) agreements to be reviewed and renegotiated every five years to "ensure that they continued to meet the changing circumstances and needs of the Eskimo and Indian residents in Labrador.

87. A Royal Commission on Labrador was convened in 1973 with a mandate to conduct a full inquiry into the economic and sociological conditions in Labrador. In addition to recommending to Newfoundland that it immediately renegotiate its funding agreements with Canada, given that amounts paid there under were inadequate and insufficient, the Commission also made the following determination:

"The Commission finds itself unable to determine a sound rationale for the practice under this Agreement of having the Province pay a percentage of cost for services to Indians and Eskimos. This is not the practice in other parts of Canada. In the view of the Commission, the Federal Government, as it does elsewhere, should be prepared to accept full fiscal responsibility unless the Province wishes to ensure its continued direct involvement in the program for Indians and Eskimos through sharing part of the cost..."

88. Many of the recommendations of the Royal Commission were implemented through the Federal-Provincial funding agreements which were ratified in the years following publication of the Commission Report. For example, an interim agreement was in place between 1976 and 1981 and funded projects which were valued at \$22 million in Labrador. Negotiations between the Province and Federal government led to the signing of two agreements in July 1981:

- (i) Canada-Newfoundland Community Development Subsidiary Agreement, valued at \$38,996,000.00, payable by the Federal government; and
- (ii) Native People's of Labrador Agreement, valued at \$38,831,00.00 federal payments/contributions.

89. The Labrador Agreement covered the following Indian and Inuit communities: Davis Inlet, Northwest Rivet, Nain, Hopedale, Makkovik, Rigolet and Postville. Pursuant to that Agreement, between 1981 and 1986, Canada contributed 90% of the costs of the programs and services in these Indian communities and 60% of the costs of those delivered in the Inuit communities. In total, Canada contributed \$29,135,100.00 in this respect between 1981 and 1986.

90. In August 1985, Canada entered into a further contribution agreement with Newfoundland and Labrador, "for the benefit of native peoples in Labrador", recognizing Canada's "special interest in the social and economic development of Inuit and Indian People." The operation of education was the largest budget allocation item pursuant to this Agreement, for a total of \$1,530,000.00 (1985/1986 fiscal year), 71% of which was Canada's responsibility.

91. Fiduciary obligations are and were owed by Canada to Aboriginal persons, peoples who, pursuant to section 35(2) of the *Constitution Act 1982* include the Indian, Inuit and Metis. This fiduciary relationship between Canada and Aboriginal persons was and is *sui generis* in nature. Accordingly, a fiduciary duty between Canada and Aboriginal persons in Newfoundland and Labrador arose at the moment of Confederation in 1949.

92. Canada has acknowledged its own sole singular responsibility over Indians and Inuit in Newfoundland by accepting its obligation to financially assist or contribute. In any event,



Canada has always assumed some level of legal responsibility for aboriginal persons in Newfoundland and Labrador. Having undertaking discretionary control over a cognizable Indian interest, a fiduciary duty existed between Canada and the Class in these circumstances.

93. As the nature of Canada's relationship with Aboriginal persons gives rise to a non-delegable duty to preserve, protect and promote welfare and education of Aboriginal children, the responsibility for its execution rested solely with Canada.

47. In the alternative, if Canada failed to properly assume those common law and constitutional obligations, it breached its, fiduciary and common law duties owed to the class by failing to do so.

ii. Canada's Operation of the School in Newfoundland

48. The School was located in Makkovik, Newfoundland. It was first established in the 1950's and ceased operation as a residential school for Aboriginal children in the 1970's.

49. The purpose of the School was to provide education to Aboriginal children between the ages of 6 and 16 years who attended the School from various First Nations bands and communities in Newfoundland. The School eventually became a vehicle for assimilating Aboriginal children through the eradication of their native languages, cultures and spiritual beliefs.

50. The School was initially founded and established by the Moravian Mission. Once Confederation occurred in March 1949 and Newfoundland joined Canada, the International Grefnell Association began ceasing its involvement, funding and role in the School. At all material times, the staff members at the School were employees, servants and/or agents of

~~Canada~~. The funding provided by Canada following Confederation was inadequate to meet the costs of operating and maintaining the School, and in particular, to meet the daily and educational needs of the students at the School. As a result, the care provided to the students and the conditions at the School were poor, the staff hired were unskilled and/or unsuitable for dealing with children and the conditions at the School were unsuitable and inappropriate for an educational facility for children.

51. ~~In many cases, the Aboriginal children were forced to attend the School by representatives, agents or servants of Canada. The Aboriginal children who attended the School were separated from their families, uprooted and taken to the School, where they were placed within the control of Canada. For all intents and purposes, the children who attended the School, were wards of the School and Canada.~~

52. ~~Canada participated in the funding, oversight carried out that operation and administration of the School until the late 1970's. These operative and administrative responsibilities, carried out on behalf of Canada or by its agents included:~~

- (a) the operation and maintenance of the School during the Class Period;
- (b) the care and supervision of all members of the Survivor Class, and for supplying all the necessaries of life to Survivor Class members *in loco parentis*;
- (c) the provision of educational and recreational services to the Survivor Class while in attendance at the School and control over all persons allowed to enter the School premises at all material times;
- (d) the selection, supply and supervision of teaching and non-teaching staff at the School and reasonable investigation into the character, background and psychological profile of all individuals employed to teach or supervise the Survivor Class;

- (e) inspection and supervision of the School and all activities taking place therein, and for full and frank reporting to Canada respecting conditions in the School and all activities taking place therein;
- (f) transportation of Survivor Class members to and from the School; and
- (g) communication with and reporting to the Family Class respecting the activities and experiences of Survivor Class members while attending the School.

53. Attempts to provide educational opportunities to children confined in the School were ill-conceived and poorly executed by inadequately trained teaching staff. The result was to effectively deprive the Aboriginal children of any useful or appropriate education. Very few survivors of the School went on to any form of higher education.

54. The conditions and abuses in the School during the Class Period were well-known to Canada.

55. Any attempt by Canada to delegate its duties, responsibilities or obligations to the Class to the Province of Newfoundland is unlawful and in breach of its exclusive and non-delegable fiduciary duties owed to the class.

#### **F. CANADA'S BREACHES OF DUTIES TO THE CLASS MEMBERS**

56. Canada has a fiduciary relationship with Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled and regulated the School during the Class Period, either on its own or in conjunction with the Province.

57. Canada, and its respective servants and agents compelled members of the Survivor Class to leave their homes, families and communities, and forced members of the Survivor Class to attend (and sometimes live in) the School, all without lawful authority or the

permission and consent of Survivor Class members or that of their parents. Such confinement was wrongful, arbitrary and for improper purposes.

58. Survivor Class members were systematically subjected to the institutional conditions, regime and discipline of the School without the permission and consent of Survivor Class members or that of their parents, and were also subjected to wrongful acts at the hands of Canada while confined therein.

59. In particular, Emily Edgar experienced emotional abuse during her his time at the School by teachers, "caregivers" and other students. Many of the children at the School experienced serious physical, mental and abuse during their time at the School from both teachers and students. Many of the children at the School also experienced sexual, physical and verbal abuse, perpetrated against them by teachers, adults in positions of authority or from other students.

60. Dominic, as a member of the Family Class, has experienced emotional abuse due to his mother's Emily Dickman's inability to participate in normal family life as result harm she suffered during her attendance at the School.

61. All persons, including Emily Edgar, who attended the School ~~did so as wards of Canada, with Canada as their guardian,~~ and were persons to whom Canada owed the highest non-delegable, fiduciary, ~~moral, statutory~~ and common law duties, which included, but were not limited to, the duty to ensure that reasonable care was taken of the Survivor Class while at the School, the duty to protect the Survivor Class while at the School and the duty to protect the Survivor Class from intentional torts perpetrated on them while at the School. These non-delegable and fiduciary duties were performed negligently and tortiously by Canada, in

breach of its special responsibility to ensure the safety of the Survivor Class while at the School.

62. Canada was responsible for:

- (a) ~~the administration of the Act and its predecessor statutes as well as any other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;~~
- (b) the promotion of the health, safety and well being of Aboriginal Persons in Newfoundland during the Class Period;
- (c) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessor ministries and departments during the Class Period;
- (d) decisions, procedures, regulations promulgated, operations and actions taken by the Department of Indian Affairs and Northern Development and, its employees, servants, officers and agents in Canada during the Class Period;
- (e) overseeing the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the School and for the creation, design and implementation of the program of education for Aboriginal Persons confined therein during the Class Period;
- (f) the selection, control, training, supervision and regulation of the designated operators and their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons confined in the Residential School during the Class Period;
- (g) the provision of all educational services and opportunities to the Survivor Class members, pursuant to the provisions of the Act and any other statutes relating to Aboriginal Persons during the Class Period;
- (h) ~~transportation of Survivor Class Members to and from the School and to and from their homes while attending the School during the Class Period;~~
- (i) ~~preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities;~~
- (j) the care and supervision of all members of the Survivor Class while they were in attendance at the School during the Class Period and for the supply of all the necessities of life to Survivor Class Members, *in loco parentis*, during the Class Period;

- (k) the provision of educational and recreational services to the Survivor Class while in attendance at the School during the Class Period;
- (l) inspection and supervision of the School and all activities that took place therein during the Class Period and for full and frank reporting to Canada and to the Family Class Members with respect to conditions in the School and all activities that took place therein during the Class Period; and
- (m) ~~communication with and reporting to the Family Class with respect to the activities and experiences of Survivor Class Members while attending the School during the Class Period.~~

63. During the Class Period, male and female Aboriginal children, including Emily Edgar, were subjected to gender specific, as well as non-gender specific, systematic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

64. At all material times, the children who attended the School were within the knowledge, contemplation, power or control of Canada and were subject to the unilateral exercise of Canada's (or its delegates') power or discretion. By virtue of the relationship between the children and Canada, being one of trust, reliance and dependence, by the Aboriginal children, Canada owed a fiduciary obligation to ensure that the students who attended the School were treated fairly, respectfully, safely and in all other ways, consistent with the obligations of a parent or guardian to a child under its care and control.

65. At all material times, Canada owed a fiduciary obligation to the students who attended the School to act in the best interests of those students and to protect them from any abuse, be it mental, emotional, physical, sexual or otherwise. The children at the School relied upon Canada, to their detriment, to fulfill its fiduciary obligations.

66. Through its servants, officers, employees and agents, Canada was negligent and in breach of its non-delegable fiduciary, ~~moral, statutory,~~ and common law duties of care to the Survivor Class and the Family Class during the Class Period. Particulars of the negligence and breach of duty of Canada include the following:

- (a) it systematically, negligently, unlawfully and wrongfully delegated its fiduciary and other responsibility and duties regarding the education of and care for Aboriginal children to others;
- (b) it systematically, negligently, unlawfully and wrongfully admitted and confined Aboriginal children to the School;
- ~~(c) it acted without lawful authority and not in accordance with any statutory authority pursuant to or as contemplated by the provisions of the Act or any other statutes relating to Aboriginal Persons as:~~
  - ~~(i) said provisions are and were *ultra vires* the Parliament of Canada and of no force and effect in law;~~
  - ~~(ii) the conduct of Canada in placing the Aboriginal children in the School, confining them therein, and treating or permitting them to be treated there as set forth herein was in breach of Canada's fiduciary obligations to the Survivor Class and Family Class Members, which was not authorized or permitted by any applicable legislation and was, to the extent such legislation purported to authorize such fiduciary breach, of no force and effect and/or *ultra vires* the Parliament of Canada; and~~
  - ~~(iii) Canada routinely and systematically failed to act in accordance with its own laws, regulations, policies and procedures with respect to the confinement of Aboriginal children in the School, which confinement was wrongful.~~
- (d) it delegated to and contracted with the Churches and other Religious organizations and the Province to implement its program of forced integration, confinement and abuse;
- (e) it failed to adequately screen and select the organizations and individuals to which it delegated the implementation of its Residential School program;
- (f) it failed to adequately supervise and control the School and its agents operating same under its jurisdiction;

- (g) it deliberately and chronically deprived the Survivor Class Members of the education they were entitled to or were led to expect from the School or of any adequate education;
- (h) it designed, constructed, maintained and operated the School buildings which were sub-standard, inadequate to the purpose for which they were intended and detrimental to the emotional, psychological and physical health of the Survivor Class;
- (i) it failed to provide funding for the operation of the School that was sufficient or adequate to supply the necessities of life to Aboriginal children confined to them;
- (j) it failed to respond appropriately or at all to disclosure of abuses in the School during the Class Period;
- ~~(k) it conspired with the operators of the schools to suppress information about abuses taking place in the School during the Class Period;~~
- ~~(l) it assaulted and battered the Survivor Class Members and permitted them to be assaulted and battered during the Class Period;~~
- (m) it permitted an environment which permitted and allowed student-upon-student abuse;
- ~~(n) it forcibly confined the Survivor Class Members and permitted them to be forcibly confined during the Class Period;~~
- (o) it was in breach of its fiduciary duty to its Wards the Survivor Class Members by reason of the misfeasances, malfeasances and omissions set out above;
- (p) it failed to inspect or audit the School adequately or at all;
- (q) it failed to implement an adequate system of evaluation, monitoring and control of teachers, administrators and non-teaching staff of the School during the Class Period;
- (r) it failed to periodically reassess its regulations, procedures and guidelines for the School when it knew or ought to have known of serious systemic failures in the School during the Class Period;
- (s) it failed to close the School and otherwise protect and care for those persons confined therein when it knew or ought to have known that it was appropriate and essential to do so in order to preserve the health, welfare and well being of the Survivor Class Members;
- (t) it delegated, attempted to delegate, continued to delegate and improperly delegated its non delegable duties and responsibility for the Survivor Class



when it was incapable to do so and when it knew or ought to have known that these duties and responsibilities were not being met;

- (u) it failed to recognize and acknowledge harm once it occurred, to prevent additional harm from occurring and to, whenever and to the extent possible, provide appropriate treatment to those who were harmed;
- ~~(v) it undertook a systematic program of forced integration and assimilation of the Aboriginal Persons through the institution of the School when it knew or ought to have known that doing so would cause profound and permanent cultural, psychological, emotional and physical injury to the members of the Survivor Class during and following the Class Period; and~~
- ~~(w) it was in breach of its obligations to the Survivor Class Members and Family Class Members as set out in the Act and its Treaties with various First Nations providing a right to education at a school to be established and maintained by Canada and which implicitly included the right to education in a safe environment free from abuse and the right to an education which would recognize Aboriginal beliefs, traditions, culture, language and way of life in a way that would not denigrate or eliminate these beliefs, traditions, culture, language and way of life.~~

67. Canada, through its employees, agents or representatives also breached its duty of care to protect the Survivor Class Members from sexual abuse by the student perpetrators while those particular Plaintiffs and the Survivor Class Members were attending and residing at the School with the result that the student perpetrators did in fact commit sexual abuse upon certain Plaintiffs and the Survivor Class Members.

68. Canada breached its fiduciary duties to the Plaintiffs and the Class and their families by failing to take any steps to protect the Survivor Class Members from sexual abuse.

69. In breach of its ongoing fiduciary duty to the Class, Canada failed and continues to fail, to adequately remediate the damage caused by its failures and omissions set out herein. In particular, ~~Canada has failed to take adequate measures to ameliorate the cultural, linguistic and social damage suffered by the class, and further~~ has failed to provide compensation for the physical, sexual and emotional abuse suffered by the Class.

70. ~~The Plaintiffs plead that Canada was in breach of its various treaty obligations set out through the establishment and operation of the School and are liable for such breaches. In contravention of the Treaties between the Government and First Nations and in contravention of the *United Nations Genocide Convention*, particularly Article 2(e) thereof to which Canada is a signatory, the Plaintiffs and other Aboriginal children were to be systemically assimilated into white society. In pursuance of that plan, they were forced to attend the School and contact with their families was restricted. Their cultures and languages were taken from them with sadistic punishment and practices.~~

71. ~~The systemic child abuse, neglect and maltreatment sustained by the children at the School during the Class Period, the effect and impact of which is still being felt by Survivor Class Members and Family Class Members, was in violation of the rights of children, specifically, but not limited to, the following rights set out in the *United Nations Convention on the Rights of the Child*, adopted by the United Nations in 1989, and ratified by Canada in December of 1991.~~

#### G. DAMAGES SUFFERED BY CLASS MEMBERS

72. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province for whom Canada is vicariously liable, the Survivor Class Members, including Emily Edgar, suffered injury and damages including:

- (a) isolation from family and community;
- (b) ~~prohibition of the use of Aboriginal language and the practice of Aboriginal religion and culture and the consequential loss of facility and familiarity with Aboriginal language, religion and culture;~~

- (c) forced confinement;
- (d) assault and battery;
- (e) sexual abuse;
- (f) emotional abuse;
- (g) psychological abuse;
- (h) deprivation of the fundamental elements of an education;
- (i) an impairment of mental and emotional health amounting to a severe and permanent disability;
- (j) a propensity to addiction;
- (k) an impaired ability to participate in normal family life;
- (l) alienation from family, spouses and children;
- (m) an impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;
- (n) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the School experience;
- (o) depression, anxiety and emotional dysfunction;
- (p) suicidal ideation;
- (q) pain and suffering;
- (r) deprivation of the love and guidance of parents and siblings;
- (s) loss of self-esteem and feelings of degradation;
- (t) fear, humiliation and embarrassment as a child and adult, and sexual confusion and disorientation as a child and young adult;
- (u) loss of ability fulfill cultural duties;
- (v) loss of ability to live in community; and
- (w) constant and intense emotional, psychological pain and suffering.

73. The foregoing damages resulted from Canada's breach of fiduciary duty, and/or negligence, ~~assault, battery and/or breach of Aboriginal treaty rights.~~

74. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Family Class Members, including Dominic, suffered injury and damages including:

- (a) they were separated and alienated from Survivor Class Members for the duration of their confinement in the School;
- (b) their relationships with Survivor Class Members were impaired, damaged and distorted as the result of the experiences of Survivor Class members in the School;
- (c) they suffered abuse from Survivor Class members as a direct consequence of their School experience;
- (d) they were unable to resume normal family life and experience with Survivor Class Members after their return from the Schools;
- ~~(e) their culture and language was undermined and in some cases eradicated by, amongst other things, as pleaded herein, the forced assimilation of Survivor Class Members into non-aboriginal culture through the School.~~

75. Canada knew, or ought to have known, that as a consequence of its mistreatment of the children at the School, these Plaintiffs and class members would suffer significant mental, emotional, psychological and spiritual harm which would adversely affect their relationships with their families and their communities. ~~In fact, one of the purposes behind the operation of the School was to eliminate and damage relationships within families and communities with a view to promoting the assimilation of Aboriginal children into non-Aboriginal society.~~

## H. PUNITIVE AND EXEMPLARY DAMAGES

76. The Plaintiffs plead that Canada, including its senior officers, directors, bureaucrats, ministers and executives, had specific and complete knowledge of the widespread physical, psychological, emotional, cultural and sexual abuses of Survivor Class Members which were occurring at the School during the Class Period. Despite this knowledge, Canada continued to operate the School and permit the perpetration of grievous harm to the Survivor Class Members.

~~77. In addition, Canada deliberately planned the eradication of the language, religion and culture of Survivor Class Members and Family Class Members. Their actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.~~

78. Full particulars respecting the daily care, operation and control of the School are within the Defendant's knowledge, control and possession.

79. The Plaintiffs plead and rely upon the following:

~~*Canadian Charter of Rights and Freedoms*, ss. 7, 15 and 24;~~

*Class Actions Act*, S.N.L. 2001, c. C-18.1.

*Constitution Act, 1982*, s. 35(1), being Schedule "B" to the *Canada Act, 1982* (U.K.), c. 11.

~~*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, ss. 3, 21, 22, and 23;~~

~~*The Indian Act*, S.C. 1951, c. 29, ss. 113-118;~~

~~*The Indian Act*, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122.~~

*The Newfoundland Act*, 1949 (U.K.), c. 22.

80. The Plaintiffs propose this action be tried in the City of St. John's, in the Province of Newfoundland.

**Dated** at St. John's, in the Province of Newfoundland and Labrador, this 19<sup>th</sup> day of April, 2012.

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Leave granted  
R 7A08  
Apr 12/12  
Wm

2008 01T0845CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION

BETWEEN:

SARAH ASIVAK and ~~DELANO FLOWERS~~  
JAMES ASIVAK

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Brought under the *Class Actions Act*, S.N.L. 2001, c. C-18.1

AMENDED STATEMENT OF CLAIM

A. RELIEF SOUGHT BY THE PLAINTIFFS AGAINST CANADA

1. The Representative Plaintiffs, on their own behalf, and on behalf of the members of the Survivor Class and Family Class claim:

- (a) an Order certifying this proceeding as a Class Action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 and appointing Sarah Asivak and ~~Delano Flowers~~ James Asivak as Representative Plaintiff for the Survivor Class and Family Class and any appropriate subgroup thereof;
- (b) a Declaration that Canada owed ~~and was in breach of~~ exclusive non-delegable fiduciary and ~~statutory and common law~~ duties of care to the Plaintiffs and the other Survivor Class Members in relation to the establishment, funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to,~~ obligatory attendance of Survivor Class Members at and support of the Nain Boarding School in Nain, Labrador (the "School");
- (c) a Declaration that Canada was negligent in the establishment, funding, oversight, operation, supervision, control, maintenance, ~~confinement in,~~ transport of Survivor Class Members to, ~~obligatory attendance of Survivor Class Members at~~ and support of the School;

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- (d) a Declaration the Canada was or is in breach of its exclusive and non-delegable fiduciary obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, oversight, confinement in, transport of Survivor Class Members, to obligatory attendance at the School of the school;
- (e) ~~a Declaration that Canada was or is in breach of its statutory duties pursuant to the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act") and its Treaty obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;~~
- (f) ~~a Declaration that the School caused cultural, linguistic and social damage and irreparable harm to the Survivor Class;~~
- (g) a Declaration that Canada is liable to the Plaintiffs and other Survivor Class Members for the damages caused by its breach exclusive of non delegable, fiduciary and, ~~statutory and common law~~ duties of care and for negligence in relation to the establishment, funding, operation, supervision, control maintenance, oversight, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;
- (h) non-pecuniary general damages for negligence, ~~loss of language and culture~~, breach of non-delegable exclusive fiduciary and duties of care, ~~statutory, treaty and common law~~ duties in the amount of \$500 million or such other sum as this Honourable Court finds appropriate;
- (i) pecuniary general damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, breach of non delegable exclusive fiduciary and, ~~statutory, treaty and common law~~ duties of care in the amount of \$500 million or such other sum as this Honourable Court deems just finds appropriate;
- (j) ~~exemplary and punitive damages in the amount of \$100 million or such other sum as this Honourable Court deems just finds appropriate;~~
- (k) damages in the amount of ~~\$100 million or such other sum as this Honourable Court deems just~~, pursuant to the *Family Law Act*, R.S.N., 1990, and its predecessors;
- (l) prejudgment and postjudgment interest pursuant to the provisions of the *Judicature Act*, R.S.N. 1990, c. J-4 ; and
- (m) the costs of this action on a substantial indemnity scale.

## B. DEFINITIONS

2. The following definitions apply for the purposes of this Claim:

- (a) "Aboriginal", "Aboriginal People(s)" or "Aboriginal Person(s)" means a person whose rights are recognized and affirmed by the *Constitution Act, 1982*, s. 35, being Schedule "B" to the *Canada Act, 1982* (U.K.), 1982. c. 11, specifically, members of the Metis and Inuit nations;
- (b) "Aboriginal Right(s)" means rights recognized and affirmed by the *Constitution Act, 1982*, s. 35, being Schedule "B" to the *Canada Act, 1982* (U.K.), 1982. c. 11;
- (c) "Agents" mean the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of the School;
- (d) "Canada" means Her Majesty the Queen in Right of Canada, as represented in this proceeding by the Attorney General of Canada;
- (e) "Class" or "Class Members" means all members of the Survivor Class and the Family Class;
- (f) "Class Period" means March 31, 1949 to ~~December 31, 1996~~ and the date of closure of the Nain Boarding School;
- (g) "Excluded Persons" means all persons who attended an Eligible Indian Residential School as defined by the Indian Residential Schools Settlement Agreement dated May 10, 2006 (the "Agreement") and all persons who are otherwise eligible, pursuant to the Agreement, to receive a Common Experience Payment or pursue a claim through the Individual Assessment Process, as defined by the Agreement;
- (h) "Family Class" means:
  - (i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;
  - ~~(ii) the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;~~
  - (iii) a former spouse of a Survivor Class Member;
  - (iv) a child or other lineal descendent of a grandchild of a Survivor Class Member;

- (v) 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;
- (vi) 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;
- (vii) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death;
- (i) "School" means the Nain Boarding School, located in Nain, Newfoundland and Labrador;
- (j) "Survivor Class" means:

All persons who attended the School between March 31, 1949 and ~~December 31, 1996~~ the date of closure of the Nain Boarding School.

### C. THE PARTIES

#### i. Representative Plaintiffs

3. The Plaintiff, Sarah Asivak ("Asivak"), resides in Goose Bay, Newfoundland and Labrador ("Newfoundland") is an Inuit. Asivak attended the School in Nain, Newfoundland for one (1) year between 1958 and 1959. Asivak is a ~~proposed~~ the representative plaintiff for the Survivor Class.

4. The Plaintiff, ~~Delano Flowers~~ James Asivak ("Flowers James") resides in Goose Bay, Newfoundland and is an Inuit. James Flowers was born on May ~~13~~ 15, ~~1962~~ 1943 and his ~~mother~~ wife, ~~Emily Dickman~~ Sarah Asivak, ~~the other named plaintiff~~, attended the School in Nain, Newfoundland for one (1) year between ~~1949~~ 1958 and ~~1959~~ 1959. Flowers James is a ~~proposed~~ the representative plaintiff for the Family Class.

5. The proposed Representative Plaintiffs do not purport to advance claims on behalf of any persons who are otherwise entitled to compensation pursuant to the terms of the Agreement.

6. Neither the proposed Representative Plaintiffs' claim nor the classes they propose to represent overlap with the terms of the order issued by Regional Senior Justice Winkler of the Ontario Superior Court of Justice, dated March 8, 2007.

ii. The Defendant

7. The Defendant, Her Majesty the Queen in Right of Canada, is represented in this proceeding by the Attorney General of Canada ("Canada"). Canada represents the interests of the Minister of the Department of Indian Affairs Canada, who was, at all material times, responsible for the maintenance, funding and oversight or management and ~~operation~~ of the School, either on its own or in combination with other of its governmental agents or servants.

8. Once the Province of Newfoundland and Labrador entered Confederation in 1949, Canada assumed and possessed exclusive Legislative and executive responsibility over aboriginal persons, including the Classes. As aboriginal persons in the 'new' province in 1949 were legally "Indians" for the purposes of section 91(24) of the *British North America Act, 1867*, they were proper subjects of federal jurisdiction.

9. Canada's participation in the funding and operation of the School breached its exclusive duty of care owed to the Classes which was also in breach of its non-delegable fiduciary obligations and constitutional obligations owed to aboriginal persons.

10. Alternatively, even if Canada did not materially operate or manage the school, it nevertheless breached its fiduciary duties by failing to properly do so and protect the Class as it alone possessed singular and exclusive legal jurisdiction over aboriginal persons.

**D. RESIDENTIAL SCHOOL SYSTEM – OPERATION OF THE SCHOOL**

i. Background - Residential School History Generally

11. Residential Schools were established by Canada as early as 1874, for the education of Aboriginal children. These children were taken from their homes and their communities and transported to Residential Schools where they were confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them.

12. Commencing in 1911, Canada entered into formal agreements with various Churches and other philanthropic organizations (collectively the "Churches") for the operation of such schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of the Residential Schools. The Churches assumed the day-to-day operation of the Residential Schools under the control, supervision and direction of Canada, for which the Canada paid the Churches a per capita grant calculated to cover part of the cost of the Residential School operation.

13. As of 1920, the Residential School Policy included compulsory attendance at Residential Schools for all Aboriginal children aged 7 (seven) to 15 (fifteen). This approach to the control and operation of the Residential Schools system continued until April 1, 1969, at which time Canada assumed the sole operation and administration of the

Residential Schools from the Churches, excepting certain cases where Churches continued to act as agents of Canada.

14. Canada removed Aboriginal Persons, usually young children, from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. Canada controlled all aspects of the admission of Aboriginal Persons to the Residential Schools including arrangements for the care of such persons over holiday periods and the methods of transporting children to and from Residential Schools.

15. ~~The same Similar Residential Schools policy was implemented and effected in~~ existed in Newfoundland, which joined Canada on March 31, 1949. Accordingly, the claim against Canada is limited temporally to the time when the Canada became legally responsible for Aboriginal Persons residing in Newfoundland, or 1949, and beyond.

16. Aboriginal Persons were often taken from their families without the consent of their parents or guardians. While the stated purpose of the Residential Schools from their inception was the education of Aboriginal children, their true purpose was the complete integration and assimilation of Aboriginal children into mainstream Canadian society and the obliteration of their traditional language, culture and religion. Many children attending Residential Schools were also subject to repeated and extreme physical, sexual and emotional abuse, all of which continued until the year 1996, when the last Residential School operated by Canada was closed.

17. During the Class Period, children at the school were subjected to systemic child abuse, neglect and maltreatment. They were forcibly confined in the School and were

systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

18. The accommodation was crowded, cold, and sub-standard. Aboriginal children were underfed and ill nourished, forbidden to speak their native languages or to practice the customs and traditions of their culture. They were deprived of love and affection from their families and of the support that a child would normally expect to have from those in positions of trust and authority. Aboriginal children were also subjected to corporal punishment, assaults, including physical and sexual, and systematic child abuse.

**E. CANADA'S ASSUMPTION OF DUTIES WHEN NEWFOUNDLAND JOINED CONFEDERATION IN 1949**

19. Around the time of Confederation, two separate legal opinions commissioned by the Federal Department of Justice confirmed that the Federal Crown possessed exclusive legislative and executive responsibility in relation to Aboriginal persons, including the Inuit and Eskimo, living in Newfoundland and Labrador.

20. The records of the Federal departments, agencies, ministers and bureaucrats responsible for negotiating the *Terms of Union* show that from 1946 the Federal Government recognized that under the terms of the *British North America Act*, section 91(24), it would have to assume full responsibility for the native people of the new province.

21. As Canada's legal responsibility to Aboriginals was constitutional in nature, it was prohibited from attempting to cede or delegate such duties to any other entity,

including the Province itself. Given the broad duties owed by Canada to Aboriginal persons, the welfare and education of Aboriginal children cannot be said to have resided with the Crown in right of the Province of Newfoundland after March 31, 1949.

22. The entry of Newfoundland and Labrador into Confederation brought its Aboriginal population fully within exclusive federal jurisdiction. At the time of Confederation, Canada was aware that any union with Newfoundland and Labrador would have had an Aboriginal component and legal responsibility associated with it.

23. In 1947, in advance of preparing for the *Terms of Union* negotiations, the Federal Government prepared a document for the Newfoundland delegation which outlined the nature of Federal involvement with and for Aboriginal peoples. Amongst other things, under classes of subjects in which the Federal Parliament exercised exclusive jurisdiction, 'Indians and lands reserved for Indians' was listed and when outlining the responsibilities that the various Federal departments would have for Newfoundland, 'Indian Affairs' was listed under the Department of Mines and Resources.

24. The function of the Indian Affairs Branch was described as administering the "affairs of the Indians of Canada [which] included the control of their education". The Federal Department of Mines and Resources stated, at that time, that the Dominion assumes full responsibility for the welfare, including education, of Indians and Eskimos, a response which went on at length to describe the day and residential school system.

25. In and around the time of Confederation, a number of Federal legal opinions on the question were prepared, most of them acknowledging sole federal responsibility for Newfoundland's Aboriginal people. Under Term 3 of the *Terms of Union*, for matters not



specifically referred to, things were deemed to be as if Newfoundland had joined under the terms of the *Constitution Act, 1867*.

26. When Canada sent its official version of the proposed *Terms of Union* to the National Convention in Newfoundland in October 1947, it had already acknowledged that under the terms of the *British North America Act* it had exclusive jurisdiction in the area of Aboriginal peoples. By deleting the reference to native people in the proposed draft *Terms of Union* and writing in Federal responsibility, as outlined in the *British North America Act*, the Federal Government acknowledged *de facto* jurisdiction for the Indians, Inuit and Eskimos of Newfoundland and Labrador.

27. At the time of Confederation, the Premier, Joseph Smallwood, actually refused to sign an agreement with Canada which would have transferred federal responsibility for native persons to the Province. The Province maintained that the fiduciary obligations for Aboriginal persons remained, and belonged to the federal government.

28. Following Confederation, in December 1949, Canada established an Interdepartmental Committee on Labrador Indians and Eskimos which requested another legal opinion from the Justice Department which stated that in the matter of Newfoundland "Indians and Eskimos":

"...the federal Parliament has exclusive legislative authority in relation to Indians ... which, of course, means that the provincial legislature has no authority to enact legislation directed at or dealing with [matters] in relation to Indians.... It is the responsibility of the federal government to formulate and carry out all policies that are directed at dealing with Indian or Indian problems. Such policy is to be formulated by Parliament and the executive. This responsibility carries with it the responsibility or providing money to be devoted to the carrying of our policies in relation to the Indians."

29. This opinion provided by the Justice Department is consistent with the assumptions made during the pre-Confederation talks: Aboriginal persons, pursuant to the *British North America Act*, were Canada's responsibility. Even before Newfoundland's entry into Confederation, various federal departments had included in their departmental estimates sizeable amounts towards relief, services and expenditures for the native populations in Newfoundland and Labrador. This demonstrates that the federal government believed it had a responsibility to fulfill in regard to the Eskimo and Inuit in Labrador and that it would be called upon to provide programs and assistance, funding, oversight and implementation of certain programs, including education.

30. In fact, the *Terms of Union* indirectly provided that the then Aboriginal population in Newfoundland fell under federal jurisdiction. Section three of the *Terms of Union* affirms that: "[t]he *Constitution Acts, 1867 to 1940* apply to the Province of Newfoundland in the same way, and to the like extent as they apply to the provinces heretofore comprised in Canada".

31. The *Constitution Act, 1867* itself states that "the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say ... Indians, and Lands reserved for the *Indians*".

32. Following Confederation in 1949, and by 1951, Canada had agreed to pay the bills submitted by Newfoundland for "Indians and Eskimos" for the period 1949-1950. At that same time, Newfoundland also provided Canada with an estimate of provincial expenditures with respect to Eskimo and Inuit in Labrador for which it expected payment.

Throughout the 1950's and 1960's, programs for aboriginal education in Newfoundland and Labrador were paid for by Canada at the rate of 90% for Indian communities and 40% in Inuit communities.

33. A 1951 memorandum prepared by the Chairman of the Inter-departmental Committee on Newfoundland Indians and Eskimos formed the basis of much of Canada's position for the future:

"Section 3 of the *Terms of Union* stipulates that the provisions of the *BNA Act* shall apply to Newfoundland except insofar as varied by the Terms. Since the Terms of Union do not refer to Indians and Eskimos and since head 24 of section 91 of the *BNA Act* places 'Indians and lands reserved for Indians' exclusively under Federal jurisdiction, it seems clear that the Federal Government is responsible for the native population resident in Labrador."

34. By 1954, Newfoundland requested that Canada provide both operating and capital expenditures towards education for Eskimos and Inuit. The 1954 Agreement between Newfoundland and Canada stipulated that Canada would assume 66% of capital expenditures on behalf of Eskimos in Newfoundland and 100% of capital expenditures on behalf of Indians in the fields of health, welfare and education. This agreement reached between the Premier of Newfoundland and Canada in 1954 provided for the re-assumption of federal constitutional responsibility over aboriginal persons in the new province of Newfoundland and Labrador.

35. Just four years into this Agreement, Newfoundland requested further funds from Canada to provide education and housing for both Indians and Inuit. Shortly thereafter, in 1964, the Premier of Newfoundland asked Prime Minister Pearson, to either have Canada assume sole and full responsibility for Indians and Inuit or to at least increase funding to the level of support being provided by Canada to other provinces in Canada.

36. At the same time, the Pearson government requested a second legal opinion from the Justice Department. On November 23, 1964, the Deputy Attorney General provided that opinion and determined that:

“...there is no provision in the *Indian Act* excluding any portion of Canada from its application. Mr. Varcoe’s opinion [the 1950 Justice Department opinion] as to the constitutional position is, in my opinion, correct. The fact that there is no mention of Eskimos or Indians in the *Terms of Union* means only that the constitutional position with respect thereto has not changed with regard to Newfoundland.”

37. As a result, by 1965, Canada had agreed to provide the same resources and programs to Indians, Inuit and Eskimos in Labrador as were provided to similar groups elsewhere in Canada. The proposed agreements were to be: (a) renegotiated and reviewed every five years; (b) a Federal-Provincial committee was to be established to monitor expenditures and propose budgets for approval by both governments; (c) Newfoundland would be reimbursed for 90% of the Provinces’ capital expenditures for Indians and Eskimos for the period 1954 – 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments.

38. Amongst other things, this “Contribution Agreement” was designed to provide services to the communities of Sheshatshit and Davis Inlet, including education. The Contribution Agreement identified the amount of funding available as (a) 90% from Canada; and (b) 10% from Newfoundland. The Contribution Agreement also established a management committee composed of federal officials, provincial officials and representatives of the Davis Inlet and Sheshatshit communities.

39. At the same time, the then Prime Minister also proposed certain increases in Canadian contributions for “Indians and Eskimos” in Newfoundland and Labrador which

ultimately constituted an agreement between Canada and Newfoundland, providing, amongst other things, for:

- (a) Canada to pay Newfoundland up to \$1,000,000.00 per annum for 90% of the Province's Innu and Inuit expenditures (except where otherwise covered under other federal-provincial agreements);
- (b) establishment of a federal-provincial committee to monitor provincial expenditures;
- (c) continuation of federal funding for Inuit communities in Labrador; and
- (d) agreements to be reviewed and renegotiated every five years to "ensure that they continued to meet the changing circumstances and needs of the Eskimo and Indian residents in Labrador.

40. A Royal Commission on Labrador was convened in 1973 with a mandate to conduct a full inquiry into the economic and sociological conditions in Labrador. In addition to recommending to Newfoundland that it immediately renegotiate its funding agreements with Canada, given that amounts paid there under were inadequate and insufficient, the Commission also made the following determination:

"The Commission finds itself unable to determine a sound rationale for the practice under this Agreement of having the Province pay a percentage of cost for services to Indians and Eskimos. This is not the practice in other parts of Canada. In the view of the Commission, the Federal Government, as it does elsewhere, should be prepared to accept full fiscal responsibility unless the Province wishes to ensure its continued direct involvement in the program for Indians and Eskimos through sharing part of the cost..."

41. Many of the recommendations of the Royal Commission were implemented through the Federal-Provincial funding agreements which were ratified in the years following publication of the Commission Report. For example, an interim agreement was in place between 1976 and 1981 and funded projects which were valued at \$22 million in Labrador. Negotiations between the Province and Federal government led to the signing of two agreements in July 1981:

- (i) Canada-Newfoundland Community Development Subsidiary Agreement, valued at \$38,996,000.00, payable by the Federal government; and
- (ii) Native People's of Labrador Agreement, valued at \$38,831,00.00 federal payments/contributions.

42. The Labrador Agreement covered the following Indian and Inuit communities:

Davis Inlet, Northwest Rivet, Nain, Hopedale, Makkovik, Rigolet and Postville.

Pursuant to that Agreement, between 1981 and 1986, Canada contributed 90% of the costs of the programs and services in these Indian communities and 60% of the costs of those delivered in the Inuit communities. In total, Canada contributed \$29,135,100.00 in this respect between 1981 and 1986.

43. In August 1985, Canada entered into a further contribution agreement with Newfoundland and Labrador, "for the benefit of native peoples in Labrador", recognizing Canada's "special interest in the social and economic development of Inuit and Indian People." The operation of education was the largest budget allocation item pursuant to this Agreement, for a total of \$1,530,000.00 (1985/1986 fiscal year), 71% of which was Canada's responsibility.

44. Fiduciary obligations are and were owed by Canada to Aboriginal persons, peoples who, pursuant to section 35(2) of the *Constitution Act 1982* include the Indian, Inuit and Metis. This fiduciary relationship between Canada and Aboriginal persons was and is *sui generis* in nature. Accordingly, a fiduciary duty between Canada and Aboriginal persons in Newfoundland and Labrador arose at the moment of Confederation in 1949.

45. Canada has acknowledged its own sole singular responsibility over Indians and Inuit in Newfoundland by accepting its obligation to financially assist or contribute. In any event, Canada has always assumed some level of legal responsibility for aboriginal persons in Newfoundland and Labrador. Having undertaken discretionary control over a cognizable Indian interest, a fiduciary duty existed between Canada and the Class in these circumstances.

46. As the nature of Canada's relationship with Aboriginal persons gives rise to a non-delegable duty to preserve, protect and promote welfare and education of Aboriginal children, the responsibility for its execution rested solely with Canada.

47. In the alternative, if Canada failed to properly assume those common law and constitutional obligations, it breached its fiduciary and common law duties owed to the class by failing to do so.

ii. Canada's Operation of the School in Newfoundland

48. The School was located in Nain, Newfoundland. It was first established in the 1950's and ceased operation as a residential school for Aboriginal children in the 1970's.

49. The purpose of the School was to provide education to Aboriginal children between the ages of 6 and 16 years who attended the School from various First Nations bands and communities in Newfoundland. The School eventually became a vehicle for assimilating Aboriginal children through the eradication of their native languages, cultures and spiritual beliefs.

50. The School was initially founded and established by the Moravian Mission. Once Confederation occurred in March 1949 and Newfoundland joined Canada, the International Grefnell Association began ceasing its involvement, funding the role in the School. ~~At all material times, the staff members at the School were employees, servants and/or agents of Canada.~~ The funding provided by Canada following Confederation was inadequate to meet the costs of operating and maintaining the School, and in particular, to meet the daily and educational needs of the students at the School. As a result, the care provided to the students and the conditions at the School were poor, the staff hired were unskilled and/or unsuitable for dealing with children and the conditions at the School were unsuitable and inappropriate for an educational facility for children.

~~51. In many cases, the Aboriginal children were forced to attend the School by representatives, agents or servants of Canada. The Aboriginal children who attended the School were separated from their families, uprooted and taken to the School, where they were placed within the control of Canada. For all intents and purposes, the children who attended the School, were wards of the School and Canada.~~

52. Canada participated in the funding, oversight ~~carried out that operation and administration of the School until the late 1970's.~~ These operative and administrative responsibilities, carried out on behalf of Canada or by its agents included:

- (a) the operation and maintenance of the School during the Class Period;
- (b) the care and supervision of all members of the Survivor Class, and for supplying all the necessities of life to Survivor Class members *in loco parentis*;



- (c) the provision of educational and recreational services to the Survivor Class while in attendance at the School and control over all persons allowed to enter the School premises at all material times;
- (d) the selection, supply and supervision of teaching and non-teaching staff at the School and reasonable investigation into the character, background and psychological profile of all individuals employed to teach or supervise the Survivor Class;
- (e) inspection and supervision of the School and all activities taking place therein, and for full and frank reporting to Canada respecting conditions in the School and all activities taking place therein;
- (f) transportation of Survivor Class members to and from the School; and
- (g) communication with and reporting to the Family Class respecting the activities and experiences of Survivor Class members while attending the School.

53. Attempts to provide educational opportunities to children confined in the School were ill-conceived and poorly executed by inadequately trained teaching staff. The result was to effectively deprive the Aboriginal children of any useful or appropriate education. Very few survivors of the School went on to any form of higher education.

54. The conditions and abuses in the School during the Class Period were well-known to Canada.

55. Any attempt by Canada to delegate its duties, responsibilities or obligations to the Class to the Province of Newfoundland is unlawful and in breach of its exclusive and non-delegable fiduciary duties owed to the class.

#### **F. CANADA'S BREACHES OF DUTIES TO THE CLASS MEMBERS**

56. Canada has a fiduciary relationship with Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled

and regulated the School during the Class Period, either on its own or in conjunction with the Province.

57. Canada, and its respective servants and agents compelled members of the Survivor Class to leave their homes, families and communities, and forced members of the Survivor Class to attend (and sometimes live in) the School, all without lawful authority or the permission and consent of Survivor Class members or that of their parents. Such confinement was wrongful, arbitrary and for improper purposes.

58. Survivor Class members were systematically subjected to the institutional conditions, regime and discipline of the School without the permission and consent of Survivor Class members or that of their parents, and were also subjected to wrongful acts at the hands of Canada while confined therein.

59. In particular, Asivak experienced abuse during her time at the School by teachers, "caregivers" and other students. Many of the children at the School also experienced sexual, physical and verbal abuse, perpetrated against them by teachers, adults in positions of authority or from other students.

60. ~~Flowers~~ James, as a member of the Family Class, has experienced emotional abuse due to his ~~mother's~~ wife's inability to participate in normal family life as result harm she suffered during her attendance at the School.

61. All persons, including Asivak, who attended the School ~~did so as wards of Canada, with Canada as their guardian,~~ and were persons to whom Canada owed the highest non-delegable, fiduciary, ~~moral, statutory~~ and common law duties, which

included, but were not limited to, the duty to ensure that reasonable care was taken of the Survivor Class while at the School, the duty to protect the Survivor Class while at the School and the duty to protect the Survivor Class from intentional torts perpetrated on them while at the School. These non-delegable and fiduciary duties were performed negligently and tortiously by Canada, in breach of its special responsibility to ensure the safety of the Survivor Class while at the School.

62. Canada was responsible for:

- (a) ~~the administration of the Act and its predecessor statutes as well as any other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;~~
- (b) the promotion of the health, safety and well being of Aboriginal Persons in Newfoundland during the Class Period;
- (c) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessor ministries and departments during the Class Period;
- (d) decisions, procedures, regulations promulgated, operations and actions taken by the Department of Indian Affairs and Northern Development and, its employees, servants, officers and agents in Canada during the Class Period;
- (e) oversee the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the School and for the creation, design and implementation of the program of education for Aboriginal Persons confined therein during the Class Period;
- (f) the selection, control, training, supervision and regulation of the designated operators and their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons confined in the Residential School during the Class Period;
- (g) the provision of all educational services and opportunities to the Survivor Class members, pursuant to the provisions of the Act and any other statutes relating to Aboriginal Persons during the Class Period;
- (h) ~~transportation of Survivor Class Members to and from the School and to and from their homes while attending the School during the Class Period;~~

- ~~(i) preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities;~~
- (j) the care and supervision of all members of the Survivor Class while they were in attendance at the School during the Class Period and for the supply of all the necessities of life to Survivor Class Members, *in loco parentis*, during the Class Period;
- (k) the provision of educational and recreational services to the Survivor Class while in attendance at the School during the Class Period;
- (l) inspection and supervision of the School and all activities that took place therein during the Class Period and for full and frank reporting to Canada and to the Family Class Members with respect to conditions in the School and all activities that took place therein during the Class Period; and
- ~~(m) communication with and reporting to the Family Class with respect to the activities and experiences of Survivor Class Members while attending the School during the Class Period.~~

63. During the Class Period, male and female Aboriginal children, including Asivak, were subjected to gender specific, as well as non-gender specific, systematic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

64. At all material times, the children who attended the School were within the knowledge, contemplation, power or and control of Canada and were subject to the unilateral exercise of Canada's (or its delegates') power or discretion. By virtue of the relationship between the children and Canada, being one of trust, reliance and dependence, by the Aboriginal children, Canada owed a fiduciary obligation to ensure that the students who attended the School were treated fairly, respectfully, safely and in

all other ways, consistent with the obligations of a parent or guardian to a child under its care and control.

65. At all material times, Canada owed a fiduciary obligation to the students who attended the School to act in the best interests of those students and to protect them from any abuse, be it mental, emotional, physical, sexual or otherwise. The children at the School relied upon Canada, to their detriment, to fulfill its fiduciary obligations.

66. Through its servants, officers, employees and agents, Canada was negligent and in breach of its non-delegable fiduciary, ~~moral, statutory,~~ and common law duties of care to the Survivor Class and the Family Class during the Class Period. Particulars of the negligence and breach of duty of Canada include the following:

- (a) it systematically, negligently, unlawfully and wrongfully delegated its fiduciary and other responsibility and duties regarding the education of and care for Aboriginal children to others;
- (b) it systematically, negligently, unlawfully and wrongfully admitted and confined Aboriginal children to the School;
- ~~(c) it acted without lawful authority and not in accordance with any statutory authority pursuant to or as contemplated by the provisions of the Act or any other statutes relating to Aboriginal Persons as:~~
  - ~~(i) said provisions are and were *ultra vires* the Parliament of Canada and of no force and effect in law;~~
  - ~~(ii) the conduct of Canada in placing the Aboriginal children in the School, confining them therein, and treating or permitting them to be treated there as set forth herein was in breach of Canada's fiduciary obligations to the Survivor Class and Family Class Members, which was not authorized or permitted by any applicable legislation and was, to the extent such legislation purported to authorize such fiduciary breach, of no force and effect and/or *ultra vires* the Parliament of Canada; and~~
  - ~~(iii) Canada routinely and systematically failed to act in accordance with its own laws, regulations, policies and procedures with~~

~~respect to the confinement of Aboriginal children in the School, which confinement was wrongful.~~

- (d) it delegated to and contracted with the Churches and other Religious organizations and the Province to implement its program of forced integration, confinement and abuse;
- (e) it failed to adequately screen and select the organizations and individuals to which it delegated the implementation of its Residential School program;
- (f) it failed to adequately supervise and control the School and its agents operating same under its jurisdiction;
- (g) it deliberately and chronically deprived the Survivor Class Members of the education they were entitled to or were led to expect from the School or of any adequate education;
- (h) it designed, constructed, maintained and operated the School buildings which were sub-standard, inadequate to the purpose for which they were intended and detrimental to the emotional, psychological and physical health of the Survivor Class;
- (i) it failed to provide funding for the operation of the School that was sufficient or adequate to supply the necessities of life to Aboriginal children confined to them;
- (j) it failed to respond appropriately or at all to disclosure of abuses in the School during the Class Period;
- ~~(k) it conspired with the operators of the schools to suppress information about abuses taking place in the School during the Class Period;~~
- ~~(l) it assaulted and battered the Survivor Class Members and permitted them to be assaulted and battered during the Class Period;~~
- (m) it permitted an environment which permitted and allowed student-upon-student abuse;
- ~~(n) it forcibly confined the Survivor Class Members and permitted them to be forcibly confined during the Class Period;~~
- (o) it was in breach of its fiduciary duty to ~~its~~ Wards the Survivor Class Members by reason of the misfeasances, malfeasances and omissions set out above;
- (p) it failed to inspect or audit the School adequately or at all;

- (q) it failed to implement an adequate system of evaluation, monitoring and control of teachers, administrators and non-teaching staff of the School during the Class Period;
- (r) it failed to periodically reassess its regulations, procedures and guidelines for the School when it knew or ought to have known of serious systemic failures in the School during the Class Period;
- (s) it failed to close the School and otherwise protect and care for those persons confined therein when it knew or ought to have known that it was appropriate and essential to do so in order to preserve the health, welfare and well being of the Survivor Class Members;
- (t) it delegated, attempted to delegate, continued to delegate and improperly delegated its non delegable duties and responsibility for the Survivor Class when it was incapable to do so and when it knew or ought to have known that these duties and responsibilities were not being met;
- (u) it failed to recognize and acknowledge harm once it occurred, to prevent additional harm from occurring and to, whenever and to the extent possible, provide appropriate treatment to those who were harmed;
- ~~(v) it undertook a systematic program of forced integration and assimilation of the Aboriginal Persons through the institution of the School when it knew or ought to have known that doing so would cause profound and permanent cultural, psychological, emotional and physical injury to the members of the Survivor Class during and following the Class Period; and~~
- ~~(w) it was in breach of its obligations to the Survivor Class Members and Family Class Members as set out in the Act and its Treaties with various First Nations providing a right to education at a school to be established and maintained by Canada and which implicitly included the right to education in a safe environment free from abuse and the right to an education which would recognize Aboriginal beliefs, traditions, culture, language and way of life in a way that would not denigrate or eliminate these beliefs, traditions, culture, language and way of life.~~

67. Canada, through its employees, agents or representatives also breached its duty of care to protect the Survivor Class Members from sexual abuse by the student perpetrators while those particular Plaintiffs and the Survivor Class Members were attending and residing at the School with the result that the student perpetrators did in fact commit sexual abuse upon certain Plaintiffs and the Survivor Class Members.

68. Canada breached its fiduciary duties to the Plaintiffs and the Class and their families by failing to take any steps to protect the Survivor Class Members from sexual abuse.

69. In breach of its ongoing fiduciary duty to the Class, Canada failed and continues to fail, to adequately remediate the damage caused by its failures and omissions set out herein. In particular, Canada ~~has failed to take adequate measures to ameliorate the cultural, linguistic and social damage suffered by the class, and further~~ has failed to provide compensation for the physical, sexual and emotional abuse suffered by the Class.

~~70. The Plaintiffs plead that Canada was in breach of its various treaty obligations set out through the establishment and operation of the School and are liable for such breaches. In contravention of the Treaties between the Government and First Nations and in contravention of the *United Nations Genocide Convention*, particularly Article 2(e) thereof to which Canada is a signatory, the Plaintiffs and other Aboriginal children were to be systemically assimilated into white society. In pursuance of that plan, they were forced to attend the School and contact with their families was restricted. Their cultures and languages were taken from them with sadistic punishment and practices.~~

71. ~~The systemic child abuse, neglect and maltreatment sustained by the children at the School during the Class Period, the effect and impact of which is still being felt by Survivor Class Members and Family Class Members, was in violation of the rights of children, specifically, but not limited to, the following rights set out in the *United Nations Convention on the Rights of the Child*, adopted by the United Nations in 1989, and ratified by Canada in December of 1991.~~



**G. DAMAGES SUFFERED BY CLASS MEMBERS**

72. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Survivor Class Members, including Asivak, suffered injury and damages including:

- (a) isolation from family and community;
- (b) ~~prohibition of the use of Aboriginal language and the practice of Aboriginal religion and culture and the consequential loss of facility and familiarity with Aboriginal language, religion and culture;~~
- (c) forced confinement;
- (d) assault and battery;
- (e) sexual abuse;
- (f) emotional abuse;
- (g) psychological abuse;
- (h) deprivation of the fundamental elements of an education;
- (i) an impairment of mental and emotional health amounting to a severe and permanent disability;
- (j) a propensity to addiction;
- (k) an impaired ability to participate in normal family life;
- (l) alienation from family, spouses and children;
- (m) an impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;
- (n) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the School experience;
- (o) depression, anxiety and emotional dysfunction;
- (p) suicidal ideation;
- (q) pain and suffering;

- (r) deprivation of the love and guidance of parents and siblings;
- (s) loss of self-esteem and feelings of degradation;
- (t) fear, humiliation and embarrassment as a child and adult, and sexual confusion and disorientation as a child and young adult;
- (u) loss of ability fulfill cultural duties;
- (v) loss of ability to live in community; and
- (w) constant and intense emotional, psychological pain and suffering.

73. The foregoing damages resulted from Canada's breach of fiduciary duty, and/or negligence assault, battery ~~and/or breach of Aboriginal treaty rights~~.

74. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Family Class Members, including Flowers James, suffered injury and damages including:

- (a) they were separated and alienated from Survivor Class Members for the duration of their confinement in the School;
- (b) their relationships with Survivor Class Members were impaired, damaged and distorted as the result of the experiences of Survivor Class members in the School;
- (c) they suffered abuse from Survivor Class members as a direct consequence of their School experience;
- (d) they were unable to resume normal family life and experience with Survivor Class Members after their return from the Schools;
- ~~(e) their culture and language was undermined and in some cases eradicated by, amongst other things, as pleaded herein, the forced assimilation of Survivor Class Members into non-aboriginal culture through the School.~~

75. Canada knew, or ought to have known, that as a consequence of its mistreatment of the children at the School, these Plaintiffs and class members would suffer significant mental, emotional, psychological and spiritual harm which would adversely affect their relationships with their families and their communities. ~~In fact, one of the purposes behind the operation of the School was to eliminate and damage relationships within families and communities with a view to promoting the assimilation of Aboriginal children into non-Aboriginal society.~~

#### G. PUNITIVE AND EXEMPLARY DAMAGES

76. The Plaintiffs plead that Canada, including its senior officers, directors, bureaucrats, ministers and executives, had specific and complete knowledge of the widespread physical, psychological, emotional, cultural and sexual abuses of Survivor Class Members which were occurring at the School during the Class Period. Despite this knowledge, Canada continued to operate the School and permit the perpetration of grievous harm to the Survivor Class Members.

~~77. In addition, Canada deliberately planned the eradication of the language, religion and culture of Survivor Class Members and Family Class Members. Their actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.~~

78. Full particulars respecting the daily care, operation and control of the School are within the Defendant's knowledge, control and possession.

79. The Plaintiffs plead and rely upon the following:

*Canadian Charter of Rights and Freedoms, ss. 7, 15 and 24;*

~~Class Actions Act, S.N.L. 2001, c. C-18.1.~~

~~Constitution Act, 1982, s. 35(1), being Schedule "B" to the  
Canada Act, 1982 (U.K.), c. 11.~~

~~Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, ss.  
3, 21, 22, and 23;~~

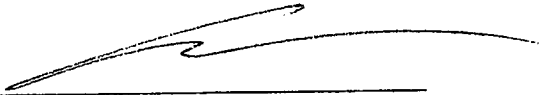
~~The Indian Act, S.C. 1951, c. 29, ss. 113-118;~~

~~The Indian Act, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122.~~

~~The Newfoundland Act, 1949 (U.K.), c. 22.~~

80. The Plaintiffs propose this action be tried in the City of St. John's, in the Province of Newfoundland.

**Dated** at St. John's, in the Province of Newfoundland and Labrador, this 19<sup>th</sup> day of April, 2012.



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leave granted  
R 7A 08  
April 12/11  
Wm

2007 5423CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION

BETWEEN:

TOBY OBED, WILLIAM ADAMS and  
MARTHA BLAKE

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Brought under the *Class Actions Act*, S.N.L. 2001, c. C-18.1

AMENDED STATEMENT OF CLAIM

A. RELIEF SOUGHT BY THE PLAINTIFFS AGAINST CANADA

1. The Representative Plaintiffs, on their own behalf, and on behalf of the members of the Survivor Class and Family Class claim:

- (a) an Order certifying this proceeding as a Class Action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 and appointing Toby Obed and William Adams as Representative Plaintiffs for the Survivor Class and any appropriate subgroup thereof;
- (b) a Declaration that Canada owed ~~and was in breach of~~ exclusive non-delegable, fiduciary, and ~~statutory and common-law~~ duties of care to the Plaintiffs and the other Survivor Class Members in relation to the ~~establishment, funding, oversight, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the Yale School in Northwest River, Newfoundland and Labrador (the "School");
- (c) a Declaration that Canada was negligent in the ~~establishment, funding, oversight, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

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- (d) a Declaration the Canada was or is in breach of its exclusive and non-delegable fiduciary obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, oversight, confinement in, transport of ~~Survivor Class Members, to obligatory attendance at the School of the School;~~
- (e) ~~a Declaration that Canada was or is in breach of its statutory duties pursuant to the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act") and its Treaty obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;~~
- (f) ~~a Declaration that the School caused cultural, linguistic and social damage and irreparable harm to the Survivor Class;~~
- (g) a Declaration that Canada is liable to the Plaintiffs and other Survivor Class Members for the damages caused by its breach of exclusive non delegable, fiduciary and, statutory and common law duties of care and for negligence in relation to the establishment, funding, operation, supervision, control maintenance, oversight, confinement in, transport of ~~Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;~~
- (h) non-pecuniary general damages for negligence, ~~loss of language and culture, breach of non-delegable, exclusive fiduciary, and duties of care, statutory, treaty and common law duties~~ in the amount of \$500 million or such other sum as this Honourable Court finds appropriate;
- (i) pecuniary general damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, breach of non-delegable exclusive fiduciary and, statutory, treaty and common law duties of care in the amount of \$500 million or such other sum as this Honourable Court deems just finds appropriate;
- (j) exemplary and punitive damages in the amount of \$100 million or such other sum as this Honourable Court deems just finds appropriate;
- (k) damages in the amount of \$100 million or such other sum as this Honourable Court finds appropriate, pursuant to the *Family Law Act*, R.S.N., 1990, and its predecessors;
- (l) prejudgment and postjudgment interest pursuant to the provisions of the *Judicature Act*, R.S.N. 1990, c. J-4 ; and
- (m) the costs of this action on a substantial indemnity scale.

## B. DEFINITIONS

2. The following definitions apply for the purposes of this Claim:

- (a) "Aboriginal", "Aboriginal People(s)" or "Aboriginal Person(s)" means a person whose rights are recognized and affirmed by the *Constitution Act*, 1982, s. 35, being Schedule "B" to the *Canada Act*, 1982 (U.K.), 1982. c. 11, specifically, members of the Metis and Inuit nations;
- (b) "Aboriginal Right(s)" means rights recognized and affirmed by the *Constitution Act*, 1982, s. 35, being Schedule "B" to the *Canada Act*, 1982 (U.K.), 1982. c. 11;
- (c) "Agents" mean the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of the School;
- (d) "Canada" means Her Majesty the Queen in Right of Canada, as represented in this proceeding by the Attorney General of Canada;
- (e) "Class" or "Class Members" means all members of the Survivor Class and the Family Class;
- (f) "Class Period" means March 31, 1949 ~~to December 31, 1996~~ and the date of closure of the Yale School;
- (g) "Excluded Persons" means all persons who attended an Eligible Indian Residential School as defined by the Indian Residential Schools Settlement Agreement dated May 10, 2006 (the "Agreement") and all persons who are otherwise eligible, pursuant to the Agreement, to receive a Common Experience Payment or pursue a claim through the Individual Assessment Process, as defined by the Agreement;
- (h) "Family Class" means:
  - (i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;
  - ~~(ii) the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;~~
  - (iii) a former spouse of a Survivor Class Member;
  - (iv) a child or other lineal descendent of a grandchild of a Survivor Class Member;



- (v) 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;
- (vi) 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;
- (vii) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death;
- (i) "School" means the Yale School, located in Northwest River, Newfoundland;
- (j) "Survivor Class" means:

All persons who attended the School between March 31, 1949 and ~~December 31, 1996~~ the date of closure of the Yale School.

### C. THE PARTIES

#### i. Representative Plaintiffs

3. The Plaintiff, Toby Obed ("Obed"), resides in Goose Bay, Newfoundland and is an Inuk. Obed attended the School in Northwest River, Newfoundland and Labrador ("Newfoundland") for four (4) years between 1972 and 1976. Obed is a ~~proposed~~ the representative plaintiff for the Survivor Class.

4. The Plaintiff, William Adams ("Adams"), resides in Northwest River, Newfoundland and is an Inuk. Adams attended the School in Northwest River, Newfoundland for eight (8) years between 1969 and 1977. Adams is a ~~proposed~~ the representative plaintiff for the Survivor Class.

5. The Plaintiff, Martha Blake ("Blake") resides in Northwest River, Newfoundland and is an Inuk. Blake was born on March 25, 1958 and her common law husband,

Adams, attended the School in Northwest River, Newfoundland for eight (8) years between 1969 and 1977. Blake is a ~~proposed~~ the representative plaintiff for the Family Class.

6. The ~~proposed~~ Representative Plaintiffs do not purport to advance claims on behalf of any persons who are otherwise entitled to compensation pursuant to the terms of the Agreement.

7. Neither, the proposed Representative Plaintiffs' claim nor the classes they ~~propose~~ to represent overlap with the terms of the order issued by Regional Senior Justice Winkler of the Ontario Superior Court of Justice, dated March 8, 2007.

ii. The Defendant

8. The Defendant, Her Majesty the Queen in Right of Canada, is represented in this proceeding by the Attorney General of Canada ("Canada"). Canada represents the interests of the Minister of the Department of Indian Affairs Canada, who was, at all material times, responsible for the maintenance, funding, oversight or management and ~~operation~~ of the School, either on its own or in combination with other of its governmental agents or servants.

9. Once the Province of Newfoundland and Labrador entered Confederation in 1949, Canada assumed and possessed exclusive Legislative and executive responsibility over aboriginal persons, including the Classes. As aboriginal persons in the 'new' province in 1949 were legally "Indians" for the purposes of section 91(24) of the *British North America Act, 1867*, they were proper subjects of federal jurisdiction.

10. Canada's participation in the funding and operation of the School breached its exclusive duty of care owed to the Classes which was also in breach of its non-delegable fiduciary obligations and constitutional obligations owed to aboriginal persons.

11. Alternatively, even if Canada did not materially operate or manage the school, it nevertheless breached its fiduciary duties by failing to properly do so and protect the Class as it alone possessed singular and exclusive legal jurisdiction over aboriginal persons.

#### **D. RESIDENTIAL SCHOOL SYSTEM – OPERATION OF THE SCHOOL**

##### **i. Background - Residential School History Generally**

12. Residential Schools were established by Canada as early as 1874, for the education of Aboriginal children. These children were taken from their homes and their communities and transported to Residential Schools where they were confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them.

13. Commencing in 1911, Canada entered into formal agreements with various Churches and other philanthropic organizations (collectively the "Churches") for the operation of such schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of the Residential Schools. The Churches assumed the day-to-day operation of the Residential Schools under the control, supervision and direction of Canada, for which the Canada paid the Churches a per capita grant calculated to cover part of the cost of the Residential School operation.

14. As of 1920, the Residential School Policy included compulsory attendance at Residential Schools for all Aboriginal children aged 7 (seven) to 15 (fifteen). This approach to the control and operation of the Residential Schools system continued until April 1, 1969, at which time Canada assumed the sole operation and administration of the Residential Schools from the Churches, excepting certain cases where Churches continued to act as agents of Canada.

15. Canada removed Aboriginal Persons, usually young children, from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. Canada controlled all aspects of the admission of Aboriginal Persons to the Residential Schools including arrangements for the care of such persons over holiday periods and the methods of transporting children to and from Residential Schools.

16. ~~The same Similar Residential Schools policy was implemented and effected in~~ existed in Newfoundland, which joined Canada on March 31, 1949. Accordingly, the claim against Canada is limited temporally to the time when the Canada became legally responsible for Aboriginal Persons residing in Newfoundland, or 1949, and beyond.

17. Aboriginal Persons were often taken from their families without the consent of their parents or guardians. While the stated purpose of the Residential Schools from their inception was the education of Aboriginal children, their true purpose was the complete integration and assimilation of Aboriginal children into mainstream Canadian society and the obliteration of their traditional language, culture and religion. Many children attending Residential Schools were also subject to repeated and extreme physical, sexual

and emotional abuse, all of which continued until the year 1996, when the last Residential School operated by Canada was closed.

18. During the Class Period, children at the school were subjected to systemic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

19. The accommodation was crowded, cold, and sub-standard. Aboriginal children were underfed and ill nourished, forbidden to speak their native languages or to practice the customs and traditions of their culture. They were deprived of love and affection from their families and of the support that a child would normally expect to have from those in positions of trust and authority. Aboriginal children were also subjected to corporal punishment, assaults, including physical and sexual, and systematic child abuse.

**E. CANADA'S ASSUMPTION OF DUTIES WHEN NEWFOUNDLAND JOINED CONFEDERATION IN 1949**

20. Around the time of Confederation, two separate legal opinions commissioned by the Federal Department of Justice confirmed that the Federal Crown possessed exclusive legislative and executive responsibility in relation to Aboriginal persons, including the Inuit and Eskimo, living in Newfoundland and Labrador.

21. The records of the Federal departments, agencies, ministers and bureaucrats responsible for negotiating the *Terms of Union* show that from 1946 the Federal Government recognized that under the terms of the *British North America Act*, section

91(24), it would have to assume full responsibility for the native people of the new province.

22. As Canada's legal responsibility to Aboriginals was constitutional in nature, it was prohibited from attempting to cede or delegate such duties to any other entity, including the Province itself. Given the broad duties owed by Canada to Aboriginal persons, the welfare and education of Aboriginal children cannot be said to have resided with the Crown in right of the Province of Newfoundland after March 31, 1949.

23. The entry of Newfoundland and Labrador into Confederation brought its Aboriginal population fully within exclusive federal jurisdiction. At the time of Confederation, Canada was aware that any union with Newfoundland and Labrador would have had an Aboriginal component and legal responsibility associated with it.

24. In 1947, in advance of preparing for the *Terms of Union* negotiations, the Federal Government prepared a document for the Newfoundland delegation which outlined the nature of Federal involvement with and for Aboriginal peoples. Amongst other things, under classes of subjects in which the Federal Parliament exercised exclusive jurisdiction, 'Indians and lands reserved for Indians' was listed and when outlining the responsibilities that the various Federal departments would have for Newfoundland, 'Indian Affairs' was listed under the Department of Mines and Resources.

25. The function of the Indian Affairs Branch was described as administering the "affairs of the Indians of Canada [which] included the control of their education". The Federal Department of Mines and Resources stated, at that time, that the Dominion

assumes full responsibility for the welfare, including education, of Indians and Eskimos, a response which went on at length to describe the day and residential school system.

26. In and around the time of Confederation, a number of Federal legal opinions on the question were prepared, most of them acknowledging sole federal responsibility for Newfoundland's Aboriginal people. Under Term 3 of the *Terms of Union*, for matters not specifically referred to, things were deemed to be as if Newfoundland had joined under the terms of the *Constitution Act, 1867*.

27. When Canada sent its official version of the proposed *Terms of Union* to the National Convention in Newfoundland in October 1947, it had already acknowledged that under the terms of the *British North America Act* it had exclusive jurisdiction in the area of Aboriginal peoples. By deleting the reference to native people in the proposed draft *Terms of Union* and writing in Federal responsibility, as outlined in the *British North America Act*, the Federal Government acknowledged *de facto* jurisdiction for the Indians, Inuit and Eskimos of Newfoundland and Labrador.

28. At the time of Confederation, the Premier, Joseph Smallwood, actually refused to sign an agreement with Canada which would have transferred federal responsibility for native persons to the Province. The Province maintained that the fiduciary obligations for Aboriginal persons remained, and belonged to the federal government.

29. Following Confederation, in December 1949, Canada established an Interdepartmental Committee on Labrador Indians and Eskimos which requested another legal opinion from the Justice Department which stated that in the matter of Newfoundland "Indians and Eskimos":

“...the federal Parliament has exclusive legislative authority in relation to Indians ... which, of course, means that the provincial legislature has no authority to enact legislation directed at or dealing with [matters] in relation to Indians.... It is the responsibility of the federal government to formulate and carry out all policies that are directed at dealing with Indian or Indian problems. Such policy is to be formulated by Parliament and the executive. This responsibility carries with it the responsibility or providing money to be devoted to the carrying of our policies in relation to the Indians.”

30. This opinion provided by the Justice Department is consistent with the assumptions made during the pre-Confederation talks: Aboriginal persons, pursuant to the *British North America Act*, were Canada’s responsibility. Even before Newfoundland’s entry into Confederation, various federal departments had included in their departmental estimates sizeable amounts towards relief, services and expenditures for the native populations in Newfoundland and Labrador. This demonstrates that the federal government believed it had a responsibility to fulfill in regard to the Eskimo and Inuit in Labrador and that it would be called upon to provide programs and assistance, funding, oversight and implementation of certain programs, including education.

31. In fact, the *Terms of Union* indirectly provided that the then Aboriginal population in Newfoundland fell under federal jurisdiction. Section three of the *Terms of Union* affirms that: “[t]he *Constitution Acts, 1867 to 1940* apply to the Province of Newfoundland in the same way, and to the like extent as they apply to the provinces heretofore comprised in Canada”.

32. The *Constitution Act, 1867* itself states that “the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated: that is to say ... Indians, and Lands reserved for the Indians”.



33. Following Confederation in 1949, and by 1951, Canada had agreed to pay the bills submitted by Newfoundland for "Indians and Eskimos" for the period 1949-1950. At that same time, Newfoundland also provided Canada with an estimate of provincial expenditures with respect to Eskimo and Inuit in Labrador for which it expected payment. Throughout the 1950's and 1960's, programs for aboriginal education in Newfoundland and Labrador were paid for by Canada at the rate of 90% for Indian communities and 40% in Inuit communities.

34. A 1951 memorandum prepared by the Chairman of the Inter-departmental Committee on Newfoundland Indians and Eskimos formed the basis of much of Canada's position for the future:

"Section 3 of the *Terms of Union* stipulates that the provisions of the *BNA Act* shall apply to Newfoundland except insofar as varied by the Terms. Since the Terms of Union do not refer to Indians and Eskimos and since head 24 of section 91 of the *BNA Act* places 'Indians and lands reserved for Indians' exclusively under Federal jurisdiction, it seems clear that the Federal Government is responsible for the native population resident in Labrador."

35. By 1954, Newfoundland requested that Canada provide both operating and capital expenditures towards education for Eskimos and Inuit. The 1954 Agreement between Newfoundland and Canada stipulated that Canada would assume 66% of capital expenditures on behalf of Eskimos in Newfoundland and 100% of capital expenditures on behalf of Indians in the fields of health, welfare and education. This agreement reached between the Premier of Newfoundland and Canada in 1954 provided for the re-assumption of federal constitutional responsibility over aboriginal persons in the new province of Newfoundland and Labrador.

36. Just four years into this Agreement, Newfoundland requested further funds from Canada to provide education and housing for both Indians and Inuit. Shortly thereafter, in 1964, the Premier of Newfoundland asked Prime Minister Pearson, to either have Canada assume sole and full responsibility for Indians and Inuit or to at least increase funding to the level of support being provided by Canada to other provinces in Canada.

37. At the same time, the Pearson government requested a second legal opinion from the Justice Department. On November 23, 1964, the Deputy Attorney General provided that opinion and determined that:

“...there is no provision in the *Indian Act* excluding any portion of Canada from its application. Mr. Varcoe’s opinion [the 1950 Justice Department opinion] as to the constitutional position is, in my opinion, correct. The fact that there is no mention of Eskimos or Indians in the *Terms of Union* means only that the constitutional position with respect thereto has not changed with regard to Newfoundland.”

38. As a result, by 1965, Canada had agreed to provide the same resources and programs to Indians, Inuit and Eskimos in Labrador as were provided to similar groups elsewhere in Canada. The proposed agreements were to be: (a) renegotiated and reviewed every five years; (b) a Federal-Provincial committee was to be established to monitor expenditures and propose budgets for approval by both governments; (c) Newfoundland would be reimbursed for 90% of the Provinces’ capital expenditures for Indians and Eskimos for the period 1954 – 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments.

39. Amongst other things, this “Contribution Agreement” was designed to provide services to the communities of Sheshatshit and Davis Inlet, including education. The Contribution Agreement identified the amount of funding available as (a) 90% from

Canada; and (b) 10% from Newfoundland. The Contribution Agreement also established a management committee composed of federal officials, provincial officials and representatives of the Davis Inlet and Sheshatshit communities.

40. At the same time, the then Prime Minister also proposed certain increases in Canadian contributions for "Indians and Eskimos" in Newfoundland and Labrador which ultimately constituted an agreement between Canada and Newfoundland, providing, amongst other things, for:

- (a) Canada to pay Newfoundland up to \$1,000,000.00 per annum for 90% of the Province's Innu and Inuit expenditures (except where otherwise covered under other federal-provincial agreements);
- (b) establishment of a federal-provincial committee to monitor provincial expenditures;
- (c) continuation of federal funding for Inuit communities in Labrador; and
- (d) agreements to be reviewed and renegotiated every five years to "ensure that they continued to meet the changing circumstances and needs of the Eskimo and Indian residents in Labrador.

41. A Royal Commission on Labrador was convened in 1973 with a mandate to conduct a full inquiry into the economic and sociological conditions in Labrador. In addition to recommending to Newfoundland that it immediately renegotiate its funding agreements with Canada, given that amounts paid there under were inadequate and insufficient, the Commission also made the following determination:

"The Commission finds itself unable to determine a sound rationale for the practice under this Agreement of having the Province pay a percentage of cost for services to Indians and Eskimos. This is not the practice in other parts of Canada. In the view of the Commission, the Federal Government, as it does elsewhere, should be prepared to accept full fiscal responsibility unless the Province wishes to ensure its continued direct involvement in the program for Indians and Eskimos through sharing part of the cost..."

42. Many of the recommendations of the Royal Commission were implemented through the Federal-Provincial funding agreements which were ratified in the years following publication of the Commission Report. For example, an interim agreement was in place between 1976 and 1981 and funded projects which were valued at \$22 million in Labrador. Negotiations between the Province and Federal government led to the signing of two agreements in July 1981:

- (i) Canada-Newfoundland Community Development Subsidiary Agreement, valued at \$38,996,000.00, payable by the Federal government; and
- (ii) Native People's of Labrador Agreement, valued at \$38,831,00.00 federal payments/contributions.

43. The Labrador Agreement covered the following Indian and Inuit communities: Davis Inlet, Northwest Rivet, Nain, Hopedale, Makkovik, Rigolet and Postville. Pursuant to that Agreement, between 1981 and 1986, Canada contributed 90% of the costs of the programs and services in these Indian communities and 60% of the costs of those delivered in the Inuit communities. In total, Canada contributed \$29,135,100.00 in this respect between 1981 and 1986.

44. In August 1985, Canada entered into a further contribution agreement with Newfoundland and Labrador, "for the benefit of native peoples in Labrador", recognizing Canada's "special interest in the social and economic development of Inuit and Indian People." The operation of education was the largest budget allocation item pursuant to this Agreement, for a total of \$1,530,000.00 (1985/1986 fiscal year), 71% of which was Canada's responsibility.

45. Fiduciary obligations are and were owed by Canada to Aboriginal persons, peoples who, pursuant to section 35(2) of the Constitution Act 1982 include the Indian, Inuit and Metis. This fiduciary relationship between Canada and Aboriginal persons was and is sui generis in nature. Accordingly, a fiduciary duty between Canada and Aboriginal persons in Newfoundland and Labrador arose at the moment of Confederation in 1949.

46. Canada has acknowledged its own sole singular responsibility over Indians and Inuit in Newfoundland by accepting its obligation to financially assist or contribute. In any event, Canada has always assumed some level of legal responsibility for aboriginal persons in Newfoundland and Labrador. Having undertaking discretionary control over a cognizable Indian interest, a fiduciary duty existed between Canada and the Class in these circumstances.

47. As the nature of Canada's relationship with Aboriginal persons gives rise to a non-delegable duty to preserve, protect and promote welfare and education of Aboriginal children, the responsibility for its execution rested solely with Canada.

48. In the alternative, if Canada failed to properly assume those common law and constitutional obligations, it breached its, fiduciary and common law duties owed to the class by failing to do so.

ii. Canada's Operation of the School in Newfoundland

49. The School was located in Northwest River, Newfoundland. It was first established in 1948 and ceased operation as a residential school for Aboriginal children in 1979.

50. The purpose of the School was to provide education to Aboriginal children between the ages of 6 and 16 years who attended the School from various First Nations bands and communities in Newfoundland and Labrador. The School eventually became a vehicle for assimilating Aboriginal children through the eradication of their native languages, cultures and spiritual beliefs.

51. The School was initially founded and established by the International Grenfell Association. Once Confederation occurred in March 1949 and Newfoundland joined Canada, the International Grenfell Association began ceasing its involvement, funding and role in the School. ~~At all material times, the staff members at the School were employees, servants and/or agents of Canada.~~ The funding provided by Canada following Confederation was inadequate to meet the costs of operating and maintaining the School, and in particular, to meet the daily and educational needs of the students at the School. As a result, the care provided to the students and the conditions at the School were poor, the staff hired were unskilled and/or unsuitable for dealing with children and the conditions at the School were unsuitable and inappropriate for an educational facility for children.

~~52. In many cases, the Aboriginal children were forced to attend the School by representatives, agents or servants of Canada. The Aboriginal children who attended the School were separated from their families, uprooted and taken to the School, where they were placed within the control of Canada. For all intents and purposes, the children who attended the School, were wards of the School and Canada.~~

53. Canada participated in the funding, oversight ~~carried out that operation~~ and administration of the School until 1979. These operative and administrative responsibilities, carried out on behalf of Canada or by its agents included:

- (a) the operation and maintenance of the School during the Class Period;
- (b) the care and supervision of all members of the Survivor Class, and for supplying all the necessaries of life to Survivor Class members *in loco parentis*;
- (c) the provision of educational and recreational services to the Survivor Class while in attendance at the School and control over all persons allowed to enter the School premises at all material times;
- (d) the selection, supply and supervision of teaching and non-teaching staff at the School and reasonable investigation into the character, background and psychological profile of all individuals employed to teach or supervise the Survivor Class;
- (e) inspection and supervision of the School and all activities taking place therein, and for full and frank reporting to Canada respecting conditions in the School and all activities taking place therein;
- (f) transportation of Survivor Class members to and from the School; and
- (g) communication with and reporting to the Family Class respecting the activities and experiences of Survivor Class members while attending the School.

54. Attempts to provide educational opportunities to children confined in the School were ill-conceived and poorly executed by inadequately trained teaching staff. The result was to effectively deprive the Aboriginal children of any useful or appropriate education. Very few survivors of the School went on to any form of higher education.

55. The conditions and abuses in the School during the Class Period were well-known to Canada.

56. Any attempt by Canada to delegate its duties, responsibilities or obligations to the Class to the Province of Newfoundland is unlawful and in breach of its exclusive and non-delegable fiduciary duties owed to the class.

**F. CANADA'S BREACHES OF DUTIES TO THE CLASS MEMBERS**

57. Canada has a fiduciary relationship with Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled and regulated the School during the Class Period, either on its own or in conjunction with the Province.

58. Canada, and its respective servants and agents compelled members of the Survivor Class to leave their homes, families and communities, and forced members of the Survivor Class to attend (and sometimes live in) the School, all without lawful authority or the permission and consent of Survivor Class members or that of their parents. Such confinement was wrongful, arbitrary and for improper purposes.

59. Survivor Class members were systematically subjected to the institutional conditions, regime and discipline of the School without the permission and consent of Survivor Class members or that of their parents, and were also subjected to wrongful acts at the hands of Canada while confined therein.

60. In particular, Obed and Adams experienced severe physical abuse and verbal abuse during their time at the School by teachers, "caregivers" and other students. Obed and Adams also suffered from serious physical, mental and abuse during their time at the School from both teachers and students. In particular, both Obed and Adams were repeatedly sexually abused by dorm supervisors, supposed caregivers and other students.



Many of the children at the School also experienced sexual abuse, perpetrated against them by teachers, adults in positions of authority or from other students.

61. Blake, as a member of the Family Class, has experienced both serious physical and emotional abuse due to Adams' inability to participate in normal family life as result harm he suffered during his attendance at the School.

62. All persons, including Obed and Adams, who attended the School ~~did so as wards of Canada, with Canada as their guardian, and~~ were persons to whom Canada owed the highest non-delegable, fiduciary, ~~moral, statutory~~ and common law duties, which included, but were not limited to, the duty to ensure that reasonable care was taken of the Survivor Class while at the School, the duty to protect the Survivor Class while at the School and the duty to protect the Survivor Class from intentional torts perpetrated on them while at the School. These non-delegable ~~and fiduciary~~ duties were performed negligently and tortuously by Canada, in breach of its special responsibility to ensure the safety of the Survivor Class while at the School.

63. Canada was responsible for:

- (a) ~~the administration of the Act and its predecessor statutes as well as any other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;~~
- (b) the promotion of the health, safety and well being of Aboriginal Persons in Newfoundland during the Class Period;
- (c) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessor ministries and departments during the Class Period;
- (d) decisions, procedures, regulations promulgated, operations and actions taken by the Department of Indian Affairs and Northern Development and,

- (c) ~~it acted without lawful authority and not in accordance with any statutory authority pursuant to or as contemplated by the provisions of the Act or any other statutes relating to Aboriginal Persons as:~~
- (i) ~~said provisions are and were *ultra vires* the Parliament of Canada and of no force and effect in law;~~
  - (ii) ~~the conduct of Canada in placing the Aboriginal children in the School, confining them therein, and treating or permitting them to be treated there as set forth herein was in breach of Canada's fiduciary obligations to the Survivor Class and Family Class Members, which was not authorized or permitted by any applicable legislation and was, to the extent such legislation purported to authorize such fiduciary breach, of no force and effect and/or *ultra vires* the Parliament of Canada; and~~
  - (iii) ~~Canada routinely and systematically failed to act in accordance with its own laws, regulations, policies and procedures with respect to the confinement of Aboriginal children in the School, which confinement was wrongful.~~
- (d) it delegated to and contracted with the Churches and other Religious organizations and the Province to implement its program of forced integration, confinement and abuse;
- (e) it failed to adequately screen and select the organizations and individuals to which it delegated the implementation of its Residential School program;
- (f) it failed to adequately supervise and control the School and its agents operating same under its jurisdiction;
- (g) it deliberately and chronically deprived the Survivor Class Members of the education they were entitled to or were led to expect from the School or of any adequate education;
- (h) it designed, constructed, maintained and operated the School buildings which were sub-standard, inadequate to the purpose for which they were intended and detrimental to the emotional, psychological and physical health of the Survivor Class;
- (i) it failed to provide funding for the operation of the School that was sufficient or adequate to supply the necessities of life to Aboriginal children confined to them;
- (j) it failed to respond appropriately or at all to disclosure of abuses in the School during the Class Period;

- ~~(k) it conspired with the operators of the schools to suppress information about abuses taking place in the School during the Class Period;~~
- (l) it assaulted and battered the Survivor Class Members and permitted them to be assaulted and battered during the Class Period;
- (m) it permitted an environment which permitted and allowed student-upon-student abuse;
- (n) ~~it forcibly confined the Survivor Class Members and permitted them to be forcibly confined during the Class Period;~~
- (o) it was in breach of its fiduciary duty to ~~its~~ Wards the Survivor Class Members by reason of the misfeasances, malfeasances and omissions set out above;
- (p) it failed to inspect or audit the School adequately or at all;
- (q) it failed to implement an adequate system of evaluation, monitoring and control of teachers, administrators and non-teaching staff of the School during the Class Period;
- (r) it failed to periodically reassess its regulations, procedures and guidelines for the School when it knew or ought to have known of serious systemic failures in the School during the Class Period;
- (s) it failed to close the School and otherwise protect and care for those persons confined therein when it knew or ought to have known that it was appropriate and essential to do so in order to preserve the health, welfare and well being of the Survivor Class Members;
- (t) it delegated, attempted to delegate, continued to delegate and improperly delegated its non delegable duties and responsibility for the Survivor Class when it was incapable to do so and when it knew or ought to have known that these duties and responsibilities were not being met;
- (u) it failed to recognize and acknowledge harm once it occurred, to prevent additional harm from occurring and to, whenever and to the extent possible, provide appropriate treatment to those who were harmed;
- ~~(v) it undertook a systematic program of forced integration and assimilation of the Aboriginal Persons through the institution of the School when it knew or ought to have known that doing so would cause profound and permanent cultural, psychological, emotional and physical injury to the members of the Survivor Class during and following the Class Period; and~~
- ~~(w) it was in breach of its obligations to the Survivor Class Members and Family Class Members as set out in the Act and its Treaties with various~~

~~First Nations providing a right to education at a school to be established and maintained by Canada and which implicitly included the right to education in a safe environment free from abuse and the right to an education which would recognize Aboriginal beliefs, traditions, culture, language and way of life in a way that would not denigrate or eliminate these beliefs, traditions, culture, language and way of life.~~

68. Canada, through its employees, agents or representatives also breached its duty of care to protect the Survivor Class Members from sexual abuse by the student perpetrators while those particular Plaintiffs and the Survivor Class Members were attending and residing at the School with the result that the student perpetrators did in fact commit sexual abuse upon certain Plaintiffs and the Survivor Class Members.

69. Canada breached its fiduciary duties to the Plaintiffs and the Class and their families by failing to take any steps to protect the Survivor Class Members from sexual abuse.

70. In breach of its ongoing fiduciary duty to the Class, Canada failed and continues to fail, to adequately remediate the damage caused by its failures and omissions set out herein. In particular, Canada ~~has failed to take adequate measures to ameliorate the cultural, linguistic and social damage suffered by the class, and further has failed to~~ provide compensation for the physical, sexual and emotional abuse suffered by the Class.

~~71. The Plaintiffs plead that Canada was in breach of its various treaty obligations set out through the establishment and operation of the School and are liable for such breaches. In contravention of the Treaties between the Government and First Nations and in contravention of the *United Nations Genocide Convention*, particularly Article 2(e) thereof to which Canada is a signatory, the Plaintiffs and other Aboriginal children were to be systemically assimilated into white society. In pursuance of that plan, they were~~

~~forced to attend the School and contact with their families was restricted. Their cultures and languages were taken from them with sadistic punishment and practices.~~

~~72. The systemic child abuse, neglect and maltreatment sustained by the children at the School during the Class Period, the effect and impact of which is still being felt by Survivor Class Members and Family Class Members, was in violation of the rights of children, specifically, but not limited to, the following rights set out in the *United Nations Convention on the Rights of the Child*, adopted by the United Nations in 1989, and ratified by Canada in December of 1991.~~

**G. DAMAGES SUFFERED BY CLASS MEMBERS**

73. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Survivor Class Members, including Obed and Adams, suffered injury and damages including:

- (a) isolation from family and community;
- ~~(b) prohibition of the use of Aboriginal language and the practice of Aboriginal religion and culture and the consequential loss of facility and familiarity with Aboriginal language, religion and culture;~~
- (c) forced confinement;
- (d) assault and battery;
- (e) sexual abuse;
- (f) emotional abuse;
- (g) psychological abuse;
- (h) deprivation of the fundamental elements of an education;

- (i) an impairment of mental and emotional health amounting to a severe and permanent disability;
- (j) a propensity to addiction;
- (k) an impaired ability to participate in normal family life;
- (l) alienation from family, spouses and children;
- (m) an impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;
- (n) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the School experience;
- (o) depression, anxiety and emotional dysfunction;
- (p) suicidal ideation;
- (q) pain and suffering;
- (r) deprivation of the love and guidance of parents and siblings;
- (s) loss of self-esteem and feelings of degradation;
- (t) fear, humiliation and embarrassment as a child and adult, and sexual confusion and disorientation as a child and young adult;
- (u) loss of ability fulfill cultural duties;
- (v) loss of ability to live in community; and
- (w) constant and intense emotional, psychological pain and suffering.

74. The foregoing damages resulted from Canada's breach of fiduciary duty, and/or negligence, assault, battery and/or breach of Aboriginal treaty rights.

75. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Family Class Members, including Blake, suffered injury and damages including:

- (a) they were separated and alienated from Survivor Class Members for the duration of their confinement in the School;
- (b) their relationships with Survivor Class Members were impaired, damaged and distorted as the result of the experiences of Survivor Class members in the School;
- (c) they suffered abuse from Survivor Class members as a direct consequence of their School experience;
- (d) they were unable to resume normal family life and experience with Survivor Class Members after their return from the Schools;
- (e) ~~their culture and language was undermined and in some cases eradicated by, amongst other things, as pleaded herein, the forced assimilation of Survivor Class Members into non-aboriginal culture through the School.~~

76. Canada knew, or ought to have known, that as a consequence of its mistreatment of the children at the School, these Plaintiffs and class members would suffer significant mental, emotional, psychological and spiritual harm which would adversely affect their relationships with their families and their communities. ~~In fact, one of the purposes behind the operation of the School was to eliminate and damage relationships within families and communities with a view to promoting the assimilation of Aboriginal children into non-Aboriginal society.~~

#### H. PUNITIVE AND EXEMPLARY DAMAGES

77. The Plaintiffs plead that Canada, including its senior officers, directors, bureaucrats, ministers and executives, had specific and complete knowledge of the widespread physical, psychological, emotional, cultural and sexual abuses of Survivor Class Members which were occurring at the School during the Class Period. Despite this knowledge, Canada continued to operate the School and permit the perpetration of grievous harm to the Survivor Class Members.

~~78. In addition, Canada deliberately planned the eradication of the language, religion and culture of Survivor Class Members and Family Class Members. Their actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.~~

79. Full particulars respecting the daily care, operation and control of the School are within the Defendant's knowledge, control and possession.

80. The Plaintiffs plead and rely upon the following:

~~*Canadian Charter of Rights and Freedoms*, ss. 7, 15 and 24;~~

*Class Actions Act*, S.N.L. 2001, c. C-18.1.

*Constitution Act, 1982*, s. 35(1), being Schedule "B" to the *Canada Act, 1982* (U.K.), c. 11.

~~*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, ss. 3, 21, 22, and 23;~~

~~*The Indian Act*, S.C. 1951, c. 29, ss. 113-118;~~

~~*The Indian Act*, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122.~~

*The Newfoundland Act*, 1949 (U.K.), c. 22.

81. The Plaintiffs propose this action be tried in the City of St. John's, in the Province of Newfoundland.



**Dated** at St. John's, in the Province of Newfoundland and Labrador, this 19<sup>th</sup> day of April, 2012.

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its employees, servants, officers and agents in Canada during the Class Period;

- (e) overseeing the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the School and for the creation, design and implementation of the program of education for Aboriginal Persons confined therein during the Class Period;
- (f) the selection, control, training, supervision and regulation of the designated operators and their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons confined in the Residential School during the Class Period;
- (g) the provision of all educational services and opportunities to the Survivor Class members, pursuant to the provisions of the Act and any other statutes relating to Aboriginal Persons during the Class Period;
- ~~(h) transportation of Survivor Class Members to and from the School and to and from their homes while attending the School during the Class Period;~~
- ~~(i) preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities;~~
- (j) the care and supervision of all members of the Survivor Class while they were in attendance at the School during the Class Period and for the supply of all the necessities of life to Survivor Class Members, *in loco parentis*, during the Class Period;
- (k) the provision of educational and recreational services to the Survivor Class while in attendance at the School during the Class Period;
- (l) inspection and supervision of the School and all activities that took place therein during the Class Period and for full and frank reporting to Canada and to the Family Class Members with respect to conditions in the School and all activities that took place therein during the Class Period; and
- ~~(m) communication with and reporting to the Family Class with respect to the activities and experiences of Survivor Class Members while attending the School during the Class Period.~~

64. During the Class Period, male and female Aboriginal children, including Obed and Adams, were subjected to gender specific, as well as non-gender specific, systematic child abuse, neglect and maltreatment. They were forcibly confined in the School and

were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

65. At all material times, the children who attended the School were within the knowledge, contemplation, power or and control of Canada and were subject to the unilateral exercise of Canada's (or its delegates') power or discretion. By virtue of the relationship between the children and Canada, being one of trust, reliance and dependence, by the Aboriginal children, Canada owed a fiduciary obligation to ensure that the students who attended the School were treated fairly, respectfully, safely and in all other ways, consistent with the obligations of a parent or guardian to a child under his care and control.

66. At all material times, Canada owed a fiduciary obligation to the students who attended the School to act in the best interests of those students and to protect them from any abuse, be it mental, emotional, physical, sexual or otherwise. The children at the School relied upon Canada, to their detriment, to fulfill its fiduciary obligations.

67. Through its servants, officers, employees and agents, Canada was negligent and in breach of its non-delegable fiduciary, ~~moral, statutory,~~ and common law duties of care to the Survivor Class and the Family Class during the Class Period. Particulars of the negligence and breach of duty of Canada include the following:

- (a) it systematically, negligently, unlawfully and wrongfully delegated its fiduciary and other responsibility and duties regarding the education of and care for Aboriginal children to others;
- (b) it systematically, negligently, unlawfully and wrongfully admitted and confined Aboriginal children to the School;

leave granted  
R7A08, April 12/12  
Winn

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IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION

**BETWEEN:**

CAROL ANDERSON, ALLEN WEBBER  
and JOYCE WEBBER

PLAINTIFFS

**AND:**

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Brought under the *Class Actions Act*, S.N.L. 2001, c. C-18.1

**AMENDED STATEMENT OF CLAIM**

**A. RELIEF SOUGHT BY THE PLAINTIFF AGAINST CANADA**

1. The Representative Plaintiffs, on their own behalf, and on behalf of the members of the Survivor Class and Family Class claim:

- (a) an Order certifying this proceeding as a Class Proceeding pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 and appointing Carol Anderson and Allen Webber as Representative Plaintiffs for the Survivor Class and any appropriate subgroup thereof;
- (b) a Declaration that Canada owed ~~and was in breach of~~ exclusive non-delegable fiduciary, and statutory and common law duties of care to the Plaintiffs and the other Survivor Class Members in relation to the establishment, funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the Lockwood School in Cartwright, Labrador (the "School");
- (c) a Declaration that Canada was negligent in the establishment, funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

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- (d) a Declaration the Canada was or is in breach of its exclusive and non-delegable fiduciary obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, oversight, confinement in, transport of Survivor Class Members, to obligatory attendance at the School of the School;
- (e) ~~a Declaration that Canada was or is in breach of its statutory duties pursuant to the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act") and its Treaty obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;~~
- (f) ~~a Declaration that the School caused cultural, linguistic and social damage and irreparable harm to the Survivor Class;~~
- (g) a Declaration that Canada is liable to the Plaintiffs and other Survivor Class Members for the damages caused by its breach of exclusive non delegable, fiduciary and, statutory and common law duties of care and for negligence in relation to the establishment, funding, operation, supervision, control, maintenance, oversight, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;
- (h) non-pecuniary general damages for negligence, loss of language and culture, breach of non-delegable exclusive fiduciary and duties of care, statutory, treaty and common law duties in the amount of \$500 million or such other sum as this Honourable Court finds appropriate;
- (i) pecuniary general damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, breach of non-delegable exclusive fiduciary and, statutory, treaty and common law duties of care in the amount of \$500 million or such other sum as this Honourable Court finds appropriate;
- (j) exemplary and punitive damages in the amount of \$100 million or such other sum as the this Honourable Court finds appropriate;
- (k) damages in the amount of \$100 million or such other sum as this Honourable Court finds appropriate, pursuant to the *Family Law Act*, R.S.N., 1990, and its predecessors;
- (l) prejudgment and post judgment interest pursuant to the provisions of the *Judicature Act*, R.S.N. 1990, c. J-4 ; and
- (m) the costs of this action on a substantial indemnity scale.

## B. DEFINITIONS

2. The following definitions apply for the purposes of this Claim:

- (a) "Aboriginal", "Aboriginal People(s)" or "Aboriginal Person(s)" means a person whose rights are recognized and affirmed by the *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act, 1982* (U.K.), 1982. c. 11, specifically, members of the Metis and Inuit nations;
- (b) "Aboriginal Right(s)" means rights recognized and affirmed by the *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act, 1982* (U.K.), 1982. c. 11;
- (c) "Agents" mean the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of the School;
- (d) "Canada" means the Defendant, the Government of Canada as represented in this proceeding by the Attorney General of Canada;
- (e) "Class" or "Class Members" means all members of the Survivor Class and the Family Class;
- (f) "Class Period" means March 31, 1949 to December 31, 1996 and the date of closure of the Lockwood School;
- (g) "Excluded Persons" means all persons who attended an Eligible Indian Residential School as defined by the Settlement Agreement dated May 10, 2006, executed between Canada, as represented by the Attorney General of Canada (the "Agreement") and all persons who are otherwise eligible, pursuant to the Agreement, to receive a Common Experience Payment or pursue a claim through the Individual Assessment Process, as defined by the Agreement;
- (h) "Family Class" means:
  - (i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;
  - ~~(ii) the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;~~
  - (iii) a former spouse of a Survivor Class Member;
  - (iv) a child or other lineal descendent of a grandchild of a Survivor Class Member;

- (v) 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;
- (vi) 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;
- (vii) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death;
- (i) "School" means the Lockwood School, located in Cartwright, Labrador;
- (j) "Survivor Class" means:

All persons who attended the School between March 31, 1949 and ~~December 31, 1996~~ the date of closure of the Lockwood School.

## C. THE PARTIES

### i. Representative Plaintiffs

3. The Plaintiff, Carol Anderson ("Anderson"), resides in Goose Bay, Newfoundland and is a Metis First Nation. Anderson attended the School in Cartwright between 1958 and 1959. Anderson is a ~~proposed~~ the representative plaintiff for the Survivor Class.

4. The Plaintiff, Allen Webber ("Allen"), resides in Goose Bay, Newfoundland and is a Metis First Nation. Allen attended the School in Cartwright between 1958 and 1959. Allen is a ~~proposed~~ the representative plaintiff for the Survivor Class.

5. The Plaintiff, Joyce Webber ("Webber") resides in Goose Bay, Newfoundland and is a Metis First Nation. Joyce was born on June 2, 1954. Her husband Allen attended the School in Cartwright, Newfoundland between 1958 and 1959. Joyce is a ~~proposed~~ the representative plaintiff for the Family Class.

6. The proposed Representative Plaintiffs do not purport to advance claims on behalf of any persons who are otherwise entitled to compensation pursuant to the terms of the Agreement.

7. In particular, the proposed Representative Plaintiffs' claim and the class they propose to represent, do not overlap with the terms of the order granted by Justice Winkler of the Ontario Superior Court of Justice, dated March 8, 2007, attached hereto as Schedule "A".

ii. The Defendant

8. The Defendant, the Government of Canada, is being represented in this proceeding by the Attorney General of Canada. Canada represents the interests of the Minister of the Department of Indian Affairs Canada, who was, at all material times, responsible for the maintenance, funding, oversight or management and operation of the School, either on its own or in combination with other of its agents or servants.

9. Once the Province of Newfoundland and Labrador entered Confederation in 1949, Canada assumed and possessed exclusive Legislative and executive responsibility over aboriginal persons, including the Classes. As aboriginal persons in the 'new' province in 1949 were legally "Indians" for the purposes of section 91(24) of the *British North America Act, 1867*, they were proper subjects of federal jurisdiction.

10. Canada's participation in the funding and operation of the School breached its exclusive duty of care owed to the Classes which was also in breach of its non-delegable fiduciary obligations and constitutional obligations owed to aboriginal persons.



11. Alternatively, even if Canada did not materially operate or manage the school, it nevertheless breached its fiduciary duties by failing to properly do so and protect the Class as it alone possessed singular and exclusive legal jurisdiction over aboriginal persons.

**D. RESIDENTIAL SCHOOL SYSTEM – OPERATION OF THE SCHOOL**

**i. Background - Residential School History Generally**

12. Residential Schools were established by Canada as early as 1874, for the education of Aboriginal children. These children were taken from their homes and their communities and transported to Residential Schools where they were often confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them.

13. Commencing in 1911, Canada entered into formal agreements with the Churches for the operation of such schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of the Residential Schools. The Churches assumed the day-to-day operation of the Residential Schools under the control, supervision and direction of Canada, for which the Canada paid the Churches a per capita grant calculated to cover part of the cost of the Residential School operation.

14. As of 1920, the Residential School Policy included compulsory attendance at Residential Schools for all Aboriginal children aged 7 (seven) to 15 (fifteen). This approach to the control and operation of the Residential Schools system continued until April 1, 1969, at which time Canada assumed the sole operation and administration of the

Residential Schools from the Churches, excepting certain cases where Churches continued to act as agents of Canada.

15. Canada removed Aboriginal Persons, usually young children, from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. Canada controlled all aspects of the admission of Aboriginal Persons to the Residential Schools including arrangements for the care of such persons over holiday periods and the methods of transporting children to and from Residential Schools.

16. ~~The same A-Similar Residential Schools policy was implemented and effected in~~ existed in Newfoundland and Labrador which joined Canada on March 31, 1949. Accordingly, the claim against Canada is limited temporally to the time when the Canada became legally responsible for Aboriginal Persons residing in that province, or 1949, and beyond.

17. Aboriginal Persons were often taken from their families without the consent of their parents or guardians. While the stated purpose of the Residential Schools from their inception was the education of Aboriginal children, their true purpose was the complete integration and assimilation of Aboriginal children into mainstream Canadian society and the obliteration of their traditional language, culture and religion. Many children attending Residential Schools were also subject to repeated and extreme physical, sexual and emotional abuse, all of which continued until the year 1996, when the last federally operated Residential School was closed.

18. During the Class Period, children at the school were subjected to systemic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

19. The accommodation was crowded, cold and sub-standard. Aboriginal children were underfed and ill nourished, forbidden to speak their native languages or to practice the customs and traditions of their culture. They were deprived of love and affection from their families and of the support that a child would normally expect to have from those in positions of trust and authority. Aboriginal children were also subjected to corporal punishment, assaults, including physical and sexual and systematic child abuse.

**E. CANADA'S ASSUMPTION OF DUTIES WHEN NEWFOUNDLAND JOINED CONFEDERATION IN 1949**

20. Around the time of Confederation, two separate legal opinions commissioned by the Federal Department of Justice confirmed that the Federal Crown possessed exclusive legislative and executive responsibility in relation to Aboriginal persons, including the Inuit and Eskimo, living in Newfoundland and Labrador.

21. The records of the Federal departments, agencies, ministers and bureaucrats responsible for negotiating the *Terms of Union* show that from 1946 the Federal Government recognized that under the terms of the *British North America Act*, section 91(24), it would have to assume full responsibility for the native people of the new province.

22. As Canada's legal responsibility to Aboriginals was constitutional in nature, it was prohibited from attempting to cede or delegate such duties to any other entity, including the Province itself. Given the broad duties owed by Canada to Aboriginal persons, the welfare and education of Aboriginal children cannot be said to have resided with the Crown in right of the Province of Newfoundland after March 31, 1949.

23. The entry of Newfoundland and Labrador into Confederation brought its Aboriginal population fully within exclusive federal jurisdiction. At the time of Confederation, Canada was aware that any union with Newfoundland and Labrador would have had an Aboriginal component and legal responsibility associated with it.

24. In 1947, in advance of preparing for the *Terms of Union* negotiations, the Federal Government prepared a document for the Newfoundland delegation which outlined the nature of Federal involvement with and for Aboriginal peoples. Amongst other things, under classes of subjects in which the Federal Parliament exercised exclusive jurisdiction, 'Indians and lands reserved for Indians' was listed and when outlining the responsibilities that the various Federal departments would have for Newfoundland, 'Indian Affairs' was listed under the Department of Mines and Resources.

25. The function of the Indian Affairs Branch was described as administering the "affairs of the Indians of Canada [which] included the control of their education". The Federal Department of Mines and Resources stated, at that time, that the Dominion assumes full responsibility for the welfare, including education, of Indians and Eskimos, a response which went on at length to describe the day and residential school system.

26. In and around the time of Confederation, a number of Federal legal opinions on the question were prepared, most of them acknowledging sole federal responsibility for Newfoundland's Aboriginal people. Under Term 3 of the *Terms of Union*, for matters not specifically referred to, things were deemed to be as if Newfoundland had joined under the terms of the *Constitution Act, 1867*.

27. When Canada sent its official version of the proposed *Terms of Union* to the National Convention in Newfoundland in October 1947, it had already acknowledged that under the terms of the *British North America Act* it had exclusive jurisdiction in the area of Aboriginal peoples. By deleting the reference to native people in the proposed draft *Terms of Union* and writing in Federal responsibility, as outlined in the *British North America Act*, the Federal Government acknowledged *de facto* jurisdiction for the Indians, Inuit and Eskimos of Newfoundland and Labrador.

28. At the time of Confederation, the Premier, Joseph Smallwood, actually refused to sign an agreement with Canada which would have transferred federal responsibility for native persons to the Province. The Province maintained that the fiduciary obligations for Aboriginal persons remained, and belonged to the federal government.

29. Following Confederation, in December 1949, Canada established an Interdepartmental Committee on Labrador Indians and Eskimos which requested another legal opinion from the Justice Department which stated that in the matter of Newfoundland "Indians and Eskimos":

"...the federal Parliament has exclusive legislative authority in relation to Indians ... which, of course, means that the provincial legislature has no authority to enact legislation directed at or dealing with [matters] in relation to Indians.... It is the responsibility of the federal government to formulate and carry out all policies that are

directed at dealing with Indian or Indian problems. Such policy is to be formulated by Parliament and the executive. This responsibility carries with it the responsibility or providing money to be devoted to the carrying of our policies in relation to the Indians."

30. This opinion provided by the Justice Department is consistent with the assumptions made during the pre-Confederation talks: Aboriginal persons, pursuant to the *British North America Act*, were Canada's responsibility. Even before Newfoundland's entry into Confederation, various federal departments had included in their departmental estimates sizeable amounts towards relief, services and expenditures for the native populations in Newfoundland and Labrador. This demonstrates that the federal government believed it had a responsibility to fulfill in regard to the Eskimo and Inuit in Labrador and that it would be called upon to provide programs and assistance, funding, oversight and implementation of certain programs, including education.

31. In fact, the *Terms of Union* indirectly provided that the then Aboriginal population in Newfoundland fell under federal jurisdiction. Section three of the *Terms of Union* affirms that: "[t]he *Constitution Acts, 1867 to 1940* apply to the Province of Newfoundland in the same way, and to the like extent as they apply to the provinces heretofore comprised in Canada".

32. The *Constitution Act, 1867* itself states that "the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say ... Indians, and Lands reserved for the Indians".

33. Following Confederation in 1949, and by 1951, Canada had agreed to pay the bills submitted by Newfoundland for "Indians and Eskimos" for the period 1949-1950.

At that same time, Newfoundland also provided Canada with an estimate of provincial expenditures with respect to Eskimo and Inuit in Labrador for which it expected payment. Throughout the 1950's and 1960's, programs for aboriginal education in Newfoundland and Labrador were paid for by Canada at the rate of 90% for Indian communities and 40% in Inuit communities.

34. A 1951 memorandum prepared by the Chairman of the Inter-departmental Committee on Newfoundland Indians and Eskimos formed the basis of much of Canada's position for the future:

"Section 3 of the *Terms of Union* stipulates that the provisions of the *BNA Act* shall apply to Newfoundland except insofar as varied by the Terms. Since the Terms of Union do not refer to Indians and Eskimos and since head 24 of section 91 of the *BNA Act* places 'Indians and lands reserved for Indians' exclusively under Federal jurisdiction, it seems clear that the Federal Government is responsible for the native population resident in Labrador."

35. By 1954, Newfoundland requested that Canada provide both operating and capital expenditures towards education for Eskimos and Inuit. The 1954 Agreement between Newfoundland and Canada stipulated that Canada would assume 66% of capital expenditures on behalf of Eskimos in Newfoundland and 100% of capital expenditures on behalf of Indians in the fields of health, welfare and education. This agreement reached between the Premier of Newfoundland and Canada in 1954 provided for the re-assumption of federal constitutional responsibility over aboriginal persons in the new province of Newfoundland and Labrador.

36. Just four years into this Agreement, Newfoundland requested further funds from Canada to provide education and housing for both Indians and Inuit. Shortly thereafter, in 1964, the Premier of Newfoundland asked Prime Minister Pearson, to either have Canada

assume sole and full responsibility for Indians and Inuit or to at least increase funding to the level of support being provided by Canada to other provinces in Canada.

37. At the same time, the Pearson government requested a second legal opinion from the Justice Department. On November 23, 1964, the Deputy Attorney General provided that opinion and determined that:

"...there is no provision in the *Indian Act* excluding any portion of Canada from its application. Mr. Varcoe's opinion [the 1950 Justice Department opinion] as to the constitutional position is, in my opinion, correct. The fact that there is no mention of Eskimos or Indians in the *Terms of Union* means only that the constitutional position with respect thereto has not changed with regard to Newfoundland."

38. As a result, by 1965, Canada had agreed to provide the same resources and programs to Indians, Inuit and Eskimos in Labrador as were provided to similar groups elsewhere in Canada. The proposed agreements were to be: (a) renegotiated and reviewed every five years; (b) a Federal-Provincial committee was to be established to monitor expenditures and propose budgets for approval by both governments; (c) Newfoundland would be reimbursed for 90% of the Provinces' capital expenditures for Indians and Eskimos for the period 1954 – 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments.

39. Amongst other things, this "Contribution Agreement" was designed to provide services to the communities of Sheshatshit and Davis Inlet, including education. The Contribution Agreement identified the amount of funding available as (a) 90% from Canada; and (b) 10% from Newfoundland. The Contribution Agreement also established a management committee composed of federal officials, provincial officials and representatives of the Davis Inlet and Sheshatshit communities.



40. At the same time, the then Prime Minister also proposed certain increases in Canadian contributions for "Indians and Eskimos" in Newfoundland and Labrador which ultimately constituted an agreement between Canada and Newfoundland, providing amongst other things, for:

- (a) Canada to pay Newfoundland up to \$1,000,000.00 per annum for 90% of the Province's Innu and Inuit expenditures (except where otherwise covered under other federal-provincial agreements);
- (b) establishment of a federal-provincial committee to monitor provincial expenditures;
- (c) continuation of federal funding for Inuit communities in Labrador; and
- (d) agreements to be reviewed and renegotiated every five years to "ensure that they continued to meet the changing circumstances and needs of the Eskimo and Indian residents in Labrador.

41. A Royal Commission on Labrador was convened in 1973 with a mandate to conduct a full inquiry into the economic and sociological conditions in Labrador. In addition to recommending to Newfoundland that it immediately renegotiate its funding agreements with Canada, given that amounts paid there under were inadequate and insufficient, the Commission also made the following determination:

"The Commission finds itself unable to determine a sound rationale for the practice under this Agreement of having the Province pay a percentage of cost for services to Indians and Eskimos. This is not the practice in other parts of Canada. In the view of the Commission, the Federal Government, as it does elsewhere, should be prepared to accept full fiscal responsibility unless the Province wishes to ensure its continued direct involvement in the program for Indians and Eskimos through sharing part of the cost..."

42. Many of the recommendations of the Royal Commission were implemented through the Federal-Provincial funding agreements which were ratified in the years following publication of the Commission Report. For example, an interim agreement was in place between 1976 and 1981 and funded projects which were valued at \$22 million in

Labrador. Negotiations between the Province and Federal government led to the signing of two agreements in July 1981:

- (i) Canada-Newfoundland Community Development Subsidiary Agreement, valued at \$38,996,000.00, payable by the Federal government; and
- (ii) Native People's of Labrador Agreement, valued at \$38,831,00.00 federal payments/contributions.

43. The Labrador Agreement covered the following Indian and Inuit communities: Davis Inlet, Northwest Rivet, Nain, Hopedale, Makkovik, Rigolet and Postville. Pursuant to that Agreement, between 1981 and 1986, Canada contributed 90% of the costs of the programs and services in these Indian communities and 60% of the costs of those delivered in the Inuit communities. In total, Canada contributed \$29,135,100.00 in this respect between 1981 and 1986.

44. In August 1985, Canada entered into a further contribution agreement with Newfoundland and Labrador, "for the benefit of native peoples in Labrador", recognizing Canada's "special interest in the social and economic development of Inuit and Indian People." The operation of education was the largest budget allocation item pursuant to this Agreement, for a total of \$1,530,000.00 (1985/1986 fiscal year), 71% of which was Canada's responsibility.

45. Fiduciary obligations are and were owed by Canada to Aboriginal persons, peoples who, pursuant to section 35(2) of the *Constitution Act 1982* include the Indian, Inuit and Metis. This fiduciary relationship between Canada and Aboriginal persons was and is *sui generis* in nature. Accordingly, a fiduciary duty between Canada and

Aboriginal persons in Newfoundland and Labrador arose at the moment of Confederation in 1949.

46. Canada has acknowledged its own sole singular responsibility over Indians and Inuit in Newfoundland by accepting its obligation to financially assist or contribute. In any event, Canada has always assumed some level of legal responsibility for aboriginal persons in Newfoundland and Labrador. Having undertaking discretionary control over a cognizable Indian interest, a fiduciary duty existed between Canada and the Class in these circumstances.

47. As the nature of Canada's relationship with Aboriginal persons gives rise to a non-delegable duty to preserve, protect and promote welfare and education of Aboriginal children, the responsibility for its execution rested solely with Canada.

48. In the alternative, if Canada failed to properly assume those common law and constitutional obligations, it breached its fiduciary and common law duties owed to the class by failing to do so.

ii. Canada's Operation of the School in Labrador

49. The School was located in Cartwright, Labrador. It was first established in 1949 and ceased operation as a residential school for Aboriginal children in 1979.

50. The purpose of the School was to provide education to Aboriginal children between the ages of 6 and 16 years who attended the School from various First Nations bands and communities in Newfoundland and Labrador. The School eventually became a

vehicle for assimilating Aboriginal children through the eradication of their native languages, cultures and spiritual beliefs.

51. The School was initially founded and established by the International Grenfell Association. Once Confederation occurred in March 1949 and Newfoundland joined Canada, the International Grenfell Association began ceasing its involvement, funding and role in the School. ~~At all material times, the staff members at the School were employees, servants and/or agents of Canada.~~ The funding provided by Canada following Confederation was inadequate to meet the costs of operating and maintaining the School, and in particular, to meet the daily and educational needs of the students at the School. As a result, the care provided to the students and the conditions at the School were poor, the staff hired were unskilled and/or unsuitable for dealing with children and the conditions at the School were unsuitable and inappropriate for an educational facility for children.

~~52. In many cases, the Aboriginal children were forced to attend the School by representatives, agents or servants of Canada. The Aboriginal children who attended the School were separated from their families, uprooted and taken to the School, where they were placed within the control of Canada. For all intents and purposes, the children who attended the School, were wards of the School and/or Canada.~~

53. Canada participated in the funding, oversight ~~carried out that operation and administration of the School until 1979.~~ These operative and administrative responsibilities, carried out on behalf of Canada or by its agents included:

- (a) the operation and maintenance of the School during the Class Period;

- (b) the care and supervision of all members of the Survivor Class, and for supplying all the necessities of life to Survivor Class members *in loco parentis*;
- (c) the provision of educational and recreational services to the Survivor Class while in attendance at the School and control over all persons allowed to enter the School premises at all material times;
- (d) the selection, supply and supervision of teaching and non-teaching staff at the School and reasonable investigation into the character, background and psychological profile of all individuals employed to teach or supervise the Survivor Class;
- (e) inspection and supervision of the School and all activities taking place therein, and for full and frank reporting to Canada respecting conditions in the School and all activities taking place therein;
- (f) transportation of Survivor Class members to and from the School; and
- (g) communication with and reporting to the Family Class respecting the activities and experiences of Survivor Class members while attending the School.

54. Attempts to provide educational opportunities to children confined in the School were ill-conceived and poorly executed by inadequately trained teaching staff. The result was to effectively deprive the Aboriginal children of any useful or appropriate education. Very few survivors of the School went on to any form of higher education.

55. The conditions and abuses in the School during the Class Period were well-known to Canada.

56. Any attempt by Canada to delegate its duties, responsibilities or obligations to the Class to the Province of Newfoundland is unlawful and in breach of its exclusive and non-delegable fiduciary duties owed to the class.

**F. CANADA'S BREACHES OF DUTIES TO THE CLASS MEMBERS**

57. The Defendant Canada, as represented by the Attorney General of Canada, has a fiduciary relationship with Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled and regulated the School during the Class Period, either on its own or in conjunction with the Province.

58. Canada, and its respective servants and agents compelled members of the Survivor Class to leave their homes, families and communities, and forced members of the Survivor Class to attend (and sometimes live in) the School, all without lawful authority or the permission and consent of Survivor Class members or that of their parents. Such confinement was wrongful, arbitrary and for improper purposes.

59. Survivor Class members were systematically subjected to the institutional conditions, regime and discipline of the School without the permission and consent of Survivor Class members or that of their parents, and were also subjected to wrongful acts at the hands of Canada while confined therein.

60. In particular, Anderson experienced severe physical abuse and verbal abuse during her time at the School by teachers, "caregivers" and other students. Anderson was hospitalized for a period of two weeks during her residence at the School due to her kidney ailments as a child, exacerbated by the substandard care, poor nutrition and abuse. Webber also suffered from serious physical and mental abuse during his time at the School from both teachers and students. Many of the children at the School also experienced sexual abuse, perpetrated against them by teachers, adults in positions of authority or from other students.

61. All persons, including Anderson and Webber, who attended the School ~~did so as wards of Canada, with Canada as their guardian,~~ and were persons to whom Canada owed the highest non-delegable, fiduciary, ~~moral, statutory~~ and common law duties, which included, but were not limited to, the duty to ensure that reasonable care was taken of the Survivor Class while at the School, the duty to protect the Survivor Class while at the School and the duty to protect the Survivor Class from intentional torts perpetrated on them while at the School. These non-delegable and fiduciary duties were performed negligently and tortiously by Canada, in breach of its special responsibility to ensure the safety of the Survivor Class while at the School.

62. Canada was responsible for:

- (a) ~~the administration of the Act and its predecessor statutes as well as any other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;~~
- (b) the promotion of the health, safety and well being of Aboriginal Persons in Newfoundland during the Class Period;
- (c) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessor Ministries and Departments during the Class Period;
- (d) decisions, procedures, regulations promulgated, operations and actions taken by the Department of Indian Affairs and Northern Development, its employees, servants, officers and Agents in Canada their predecessors during the Class Period;
- (e) overseeing the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the School and for the creation, design and implementation of the program of education for Aboriginal Persons confined therein during the Class Period;
- (f) the selection, control, training, supervision and regulation of the designated operators and their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons confined in the Residential School during the Class Period;

- (g) the provision of all educational services and opportunities to the Survivor Class members, pursuant to the provisions of the Act and any other statutes relating to Aboriginal Persons during the Class Period;
- ~~(h) transportation of Survivor Class Members to and from the School and to and from their homes while attending the School during the Class Period;~~
- ~~(i) preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities;~~
- (j) the care and supervision of all members of the Survivor Class while they were in attendance at the School during the Class Period and for the supply of all the necessities of life to Survivor Class Members, *in loco parentis*, during the Class Period;
- (k) the provision of educational and recreational services to the Survivor Class while in attendance at the School during the Class Period;
- (l) inspection and supervision of the School and all activities that took place therein during the Class Period and for full and frank reporting to Canada and to the Family Class Members with respect to conditions in the School and all activities that took place therein during the Class Period; and
- ~~(m) communication with and reporting to the Family Class with respect to the activities and experiences of Survivor Class Members while attending the School during the Class Period.~~

63. During the Class Period, male and female Aboriginal children, including Anderson, were subjected to gender specific, as well as non-gender specific, systematic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

64. At all material times, the children who attended the School were within the knowledge, contemplation, power or and control of Canada and were subject to the unilateral exercise of Canada's (or its delegates') power or discretion. By virtue of the



relationship between the children and Canada, being one of trust, reliance and dependence, by the Aboriginal children, Canada owed a fiduciary obligation to ensure that the students who attended the School were treated fairly, respectfully, safely and in all other ways, consistent with the obligations of a parent or guardian to a child under his care and control.

65. At all material times, Canada owed a fiduciary obligation to the students who attended the School to act in the best interests of those students and to protect them from any abuse, be it mental, emotional, physical, sexual or otherwise. The children at the School relied upon Canada, to their detriment, to fulfill its fiduciary obligations.

66. Through its servants, officers, employees and agents, Canada was negligent and in breach of its non-delegable fiduciary, ~~moral, statutory~~, and common law duties of care to the Survivor Class and the Family Class during the Class Period. Particulars of the negligence and breach of duty of Canada include the following:

- (a) it systematically, negligently, unlawfully and wrongfully delegated its fiduciary and other responsibility and duties regarding the education of and care for Aboriginal children to others;
- (b) it systematically, negligently, unlawfully and wrongfully admitted and confined Aboriginal children to the School;
- ~~(c) it acted without lawful authority and not in accordance with any statutory authority pursuant to or as contemplated by the provisions of the Act or any other statutes relating to Aboriginal Persons as:~~
  - ~~(i) said provisions are and were *ultra vires* the Parliament of Canada and of no force and effect in law;~~
  - ~~(ii) the conduct of Canada in placing the Aboriginal children in the School, confining them therein, and treating or permitting them to be treated there as set forth herein was in breach of Canada's fiduciary obligations to the Survivor Class and Family Class Members, which was not authorized or permitted by any applicable~~

~~legislation and was, to the extent such legislation purported to authorize such fiduciary breach, of no force and effect and/or *ultra vires* the Parliament of Canada; and~~

- ~~(iii) Canada routinely and systematically failed to act in accordance with its own laws, regulations, policies and procedures with respect to the confinement of Aboriginal children in the School, which confinement was wrongful.~~
- (d) it delegated to and contracted with the Churches, and other Religious organizations and the Province to implement its program of forced integration, confinement and abuse;
- (e) it failed to adequately screen and select the organizations and individuals to which it delegated the implementation of its Residential School program;
- (f) it failed to adequately supervise and control the School and its agents operating same under its jurisdiction;
- (g) it deliberately and chronically deprived the Survivor Class Members of the education they were entitled to or were led to expect from the School or of any adequate education;
- (h) it designed, constructed, maintained and operated the School buildings which were sub-standard, inadequate to the purpose for which they were intended and detrimental to the emotional, psychological and physical health of the Survivor Class;
- (i) it failed to provide funding for the operation of the School that was sufficient or adequate to supply the necessities of life to Aboriginal children confined to them;
- (j) it failed to respond appropriately or at all to disclosure of abuses in the School during the Class Period;
- ~~(k) it conspired with the operators of the schools to suppress information about abuses taking place in the School during the Class Period;~~
- (l) ~~it assaulted and battered the Survivor Class Members and permitted them to be assaulted and battered during the Class Period;~~
- (m) it permitted an environment to which permitted and allowed student-upon-student abuse;
- (n) ~~it forcibly confined the Survivor Class Members and permitted them to be forcibly confined during the Class Period;~~

- (o) it was in breach of its fiduciary duty to ~~its~~Wards the Survivor Class Members by reason of the misfeasances, malfeasances and omissions set out above;
- (p) it failed to inspect or audit the School adequately or at all;
- (q) it failed to implement an adequate system of evaluation, monitoring and control of teachers, administrators and non-teaching staff of the School during the Class Period;
- (r) it failed to periodically reassess its regulations, procedures and guidelines for the School when it knew or ought to have known of serious systemic failures in the School during the Class Period;
- (s) it failed to close the School and otherwise protect and care for those persons confined therein when it knew or ought to have known that it was appropriate and essential to do so in order to preserve the health, welfare and well being of the Survivor Class Members;
- (t) it delegated, attempted to delegate, continued to delegate and improperly delegated its non delegable duties and responsibility for the Survivor Class when it was incapable to do so and when it knew or ought to have known that these duties and responsibilities were not being met;
- (u) it failed to recognize and acknowledge harm once it occurred, to prevent additional harm from occurring and to, whenever and to the extent possible, provide appropriate treatment to those who were harmed;
- ~~(v) it undertook a systematic program of forced integration and assimilation of the Aboriginal Persons through the institution of the School when it knew or ought to have known that doing so would cause profound and permanent cultural, psychological, emotional and physical injury to the members of the Survivor Class during and following the Class Period; and~~
- ~~(w) it was in breach of its obligations to the Survivor Class Members and Family Class Members as set out in the Act and its Treaties with various First Nations providing a right to education at a school to be established and maintained by Canada and which implicitly included the right to education in a safe environment free from abuse and the right to an education which would recognize Aboriginal beliefs, traditions, culture, language and way of life in a way that would not denigrate or eliminate these beliefs, traditions, culture, language and way of life.~~

67. Canada, through its employees, agents or representatives also breached its duty of care to protect the Survivor Class Members from sexual abuse by the student perpetrators while those particular Plaintiffs and the Survivor Class Members were attending and

residing at the School with the result that the student perpetrators did in fact commit sexual abuse upon certain Plaintiffs and the Survivor Class Members.

68. Canada breached its fiduciary duties to the Plaintiffs and the Class and their families by failing to take any steps to protect the Survivor Class Members from sexual abuse.

69. In breach of its ongoing fiduciary duty to the Class, Canada failed and continues to fail, to adequately remediate the damage caused by its failures and omissions set out herein. In particular, Canada ~~has failed to take adequate measures to ameliorate the cultural, linguistic and social damage suffered by the class, and further~~ has failed to provide compensation for the physical, sexual and emotional abuse suffered by the Class.

70. ~~The Plaintiffs plead that Canada was in breach of its various treaty obligations set out through the establishment and operation of the School and are liable for such breaches. In contravention of the Treaties between the Government and First Nations and in contravention of the *United Nations Genocide Convention*, particularly Article 2(e) thereof to which Canada is a signatory, the Plaintiffs and other Aboriginal children were to be systemically assimilated into white society. In pursuance of that plan, they were forced to attend the School and contact with their families was restricted. Their cultures and languages were taken from them with sadistic punishment and practices.~~

71. ~~The systemic child abuse, neglect and maltreatment sustained by the children at the School during the Class Period, the effect and impact of which is still being felt by Survivor Class Members and Family Class Members, was in violation of the rights of children, specifically, but not limited to, the rights set out in the *United Nations*~~

~~Convention on the Rights of the Child, adopted by the United Nations in 1989, and ratified by Canada in December of 1991.~~

**G. DAMAGES SUFFERED BY CLASS MEMBERS**

72. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Survivor Class Members, including Anderson, Allen and Webber, suffered injury and damages including:

- (a) isolation from family and community;
- (b) ~~prohibition of the use of Aboriginal language and the practice of Aboriginal religion and culture and the consequential loss of facility and familiarity with Aboriginal language, religion and culture;~~
- (c) forced confinement;
- (d) assault and battery;
- (e) sexual abuse;
- (f) emotional abuse;
- (g) psychological abuse;
- (h) deprivation of the fundamental elements of an education;
- (i) an impairment of mental and emotional health amounting to a severe and permanent disability;
- (j) a propensity to addiction;
- (k) an impaired ability to participate in normal family life;
- (l) alienation from family, spouses and children;
- (m) an impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;

- (n) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the School experience;
- (o) depression, anxiety and emotional dysfunction;
- (p) suicidal ideation;
- (q) pain and suffering;
- (r) deprivation of the love and guidance of parents and siblings;
- (s) loss of self-esteem and feelings of degradation;
- (t) fear, humiliation and embarrassment as a child and adult, and sexual confusion and disorientation as a child and young adult;
- (u) loss of ability fulfill cultural duties;
- (v) loss of ability to live in community; and
- (w) constant and intense emotional, psychological pain and suffering.

73. The foregoing damages resulted from Canada's breach of fiduciary duty, and/or negligence, assault, battery and/or breach of Aboriginal treaty rights.

74. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Family Class Members, including Webber, suffered injury and damages including:

- (a) they were separated and alienated from Survivor Class Members for the duration of their confinement in the School;
- (b) their relationships with Survivor Class Members were impaired, damaged and distorted as the result of the experiences of Survivor Class members in the School;
- (c) they suffered abuse from Survivor Class members as a direct consequence of their School experience;

- (d) they were unable to resume normal family life and experience with Survivor Class Members after their return from the Schools;
- (e) ~~their culture and language was undermined and in some cases eradicated by, amongst other things, as pleaded herein, the forced assimilation of Survivor Class Members into non-aboriginal culture through the School.~~

75. Canada knew, or ought to have known, that as a consequence of its mistreatment of the children at the School, these Plaintiffs and class members would suffer significant mental, emotional, psychological and spiritual harm which would adversely affect their relationships with their families and their communities. ~~In fact, one of the purposes behind the operation of the School was to eliminate and damage relationships within families and communities with a view to promoting the assimilation of Aboriginal children into non-Aboriginal society.~~

#### **H. PUNITIVE AND EXEMPLARY DAMAGES**

76. The Plaintiffs plead that Canada, including its senior officers, directors, bureaucrats, ministers and executives, had specific and complete knowledge of the widespread physical, psychological, emotional, cultural and sexual abuses of Survivor Class Members which were occurring at the School during the Class Period. Despite this knowledge, Canada continued to operate the School and permit the perpetration of grievous harm to the Survivor Class Members.

~~77. In addition, Canada deliberately planned the eradication of the language, religion and culture of Survivor Class Members and Family Class Members. Their actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.~~

78. The Plaintiffs plead and rely upon the following:

~~Canadian Charter of Rights and Freedoms, ss. 7, 15 and 24;~~

~~Class Actions Act, S.N.L. 2001, c. C-18.1.~~

~~Constitution Act, 1982, s. 35(1), being Schedule "B" to the  
Canada Act, 1982 (U.K.), c. 11.~~

~~Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, ss.  
3, 21, 22, and 23;~~

~~The Indian Act, S.C. 1951, c. 29, ss. 113-118;~~

~~The Indian Act, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122;~~

~~The Newfoundland Act, 1949 (U.K.), c. 22;~~

~~United Nations Genocide Convention; and~~

~~United Nations Convention on the Rights of the Child, adopted  
by the United Nations in 1989, and ratified by Canada in  
December of 1991.~~

79. The Plaintiffs propose this action be tried in the City of St. John's, in the Province of Newfoundland.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 19<sup>th</sup> day of April, 2012.

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Solicitors for the Defendant

2007 01T4955CP

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION (GENERAL)**

BETWEEN:

**CAROL ANDERSON, ALLEN WEBBER  
AND JOYCE WEBBER**

PLAINTIFFS

AND:

**THE ATTORNEY GENERAL OF CANADA**

DEFENDANT

**Brought under the *Class Actions Act*, S.N.L. 2001, c. C-18.1**

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**SUPPLEMENTARY RESPONSE TO DEMAND FOR PARTICULARS  
(On the Amended Statement of Claim, filed April 18, 2012)**

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2008 01T0845CP

BETWEEN:

**SARAH ASIVAK and JAMES ASIVAK**

PLAINTIFFS

AND:

**THE ATTORNEY GENERAL OF CANADA**

DEFENDANT

2008 01T0844CP

BETWEEN:

**SELMA BOASA and REX HOLWELL**

PLAINTIFFS

AND:

**THE ATTORNEY GENERAL OF CANADA**

DEFENDANT

2008 01T0846CP

BETWEEN:

**EDGAR LUCY and DOMINIC DICKMAN**

PLAINTIFFS

AND:

**THE ATTORNEY GENERAL OF CANADA**

DEFENDANT

2007 01T5423CP

BETWEEN:

**TOBY OBED, WILLIAM ADAMS and  
MARTHA BLAKE**

PLAINTIFFS

AND:

**THE ATTORNEY GENERAL OF CANADA**

DEFENDANT

The Plaintiffs provide the following answers to the Defendant's Demand for Particulars dated April 23, 2012. These answers constitute a supplement to, and are intended to be read with, the Amended Statement of Claim and the Plaintiffs' Response to the Demand for Particulars dated May 13, 2012, the material facts and allegations which the Plaintiffs expressly and impliedly repeat and adopt herein:

**3. The Amended Statement of Claim at para. 2(c) lists "Agents" as a defined term. Please confirm whether the term "delegates" (see for example para. 64) used throughout the Claim can also be included under the defined term "Agents" for the purposes of the claim.**

A: "Agents" can be used interchangeably with the term "delegates" throughout the claim.

**4. Name any and all entities that the Plaintiffs allege are included under the defined term "Agents" for the purposes of this claim.**

A: The Moravian Mission/Church, the International Grenfell Association ("IGA"), the Labrador School Board and the Western School Board (the "Boards") and the Province of Newfoundland and Labrador (the "Province"), including all of the servants and employees of these entities (collectively the "Delegates").

It is the Plaintiffs' position that for the purposes of Canada's fiduciary duty owed to the class (as enumerated with particulars in paragraphs 9, 10, 15 and 19 of the Response to Demand for Particulars, dated May 13, 2012), Canada was not permitted, as a matter of law, to delegate any portion of that duty. To the extent that Canada did attempt to delegate, or did delegate, any of its fiduciary obligations, the Plaintiffs plead that such duties were incapable of delegation and therefore, wrongful in law. Accordingly, the entities named above could not be "agents" *per se*, as that term is known to law, of Canada for the purposes of fulfilling any fiduciary duties, only *purported* "agents".

For the purposes of the tort claim, as a matter of law, Canada was responsible in tort for the operation of the schools and care of the children through its participation in funding and the federal-provincial committees expressly assumed such responsibility. The Plaintiffs plead that Canada had a positive duty to inform itself of the safety and welfare of its aboriginal charges (minors) residing at the Schools.

By the time Confederation occurred with Canada in 1949, institutions similar to the "Mainland's" recognized residential schools existed in several Newfoundland and Labrador communities. For the most part, they were operated by the Moravian Mission<sup>1</sup> and IGA<sup>2</sup> prior to Confederation. Since Confederation, and in particular, as early as 1950, both Canada and the Province recognized and acknowledged these institutions as "residential schools"<sup>3</sup> (hosting children from a variety of isolated communities as was the case with residential schools in

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<sup>1</sup> The Moravian Missions were responsible for the education of the Inuit along the northern coast of Labrador and operated four schools in Makkovik, Nain, Hopedale and Hebron.

<sup>2</sup> The IGA operated three schools in Cartwright, North West River and St Anthony.

<sup>3</sup> April 3, 1950, Memorandum from the Deputy Minister of the Newfoundland Department of Natural Resources to the Interdepartmental Committee on Indians and Eskimos, Appendix 4 and 7.

Western Canada). Canada expressly realized and acknowledged that these schools were "residential" in nature.

Given its involvement with such schools in Western Canada, Canada knew, or ought to have known, how such schools were maintained and operated. By actively participating in the funding, planning, review and approval of projects in these schools, Canada accepted its legal responsibility for the education of aboriginal persons in the Province. Given its joint funding of the schools and active participation in the planning committees, Canada accepted responsibility for the operation and administration of the schools and the welfare of the children who attended them. As a result, it was subject to the duty to use due care and take reasonable steps.

To the extent that it permitted individuals from either the Moravian Mission/Church, the IGA or the Province to carry out those daily operational duties, those persons were acting on behalf of Canada. Knowingly permitting either the IGA, the Moravian Mission/Church or the Province to implement a system of residential schools post-Confederation, while also financially contributing to such a system, yet failing to provide appropriate oversight, all the while acknowledging a sole Federal responsibility in the arena, was an attempt to improperly delegate Federal duties. Having assumed full responsibility for the welfare, including that of Indians, in the new Province, any entities or persons who were in daily operational control of the Schools were acting on behalf of Canada, as a matter of law.

Participation or involvement by the Moravian Mission/Church and the IGA in residential schools in Labrador followed the pattern of how such schools were operated across Canada. In all such schools, the religious organizations acted with the guidance and input of federal representatives in staffing the schools and in managing their daily operations. As in Labrador, Canada was involved in the policy decisions of the schools which were closely tied to its funding obligations. Moravian and IGA involvement was merely an exercise of carrying out federal obligations with the oversight (or lack thereof) of Canada.

While the schools may have been established and operated by the time Canada assumed a legal responsibility to become involved, Canada had a funding role which also gave it input into where and how such funds were to be allocated. These policy determinations affected the operations of the schools both directly and indirectly.

**5. Does the Plaintiff allege the entities, collectively called "Agents", were in a principal/agent relationship with Canada for the purposes of this claim?**

A See Answers to paragraphs 4 and 6 herein. The Plaintiffs plead that by operation of law and the legal duties imposed upon Canada once the Province entered into Confederation, any persons or entities who carried out the responsibilities of operating the Schools were acting on behalf of Canada, as a matter of law.

**6. Provide the material facts that could show a relationship of principal/agent between Canada and each of the entities collectively referred to as "Agents" for the purposes of this claim.**

A: From the moment of Confederation with Canada in April 1949, Canada, by operation of law, assumed a constitutional responsibility toward native persons in the new Province codified by section 91(24) of the *Constitution Act, 1867*. That legal responsibility extended to funding and oversight of such persons' education, health and welfare. Such federal constitutional

responsibility for the Inuit in Labrador was acknowledged by a Privy Counsel Memorandum in 1953, which stated:

“From a purely constitutional point of view, it is difficult to see how the Federal Government can escape at least some responsibility for Indians and Eskimos in the new province as the *British North America Act* vests in the Parliament of Canada exclusive legislative authority in respect of this group.”<sup>4</sup>

Therefore, entities such as the Moravian Mission/Church, the IGA, the Boards and the Province (the “Delegates”) acted on behalf of Canada in their operation and oversight of the schools. Canada was the party with the legal responsibility towards the individuals at the schools. To the extent that it permitted the Delegates to assume that role, Canada wrongly forsaked its legal obligations and is responsible in law for the wrongs or omissions of those parties. To the extent that Canada provided the core funding and pursuant to its constitutional duties, it was obliged to supervise the administration of the schools, which it utterly failed to do.

Some of the material facts which bear out this relationship, include, but are not limited to:

- (i) Canada required a report from the Committee to the Department of Natural Resources to supply information regarding Indian and Eskimo administration, education and welfare,<sup>5</sup> a report that never would have been requested by Canada if its involvement had been limited to the provision of funds;
- (ii) a 1952 memorandum from the Chief of the Northern Administration Division of the Federal Department of Resources and Development references a request from the Secretary of the Committee studying financial arrangements between Canada and the Province, including information regarding the annual operating costs of education for Eskimos which “would include the cost of operating our own schools and the grants we pay to Eskimo mission schools”;<sup>6</sup>
- (iii) in 1956, the Deputy Minister of Education from the Federal Secretary of the Treasury Board requested detailed information on the Nain school in particular, “for the information of my government, something of the facilities there at present and the size and nature of the population to be served ... I would like to know what the sociological policies are that underlie the choice of Nain for this development”;<sup>7</sup>
- (iv) in 1965, Canada requested information of the proposed school and dormitory at North West River, and expressed concern about the location of two small schools

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<sup>4</sup> Memorandum from Paul Pelletier, Privy Council Office (24 February 1953) at 5.

<sup>5</sup> Memorandum for the Interdepartmental Committee on Indians and Eskimos by P. Pelletier of the Privy Council Office, April 3, 1950

<sup>6</sup> Memorandum from the Chief, Northern Administration Division, of the Federal Department of Resources and Development dated June 23, 1952.

<sup>7</sup> Correspondence to the Deputy Minister of Education from the Federal Secretary to the Treasury Board, May 28, 1956.

in the same area, resulting in approval for Canada's representatives to travel to Northern Labrador to visit the schools;<sup>8</sup>

(v) in 1966, Canadian representatives reported on their visit to Northern Labrador and discussed the integration of Indian children with white and Eskimo children pursuant to the Canadian government's general policy, including a Canadian expression of concern on the ability to recruit and retain suitable teaching staff and a Canadian request for copies of plans and estimates;<sup>9</sup>

(vi) in 1966, Canadian representatives questioned the proposed location of a dormitory in North West River, pointing out that "the Federal government is careful in its application of principles concerning Indians and Eskimos so that the financial support to each is comparable to the rest of the country";<sup>10</sup>

(vii) in 1967, the Province provided a detailed report on various aspects of Indian and Eskimo school services to the entire Federal-Provincial Committee,<sup>11</sup> evidencing Canada's interest, knowledge and involvements in such matters;

(viii) Canada and the Province entered into agreements commencing in 1965 which was renewed every five years, and ultimately by 1981 entitled "Canada-Newfoundland Native Peoples of Labrador Agreement" which establishes a Coordinating Committee of both federal and provincial representative and charges it with "designated programs" including "education programs";

(ix) a variety of native educational issues fell within the meaning of "education programs", demonstrating the long standing agreement and understanding between Canada and the Province respecting native education in Labrador and is an indicator of the degree of federal participation or legal duty.

In this respect, and in particular, the Plaintiffs further repeat and rely upon paragraphs 14, 15 and 18 of the Response to Demand dated May 13, 2012.

**7. Name any and all entities that the Plaintiffs allege were in a principal/agent relationship with Canada for the purposes of this claim.**

A: See Answers to paragraphs 4, 5 and 6 herein.

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<sup>8</sup> Minutes of the Second Meeting of the Federal-Provincial Committee on Financial Assistance for Indians and Eskimos in Northern Labrador (November 30, 1965 – December 1, 1965) with capital expenditure attachments.

<sup>9</sup> Minutes of the Third Meeting of the Federal-Provincial Committee on Financial Assistance for Indians and Eskimos in Northern Labrador (June 21, 1966) with capital expenditure attachments.

<sup>10</sup> Minutes of the Fourth Meeting of the Federal-Provincial Committee on Financial Assistance for Indians and Eskimos in Northern Labrador (December 13 – 14, 1966), with capital expenditure attachments.

<sup>11</sup> Minutes of the Sixth Meeting of the Federal-Provincial Committee on Financial Assistance for Indians and Eskimos in Northern Labrador (November 28, 1967), with capital expenditure attachments.

**8. Provide the material facts that could show a relationship of principal/agent between Canada and any entities alleged to have been Canada's agents for the purposes of this claim.**

A: This requested Particular is identical to item #6 above. See Answers to paragraphs 4, 5 and 6 herein.

**27. In respect of paragraph 58: particulars of who and/or what are the alleged "servants" and "agents" of Canada.**

A: See Answers to paragraphs 4, 5 and 6 herein. In particular, individuals working for, on behalf of or employed by:

- (i) Her Majesty the Queen in Right of Canada, irrespective of Ministry, Department or Agency;
- (ii) the Moravian Mission/Church;
- (iii) the IGA;
- (iv) the Province; and
- (v) the Boards.

**33. In respect of paragraph 65: particulars of who and/or what are Canada's "delegates".**

A: See Answers to paragraphs 4, 5, 6, 7, 8 and 27 herein.

**34. In respect of paragraph 67: particulars of who and/or what are Canada's "servants, officers, employees or agents".**

A: See Answers to paragraphs 4, 5, 6, 7, 8, 27 and 33 herein.

**36. In respect of paragraph 67(d): particulars of the "Churches", "other Religious organizations" Canada is alleged to have delegated and/or contracted with; and particulars of all contracts and/or delegations Canada is alleged to have made with respect to the School.**

A: The Moravian Mission/Church and the IGA.

**37. In respect of paragraph 67(f): particulars of the "agents" operating the School.**

A. Teachers, principal, schools staff, employees of the School, administrators and, any individuals in the employ of, or working on behalf of, one of the Delegates

**40. In respect of paragraph 68: particulars of Canada's employees, agents and representatives, including (where possible) their names, positions/title and responsibilities.**

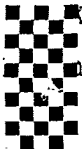
A: Teachers, principals, school staff, employees of the School, administrators and, any individuals in the employ of, or working on behalf of, one of the Delegates.

**41. In respect of paragraphs 73 and 75: particulars of the “agents” (apart from the Province) for whom Canada is vicariously liable.**

A: See Answers to paragraphs 4, 5, 6, 7, 8, 27, 33, 34, 36, 37 and 40 herein.







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Halifax, Nova Scotia B3J 1P3

Dear Mr. Tarlton:

Re: Obed et al. v. The Attorney General  
Our File No. 070584

We are in receipt of the defendant's Demand for Particulars dated April 23, 2012. To ensure compliance with the litigation timetable, the plaintiffs today provide the following response in connection with the Obed action's Demand for Particulars. The plaintiffs' position with respect to what they will and will not answer in response to the Obed Demand will be identical for the other four Demands for Particulars. If you wish, the plaintiffs can provide a separate response to each Demand for Particulars in due course but those responses will be the same as set out below.

The plaintiffs will make their best efforts to answer the following paragraphs of the Obed Demand for Particulars, if that information is in their possession, power or control:

1, 3, 9, 10, 12, 14, 15, 16, 17, 18, 19, 20, 21, 25, 26, 28, 32, 35 and 38

Even though it is the plaintiffs' position that:

- i) paragraphs 9, 10, 14, 15, 19, 20, 21, 28 and 35 request answers to pure questions of law;
- ii) paragraphs 12, 16, 17, 18 and 26 are within the power, control and knowledge of the defendant; and
- iii) paragraphs 32 and 38 request answers to individual inquiries, not necessary for the purposes of pleading.

the plaintiffs will nevertheless make best efforts to answer these paragraphs from any information in their possession, power or control in an effort to move the litigation forward

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expeditiously and remove any need for a motion concerning the defendant's Demands for Particulars so that Canada may deliver its Statement of Defence in a timely fashion.

With respect to the plaintiffs' refusals, we would remind counsel of the governing principles regarding pleadings and proper request for particulars which include:

- i) the defendant has sought particulars of irrelevant information which is unnecessary for the purposes of pleading, as provided for by Rule 14 of the *Rules of the Supreme Court, 1986*;
- ii) the defendant has sought particulars concerning the individual circumstances of class members which is not permitted pursuant to the current state of class proceedings jurisprudence or the wording of the governing legislation;
- iii) much of the particulars sought by the defendant constitute evidence which is only properly gathered during the discovery process; and
- iv) many of the defendant's requests are entirely within Canada's sole knowledge and control and therefore do not properly form part of a Demand for Particulars.

Accordingly, the plaintiffs refuse to answer the following paragraphs of the Obed Demand for Particulars and the basis for each such refusal is provided next to the correspondence paragraph number:

- 2 - seeks evidence and not material facts necessary to plead
- 4 - irrelevant for the purposes of pleading and within the sole knowledge and control of the defendant
- 5 - irrelevant for the purposes of pleading and any agency relationship is within defendant's knowledge
- 6 - irrelevant for the purposes of pleading
- 7 - irrelevant for the purposes of pleading
- 8 - irrelevant for the purposes of pleading
- 11 - seeks evidence and not material facts necessary to plead
- 13 - irrelevant and within the sole knowledge and control of the defendant
- 22 - irrelevant for the purposes of pleading and an individual issue in any event
- 23 - within the sole knowledge and possession of the defendant
- 24 - within the sole knowledge and possession of the defendant

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Page 3

- 27 - within the sole knowledge and possession of the defendant
- 29 - overbroad and within the defendant's exclusive knowledge, constitutes evidence
- 30 - overbroad and within the defendant's exclusive knowledge, constitutes evidence
- 31 - overbroad and within the defendant's exclusive knowledge
- 33 - within the sole knowledge and possession of the defendant
- 34 - within the sole knowledge and possession of the defendant
- 36 - within the sole knowledge and possession of the defendant
- 37 - within the sole knowledge and possession of the defendant
- 39 - within the sole knowledge and possession of the defendant
- 40 - within the sole knowledge and possession of the defendant
- 41 - within the sole knowledge and possession of the defendant
- 42 - individual issues not relevant for the purposes of pleading

As advised above, one of the main principles upon which we rely to base the plaintiffs' refusals is that it is well-settled law that particulars will not be ordered where the facts sought are within the defendant's knowledge: *John Doe v. Roman Catholic Episcopal Corp. of St. John's*, [2007] N.J. No. 84 at para. 10.

Please advise as soon as is possible as to whether Canada intends to move on the plaintiffs' refusals. If such a motion is necessary, the plaintiffs will ask Justice Budge to hear the motion on July 26, 2012, at the same time Canada's application to add any defendants or third parties is returnable.

Yours truly,

**KOSKIE MINSKY LLP**

Celoste Pollack  
CPLs

cc Kirk Baeh - Koskie Minsky LLP  
Mark Freedman - Department of Justice Canada  
Steve Cooper - Ahlstrom Wright Oliver & Cooper LLP  
Ches Christie

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION

BETWEEN:

TOBY OBED, WILLIAM ADAMS and  
MARTHA BLAKE

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Brought under the *Class Actions Act*, S.N.L. 2001, c. C-18.1

RESPONSE TO DEMAND FOR PARTICULARS  
On the Amended Statement of Claim

The Plaintiffs provide the following answers to the Defendant's Demand for Particulars dated April 23, 2012, as follows; this Response is a supplement to, and intended to be read with, the Amended Statement of Claim the materials facts and allegations of which the Plaintiffs repeat and adopt herein:

1. The June 24, 2010 certification order directs that "breach of fiduciary duty" and "negligence" will proceed to a common issues trial. Please confirm that any and all duties and causes of action alleged throughout the amended statement of claim are limited to "breach of fiduciary duty" and "breach of duty of care in negligence" for the purposes of this claim.

A: Yes.

3. The amended claim at para. 2(c) lists "Agents" as a defined term. Please confirm whether the term "delegates" (see for example para. 64) used throughout the claim can also be included under the defined term "Agents" for the purposes of the claim.

A: No. Delegates are not necessarily also agents.

**9. In respect of paragraph 10: particulars of Canada's exclusive duty of care, and fiduciary and constitutional obligations owed to aboriginal persons.**

A: Since 1949, Canada has had a constitutional responsibility in accordance with section 91(24) of the *Constitution Act 1867* for the aboriginals in Newfoundland. This carries with it the fiduciary obligation to act in the best interests of the individuals to whom that obligation is owed. The fiduciary obligations of Canada involved an obligation to act for the benefit of aboriginal persons, including taking whatever measures were appropriate in light of the particular circumstances and actual needs of the time. Constitutionally, Canada was responsible for providing for the administration of aboriginal persons in the new province, including their education. The Federal Crown acknowledged this responsibility in and around the time of Confederation. By virtue of the *Constitution Act*, the implementation of residential school policy across the rest of Canada at the time and the historic presumptive fiduciary relationship between the federal Crown and aboriginals, Canada assumed a duty to act in a fiduciary capacity with respect to the education of aboriginal persons.

The affirmative obligation to provide for the welfare of aboriginal persons belongs solely to the Federal Crown. Pursuant to section 91(24), Canada has primary jurisdiction with respect to aboriginal persons which means the federal government cannot, consistent with its fiduciary obligations, deliberately decide not to exert itself when aboriginal persons are abused or their culture threatened. The implementation of the residential school policy in Canada, gave rise to a federal assumption of fiduciary duty with respect to the education of aboriginal persons. Once Newfoundland joined Canada, that same assumption of fiduciary and constitutional duty applied to aboriginals in the new province.

Knowing of the residential school policies and operations across Canada at the time of Newfoundland's Confederation, the Federal Crown had a responsibility to ensure that aboriginals in the new province were not similarly treated by the Province or any organization. Having internally acknowledged its responsibilities to aboriginals in Newfoundland, including their education, Canada funded many aboriginal programs and had the corollary responsibility to ensure those institutions were operated safely and in accordance with minimum standards.

Constitutional obligations include Canada's obligation to fully assume the role demanded of it by the Constitution. If Canada failed to fully exercise its exclusive jurisdiction over aboriginals in Newfoundland, that itself could constitute a breach of fiduciary duty. Where by statute or unilateral undertaking, one party has an obligation to act for the benefit of another – and the power carries with it discretionary power – that party is a fiduciary.

As the responsibility for "Indians" continued to be a federal constitutional responsibility following Confederation, if Canada failed to fulfil its direct and exclusive constitutional responsibilities, those failures themselves constitute breaches of duty. If Canada financially contributed to a provincial school system that had assimilation as one its

aims, or was woefully inadequate, Canada's improper delegation or oversight constituted a breach of fiduciary duty.

To the extent that Canada funded and thereby participated in the systemic practices, programs, policies and wrongs which occurred at the Schools, it thereby abdicated and breached its duty of care and fiduciary obligations as Canada knew, or should have reasonably known, that harm would enure to aboriginal children. Canada was under an obligation to ensure that the institutions it was funding were carried out safely and in accordance in basic minimum standards of education.

Direct federal administration could have, and should have, been exerted over the Inuit and metis in Newfoundland and Labrador in 1949 just as it was being done at the same time in Northern Quebec.

**10. In respect of paragraph 16: particulars of Canada's legal responsibility for Aboriginal persons residing in Newfoundland in 1949 and beyond.**

A: The Plaintiffs repeat and rely on the particulars provided in paragraph 9 above.

Additionally, by funding an improper educational system and failing to properly oversee and/or administer those educational institutions, Canada abdicated its federal duty to Indian persons pursuant to section 91(24) and its duty of care at common law. Canada's participation in these residential schools amounted to dishonest and disloyal conduct which violated its fiduciary duties to aboriginal persons.

Canada breached a fiduciary duty or was negligence by failing to take steps to prevent these children from being abused and losing the aboriginal identities as a by-product of the province's residential schools which were being supported by federal funds.

**12. In respect of paragraph 20: particulars of the dates and authors of the two separate legal opinions commissioned by the Federal Department of Justice.**

A: On July 2, 1947, the Newfoundland delegation, aware of the obligatory Federal role in Indian affairs, requested from Canada "amplification with regard to treatment of Indians and Eskimos and in particular the question of education, the method by which it is carried on, the role which provinces and religious denominations play in this connection".<sup>1</sup>

The response to this query was provided by the Department of Mines and Minerals (the department responsible for Indian Affairs) which stated that "the Dominion assumes full

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<sup>1</sup> NAC, RG 2, vol. 128, file N-18 Newfoundland and Labrador 1947 (July). Ottawa, July 3, 1947 J.R. Baldwin to Dr. H.L. Keenleyside, Deputy Minister of Mines and Resources.



responsibility for the welfare, including education, of Indians and Eskimos and has the control and management of their lands and property.”<sup>2</sup>

In 1950, a legal opinion was sought from the Federal Department of Justice on the “precise legal extent of the federal government’s responsibility insofar as Indians and Eskimos residing in Newfoundland and Labrador are concerned”. Opinion regarding the legal position respecting Federal jurisdiction over and responsibility for Newfoundland Indians and Eskimos, was authored by F.P. Varcoe, Deputy Minister of Justice, April 14, 1950:

“...for the purposes of the *British North America Act*, ‘Indians’ includes Eskimos. ... It is the responsibility of the federal government to formulate and carry out all policies that are directed at dealing with Indian or Indian problems. Such policy is to be formulated by Parliament and the executive. This responsibility carries with it the responsibility of providing money to be devoted to the carrying out of policies in relation to the Indians.”<sup>3</sup>

The 1947 and 1950 Federal opinions were a correct statement of the legal extent of the Federal Crown’s responsibilities and obligations insofar as Indians, Eskimos and Inuit residing in Newfoundland were concerned.

**14. In respect of paragraph 22: particulars of Canada’s legal responsibility and duties owed to Aboriginal persons in Newfoundland after March 31, 1949.**

A: See response to in paragraphs 9 and 10 above, repeated and relied upon here.

The lack of a specific provision pertaining to the new province’s aboriginal persons in the *Terms of Union* is of no importance with respect to Canada’s jurisdiction over aboriginal persons – the *Terms of Union* explicitly provide that the *Constitution Acts 1867 and 1940* shall apply to the Province of Newfoundland in the same way and to the like extent as they apply to the other provinces, confirming the application of section 91(24) to persons in Newfoundland. Similarly, at the time of entry or creation of other non-original provinces, there was no provision that aboriginals in those provinces fell within exclusive federal jurisdiction yet there has never been any suggestion that aboriginals in those provinces were not subject to section 91(24).<sup>4</sup>

Examples of Canada’s acknowledgement and assumption of such duties lies in its very own legal opinions and include, but are not limited to the following contractual arrangements with the Province:

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<sup>2</sup> NAC, MG 32, B5, vol. 118, file Newfoundland References 1946 – 47 (file 2). “Questions Asked by Newfoundland Delegation and Answered by the Appropriate Departments”, stamped July 14, 1947.

<sup>3</sup> NAC, RG 2/18, vol. 172, file: N-18-3 (1949 – 1951). Ottawa, April 14, 1950, F.P. Varcoe, Deputy Minister of Justice to the Secretary to the Cabinet, Privy Council Office.

<sup>4</sup> *Manitoba Act, 1870*, 33 Vict. c. 3(Canada); *Prince Edward Island Terms of Union (1873)*; *The Alberta Act, 4 – 5 Ed. VII, c. 3 (1905)*(Canada); *Saskatchewan Act, 4 – 5 Ed. VII, c. 42 (1905)*(Canada).

- 1954 Canada-Newfoundland Agreement provided that Canada would assume 66 2/3% of costs in respect of Eskimos and 100% of the costs in respect of Indians relating to "capital expenditures...in the fields of welfare, health and education",<sup>5</sup>
- four years later, Newfoundland requested further funds from Canada to provide education and housing for both the Innu and Inuit. ;
- in 1964, the Premier of Newfoundland asked Prime Minister Pearson, to either have Canada assume sole and full responsibility for the Innu and Inuit or to at least increase funding to the level of support being provided by Canada to other provinces in Canada;
- by 1965, Canada had agreed to provide the same resources and programs to Indians and Eskimos in Labrador as were provided to similar groups elsewhere in Canada;
- these proposed agreements were to be: (a) renegotiated and reviewed every five years; (b) a Federal-Provincial committee was to be established to monitor expenditures and propose budgets for approval by both governments; (c) Newfoundland would be reimbursed for 90% of the Provinces' capital expenditures for Indians and Eskimos for the period 1954 - 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments
- the Prime Minister also proposed certain increases in Canadian contributions for "Indians and Eskimos" in Newfoundland and Labrador which ultimately constituted an agreement between Canada and Newfoundland, providing, amongst other things, for:
  - a) Canada to pay Newfoundland up to \$1,000,000.00 per annum for 90% of the Province's Innu and Inuit expenditures (except where otherwise covered under other federal-provincial agreements);
  - b) establishment of a federal-provincial committee to monitor provincial expenditures;
  - c) continuation of federal funding for Inuit communities in Labrador; and
- agreements to be reviewed and renegotiated every five years to "ensure that they continued to meet the changing circumstances and needs of the Eskimo and Indian residents in Labrador"

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<sup>5</sup> J.W. Pickersgill to H.L. Pottle, April 12, 1954; Pottle to Pickersgill, April 26, 1954, to come into effect April 1, 1954.

15. In respect of paragraph 23: particulars of how Newfoundland and Labrador's entry into Confederation brought its Aboriginal population fully within exclusive federal jurisdiction and particulars of Canada's legal responsibility.

A: In June 1947, the first official meeting between the Newfoundland delegation and federal representatives to discuss a union with Canada. Prior the meeting, the federal Department of Mines and Resources requested information regarding the numbers, location, education facilities and policing for aboriginals in Newfoundland.<sup>6</sup>

During this meeting, a document was provided to the Newfoundland delegation by the Federal Government which outlined responsibilities that various Federal departments would have over the new province Newfoundland. "Indian Affairs" was listed under the jurisdiction of the Federal Department of Mines and Resources. The function of the Indian Affairs branch was to administer "the affairs of Indians of Canada ... [which] included the control of their education, the development of agriculture, the administration of their lands, their community funds and estate and the general supervision of their welfare".<sup>7</sup>

At a July 1947 meeting in Ottawa between the Newfoundland delegation and the Federal Crown, the Department of Mines and Resources explicitly stated to the Newfoundland delegation that "the Dominion assumes full responsibility for the welfare, including education, of Indians and Eskimos and has the control and management of their lands and property".<sup>8</sup> To that end, during these negotiations in July 1947, the Federal delegation advised that "the general federal practice has been to cooperate with both provincial authorities and religious groups in Indian education, using whichever seemed appropriate to local conditions".<sup>9</sup>

Following the initial plenary sessions between federal and provincial delegations, an Indian and Eskimo Sub-Committee was established. It is widely thought that the creation of this Sub-Committee was in response to queries about native education raised by the Newfoundland delegation. Ultimately, the Sub-Committee was tasked "to bring together and examine information on the numbers, economic conditions and general situation of

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<sup>6</sup> LAC, RG 21 Records of the Department of Energy, Mines and Resources, vol. 10, file: 171-2, pt. 1, R.A. Gibson to H.L. Keenleyside, 11 June 1947.

<sup>7</sup> National Archives of Canada (NAC), MG 32, B5, vol. 118, file Newfoundland Reference 1947 (file 1). "Some Notes on the Constitution and Government of Canada and the Canadian Federal System", June 1947.

<sup>8</sup> NAC, MG 32, B5, vol. 118, file Newfoundland Reference 1946-1947 (file 2). "Questions Asked by the Newfoundland Delegation and Answered by the Appropriate Departments", stamped July 14, 1947

<sup>9</sup> *Documents on Relations between Canada and Newfoundland*, vol. 2. doc. 362: "Minutes of a Meeting between Delegates from the National Convention of Newfoundland and Representatives of the Government of Canada" 2 July 1947.

the Indians and Eskimos of Labrador and how they would be provided for in the event of union”<sup>10</sup>.

Minutes of the Sub-Committee on Indians and Eskimos shows that in September 1947, Canadian officials responsible for federal Indian affairs advised that if Newfoundland became a province of Canada, the province's Indians and Eskimos would be the sole responsibility of the federal government, including the provision of education.<sup>11</sup>

The Sub-Committee on Indians and Eskimos published its final report in October 1947, “A Preliminary Statement regarding the Position of Newfoundland's Indians and Eskimos in the Event of Union”, which stated the following:

“Under the *Indian Act*, Indians and Eskimos in Canada are regarded as one race for the purposes of administration. In the event of Newfoundland becoming a province of Canada, the Indians and Eskimos of Newfoundland and Labrador would be the sole responsibility of the federal government ...”<sup>12</sup>  
[emphasis added]

In the same document, under the section “Education of Indians and Eskimos”, it stated that “the Dominion assumes full responsibility for the welfare, including education, of Indians and Eskimos”.<sup>13</sup> [emphasis added]

By confirming in the Terms of Union that Federal responsibility in the new province was that as outlined in the *B.N.A. Act*, in the same way and to the same extent as applicable in the balance of Canada, “as if the Province of Newfoundland had been one of the Provinces originally united”,<sup>14</sup> Canada acknowledged and accepted exclusive jurisdiction over Indians and Eskimos in Newfoundland and Labrador.

As early as May 1948, the federal Department of the Indian Affairs Branch contemplated a federal administrative take-over of aboriginal affairs in the new province:

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<sup>10</sup> LAC. MG 30 E 159, R.A. MacKay Papers, vol. 4, File: Nfld National Convention to Ottawa Reports, “Meetings Between Delegates from the National Convention of Newfoundland and Representatives of the Government of Canada”.

<sup>11</sup> NAC, MG 30e, 159, vol. 4, file – “Indians and Eskimos of Newfoundland”, submitted 1950, Minutes, 2 September 1947, Report of the Indian and Eskimo Sub-Committee.

<sup>12</sup> NAC, RG 2, vol. 128. “Meeting between Delegates from the National Convention of Newfoundland and Representatives of the Government of Canada”. Appendix XI, “A Preliminary Statement regarding the Position of Newfoundland's Indians and Eskimos in the event of Union”, typescript report, October 10, 1947.

<sup>13</sup> *ibid.*

<sup>14</sup> NAC, RG 2, vol. 128, file: N-18 Newfoundland (October). Ottawa, October 10, 1947, J.R. Baldwin, memorandum for Mr. St. Laurent.

“So far as this Branch is concerned, it is not considered that any serious difficulties would arise as a result of a precipitated administrative change-over. As the Newfoundland government does not administer the welfare of its native peoples, as in the case of Canada, and as missionary societies are largely responsible for such work in Newfoundland territory, any change-over along this line could be a gradual process...”<sup>15</sup>

The Supreme Court of Canada decision in 1939 in *Re Eskimo* further confirmed federal jurisdiction and constitutional obligations over the Inuit. In that case, Canada had appealed to the Supreme Court of Canada, unsuccessfully, to avoid having to accept any responsibility for the Quebec Inuit. The Court in that case rejected Canada's arguments that Quebec bore provincial responsibility to administer the Inuit. Rather, the court ruled that the Inuit were “Indians” within the meaning of section 91(24) and therefore, a federal responsibility. Similarly, upon becoming part of the Dominion in 1949, aboriginals in Newfoundland automatically became the constitutional responsibility of Canada. Having acknowledged its legal obligations and accepted fiscal responsibility for the aboriginals in Newfoundland, Canada was also obliged to ensure the systems and institutions it was funding were operated in a safe and appropriate manner.

**16. In respect of paragraph 26: particulars including the dates, authors and subject lines of the legal opinions.**

A:Opinion regarding the legal position respecting Federal jurisdiction over and responsibility for Newfoundland Indians and Eskimos, authored by F.P. Varcoe, Deputy Minister of Justice, April 14, 1950:

“...for the purposes of the *British North America Act*, ‘Indians’ includes Eskimos. ... It is the responsibility of the federal government to formulate and carry out all policies that are directed at dealing with Indian or Indian problems. Such policy is to be formulated by Parliament and the executive. This responsibility carries with it the responsibility of providing money to be devoted to the carrying out of policies in relation to the Indians.”<sup>16</sup>

In 1954, officials recognized federal responsibility in this field and went so far to say that if Newfoundland went to court to compel Canada to assume responsibility, the province would be successful:

“The federal government's responsibility in this matter seems to be inescapable, legally and otherwise...”<sup>17</sup>

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<sup>15</sup> LAC, RG 10, vol. 6925, file: 121/29-1 vol. 1: Director to Deputy Minister (Mines and Resources), 20 May 1948.

<sup>16</sup> NAC, RG 2/18, vol. 172, file: N-18-3 (1949 – 1951). Ottawa, April 14, 1950, F.P. Varcoe, Deputy Minister of Justice to the Secretary to the Cabinet, Privy Council Office.

<sup>17</sup> P. Pelletier to J.W. Pickersgill, Secretary of State, 16 March 1954; N.A. Robertson to P. Martin, Minister of Health and Welfare, June 1954.

In October 1963, J. W. Pickersgill (Newfoundland MP and Minister of Transport) tried to persuade Prime Minister Pearson to place a reference before the Supreme Court of Canada to determine the extent of federal responsibility for aboriginals in Newfoundland but Prime Minister Pearson refused.<sup>18</sup>

In March 1964, Premier Smallwood wrote to Prime Minister Pearson asserting federal responsibility for Indians and Eskimos in the province. No objection was made to the letter by Prime Minister Pearson.<sup>19</sup>

In November 1964, a further legal opinion was requested from the Department of Justice. In that opinion, the 1950 Varcoe position was endorsed and confirmed that the constitutional position in respect of Indians applicable in the rest of Canada was equally applicable to Newfoundland:

“Mr. Varcoe’s opinion as to the constitutional position is, in my opinion, correct. The fact that there is no mention of Eskimos or Indians in the Terms of Union means only that the constitutional position with respect thereto has not changed with regard to Newfoundland”.<sup>20</sup>

An April 1965 Federal Cabinet memorandum addresses the constitutional framework once more, stating that: “The conclusion to be drawn from the outline of the situation given above seems to support a substantial degree of federal obligation with respect to the formulation of policies and the voting of funds to provide for programs on their [Indians and Eskimos in Newfoundland] behalf”.<sup>21</sup>

Despite acknowledgement of a “substantial degree of federal obligation”, the same Cabinet memorandum went on to recommend “gradually relieving the Federal Government of direct responsibility, both financial and administrative, for this segment of the Indian and Eskimo population of Canada”.<sup>22</sup>

**17. In respect of paragraph 28: particulars of the agreement referred to therein, including the date, author and terms of said agreement.**

A: At this time, the Plaintiffs cannot locate the specific agreement. The Plaintiffs will continue to search for the agreement and provide a copy if same can be located.

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<sup>18</sup> 21 October 1963, Correspondence, J.W. Pickersgill, to Prime Minister Pearson; 24 October 1963, Correspondence, Prime Minister Pearson to J.W. Pickersgill.

<sup>19</sup> Letter of Premier Smallwood to Lester Pearson, dated March 23, 1964.

<sup>20</sup> Letter of the Deputy Attorney General, dated November 23, 1964.

<sup>21</sup> 22 April 1965, Cabinet Memorandum, “Contributions to Newfoundland Respecting Indians and Eskimos”.

<sup>22</sup> *ibid*, Recommendations #13 and #17.

18. In respect of paragraph 30: particulars of the federal departmental estimates prior to Confederation (1949), including the names of the said departments, the amounts that were submitted and the dates when those amounts were included in the estimates.

A: In 1946, the Federal Cabinet established the Cabinet Committee on Newfoundland Relations and an advisory interdepartmental committee to report to Cabinet. Cabinet requested a report to show the costs of the various items Canada would be responsible for upon Newfoundland's entry into Confederation.<sup>23</sup>

In 1947, when discussing the implications of Confederation with Newfoundland officials, federal official clearly indicated that the aboriginal peoples of Newfoundland would be subjected to federal jurisdiction and an allocation was made to the 1949-1950 budget estimates of the federal government in order to begin covering the costs of such persons for 1949. Minutes of a meeting of federal officials and Newfoundland delegates in September 1947 show that the federal government at the time contemplated the application of the *Indian Act* and establishment of land reserves.<sup>24</sup> To this end, approximately sixty-thousand dollars was put into the 1949-1950 budget estimates for these purposes.<sup>25</sup>

i. Indians (Federal Department of Citizenship & Immigration)

April 1, 1949 – March 31, 1950:	\$20,906.10
April 1, 1950 – March 31, 1951:	<u>\$21,354.22</u>
	\$42,260.32

ii. Eskimos (Federal Department of Resources & Development)

April 1, 1949 – March 31, 1950:	\$13,601.82
April 1, 1950 – March 31, 1951:	<u>\$12,302.90</u>
	\$25,904.72 <sup>26</sup>

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<sup>23</sup> NAC, MG32, B5, vol. 114, file, Newfoundland: Cables between Canada and High Commissioner for Canada in Newfoundland 1945 – 47 (file 2); NAC, RG 85, vol. 2079, file 1006-5(1), "Natural Resources of Newfoundland"; Report by J.L. Robinson, Geographer, with appendix "Additional Responsibilities and Costs to the Department of Mines and Resources" (August 10, 1946).

<sup>24</sup> NAC, RG 2, 18 Vol. 128, file N-18 Newfoundland Delegation-Canadian government representatives meeting, June – September 1947.

<sup>25</sup> NAC, RG 2, 18, Vol. 172, File N-18-3 (1949-51), Major D.M. Mackay, Director of Indian Affairs Branch (Mines and Resources) to H.L. Keenleyside Deputy Minister of Mines and Resources.

<sup>26</sup> NAC, RG22, vol. 22, File 40-8-4. P. Pelletier, Privy Council Office. "Notes on the Indian and Eskimo Problem in Labrador", 31 October 1951.

**19. In respect of paragraph 45: particulars of fiduciary obligations and duty between Canada and Aboriginal persons in Newfoundland and Labrador that arose at the instant of Confederation in 1949.**

A: The Plaintiffs repeat and rely on the particulars provided above in paragraphs 9, 10, 14 and 15.

Additionally, the fiduciary relationship between Aboriginals in Newfoundland and Canada arises from the historical facts of these parties. Inuit and Eskimo existed and occupied Newfoundland and Labrador for hundreds of years prior to European contact. Canada ultimately assumed jurisdiction over all aboriginals in the country. One of the major responsibilities assumed by Canada in the *Constitution Act* was to reserve for itself exclusive jurisdiction over "Indians". Newfoundland joined Canada in 1949 with the agreement in the Terms of Union that the *Constitution Act* apply to the new province in the same way, and to the like extent, as in the rest of Canada. Accordingly, as of March 31, 1949, section 91(24) of the *Constitution Act* applied with full force to the aboriginal persons living in Newfoundland and Labrador.

By retaining for itself exclusive jurisdiction over Indians in the Constitution Act, which applied to persons in Newfoundland after March 31, 1949, Canada was under an obligation to act. This fiduciary duty, essentially codified by section 91(24) has always existed, from the moment that Canada assumed unto itself dominion over Indians. The federal power pursuant to section 91(24) must also be reconciled with federal duties and the requirement on the Crown to justify its conduct or steps that either infringe upon or deny aboriginal persons their rights. This is consistent with the well-entrenched principle of holding the Crown to a high standard of honourable dealing with respect to all of the aboriginal peoples in Canada. As a result, the Federal Crown was responsible for protecting the rights of aboriginals in Newfoundland following Confederation which arose from the special trust relationship between the parties created by history and legislation.

Moreover, the common law fiduciary relationship between the Crown and the Indians is also rooted in the historic reality of the parties. That duty extends to protect such persons from personal harm visited upon them by non-Indian forces.

**20. In respect of paragraph 46: particulars of Canada's legal responsibility, discretionary control and cognizable Indian interest alleged to give rise to a fiduciary duty between Canada and the Class.**

A: The Plaintiffs repeat and rely upon the particulars provided above in paragraphs 9, 10, 14 and 15 and in particular, the Federal opinions given in 1947, 1950 and 1964.

**21. In respect of paragraph 48: particulars of the common law and constitutional obligations, and fiduciary and common law duties.**

A. The Plaintiffs repeat and rely upon the particulars provided above in paragraphs 9, 10, 14 and 19.



**25. In respect of paragraph 54: particulars of educational opportunities.**

A: Refusal to provide particulars. The information sought by this particular paragraph constitutes evidence and not facts necessary to plead. Particulars regarding the denial and/or loss of educational opportunities is evidence that the Defendant may glean or explore during the discovery process.

**26. In respect of paragraph 56: particulars of the duties, responsibilities or obligations Canada is alleged to have attempted to delegate to the Province of Newfoundland.**

A: The Plaintiffs repeat and rely upon the particulars provided above in paragraphs 9, 10, 14, 15 and 19, including the 1947, 1950 and 1964 Federal opinions and the Supreme Court of Canada decision in *Re Eskimo*.

**28. In respect of paragraph 62: particulars of Canada's "special responsibility".**

A. The Plaintiffs repeat and rely upon the particulars provided and described above in paragraphs 9, 10, 14 and 19.

**32. In respect of paragraph 64: particulars of the systemic child abuse, neglect and maltreatment and the systematic deprivation of the essential components of a healthy childhood at the School.**

A: Tony Obed was physically beaten repeatedly for speaking his mother language Inuktitut and was sexually abused at the School on numerous occasions.

William Adams was prohibited from having any contact with his Inuk siblings at the School where the children were not permitted to speak their native language. Adams was physically beaten several times for speaking Inuktitut and physically and verbally abused by the School's supervisors. Given the physical labour required to Adams, he received little education. Adams was also sexually abused by a dorm supervisor and the principal of the School.

Other resident class members experienced similar mistreatment and abuse during their time at the School. The School was operated more like a reformatory or prison than a school for young children, with inadequate physical care of the children and a systemic pervasive atmosphere of both physical and sexual abuse. Former students of the School were subjected to an atmosphere targeted at their assimilation by removing their native culture, identity and language, which profoundly and adversely affected them.

**35. In respect of paragraph 67(a): particulars of Canada's "other responsibilities and duties" and particulars of who and/or what are the "others" to which Canada is alleged to have wrongfully delegated said other responsibility and duties.**

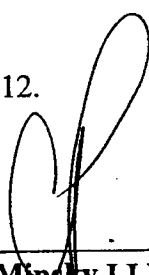
A: Knowingly permitting either the International Grefnell Association, Moravian Church or the province to continue a system of residential schools following Confederation,

while also financially contributing to such a system, yet providing no oversight to ensure the safety of the students, all the while acknowledging its sole responsibility in this arena, was an improper attempt to delegate exclusive Federal duties.

**38. In respect of paragraph 67(i): particulars of all disclosure of abuses in the School during the Class Period.**

A: Not in the Plaintiffs' possession. These would be documents solely within the Defendant's possession. Alternatively, the Plaintiffs allege that if the Defendant claims it was unaware of these abuses, it was thereby negligent for failing to administer any appropriate oversight of the School (or was otherwise wilfully blind) when, at the same time, it was providing educational funding and acknowledged that it owed an exclusive constitutional duty to the persons attending that school.

DATED at Toronto, Ontario, this 11<sup>th</sup> day of May, 2012.



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» and »  
Plaintiff Defendant

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at «place»

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Lawyers for the Plaintiff

Served on Fax: «Other party's fax, if known.»

**SCHEDULE "B"**  
**THIRD PARTY CLAIM**

1. The Plaintiffs' Statement of Claim (the "Claim") is brought as five class actions. The Plaintiffs allege abuses and breaches of duties at five schools (the "Schools") in Newfoundland and Labrador. The Plaintiffs state they are either former students of the Schools or their family members.
2. The Plaintiffs have sued Canada seeking damages for the alleged abuse, loss of language and culture and other heads of damage arising from their alleged experience at the Schools.
3. The International Grenfell Association (the "IGA"), the Moravian Church (the "Moravians") the Labrador and Western School Boards (the "Boards") and the Government of Newfoundland and Labrador (the "Province"), by their purpose, operation and management, created and ran the Schools.
4. The Province, by its purpose, operation and/or management, created and ran the Schools. Upon entering Confederation in 1949, the Province continued to have exclusive legislative authority over education. The Province's exclusive legislative authority over education remains in effect today. Both before and after Confederation, the Schools existed and were run in accordance with Provincial legislation, regulations and policy. The Schools existed and were operated prior to 1949, the year of Confederation between Canada and Newfoundland. The Schools continued to operate for several decades post Confederation.
5. Canada admits it provided some funding to the Province for use in programs for Aboriginal Peoples. Canada did not administer any programs or services relating to education of Aboriginal Peoples in respect of the Schools.
6. Canada states that the provision of funding, whether by the federal or provincial government, in keeping with the policy decisions of the government of the day, does not constitute a cause of action at law. Specifically, Canada's provision of funding to the Province does not give rise to a cause of action or legal liability.

7. Alternatively, if the Court decides that the provision of funding (or otherwise) can give rise to liability on Canada, then Canada hereby seeks contribution and indemnity from the Province. The Province received money from Canada and directed its uses. Canada was provided with an accounting of funds. The Province, not Canada, dealt directly with the Boards, IGA and Moravians in accordance with the Province's jurisdiction over education.
8. Canada had no agreements regarding the operation of the Schools. Canada did enter into agreements with the Province regarding funding arrangements for capital expenditures. Canada did not mandate the implementation of federal policy or guidelines with respect to the operation of the Schools.
9. Over the years, Canada participated in various committees with the Province and, later, with Aboriginal Peoples. These committees discussed funding, but did not require mandatory reporting to Canada regarding the daily operations of the Schools. Canada was not responsible for and did not undertake the day-to-day operation and management of the Schools. At no time was Canada ever made aware of any allegations of abuse at the Schools.
10. Canada had no agreements, policies or guidelines regarding the daily operation of the Schools. Canada did not inspect or audit the Schools, and did not have the power or authority to do so. Canada reviewed the Province's expenditures in order to determine whether the money provided was spent in accordance with the terms of the applicable agreements. Canada was not responsible for and did not undertake the day-to-day purpose, operation or management of the Schools.
11. Canada did not take any of the following actions, undertaken by the Province, Boards, IGA and/or Moravians, such actions including, but not limited to:
  - a. admission of children to the Schools;
  - b. transportation of children to and from the Schools;

- c. living conditions and food within the Schools;
- d. selection, hiring, supervision, discipline and dismissal of staff;
- e. academic, vocational, religious, and moral teaching of the students;
- f. school curriculum and attendance;
- g. medical treatment; and
- h. supervision, day-to-day care, guidance and discipline of the students.

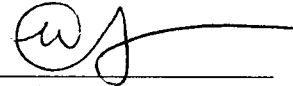
12. The Province, Boards, IGA and Moravians were the employers of any staff at the Schools. The Province and possibly others are vicariously liable for the actions of such staff at the Schools. Canada is not vicariously liable for the acts or omissions of such staff. Furthermore, Canada is not liable for the actions of anyone that was on School property, regardless of whether they had the express or implied consent of the Province, Boards, IGA and Moravians, who had operation, management and control of the Schools.

13. Canada repeats the foregoing and claims against the Province as follows:

- a. A declaration that Canada is entitled to contribution and indemnity from the Province to the extent that Canada is found liable to pay damages to the Plaintiffs; including any award as to interest and costs made against Canada;
- b. Judgment for contribution and/or indemnity in an amount equivalent to the amount of any judgment awarded against Canada in favour of the Plaintiffs, including any award as to interest and costs;
- c. Costs of this Third Party Claim; and
- d. Such further and other relief as the Court deems just.

14. Canada pleads and relies upon the *Contributory Negligence Act*, RSNL 1990, c. C-33; the *Crown Liability and Proceedings Act*, RSC 1985, c C-50; and the *Schools Act*, 1997, SNL 1997, c S-12.2, and its predecessor legislation.

**DATED** at Halifax, Nova Scotia, this 16<sup>th</sup> day of November, 2012.



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