

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

AND BETWEEN:

TOBY OBED, WILLIAM ADAMS and MARTHA BLAKE

2007 01T5423 CP

- and -

THE ATTORNEY GENERAL OF CANADA

SELMA BOASA and REX HOLWELL

2008 01T0844 CP

- and -

THE ATTORNEY GENERAL OF CANADA

SARAH ASIVAK and JAMES ASIVAK

2008 01T0845 CP

- and -

THE ATTORNEY GENERAL OF CANADA

EDGAR LUCY and DOMINIC DICKMAN

2008 01T0846 CP

- and -

THE ATTORNEY GENERAL OF CANADA

APPLICATION RECORD OF THE PLAINTIFFS
(UNDERTAKINGS AND REFUSALS MOTION)

KOSKIE MINSKY LLP 20 Queen Street West, Suite 900, Box 52 Toronto, Ontario M5H 3R3 Kirk M. Baert LSUC#: 309420 Celeste Poltak LSUC#: 46207A Tel: 416-595-2117 Fax: 416-204-2889	AHLSTROM WRIGHT OLIVER & COOPER LLP 200, 80 Chippewa Road Sherwood Park, AB T8A 4W6 Steve P. Cooper Tel: 780-464-7477 ext 233 Fax: 780-467-6428	CHES CROSBIE BARRISTERS 169 Water Street St. John's, NL A1C 1B1 Chesley F. Crosbie, Q.C. Tel: 709-579-4000 Fax: 709-579-9671 Solicitors for the Plaintiffs
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2007 01T4955CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
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TO: DEPARTMENT OF JUSTICE CANADA
Suite 1400, Duke Tower
5251 Duke Street
Halifax, NS B3J 1P3

Jonathan D. N. Tarlton
Tel: 902-426-5959
Fax: 902-426-8796
Mark S. Freeman
Tel: 902-426-5761
Fax: 902-426-2329

Solicitors for the Defendant

**AND TO: DEPARTMENT OF JUSTICE,
GOVERNMENT OF NEWFOUNDLAND AND LABRADOR**
4th Flr – East Block Confederation Building, P.O. Box 8700
St. John's NL A1B 4J6

Rolf Pritchard
Tel: 709-729-2864
Fax: 709-729-2129

Solicitors for Third Party



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**INTERLOCUTORY APPLICATION
(INTER PARTES)**

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2007 01T4955CP 2007 01T5423 CP 2008 01T0844 CP 2008 01T0845 CP 2008 01T0846 CP
Date of Filing Document:	February __, 2013
Name of Filing Party or Person:	Anderson, et al. (Applicant)
Application to which Documents being filed relates:	Application under Rule 30.08
Statement of purpose in filing:	Applicant seeks answers to proper and relevant questions asked on discovery of defendant's representative.
Court Sub-File, if any:	N/A

THE PLAINTIFFS will bring an application to the Honourable Justice Butler on Thursday March 21, 2013, at Trial Division (General), Supreme Court of Newfoundland and Labrador, 309 Duckworth Street, St. John's, NL A1C 1G9, seeking answers to proper and relevant questions asked on the discovery of the defendant's representative, pursuant to Rule 30.08 of the *Rules of the Supreme Court, 1986*.

THE APPLICATION shall be heard orally.

THE APPLICATION IS FOR:

- (a) an order that the defendant, The Attorney General of Canada ("Canada") answer questions taken under advisement during the examination for discovery of Mr. Claude Mark Davis ("Davis"), as listed in the chart attached as **Schedule "A"** hereto, within 30 days;
- (b) an order that Canada provide full and complete answers to the undertakings made during the examination of Davis, as listed in the chart attached as **Schedule "B"**;
- (c) an order that Davis re-attend, if necessary, at an examination for discovery to answer questions arising from the further answers provided in (a) and (b) above, within 90 days;
- (d) an order striking Canada's Statement of Defence should it fail to comply with any of the orders above;
- (e) the costs of this motion, fixed and payable forthwith by Canada to the plaintiffs; and,

- (f) any further and other relief that counsel may advise and this Honourable Court may permit.

GROUND FOR THE APPLICATION:

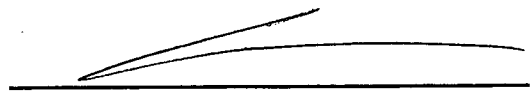
- (a) on October 29, 30 and 31, 2012 and November 1, 2012, Davis attended to be examined for discovery as the representative of Canada;
- (b) during the course of his examination for discovery, a number of proper and relevant questions were asked and were taken under advisement, some of which were answered by Canada on February 5, 2013;
- (c) Canada refuses to answer a number of proper and relevant questions taken under advisement as enumerated in **Schedule "A"**;
- (d) during the course of Davis' examination for discovery, a number of undertakings were provided by Canada, one of which has not been answered sufficiently, as enumerated in **Schedule "B"**;
- (e) the plaintiffs are entitled to the requested answers and documentation and, if necessary, to ask Davis questions arising from them as the information sought by the plaintiffs in the questions enumerated in **Schedules "A" and "B"** are relevant to the matters at issue in this action;
- (f) a timetable has been established and it is now anticipated that the trial of this action will commence between November 2013 and January, 2014;
- (g) the plaintiffs are entitled to receive all relevant documents in this action to permit them to review those documents and re-examine Davis on such documents, if necessary, with sufficient time to prepare for trial;
- (h) Rules 29, 30.08, 30.14 and 32 of the *Rules of the Supreme Court, 1986*, SNL 1986, c 42, Sch D; and,
- (i) such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the return of the application;

- (a) the affidavit of Jonathan Schachter, to be sworn;
- (b) the pleadings and proceedings in this action;
- (c) transcripts from the examination for discovery of Davis held on October 29, 30 and 31, 2012 and November 1, 2012 (see accompanying Book of Transcripts); and,

(d) such further and other material as counsel may advise and this Honourable Court may permit.

DATED at St. John's, Newfoundland and Labrador, this *19th* day of February, 2013.



KOSKIE MINSKY LLP
900 – 20 Queen Street West
Toronto, ON M5H 3R3

Kirk M. Baert
Tel: 416-595-2117
Fax: 416-204-2889
Celeste Poltak
Tel: 416-595-2701
Fax: 416-204-2909

**AHLSTROM WRIGHT OLIVER &
COOPER LLP**
200, 80 Chippewa Road
Sherwood Park, AB T8A 4W6

Stephen L. Cooper
Tel: 780-464-7477 ext 233
Fax: 780-467-6428

CHES CROSBIE BARRISTERS
169 Water Street
St. John's, NL A1C 1B1

Chesley F. Crosbie
Tel: 709-579-4000
Fax: 709-579-9671

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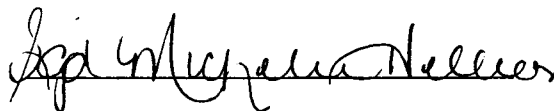
Solicitors for the Defendant

**AND TO: DEPARTMENT OF JUSTICE,
GOVERNMENT OF NEWFOUNDLAND AND LABRADOR**
4th Flr – East Block Confederation Building, P.O. Box 8700
St. John's NL A1B 4J6

Rolf Pritchard
Tel: 709-729-2869
Fax: 709-729-0469

Solicitors for Third Party

ISSUED at St. John's, Newfoundland and Labrador, this 28 day of February, 2013.



**COURT
OFFICER**

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
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MADAM JUSTICE BUTLER
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2008 01T0846 CP

UNDER ADVISEMENT CHART

Examination of Claude Mark Davis, on October 29, 2012 – Questions taken under advisement and not answered					
Issue & Relationship to pleadings	Line No.	Page No.	Specific Question	Answer of Defendant	Disposition by the Court
1. Duty of care, Standard of care, Breach of duty	1-42/8-24/1-16	182/183/184	To provide any or all documents in respect of the arrangement between the federal government and Quebec that are referred to in Document AGC00006993, a February 27, 1962 letter from the Newfoundland Minister of Education to Mr. Pickersgill, the Minister of Transport, regarding discriminatory treatments being meted out to Newfoundland's Eskimos and Indians as compared to other parts of Canada, particularly Quebec, as being in place around 1964.	It is our position that this line of questions has no semblance of relevance to the common issues and, therefore, it need not be answered.	
Examination of Claude Mark Davis, on October 30, 2012 – Questions taken under advisement and not answered					
Issue & Relationship to pleadings	Line No.	Page No.	Specific Question	Answer of Defendant	Disposition by the Court
2. Duty of care	8-17	293	To provide information on whether applications for reimbursements from the International Grenfell Association and Dr. Thomas were submitted directly to the federal government or if they went to Health and Welfare Canada through the Province, regarding AGC00010527, a letter from Dr. Miller, Dep. Minister of Health which implies that the IGA claims amounts directly from National Health and Welfare for medical expenses including a TB clinic.	It is our position that this line of questioning is related to health and not education. This line of questioning has no semblance of relevance to the common issues and, therefore, need not be answered.	

Issue & Relationship to pleadings	Line No.	Page No.	Specific Question	Answer of Defendant	Disposition by the Court
3. Duty of care	12-24/1-24/1-21	380/381/382	To provide the defendant's position on whether there is a difference between the Inuit of Labrador and Northern Quebec, and to provide clarification as to whether it is the position of the defendant that it was an established fact that the federal government had no responsibility for Indians and Eskimos in Newfoundland as of the time of Document AGC00005880, a 1960 letter from Dep. Minister of Education in Newfoundland, discussing the fact that the question of responsibility for Indians would be deferred until after confederation.	<p>It is our position that request A has no semblance of relevance to the common issues and, therefore, it need not be answered.</p> <p>It is our position that request B has not semblance of relevance to the common issues and, therefore, it need not be answered.</p>	
4. Duty of care	9-24	390	To provide Canada's position as to whether in 1960, it was the federal government's responsibility to formulate and carry out all policies that are directed at dealing with Indians or Indian problems, as was indicated by the Department of Justice in 1964.	Canada does not reference this question in their answers on February 5, 2013.	
5. Duty of care	14-24/1-13	389/390	To provide the defendant's position on whether as of 1960 the federal government's position with Quebec was that the Eskimos of Northern Quebec were Quebec's responsibility as opposed to the federal government's responsibility.	It is our position that request D has no semblance of relevance to the common issues and, therefore, it need not be answered.	

6. Duty of care	4-24/1-23	389/390	To provide clarification as to what was happening in Quebec around 1960 with respect to the same education question that is involved in this litigation.	It is our position that Request D has no semblance of relevance to the common issues and, therefore, need not be answered.	
7. Duty of care	24/1-7	390/391	To provide the defendant's position on whether as of 1960, it was an established fact that legally the federal government had no responsibility for the Indians and Eskimos in Newfoundland and that this was the responsibility of the Province regarding Document AGC0006154.	We have made our best efforts and hereby advise that this information is not within our knowledge. We note that Mr. Hanley was a Deputy Minister of Education for the Province.	

Examination of Claude Mark Davis, on November 1, 2012 – Questions taken under advisement and not answered

Issue & Relationship to pleadings	Line No.	Page No.	Specific Question	Answer of Defendant	Disposition by the Court
8. Duty of care	23-24/1-6	488/489	To provide a copy of a letter dated November 23, 1992 referred to in AGC00021494. The letter is from the Minister of Indian and National Affairs to the Innu Nation and responds to the concerns outlined in a report entitled "Canada/Newfoundland Agreements: An Innu Perspective".	We have made best efforts and hereby advise that a <u>final</u> signed version of the letter dated November 23, 1992 could not be located.	

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and
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DEFENDANTS

2008 01T0846 CP

UNDERTAKINGS CHART

Examination of Claude Mark Davis, on October 30, 2012 – Outstanding Undertakings					
Issue & Relationship to pleadings	Line No.	Page No.	Specific Undertaking	Answer of Defendant	Disposition by the Court
1. Duty of care	23-24/1-10	311/312	To provide a signed copy of Document AGC00015797, "Canada Newfoundland Native Peoples of Labrador" Agreement dated May 8, 1980 or verify that this was the version in effect at the relevant time.	Please see AGC005657.	

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AFFIDAVIT

I, Chesley F. Crosbie, Q.C., of St. John's, in the Province of Newfoundland and Labrador, co-counsel for the Plaintiffs, make oath and say as follows:

1. THAT I have read and I understand the foregoing application.
2. THAT the facts contained therein are true to the best of my knowledge, information and belief.

3. THAT I make this Affidavit in support of the Plaintiffs' application of even date.

SWORN TO at the City of St. John's, in the Province of Newfoundland and Labrador, this *19th* day of February, 2013, before me:

S. Geehan

SHERI GEEHAN
A Commissioner for Oaths in and for
the Province of Newfoundland and Labrador.
My commission expires on December 31, 2016.



CHESLEY F. CROSBIE, Q.C.

2007 01T4955CP

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DEFENDANT

NOTICE TO THE PARTIES

You are hereby notified that the foregoing application will be heard on Thursday, the 21st day of March, 2013, at the hour of ten o'clock in the forenoon or so soon thereafter as the application can be heard.

TO: DEPARTMENT OF JUSTICE CANADA
Suite 1400, Duke Tower
5251 Duke Street
Halifax, NS B3J 1P3

Jonathan D. N. Tarlton

Tel: 902-426-5959

Fax: 902-426-8796

Mark S. Freeman

Tel: 902-426-5761

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Solicitors for the Defendant

**AND TO: DEPARTMENT OF JUSTICE,
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4th Flr – East Block Confederation Building, P.O. Box 8700
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AFFIDAVIT OF SERVICE

I,
follows:

, of

make oath and say as

(Personal Service)

1. On
with the

, at , I served
by leaving a copy with him (or her) at

2. I was able to identify the person by means of

(Service by leaving a copy with an adult person in the same household as an alternative to personal service)

1. I served _____ with the _____ by leaving a copy on _____ at _____, with a person, _____, who appeared to be an adult member of the same household in which _____ is residing, at _____, and by sending a copy by regular lettermail (or registered or certified mail) on _____ to _____ at the same address.

2. I ascertained that the person was an adult member of the household by means of

3. Before serving the documents in this way, I made an unsuccessful attempt to serve _____ personally at the same address on _____. (If more than one attempt has been made, add: and again on _____.)

(Service by registered mail as an alternate to personal service)

1. On _____, I sent to _____ by registered mail with Canada Post Corporation item # _____ attached to the envelope, a copy of the

2. Attached is the confirmation of delivery receipt obtained from Canada Post Corporation for item # _____ showing the envelope was delivered to _____ on

3. The item # on the confirmation of delivery receipt is identical to the item number on the registered mail receipt obtained from Canada Post Corporation for the envelope sent to

(Service by certified mail as an alternative to personal service)

1. On _____, I sent to _____ by certified mail a copy of the

2. I received the attached receipt card from Canada Post Corporation which indicates the documents were received on _____ and which bears a signature that purports to be the signature of

(Service by regular lettermail as an alternative to personal service)

1. On _____, I sent to the _____ by regular lettermail a copy of the _____ together with an acknowledgment of receipt form.

2. On _____, I received the attached acknowledgment of receipt form bearing a signature that purports to be the signature of _____

SWORN TO before me at the City of _____, in the Province of _____, this day of _____, 2013.

2007 01T4955CP

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- and -

THE ATTORNEY GENERAL OF CANADA

AFFIDAVIT OF JONATHAN SCHACHTER

(sworn February 25, 2013)

I, Jonathan Schachter, of the City of Toronto, in the Province of Ontario MAKE OATH AND SAY AS FOLLOWS:

1. I am a law student with the law firm Koskie Minsky LLP, class counsel for the plaintiffs, and as such have knowledge of the matters to which I hereinafter depose. I am one of the solicitors involved in this matter. Specifically, I have been extensively involved in

reviewing the documentary productions produced by the defendant, The Attorney General of Canada ("Canada") and with the examinations for discovery.

BACKGROUND

2. This class proceeding brought by the plaintiffs concerns claims in both negligence and breach of fiduciary duty based on the manner in which Canada participated in the operation, funding, oversight and control (or its failure to properly operate and oversee) five residential schools for aboriginal children following Confederation in 1949

3. Attached as **Exhibit "A"** is a copy of the Amended Statement of Claim dated April 19, 2012, in Court File No. 2007 01T4955CP.

4. Attached as **Exhibit "B"** is a copy of Canada's Statement of Defence filed on November 21, 2012.

5. A copy of the Certification Order dated June 7, 2010 is attached as **Exhibit "C"**.

6. The Reasons for Decision of the Court of Appeal, dated December 21, 2011 are attached as **Exhibit "D"**.

EXAMINATIONS FOR DISCOVERY

7. Examinations for discovery of Canada's Representative, Mr. Claude Mark Davis ("Davis"), were conducted on October 29, 30 and 31, 2012 and November 1, 2012. During those examinations, Canada provided a number of undertakings in response to specific questions, and took a number of questions under advisement.

8. On February 5, 2013, Canada provided a number of answers to undertakings and questions taken under advisement. A copy of a letter from Canada's counsel in this regard, dated February 5, 2013, is attached as **Exhibit "E"**.

9. Attached as **Exhibit "F"** is a chart, listing the remaining questions taken under advisement which have not been answered by Canada or for which an unsatisfactory answer has been provided, (also to be attached to the Notice of Application herein as **Schedule "A"**) (the "Advisements Chart"). This chart also incorporates the answers to questions taken under advisement provided by Canada on February 5, 2013.

10. Attached as **Exhibit "G"** (also to be attached to the Notice of Application herein as **Schedule "B"**) is a chart of the undertakings for which Canada has not provided sufficient answers (the "Undertakings Chart"). This chart also incorporates the incomplete answer given by Canada on February 5, 2013.

11. Attached are the documents referred to in **Exhibits "F"** and **"G"**:

- (a) Attached and marked as **Exhibit "H"** is document AGC00006993 referred to in Line No. 14-24, Page 179 of the transcript of the examination of Davis;
- (b) Attached and marked as **Exhibit "I"** is document AGC00007073 referred to in Line No. 17-23 , Page 184 of the transcript of the examination of Davis;
- (c) Attached and marked as **Exhibit "J"** is document AGC00010527 referred to in Line No. 1-8, Page 290 of the transcript of the examination of Davis;
- (d) Attached and marked as **Exhibit "K"** is document AGC00015797_referred to in Line No. 1-13, Page 311 of the transcript of the examination of Davis;
- (e) Attached and marked as **Exhibit "L"** is document AGC00005880 referred to in Line No. 18-24, Page 371 of the transcript of the examination of Davis;
- (f) Attached and marked as **Exhibit "M"** is document AGC00006154 referred to in Line No. 8-16, Page 391 of the transcript of the examination of Davis;
- (g) Attached and marked as **Exhibit "N"** is document AGC00021494 referred to in Line No. 2-5, Page 488 of the transcript of the examination of Davis;

INACCURATE ANSWERS TO UNDERTAKINGS

12. As outlined in the Undertakings Chart, the plaintiffs requested that Canada provide a signed copy of Document AGC00015797 (marked as **Exhibit "K"**), "Canada Newfoundland Native Peoples of Labrador" Agreement dated May 8, 1980 or verify that this was the version in effect at the relevant time. Canada's answer provided that a signed copy of this document could be found at AGC00005657, which document is attached as **Exhibit "O"**. The plaintiffs request a sufficient and complete answer to this proper and relevant question.

IMPROPER REFUSALS TO ANSWER ADVISEMENTS

13. In its answers to questions taken under advisement on February 5, 2013, Canada refuses to answer several questions taken under advisement as noted herein.

14. Canada has refused to answer a number of these questions taken under advisement on the basis that questions relating to the treatment of Indians and Eskimos in Canada, other than in Newfoundland and Labrador, has no semblance of relevance to the common issues. These questions are outlined in the Advisements Chart at questions 1, 3, 5 and 6. The plaintiffs maintain that these questions directly relate to the pleadings in this action regarding the question of whether Canada owed a duty of care or fiduciary duty to the class and standard of any duty and are therefore proper and relevant questions that Canada is obliged to answer.

15. In addition, Canada has not provided a full answer to the question posed by the plaintiffs as outlined in the Advisements Chart at question 3.

16. Regarding question 2 in the Advisements Chart, Canada has also refused to provide information on whether applications for reimbursements from the International Grenfell Association and Dr. Thomas were submitted directly to the federal government or if they went to Health and Welfare Canada through the Province, regarding AGC00010527 (marked as **Exhibit "J"**), on the basis that this line of questioning is related to health and not education and therefore has no semblance of relevance to the common issues. The plaintiffs maintain that this question directly relates to the pleadings in this action regarding the question of whether Canada owed a duty of care or fiduciary duty to the class and is therefore a proper and relevant question.

17. Question 4 in the Advisements Chart has not been addressed by Canada at all in their answers to undertakings and advisements on February 5, 2013, and is clearly a proper and relevant question. This was a request for Canada's position as to whether in 1960, it was the federal government's responsibility to formulate and carry out all policies that are directed at dealing with Indians or Indian problems, as was indicated by the Department of Justice in 1964. This clearly relates to whether Canada owed a duty of care or fiduciary duty to the class and is therefore a proper and relevant question.

18. Regarding question 7 in the Advisements Chart, the question answered by Canada does not reflect the question posed by counsel for the plaintiffs, as outlined in the discovery transcript and in the Advisements Chart. The proper question proposed by plaintiffs' counsel sought Canada's position on whether as of 1960, it was an established fact that legally the federal government had no responsibility for the Indians and Eskimos in Newfoundland and

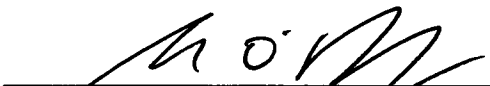
that this was the responsibility of the province regarding Document AGC0006154 (marked as **Exhibit "M"**). This also clearly relates to whether Canada owed a duty of care or fiduciary duty to the class and is therefore a proper and relevant question.

19. Finally, regarding question 8 in the Advisements Chart, the plaintiffs requested that Canada provide a copy of a letter dated November 23, 1992, referred to in AGC00021494. This was a letter from the Minister of Indian and National Affairs to the Innu Nation responding to the concerns outlined in a report entitled "Canada/Newfoundland Agreements: An Innu Perspective". Canada advised in its February 5, 2013 letter that a final signed version of this document could not be located, however, that was not the question posed by plaintiffs' counsel. This question relates to whether Canada owed a duty of care or fiduciary duty to the class and is therefore a proper and relevant question.

20. On February 13, 2013, the plaintiffs advised Canada of their intention to move on these issues. Attached as **Exhibit "P"** is a copy of this letter.

21. I make this affidavit in support of the plaintiffs' application for answers to proper and relevant questions asked on the examination for discovery of Davis.

SWORN BEFORE ME at the
City of Toronto,
in the Province of Ontario
on February 25, 2013.


Commissioner for Taking Affidavits

Sean O'Donnell


JONATHAN SCHACHTER

This is Exhibit A referred to in the affidavit of Jonathan Schachter sworn before me, this 25 day of February 2013

heave granted 24
R7A08, April 12/12
Wm

[Signature]
A COMMISSIONER FOR TAKING AFFIDAVITS

2007 01T4955 CP

**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;

Filed Apr 18/12 [Signature]

- (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.