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

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 -	
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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#: 30942O** **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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APPLICATION RECORD OF THE PLAINTIFFS
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Solicitors for Third Party

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THE ATTORNEY GENERAL OF CANADA	

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.

GROUNDS 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.

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AND TO: **DEPARTMENT OF JUSTICE,**
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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
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 BEFORE THE HONOURABLE MADAM JUSTICE BUTLER
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EDGAR LUCY and DOMINIC DICKMAN	PLAINTIFFS
and	
THE ATTORNEY GENERAL OF CANADA	DEFENDANTS

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.	It is our position that request A has no semblance of relevance to the common issues and, therefore, it need not be answered. It is our position that request B has not semblance of relevance to the common issues and, therefore, it need not be answered.	
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
THE ATTORNEY GENERAL OF CANADA DEFENDANTS

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:

CHESLEY F. CROSBIE, Q.C.

S Geehan

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

2007 01T4955CP

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EDGAR LUCY and DOMINIC DICKMAN PLAINTIFFS

- and -

THE ATTORNEY GENERAL OF CANADA 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.

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- and -

THE ATTORNEY GENERAL OF CANADA DEFENDANT

AFFIDAVIT OF SERVICE

I, , of make oath and say as follows:

(Personal Service)

1. On , at , I served with the 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

18

(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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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 20 13

A COMMISSIONER FOR TAKING AFFIDAVITS

leave granted 24 RTA 08, April 12/12

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 mc

(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 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.

~~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 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. 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) <u>overseeing</u> 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 which 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 19th day of April, 2012.

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B

This Is Exhibit B referred to in the affidavit of Jonathan Schachter sworn before me, this 25 day of February 2017

A COMMISSIONER FOR TAKING AFFIDAVITS

2007 01T4955 CP

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

DEFENCE

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

Filed Nov. 21/12 DP

Introduction

1. The Defendant, the Attorney General of Canada ("Canada"), denies the allegations in the Statements of Claim (the "Claim"), as though each was set out here and individually and specifically denied. Canada puts the Plaintiffs to the strict proof of the allegations in the Claim.

2. The Claim, which is brought as five class actions, alleges 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.

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 (hereinafter we refer to these parties collectively as the "Operators").

4. 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. The Plaintiffs allege that Canada ran the Schools and/or was responsible for the Schools. The Plaintiffs allege that Canada, by its purpose, operation or management, of the Schools breached certain duties to protect the Plaintiffs from harm. Canada denies these allegations. Canada did not owe any legal duties to the Plaintiffs, nor did Canada breach any such duties or cause any harm to the Plaintiffs.

The Operators

6. The IGA, by its purpose, operation and management, created and ran three of the Schools, which were located in St. Anthony, Cartwright and North West River. The IGA was incorporated in 1914 under the *Companies Act* of 1899. The IGA is currently recognized as an "incorporation without share capital - in good standing".

7. The Moravians, by their purpose, operation and management, created and ran two of the Schools, which were located at Nain and Makkovik. According to the Moravians' website, the Moravian Union (Incorporated) is a legally incorporated body. The Moravian Union (Incorporated) is part of the world wide Moravian Church of the Christian religion with its head office located in London, England. It is responsible for the direction and control of its Churches, missionaries, and employees worldwide including, but not limited to, the Moravian Church in Newfoundland and Labrador. The Moravian Church in Newfoundland and Labrador was incorporated under the *Moravian Church in Newfoundland and Labrador Act,* SNL 1970, c. 40.

8. The Boards, by their purpose, operation and management, created and ran the Schools. The Labrador School Board created, operated and managed four Schools at Cartwright, North West River, Nain and Makkovik. The Western School Board created, operated and managed one School at St. Anthony. The Boards were incorporated in 1969. Provincial legislation provides for the assumption of liabilities of past boards by successor boards.

9. 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.

10. For example, the Province enacted a statute in 1970 giving the Minister of Social Services and Rehabilitation the power to erect a dormitory in North West River to provide accommodation for Aboriginal people; provide financial assistance for its operation; set up an administrative board to operate it; and conduct inspections (*The Northern Labrador (Social Services and Rehabilitation) Act*, SNL 1970, No. 23, s. 11 (1)).

11. The first provincial *Education Act* was passed in 1836. Subsequent acts and amendments gradually formalized the role played by the Province, Boards, philanthropic organizations and religious denominations in the administration and delivery of education to students in

Newfoundland and Labrador. Canada pleads and relies on the *Schools Act, 1997*, SNL 1997, c. S-12.2, and its predecessor legislation.

12. Canada did not take any of the following actions, undertaken by the Operators, such actions include, but are 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 at the Schools;
    e. academic, vocational, religious, and moral teaching of the students at the Schools;
    f. school curriculum and attendance at the Schools;
    g. medical treatment at the Schools; and
    h. supervision, day-to-day care, guidance and discipline of the students at the Schools.

Alleged duties

13. The following is Canada's attempt to summarize the myriad duties the Plaintiffs allege were owed and were breached by Canada in relation to the Schools:

    a. "non-delegable" fiduciary duty to protect the Plaintiffs from harm;

    b. duty of care (in negligence) to protect the Plaintiffs from harm.

14. Canada denies that it owed these duties. If anyone owed a fiduciary duty or duty of care to the Plaintiffs, it was the Operators, who, by their purpose, operation and management, created and ran the Schools at all times.

15. The Operators controlled the Schools on a day to day basis such that only they could have owed a duty of trust and loyalty to the Plaintiffs. Similarly, only the Operators could have been close enough to the Plaintiffs to potentially owe a duty of care.

16. While Canada, at various times and for various purposes, provided money to the Province for Aboriginal Peoples generally, the Province maintained authority over how such money was spent.

Agents

17. The Plaintiffs allege that Canada had "agents" or who acted on its behalf in relation to the Schools. Canada denies this allegation.

18. Canada did not create express or implied agency relationships with the Operators or anyone else in relation to the Schools. The facts do not satisfy the legal test for the existence of an express or implied principal/agent relationship between Canada and the Operators, or any other party.

19. Alternatively, even if some form of agency relationship could have existed, if the "agents" were causing harm to the Plaintiffs, then they were clearly acting outside the scope of any express or implied agency relationship or authority.

20. At law, Canada may only be found liable in tort for the negligent actions of a Crown servant that is acting in the scope of their employment. The Plaintiffs have not identified a Crown servant through whom any potential alleged liability could flow. Canada pleads and relies on the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, ss. 3(b).

21. It was the Operators, by their own authority, purpose, operation and management that created and ran the Schools at all times. Canada had no role whatsoever in the purpose, operation or management of the Schools.

Delegates and "Non-delegable Duty"

22. The Plaintiffs allege that Canada had "delegates" who acted on Canada's behalf in relation to the Schools. Canada denies these allegations.

23. Canada did not make express or implied delegations to the Operators or anyone else in relation to the Schools. The facts do not satisfy the legal test for the delegation of any duty by way of express or implied delegation by Canada to the Operators, or any other party.

24. The Plaintiffs allege what they call at various times a "non-delegable" duty and a "non-delegable fiduciary duty". However, at law, "non-delegable duties" arise from statute; fiduciary duties, which are entirely different, arise only in certain factual circumstances.

25. "Non-delegable duties" require a statute that places full responsibility on one party for some activity. Where there is such a statute, the duty is "non-delegable" in the sense that the party that owes the duty cannot discharge its responsibility simply by delegating the activity to someone else. No such statute exists in this case, and the facts do not support the existence of a "non-delegable duty" owed to the Plaintiffs by Canada.

26. Canada did not owe a "non-delegable duty" or a "non-delegable fiduciary duty" to the Plaintiffs; therefore, Canada could not have inappropriately delegated such a duty. The facts do not satisfy the legal test for the existence of a "non-delegable duty" between Canada and the Plaintiffs, nor do the facts show the breach of any such duty by Canada.

Fiduciary Duty

27. Canada did not owe a fiduciary duty to the Plaintiffs. The Plaintiffs allege that the legal test for the existence of a fiduciary duty between Canada and the Plaintiffs has been satisfied. Canada denies this. The facts plead do not satisfy the legal test for the existence of a fiduciary duty between Canada and the Plaintiffs.

28. There is no "cognizable Indian interest" present as asserted by the Plaintiffs. Canada did not exercise "discretionary control" over the Schools and/or the Plaintiffs. The facts necessary to ground a claim in fiduciary duty are not present in this case.

29. Alternatively, even if a fiduciary duty exists, Canada did not breach such a duty. If the Plaintiffs were owed a fiduciary duty, it would have been owed by the Operators, who by their purpose, operation and management actually created and ran the Schools.

Negligence

30. Canada did not owe a duty of care to the Plaintiffs. The Plaintiffs allege that the legal test for the creation of a duty of care has been satisfied. Canada denies this; the facts plead do not satisfy the legal test for the creation of a duty of care.

31. A proximate relationship did not exist between Canada and the Plaintiffs; proximity is necessary to give rise to a duty of care. Furthermore, Canada could not have reasonably foreseen the acts and harms allegedly suffered by the Plaintiffs at the Schools.

32. Furthermore, Canada was not and could not have been the "but for" cause of any harm allegedly suffered by the Plaintiffs at the Schools.

33. Alternatively, even if Canada owed a duty of care, Canada did not fall below any applicable standard of care. Canada says that the standard of care at the Schools can only be judged by the applicable "standards of the day". Even if Canada owed a duty of care (which is denied), the applicable "standards of the day" were not breached.

34. If anyone could have owed a duty of care that could have been negligently breached in the circumstances, it was the Operators. By their purpose, operation and management, the Operators created and ran the Schools.

Allegations of abuse and duties

35. Canada denies that it owed the duties alleged by the Plaintiffs. In particular, Canada denies that it owed a duty to promote the health, safety and well-being of Aboriginal persons, or their language, cultural and spiritual traditions, or to provide an education or educational services to the Plaintiffs. In the alternative, any actions undertaken by Canada were dictated by *bona fide* policy choices made by successive Canadian governments, which cannot give rise to liability at law.

36. Canada denies that the Plaintiffs were in Canada's custody, or wards of the state whose care and welfare required Canada to stand *in loco parentis* to them. The evidence shows the Plaintiffs' care while at the Schools was the responsibility of the Operators.

37. Canada denies that the living conditions at the Schools were inadequate or were below acceptable standards for the time periods and circumstances in question. In any event, Canada was not responsible for the living conditions at the Schools. The Operators were responsible for the daily operations of the Schools, including the food and living conditions. According to the documents, the conditions at the Schools varied by School, time period, relative wealth of the Operator responsible for the administration of the School, and the general level of economic health of the economy in any particular era.

38. Canada denies that the Plaintiffs were subjected to emotional, cultural, or spiritual abuse. In any event, such allegations disclose no cause of action in law. If any such cause of action exists, then only the Operators could have owed such a duty in the circumstances as the parties whose purpose, operation and management resulted in the creation and running of the Schools.

39. Canada denies that it sought to destroy the Plaintiffs' ability to speak their native language, or to lose the customs and traditions of their culture, by requiring that the formal education of the Plaintiffs be conducted in English. The first language learned by many of the Plaintiffs, often from their parents, was English.

40. Canada says there was extensive cultural intermingling between Aboriginal and non-Aboriginals communities in Newfoundland and Labrador. For example, both before and for decades after Confederation, there was no reserve system in the Province. In addition, Aboriginal children and non-Aboriginal children often attended the Schools together. It was the Province's policy not to treat Aboriginal and non-Aboriginal people differently.

41. Canada had no role in setting the curriculum at the Schools. The Operators were solely responsible for the curriculum at Schools. If particular Plaintiffs were in any manner

punished or demeaned for speaking their native languages, or for practicing their cultural or spiritual traditions, such actions were in no way directed by any policy or systemic practice by Canada.

42. If individual Plaintiffs suffered losses of language or culture, which is not admitted, such losses occurred as a result of myriad historical, personal, societal and community circumstances, as a result of the interaction of Aboriginal communities with non-Aboriginal communities, along with the progressive urbanization of Canadian society, as part of an observable international trend towards diminishing use of minority languages and culture, and not as a result of any acts or omissions of Canada. In any event, the Plaintiffs' allegations concerning loss of language and culture disclose no cause of action in law.

43. Canada denies that the students suffered systemic child abuse, neglect or maltreatment. Any instances of abuse, neglect or maltreatment were isolated and not incidents of a systemic problem that involved Canada in any way. Any abuse, neglect or maltreatment of students was caused not by the breach of any duty by Canada but solely by the acts or omissions of the Operators, for whose actions Canada is not liable.

44. The Operators accused of abusing, neglecting or otherwise mistreating the Plaintiffs were at no time employees, agents or delegates of Canada. The Operators were responsible for the actions of any persons who committed the alleged abuse.

45. In the alternative, if any employees or agents of Canada did abuse, neglect or mistreat students, Canada is not vicariously liable for those acts, as they were not authorized by Canada. None of the alleged acts of abuse were sufficiently related to the course or scope of employment or agency allegedly granted by Canada so as to justify the imposition of vicarious liability on it.

46. Canada is not and cannot at law be held directly liable in negligence, or breach of fiduciary duty, for any abuses which may have taken place. The Plaintiffs allege that Canada had a "duty to protect" the Plaintiffs from harm that was allegedly visited upon

them at the Schools. There is no such at large "duty to protect" Aboriginal people from harm imposed by Canada at law. It was not Canada's purpose, operation or management that led to the creation or running of the Schools. Canada owed no duty to the Plaintiffs.

Canada only provided funding to the Province

47. Canada admits it has provided some funding to the Province for use in programs for Aboriginal people. Canada did not administer any programs or services relating to education of Aboriginal people in respect of the Schools. The provision of funding by the Federal government to the Provincial government does not give rise to liability.

48. 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. 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.

49. 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 was spent in accordance with the terms of applicable agreements. Canada was not responsible for and did not undertake the day-to-day purpose, operation or management of the Schools

The Indian Residential Schools Settlement Agreement ("IRSSA") and the Schools

50. By authority of the *Indian Act*, RSC 1985, c I-5, Canada and certain religious organizations did operate some "Indian Residential Schools" for the education of Aboriginal children. Certain abuses were committed against the children that attended

the Indian Residential Schools. None of these Indian Residential Schools were located or operated in Newfoundland and Labrador.

51. The IRSSA was approved by the Courts and came into effect on September 19, 2007. Canada concluded the IRSSA with former students of Indian Residential Schools, the Churches involved in running those schools, the Assembly of First Nations, and other Aboriginal organizations. The IRSSA includes the individual and collective measures to address the legacy of the Indian Residential School system.

52. The Plaintiffs' Claim fundamentally misconstrues the nature of the Schools in this case. The Claim alleges, both expressly and impliedly, that the Schools are akin to Indian Residential Schools that existed under the *Indian Act* and that were the subject of the IRSSA. This characterization of the Schools is inaccurate and Canada denies such allegations. The Schools in this case were not Indian Residential Schools. Canada did not, either under the *Indian Act* or by other purpose or authority, create, operate or manage the Schools.

53. Canada was involved with the *Indian Act* based Indian Residential Schools. In the context of the IRSSA, if the Schools in question were Indian Residential Schools, then they would be eligible for admission to the IRSSA. Article 12 of the IRSSA allows for the addition of an institution to the settlement if Canada was jointly or solely responsible for the operation of the institution. Contrary to the Plaintiffs' allegations, Canada was not jointly or solely responsible for the operation of these Schools. If there were facts and evidence showing that Canada was jointly or solely responsible for the Schools, then the Schools would be included in the IRSSA.

54. Canada was not jointly or solely responsible for the operation of the Schools and the care of the Plaintiffs there. It was not Canada's purpose, operation or management that led to the creation or running of the Schools, for example:

    a. the Schools were not federally owned;
    b. Canada did not stand *in loco parentis* as parent to the children at the Schools;

c. Canada was neither wholly nor partially responsible for the administration of the Schools;
d. Canada did not inspect, nor did it have the right to inspect, the Schools;
e. Canada did not stipulate that the Schools were Indian Residential Schools in accordance with the *Indian Act*.

55. It is not surprising that there were no Indian Residential Schools, under the *Indian Act*, in Newfoundland and Labrador. The Plaintiffs identify as Inuit and Métis people. The *Indian Act* does not apply to Inuit and Métis people. The *Indian Act* did not and does not provide the statutory authority to create, operate or manage a hypothetical "Inuit/Métis Residential School" in Newfoundland and Labrador.

Family Class Claims

56. The Plaintiffs' Claim alleges that Canada owed and breached duties to certain family members of persons that allegedly attended the schools (the "Family Class"). Canada denies theses allegations.

57. With respect to the claims of the Family Class, Canada denies that it owed any duties to this group arising out of the Plaintiffs' alleged attendance at the Schools. In particular, Canada denies that it owed any duty of care or fiduciary duty to the Family Class. Canada denies that the Family Class has any cause of action at law whatsoever against Canada.

Damages

58. If the Plaintiffs suffered any of the damage, losses or injuries alleged, such damage, losses or injuries were not caused by any acts or omissions of Canada or for which Canada is liable. Rather, such damage, losses or injuries were caused by factors unrelated to Canada's conduct, including but not limited to events prior and subsequent to the Plaintiffs' alleged attendance at the Schools. Furthermore, the damage, losses and injuries alleged by the Plaintiffs are exaggerated, remote and unforeseeable.

59. Canada pleads and relies upon the *Contributory Negligence Act*, RSNL 1990, c. C-33.

60. Canada denies that the circumstances alleged, if proven, were such as to give rise to liability for punitive, exemplary, or aggravated damages.

61. If the Plaintiffs suffered any of the damage, losses or injuries alleged as a result of any acts or omissions of Canada for which Canada is liable, which is not admitted but denied, the individual Plaintiffs, and the Plaintiffs as a whole, were under a duty to exercise reasonable diligence and ordinary care in attempting to minimize their damages after the occurrence of damage, losses or injury as alleged in the claim. Canada pleads that the Plaintiffs, individually or as a group, failed to take reasonable actions which would have tended to mitigate any damages.

62. The Plaintiffs are seeking the assessment of an aggregate damages award from the Court. Canada denies that such an award could be assessed in this case even if liability were found (which is denied). The circumstances of each Representative Plaintiff are unique, as are the circumstances of every potential class member. There was no common experience amongst students at the same School, much less at different Schools. The allegations of cultural loss, language loss, physical abuse and sexual abuse are infinitely varied for each class member. Furthermore, the size of the potential classes is undefined in the Claim. Therefore, even if liability could be found (which is denied) it is simply not possible for the Court to assess an aggregate damages award in the circumstances.

Limitation periods

63. The Plaintiffs' Claims are not timely and, consequently, are statute-barred. Canada pleads and relies upon the *Limitations Act*, SNL 1995, c. L-16, the *Crown Liability and Proceedings Act*, RSC 1985, c. C-50, and the *Crown Liability Act*, SC 1952-53, c. 30. Canada also relies upon the equitable doctrines of *laches* and acquiescence.

64. Canada cannot be held vicariously liable in tort for conduct of Crown servants prior to May 14, 1953, which is the date upon which subsection 3(1)(a) of the *Crown Liability*

Act, S.C. 1952-53, c. c.30, came into force. Prior to that time, pursuant to the *Exchequer Court Act*, RSC 1927, c. 34, as amended by S.C. 1938, c. 28, Canada could only be held liable for the negligence of a Crown servant acting within the scope of his or her duties of employment. Furthermore, prior to amendment of the *Exchequer Court Act*, Canada could only be held liable for the negligence of a Crown servant on a public work. Canada denies any such negligence with respect to the Plaintiffs' Claim.

65. The Plaintiffs claim prejudgment interest; however, the failure of the Plaintiffs to give sufficient particulars of the damages claimed and the basis of such claims causes Canada to be unable to evaluate such claims. Consequently, the Plaintiffs are disentitled from claiming prejudgment interest. In the alternative, if the Plaintiffs are entitled to prejudgment interest, such interest may be awarded only for a period beginning on February 1, 1992, at the earliest by virtue of s. 36(6) of the *Federal Court Act*, RSC 1985 c. F-7, and s. 31(6) of the *Crown Liability and Proceedings Act*.

Relief sought

66. Canada repeats the foregoing denial of liability and requests that the Plaintiffs' action be dismissed with costs.

DATED at Halifax, Nova Scotia, this 16th day of November, 2012.

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Solicitor for the Third Party Defendant

C

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

A COMMISSIONER FOR TAKING AFFIDAVITS

2007 01T4955CP

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

THE HONOURABLE MR. JUSTICE ROBERT A. FOWLER) MONDAY THE 7TH) DAY OF JUNE, 2010

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
BEFORE THE HONOURABLE JUSTICE ROBERT A. FOWLER,
CASE-MANAGEMENT JUDGE

June 24/10

ORDER

THIS APPLICATION, brought by the Plaintiffs for an order certifying this action as a class action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1, and other ancillary orders, was heard June 1, 2 and 3, 2009, at St. John's, Newfoundland and Labrador, with written reasons released June 7, 2010.

ON READING the affidavits filed in support of this application by the plaintiffs and in response by the defendant, the facta of the parties, filed, and on hearing the submissions of counsel for the parties,

1. **THIS COURT ORDERS** that this action be and hereby is certified as a class action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1.

Filed June 24, 2010

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2. **THIS COURT ORDERS AND DECLARES** that:

(a) The "Survivor Class" shall be defined as:

(i) All persons who attended the Lockwood School, located in Cartwright, Labrador, between March 31, 1949 and the date of closure of the Lockwood School.

(b) The "Family Class" shall be defined as:

(i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

(ii) a former spouse of a Survivor Class Member;

(iii) a child or other lineal descendent of a grandchild of a Survivor Class Member;

(iv) 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;

June 24/11

(v) 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; or

(vi) 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.

3. **THIS COURT ORDERS AND DECLARES** that Carol Anderson, Allen Webber and Joyce Webber be and are hereby appointed as the representative plaintiffs for the Classes and that Koskie Minsky LLP and Ahlstrom Wright Oliver & Cooper LLP be and hereby are appointed as class counsel ("Class Counsel").

4. **THIS COURT ORDERS** that within 45 days of the date of this Order, the defendant shall make its best efforts to deliver to Class Counsel a list of all known members of the Survivor Class and Family Class, including their last known addresses and contact information.

5. **THIS COURT ORDERS AND DECLARES** that the claims asserted on behalf of the Classes to be breach of fiduciary duty and negligence.

6. **THIS COURT ORDERS AND DECLARES** that the relief sought by Class are issues of the defendant's liability and damages, specifically:

(a) declarations with respect to breaches of fiduciary duty and/or negligence;

(b) general damages in the amount of $500,000,000;

(c) special damages in an amount of $500,000,000;

(d) exemplary and punitive damages in the amount of $100,000,000;

June 24/10

(e) damages in the amount of $100,000,000 on behalf of the Family Class;

(f) prejudgment and postjudgment interest pursuant to the provisions of the *Judicature Act*, R.S.N. 1990, c. J-4 ; and

(g) costs of this action.

7. **THIS COURT ORDERS AND DECLARES** that the common issues for the Class are:

(a) by its operation or management of the Lockwood School did the defendant breach a duty of care owed to the students of the Lockwood School to protect them from actionable physical or mental harm?;

(b) by its purpose, operation or management of the Lockwood School, did the defendant breach a fiduciary duty owed to the students of the Lockwood School to protect them from actionable physical or mental harm?;

(c) by its purpose, operation or management of the Lockwood School, did the

defendant breach a fiduciary duty owed to the families and siblings of the students of the Lockwood School;

(d) if the answer to any of the above common issues is "yes", can the court make an aggregate assessment of the damages suffered by all class members as part of the common issues trial?;

(e) if the answer to any of these common issues is "yes", was the defendant guilty of conduct that justifies an award of punitive damages?; and

(f) if the answer to common issue (e) is "yes", what amount of punitive damages ought to be awarded?

8. **THIS COURT ORDERS** that further orders shall be issued, and a time and place be scheduled, for a hearing, to be heard by September 30, 2010, to determine the issues relating to notice to the Class, opting out and such other matters as may be appropriate under the *Class Actions Act*, and in particular:

(a) the form and content of notice to the Classes;

June 24/10

(b) the appropriate method of dissemination of such notice;

(c) the liability for the cost of the dissemination of such notice;

(d) the form, content, and method for Class Members to opt out;

(e) a deadline for Class Members to opt out of the class action; and

(f) the form, content, method and deadline for Class Members who are not residents of the Province of Newfoundland and Labrador to opt in to the class action.

9. **THIS COURT ORDERS** that costs of the certification application may be spoken to at a time to be arranged between counsel and this court.

Asst Deputy Registrar

CAROL ANDERSON et al	and **THE ATTORNEY GENERAL OF CANADA**	Court File No: 2007 01T4955CP
Plaintiffs	Defendant	

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR TRIAL DIVISION (GENERAL)
Proceeding commenced at the City of St. John's

BROUGHT UNDER THE CLASS ACTIONS ACT, S.N.L. 2001, C. C-18.1, BEFORE THE HONOURABLE JUSTICE ROBERT A. FOWLER, CASE MANAGEMENT JUDGE

ORDER

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Solicitors for the Plaintiffs

June 24th 10

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This is Exhibit D referred to in the affidavit of Jonathan Schachter sworn before me, this 25 day of February 20 13

A COMMISSIONER FOR TAKING AFFIDAVITS

Date: 20111221
Docket: 10/88
Citation: *Canada (Attorney General) v. Anderson*, 2011 NLCA 82

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA — APPELLANT

AND:

CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER — RESPONDENTS

Docket: 10/89

BETWEEN:

ATTORNEY GENERAL OF CANADA — APPELLANT

AND:

TOBY OBED, WILLIAM ADAMS AND MARTHA BLAKE — RESPONDENTS

Docket: 10/90

BETWEEN:

ATTORNEY GENERAL OF CANADA — APPELLANT

AND:

SELMA BOASA AND REX HOLWELL — RESPONDENTS

Docket: 10/91

BETWEEN:

ATTORNEY GENERAL OF CANADA — APPELLANT

AND:

SARA ASIVAK AND JAMES ASIVAK — RESPONDENTS

Docket: 10/92

BETWEEN:

ATTORNEY GENERAL OF CANADA — APPELLANT

AND:

EDGAR LUCY AND DOMINIC DICKMAN — RESPONDENTS

Coram: Green, C.J.N.L., Barry and Harrington, JJ.A.
Court Appealed From: Supreme Court of Newfoundland and Labrador Trial Division (G) 2007 01T4955CP; 2008 01T 0845CP; 2008 01T0844CP; 200801T 0846CP; 2007 01T5423CP

Appeal Heard: November 9 and 10, 2010
Judgment Rendered: December 12, 2011

Reasons for Judgment by Barry and Harrington, JJ.A.
Concurred in by: Green, C.J.N.L.

Counsel for the Appellant: Jonathan Tarlton and Mark Freeman
Counsel for the Respondents: Kirk Baert, Celeste Poltak, Stephen Cooper and Chesley Crosbie, Q.C.

Barry and Harrington, JJ.A.:

[1] The federal Crown ("Canada") appeals a decision certifying a class action by the respondents against Canada regarding the operation of five residential schools in Newfoundland and Labrador, three operated by the International Grenfell Association and two others by the Moravian Missions (the "Schools"). The Schools, four in Labrador and one in St. Anthony, on the Northern Peninsula of the Island of Newfoundland, were in operation prior to 1949, the year of Confederation between Newfoundland and Canada. They continued for several decades after Confederation. Canada does not deny that harm may have been caused to the respondents at the Schools but submits that Canada has no responsibility for this.

BACKGROUND FACTS

[2] Certain historical information was placed before the Court without objection by any other party. It is appropriate to make reference to some of that information at the outset to place the issues engaged on this appeal in context.

(a) Canada's funding of expenditures for aboriginals

[3] Before the 1949 Terms of Union between Newfoundland and Canada, two delegations from this Province in 1947 and 1948 met with Canadian delegations to negotiate the terms of Confederation. Reports admitted without objection by the parties indicate that, initially, documents exchanged by the delegations included express reference to federal responsibility for the welfare of "Indians and Eskimos", including education, as well as a description of the day and residential school systems in place in the rest of Canada. The final Terms, however, included merely a general clause in Term 3 that the provisions of the *British North America Act* shall apply to Newfoundland except insofar as varied by the Terms.

[4] A decision of the Supreme Court of Canada, *Reference re: British North America Act, 1867 (U.K.)* s. 91, [1939] S.C.R. 104, had decided ten years before Confederation that the "Eskimo" people of Quebec, and by implication throughout Canada, were "Indians" as that term was used under s. 91(24) of the *British North America Act, 1867*.

[5] A 1951 memorandum prepared by the chairman of Canada's Inter-Departmental Committee on Newfoundland Indians and Eskimos noted that 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, Canada is responsible for the

native population resident in Labrador. By 1951, Canada had agreed to pay bills submitted by Newfoundland for "Indians and Eskimos".

[6] A 1954 agreement between this Province 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.

[7] By 1965, after a legal opinion of November 23, 1964 from the Federal Justice Department, which advised that the 1951 memorandum was correct, 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. Proposed agreements were to be reviewed every five years, a Federal-Provincial committee was to be established to monitor expenditures and propose budgets for approval by both governments, Newfoundland was to be reimbursed for 90% of the Province's capital expenditures for Indians and Eskimos for the period 1954-1964, and the agreement was to be administered and provincial expenditures monitored by an inter-governmental committee composed of representatives of both governments. This "Contribution Agreement" contemplated providing services to the Innu communities of Sheshatshit and Davis Inlet with 90% funding from Canada and 10% from Newfoundland and a management committee composed of federal and provincial officials and representatives of Davis Inlet and Sheshatshit.

[8] A Royal Commission on Labrador established in 1973 concluded amounts paid under the funding agreement with Canada were inadequate. The Commission also stated it could find no sound rationale for the practice of having the Province pay a percentage of the costs for services to Indians and Eskimos. It noted this was not the practice in other parts of Canada and advised that the federal government, as it does elsewhere, should be prepared to accept full fiscal responsibility unless the Province decided to continue its practice of sharing part of the cost.

[9] An interim agreement between 1976 and 1981 saw funding of projects in Labrador to the value of $22 million. Two agreements in July, 1981, saw the federal government pay $38,996,000.00 under a Canada-Newfoundland Community Development Subsidiary Agreement and $38,831,000.00 under a Native People's Labrador Agreement.

[10] Over the years since, as noted by Innu Nation Researcher James Roche, in a report dated July, 1992, at p. 27, "Canada has vacillated between acknowledging its own singular responsibility over Innu and Inuit in

Newfoundland and Labrador and accepting no obligation to financially assist or contribute". But Canada has always assumed some level of legal responsibility for aboriginal persons in the Province.

(b) Canada's involvement in aboriginal education

[11] Winkler J. (as he then was), in certifying a class action and approving a "Canada-wide" settlement in a case brought by 15,000 former students of Indian residential schools, the benefits of which have not to date been made available to aboriginals of this Province, described Canada's involvement in the education of aboriginal children in other parts of Canada as follows:

> For over 100 years, Canada pursued a policy of requiring the attendance of aboriginal children at residential schools, which were largely operated by religious organizations under the supervision of the federal government. The children were required to reside at these institutions, in isolation from their families and communities for varying "periods" of time. This policy was finally terminated in 1996 with the closing of the last of the residential schools and has now been widely acknowledged as a seriously flawed failure. ...
>
> ...Upon review by the Royal Commission on Aboriginal Peoples [reports filed 1993 and 1996] it was found that the children were removed from their families and communities to serve the purpose of carrying out "a concerted campaign to obliterate" the "habits and associations" of "Aboriginal languages, traditions and beliefs", in order to accomplish "a radical re-socialization" aimed at instilling the children instead with the values of Euro-centric civilization.

See, *Baxter et al. v. The Attorney General of Canada* (2006), 83 O.R. (3d) 481 (S.C.J.) at paras. 2-3.

[12] The pleadings in the present case allege that Canada, by its funding of education for aboriginals in this Province and by its participation in management committees overseeing the expenditure of funds, involved the federal government sufficiently in the management and operations relating to the residential schools attended by the respondents in this Province so as to give rise to a common law duty of care to the respondents, which Canada breached. The pleadings in addition allege Canada owed a fiduciary duty to the respondents as aboriginals to protect their cultural identity as well as a constitutional duty to protect their well-being.

[13] The respondents represent a class identified as being all persons who between 1949 and the date of their respective school closures: (i) attended the Lockwood school, Yale school, Makkovik school, Nain school and St. Anthony school (the "Survivor Class"); and (ii) all persons who have a

derivative claim on account of a family relationship with a person in the Survivor Class (the "Family Class").

THE PARTIES' POSITIONS

(a) The respondents' claim

[14] The respondents say that Canada forcibly confined them to the Schools and systematically deprived them of the essential components of a healthy childhood by causing them to be subjected to child abuse, neglect and maltreatment including physical, emotional, psychological, cultural, spiritual and sexual abuse by those responsible for their well-being.

[15] The respondents more specifically allege they were prohibited from speaking their native language and beaten for speaking any language other than English. The respondents say:

> they were sexually abused either at the hands of other students, dormitory supervisors or principals;
>
> they experienced physical abuse on a frequent basis;
>
> they were deprived of their childhood and grew ashamed of their aboriginal identities, which led them into substance abuse, depression, failure to form familial relationships, suicidal tendencies and deep-rooted anger, acted out by verbal and physical abuse to family members; and their experience at the Schools manifested itself in an inability to properly raise children because of their own lack of parental bonds as children and lack of role models with respect to parenting.

[16] The respondents claim that Canada, having a constitutional duty of care in relation to all aboriginal peoples of this country, systematically failed in that duty of care and were specifically negligent in failing to exercise the duty owed to the aboriginal people of coastal Labrador to protect their physical and mental well-being and their cultural identity.

[17] The respondents also say that Canada, at the moment of Confederation in 1949, assumed a fiduciary duty toward the aboriginal children who in this Province were forced to attend the Schools. The respondents submit that, even if Canada did not directly manage or operate the Schools, it was still in breach of its common law duty of care and its fiduciary duty to those aboriginal students by failing to ensure that these Schools were properly run so as to avoid abuse.

[18] The respondents claim that Canada, with respect to the legal duties alleged to be owed, "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 were not being met".

(b) Canada's position

[19] Canada submits that the pleadings do not disclose a cause of action against Canada in relation to the Schools. Canada takes no issue with the fact that the respondents attended the Schools and that they suffered various types of abuse. However, Canada submits that it owed no legal duty to the respondents since the Schools existed prior to 1949 and were operated, in the case of three of them by the International Grenfell Association and the other two by the Moravian Missions. Canada also submits that there was no agreement between Canada and anyone else to run the Schools, that Canada merely provided funding to the Province of Newfoundland and Labrador, which has constitutional authority regarding education, and that, in the absence of any statutory authority, there is no duty of care owed by the federal Crown.

[20] Canada submits that, while section 91(24) of the *Constitution Act, 1982* gives the federal government the power to legislate in relation to aboriginals, it does not in and of itself create an obligation to legislate nor does it convey or bestow any substantive rights on individual aboriginals.

[21] Canada relies upon the provincial authority over educational matters within the Province and submits that the federal government, even if it wanted to, could not exercise jurisdiction. Canada argues that Term 17 of the union between Newfoundland and Canada made it clear that Newfoundland was to have exclusive jurisdiction to make laws concerning education and those laws were never repealed. Canada submits that any liability must be fault based and that Canada is only liable if there is a legal cause of action against it. Canada takes the position that any duty of care owed to the respondents in these matters rested with the Province of Newfoundland, and that it was not Canada that caused harm to the respondents since Canada was not involved in the Schools by any agreement or by way of the *Indian Act*.

[22] Canada submits further that, although it provided money to the Province of Newfoundland and Labrador to provide for the needs of the aboriginal people of Labrador this did not make Canada responsible for their welfare or trigger any liability to the respondents.

THE TRIAL DIVISION

[23] The reasons of the applications judge supporting his decision to allow certification under the *Class Actions Act*, SNL 2001, c. C-18.1 ("the *Act*") may be summarized as follows:

(a) Cause of action

The respondents have made an arguable case that a fiduciary duty between the aboriginal people of Labrador and Canada arose at the instant of Confederation in 1949 and this duty extended to them as a people to protect their cultural identity and not just in relation to their lands.

Whether the federal Crown had sufficient involvement in the running of the Schools to establish a breach of any fiduciary, constitutional or common law duty owed, is a matter to be established by evidence at trial and it is not plain and obvious that the respondents will be unable to prove this.

(b) Identifiable class

In the circumstances, the following class definitions adopted by the respondents meet the requirements of the *Act*:

(i) all persons who attended the Schools between 1949 and the date of its respective closure (the "Survivor Class"); and

(ii) all persons who have a derivative claim on account of a family relationship with a person in the Survivor Class (the "Family Class").

The circumstances involve only five isolated schools in a relatively remote part of Canada. The class as defined appears for the most part to be a closed set of about 500 individuals. They can be readily identified since the attendance of individuals would have been in a school record or known by people in the communities.

(c) Common issues

The pleadings adequately set out the material facts required to support the assertions of breaches of fiduciary duty and negligence common to the entire class.

(d) Preferable procedure

Viewing the common issues in the context of the entire claim, their resolution will significantly advance the action. The appellants have not shown that some other procedure is preferable. Many of the class members are elderly and unlikely to survive protracted litigation and inevitable appeals on an individual basis. A test case would not guarantee a less time consuming resolution. The financial burden on an individual would have the potential to prevent access to justice. Judicial economy would result by making it unnecessary, for example, to adduce more than once evidence of the history of the establishment and operation of the Schools.

(e) Representative plaintiffs

As individual members of the group of Inuit and Metis, who attended the Schools during the period from 1949 until the respective School closures, the respondents are appropriate representative plaintiffs, competent to vigorously prosecute the claims, with an adequate litigation plan.

THE APPLICABLE STATUTORY AND CONSTITUTIONAL PROVISIONS

[24] Section 5 of the *Act* provides:

> 5. (1) On an application made under section 3 or 4, the court shall certify an action as a class action where
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;

(d) a class action is the preferable procedure to resolve the common issues of the class; and

(e) there is a person who

(i) is able to fairly and adequately represent the interests of the class,

(ii) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

(2) In determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether

(a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) the class action would involve claims that are or have been the subject of another action;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

[25] Sections 35(2) and 91(24)of the *Constitution Act, 1982* read as follows:

35 (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing

> Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) 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, —
>
> ...
>
> 24. Indians, and Lands reserved for the Indians.

[26] Term 3 of the *Terms of Union of Newfoundland with Canada*, attached as a schedule to the Newfoundland Act, 12 & 13 Geo. VI, c. 22 (enacted March 23, 1949), provides:

> 3. The *British North America Acts*, 1867 to 1946, shall 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, as if the Province of Newfoundland had been one of the provinces originally united, except in so far as varied by these Terms and except such provisions as are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more and not all of the provinces originally united.

STANDARD OF PROOF

[27] The onus is on the applicant to establish the five criteria set out in section 5(1) of the *Act*: see *Dow Chemical Company v. Ring, Sr.*, 2010 NLCA 20 at para. 10; *Davis v. Canada (Attorney General)*, 2008 NLCA 49 at para. 23. The test applied in determining whether the pleadings disclose a cause of action is the "plain and obvious" test: see *Ring* at para. 11.

[28] In *Davis*, this Court dismissed an appeal from a refusal by an applications judge to grant certification of a claim asserting that aboriginal rights had been breached. The Court relied upon its reasons in *Walsh v. TRA Co. et al.* (2007), 268 Nfld. & P.E.I.R. 111 at para. 13, for the proper test to be applied as to whether a statement of claim should be struck. It was said to be:

> ... not on the basis that it may not succeed, but only on the basis that it cannot succeed.

[29] In *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 16, McLachlin C.J. wrote:

> ... The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action ...

[30] In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, (filed subsequent to submissions of the parties on this appeal) McLachlin C.J. reiterated:

> [20] The test for striking out pleadings is not in dispute. The question at issue is whether the disputed claims disclose a cause of action, assuming the facts pleaded to be true. If it is plain and obvious that a claim cannot succeed, then it should be struck out: see *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980.

[31] The comments in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 are also instructive on the proper approach to addressing applications to strike claims raising novel duties of care:

> [21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.
>
> [22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

> [23] Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.
>
> [24] This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities — as they sometimes do — the remedy is to amend the pleadings to plead new facts at that time.
>
> [25] Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding.

[32] To establish the last four criteria of s. 5(1), the applicant need only demonstrate "some basis in fact": see *Ring* at para. 14.

THE ISSUES

[33] Three issues arise:

a. Should leave to appeal be granted?

b. What is the standard of review on an appeal of a certification decision?

c. Was the applications judge correct in concluding it was not plain and obvious that no cause of action was disclosed in the statement of claim or did he commit a palpable and overriding error in concluding some basis in fact existed for the other criteria for certification?

LEAVE TO APPEAL

[34] An appeal of a certification decision requires leave of this Court: the *Act*, s. 36(3)(a). In determining whether leave should be granted, this Court may look to, but is not restricted by, the factors set out in rule 57.02(4) of the *Rules of the Supreme Court, 1986*; see *Sparkes v. Imperial Tobacco Canada Limited*, 2010 NLCA 21 at para. 9; *Davis* at paras. 14 to 20; and *Bayer Inc. v. Pardy*, 2005 NLCA 20. That rule provides:

> (4) Leave to appeal an interlocutory order may be granted where
>
> (a) there is a conflicting decision by another judge or court upon a question involved in the proposed appeal and, in the opinion of the Court, it is desirable that leave to appeal be granted,
>
> (b) the Court doubts the correctness of the order in question,
>
> (c) the Court considers that the appeal involves matters of such importance that leave to appeal should be granted,
>
> (d) the Court considers that the nature of the issue is such that any appeal on that issue following final judgment would be of no practical effect, or
>
> (e) the Court is of the view that the interests of justice require that leave be granted.

[35] While the general proposition is that leave to appeal should be sparingly granted where a party is appealing an interlocutory order on a procedural matter, this is particularly true where a certification order has been granted. On this point, Welsh J.A. had previously noted in *Davis*:

> [19] As well, a distinction may be drawn between the circumstances when certification is granted and when it is refused. For example, when certification is granted, certain procedural protections are engaged which may, depending on all the circumstances, support refusal to grant leave to appeal. This point is referenced in the **Pardy** decision:
>
> > [12] A similar reticence to interfere has been expressed by the Ontario Court of Appeal. Carthy, J.A., in **Anderson et al. v. Wilson et al.** (1999), 122 O.A.C. 69; 175 D.L.R. (4th) 409, at para. 12 wrote:
> >
> > > "... I am mindful of the deference which is due to the Superior Court judges who have developed expertise in this very sophisticated area of practice. The **Act** provides for flexibility and adjustment at all stages of the proceeding and any intervention by

> this court at the certification level should be restricted to matters of general principle."
>
> ...
>
> [14] ... There is no reason to doubt the correctness of the certification order, particularly having regard to s. 11(1) of the Act which allows for variation of the order, and even decertification, as the action progresses.

[36] It should be noted that "the granting of leave is, in the final analysis, discretionary, even if one or more of the criteria listed in rule 57.02(4) has been established": see *Pardy* at para. 14 and *Davis* at para. 17.

[37] In this case the interests of justice require that leave be granted: rule 57.02(4)(e). Where a claim is based on a novel duty of care or fiduciary duty, allowing it to proceed where it is alleged to be plain and obvious that the statement of claim does not disclose a cause of action would require the parties to engage in costly litigation which might be avoided if leave to appeal were granted and the matter dealt with at this initial stage.

THE STANDARD OF REVIEW

[38] The standard of review with respect to the first criterion for certification set out in s. 5(1) of the *Act*, whether the pleadings disclose a cause of action, "turns on determinations of law and, therefore, it is reviewed on the standard of correctness": see *Ring* at para. 34. All of the other criteria enumerated in section 5(1) are questions of mixed fact and law and the certification judge's determinations on these issues are owed considerable deference. They cannot be reversed absent a palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of a legal standard or its application, in which case the error may amount to an error in law and the applicable standard of review is correctness. See *Ring* at paras. 6-8.

LAW AND ANALYSIS

(a) Did the applications judge err in concluding a certifiable cause of action exists?

(i) The alleged causes of action

[39] In their statement of claim the respondents allege that Canada owed and was in breach of non-delegable, fiduciary, statutory and common law duties owed to the respondents in relation to the establishment, funding,

operation, supervision, control, maintenance and confinement in the Schools.

[40] The respondents submit that the funding provided by Canada was inadequate to meet the costs of operating and maintaining the Schools, and, in particular, to meet the daily and educational needs of the students, with the result that the care provided to the respondents and the conditions at the School were poor, the staff hired were unskilled and unsuitable for dealing with children and the conditions at the Schools were unsuitable and inappropriate for an educational facility for children.

[41] The respondents also claim that Canada had operational and administrative responsibilities, including: the care and supervision of all members of the Survivor Class; the selection, supply and supervision of teaching and non-teaching staff and reasonable investigation into their character, background and psychological profile; and the inspection and supervision of the Schools and all their activities.

[42] The respondents further say that attempts to provide educational opportunities to children confined in the Schools were ill-conceived and poorly executed by inadequately trained teaching staff.

[43] In addition, the respondents allege that the conditions and abuses in the Schools were or should have been well-known to Canada, particularly in light of abuses known to have occurred in residential schools in other parts of Canada.

[44] Regarding Canada's breaches of its fiduciary duty, the respondents allege that Canada wrongfully and arbitrarily compelled members of the Survivor Class to attend the Schools, where they were subjected to wrongful acts, specifically severe physical, mental, emotional and sexual abuse.

[45] The respondents submit that Canada effectively became the guardian of those who attended the Schools and that Canada owed the highest non-delegable, fiduciary, moral, statutory and common law duties to the respondents, which included, but were not limited to, the duty to ensure that reasonable care was taken of the Survivor Class while at the Schools, the duty to protect the Survivor Class while at the Schools and, specifically, the duty to protect the Survivor Class from intentional torts perpetrated on them while at the Schools.

[46] The respondents say that 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 Schools.

[47] The respondents further claim that Canada owed a fiduciary obligation to ensure that the students who attended the Schools were treated fairly, respectfully, safely and in all other ways consistent with the obligations of a parent or guardian to a child under his or her care and control and specifically to protect them from any abuse, be it mental, emotional, physical, sexual or otherwise.

[48] The respondents submit that Canada was in breach of its duties owed to the respondents:

> by failing to adequately screen and select the organizations and individuals to which it delegated the implementation of its Residential School program;
>
> by failing to adequately supervise and control the Schools and its agents;
>
> by deliberately and chronically depriving the Survivor Class members of the education they were entitled to;
>
> by failing to respond appropriately or at all to the disclosure of abuses in the Schools;
>
> by failing to inspect or audit the Schools;
>
> by failing to implement an adequate system of evaluation, monitoring and control of teachers, administrators and non-teaching staff;
>
> by failing to periodically re-assess its regulations, procedures and guidelines when it knew or ought to have known of serious systemic failures in the Schools;
>
> and by undertaking a systematic program of forced integration and assimilation of the Aboriginal Persons through the institutions of the Schools 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.

(ii) Breach of non-delegable fiduciary duty

[49] The applications judge relied upon *Guerin v. The Queen*, [1984] 2 S.C.R. 335 to support the conclusion that an overall fiduciary duty was owed by Canada to aboriginal people to prevent their exploitation. Noting that *Guerin* involved the use of land, the applications judge concluded that if a fiduciary duty existed in relation to the protection of the land of aboriginals, "this duty to protect must logically be extended to protect the people themselves from personal harm visited upon them from non-Indian forces".

[50] The applications judge found that the respondents could "generate a strong argument" to show the fiduciary relationship between the aboriginal people of Labrador and Canada arose at the instant of Confederation between Canada and Newfoundland in 1949.

[51] One of the causes of action asserted in the respondents' statement of claim is grounded on a breach of fiduciary duty owed by Canada to the Survivor Class and the Family Class. Because of their unique position, governments, such as the government of Canada, will only owe fiduciary duties in limited and special circumstances; see *Elder Advocates* at para. 37. The Supreme Court of Canada has, however, recognized such a fiduciary duty existing between aboriginal peoples and the Crown in certain instances. With respect to when such a duty might be imposed, Binnie J. noted in *Wewaykum Indian Band v. Canada*, 2002 SCC 7i9, [2002] 4 S.C.R. 245:

> [81] ... [T]here are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. Land was also the subject matter of *Ross River* ("the lands occupied by the Band"), *Blueberry River* and *Guerin* (disposition of existing reserves). Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*.
>
> ...
>
> [83] ... I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals*, *supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the

> Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

(Emphasis added.)

[52] With respect to fiduciary duties generally, Chief Justice McLachlin stated in *Elder Advocates*, at para. 54, that:

> It thus emerges that a rigorous application of the general requirements for fiduciary duty will of necessity limit the range of cases in which a fiduciary duty on the government is found. Claims against the government that fail to satisfy the legal requirements of a fiduciary duty should not be allowed to proceed in the speculative hope that they may ultimately succeed. The truism that the categories of fiduciary duty are not closed (as Dickson J. noted in *Guerin*, at p. 384) does not justify allowing hopeless claims to proceed to trial: see M. V. Ellis, *Fiduciary Duties in Canada* (loose-leaf), at pp. 19-3 and 19-24.10. Plaintiffs suing for breach of fiduciary duty must be prepared to have their claims tested at the pleadings stage, as for any cause of action.

(Emphasis added.)

[53] While the respondents' claim is not in relation to land or a section 35(1) aboriginal right, Justice Binnie's comments in *Wewaykum* would appear to leave the door open for the assertion of a fiduciary duty where the Crown has "undertaken discretionary control of a 'cognizable Indian interest'" other than a section 35(1) right. See also Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Markham, Ont: Lexis Nexis, 2008) at pages 190-191. McCabe notes, pp. 159-160:

> It must be kept in mind as well that the fiduciary relation is *sui generis*. This enables fiduciary duties that "tolerate conflicts of interest" and that are limited in obligation "rather than [characterized by] the full menu of obligations imposed on a classic private law fiduciary". On the other hand, notwithstanding the several statements of the Supreme Court alluding to the finitude of the fiduciary duties of the Crown to aboriginal peoples, it remains manifest that as *sui generis* duties they are capable of expansion and mutation to meet the needs of justice revealed in future cases. As the Ontario Court of Appeal *(per curiam)* wrote in 2003: [in *Bonaparte v. Canada (Attorney General)* 2003, 64 O.R. (3d) 1]:
>
> > ...as Binnie J.'s review of the law in *Wewaykum Indian Band* reveals, fiduciary law in Canada, particularly in respect of the Crown's relationship with aboriginal peoples, is a very dynamic area of Canadian law. The nature and extent of the particular obligations that may arise out of this relationship are matters that remain largely unsettled in the jurisprudence.

> It appears that in some circumstances the Crown may be in a fiduciary relationship with, and owe fiduciary duties to, individual aboriginal persons. In the Ontario Court of Appeal case just mentioned, a motion to strike a claim as disclosing no reasonable cause of action, it was held that the Crown is in a fiduciary relation with the children of Indians who were students at Indian residential schools before the children were born, "as aboriginal people", and that it is not clear and plain that it had no fiduciary duty to them, as descendants of the students, "to act as a protector of their aboriginal rights, including the protection and preservation of their language, culture, and their way of life". Cullity J. of the Ontario Superior Court of Justice, on a similar motion, held that the Crown is in a fiduciary relationship with on-reserve members of a band and it is not plain and obvious that there is no fiduciary duty to take "reasonable measures to protect the health and safety" of those persons.

Further, at p. 191 McCabe elaborates:

> In addition, the Court has not foreclosed the possibility that the specific interests cognizable for purposes of fixing liability on the Crown as fiduciary can be drawn in very broad terms. In *Blackwater v. Plint* [[2005] 3 S.C.R. 3 at para. 61] it was argued:
>
> > ... that the system of residential schools robbed Indian children of their communities, culture and support and placed them in environments of abuse. This, it is argued, amounted to dishonest and disloyal conduct that violated the government's fiduciary duty to Canada's Aboriginal peoples.
>
> The Court (*per* McLachlin C.J.C.) declined to resolve the issue, not on the ground that the aboriginal interest of which the Crown had taken discretionary control was not cognizable or sufficiently specific but because the evidentiary record was inadequate to deal with the matter.

McCabe makes reference again to the *Bonaparte* decision and on the same page comments further:

> ... The particular cognizable interest of the plaintiffs to be considered "with the benefit of an evidentiary record" was, it may be inferred, preservation of "their culture and identity, [and] ... as and when they became adults, their ability "to pass on to succeeding generations the spiritual, cultural and behavioural bases of their people".

[54] The analysis by McCabe, though not relied on by the applications judge (or cited on this appeal), provides support for the finding by the judge of a certifiable cause of action residing in both the Survivor Class and the Family Class in these proceedings. The Supreme Court's reasons at para. 47 of *Elder Advocates*, which compares fiduciary duties owed by the Crown to

aboriginal peoples to traditional categories of fiduciary relationships such as "guardian-ward or parent-child", provides additional support.

[55] The respondents assert that the nature of Canada's relationship with aboriginal peoples gives rise to a non-delegable duty to preserve, protect and promote the health, welfare and education of aboriginal children. They submit that support for this position is found in the reasons of Cromwell J. in *Reference re Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360, at para. 54:

> As Professor Klar states in his text *Tort Law* (4th ed. 2008), at p. 663, "[t]he essential feature of a non-delegable duty is that responsibility for its execution always rests on the person upon whom the duty is imposed. Although it may be delegated to another, the breach, no matter how committed, by the delegatee, will be treated as a breach by the delegator." See also *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at paras. 30-32. A non-delegable duty may have its source in statute, as the appellants here allege. For example, in *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, the Court found that the relevant legislation imposed a non-delegable duty on the Ministry of Transportation and Highways to ensure that maintenance work on the highways was performed with reasonable care.

[56] The non-delegable duty alleged here does not arise from statute but rather, on the respondents' submissions, from the *sui generis* nature of the relationship between the Crown and aboriginal peoples.

[57] In *Elder Advocates* the class seeking certification relied upon provincial statutory obligations contained in health and welfare legislation to ground an assertion of a private duty of care which was allegedly breached by the Alberta government by its failure to properly audit, supervise and monitor the running of long term care homes. McLachlin C.J., at paragraph 69, wrote:

> Determining whether a duty of care lies on the government proceeds by "review of the relevant powers and duties of the [government body] under the Act": *Cooper*, at para. 45. See also *Broome*, at para. 20; *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 27.

[58] Here the respondents submit that at Confederation Canada reaffirmed its exclusive responsibility for the affairs of aboriginal peoples insofar as its responsibility related to native peoples of Labrador (and northern Newfoundland). These duties would not have been related solely to educational funding contributions to Newfoundland, which is separately alleged to have been woefully inadequate. The respondents claim that

Canada had a duty to manage, monitor, investigate, promote and protect the health and welfare of the Survivor Class, while subject to compulsory attendance at the Schools. It is alleged that Canada knew or ought to have known that they would be at risk of physical, verbal, mental and sexual abuse in an environment of involuntary cultural assimilation in the European tradition.

[59] In *Broome,* at para. 67 the Supreme Court compared the circumstances in the Prince Edward Island Children Aid Societies, where funding was the only role of the provincial government, with the circumstances in its decision in *Blackwater v. Plint*, "... where the Court assumed but did not decide there was a fiduciary duty, the federal government had a central role in running the residential school in which the abuse had taken place, and the children were taken from their families and placed there pursuant to a federal statute, the *Indian Act,* S.C. 1951, c-29."

[60] Canada suggests that the reasons of the Supreme Court in *Blackwater* do not apply here since the facts, assumed to be true, do not indicate a "central role" of the federal government in the operations of the Schools in question, the Schools being operated by charitable entities with financial support and oversight by the Department of Education of the Newfoundland government.

[61] However, the respondents argue that on a broad view of Canada's fiduciary duty the health, welfare and education of aboriginal peoples cannot be said to have resided solely in the Crown in right of Newfoundland after Confederation in 1949.

[62] The respondents support their position by reference to the Supreme Court decision in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193 at 209 where Dickson C.J. wrote:

> ... it is true that, since 1867, the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples. However, the Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations. ...
>
> (Emphasis added.)

[63] Given that there is some basis in fact for the proposition that Canada had an over-arching responsibility for the health and welfare of aboriginal persons attending residential schools, Canada has failed to show at this early stage of the proceeding that a non-delegable fiduciary duty cannot be sustained because Canada's sole role respecting the operations of the Schools was only to make funding contributions under the auspices of Newfoundland's exclusive constitutional role in education regarding all persons within the Province. The respondents have pleaded a greater involvement by Canada and these pleadings must be accepted as true at this stage.

(iii) Direct negligence claim

[64] The duty of care alleged to exist in this case has not been "settled by existing authority" and must therefore meet the two stage test for determining whether a novel duty of care could be recognized in these circumstances: see *Broome* at para. 12. That test was described in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537. There, McLachlin C.J. and Major J. stated:

> [30] In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
>
> [31] On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by

> reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.
>
> (Emphasis in original.)

[65] What is the nature of the relationship in this case? The respondents allege that Canada had a constitutional responsibility for the welfare of all aboriginal peoples including members of the Survivor Class from the date of Confederation in 1949. It is alleged that Canada failed not only to adequately fund the education of the class members but also more broadly failed to monitor, manage, investigate and protect the health and welfare interests of the aboriginal children who were compelled to attend the Schools when Canada knew or ought to have known that abuses and neglect of aboriginal children had occurred at other residential schools in other parts of Canada prior to and after Confederation in 1949.

[66] The respondents contend that the issue of proximity is met by the degree of interaction between Canada and the Newfoundland government pre and post Confederation, which is highlighted by repeated concerns of Government of Newfoundland officials that were expressed to Canada about the inadequacy of financial support for education of aboriginal children living in Labrador, particularly in light of the province's weak financial position at the date of and after Confederation.

[67] Canada contends that there is no duty of care recognizable in law with regard to its limited single purpose role with respect to the Schools after Confederation. Canada submits that funding of the Schools through the provincial government was its only involvement and asserts that this role is not sufficient to create a duty of care owing to the Survivor Class. Canada relies on the Supreme Court's decision in *Broome* in support of its position.

[68] The respondents cannot point to any specific legislation that would support the creation of a duty of care owed to them by Canada. Similarly, the provision of funding with no accountability requirements will not support the finding of a duty of care; see *Broome* at para. 45.

[69] The unique constitutional relationship existing here between Canada and the respondents, however, may give rise to different considerations. While the claim that Canada has a constitutional responsibility for the welfare of all aboriginal peoples including members of the Survivor Class, from the date of Confederation in 1949, might be a novel claim, it has some justification. This is particularly so in light of the respondents' allegations

against Canada set out in paragraph 48 of these reasons including the continuation of "a systematic program of forced integration of aboriginal persons through the institutions of the schools when it knew or ought to have known that doing so would cause profound and permanent cultural, emotional and physical injury to the members of the Survivor Class". Looking at this unilateral exercise of control over aboriginal children, it is at least arguable that an analogy may be drawn between the situation herein existing and one or more of the relationships in which duties of care have been recognized, such as that existing between guardians and wards cited by the Supreme Court in *Broome* and later in *Elder Advocates*.

[70] Considering the special constitutional relationship between the Crown and aboriginals, it is not plain and obvious that the respondents will not be able to establish a *prima facie* duty of care in this case.

[71] Even without a special constitutional relationship, a common law duty of care may arise in the circumstances.

[72] Establishing a breach of duty in the case of governmental malfeasance has been constrained by the threshold requirement that claimants identify a negligent act or omission in an operational context rather than in a policy making mode.

[73] In *Just v. British Columbia*, [1989] 2 S.C.R. 1228, the Supreme Court recognized a duty of care being owed to the motoring public by a government highways department to carry out highway maintenance, which duty could extend to the prevention of injury from falling rock onto the highway.

[74] Cory J. wrote for the majority at 1239:

> ... Over the passage of time the increased government activities gave rise to incidents that would have led to tortious liability if they had occurred between private citizens. The early governmental immunity from tortious liability became intolerable. This led to the enactment of legislation which in general imposed liability on the Crown for its acts as though it were a person. However, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. ...

[75] In setting out ground rules for the determination of policy-based versus operational decision making, Justice Cory wrote at 1244-1245:

> .... a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.

> In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the *bona fide* exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.
>
> The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment.
>
> (Emphasis added.)

[76] The respondents submit that Canada not only had constitutional and statutory obligations to the Survivor Class in a policy context but also had operational and administrative obligations, either separately or jointly with Newfoundland, to inspect and supervise the Schools attended by the Survivor Class to ensure that the residents were healthy and safe from various forms of abuse, after being involuntarily removed from the care of their families. (See paragraph 41 above.) Any inspection could only be meaningful if minimum standards of care were required by Canada and imposed on school authorities. The respondents allege that neither Canada nor the Newfoundland authorities discharged any of these obligations.

[77] Whether Canada moved from the policy stage to assume operational and administrative obligations is a matter for trial. At a preliminary stage of a class action proceeding it is difficult to make these determinations.

[78] Canada relies heavily upon *Hicks v. Saskatchewan Crop Insurance Corp.* (2008), 313 Sask.R. 238 (Q.B.), where the applications judge struck claims against one defendant allegedly involved in administering a weather-based crop insurance program because an affidavit filed established that other defendants in fact did the administration. Canada submits that, in the same way, the evidence before the applications judge in the present case establishes that Canada had involvement only in funding. That submission

ignores the allegations in the pleadings, supported by affidavits of the plaintiffs, asserting greater involvement by Canada in monitoring and supervising the Schools. In the present case, one cannot say that the facts pleaded are "manifestly incapable of being proven": see *Imperial Tobacco* at para. 22.

[79] Based on the facts alleged in the pleadings, it is not plain and obvious that the respondents will not be able to make out a duty of care owed by Canada to the respondents.

(b) Whether the class is identifiable for a class proceeding

[80] Canada submits that the certified class is unnecessarily broad and does not bear a rational relationship with the proposed common issues.

[81] Canada further submits that all the following factors must be considered when assessing whether or not there is an identifiable class:

(a) The class must be capable of clear definition. The purpose of the definition is to identify the individuals who are entitled to notice, entitled to relief if relief is awarded, and bound by the judgment.

(b) The class definition should state objective criteria for membership.

(c) The criteria for membership should bear a rational relationship to the asserted common issues.

(d) The proposed representative plaintiff must show that the class is not unnecessarily broad. When the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the class definition be amended.

[82] Canada also submits that, unless there is a cause of action common to the identified class members, there is no rational relationship between the membership criterion of being a residential school student for the stated period and the common issues. Canada relies on *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.), where Winkler J. (as he then was) rejected a class definition described as "all persons who attended the [s]chool between 1990 and May 1996" on the basis that a rational connection was not established between the class definition and the common issue. Justice Winkler, at paragraph 68, took the position that the mere fact

that a group of people is identifiable is not sufficient to render them a class for the purpose of the *Act.*

[83] Here, Canada points out that the intended class are not using aboriginal ancestry as a limiter but seek to include all children including non-aboriginals who attended the Schools. Canada submits that the pleaded claim is founded in claims of negligence and breach of fiduciary duty arising from section 91(24) of the *Constitution Act, 1867.* Canada says it follows that the definition lacks a "rational connection between the classes defined and the asserted common issues". Canada further asserts that the respondents appear to be espousing a class definition similar to one advanced in the Indian Residential School class action proceeding. However the difficulty here, says Canada, is that it had no direct involvement in the operations or management of the Schools.

[84] Canada further says that the class definition is not sufficiently akin to that certified in *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401 (C.A.), leave to appeal refused at [2005] 1 S.C.R. vi, or in *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184.

[85] The respondents reply that Canada's primary objection to the applications judge's finding that an identifiable class exists is closely connected to arguments regarding the sustainability of the cause of action. In doing so, the respondents suggest that the viability of the cause of action and of the class definition are necessarily interdependent and that if the appellants are unsuccessful with regard to the cause of action it follows that the assertion of no identifiable class must also fall.

[86] The applications judge found that it is possible to objectively identify the proposed class members by reference to their attendance at the Schools during the period described after 1949. For the most part, the class definition is similar to that certified in *Rumley*, although the nature of the misconduct there alleged related solely to sexual abuse affecting students attending a particular school between certain years. The respondents submit that in *Cloud*, the Ontario Court of Appeal approved a class definition of former residential school survivors which was defined by attendance at the school within a particular time frame. The Court of Appeal was satisfied with the proposed class as having been "circumscribed by defining criteria" and were rationally linked to the common issues because "all class members claimed breach of these duties and they all suffered at least some harm as a result" (para. 47). The approved class in that case was:

(a) All persons who attended the Mohawk Institute Residential School between 1922 and 1969;

(b) All parents and siblings of all persons who attended the Mohawk Institute School between 1922 and 1969; and

(c) All spouses and children of all persons who attended the Mohawk Institute School between 1922-1969.

[87] This Court in *Ring* elaborated on the statutory criteria for the identification of the class, at paras. 62, 64 and 67:

(i) It is not intended that the class be limited to those who will be ultimately successful;

(ii) As large as the numbers are, that factor alone does not make the definition too broad; and

(iii) The general rule is that criteria should not depend on the outcome of the litigation.

[88] Canada submits that the class definition certified by the applications judge conflicts with the principles set forth in *Ring*. Counsel for the respondents submit that the class is not defined by any "claims limiter" as was criticized in *Ring*. The class here is defined by reference to attendance at the Schools during a fixed period of time, which is capable of being determined by objective criteria, the latter being a principal concern in *Ring*.

[89] The applications judge made no palpable and overriding error in concluding that the criteria for inclusion in the class have been reasonably defined at this stage and are objectively capable of determination. The applications judge correctly found, at paragraph 101, as follows:

> ... the circumstances relate to only five small isolated schools in a relatively remote area of Canada. No doubt it will not be a simple task to identify every possible person touched by this litigation; however, this class of people is here for the most part to be a closed set of about 500 individuals. They are almost unique in their geographical location and their attendance would be expected and had been recorded as part of the school record at the time or at least known in their community by people still able to remember that they in fact attended these residential schools ... .

[90] The class definition certified by the applications judge is consistent with those certified in *Cloud v. Canada (Attorney General)*, (2004), 247 D.L.R. (4th) 667 (Ont. C.A.), leave to appeal to S.C.C. refused [2005] SCCA 50 and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184. In *Rumley* the Court found that all students at a certain school between 1950 and 1992 shared an interest in the question of whether the government breached a duty of care by systemic negligence in failing to prevent sexual and physical abuse. In *Cloud* the Court followed *Rumley* and certified a class action for harm allegedly caused at an aboriginal residential school between certain years. In the present case, the applications judge did not err in determining that the class meets the identifiably criteria for certification. At a later stage in the proceedings an amendment to the class may be justified. However, as the Supreme Court pointed out in *Hollick*, that is part of the inevitable exercise that may result as a class action progresses.

[91] The applications judge also certified a Family Class allowing family members of claimants to bring derivative claims. A similar class had been certified in *Cloud*. However, Canada says that there is doubt as to whether family members can bring derivative claims in this Province where the family member directly affected by the tort has not died as a result of the tortious activity alleged.

[92] In Ontario, subsection 61(1) of the *Family Law Act*, RSO 1990, c. F-3, provides:

> 61(1) If a person is **injured or killed** by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.
>
> (Emphasis added.)

[93] The Newfoundland and Labrador *Family Law Act*, RSNL 1990, c. F-2, has no similar provision. The *Fatal Accidents Act*, RSNL 1990, c. F-6, subsection 3(1) provides:

> 3(1) Where the **death** of a person is caused by a wrongful act, neglect or default and the act, neglect or default would have entitled the party injured to maintain an action and recover damages, then the person who would have been liable if death

> had not ensued is liable to an action for damages, notwithstanding the death of the person injured.
>
> (Emphasis added.)

The subsection allows dependants to bring actions when the tortious activity has resulted in the death of the person directly affected by the tortious activity, but not when the individual was merely injured. Ontario has no *Fatal Accidents Act*. Instead, section 61(1) of the *Family Law Act* achieves the same result.

[94] The Ontario Superior Court of Justice discussed the impact of section 61 of the Ontario *Family Law Act* in *Lionti v. Toronto Star*, 2000 CarswellOnt 24. At paragraph 25 of that decision, Perkins, J. stated:

> The history referred to in *Munro* is the fact that s. 61, first enacted in 1978, is a direct descendant of the *Fatal Accidents Act*, R.S.O. 1970. That act provided for recovery of damages by family members only when the "injury" complained of caused the death of the person who suffered the injury. In the *Family Law Reform Act, 1978*, the Legislative Assembly of Ontario enacted the predecessor of s. 61 in substantially the same terms as the current provision. In doing so it gave effect to the recommendations of the Ontario Law Reform Commission (whose abolition is regretted) in its landmark Report on Family Law, volume 1, Torts (1969). That volume recounted the history of the various "family" torts such as loss of consortium and loss of services. It recommended the abolition of many of those torts, but when it came to the statutory cause of action created by the *Fatal Accidents Act* the report noted a gap in the law. It was anomalous that a fatal injury gave rise to an action by family members for both out of pocket expenses in caring for or burying the victim and damages for loss of care, guidance and companionship, whereas a nearly fatal injury that left the victim a quadriplegic or lingering in a coma gave rise to no action by the family (perhaps not even for out of pocket expenses). It recommended reforms of the statutory tort. The government responded positively with a discussion paper released in October, 1976 and a bill that was ultimately enacted in March, 1978.

[95] In *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, the Supreme Court of Canada extended the maritime common law to allow claims to be brought by dependants of a person injured but not killed in a boating accident. In that case, the defendants had argued that the *Family Law Act* of Ontario could not apply to maritime claims.

[96] Despite the fact that this Province's legislature has not addressed the "gap" in the law as did the Ontario legislature, prior decisions in certification proceedings in this Province, have applied the reasoning in *Ordon* and have

refused to strike out claims of dependents on the basis that it is plain and obvious that they will fail.

[97] In *Rideout v. Health Labrador Corp.*, 2005 NLTD 116, Russell J. considered a similar argument to the one proposed in *Ordon*, and stated:

> [90] The defendant points out that unlike some jurisdictions, Newfoundland and Labrador does not have legislation in place whereby family members can make this claim as a result of injuries to another family member.
>
> [91] The defendant also submits the spouses did not suffer any damages and, therefore, their claim will fail.
>
> [92] The plaintiff agrees that to date, in this jurisdiction, an award under this claim has only been given in fatal accident cases. However, the plaintiff submits that the decision in *Ordon Estate v. Grail* (1998), 166 D.L.R. (4th) 193 (S.C.C.) has fundamentally altered this area of the law by mandating non-pecuniary awards of damages, in both death cases and personal injury cases.
>
> [93] *Ordon* concerned five separate actions for personal injury and wrongful death arising out of boating accidents in inland waters. The Court was dealing with Federal Maritime law and concluded that no existing common law rule permitted either personal injury or fatal accident claims for damages for loss of guidance, care and companionship. The Court then stated at par. 100:
>
> > That said, the next question, in accordance with the framework established in *Bow Valley Husky*, *supra*, and in this case, is whether the common law rules barring recovery in both instances should be judicially reformed to allow claims for damages for loss of guidance, care and companionship (and, in the case of dependants of a person injured but not killed in a boating accident, to allow such claims to be brought by a broader class of plaintiffs than is currently permitted under *the actio per quod servitium amisit* and *actio per quod consortium amisit*). We agree with the Court of Appeal for Ontario that they should.
>
> [94] At para. 102, the Court stated:
>
> > It is unfair to deny compensation to the plaintiff dependants in these actions based solely upon an anachronistic and historically contingent understanding of the harm they may have suffered. This is true both for the fatal accident claimants and for the personal injury claimants. In this light, we are of the view that changing the definition of "damages" within the context of maritime accident claims is required to keep non-statutory maritime law in step with modern understandings of fairness and justice, as well as with the "dynamic and evolving fabric of our society"...

> [95] The plaintiff submits that based upon the pronouncements in *Ordon*, it has an arguable case that in this jurisdiction, where the legislature has not addressed derivative or relationship claims, that the common law has been reformed to allow for claims for loss of guidance, care, and companionship. At this early stage, I am unable to conclude that it is plain and obvious that this claim will fail.

[98] In *Doucette v. Eastern Regional Integrated Health Authority*, 2007 NLTD 138, Thompson J. stated:

> [36] I adopt the statements of Russell, J. of this Court in *Rideout*, *supra* at paragraphs 88-96 and in his consideration of *Ordon Estate v. Grail* (1998), 166 D.L.R. (4th) 193 (S.C.C.), I conclude that it is not plain and obvious that this claim would fail. I am satisfied that the plaintiff has established a basis in fact for this cause of action. I conclude the proposed cause of action meets the requirement of s. 5(1)(a) of the *Class Actions Act*. However, as the defence properly notes, these actions are derivative of the family members whose causes of action are being submitted for certification. The defendant acknowledges in argument that it accepts the approach taken in *Rideout* at this stage.

[99] In Klar, *Tort Law*, 4th ed. (Toronto: Carswell, 2008), at p. 273, the author notes:

> There are three areas where recovery for [economic loss consequent on personal injuries suffered by others] is permitted. First, there is the action for loss of consortium and services which may be brought by one spouse for losses caused as a result of personal injuries suffered by the other... Third, there is the action under provincial legislation which may be brought by dependents of those killed, and, in some provinces, injured, for loss of support, or for expenses incurred as a result of the death, or injury, of their relative.

[100] With respect to the loss of consortium, Klar, at page 274, notes:

> The action [for loss of consortium] was, at common law, an action brought by a husband for a wrong done to his wife which resulted in a loss of her services to him. It has a long history, and originates in a society whose approach to the relationship between husband and wife would clearly be repugnant to us today. Nevertheless, in some jurisdictions the action still survives, changed however by public policies and legislative enactments which have attempted to achieve sexual equality with respect to it. [Footnote: ... It has been extended to wives by the application of the Charter of Rights and Freedoms in *Power v. Moss* (1986), 38 C.C.L.T. 31 (Nfld. T.D.)...] It also must be noted that provincial statutes now provide for a wide range of compensation to relatives of those injured or killed by the torts of others, which render the common law actions unnecessary. [Footnote: Compensation is now frequently provided, for example, for the loss of care, guidance and companionship, of relatives injured or killed in accidents. In the

> case of [*Ordon*], the Supreme Court of Canada extended the common law action for loss of consortium and services to provide for similar compensation to relatives of those injured or killed in boating accidents, which is not governed by the provincial statutes but by maritime common law...]

[101] At common law, a spouse may bring an action for loss of consortium and services. However, this head of damages has not yet been made available to other dependents, such as children. Other dependents have an arguable case that their claims for loss of care, guidance and companionship should be allowed on the basis that *Ordon* mandates an expansion of the types of situations in which such damages may be awarded. The comments in *Imperial Tobacco* regarding novel claims are relevant here. The applications judge made no palpable and overriding error in certifying the Family Class.

(c) Common Issues

[102] With respect to the existence of common issues, the applications judge concluded, at paragraph 104:

> As to the relationship between membership and the class on the asserted common issues, it is clear what the plaintiffs are stating is that because they were aboriginal children, that is, Inuit and Metis, they were literally rounded up, taken from their homes and families and forced to attend residential schools set up to accommodate them. Consequently, as a result of attending these schools they collectively allege that they suffered cultural, physical, and some cases sexual abuse, for which they want access to the courts to address these issues. While there are no guarantees as to the merits of the litigation, I find that there is a rational relationship between the class members and the common issues as framed in a fiduciary duty, or negligence...

[103] The applications judge referred to this Court's reasons in *Ring* at para. 62, which read as follows:

> Arriving at a class definition may be easier in some types of cases than in others. In **Hollick** it was said that in product liability cases the class might typically be "those who purchased the product" (para. 20). In environmental actions such as **Hollick** and this case, however, "the appropriate scope of the class is not so obvious" and "it falls to the putative representative to show that the class is defined sufficiently narrowly" (**Hollick**, para. 20). On the subject of finding the right balance in defining a class Chief Justice McLachlin said at para. 21 of **Hollick**:
>
> > ... The representative need not show that <u>everyone</u> in the class shares the same interest in the resolution of the asserted common issue. There must

> be some showing, however, that the class is not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended ... (Emphasis in original.)

> It is recognized, however, that it is not intended that the class be limited to those who will be ultimately successful. A purpose of class actions is to deal with all potential claims at the same time so that defendants proceed with the knowledge that "all potential claims are resolved and all potential claimants are bound by the result, including those that may fail." **Attis v. Canada (Minister of Health)** (2007), 46 C.P.C. (6th) 129, (Ont. S.C.J.) para. 53.

(Emphasis added.)

[104] The applications judge disagreed with Canada's position that the class is "unreasonably overbroad and therefore unmanageable". He was content that the class was a limited and closed set of aboriginal persons living in remote areas of Labrador and the tip of Newfoundland's Northern Peninsula. While acknowledging that there were a number of non-aboriginal children who had been attending the Schools at the periods claimed to be relevant after 1949, the applications judge was nevertheless satisfied that the claim is primarily an aboriginal based claim. He concluded that the issue could be addressed specifically as the class proceeding progressed, including by the granting of leave to amend at trial if the evolution of the proceeding and the evidence warranted such a step. He concluded, at paragraph 105, that "... the inclusion of non-aboriginal children is not a fatal flaw to the matter going forward". He further emphasized that he only needed to be satisfied that there is "some basis in fact" to accept the class as set out by the plaintiffs in this application. There was no error in making these determinations.

[105] We are satisfied that the essence of Canada's position with regard to the absence of common issues is rooted in its submission, at paras. 88-89 of its factum, which states:

> As a starting point, there is no cause of action against Canada and therefore no class capable of definition in this matter. A rational connection between the proposed class definition, the proposed common issues and the alleged causes of action cannot be proven where the common issues and causes of action themselves are incapable of proof.

> Given that the intended respondents have failed to identify a cause of action that is capable of proof against Canada, it is difficult to evaluate the requisite link between the allege cause of action, the proposed cause of common issues and the proposed class definition.
>
> (Emphasis added.)

[106] Canada relies upon the principles for determination of a common issue set out in *Ring* at para. 80 where "an issue was said to be common 'only where its resolution is necessary to the resolution of each class members' claim': *Hollick* at para. 18. It is not common unless the issue is a substantial ingredient of each members' claim".

[107] The analysis continued in *Ring* as to whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis. Canada submits that the success for one class member must mean success for all and that determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. (See *Ring* at para. 81.)

[108] Ultimately Canada returns to the lack of sustainability of the cause of action as it affects the class definition as well as the common issues, when it makes the following submission:

> As with the proposed class definition, it is a matter of conjecture from the pleadings to isolate specific issues which might be claimed to be capable of common determination or how such a determination is proposed to proceed. That the pleadings do not reveal a cause of action with sufficient factual or legal foundation to proceed exacerbates this difficulty for a court or a party defending the claim. The causes of action pleaded are incapable of proof against Canada – as a result the proposed common issues are, by necessary extension deficient.

[109] The respondents say that Canada's position relies on the fact that an objective view of the pleadings demonstrates that a number of common issues, which are all justifiably part of the certified class action, include:

(i) The history and scope of Canada's legal responsibilities, if any, to aboriginal persons of Newfoundland and Labrador;

(ii) Canada's involvement in education in the Province;

(iii) Canada's agreements and arrangements with the Province;

(iv) The nature of any legal duties owed; and

(v) Whether those legal duties were breached.

[110] From the respondents' perspective the certified common issues affect all class members and include the presence of a duty of care; the standard of care owed; whether a breach of duty of care occurred; the degree of care and control that Canada enjoyed over the Schools; and legal issues surrounding the scope and content of Canada's duties to aboriginals of Newfoundland and Labrador following Confederation. The respondents believe that the only individual matters to be resolved would be those of causation and damages.

[111] The respondents rely on the reasoning of the Ontario Superior Court of Justice in *Sauer v. Canada (Attorney General)*, (2008), 169 A.C.W.S. (3d) 27 at para. 57:

> [A]s in *Cloud*, the resolution of the debate about the essential legal duties of which the claim is founded and whether those duties were breached, will significantly advance the claim to the point where, on my view of the case, only an assessment of damages would remain.

[112] Further support for the respondents' position is found in *Rumley*, at para. 27, where the Supreme Court affirmed the finding of the British Columbia Court of Appeal with regard to commonality of issues while applying the criteria that "all class members share an interest in the question of whether the appellant breached a duty of care, on claims of negligence and breach of fiduciary duty, no class member can prevail without showing duty and breach".

[113] Considering the above, the applications judge did not err in his determination that common issues exist in this proceeding.

(d) Preferred Procedure

[114] Canada contends that the applications judge erred in his determination that a class action is the preferable procedure as this proceeding will not achieve the goals of judicial economy, access to justice and behaviour modification. It submits that the proceeding will simply allow the respondents to bring claims that are not legally recognized against Canada.

[115] Canada says that the claims will require proof of aboriginal ancestry on an individual basis. This would negate the benefits of the class action process where discovery of class representatives should be sufficient. Canada says that the obvious necessity of individual discovery here militates against a finding of preferability.

[116] Canada also refers to an alternate procedure that was allegedly overlooked by the applications judge which involves a pursuit of an appeal under Article 12 of the *Indian Residential Schools Settlement Agreement* (IRSSA), where a settlement process is provided with regard to native residential schools in Canada. Canada has acknowledged the eligibility of attendees at various residential schools to seek compensation under that agreement does not include attendees at the five schools involved in this proceeding. However, Canada notes there is an appeal process to a judge of the Ontario Superior Court, who has the power to declare eligibility for inclusion in the IRSSA.

[117] The respondents say that Canada's submission is disingenuous on its face since Canada has not been willing to include residents of the Schools as eligible claimants under the IRSSA at the same time it suggests that an appeal should be made under the terms of the agreement. Meanwhile Canada has mounted a vigorous denial of any duties owed to any of the residents of the Schools in its submissions to this Court and the Court below.

[118] The existence of the IRSSA does not of itself establish that there is a legitimate and meaningful avenue of redress other than this litigation as it affects the class claimants in this proceeding. The respondents correctly point out that even if the class claimants had access to the IRSSA process, it would merely involve the threshold question of accessibility but would not resolve any of the common issues raised in this proceeding. They note that the Ontario Court of Appeal in *Cloud* found that a class action was still preferable notwithstanding Canada's submission that the claimants there should seek a determination of eligibility under IRSSA first.

[119] Though not specifically referring to the appeal procedure, the applications judge was satisfied that the national settlement program under the IRSSA was effectively closed to the respondents. He was satisfied that there was no other procedure more preferable than the present class action for what he described as a "small population of aboriginal people who are seeking access to justice as a single unit, all claiming identical issues to be addressed by the same legal methods open to them".

[120] Given the degree of commonality which he found, the applications judge saw no reason why the class action process should not be followed and was skeptical as to whether a test case would be preferable given that it could lead to a full civil trial, which would be time consuming and would create an enormous financial burden on the single claimant in such a process.

[121] The certification judge is owed deference on the issue of preferability. He was satisfied that "some basis in fact" existed for the assertion that a class action is the preferable procedure. There was no palpable and overriding error with respect to that finding.

(e) Whether there is an appropriate representative plaintiff

[122] The appellants provided no basis for concluding the applications judge committed a palpable and overriding error in finding the respondents are appropriate representative plaintiffs.

SUMMARY AND DISPOSITION

[123] In summary:

(a) Leave to appeal should be granted in the interests of justice.

(b) The standard of review is correctness regarding existence of a cause of action and palpable and overriding error regarding an identifiable class, presence of a common issue, the preferable procedure, and an appropriate representative plaintiff.

(c) The applications judge correctly concluded it was not plain and obvious that no cause of action is disclosed and made no palpable and overriding error in concluding some basis in fact was set out for the other certification criteria.

The appeal is dismissed with no order as to costs.

L. D. Barry, J.A.

M. F. Harrington, J.A.

I Concur:

J. D. Green, C.J.N.L.

Department of Justice Canada
Ministère de la Justice Canada

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Our File: *Notre dossier:* AR-17-76040

Your file: *Votre dossier:* n/a

Via Email

February 5, 2013

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Government of NL
Department of Justice
4th Floor – East Block Confederation Bld.
St. John's, Newfoundland and Labrador
A1B 4J6

Dear Counsel:

Re: ***Anderson et al v Attorney General of Canada*** **- 2007 01T 4955 CP**
Response to undertakings and requests taken under advisement

Further to your discovery examination of Canada's deponent Mark Davis on October 29-31, 2012, and November 1, 2012, we hereby provide the following responses to undertakings and requests taken under advisement:

1) Transcript pg. 66:

Confirm Mark Davis' reference to a *1959* document that stated that the federal government should go look at schools on the coast, is meant to be *1952*.

- Please see AGC00003518. The reference should indeed be March 24, *1952*. Please note that the letter is in reference to a potential visit by the Provincial Department of Education.

2) Transcript pg. 68:

Provide a hard copy of the document noted in undertaking number one above.

- Please see AGC00003518.

Canada

This is Exhibit E referred to in the affidavit of Jonathan Schachter sworn before me, this 25th day of February 20 13

A COMMISSIONER FOR TAKING AFFIDAVITS

3) Transcript pg. 110-11:

Document reference AGC00000132 – Appendix VII – Costs Eligible for Federal-Provincial Cost-Sharing under the Canada-Newfoundland-Labrador Agreement. Provide date and source regarding the appendix to this agreement.

- We have made our best efforts, but are unable to locate this information.

4) Transcript pg. 137:

Advise if there are any further documents after April 14, 1950, in relation to Justice Canada opinions.

- We have made our best efforts and have not located any further such documents in our possession or control. We continue to reserve our right to claim privilege if such documents are ever located.

5) Transcript pg. 182 – Document reference AGC00006993:

Produce documents regarding any and all arrangements between the federal government and Quebec referred to in the letter as being in place in the February 1964 time frame (**taken under advisement**).

- 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.

6) Transcript pgs. 186-187 – Document reference AGC00007073:

Regarding the April 8, 1964, report on education services for federal schools, reference to page 3 – indicate the amount spent by the federal government on education of Indians and Eskimos in Labrador, and if it doubled between 1956 and 1961.

- This question was answered by Mark Davis on October 29, 2012. Please see page 187, line 12 of the transcript of his discovery.

7) Transcript pg. 212 – Document reference AGC0008305:

July 7, 1965, meeting of the Federal-Provincial Committee, reference to page 2, 2nd paragraph, provide a copy of the statement made by Mr. King.

- Please see: AGC00008326.

8) Transcript pg. 234 – Document reference AGC00008863:

December 8, 1966, letter, pg. 2, under "General" heading, provide document that substantiates "minimal standards" for pupil residences in other parts of Canada (**taken under advisement**).

- We have made our best efforts and could not locate any documentation regarding "minimal standards" for pupil residences in other parts of Canada.

9) Transcript pgs. 263-264 – Document reference AGC00009630:

February 5, 1969, notes of the 8th meeting of the Federal-Provincial Committee on Newfoundland. What does the term "education current" mean? Is there a distinction between "current" and "capital"?

- We have made our best efforts and determined that this information is not within our knowledge. We suggest it is possible this information may be within the knowledge of the Province.

10) Transcript pg. 275 – Document reference AGC0009709:

Regarding March 28, 1969, Memorandum. Provide a copy of "federal standards" for classrooms, a 1969 letter from Mr. Hislop (**taken under advisement**).

- We have made our best efforts and could not locate any documentation regarding "federal standards" for classrooms.

11) Transcript pg. 293- Document reference AGC00010527:

December 3, 1970 - Memorandum - 11th meeting of the Federal-Provincial Committee, pg 2, note reimbursement for TB clinics and reimbursement to IGA for medical. Where did these two separate requests come from? Who did they go through and who would have received the requests? Were the applications submitted directly or through the Department (**taken under advisement**)?

- 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.

12) Transcript pgs. 311-312 – Document reference AGC00015797:

Provide a signed copy of this draft 1980-1985 Canada-Newfoundland Native Peoples of Labrador Agreement or verify that this was the version in effect at the relevant time.

- Please see AGC005657.

13) Transcript pgs. 380-422 – Document reference AGC00005880:

Provide clarification of the difference or distinction between Federal responsibility for the Innu in Quebec and the Innu in Labrador **(taken under advisement)**.

A) Provide clarification that there was no distinction between Quebec and Newfoundland constitutionally or legally regarding the above noted issue.

- It is our position that Request A has no semblance of relevance to the common issues and, therefore, it need not be answered.

B) Provide clarification that there was no distinction between Quebec and Newfoundland constitutionally or legally regarding the above noted issue.

- It is our position that Request B has no semblance of relevance to the common issues and, therefore, it need not be answered.

C) Check and provide any documents that substantiate that it was the Newfoundland delegation that did not want the clause in the contract saying that Newfoundland did not want the Federal government to take responsibility for Indians;

- We have made best efforts and advise that to the best of our knowledge Canada does not have any such documents in its exclusive possession or control.

D) What was happening in Quebec at that time in regards to the same education question that we're dealing with in this litigation? What was Quebec's position regarding responsibility for Indians and Education?

- It is our position that Request D has no semblance of relevance to the common issues and, therefore, it need not be answered.

E) As of 1960, was it Mr. Hanley's established position that the Federal Government had no responsibility for Indians and Eskimos in Newfoundland?

- We have made 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.

F) Provide a copy of the Harris Report (transcript pg 422).

- It is our understanding that these are public records, not within our exclusive possession or control, which can be obtained at the Memorial University Library.

14) Transcript pg. 391 – Document reference AGC00006154:

A) Reference to page 2, last paragraph, is this an accurate account of events?

B) At pg. 3, first paragraph one – Confirm that there is no distinction between the 2000 Quebec Eskimos and the 450 Labrador Eskimos (**taken under advisement**).

- It is our position that Requests A and B have no semblance of relevance to the common issues and, therefore, need not be answered.

15) Transcript pg. 422 – Document reference AGC00021454:

July 20, 1992 Memorandum with attachments. See pg 3, clause 2.2 – Provide the Harris report.

- It is our understanding that these are public records, not within our exclusive possession and control, which can be obtained at the Memorial University Library.

16) Transcript pgs. 467-468 – Document reference AGC00005357:

August 12, 1958 Memorandum with attachment. Advise who the author is with the initials "G.C."?

- We have made best efforts and hereby advise that the initials are likely those of George A. Coderre. He appears to have been an executive assistant to the Minister in that time period.

17) Transcript pgs. 472-473 – Document reference AGC00005993:

January 20, 1961 – Letter from Bishop Scheffer. Provide a better copy of the attachment, letter dated December 20, 1960 from Solicitor General W.J. Browne to Minister of Citizenship and Immigration, Ellen Fairclough.

- We have made best efforts, however a better copy of the letter dated December 20, 1960, could not be located.

18) Transcript pg. 480 – Document reference AGC00006464:

January 29, 1963 letter regarding proposed change in administration in Northern Quebec; Provide letter dated December 27, 1962 from Jean Lesage, Premier of Quebec to John Diefenbaker, as referenced in paragraph 1 (**taken under advisement**).

- It is our position that this question has no semblance of relevance to common issues and, therefore, need not be answered. Notwithstanding and without prejudice to our position and subject to any further objection we may make at trial, attached as Appendix "A" is a letter dated December 27, 1962, from Jean Lesage, Premier of Quebec to John Diefenbaker.

19) Transcript pg. 486 – Document reference AGC00016594:

March 27, 1981 Memorandum forwarding letter dated October 8, 1971, from Deputy Minister of Justice to A.D. Hunt regarding creation of Indian bands in Newfoundland. See pg. 5 – Provide letter dated March 23, 1949, from Mr. E. A. Driedger regarding postponement of the proclamation of the *Indian Act* at the time of NL's entry into Confederation (**taken under advisement**).

- We have made best efforts and hereby advise that the letter dated March 23, 1949, could not be located.

20) Transcript pgs. 489-491 – Document reference AGC00021494:

Dec 21, 1992 Letter - Suggested additions to the concerns on the four conclusions/recommendations contained in the Canada/Newfoundland Agreement (**taken under advisement**).

A) Provide a letter dated November 23, 1992, from Minister Tom Siddon to Peter Penashue responding to concerns and recommendations.

- 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.

B) Reference to pg. 2, para 2 – Provide document where the Minister of Northern Affairs and Nation Resources states in 1965 that the arrangement could be challenged as an attempt by "the federal government to avoid its legal responsibility to Indians, or alternatively to transfer its jurisdiction over them to the Province."

- Please see AGC00007912.

C) Reference to pg. 2, para 7 - Provide Memorandum of Cabinet dated April 23, 1965.

- Please see AGC00007912.

21) Transcript pg. 501 – Document reference AGC00002334:

July 4, 1947 Memorandum - Author reports on Sections 9, 10, and 11 of the *Indian Act*. See pg 1, under "Day Schools". Clarify which department in Newfoundland dealt with day and residential schools verses the one dealing with day schools and residential schools for the rest of Canada.

- In 1947, Newfoundland and Labrador was not a part of Canada. No Canadian department was "responsible" for day or residential schools in Newfoundland and Labrador at that time.

22) Transcript pg. 515 – Document reference AGC00007114:

May 11, 1964 Memorandum of Special Cabinet review of Provincial-Federal Negotiations on Indians & Eskimos. See top of pg 1 – Provide Memorandum of Cabinet dated May 6, 1964 that contains lists recommendations on its page 4.

- We have made best efforts and hereby advise that the Memorandum of Cabinet dated May 6, 1964, could not be located.

Yours truly,

FOR:

Jonathan D.N. Tarlton
Senior Counsel
Civil Litigation and Advisory Services

Appendix "A" from UIB

343534

Le très honorable JOhn G. Diefenbaker 27/12/62

Je suis sûr que votre Gouvernement comprend parfaitement notre attitude et qu'il nous fournira la collaboration entière des services fédéraux que cette question concerne.

Comme votre Gouvernement a aménagé diverses installations qui pourraient nous être grandement utiles, je crois qu'il conviendrait d'en discuter la possibilité de transfert. Il en est de même pour les sommes que vous aviez projeté d'y investir pendant les prochaines années.

Enfin, il me paraîtrait sage de confier à un comité officiel la tâche d'étudier les problèmes du changement de juridiction. Ce comité pourrait faire un rapport conjoint au ministre que vous désignerez et à celui que je choisis. Ce comité, à mon sens, devrait comprendre quatre membres, deux d'Ottawa et deux du Québec. De part et d'autre, il serait bon que l'un des membres fût un avocat, à cause des problèmes juridiques qui peuvent surgir.

Si vous voulez bien me donner votre accord de principe, l'honorable René Lévesque, ministre des Richesses naturelles, qui représentera officiellement notre Gouvernement, se mettra en relations avec le ministre que vous désignerez.

Je vous prie, mon cher Premier ministre, de croire toujours à l'assurance de mes sentiments les meilleurs.

Jean Lesage.

Translation of Document LAB - 0954a - page 1

[Letterhead:] PREMIER'S OFFICE
PROVINCE OF QUEBEC

[stamp:] Seen by John G. Diefenbaker, 343533

December 27, 1962

The Right Honourable John G, Diefenbaker, C.R., C.P.
Prime Minister of Canada
Ottawa, Ontario

My dear prime Minister,

The Government of Québec has the intention of creating a new Division within the Department of Natural Resources which will have the task of assuming the responsibility for the administration of that part of our territories commonly known as New-Québec.

For a number of years, the Government of Canada has taken care of the Eskimos in these territories, but the Government of Québec, of which I am the head, believes that it should take over this responsibility.

All the details of a change of administration should be inspired by the fact that the Eskimos are Canadian and Québec citizens at the same time, as their ancestors have preceded our own forefathers on Québec lands. We are fully aware of that fact and intend to fully respect the Eskimos' culture and their legitimate ambitions in such a manner which will enable them to favour their expansion in Canadian and Québec life.

Which means that we do not intend to do anything against the Federal Government's initiative, but rather we propose to go further, thanks to past experiences of what has been done already and what is under way.

...2

Translation of Document LAB - 0954 - page 2

-2-

[Stamp] 343534

The Right Honourable Jon G. Dieffenbaker 27/12/62

I am sure that your Government understands our position perfectly and that it will furnish us with the full collaboration of the federal services involved in this matter.

As your Government has set up a number of installations which could be greatly helpful to us, I believe that it would be opportune to discuss the possibility of their transfer. The same applies to the amounts of funding you had projected to be invested over the next years.

Finally, it appears to me to be wise to entrust an official committee with the study of the problems involved with the change of jurisdiction. This committee could make a joint report to the minister you select and the one I choose. As I see it, this committee should consist of four members, two from Ottawa and two from Québec. Moreover, it would be good if one of the members was to be a lawyer, because of legal problems which could arise.

If you would like to advise me of your agreement in principle, the Honourable René Levesque, Minister of Natural Resources who would officially represent our Government will get in touch with the minister you designate.

My dear Prime minister, I ask you to always believe in the assurance of my best sentiments.

[signed] Jean Lesage.

F

This is Exhibit F referred to in the affidavit of Jonathan Schaefer sworn before me, this 25 day of February 20 13

A COMMISSIONER FOR TAKING AFFIDAVITS

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 BEFORE THE HONOURABLE MADAM JUSTICE BUTLER
CASE MANAGEMENT JUDGE

AND BETWEEN:

2007 01T5423 CP

TOBY OBED, WILLIAM ADAMS and MARTHA BLAKE PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANT

2008 01T0844 CP

SELMA BOASA and REX HOLWELL PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANT

2008 01T0845 CP

SARAH ASIVAK and JAMES ASIVAK PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANTS

2008 01T0846 CP

EDGAR LUCY and DOMINIC DICKMAN PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANTS

UNDER ADVISEMENT CHART

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 (marked as **Exhibit "I"**), 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.		
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 (marked as **Exhibit "O"**), 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.		

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 (marked as **Exhibit "Q"**), 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.		
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.		
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.		

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.		
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 (marked as **Exhibit "R"**).		
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 (marked as **Exhibit "Y"**). 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".		

This is Exhibit "5" referred to in the affidavit of Samantha Schachka sworn before me, this 25 day of February 2013

A COMMISSIONER FOR TAKING AFFIDAVITS

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 BEFORE THE HONOURABLE MADAM JUSTICE BUTLER
CASE MANAGEMENT JUDGE

AND BETWEEN:

2007 01T5423 CP

TOBY OBED, WILLIAM ADAMS and MARTHA BLAKE PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANT

2008 01T0844 CP

SELMA BOASA and REX HOLWELL PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANT

2008 01T0845 CP

SARAH ASIVAK and JAMES ASIVAK PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANTS

2008 01T0846 CP

EDGAR LUCY and DOMINIC DICKMAN PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANTS

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 (marked as **Exhibit "P"**), "Canada Newfoundland Native Peoples of Labrador" Agreement dated May 8, 1980 or verify that this was the version in effect at the relevant time.		

H

Current folder

PROVINCE OF NEWFOUNDLAND

130

DEPARTMENT OF EDUCATION

OFFICE OF
THE MINISTER

ST. JOHN'S

February 14th, 1964.

The Honourable J. W. Pickersgill,
Minister of Transport,
Ottawa.

Dear Mr. Pickersgill:

As you know, both the Roman Catholic and Protestant educational authorities in Labrador who have special responsibilities for the education and welfare of our indigenous people -- the Eskimoes, the Nascopie Indians and the Montagnais Indians -- have been exercised for a number of years concerning what appears to be the discriminatory treatment meted out to Newfoundland's Eskimoes and Indians as compared to that given by the Federal Government to their cousins in other parts of the Nation.

We realize in Government circles, of course, that there is a reason for this situation, namely the terms of union. Because Newfoundland's indigenous peoples had the franchise at time of Union, they were not classed as wards of the state, and because they have the privilege of voting, the Federal Government does not have the same legal responsibilities in respect of these citizens as they have for their counterparts in other regions.

Then, again, I believe that the Federal Government is able to do certain things for Indians which normally it does not do for Eskimoes, because of certain Treaty rights. I do believe, however, that in the case of Eskimo citizens residing within the boundaries of

the Province of Quebec, an arrangement was arrived at some years ago between the Federal Government and the Province of Quebec whereby for certain purposes, persons of Eskimo origin were deemed to be Indians. This in turn enabled the Federal Government to assume certain responsibilities in favour of Eskimo citizens. The moneys, I believe, are made available in the first instance to the Provincial authorities in Quebec. This information is second-hand and may not be correct.

I know that you are familiar with the situation but I feel that I should reopen the issue as the result of a conference held in the Board Room of the Department of Education on February 12th and attended by:

Rev. F. W. Peacock, Sup't Moravian Missions, North West River.

Dr. W. A. Paddon, Sup't Grenfell Mission, North West River.

Rev. S. J. Collins, Chairman, Amalgamated School Board, North West River.

The Deputy Minister of Welfare (Provincial).

The Deputy Minister of Education.

The Superintendents of Education.

The Director of Amalgamated School Services.

Captain Earl Winsor, M.H.A., Labrador North.

The undersigned.

As a matter of fact, I was asked if I would write you as Newfoundland's most highly placed representative in Ottawa, and also to Mr. Charles Granger, who represents Labrador in the House of Parliament.

The educational needs of the Eskimoes and the Indians in Labrador are becoming more and more pressing each year. Developments in Labrador are breaking down the age-old isolation and making it possible for the citizens of the area to seek employment outside the traditional range of occupation -- hunting and fishing.

If the people of the area are not properly educated, they will not be able to find employment and will become a liability instead of an asset to the country, quite apart from the demoralizing effect on themselves of being unemployable.

I believe that the Department of Welfare has been in communication with the Federal authorities concerning the whole question of the status of our Eskimoes and Indians and concerning the possibility of getting substantial assistance from the Federal Government to undertake particular projects for the advancement of these people.

The persons who attended the meeting referred to above feel that your influence and your interest in our affairs will greatly help in having our Labrador problems given the earnest and speedy consideration they deserve.

If a more equitable policy could be determined with regard to Federal help for Eskimoes and Indians, i.e. if a way could be found of making Federal aid available to Newfoundland Eskimoes and Indians on a basis comparable to that enjoyed by their cousins in other parts of Canada, we could go a long way towards giving our Eskimoes and Indians adequate educational facilities and opportunities.

I feel sure that you and Mr. Granger will do all in your power to help Newfoundland in this important matter.

Yours sincerely,

G. A. FRECKER
Minister of Education.

F:m

SERVICES FOR THE PUBLIC

Pa/Gill
600-1

wb
X 8/4/64

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

A COMMISSIONER FOR TAKING AFFIDAVITS

REPORT 14: EDUCATION SERVICES

PUBLISHED BY THE QUEEN'S PRINTER • OTTAWA • CANADA FOR THE ROYAL COMMISSION ON GOVERNMENT ORGANIZATION

2

FEDERAL SCHOOLS FOR CHILDREN

From Inuvik in the northwestern Arctic, across the Canadian provinces, and to Sardinia in the Mediterranean, there are federal government schools manned by Canadian teachers, with a student population which approximated 84,000 children in 1960-61. Three federal departments are engaged:

	Number of Pupils
Department of Citizenship and Immigration—	
Indian Children	43,100
Department of National Defence—	
Children of Service Personnel	36,000
Department of Northern Affairs and National Resources—	
Children of Northern Residents, excluding those in the Yukon Territory	4,900

In 1960-61 there were 3,469 teachers employed on terms similar to those in the Canadian school system, but extra costs are incurred in paying transportation and living allowances to those posted to isolated areas or abroad. Curricula are similar to those of provincial schools, and secondary education carries through to preparation for Canadian university entrance.

INDIAN SCHOOLS

The *Indian Act* confers on the responsible minister the power, subject to the concurrence of the Governor in Council, to operate schools or, alternatively, to arrange for the education of Indian children in schools of provincial or territorial governments or of religious and charitable organizations. Use is

made of all these facilities in varying degree. Of the 43,100 Indian children whose education is supervised by the Indian Affairs Branch of the Department of Citizenship and Immigration, approximately 32,000 are being taught in 1,200 elementary and 22 secondary classrooms operated by the Education Division of the Branch. Approximately 11,000 other Indian children attend provincial, territorial, or private schools at federal expense.

It is not generally appreciated that over ninety per cent of the Indian school population lives south of the 55th Parallel—a line running slightly north of Prince Rupert and Edmonton, passing through Flin Flon on the Saskatchewan-Manitoba border, separating James Bay from Hudson Bay, and approaching Schefferville on the Quebec-Labrador border. Most of these children live on the 2,226 Indian reserves within the provinces and, were they not wards of the federal government, their education would be the responsibility of the provinces. With the single exception of a school at Carcross in the Yukon, the school system of the Indian Affairs Branch is located entirely within the provinces. Throughout the northern territories, extensive use is made of the schools of the Department of Northern Affairs and National Resources and private institutions, but the Indian Affairs Branch provides living accommodation for Indian children in two hostels at Whitehorse and one in connection with the school at Carcross.

Within the provinces, as a result of a broad dispersal of the Indian school population and limited transportation facilities, about one-third of all children attending Indian schools are provided with board and lodging. The operation of residential facilities and the provision of transportation, often by air, between the hostels and the children's homes call for a substantial outlay, and the cost of the residential pupil is more than double that of a day-school child. A distribution, by grades, of Indian pupils attending the various classes of educational institutions is given in Table 3.

Educational Policy

Half a century ago there were fewer than 90,000 Indians in Canada, and their numbers were declining. Largely as a result of a dramatic improvement in health, the decline was arrested; already the Indian population has doubled in less than fifty years and is continuing to grow. This fact underlies the current educational policy of the Indian Affairs Branch. The doubling of Branch expenditure on education between 1956 and 1961 reflects the serious effort which is being made to equip Indian children for a fuller part in Canadian life. Looking to the integration of Indian pupils in non-Indian schools, wherever possible, educational programmes have been modelled on the curricula of the provinces. At present, the majority of Indian children

Table 3—ANALYSIS OF ENROLMENT OF INDIAN PUPILS 1960-61

Classification of Pupils	Distribution by Grades													Tech-nical	Pro-fes-sional	Not Graded	Total
	K	1	2	3	4	5	6	7	8	9	10	11	12	13			
At Day Schools	2,234	3,804	3,218	2,962	2,431	2,096	1,693	1,115	583	79	7	—	—	—	—	—	20,222*
Resident Boarders Attending Classes at Residential Schools	480	1,206	1,252	1,243	1,169	1,013	865	620	492	304	134	70	59	—	—	—	8,907
Day Pupils Attending Classes at Residential Schools	197	424	322	297	255	249	204	118	96	7	—	4	—	—	—	—	2,173
Attending Seasonal Schools	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	698	698
Attending Hospital Schools	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	293	293
Attending Provincial, Territorial and Private Schools	—	1,540	1,019	1,064	1,008	967	924	931	796	904	550	343	202	22	438	114	—	10,822**
Total	2,911	6,974	5,811	5,566	4,863	4,325	3,686	2,784	1,967	1,294	691	417	261	22	438	114	991	43,115***

* Includes 393 resident boarders attending Indian day schools
** Does not include 2,363 students for whom grading is not known
*** Does not include 1,263 non-Indians attending Indian schools

receive their high school education in non-Indian schools, and it is estimated that almost half those now enrolled in Indian schools will later attend non-Indian schools at some stage.

For these reasons, there is close co-operation between the Indian Affairs Branch and the educational authorities of the provinces. Teachers are recruited from the same sources as for provincial schools, common texts are used, school inspections are frequently carried out by provincial officers, and examinations are often a joint activity. Indian schools with sufficiently large enrolment offer practical arts courses, including home economics and industrial arts, which are essentially those offered in junior and senior grades of provincial high schools, adjusted to meet individual and community needs. The Indian Affairs Branch relies on provincial and private facilities for technical training and the education of handicapped children. In 1960-61 there were 31 Indian children in institutions for the deaf or blind.

Normally the language of instruction, either French or English, is that of the non-Indian communities surrounding the reserves. However, each Indian band and, in turn, each group within the band enjoy statutory discretions with respect to education. Thus, some Indian groups in French-speaking areas of Quebec have selected English as the language of instruction because, it is said, the children expect to seek work in due course in the United States! Provision is also made for segregation on religious grounds, and for the employment of teachers of the same faith as the pupils under their care.

Academic, professional or technical training beyond the secondary grades is financed by the Branch in individual cases. In 1960 there were 82 Indian students taking work beyond junior matriculation level, as well as 13 in teacher-training institutions.

The analysis of enrolment by grades in Table 3 shows, as might be expected with an increasing population, a heavy concentration in the lower grades which reflects the increasing momentum of the programme. But this concentration is, in part, a symptom of the problems of transportation and the economic stringency of Indian life. Table 4 analyzes school withdrawals according to age and grade. The drop-out rate below grade VIII and below sixteen years of age is very much heavier than in provincial schools. A major effort to reduce early drop-outs is needed if optimum use is to be made of federal expenditures on Indian education.

Teaching Staff

The teaching staff of the Indian Affairs Branch, as of March 1961, consisted of 1,342 full-time and 36 part-time teachers. Remuneration is related to

Table 4—AGE-GRADE WITHDRAWALS FROM INDIAN SCHOOLS 1959-60

AGE (At date of withdrawal)	Girls & Boys by Grade												
	Below 2	2	3	4	5	6	7	8	9	10	11	12	13	*Total*
10 Years and under	42	13	5	2	—	—	—	—	—	—	—	—	—	62
11 Years	3	4	5	2	2	—	—	—	—	—	—	—	—	16
12 Years	1	4	3	6	4	3	—	—	—	—	—	—	—	21
13 Years	4	7	9	3	3	5	6	—	1	—	—	—	—	42
14 Years	1	4	16	25	45	34	24	5	1	—	—	—	—	155
15 Years	4	6	18	41	90	101	86	68	8	1	2	—	—	425
16 Years	3	7	24	58	94	139	187	152	34	6	2	—	—	706
17 Years	1	3	2	2	9	26	32	51	35	8	9	—	—	178
18 Years	—	—	—	3	2	2	6	12	17	21	12	1	—	76
19 Years	—	—	2	—	—	—	1	3	5	5	11	—	1	28
20 Years	—	—	—	—	—	—	—	—	2	2	6	1	—	11
21 Years and Over	2	—	1	2	1	1	—	1	—	—	1	2	—	11
Total	61	48	85	146	252	311	342	292	103	43	43	4	1	1,731

professional qualifications and length of experience. The scale starts at $2,700, rising to $7,750 for a teacher with six years' training beyond senior matriculation and having eleven years' experience. The current average salary of trained teachers is $4,640 per annum, which is above the average salary of all the provinces save one. Teachers lacking professional training are paid in a range from $2,000 to $3,700 per annum.

Teachers contribute towards the general superannuation plan of the government and have the protection of the *Government Employees Compensation Act* against injuries suffered while on duty. They also qualify for civil service isolation allowances, ranging from $200 for a single person to $2,100 for a teacher with dependents. Transportation costs to isolated locations are also paid by the Branch, and air travel is necessary to reach areas having approximately ten per cent of the classrooms.

The recruitment of teachers occasions no greater difficulty than in rural school districts, although the schools in the south are more readily staffed than those that are more isolated. The annual turnover of teaching staff is approximately twenty-five per cent. Teachers may be recruited in one province and assigned to duties in another, a practice which facilitates matching the religion of teachers and pupils. All teaching appointments are made by the Minister of Citizenship and Immigration on the recommendation of departmental officers and, in recruiting, the Indian Affairs Branch receives active assistance from local church authorities with special interests in the Indian people.

The training and employment of Indians in the teaching profession is a significant and commendable development in Indian education. One hundred and twenty-one teachers, almost ten per cent of the present teaching staff, enjoy Indian status. In recent years, the number of Indians undergoing professional training has been approximately thirty, and the expectation is that the proportion of Indian teachers will continue to increase.

Education Costs

The policy of the Education Division of the Indian Affairs Branch is to provide for all elements of cost incurred in the operation of Indian schools. Thus, in addition to the usual expense represented by teachers' salaries, school-room accommodation, and hostel operation, there are supplementary expenses borne by the Branch Vote. Textbooks, stationery and supplies of all kinds cost $400,000, sports equipment $75,000, and nutritional supplements (biscuits and milk) approximately $95,000, annually. The expenditures on Indian education, which have doubled during the past six years, are set out in Table 5.

Table 5 ANNUAL EXPENDITURES ON INDIAN EDUCATION BY THE FEDERAL GOVERNMENT

Year	General Administration	Day Schools		Residential Schools		Payments to Other Authorities	Total
		Operating	Capital	Operating	Capital		
		(in thousands of dollars)					
1955–56	144	2,946	1,851	5,423	2,224	832	13,420
1956–57	177	3,800	1,901	5,739	2,086	1,060	14,763
1957–58	229	4,081	2,884	6,090	2,654	1,519	17,457
1958–59	279	5,159	3,427	8,536	2,869	1,982	22,252
1959–60	314	5,645	3,113	9,342	4,241	2,252	24,907
1960–61	359	6,138	4,500	10,600	3,308	2,834	27,739

The progressive increase in already large capital expenditures reflects the steady extension of operations, but there are grounds for fear that school construction by the Branch may, in fact, be hindering the process of integration. More rapid progress in the integration of Indian children into the public and high schools of the provinces should arrest the construction of new Indian classrooms.

Payments to other authorities for the tuition of Indian children attending non-Indian schools have risen from $832,000 in 1955-56 to $2,834,000 six years later, when they covered 10,800 pupils—an average of $262.41 per pupil. In the Indian schools operated by the Branch, taking into account current capital outlays, the costs to the federal government in 1960-61 were $512.63 per pupil in day schools and $1,267 per pupil in residential schools.

Adult Education

A modest programme of adult education for Indians was instituted about five years ago and is now beginning to gain momentum. The programme, which is introduced on an Indian reserve only on request, covers four basic areas:

- Literacy training in English or French.
- Continuation or upgrading courses for young adults.
- Trade, vocational and apprenticeship training.
- Community improvement for those wishing to improve home conditions, village facilities or community life.

Courses are organized in the local school on the reserve or, alternatively, the participants are transported to outside schools for night classes. Classes are

established when a minimum of five persons enrol. In some cases finances are provided for younger Indians attending regular or special courses in a nearby centre to prepare them for employment. In the most recent year for which statistics are available, 1,590 adults were taking advantage of these programmes, distributed as follows:

Literacy training	421
Continuation courses	180
Trade, vocational and apprenticeship training	469
Home and community improvement	520

Conclusions

The administrative organization of the Education Division of the Indian Affairs Branch appears to be efficient, and current results are impressive. The policy of the Branch to improve the status of the Indian is amply reflected in the educational programmes.

Despite a heavy concentration of pupils in the lower grades and an unsatisfactory record of early drop-outs, evidence of real progress is afforded by:

- The increasing number of Indian children attending school.
- Longer attendance by Indians at non-Indian schools.
- The increasing proportion of Indian teachers, which is now ten per cent.
- The interest already developed in adult education programmes, which would have appeared impossible of achievement a generation ago.

Much remains to be done, however, before the general educational level of Indians can approach that of other Canadians. In education, as in health and hospital services which are dealt with in the report on *Health Services*, the great opportunity to effect improvement without enormous cost lies in making available to Indians the services regularly available to the rest of the population. For this reason, your Commissioners regard the more rapid development of school integration as worthy of top priority. The resultant economies are so great that the federal government cannot afford to suffer delay through protracted haggling over price with provincial authorities. In addition to arranging for the enrolment of increased numbers of Indian children in provincial schools, the transfer of existing Indian school premises for operation as integrated schools by provincial authority holds promise of substantial economies. Your Commissioners accordingly view with some concern the dimensions of current capital construction programmes, which—while

ameliorating current conditions—may create obstacles to the implementation of a long-term integration policy.

We therefore recommend that:

1 Efforts to integrate Indian school populations with provincial school systems be intensified and prosecuted on a continuing basis.

2 In planning capital construction, present and projected long-term rates of integration be taken into account.

3 New construction of Indian schools be limited to cases of long-term need.

4 Special effort be directed to reducing the number of pupils withdrawing from Indian schools at early grades and ages.

NATIONAL DEFENCE SCHOOLS

The education of children of Service personnel is not a statutory federal obligation, but since World War II the Department of National Defence has assumed responsibility for dependents of Service personnel resident on Crown property or abroad. Approximately 70,000 servicemen are married, of whom some 27,000 live in quarters provided by the Department of National Defence in Canada which are not subject to municipal taxation. Military establishments are generally located in rural areas adjacent to towns or cities and as these establishments have grown, the educational needs of servicemen have generally exceeded the capacity of local facilities by a wide margin. To meet these needs, departmental schools have been constructed of standard design containing from six to nineteen classrooms. Canadian troops posted overseas have included many married men and provision has accordingly been made at several places in Europe for the education of their dependents, including the acquisition and staffing of both elementary and secondary schools.

In 1960, over 40,000 children of uniformed personnel (and of some civilian employees of the Department of National Defence) were receiving primary and secondary education at federal expense. In Canada, approximately 27,300 were being taught in about 100 schools operated by the department, and a further 5,700 were attending provincial schools at federal expense. In Europe, another 7,200 children of servicemen were enrolled in

MINUTES

The Eleventh Meeting of the Federal-Provincial Committee on Financial Assistance to Indians and Eskimos in northern Labrador was held in the Board Room of the Department of Labour, Confederation Building, St. John's, Newfoundland on December 3, 1970. The representatives of the Federal Government were: Mr. G. Bell, Assistant Chief of Federal Provincial Relations of the Department of Indian Affairs and Northern Development and Mr. Don Simpson, Education Branch of the Department of Indian Affairs and Northern Development.

The Provincial representatives were: Dr. L. Miller, Deputy Minister of Health; Mr. D.L. Butler, Deputy Minister of Labrador Affairs; Mr. E.M. Gosse, Deputy Minister of Fisheries; Mr. P.J. Hanley, Deputy Minister of Education; Mr. Leo McCann of the Department of Mines, Agriculture and Resources; Mr. R.S. King, Director of Northern Labrador Services; Mr. R.R. Roberts, Assistant Deputy Minister of the Department of Social Services and Rehabilitation, Chairman. The Chairman extended a welcome to all members of the Committee especially to the two representatives of the Government of Canada.

Dr. Miller gave the following report:

(1) Amount claimed by I.G.A. and reimbursed by Department of National Health and Welfare -

Schedule No.	Particulars	Amount
A	Operation of hospital boat	$ 23,997.88
B	Dental services	4,858.68
C	Public Health services	10,385.88
D	T.B. Control Clinic	1,990.57
	Total reimbursement claimed	$ 41,233.01

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(2) Because of some apparent deterioration in Tuberculosis situation in northern Labrador, application was received from Doctor Gordon Thomas in April 1970, and forwarded to Department of National Health and Welfare. In due course approval was received for:

(a) Capital expenditure -

radiology and laboratory equipment - $ 8,000

(b) Recurring operating expenditure

(i) Public Health Nurse (salary, transportation and vacation relief) - $ 7,000

(ii) Laboratory Technician (with vacation relief) - $ 5,000

(iii) Secretary for follow-up Tuberculosis work - $ 4,000

Total $16,000

(3) Davis Inlet Indian Settlement - Request received from Doctor W.A. Paddon, International Grenfell Association, for employment of lay dispenser (Father Pieters) and for construction of small dispensary. Doctor LeClair, Department of National Health, agreed that Father Pieters could be employed at a rate not to exceed $190.00 per month and suggested that the request for the construction of the dispensary be referred to the Committee.

Mr. King stated a building is definitely needed and agreed to discuss the building of the dispensary with Doctor Paddon, payment for which could come under the agreement.

Mr. Cosse commented on the work being done in fisheries and thought it was excellent, considering the catch failure in other parts of the province. He was glad to know facilities were being provided for freezing and smoking Arctic char and salmon and to take care of any surplus. The committee was informed that fishermen from other areas in Labrador, and Newfoundland, were showing interest

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in fishing for char and salmon in northern Labrador, and it was suggested that if many of them moved north for the fishing season there is the danger of over-fishing and within three to four years stocks of fish especially char would be depleted. Many of the fishermen in the Nain area depend entirely on the char for their livelihood. Newfoundland boats were fishing for char and salmon during the summer of 1970. Mr. Gosse stated he would bring the matter to the attention of representatives of his Department and to the Federal Department of Fisheries and was prepared to bring together all interested parties to discuss the matter and to try and find a solution to the problem. He wondered if licensing would be the answer. Mr. King pointed out that buyers were already making inquiries about the 1971 catch.

Mr. McCann reported that the Newfoundland Forest Service had assisted with the setting up of the sawmill operation at North West River and was prepared to assist with the training of Indians for fire-fighting teams and would certainly be prepared to help with any other training program dealing with woods operations. The Department of Social Services and Rehabilitation has requested that designated areas of timber land be set aside for Indians and other residents of North West River and that they be given cutting rights to these areas. If certain areas are not set aside logging companies would come into the area, take out the timber and leave nothing in return. Many of the Indians are depending on the sawmill operation at North West River. Approximately 27,000 logs have been cut this fall. The mill could be in jeopardy if cutting restrictions are not enforced. Mr. McCann stated he would take the matter up with members of his Department to determine if certain areas could be set aside. It was also agreed that Mr. McCann and Mr. King would contact Melville Pulp and Paper Company to determine if they would purchase timber from the Indians and the price they would pay per cord, delivered to Goose Bay, and to find out if the company would sell saw logs to the Northern Labrador Services Division for their mill at North West River. The company concerned laid off all Indians working with them early spring and had not re-hired any to date. However, a representative of the company had contacted the Division advising them that Indians would be hired if they are provided with chain saws. Discussions with the company on this matter

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are still underway. Mr. Butler pointed out that the Indians are getting better every year both in their living habits and their employment habits.

Mr. King advised the committee that he had been informed of a training program for loggers to be set up at Goose Bay this fall, and was interested in knowing if this was correct and if so would the Indians be included in the training.

Mr. Hanley stated the Federal Government through Manpower would set up a logging school in the Happy Valley - Goose Bay area as soon as someone capable to do the training could be found. All persons going into these courses are supposed to be unemployed. Manpower will provide the students and hopefully it will get off the ground during December. Indians will not be debarred from attending the training courses. Eight Indians who were attending the up-grading school at Happy Valley discontinued because of the increase in the cost of transportation from North West River to the school; a distance of thirty miles.

Mr. Simpson stated the Indians are demanding a greater say in their own destiny - they want to speak for themselves. Community Council meetings have been set up all across the country which is a trend in the right direction.

Mr. Butler again mentioned developing handicrafts and stated he had hoped by this time to have an exhibition case in the main lobby of this building, but was unable to finance the cost of a showcase. It was agreed if Mr. Butler got the case made, the cost would be taken care of by the Division of Northern Labrador Services. The possibility of providing a tumble wheel in one of the settlements to polish labradorite was mentioned.

Mr. Hanley reported the high school at North West River has been completed. The requirements for next year were presented and he said the expenditure would provide facilities for some time to come. A start has been made on the dormitory. The possibility of a joint heating system for the dormitory and hospital was discussed. The Boiler Inspector has issued a permit for one year for the heating system now being used at the hospital and has stated that it had outlived its

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usefulness. Doctor Miller thought it would be less costly to put in one heating plant to serve the hospital and dormitory as the operating costs would be much more for two. The hospital requirements would be greater than the dormitory but the costs would be pro-rated on a square foot basis.

Mr. Hanley stated since this committee has been functioning, education in the north has improved in quality. Without the committee and without the aid from Ottawa education would be as backward as it was ten years ago.

Mr. Bell and Mr. Simpson agreed to accept the budget as presented, the limit of expenditure to be $1,000,000.

Mr. King thanked the representatives of the other Departments for the co-operation always received. During the past two years contracts to erect teachers residences in the north have been accepted by his Division. All local people are hired and it is felt it should be government policy to have construction work done by local people where possible. The quality of the work has been most satisfactory and the costs much less than if the contracts had been awarded to outside firms. The residences at Nain and Davis Inlet should be completed before the end of the year.

Mr. King read a letter he had received from Miss Anna Templeton, Supervisor of Craft Training, Division of Technical and Vocational Education, Department of Education in which she stated it was hoped to start a jewellery class in the Happy Valley Adult Centre, but due to lack of funds they were unable to purchase the necessary equipment. She asked if this Department could assist. Mr. Hanley agreed to take up the matter with Miss Templeton. The question was asked about the possibility of having natives trained in handicrafts and returned to the coast to instruct. One Eskimo boy is an instructor in the Happy Valley school. Mr. Simpson asked if there were any co-operatives for handicrafts. He was informed that there were no co-operative stores in northern Labrador but there were plans to erect a workshop and store at Nain for handicrafts, which would be operated by Eskimos.

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A report on the settlement of Rigolet was next on the agenda. It was pointed out that approximately 83% of the inhabitants are of Eskimo origin. Four new houses were built in this settlement during 1969 and four more are being erected this year. The school is operated by the Integrated School Board with an estimated enrollment of 34 children and one teacher. Consideration should be given to the erection of a new school within the immediate future as the old building has outlived its usefulness.

The community worker at North West River resigned early in the year and a replacement has not yet been found. Actually two workers are required - one for North West River and a second for Davis Inlet if we are to improve the standard of living and organize community activities in the two communities.

Mr. Bell asked about native people on this committee and wondered if they could participate effectively. Mr. King meets with Community Councils of each settlement during his visits north to keep the residents of the area informed of the plans of the Department. It was agreed copies of the Minutes of some of the Community Council meetings would be sent to Mr. Bell.

The meeting adjourned at 12:30 p.m.

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PROJECTS
1971-72

Buildings and Equipment		
Warehouse - North West River	$ 12,000.00	
Staff House - Davis Inlet	15,000.00	
Fuel tanks - Nain, Hopedale, Makkovik 9 - 20,000 gal. tanks	45,000.00	$ 72,000.00
Boats and Vehicles		
Small truck - Makkovik	3,000.00	
Small truck - Davis Inlet	3,000.00	
Engine for boat - North West River	10,000.00	
Boat for Hopedale	14,000.00	30,000.00
Power plants and refrigeration		
Power plants - Nain	20,000.00	
Refrigeration unit - Rigolet	10,000.00	30,000.00
Sawmill Machinery and Equipment		
Small truck - North West River	4,000.00	
Misc. equipment - North West River, Rigolet and Davis Inlet	5,000.00	9,000.00
Housing - Eskimo and Indian		
All settlements	260,000.00	
Roads	20,000.00	280,000.00
Dormitory - North West River		500,000.00
Radio Equipment		
Equipment - Postville & Davis Inlet		3,500.00
Water and Sewage		
Nain & North West River		75,000.00
Furniture and Equipment		
All Depots		7,500.00
Fishery Premises and Equipment		
Freezing unit - Nain	20,000.00	
Canning equipment	10,000.00	
Fish shed - Hopedale	12,000.00	
Premises and equipment - all depots	10,000.00	52,000.00
TOTAL		$ 1,059,000.00

ESTIMATED CAPITAL EXPENDITURE
1971 - 72

1154-06-01	
Buildings - Retail trade stores, warehouses, staff houses, etc.	$ 72,000.00
1154-06-02	
Boats and Vehicles	30,000.00
1154-06-03	
Power plants and refrigeration	30,000.00
1154-06-04	
Sawmill machinery and equipment	9,000.00
1154-06-05	
Housing - Eskimo and Indian	280,000.00
1154-06-06	
Dormitory - North West River	500,000.00
1154-06-08	
Radio Equipment	3,500.00
1154-06-09	
Water and sewage systems	75,000.00
1154-06-10	
Furnishings and Equipment	7,500.00
1154-06-11	
Fishery Premises and Equipment	52,000.00
TOTAL	$ 1,059,000.00

PRELIMINARY CONSOLIDATED STATEMENT
OF PROVINCIAL DEPARTMENT ESTIMATES FOR 1971 - 72

CAPITAL

	TOTAL	FEDERAL SHARE	I.A.B. SHARE	N.A.B. SHARE
(a) Education:				
Teachers Residence - Makkovik	45,000	27,000		27,000
Extension, Nain school 2 classrooms	80,000	48,000		48,000
Gymnasium - Nain	70,000	42,000		42,000
Work Shop - Nain	30,000	18,000		18,000
Domestic Science Room - Nain	25,000	15,000		15,000
Extension - Davis Inlet School - 2 classrooms	80,000	72,000	72,000	
Gymnasium - N.W.R. out	(150,000)	135,000	135,000	
	480,000	357,000	207,000	150,000
(b) Welfare:				
Welfare	559,000	389,025	165,375	223,650
Dormitory - N.W.R.	500,000	300,000		300,000
	1,059,000	689,025	165,375	523,650

OPERATING

(a) Education	180,000	135,000	60,750	74,250
(b) Welfare	170,000	127,500	25,500	102,000
	350,000	262,500	86,250	176,250
	$1,889,000	1,308,525	458,625	849,900

CANADA - NEWFOUNDLAND - NATIVE PEOPLES OF LABRADOR

THIS AGREEMENT entered into the ___ day of _____ 19 ___

BETWEEN:

THE GOVERNMENT of Canada as represented herein by the Minister of Indian Affairs and Northern Development

OF THE FIRST PART

AND

THE GOVERNMENT of Newfoundland and Labrador as represented herein by the Minister of Rural, Agricultural and Northern Development

OF THE SECOND PART

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

A COMMISSIONER FOR TAKING AFFIDAVITS

WHEREAS the Government of Canada (hereinafter referred to as "Canada") and the Government of Newfoundland and Labrador (hereinafter referred to as "the Province") have in the past entered into special cost-sharing arrangements for the provision of programs and services to certain members of communities in Labrador which had a significant proportion of native persons for which Canada has a special interest.

WHEREAS Canada, through the Minister of Indian Affairs and Northern Development, retains a special interest in the social and economic development of Inuit and Indian People,

WHEREAS the Province recognizes a special interest for the social and economic development of Native people as citizens of the Province,

WHEREAS Canada and the Province recognize the need for a new agreement in respect of the provision and cost-sharing of social and economic development programs which recognizes their mutual interest and which encourages increased participation by Native people in the development, planning, and review of such programs as well as recognizing the role of the Province in respect of the delivery of programs and services,

WHEREAS the native members of the communities have expressed their desire for full and on-going participation in the planning, development, delivery and review of programs designed to assist them in achieving their cultural, social and economic goals,

AND WHEREAS the Governor in Council by Order in Council P.C. has authorized the Minister of Indian and Northern Affairs to enter into this Agreement on behalf of Canada.

AND WHEREAS the Lieutenant Governor in Council by Order in Council has authorized the Minister of Rural, Agricultural and Northern Development to enter into this Agreement on behalf of the Province,

NOW THEREFORE the parties, in consideration of these presents, covenant and agree as follows:

DEFINITION

1. In this Agreement,

(a) "COORDINATING COMMITTEE" means the Committee constituted pursuant to paragraph 6;

(b) "COMMUNITY PLANS" means a general multi-year community program and service plan and a specific 1 year plan prepared by each of the respective Eligible Communities and covering the delivery of programs and services by the Province to the respective community under this Agreement.

(c) "DESIGNATED PROGRAM" means any one or all of the programs described in Schedule I and insofar as they are applicable to the eligible communities;

(d) "ELIGIBLE COMMUNITY" means any one or all of the communities of Davis Inlet, Northwest River (Southside), Nain, Makkovik, Hopedale, Postville, and Rigolet;

(e) "EVALUATION PROCESS" means the process established pursuant to Part V, of the review of the administration and operation of this Agreement and of the Operation of the designated Programs;

(f) "EXPENDITURES" means any or all monies expended by the Province and eligible for cost-sharing for the administration, delivery and evaluation of Designated Programs and services in the Eligible Communities covered by this Agreement, excluding expenditures shared under other Federal/Provincial shared-cost programs;

(g) "FEDERAL MINISTER" means the Minister of Indian Affairs and Northern Development;

(h) "FISCAL YEAR" means the financial year commencing on April 1st of each year and following through until expiry on the subsequent March 31st;

(i) "NATIVE ASSOCIATION" means any one or all of the the Naskapi Montagnais Innu Association and the Labrador Inuit Association, and their successors, heirs and assigns;

(j) "PROVINCIAL MINISTER" means the Minister of Rural, Agricultural and Northern Development;

(k) "REGIONAL COMMITTEE" means any one or all of the committees established pursuant to paragraph 11.

APPLICATION OF AGREEMENT

2. This Agreement shall apply only to the Designated Programs and the Eligible Communities.

3. (a) Nothing in this Agreement shall affect the operation of other federal government department or provincial government programs and services, other than the Designated Programs, in the Eligible Communities.

(b) Should proposals for registration of residents of the communities of Northwest River and Davis Inlet result in the registration of such residents as Indians and/or the creation of Bands in those communities, it is agreed that the parties hereto shall jointly consider any impact of such registration on the content, operation and obligations created under this Agreement.

(c) Nothing in this Agreement is to be construed as conferring on any person or group of persons any right, benefit, claim or privilege which would not have accrued in the event that this Agreement had not been entered.

PURPOSE OF AGREEMENT

4. The purpose of this Agreement is to provide for the delivery and cost-sharing of Designated Programs to Eligible Communities in and Native people of the Province of Newfoundland and Labrador.

OBJECTIVES OF AGREEMENT

5. The objectives of this Agreement are to:

(a) Make available to the Native people of Newfoundland and Labrador certain Designated Programs designed to assist and support them in achieving their cultural, social and economic goals;

(b) Fully involve Native people in the planning, delivery, development and review of such programs.

(c) Assist the Native people in the long-term economic development of their Communities;

(d) Improve the standard of living of Native People of the Province; and

(e) Enhance the socio-cultural development of the Native People of the Province and to enable them to pursue such socio-cultural developments within their normal and traditional communities as well as throughout the Province.

PART II - COMMITTEE STRUCTURE

COORDINATING COMMITTEE

6. (a) Within 3 months of the coming into force of this Agreement there shall be constituted a Coordinating Committee consisting of members appointed by the respective parties;

(b) The Co-ordinating Committee shall consist of:

(i) Two (2) representatives of Canada designated by the Federal Minister,

(ii) Two (2) representatives of the Province of Newfoundland and Labrador designated by the Provincial Minister,

(iii) Two (2) representatives designated by the Labrador Inuit Association, and

(iv) Two (2) representatives designated by the Naskapi Montagnais Innu Association;

(c) Members so appointed may be replaced by the party responsible for appointing them.

7. All decisions of the Coordinating Committee shall require consensus of the members voting in favor thereof.

8. (a) The Coordinating Committee may make such rules of procedure, consistent with this Agreement, as it considers desirable in respect of the performance of its duties;

(b) The Federal and Provincial Ministers may each designate one member appointed by them to the Coordinating Committee as Co-Chairman for Canada and Co-Chairman for the Province, respectively;

(c) The Province may appoint a Permanent Secretary for the Co-ordinating Committee who shall not be a member thereof;

(d) The costs of the secretariat to the Coordinating Committee shall be borne by the Province;

(e) The salary and travel expenses of the government members of the Coordinating Committee shall be borne by the party appointing them;

(f) The travel expenses of the native members of the Coordinating Committee shall be a first change against the budget allocation under this Agreement made pursuant to paragraphs 18 and 19, for the Native Travel Expenses element of the designated Northern Development Program as described in Schedule 1.

(g) The Committee may meet as often, and in such places, as deemed necessary by the Committee to enable it to most effectively discharge its duties.

9. The Committee shall perform the duties and obligations assigned to it under this Agreement and shall have as objects:

(i) the development of recommendations and policies in respect of overall priorities for the provision of Designated Programs and services to Eligible Communities;

(ii) the recommendation of the allocation of funds under this Agreement;

(iii) the coordination of the evaluation and review of the administration and operation of this Agreement and of the operation of Designated Programs in the Eligible Communities;

(iv) the encouragement of greater interaction between the Federal and Provincial governments and the Native people in respect of the provision of Designated Programs to Eligible Communities.

10. The Committee may constitute such administrative sub-committees as are necessary to assist it in the performance of its duties under this Agreement.

REGIONAL COMMITTEES

11. For purposes of this section,

"Region 1" shall mean the region consisting of the eligible communities of Davis Inlet and Northwest River (Southside); "Region 2" shall mean the region consisting of the eligible communities of Nain, Makkovik, Hopedale, Postville, Rigolet; "Applicable Native Association" shall mean in the case of Region 1, the Naskapi Montagnais Innu Association; in the case of Region 2, the Labrador Inuit Association.

(a) There shall be constituted two Regional Committees to represent Regions 1 and 2 respectively;

(b) Members of each of the Committees shall be appointed on the following basis:

(i) For Region 1-

- The President of the applicable Native Association
- The Vice-President of the applicable Native Association,
- One member appointed by the Provincial Minister, and
- Two members from each of the applicable Eligible Communities, one member which shall be appointed by the elected council of the applicable Eligible Community and one member which shall be appointed by the applicable Native Association;

(ii) For Region 2 -

- One member appointed by the applicable Native Association,
- One member appointed by the Provincial Minister, and
- Two members from each of the applicable Eligible Communities, one member which shall be appointed by the elected council of the applicable Eligible Community and one member which shall be appointed by the applicable Native Association;

(c) Members so appointed may be replaced by the party responsible for appointing them.

12. All decisions of a Regional Committee shall require a majority of the members voting in favor thereof.

13. (a) A Regional Committee may make rules of procedure, consistent with this Agreement, in respect of the performance of its duties;

(b) The costs of the operation of the Regional Committees and the travel expenses of the native members of the Committees shall be borne under this Agreement as a first charge against the budget allocation made pursuant to paragraphs 17, 18 and 19, for the Native Travel Expenses element of the Designated Northern Development Program as described in Schedule 1;

(c) The salary and travel expenses of the Provincial government members shall be borne by the party appointing them.

14. The Regional Committees shall perform the duties and obligations assigned to them under this Agreement and shall have as objects:

(a) the receipt, study, review and assessment of Community Plans prepared by the respective communities within the Region,

(b) the preparation and review of submissions to the Coordinating Committee in respect of the administration, operation and delivery of Designated Programs in the Eligible Communities,

(c) the recommendation of the allocation of funds under this Agreement as between the Regions,

(d) the participation in the evaluation and review of the operation of Designated Programs in the Eligible Communities within the Region; and

(e) the study, review and assessment of any other matters referred to them by the Coordinating Committee.

PART III - PROGRAM PLANNING, IMPLEMENTATION ADMINISTRATION AND DELIVERY OF PROGRAMS

15. (a) Subject to this Agreement, the administration, operation, and delivery of Designated Programs in the Eligible Communities shall continue to be the responsibility of the Province in accordance with criteria determined from time to time by the Co-ordinating Committee.

(b) Notwithstanding the above the Administration, operation and delivery of Designated Programs may be undertaken by the co-ordinating Committee in accordance with this Agreement and Criteria determined from time to time.

SUBMISSIONS OF THE REGIONAL COMMITTEES

16. On or before 31 August each year, each Eligible Community shall submit to the applicable Regional Committee a Community Plan which shall contain the recommendations as to the administration, operation, and delivery of Designated Programs in that community, including recommendations respecting:

(a) priorities requested for the implementation of the Designated Programs in the community;

(b) the manner of delivery and implementation of Designated Programs in the community;

(c) such other matters in respect of the operation of Designated Programs in the community as they deem advisable.

17. On or before 31 September each year, each Regional Committee shall review all Community Plans submitted to it and shall submit to the Coordinating Committee a Regional Plan which shall contain recommendations in respect of the administration, operation, and delivery of Designate Programs in the Region, including recommendations respecting:

(a) priorities to be accorded to the implementation of Designated Programs in the Eligible Communities in the Region;

(b) the delivery and implementation of Designated Programs in the Eligible Communities in the Region;

(c) such other matters in respect of the operation of Designated Programs in the Region as they deem advisable.

SUBMISSION OF THE COORDINATING COMMITTEE

18. On or before 31 October each year the Coordinating Committee shall review all Regional Plans submitted to it pursuant to paragraph 17 and shall submit to the Province and Canada a report which shall contain recommendations respecting:

(a) the establishment of overall priorities in respect of the administration, operation and delivery of Designated Programs and services in the Eligible Communities, but this shall not adjust recommendations made pursuant to paragraph 17 as to the establishment of priorities within the individual communities themselves;

(b) the allocation of funds to Eligible Communties for Designated Programs;

(c) the delivery and implementation of Designated Programs in the Eligible Communities;

(d) such other matters in respect of the operation of Designated Programs in the Eligible Communities as it deems advisable.

19. In preparing the report pursuant to paragraph 18 and in respect of its duties pursuant to paragraph 9, the Committee shall, in recommending to the allocation of funds under this Agreement, consider the relative population levels of Native People in Eligible Communities and the total overall needs of the native peoples covered by this Agreement, and the cost sharing arrangements as determined pursuant to Part IV.

20. On or before 31 January each year Canada and the Province shall meet with the Coordinating Committee to review and discuss the report specified in paragraph 18.

CONSIDERATION BY THE PROVINCE

21. (a) The Province, through the Provincial departments responsible for administration operation and delivery of the designated programs, shall consider the report of the Coordinating Committee forthwith upon its submission.

(b) Where the Province is unable or fails to follow any of the recommendations contained in the report of the Coordinating Committee it shall, within the shortest possible time, so notify the Committee and where practical provide them with written explanations for such failure or inability.

PART IV - FINANCIAL AND REPORTING

COST-SHARING ARRANGEMENTS

22. (a) Subject to paragraph 23 and the following subparagraphs the costs, as certified by the Provincial Auditor or any

other independent auditor appointed by the Province for this purpose, of the administration, operation and delivery of the Designated Programs and services covered by this Agreement shall be shared by Canada and the Province on the following basis:

Canada 90%
Province 10%

(b) Notwithstanding subparagraph (a), the financial contribution by Canada under this Agreement shall be for the provision of Designated Programs to Native members of the Eligible Communities, and shall be determined on the percentage of Native residents in the Eligible Communities on the following basis:

(i) In the Eligible Communities of Nain, Makkovik, Hopedale, Postville, and Rigolet the Province will bear, without cost-sharing, the first full one-third (1/3) of all expenditures to reflect the percentage of non-Inuit residents in these communities;

(ii) In the Eligible Communities of Davis Inlet and Northwest River (Southside) there shall be complete cost-sharing of all expenditures;

(c) Notwithstanding subparagraphs (a) and (b) Canada's share shall be applied, with regard to expenditures for regional facilities and institutions which serve predominently non-Native communities as well as Native communities only to that part of the cost representing the proportion of enrolment and use which the Natives bear to the total enrolments and use of these institutions and facilities;

(d) No part of Canada's contribution under this Agreement shall be applied in respect of expenditures which the Province claims or is eligible to claim against Canada under any other federal-provincial agreement.

23. (a) Notwithstanding paragraph 22 and any other provision of this Agreement, and subject to annual appropriations of Parliament, the maximum contribution by Canada under the Agreement in respect of the cost of the administration, operation and delivery of the Designated Programs in the Eligible Communities for the total duration of this Agreement shall be as specified in Schedule 2.

(b) It is recognized by the parties that the amounts provided for in Schedule 2 include an amount attributable to the increased costs of operations from year to year.

24. Canada's contribution to the cost of Designated Programs, as determined in accordance with paragraphs 22 and 23, shall be payable on the first day of the 1st, 2nd, 3rd and 4th quarter of each fiscal year in the form of an advance payment to the Province, in an amount equal to its share of the costs of the Designated Programs for the following 3 months based on projected cash flow as determined by the Province.

25. Canada's contribution shall be payable on the following basis:

(a) All quarterly advance payments will be based upon cash flow statements for the ensuring quarter and will take into consideration all cash surplus arising in the previous period.

(b) No quarterly advance payment, subsequent to the first advance in the first fiscal year, will be made without an accounting for the previous quarter's advance payment;

(c) An accounting, pursuant to subparagraph (b) above, for the previous quarter's advance payment will take the form of a financial report from the Province specifying year to date expenditures, forecasted total annual expenditures, and a revised cash flow projection for any period remaining between available year to date expenditures data and the final day of the quarter being accounted;

(d) The period remaining between available year to date expenditures data and the final day of the quarter being accounted, as referred to in subparagraph (c) above, shall not exceed one (1) month;

(e) The contribution by Canada in respect of the final month of the final fiscal year of the Agreement shall not be advanced or paid until such time as an interim audit report or final audit report for that fiscal year has been received by Canada.

26. Notwithstanding paragraphs 24 and 25 above, any discrepancy between the amounts paid by Canada by way of advance payments and the expenditures actually made by the Province and eligible for cost-sharing under this Agreement shall be promptly adjusted between Canada and the Province.

27. Canada will not be responsible for any deficit accruing to the Province as a result of expenditures incurred under this Agreement where such expenditures exceed the maximum contribution by Canada for the Agreement as set out in Schedule 2.

PROVINCIAL REPORTS

28. (a) The Province shall prepare a financial report and a progress report to Canada, on at least a semi-annual basis, specifying, inter alia, year to date expenditures, forecasted total annual expenditures, progress to date and forecasted progress respecting the administration and operation of this Agreement and the administration, operation and delivery of the Designated Programs;

(b) Copies of the report referred to in subparagraph (a) shall be distributed forthwith to Canada and the Coordinating Committee.

29. The Province shall have prepared by the 30th September of each year an annual audit report and financial statement on Designated Program expenditures within Eligible Communities for the previous fiscal year, which reports shall contain inter alia:

(i) a statement of revenues and expenditures as well as a comparison with the amounts contemplated in the budget, including any supplemental budgets,

(ii) a list of any other transactions which may affect the assets and liabilities of the Parties,

(iii) a statement distinguishing revenues and expenditures in respect of each Designated Program in each of the Eligible Communities as they relate to the Native population therein,

(iv) a statement as to whether the auditors have obtained all the information and explanations they required,

(v) a statement as to whether the financial statement is drawn up so as to present fairly the eligible financial transactions under the Agreement according to the information and the explanations given and as shown by the relevant provincial books of account, and

(vi) a statement as to whether the financial statements are consistent with the books of account, were

prepared on a basis consistent with that of the previous fiscal year, and reflect fairly the revenues and expenditures of the Province in respect of transactions under the Agreement for the fiscal year concerned.

30. (a) The financial records and accounts shall be maintained by the Province in a form which permits identification of the operation of all aspects of the Designated Programs in the Eligible Communities.

(b) The reports referred to in paragraphs 28 and 29 shall be provided to Canada in a form which permits an identification and comparison with the classes of Contributions as specified in the Main Estimates for the Department of Indian Affairs and Northern Development so as to facilitate the department's reporting to the Public Accounts of Canada. The classes applicable are as setforth in Schedule 3.

(c) The utilization of such classes shall not preclude the use of the listing in Schedule 1 for the purposes of Provincial administration and/or accounting.

(d) The Province will maintain financial records in accordance with generally accepted accounting principles and practices, to ensure the adequacy, accuracy, completeness and timeliness of reports based upon these records and required by paragraphs 25, 28 and 29.

INDEPENDENT AUDITS

31. Auditors may be appointed by Canada or the Province to review the financial records maintained by the Province and/or the Eligible Communities to ensure that the Agreement is being managed within the agreed arrangement, that only allowable expenditures have been changed against the Agreement and that generally accepted accounting principles and practices have been consistently applied in the maintenance of financial records.

PART V - EVALUATION AND REVIEW

TERMS OF REFERENCE

32. (a) On or before the expiry of 12 months from the date of coming into force of this Agreement, the Coordinating Committee shall, subject to paragraph 34, establish terms of reference for and

the criteria to be employed in evaluation and review of the administration and implementation of this Agreement and the operation and delivery of the Designated Programs.

(b) In establishing the terms of reference above the Committee shall not undertake an evaluation or review of the internal administration of any Provincial department nor any of its employees.

33. It shall be the responsibility of the Coordinating Committee, in discharging its duties pursuant to paragraph 32, to:

(a) establish a Steering Committee whose membership shall consist of one member appointed by each the Federal Minister, the Provincial Minister, and each of the Native Associations;

(b) mandate the Steering Committee with the responsibility to coordinate the conduct of the evaluation and review process;

(c) review and decide upon, within 2 years of the coming into force of this Agreement, a detailed plan recommended by the Steering Committee for the conduct of the evaluation and review process in accordance with the terms of reference determined pursuant to paragraph 33 hereof;

(d) review and decide upon, the firm, person, or group of consultants recommended by the Steering Committee to undertake the evaluation and review process, ensuring that such a firm, person or group is jointly acceptable to Canada and the Province and to the Native Associations;

(e) review and decide upon, priorities recommended by the Steering Committee in respect of the evaluation and review of the Agreement and the several Designated Programs.

34. The evaluation and review process, respecting at least the Agreement and one of the Designated Programs, shall be completed no later than 4 years after the coming into force of this Agreement and prior to any extensions to the Agreement.

35. (a) The results of the evaluation and review process shall, forthwith upon its completion, be documented in a written report which shall be made available to the Parties and the Coordinating Committee.

(b) The evaluation and review report may be released to the public, interested persons, organizations, groups, etc., upon the approval of the parties and the Native Associations.

36. (a) The costs of that portion of the evaluation and review process related to the operation of the Agreement, excluding any evaluation and review of the Designated Programs, shall be shared equally by Canada and the Province.

(b) The costs of the evaluation and review process related to the operation of the Designated Programs shall be borne by the Province through its concerned departments and agencies.

37. Canada, the Province and the Native Associations shall provide without prejudice such information as may be required in order to evaluate and review the Agreement and the Designated Programs.

PART VI - IMPLEMENTATION

COORDINATION AND IMPLEMENTATION

38. The coordination, implementation and administration of this Agreement shall be the responsibility of the Provincial Minister on behalf of the Province and the Federal Minister on behalf of Canada.

39. Any notice or written communication required or permitted to be given pursuant to this Agreement may be given as setforth in Schedule 4.

AMENDMENTS

40. Amendments to this Agreement may be made upon consent of the Parties in consultation with the Native Associations.

SCHEDULES

41. All schedules to this Agreement shall be part thereof.

INTERPRETATION

42. In this Agreement:

(a) Words in the singular include the plural and words in the plural include the singular;

(b) Words imparting male persons include female persons and Corporations.

TERM OF AGREEMENT

43. (a) Subject to subparagraph (b), this Agreement shall continue in force for a period of 5 years from its coming into force at April 1, 1980.

(b) The parties shall meet on or before 31 January each year pursuant to paragraph 20, to discuss the operation of the Agreement generally and to decide whether and under what conditions to extend the period of the Agreement beyond the 5 years described in subparagraph (a) for further periods of one year.

(c) In the event that the parties have not, prior to the expiry of 3 years from the coming into force of this Agreement, agreed to any extensions of the term of this Agreement in accordance with subparagaph (b), the parties shall decide, prior to the expiry of 4 years from the coming into force of this Agreement, whether they wish to re-negotiate this Agreement or any part thereof.

SENATE AND HOUSE OF COMMONS CLAUSE

44. No member of the Senate or the House of Commons of Canada shall be admitted to any share or part of this Agreement or to any benefit arising therefrom.

08-05-80

IN WITNESS WHEREOF the Honourable JOHN C. MUNRO, Minister of Indian Affairs and Nothern Development, has hereunto set his hand on behalf of Canada, and the Honourable JOSEPH GOUDIE, Minister of Rural, Agricultural and Northern Development has hereunto set his hand on behalf of the Province, on this_____day of _____19 __.

WITNESSES TO THE AGREEMENT

Signed and approved on behalf of The Government of Canada represented herein by the Honourable Minister of Indian Affairs and Northern Development:

_____

WITNESS:
President of the Labrador Inuit Association

Signed on behalf of The Government of Newfoundland and Labrador represented herein by the Honourable Minister of Rural, Agricultural and Northern Development:

_____

WITNESS:
President of the Naskapi-Montagnais Innu Association

Approved on behalf of The Government of Newfoundland and Labrador represented herein by the Honourable Minister responsible for Intergovernmental Affairs:

_____

Schedule 1

DESIGNATED SERVICES AND PROGRAMS PURSUANT TO AN AGREEMENT RESPECTING THEIR DELIVERY TO ELIGIBLE NATIVE COMMUNITIES IN THE PROVINCE OF NEWFOUNDLAND

1. "COMMUNITY AND ECONOMIC DEVELOPMENT PROGRAM" means that portion of the program or programs established by the Province in respect of the social and economic development of communities, including any program or programs which it may be agreed by the Parties be substituted therefore, applicable to the Eligible Communities;

2. "EDUCATION PROGRAM" means that portion of the program or programs established by the Province in respect of the operation and maintenance of schools, the construction of education facilities and the financial support of students, including any program or programs which it may be agreed by the Parties be substitued therefore, applicable to the Eligible Communities;

3. "FISHERIES PROGRAM" means that portion of the program or programs established by the Province in respect of the provision of subsidies to fisheries operations and including any program or programs which it may be agreed by the Parties be substituted therefore, applicable to the Eligible Communities;

4. "HOUSING PROGRAM" means that portion of the program or programs established by the Province in respect of the construction and maintenance of houses for private owners, including any program or programs which it may be agreed by the Parties be substituted therefore, applicable to the Eligible Communities;

5. "NORTHERN DEVELOPMENT PROGRAM" means that the portion the program elements or programs established by the Province and which are designed to provide a variety of special services and financial support to the Eligible Communities in Labrador to enhance the social, cultural, and economic development of Native people and includes the following elements: depot operation; dormitory operation in Northwest River; maintenance for students including funding of post-secondary students' education expenses such as tuition fees, books, accommodations, airfare and living allowance; entrepreneurial training program; capital expenditures on depot services; and including any program or programs which it may be agreed by the Parties be substituted therefore, applicable to the Eligible Communities.

08-05-80

Schedule 2

CONTRIBUTIONS BY CANADA

The maximum contribution by Canada in respect of the cost of administration, operation and delivery of the Designated Programs in the Eligible Communities for the period of the Agreement shall be $xx million over five years. Without restricting the parties in any one fiscal year, and as a guide to financial planning by the parties the following is a projected cash flow for the annual contribution by Canada under the Agreement:

"SCHEDULE IS

SUBJECT TO FEDERAL CONFIRMATION"

Year 1:	$- million
Year 2:	$- million
Year 3:	$- million
Year 4:	$- million
Year 5:	$- million

08-05-80

Schedule 3

PROVINCIAL REPORTS AND CLASSES OF CONTRIBUTIONS BY CANADA

Annual and semi-annual financial reports and progress reports to Canada by the Province, as setforth in the Agreement, shall permit an identification and comparison with the Classes of Contributions specified in the Main Estimates for the Department of Indian Affairs and Northern Development.

The classes applicable are:

- "EDUCATION": contributions for educational services and facilities;
- "ECONOMIC AND EMPLOYMENT DEVELOPMENT": contributions for economic development and employment;
- "SOCIAL SERVICES": contributions for social assistance, care, rehabilitation and preventative services;
- "COMMUNITY INFRASTRUCTURE AND SERVICES": contributions to assist in the design, construction, maintenance and operation of community services, facilities and housing;
- "BAND GOVERNMENT": contributions for band administrative overhead costs and local development planning;

Canada may delete, amend, alter or substitute the above Classes of Contributions upon notice to the Province.

08-05-80

Schedule 4

NOTICE

Any notice or written communication required or permitted to be given pursuant to this Agreement may be given as follows:

(a) to Canada

Regional Director-General
Indian and Inuit Affairs Program
Maritime Region
Amherst, Nova Scotia

(b) to the Province:

"TITLES AND ADDRESS TO BE INSERTED"

(c) to the Coordinating Committee:

"TITLE AND ADDRESS TO BE INSERTED"

(d) to the Regional Development Committees:

"TITLE AND ADDRESS TO BE INSERTED"

Any of the parties as setforth may, at any time and from time to time, notify the others in writing as to a change of address and the new address to which notice shall be given to it thereafter until further changed.

08-05-80

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This is Exhibit 1 referred to in the affidavit of Jonathan Schachter sworn before me, this 25 day of February 20 13

A COMMISSIONER FOR TAKING AFFIDAVITS

December 2, 1960.

Please see P. 16 for reply.

Honourable W. M. Wall,
The Senate,
Ottawa, Canada.

Dear Bill,

P.S. My apologies for not replying to your letters of October 29th and November 5th at an earlier date. You will realize why when I tell you that our Minister of Education, Dr. Frecker, went to Europe on November 3rd and is not expected back in St. John's until after the middle of December.

I was certainly delighted to know that you and your wife had enjoyed your visit to so many countries.

Now to business. When Dr. Frecker and I went to Ottawa we had a discussion with Honourable Richard Starr and his Deputies and also the new Deputy in the Privy Council's Department. They treated us very well but, apparently, the question of Indians and Eskimos in Labrador was a closed chapter as far as they were concerned. The story, as we got it, was to the effect that when the Terms of Confederation were drawn up the Newfoundland delegation did not make a Clause included whereby our Indians and Eskimos would come under the Federal Government. We raised the question of what has been happening in Quebec and we were told that Quebec had contested the question as to its Indians being under Provincial or Federal jurisdiction and that, either the Supreme Court or the Privy Council, I forget which, had ruled in favour of Quebec which counted for the fact that their Indians and Eskimos were getting Federal assistance.

Apparently, it must be an established fact that legally the Federal Government has no responsibility for the Indians or Eskimos in Newfoundland.

Yours sincerely,

P.J.H./ja

M

Are the LABRADOR INDIANS a Federal or a Provincial responsibility ?

PRESENT OFFICIAL THINKING.

It is commonly accepted by many Officials from both the Federal Government of Canada and the Provincial Government of Newfoundland that the Labrador Indians are coming under the responsibility of the Province.

1. The Hon. Ellen L. FAIRCLOUGH (Minister of Citizenship and Immigration)
" The responsibility for the Indians of Labrador, like the Eskimos,
" under the terms of union was placed on the Provincial Government."
(In reply to Mr.C.R. GRANGER (M.P. Grand Falls - White Bay- Labrador, in House of Commons : Hansard Sept.26, 1961; page 8906).

2. Mr. Walter G. ROCKWOOD (Director Northern Labrador Affairs, Newfoundland): in Minutes of Proceedings and Evidence - Report to the Joint Committee of the Senate and the House of Commons on INDIAN AFFAIRS, Tuesday March 21, 1961.

page 88 : Mr. BALDWIN (MP) ... I wonder if anyone could tell me if
" there was any provision in the agreement between Canada and Newfoundland
" in confederation regarding the question of Indians, and responsibility
" for them.
Mr. ROCKWOOD : I do not know what went on at that time but
" as far as I can learn the position of the Indians and the Eskimos in
" Newfoundland at the time of confederation was that they were citizens
" that there was no legal distinction bewteen Indians and Eskimos and
" myself at that time - and there was none after we went into confederation.
" I think there was no agreement.
Mr. BALDWIN : Nothing in the agreement ? What I am really
" driving at was whether there was anything contained in the terms of
" the agreement which would cast any particular onus on the federal
" government. Was anything like that contained in the terms of the
" agreement ?
Mr. ROCKWOOD : Not to my knowledge.
Senator STAMBAUGH : Could we ask Mr. Jones ?
Mr.JONES (Director of Indian Affairs, Department of Citizenship and Immigration) :
" The terms of the union are silent as to the Indians."

page 92 . The Joint Chairman (Mr.GRENIER) : What was the reason
" for not mentioning the Indians in the agreement ?
Mr. ROCKWOOD : For the same reason [illegible], that [illegible] at that time
" there were so many other problems that I doubt very much if the
" Indians received very much attention...
Mr. CHARLTON : I would suggest the reason is that they have
" never been actually considered as anything else but citizens of
" Newfoundland. That is why. They have not been considered as Indians
" or Eskimos but just citizens of Newfoundland. That may be the reason
" why they did not want them to be segregated....

RPA MG 865 Box 3 File "Indians & Eskimos"

12/08/1961

LEGAL CONSIDERATIONS ABOUT INDIANS AND ESKIMOS IN LABRADOR :

1. THE BRITISH NORTH AMERICA ACT (July 1, 1867)

The BNA 1867 is not only the basic legal document creating Canada but is also the foundation upon which is laid the Federal responsibility for the Indians in Canada. Without amending head 24, section 91 of this BNA 1867 it would not be constitutional for the Federal Government of Canada to relinquish its legal obligations towards the Indians of Canada. The BNA cannot be amended, under the present set-up, without an Act of the British Parliament, England.

One of the reasons of giving Ottawa this Indian responsibility was that the newly formed Provinces were ill equipped to deal with the Indian problem and had many other problems to contend with; may we say that a somewhat similar situation arose when Newfoundland joined the Canadian Confederation in 1949 ? The Indians were not mentioned in those agreements and it may be safe to assume then that unless explicitly expressed to the contrary, they fall under the stipulations of the 1867 BNA which was accepted by both Canada and Newfoundland in 1949 as a basis for agreements ?

To say that the Indians were citizens in 1949 is true but may we point out to the Report quoted on page 1 by Mr. ROCKWOOD : " The " Labrador Indians were enfranchised about ten years ago..(page 87)." They receive the right to vote in 1949 just at the time of Confederation and so.. became citizens. We have in Canada Indians who had also the right to vote and were citizens... but also Indians... even before the voting privilege was extended to all Indians.

2. THE SUPREME COURT OF CANADA : (1938, June 17,20 & 1939, April 5.)

Ruled that Eskimo inhabitants of the Province of Quebec are "Indians" within the contemplation of head 24, Section 91 of the BNA 1867. Since that 1939 judgment Quebec ceased to pay bills for the welfare of the Eskimos (Indians) and the Federal Government assumed all costs and responsibility. This Northern Part of Quebec was added to the Province of Quebec in 1912 (New Quebec).

The preliminaries of this 1939 Supreme Court decision offer some interesting information for Labrador : namely that Eskimos inhabiting the Coast of Labrador for a period beginning 1760 and extending to a time subsequent to the passing of the BNA 1867 were classified as Indians... That in 1774 the boundaries of Quebec were extended and the North Eastern Coast of Labrador and the Eskimo population therein came under the jurisdiction of the Governor of Quebec and remained so until 1809... It is only in 1927 that the Privy Council, London, England, settled the boundary of Labrador.

These various changes of boundaries were not made by the Indians and the Indians were never consulted in those historical events. If 2.000 Quebec Eskimos were declared "Indians" under the jurisdiction of Canadian Constitutional laws why should there be any trouble to say the same for 450 Labrador Indians who were enfranchised by Newfoundland the day before Confederation ?

3. LEGISLATION IN NEWFOUNDLAND FOR ESKIMOS AND INDIANS.

There is no INDIAN ACT in Newfoundland similar to the one in Canada but we find many facts in Newfoundland Law which are important.

a. The concession given by the King of France to the Sieur de Courtemanche in 1702 gave him also exclusive rights of trade with the Labrador Indians. This was the beginning of the North West River trading establishment; it was considered in the transfer of Canada from France to England and quite influential in the 1927 Privy Council decision regarding the Labrador boundary.

b. The MORAVIAN Missions received huge concessions in the 18th Century. Governor Pallisser was reluctant but finally agreed to give them " for the protection of the Esquimaux Indians". This was somewhat similar to the Reducions of Paraguay" conceded to the Jesuits in South America and a prelude to the Canadian Indian Reserves. If a similar policy had been implemented for the protection of the Beothucks on the Island of Newfoundland, these Indians would not have been exterminated... and bounties made upon their heads....

c. LAWS IN NEWFOUNDLAND FOR INDIANS AND ESKIMOS.

EDUCATION : In virtue of chapter 101 Revised Statutes of Newfoundland 1952 : The Education Act : The Education (Remuneration of teachers and grants to Boards) Regulations 1958 .

Reg. 4. (4) (1) : In schools where the native language of the children is either Indian or Eskimo, and where the children are taught through the medium of text books written in the English language, the number of salary units to which the school is entitled and the conditions under which those salary units may be allocated shall be determined by the Council of Education.

This Regulation is in effect in several schools in Labrador for both Indian and Eskimos.

GAME LAWS :The Wild Life Regulations 1959, Department of Mines & Resources.

Reg. 63. Order by Minister. :
Notwithstanding anything contained in these Regulations, the Minister may by order :
...(c) exempt Indians & Eskimos living in Labrador from any or all of the provisions of these regulations.

The Minister of Mines & Resources never exercised this power under Reg.63 (c) and Eskimos Indians are subject to all Game Regulations ; they are bound to pay all licenses. Many Magistrate's Court convictions are made under the Act and it may be of interest to know that some convictions were made against Indians from the Province of Quebec, hunting or fishing in Labrador (Newfoundland). These Quebec Indian sare close relatives (by blood) of the North West River (Nfld) Indians and both groups have been trapping, hunting and fishing on either side of the border line (established in 1927) for many centuries.

It is also worthy to consider that the Law is not enforcing these Regulations too strictly against the Indians who depend and will be depending for many more yeams to come, solely on Wild Life for any cash income and food while White people do hunt, fish or trap as a sport or as a secondary source of income. This reason is the cause of existence of Reg. 63 (c).

LIQUOR LAWS:

In 1882 the sale of intoxicating liquor to Esquimaux Indians was prohibited by an Act of the Legislature of Newfoundland. This law made for the protection of the Esquimaux Indians against fishermen or traders who were using alcohol to take advantage of the natives has always been enforced and is now :
The Alcoholic Liquor Act : (Revised Statutes of Nfld, 1952, Ch.93)
Section 69 :
(1) No person shall sell, give, or otherwise supply alcoholic liquor
... (i) to any person who is an Indian or an Esquimaux whether or not such a person is an Indian under any provision of any Statutes of the Parliament of Canada.

There are many convictions in Magistrate's Court under this law since 1882 and to-day.

Nowhere in Newfoundland Law is to be found a definition of " who is an Indian or an Eskimo" but this Liquor Law does assimilate Labrador Indians to any other Indian regardless of origin or degree of integration : It does not matter if an Indian is a Senator, a Civil Servant or a trapper; from the Yukon, Ontario or Labrador... from a Reserve or not... according to this Law they are all INDIANS and cannot buy or receive alcoholic liquor in Newfoundland.
For the Eskimos one may wonder if this would apply to an Alaskan (American) or a Greenlander coming to Newfoundland ?

As far as this law is concerned there is no distinction between a full Newfoundland citizen(Indian) and any other Indian in Canada.

THE INDIAN POINT OF VIEW :

We are INDIANS ; our parents are Indians and many of us have a mother, a brother or a cousin in Quebec. We do visit them and they visit us; we are marrying our sons and daughters to them. For centuries, together, we have been trapping, hunting and fishing in this country where other people have come and drawn a line called a border (1927).
Our brothers in Quebec have nice schools in Seven Islands and Schefferville and the other Indians, across Canada, have also the same facilities to receive an adequate education ; they'll become good Canadian citizens. Our Province of Newfoundland has not the possibilities to make the same facilities available to us here. If we thought of sending our children to any other Indian School in Canada would the Federal Government say that we cannot go there because we are Newfoundlanders and not Indians ?

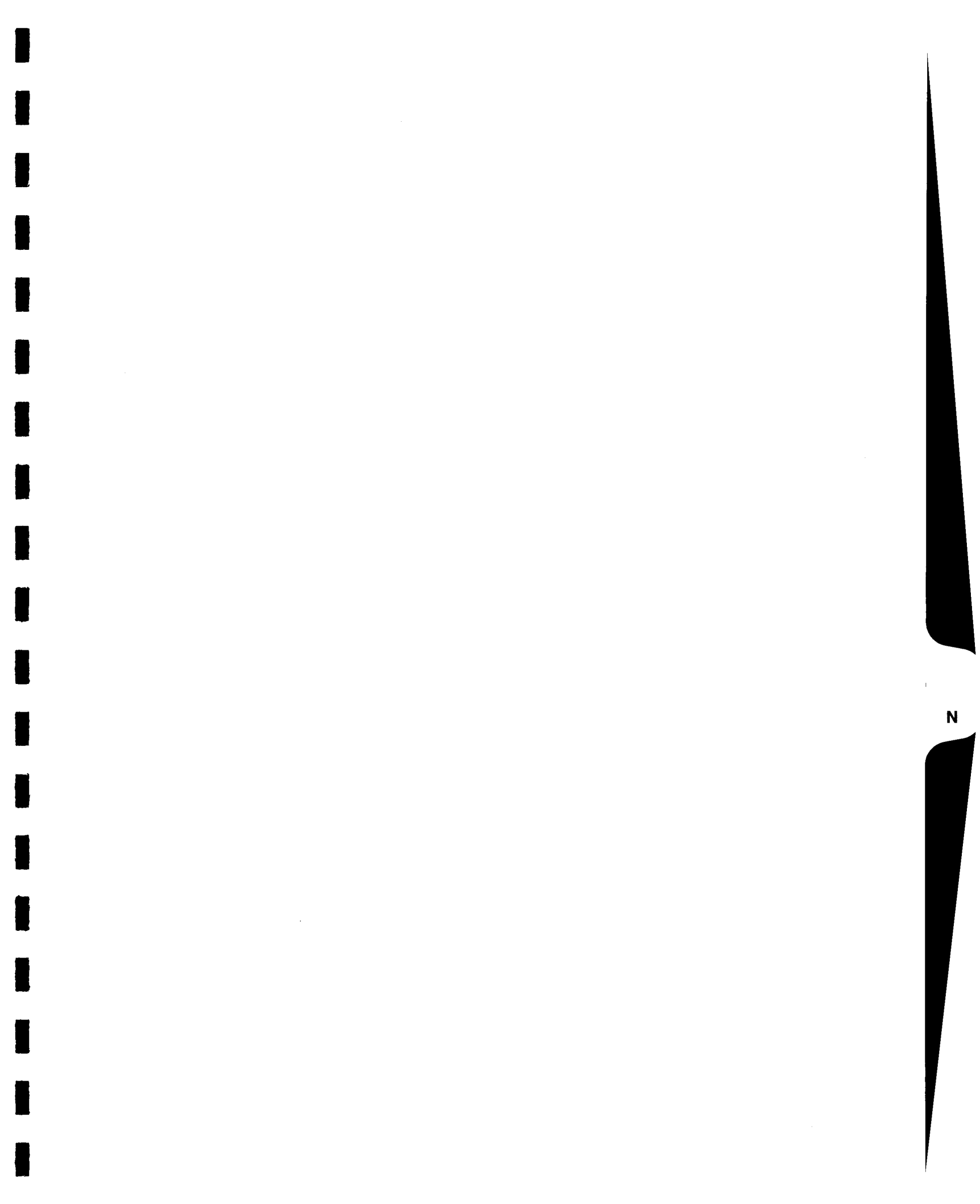
We present to your consideration the following text written by Senator W.M. WALL : "The Wall Report, A Survey of Educational problems in selected study areas in Northern Newfoundland and Labrador for the Board of Directors of the International Grenfell Association." 1960. :

" An interesting anomaly was noted by the writer when he studied
" what was being done by the Federal Government for the Education
" of Indian and Eskimo children in Newfoundland as compared with
" what was being done in other Canadian Provinces. Whatever may
" have been the considerations which shouldered the Province of
" Newfoundland with the continuing responsibility for the education
" of Indian and Eskimo children, the writer feels strongly that a
" form af discrimination is being practised against a Province
" whose educational load is heavy enough without these added
" financial responsibilities".

Happy Valley, December 8, 1961.

Ch N DeHarveng

Rev. Charles N. DeHarveng O.M.I.
Chairman of the R.C. Board of Education
Labrador North. Nfld.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LAB-2674

[redacted]

Innu Nation

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700-2

CURRENT

December 21, 1992

The Honourable Tom Siddon
Minister of Indian Affairs
and Northern Development
House of Commons
Ottawa, Ontario
K1A 0H4

E4000-10

Dear Mr. Siddon:

Thank you for your letter of November 23, 1992 in which you respond to the concerns and recommendations outlined in our report: "Canada/Newfoundland Agreements: An Innu Perspective".

In responding to your letter I want first to acknowledge two of the proposals which your department appears to be ready to initiate in relation to the Innu. We appreciate the readiness you express to work with the Innu in the period prior to the completion of Claims/Rights negotiations. We also welcome the support you express for our goal of achieving control over the delivery of programs and services which affect us directly.

Similarly, we view as positive your readiness to mandate officials to meet with the Innu and to jointly determine ways to increase the administrative and financial capacity of the Innu Nation to facilitate our assuming control of these programs.

However, your letter does not address all of our concerns as outlined in the conclusion of our Report. I want to briefly review the four conclusions/recommendations contained in the Report.

1. Federal Responsibility

Our review of the 1949-1992 period revealed what we, and others, have described as a discrepancy in the federal government's position regarding its responsibilities in relation to the Innu. In 1950, and again in 1964, the federal government was sufficiently uncertain about its responsibilities that it requested legal opinions from the Justice Department on the matter.

Those legal opinions clearly designated the federal government, and not the province, as holding "executive authority" in relation to the Innu and Inuit in Labrador.

C47472

In determining how to fulfill that legislated responsibility, the federal government has, since 1954, chosen to enter into an arrangement in which the federal government assumes a responsibility for health services for the Innu as well as a cost sharing agreement with Newfoundalnd intended to assist and supplement provincial programs and services provided to the Innu.

However, there are numerous references in the records of the Privy Council Office and the Department of Indian Affairs which indicate serious concern on their part that such an arrangement did not, and does not, adequately fulfill the responsibilities of the federal government in relation to the aboriginal Peoples of Labrador. The Minister of Northern Affairs and National Resources stated in 1965 that this arrangement could be challenged as an attempt "by the federal government to avoid its legal responsibility to Indians, or alternatively to transfer its jurisdiction over them to the province".

Given the confusion that has dominated this matter and the less favorable treatment that such an arrangement has inflicted on the Innu, we recommended that a Memorandum of Understanding be established between the Innu and federal government in which the level and areas of federal responsibility be re-examined and clearly defined.

Mr. Siddon, your letter does not address this recommendation. In fact you simply repeat the now old line which suggests that it is the provinces responsibility to provide services and programs to the Innu with the federal government being responsible only to "supplement" provincial programs. Your designation of the Innu as a "special group of aboriginal people", without defining that title is of little help in clarifying the issue.

If is difficult to see how the "devolution of existing programs and services" you refer to in your letter can take place before the question of federal and provincial responsibilities is clarified.

2. Registration

The second recommendation of our Report addressed the issue of registration. The report noted that from 1950-1953 the federal government considered registering the Innu unilaterally. In 1954 it chose not to do so largely in an attempt to avoid committing itself to continuing financial obligations in relation to the Innu.

In 1965 the federal government acknowledged that the Innu "... could demand to be registered under the Indian Act, thereby becoming eligible for the special assistance provided by the Act..." (Memorandum to Cabinet - April 23, 1965)

That same Memorandum suggested that the demand would have to be complied with given that the Innu, in particular, remain "distinct" and "identifiable" by language, culture and way of life.

Your letter states that" the Innu have chosen not to be registered" and therefore are now to be

refused services and programs provided to "status Indians". In 1949 Innu were given no opportunity to make any choices in this regard. Our report outlined our reasons why we would not want our People under the Indian Act regime and we remind you that in 1990 the Canadian Human Rights Commission, in a brief to the government of Canada, judged the Indian Act to be "... fundamentally and irreparably flawed". The brief called upon the Canadian government to undertake the early replacement of this " outdated and paternalistic act".

It would hardly be prudent for Innu to request now, in 1992, registration under the Indian Act. We remind you as well that despite our not being registered your government has chosen to establish the Band Council system in our communities and has chosen to provide the Innu with the same non-insured health benefits provided to "registered" aboriginal Peoples. You can expect us to continue to argue, in this interim period prior to the completion of Rights/Self-Government negotiations, that we are eligible for all of the policies, services and programs now provided by the federal government to "registered" aboriginal People.

3. Specific Jurdictions, Programs and Services

Innu government means the right to be self determining now and for the many generations of Innu to come. It means protection of an adequate land and resource base and control of those lands and resources. It also means adequate jurisdictions to run our own institutions such as schools, policing, community services and other programs for our people. Also it means adequate finances derived from our own lands and resources and compensation for past and continuing illegal use of our land and resources.

Until Innu government is in place, aboriginal Nations like the Innu find themselves dependent upon the services and programs of the Department of Indian Affairs in their efforts to become more self-sufficient and self-determining. We approve of the federal government's commitment to transfer responsibilities and budgets for these services directly to the peoples directly involved, but more than this is required. Both Canada and the province must vacate those jurisdictions they now illegally exercise over Innu people our land and resources.

It was for this reason that in the matter of specific programs and services to the Innu, we recommended that a Memorandum of Understanding between the Innu and the federal government should be established which would also make explicit all of the programs and services available to the Innu in this interim period prior to the implementation of Innu government. We also stated that those areas in which the Newfoundland government now claims some or all jurisdiction require special attention.

4. Finances and the Negotiating Process

Finally, the report recommended discussions between the Innu Nation and the federal and provincial governments with the aim of establishing a comprehensive financial agreement in

which the full responsibilities of both the federal and provincial government are clarified and fulfilled.

In conclusion, given that your letter to us does not clarify or adequately address all of the concerns outlined in our report and because you have stated a willingness to meet with us in regard to these very important matters, I think it would be most beneficial for us to meet with you as soon as possible.

I hope that we can meet to develop a common mandate for further discussions. However, I must say that we need monies set aside for this purpose because there is nothing in our present budget to cover this initiative.

We sincerely hope that you share our belief that the report "Canada/Newfoundland Agreements: An Innu Perspective" is a firm basis on which to begin our discussions and look forward to an early reply in this regard.

Nin

Peter Penashue

cc. Canadian Human Rights Commission
Premier Clyde Wells

MAY 11 1960

85

184

TELEPHONE: CE. 2-8806

The International Grenfell Association

48 SPARKS STREET
OTTAWA 4, CANADA

May 9th, 1960.

Dr. G.A. Frecker, B.A.,L.L.D.,
Minister of Education,
Department of Education,
ST. JOHN'S, Newfoundland.

See p 86 for reply and
p 87 for further reference
not on file in Registry

Dear Dr. Frecker:

You will recollect that Dr. Curtis wrote to you on the 29th February of this year, explaining that we were considering obtaining the services of an experienced educator to advise us how best we might be of assistance in improving education in the area covered by the Grenfell Mission.

At a recent meeting of the Board of Directors of the International Grenfell Association, it was decided to invite Senator William M. Wall to take on this job, and he has now accepted. The general intention is that he will pay a visit to St. John's in September next, and will then proceed to St. Anthony, North West River, Cartwright, and any other Mission Stations which he might deem it advisable to visit.

I have had several discussions with Senator Wall, and we are satisfied that he fully understands the educational situation in the Province of Newfoundland, and is visiting our Mission Stations only with a view to advising the Mission as to how best we may play our part in helping to improve education in our own area of operations.

I understand that Senator Wall will be writing to you himself in the near future as he naturally feels it is essential to gain your full co-operation in this project.

Yours sincerely,

(Frank Houghton),
Rear Admiral, R.C.N.(Ret.),
Secretary & Business Manager,
INTERNATIONAL GRENFELL ASSOCIATION.

FH/m

P

This is Exhibit P referred to in the affidavit of Jonathan Scharfstein sworn before me, this 25 day of February 20 13

A COMMISSIONER FOR TAKING AFFIDAVITS

KOSKIE MINSKY LLP
BARRISTERS & SOLICITORS

February 14, 2013

Sean O'Donnell
Direct Dial: 416-595-2097
Direct Fax: 416-204-4923
sodonnell@kmlaw.ca

VIA FACSIMILE

Jonathan D. N. Tarlton
Senior Counsel, Civil Litigation and Advisory Services
Department of Justice Canada
Atlantic Regional Office
1400, Duke Tower
5251 Duke Street
Halifax, Nova Scotia B3J 1P3

Dear Mr. Tarlton:

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

Thank you for your letter of February 5, 2013, wherein you provide a number of responses to undertakings and questions taken under advisement on the examination for discovery of Canada's representative, Mark Davis, which took place from October 29 to November 1, 2012.

We write to advise that we will be bringing a Rule 30.08 application seeking answers to a number of questions for which Canada has deficiently answered or refused to provide an answer, as outlined herein.

Undertakings:

As outlined in the outstanding undertakings chart, attached, the plaintiffs requested that Canada 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. The answer that you provided does not answer this question as the document you refer to is not a signed copy of this Agreement. We request that you provide an accurate answer to this question.

Questions taken under advisement:

There are also several outstanding issues with your answers to some of the questions taken under advisement (now deemed refusals), as indicated in the attached outstanding advisements chart.

There are a number of questions that your client has improperly refused to answer, relating to the treatment of Indians and Eskimos in Canada, other than in Newfoundland and Labrador. These are questions 1, 3, 5 and 6 in the attached chart. It is the plaintiffs' position that these questions directly relate to the pleadings in this action regarding the question of whether Canada owed a

KOSKIE
MINSKY LLP
BARRISTERS & SOLICITORS

duty of care or fiduciary duty to the class and are therefore proper and relevant questions that Canada is obliged to answer. In addition, your client has not provided a full answer to question 3 in the attached chart.

Your client also refuses to answer question 2 in the attached chart regarding whether applications for reimbursements from the IGA were submitted directly to the federal government or through the province. It is the plaintiffs' position that, regardless of whether these reimbursement applications were for health related expenses as opposed to education expenses, this question goes to Canada's alleged duty of care or fiduciary duty to the class and is therefore a proper and relevant question.

Question 4 in the attached chart has not been addressed by Canada at all in your February 5 letter. Canada's position on this issue is clearly relevant to the common issues and it is the plaintiffs' position that Canada is obliged to answer this question.

Furthermore, regarding question 7 in the attached chart, the question answered in your February 5 letter does not reflect the question posed by counsel for the plaintiffs, as outlined in the discovery transcript and in the attached chart. We request that you review same and provide an answer to this proper and relevant question.

Finally, regarding question 8 in the attached chart, we request that your client provides us with any copy of the document sought on Mr. Davis' discovery, not solely a final signed copy of same.

Should Canada fail to answer any of the above-noted questions, we shall address these matters at the return of the application on March 21, 2013. Please advise us by no later than February 28, 2013 with respect to the above so that the parties may attempt to resolve these matters without the necessity for an application.

Yours truly,

KOSKIE MINSKY LLP

Sean O'Donnell
SO:hp
Enclosure
cc Mark Freeman/Melissa Grant - Department of Justice Canada
Ches Crosbie, Q.C.
Steven Cooper - Ahlstrom Wright Oliver & Cooper LLP
Rolf Pritchard – Department of Justice, Newfoundland and Labrador
Kirk M. Baert/Celeste Poltak - Koskie Minsky LLP

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 BEFORE THE HONOURABLE MADAM JUSTICE BUTLER
CASE MANAGEMENT JUDGE

AND BETWEEN:

2007 01T5423 CP

TOBY OBED, WILLIAM ADAMS and MARTHA BLAKE PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANT

2008 01T0844 CP

SELMA BOASA and REX HOLWELL PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANT

2008 01T0845 CP

SARAH ASIVAK and JAMES ASIVAK PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANTS

2008 01T0846 CP

EDGAR LUCY and DOMINIC DICKMAN PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANTS

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.	

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 BEFORE THE HONOURABLE MADAM JUSTICE BUTLER
CASE MANAGEMENT JUDGE

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2008 01T0845 CP

SARAH ASIVAK and JAMES ASIVAK PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANTS

2008 01T0846 CP

EDGAR LUCY and DOMINIC DICKMAN PLAINTIFFS
and
THE ATTORNEY GENERAL OF CANADA DEFENDANTS

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.	It is our position that request A has no semblance of relevance to the common issues and, therefore, it need not be answered. It is our position that request B has not semblance of relevance to the common issues and, therefore, it need not be answered.	
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 final signed version of the letter dated November 23, 1992 could not be located.	

KOSKIE MINSKY LLP
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FAX TRANSMISSION

DATE: February 14, 2013 **TIME:**

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FROM: Sean O'Donnell • Direct Phone 416-595-2097
Direct Fax 416-204-4923 • E-mail sodonnell@kmlaw.ca

SUBJECT: Anderson et al v. The Attorney General – 200701T4955 CP
Asivak et al v. The Attorney General – 200801T0845 CP
Boasa et al v. The Attorney General – 200801T0844 CP
Dickman et al v. The Attorney General – 200801T846 CP
Obed et al v. The Attorney General – 200701T5423 CP

FILE #: 07/0584

Total No. of Pages, including this page: 9

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☐ **Urgent** ☐ **For Review** ☐ **Please Reply**

COMMENTS OR SPECIAL INSTRUCTIONS

** Transmit Confirmation Report **

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KOSKIE MINSKY LLP Fax:416-977-3316

Feb 14 2013 11:22am

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☐ Urgent ☐ For Review ☐ Please Reply

COMMENTS OR SPECIAL INSTRUCTIONS

CAROL ANDERSON et al	and	**THE ATTORNEY GENERAL OF CANADA**	Court File No: 2007 01T4955CP
Plaintiffs		Defendant	

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR TRIAL DIVISION (GENERAL)
Proceeding commenced at the City of St. John's

BROUGHT UNDER THE CLASS ACTIONS ACT, S.N.L. 2001, C. C-18.1, BEFORE THE HONOURABLE MADAM JUSTICE BUTLER, CASE MANAGEMENT JUDGE

APPLICATION RECORD OF THE PLAINTIFFS (UNDERTAKINGS AND REFUSALS MOTION)

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