Court File No.: T-1542-12

FEDERAL COURT

Class Proceeding

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, on his own behalf and on behalf of all the members of the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND and the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND,

CHIEF GARRY FESCHUK, on his own behalf and on behalf of all the members of the SECHELT INDIAN BAND and the SECHELT INDIAN BAND,

VIOLET CATHERINE GOTTFRIEDSON, CHARLOTTE ANNE VICTORINE GILBERT, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, DAPHNE PAUL, and RITA POULSEN

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN

DEFENDANT

STATEMENT OF DEFENCE

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1. Unless specifically admitted, the Defendant denies each and every allegation in the First Re-Amended Statement of Claim (the "statement of claim") and puts the Plaintiffs to the strict proof thereof.

2. The Defendant specifically denies the existence and breach of the duties alleged in paragraphs 1-3 of the statement of claim.

3. The Defendant denies the allegations contained in paragraphs 20-30, 39-49, 51, 53, 54, 58-71, 73-86, 88, 89-93, and the last sentences of paragraphs 35 and 38 of the statement of claim.

4. The Defendant has no knowledge of the allegations contained in paragraphs 19, 45, 31-38, 72, 87-88, 90 and the first sentence of paragraphs 5, 6, 9, 10, 12, 14, 16, and 17 of the statement of claim.

5. In response to paragraph 4 of the statement of claim, the following definitions apply to this statement of defence:

   (a) "CEP" means the "common experience payment", a lump sum payment available under the IRSSA to any former Residential School student who resided at any Residential School prior to December 31, 1997 and who was alive on May 30, 2005 and did not opt out, or is not deemed to have opted out of the IRSSA during the Opt-Out Periods or is a Cloud Student Class Member;

   (b) "Certification Order" means the Order of Justice Harrington dated June 18, 2015, certifying these proceedings as a class action;

   (c) "Class Period" means 1920-1997;

   (d) "Cloud Class Action" means the *Marlene C. Cloud et al.* v. *Attorney General of Canada et al.* (C40771) action certified by the Ontario Court of Appeal by Order entered at Toronto on February 16, 2005;

   (e) "Cloud Class Member" means an individual who is a member of the classes certified in the Cloud Class Action;

   (f) "Cloud Student Class Member" means an individual who is a member of the student class certified in the Cloud Class Action;

   (g) "day student" means an individual who attended classes at a Residential School as a student during the day but who did not reside at the Residential School;

   (h) "*Indian Act*" means the *Indian Act*, R.S.C. 1985, c. I-5 and its predecessors as have been amended from time to time;

(i) "IRSSA" means the Indian Residential Schools Settlement Agreement, dated May 10, 2006;

(j) "IRSSA Approval Orders" means the Orders set out in Schedule A hereto, approving the IRSSA;

(k) "IRSSA Class Member(s)" means all individuals who are members of the Class as defined in the IRSSA and IRSSA Approval Orders;

(l) "IRSSA Family Class" means all individuals who are members of the family class defined in the IRSSA Approval Orders;

(m) "KIRS" means Kamloops Indian Residential School;

(n) "parochial school" means a private primary or secondary school affiliated with a religious organization and whose curriculum includes general religious education in addition to secular subjects;

(o) "Residential School(s)" means all Indian Residential School(s) recognized under the IRSSA and listed in Schedule A to the Certification Order; and

(p) "SIRS" means Sechelt Indian Residential School;

THE PARTIES

6. In response to paragraphs 5, 6, 9, 10, 12, and 14 the Defendant admits that the individuals named in these paragraphs are the Representative Plaintiffs for the Survivor Class.

7. In response to paragraph 5, the Defendant admits that the Plaintiff Darlene Matilda Bulpit (née Joe) was born on August 13, 1948. The Defendant further admits that the Plaintiff Darlene Matilda Bulpit attended SIRS as a day student in at least October 1960, October 1961, May 1962 and September 1962.

8. In response to paragraph 6, the Defendant admits that the Plaintiff Frederick Johnson was born on July 21, 1960. The Defendant further admits that the

Plaintiff Frederick Johnson attended SIRS as a day student in at least March of 1967.

9. In response to paragraph 7, the Defendant admits that the Plaintiff Daphne Paul was born on January 13, 1948. The Defendant further admits that the Plaintiff Daphne Paul attended SIRS as a day student in at least December 1953, March 1954, June 1954, October 1954, January 1955, March 1955, September 1956, September 1957, September 1958, October 1960 and October 1961.

10. In response to paragraph 8, the Defendant admits that the Plaintiff Violet Catherine Gottfriedson was born on March 30, 1945. The Defendant further admits that the Plaintiff Violet Gottfriedson attended KIRS as a day student during the school years from September 1959 to June 1963.

11. In response to paragraph 12, the Defendant admits that the Plaintiff Charlotte Anne Victorine Gilbert (nee Larue) was born on May 24, 1952. The Defendant further admits that the Plaintiff Charlotte Gilbert attended KIRS as a day student during the school years between September 1959 and June 1966, with the exception of a period of time during which she briefly resided at KIRS. In further answer to paragraph 12, and the whole of the statement of claim as it relates to the Plaintiff Charlotte Gilbert, the Defendant says that the Plaintiff Charlotte Gilbert is an IRSSA Class Member and received payment of the CEP in relation to a period of residence at KIRS. Accordingly, all claims of the Plaintiff Charlotte Gilbert against Canada in relation to any Residential School or the operation of any Residential School have been released pursuant to the terms of the IRSSA and Approval Orders. The Defendant says that the claims of the Plaintiff Charlotte Gilbert should be dismissed.

12. In response to paragraph 14 of the statement of claim, the Defendant admits that the Plaintiff Diena Marie Jules was born on September 12, 1955. The Defendant further admits that the Plaintiff Diena Marie Jules attended KIRS as a day student during the school years from September 1962 to June 1967. In further response to paragraph 16 and the whole of the statement of claim as it relates to the Plaintiff

Diena Jules, the Defendant says that the Plaintiff Diena Jules resided at KIRS from September 1971-March 1972, received payment of the CEP and is an IRSSA Class Member. Further, the Plaintiff Diena Jules signed a Schedule P Release dated January 7, 2013. All claims of the Plaintiff Diena Jules against Canada in relation to any Residential School or the operation of any Residential School have been released pursuant to the terms of the IRSSA and Approval Orders. Further, all claims of the Plaintiff Diena Jules arising from or related to her participation in a program or activity associated with or offered at or through any Residential School and the operation of Residential Schools are released pursuant to the terms of the Schedule P release dated January 7, 2013. The Defendant says that the claims of the Plaintiff Diena Jules should be dismissed.

13. In response to paragraphs 16 and 17, the Defendant admits that the individuals named in these paragraphs are the Representative Plaintiffs for the Descendant Class.

14. In response to paragraph 16 of the statement of claim, the Defendant admits that the Plaintiff Rita Poulsen was born on March 8, 1974. The Defendant further admits that the Plaintiff Rita Poulsen's father attended SIRS as a day student in at least October 1960, October 1961, September 1962, November 1964, January 1966, June 1966, December 1966 and March 1967. In further response to paragraph 16 of the statement of claim, the Defendant says that the Plaintiff Rita Poulsen is an IRSSA Family Class Member and that her claims in these proceedings are in the nature of family class claims as defined in the IRSSA and underlying class actions and have been released pursuant to the IRSSA and the IRSSA Approval Orders. The Defendant says that the claims of the Plaintiff Rita Poulsen should be dismissed.

15. In response to paragraph 17 of the statement of claim, the Defendant admits that the Plaintiff Amanda Deanne Big Sorrel Horse was born on December 26, 1974. The Defendant further admits that the Plaintiff Amanda Big Sorrel Horse's mother attended KIRS as a day student during the school years from at least

September 1959-June 1963 and September 1965-June 1966. In further response to paragraph 17 of the statement of claim, the Defendant says that the Plaintiff Amanda Big Sorrel Horse is an IRSSA Family Class Member and that her claims in these proceedings are in the nature of a family class claim as defined in the IRSSA and underlying class actions and have been released pursuant to the IRSSA and IRSSA Approval Orders. The Defendant says that the claims of the Plaintiff Amanda Big Sorrel Horse should be dismissed.

16. In response to paragraph 18, the Defendant admits that the Indian Bands named in this paragraph are the Representative Plaintiffs for the Band Class. In further response to paragraph 18, the Defendant has no knowledge as to whether or not the Band Class general members represent the collective interests and authority for their respective communities and denies that they are the proper collectivities to exercise Aboriginal rights on behalf of the Plaintiffs.

17. In response to paragraph 20, the Defendant, Her Majesty the Queen in Right of Canada, as represented by the Attorney General of Canada says that the legal identity of the Defendant should properly be "Her Majesty the Queen" ("Canada") as ordered by this Court on October 25, 2013.

18. In response to paragraphs 19 and 25, the Defendant says that the Survivor Class, Descendant Class, and Band Class are as defined in the Certification Order.

HISTORY AND LEGISLATIVE CONTEXT

19. At the time of filing this statement of defence, the only Representative Plaintiffs for the Survivor Class who have been identified by the Plaintiffs attended either SIRS or KIRS. The Plaintiffs have not identified which other of the Residential Schools had Survivor Class members in attendance as day students during the Class Period. The opt-out period for Survivor Class members expires on November 30, 2015 (the "opt-out deadline").

20. Further, at the time of filing this statement of defence the only two members of the Band Class are the Tk'emlúps te Secwépemc Indian Band and the Sechelt

Indian Band. The only two Identified Residential Schools identified in connection with the Band Class members are SIRS and KIRS. The Certification Order provides that members of the Band Class may opt-in to the proceedings prior to February 29, 2016 (the "opt-in deadline"). Band Class members must have or have had some members who are or were members of the Survivor Class or have a Residential School located in their community and must be added to the claim with one or more specifically identified Residential Schools.

21. The identity of the specific Residential Schools at issue in these proceedings, at which some Survivor Class member(s) attended as day student(s) or which are connected to a Band Class member, will not be known until after the opt-in and opt out deadlines expire. What follows in this statement of defence is a general history of the Residential Schools, with particulars provided for the two Identified Residential Schools currently at issue in these proceedings, SIRS and KIRS. Further particulars of the history of other specific Residential Schools at issue in the proceedings will be provided following the expiry of the opt-in and opt-out deadlines.

22. In answer to the whole of the statement of claim, and in particular, paragraphs 1-3, 4(c), 21-30, 35, 38-49, 53-53, 56-58, 59-62, 65-71, 73-75, 76-77, 80-86 and 92-93, the Defendant denies that there was ever a "Residential School Policy" as alleged in the statement of claim, or at all.

23. Further, the Defendant denies that Canada intended to eradicate Aboriginal languages, culture, identity, or spiritual practices, as alleged in the Statement of Claim or at all.

24. At the time of Confederation in 1867, s. 91(24) of the *Constitution Act, 1867* gave Canada exclusive legislative authority in relation to "Indians and Lands reserved for the Indians". In 1876 Parliament enacted the *Indian Act* which has existed, as amended from time to time, ever since. The 1876 version of the *Indian Act* had only minor provisions relating to education.

25. Amendments to the *Indian Act* in 1894 would have enabled the Governor in Council to make regulations for the compulsory education of Indian children and to establish or declare existing schools to be industrial or boarding schools for Indians. It was not until 1920 that education for Indian children actually became compulsory, when Parliament enacted amendments to the *Indian Act*, which provided that every Indian child between the ages of seven and fifteen who was physically able to do so was required to attend a designated day, industrial or boarding school. The *Indian Act* was further amended in 1930 to change the upper age for mandatory school attendance to sixteen.

26. The requirement under the *Indian Act* for Indian children to attend school during the Class Period was consistent with provincial legislation in existence throughout most of Canada, which required non-Indian children to attend school. The requirement to attend school was a *bona fide* measure intended to ensure that all children, Indian and non-Indian alike, received an education and was similar to legislative requirements existing in other developed countries throughout the Class Period.

27. Pursuant to the *Indian Act*, during the Class Period most Aboriginal children received an education at day schools on their reserves. Other Aboriginal children received their education at Residential Schools, often because there were insufficient numbers of families to support a day school in a remote community, or because families were migrant.

28. The majority of children who attended Residential Schools during the Class Period lived at the Residential Schools. Only a small minority of Aboriginal children attended Residential Schools as day students during the Class Period.

29. Not all Residential Schools had day students in attendance during the Class Period. During the Class Period, some of the Residential Schools offered classes for residential students only. Many of the other Residential Schools were residences only and did not hold classes for any students during the Class Period.

Further, some of the Residential Schools offered classes for day students during only some years of their operation.

30. During the Class Period, nearly all of the Residential Schools were controlled, operated, and managed throughout Canada by churches or church organizations, pursuant to agreements entered into between the relevant churches or church organizations and Canada. These churches or church organizations are defined in Article 1.01 and Schedules "B" and "C" of the IRSSA ("church organizations").

31. Beginning in or about 1948, in an effort to educate Aboriginal children wherever possible in association with other children, provinces and their school boards assumed, over time, increasing responsibility for the education of Aboriginal children. From 1948 forward, progressively greater numbers of Aboriginal children attended public schools operated by school boards under provincial jurisdiction. From 1948 to the end of the Class Period, the proportion of Aboriginal children attending Residential Schools decreased as increasing numbers of Aboriginal children attended day schools, parochial schools and provincial schools. Further, many of the Residential Schools that had provided classes ceased to do so and began to act as residences only and many of the Residential Schools closed entirely.

32. As of April 1, 1969, the then Department of Indian Affairs and Northern Development assumed the administration of Residential Schools. At all material times, the church organizations continued to have a role and responsibility in the management and operation of the Residential Schools, including the hiring, supervision and discipline of administrators, officers, supervisors, domestic staff and other support staff, including dormitory supervisors, and in the religious teaching, caring, upbringing, safety and protection of the children in attendance.

33. From the early 1970s onward, some Aboriginal entities began to assume responsibility for and control of the education of Aboriginal children. In 1973, Canada agreed to devolve control of the education of Aboriginal children to band

councils and Aboriginal education committees. By the mid 1970s, the Residential Schools which remained in operation were in many cases administered by local band councils or their nominees. Canada's role was limited in such cases to offering financial assistance and, occasionally, other assistance where requested by the responsible Aboriginal entity, whose day to-day care and control of the schools was established by agreements entered into with Canada.

THE OPERATION OF RESIDENTIAL SCHOOLS

34. At all material times during the Class Period, almost all of the Residential Schools were controlled or operated by the church organizations. Various church organizations had established industrial, boarding and Residential Schools for the education of Aboriginal children prior to Canada's involvement in the education of Aboriginal children. The church organizations continued to be involved in the operation and management of most of the Residential Schools throughout the entire Class Period.

35. The church organizations were responsible for the operation and administration of the Residential Schools. During the Class Period, the responsibilities of the church organizations involved in Residential Schools included, but were not limited to, the following:

    (a) selection, employment, hiring, supervision, training, discipline and dismissal of officers, agents, servants and employees at Residential Schools, including residential and educational staff at Residential Schools;

    (b) academic, religious and moral teachings of the students at Residential Schools;

    (c) development and implementation of school curricula at Residential Schools;

(d) supervision, day-to-day care, guidance and discipline of the students at Residential Schools;

(e) ensuring the well-being, care and safety of the students at Residential Schools, including the Survivor Class members;

(f) taking care of and looking out for the physical and spiritual well-being of the students at Residential Schools, including the Survivor Class members;

(g) to keep the students of Residential Schools, including the Survivor Class members, safe and free from harm; and

(h) to keep Canada apprised as to any situations dangerous or harmful to the students at Residential Schools, including the Survivor Class members.

36. Canada provided financial assistance to the church organizations for the operation of Residential Schools, pursuant to agreements with the church organizations. Canada also provided policy guidelines from time to time. Canada inspected and audited the Residential Schools from time to time to ensure that the church organizations were complying with their agreements with Canada and Canada's policy guidelines. Canada was not responsible for and did not undertake the day-to-day operations of the Residential Schools which were instead operated by church organizations.

37. A number of other governments, institutions, and organizations were also involved in and responsible for the operation of residential schools and education of Aboriginal children in general. For example, in some cases:

(a) Provincial and territorial governments bore responsibility for the education of Aboriginal children, often pursuant to agreements with Canada;

(b) Provincial governments established standards and curricula and undertook inspections of Residential Schools;

(c) Education was provided in provincial day schools to students who resided in Residential Schools, often under the auspices of or pursuant to agreements with local school boards; and

(d) Child welfare agencies were involved in or responsible for the admissions policies and procedures of Residential Schools, since many of the Aboriginal students who attended did so as orphans or abandoned children, or for other child welfare reasons.

38. The extent and years of Canada's involvement in the Residential Schools differs on a school-by-school basis. Further, the number of and years of attendance of Survivor Class members as day students at the Residential Schools, if any, differs on a school-by-school basis.

39. Canada will provide more detailed particulars of the operation of individual Residential schools as additional Residential Schools at which Survivor Class members attended or with which Band Class members are connected are identified.

40. The experience and treatment of Residential School students, including the Plaintiffs and members of the Survivor Class, was not uniform across all schools, church organizations, and time periods. Rather, such experiences and treatment varied widely depending on a host of factors, including, but not limited to: variations in curriculum by province, region, religious affiliation, school, and time period; the life experiences of individual students outside of school; whether the students spoke Aboriginal languages; students' degrees of fluency in Aboriginal languages, English or French at the time of entry into the school system; and their individual experiences of particular cultural and spiritual activities prior to, during, and following attendance at the schools.

41. Other factors which had an impact on the experience of individual students, including the Plaintiffs and members of the Survivor Class, in relation to their attendance include the composition of the student population and the presence or absence of a mix of nations, bands, language groups, religious affiliations, and genders within the school population.

42. The experiences of individual students at Residential Schools, including the Plaintiffs and members of the Survivor Class, were also affected by: the geographic location of the specific school; its relative remoteness from or connection to the non-Aboriginal population; the impact of increasing urbanization of Canada over the Class Period; variability of funding from school to school and year to year; differences in hiring practices and procedures; the relative economic status of the church organization responsible for the administration of the school; whether the Residential School was one of those where aboriginal languages were specifically encouraged; individual practice with regard to enforcement of attendance requirements; the presence or absence of Aboriginal staff; individual family circumstances of students; and variability of cultural practice and language use within particular bands and families within those bands..

43. The acts of which the Representative Plaintiffs complain are those of specific priests, nuns, brothers and others who taught at the schools rather than to any policy or action by Canada.

THE ESTABLISHMENT AND OPERATION OF KIRS AND SIRS

44. At the time of the filing of this Statement of Defence, KIRS and SIRS are the only two Identified Residential Schools named in the statement of claim. The Defendant pleads the following facts specifically in relation to the establishment and operation of KIRS and SIRS.

The church organizations involved in the establishment and operation of KIRS and SIRS

45. Various of the church organizations were involved in both KIRS and SIRS from their respective inceptions until their closures. The history of each of these church organizations is set out below.

The Archbishop and Bishops

46. The Vicariate Apostolic of British Columbia was erected in 1863 and was administered by a vicar apostolic. In 1890, the Vicariate Apostolic was erected into a diocese, the Diocese of New Westminster, administered by a bishop. In 1908, the Diocese of New Westminster was erected into the Archdiocese of Vancouver and, since that time, has been administered by an archbishop (the "Archbishop").

47. In 1945, the Diocese of Kamloops was erected out of a portion of the Archdiocese of Vancouver and is administered by a bishop (the "Bishop").

48. At the relevant times, as set out below, the Bishop of New Westminster, the Archbishop and the Bishop sought and obtained legislative approval for the creation of corporations sole to act as their secular legal personalities.

49. The Roman Catholic Bishop of New Westminster was a corporation sole created by the Roman Catholic Bishop of New Westminster Incorporation Act, S.B.C. 1893, c. 62.

50. The Roman Catholic Archbishop of Vancouver (the "Archbishop Corporation Sole"), the successor to The Roman Catholic Bishop of New Westminster, is a corporation sole created by The Roman Catholic Archbishop of Vancouver Incorporation Act, S.B.C. 1909, c. 62, as amended.

51. The Roman Catholic Bishop of Kamloops (the "Bishop Corporation Sole"), is a corporation sole created by The Roman Catholic Bishop of Kamloops Incorporation Act, S.B.C. 1947, c. 102, as amended.

The Oblates

52. The Congregation of the Missionary Oblates of Mary Immaculate (the "Congregation") is a clerical Congregation of pontifical right whose Constitutions and Rules, as amended from time to time since 1826, have been approved at the relevant times by Popes of the Roman Catholic Church. The Congregation has been known by various names, including: "The Congregation of the Oblates of the Most Holy Virgin Mary", "The Congregation of the Missionary Oblates of the Most Holy and Immaculate Virgin Mary" and "The Congregation of the Missionary Oblates of the Blessed and Immaculate Virgin Mary".

53. The Congregation is headed by a Superior General who, since 1905, has resided in Rome. The Congregation is currently organized into Provinces and Vice-Provinces and formerly into Provinces and Vicariates. A Province is headed by a Provincial, a Vice-Province is headed by a Vice-Provincial and a Vicariate was headed by a Vicar of Missions.

54. In 1926, the Oblate Province of St. Peter's of New Westminster was established, which was formerly part of the Oblate Vicariate of British Columbia. In 1968, St. Peter's of New Westminster Province was divided at the Alberta/Saskatchewan border and St. Paul's Vice-Province was established in the west. St. Peter's of New Westminster Province was renamed St. Peter's Province. In 1973, St. Paul's Vice-Province was established as a full Province.

55. The Congregation in British Columbia, including the Oblate Vicariate of British Columbia, St. Peter's of New Westminster Province, St. Peter's Province, St. Paul's Vice-Province and St. Paul's Province (collectively the "Congregation in BC") is civilly incorporated as "The Order of the Oblates of Mary Immaculate in

the Province of British Columbia" under the laws of the Province of British Columbia by An Act to Incorporate the Order of the Oblates of Mary Immaculate in the Province of British Columbia, S.B.C. 1891, c. 51, as amended (the "Oblates").

56. The Oblates have existed in British Columbia since 1891 (and the Congregation since 1860) for the purpose of, amongst others, establishing and carrying on schools and colleges, including schools for Aboriginal children.

57. In 1936, the Congregation, through the offices of its Superior General, and its provincials and Oblate bishops in Canada founded the Indian Welfare and Training Commission of the Oblates of Mary Immaculate, located in Ottawa, to coordinate the objectives of the Oblate bishops, Oblate provincials and Oblate priests who were, amongst other things, working to educate native peoples in Canada. This Commission, over time, was known under various names including: the Indian and Eskimo Welfare Commission; the Indian and Eskimo Welfare Commission of the Oblates; and, the Oblate Indian-Eskimo Council (at the relevant time, the "Council").

58. On August 10, 1960, the Council incorporated by letters patent "Oblate Services Oblats" in the Province of Ontario and by supplementary letters patent, dated May 31, 1962, changed the name of Oblate Services Oblats to Indianescom.

59. At all material times, the Congregation, through the offices of its Superior General, and its Provincials and Oblate bishops in Canada, including the Provincials of St. Peter's of New Westminster Province, St. Peter's Province and St. Paul's Province and the Vice-Provincial of St. Paul's Vice-Province, amongst others (collectively the "Congregation in Canada"), created, controlled and directed the Council, Oblate Services Oblats and Indianescom.

60. In or about 1976, the Council and Indianescom were dissolved and their assets were donated to the Canadian Catholic Conference, an association of Canadian bishops and archbishops.

The Sisters of Saint Ann

61. The Sisters of Saint Ann (the "Sisters of SA") is a female religious congregation of members of the Roman Catholic faith, duly incorporated under the laws of the Province of British Columbia by the Sisters of St. Ann's Incorporation Act, S.B.C. 1892, c. 58, as amended (the "Sisters of SA Corporation").

The Sisters of Instruction of the Child Jesus

62. The Sisters of Instruction of the Child Jesus (the "Sisters of ICJ") are a teaching and charitable order or association of the Roman Catholic faith, duly incorporated under the laws of the Province of British Columbia by An Act to Incorporate the Sisters of Instruction of the Child Jesus, S.B.C. 1913, c. 94, as amended (the "Sisters of ICJ Corporation").

Establishment of KIRS

63. KIRS, or its predecessor, was established in or about 1890 at the request or initiative of the Tk'emlúps te Secwépemc Indian Band, or its predecessor. Prior to that time, there was a Mission School at which some children, including the daughter of the then chief of the Kamloops Indian Band, paid fees to board and attend classes.

64. KIRS, or its predecessor, was established by one or more of the Archbishop, or his predecessor, the Bishop, the Oblates and the Sisters of SA.

65. Prior to the establishment of KIRS in or about 1890, the Tk'emlúps te Secwépemc Indian Band, or its predecessor was aware that the language of instruction at any school established by any religious organization and at which their children would attend, would be English. The Tk'emlúps te Secwépemc Indian Band was further aware that the doctrine of Christianity would be promulgated at any such school.

66. Canada is not liable for any loss of language or culture - if any, which is not admitted but specifically denied - occasioned by the request of the Tk'emlúps te Secwépemc Indian Band to have its members' children educated in English or taught Christian doctrine.

The Operation of KIRS

67. Until 1945, KIRS was located within the Archdiocese of Vancouver (or its predecessor). The Archbishop (and his secular legal personality the Archbishop Corporation Sole) was responsible for the Archdiocese of Vancouver and retained certain rights and authority over members of Catholic religious orders and congregations working in his archdiocese.

68. As of 1945, KIRS was located within the Diocese of Kamloops. The Bishop (and his secular legal personality the Bishop Corporation Sole) was responsible for the Diocese of Kamloops and retained certain rights and authority over members of Catholic religious orders and congregations working in his diocese.

69. KIRS was conducted under the auspices of the Roman Catholic Church by the Congregation in BC, the Archbishop, the Bishop, and the Sisters of SA and by their secular legal personalities the Oblates, the Archbishop Corporation Sole, the Bishop Corporation Sole and the Sisters of SA Corporation (collectively the "KIRS Church Organizations").

70. The Congregation in BC and the Oblates controlled, operated, administered and managed KIRS in conjunction with, or with the assistance of the Sisters of SA and the Sisters of SA Corporation, and in conjunction with, with the permission of, or on instructions from, the Archbishop and the Archbishop Corporation Sole and the Bishop and the Bishop Corporation Sole pursuant to an agreement with Canada that was partly written and partly oral, including, among other things, a Memorandum of Agreement dated September 25, 1962 between Canada and Indianescom.

71. Alternatively, the Sisters of SA or, in the alternative, individual members of the Sisters were employed at KIRS by one or more of the Archbishop, the Bishop or Congregation in BC, or, in the alternative, acted as their agent to provide teaching instruction to the students and to perform other duties at the KIRS pursuant to an agreement between the Sisters and one or more of the Archbishop, Bishop or Congregation in BC.

72. The KIRS Church Organizations were responsible for selecting, employing, supervising and training officers, agents, servants and employees at KIRS, including principals, administrators, officers, servants, supervisors and domestic staff working at KIRS.

73. The KIRS Church Organizations were responsible for disciplining or dismissing any principal, administrator, officer, servant, teacher, supervisor, domestic or other staff where, in their opinion, the circumstances warranted.

74. Pursuant to Order in Council P.C. 1969-613, administrators and child care workers at the Residential Schools were exempted from the provisions of the Public Service Employment Act, S.C. 1966-67, c. 71, as amended. As a result of the Service Contract, the Congregation in Canada and in particular the Congregation in BC and the Oblates were responsible for, among other things, the hiring, supervision and discipline of all administrators and child care workers for KIRS.

75. At all material times after April 1, 1969, the KIRS Church Organizations continued to have a major role in and be responsible for the operation and management of KIRS and the religious teachings, caring, upbringing, safety and protection of the students at KIRS.

Attendance of Class Members at KIRS

76. Throughout the Class Period, the majority of students attending KIRS were residential students. Day students were only in attendance at KIRS for a limited

period of time during the Class Period, between in or about the 1959/60 to the 1966/67 school years.

77. Beginning in or about the 1940s some residents of KIRS and children from the Tk'emlúps te Secwépemc Indian Band, or its predecessor, began attending provincial or parochial schools in Kamloops. Throughout the 1950s – 1960s classroom instruction at KIRS was phased out.

78. By the 1969-70 school year no classes were held at KIRS. From that time until the end of the Class Period all students still residing at KIRS attended provincial or parochial schools in Kamloops. During this time period, students from the Tk'emlúps te Secwépemc Indian Band who were living on reserve would have also attended provincial or parochial schools in Kamloops.

79. None of the Plaintiffs or members of the Survivor Class attended KIRS as day students after the 1969-70 school year.

80. In or about 1978, the Residential School at KIRS closed in its entirety.

Establishment of SIRS

81. SIRS, or its predecessor, was established in or about 1904 at the request or initiative of the Sechelt Indian Band, or its predecessor. It was established by one or more of the Archbishop, or his predecessor, the Oblates, and the Sisters of ICJ.

82. Prior to 1904, the Sechelt Indian Band was aware that the language of instruction at any school at which their children would attend would be English. It was further aware that the doctrine of Christianity would be promulgated at any such school.

83. Prior to 1904, the Sechelt Indian Band built a schoolhouse using funds obtained from its own logging efforts. In 1904, the Sechelt Indian Band, through the Bishop of New Westminster, secured the teaching and caregiving services of the

Sisters of ICJ to operate the school. At that time, the Sechelt Indian Band was aware that the education of its children at the school would include the teaching of Catholic doctrine. The Sechelt Indian Band petitioned the government to provide funds to assist with the completion and furnishing of the school and a grant for the boarding of the children. At that time, the stated desire of the Sechelt Indian Band was for their children to learn to speak and write English and that the children train under the Catholic sisters.

84. In 1923, the Sechelt Indian Band petitioned Canada to replace the French Catholic sisters at SIRS as the children were not learning English.

85. Canada is not liable for any loss of language or culture - if any, which is not admitted but specifically denied - occasioned by the request of the Sechelt Indian Band to have its members' children educated in English and taught by members of Christian orders.

The Operation of SIRS

86. SIRS was located within the Archdiocese of Vancouver (or its predecessor). The Archbishop (and his secular legal personality the Archbishop Corporation Sole) was responsible for the Archdiocese of Vancouver and retained certain rights and authority over members of Catholic religious orders and congregations working in his archdiocese.

87. SIRS was conducted under the auspices of the Roman Catholic Church by the Congregation in BC, the Archbishop, and the Sisters of ICJ and by their secular legal personalities the Oblates, the Archbishop Corporation Sole and the Sisters of ICJ Corporation (collectively the "Sechelt Church Organizations").

88. The Congregation in BC and the Oblates controlled, operated, administered and managed SIRS in conjunction with, or with the assistance of the Sisters of ICJ and the Sisters of ICJ Corporation, and in conjunction with, with the permission of, or on instructions from, the Archbishop (or its predecessor) and the Archbishop Corporation Sole, pursuant to agreements with Canada that were

partly written and partly oral, including agreements dated 1911, 1916, and September 25, 1962 as between Canada and the Archbishop, Canada and the Archbishop, and Canada and Indianescom, respectively.

89. Alternatively, the Sisters of ICJ or, in the alternative, individual members of the Sisters of ICJ were employed at the School by one or more of the Archbishop or Congregation in BC or, in the alternative, acted as their agent to provide teaching instruction to the students and to perform other duties at the SIRS pursuant to an agreement between the Sisters of ICJ and one or both of the Archbishop or Congregation in BC.

90. The Sechelt Church Organizations were responsible for selecting, employing, supervising and training officers, agents, servants and employees at SIRS, including principals, administrators, officers, servants, supervisors and domestic staff working at SIRS.

91. The Sechelt Church Organizations were responsible for disciplining or dismissing any principal, administrator, officer, servant, teacher, supervisor, domestic or other staff where, in their opinion, the circumstances warranted.

92. On April 1, 1969, the Memorandum of Agreement dated September 25, 1962 between Canada and Indianescom ceased to have effect and new written agreements were entered into between the Council and/or Indianescom and Canada.

93. On and after April 1, 1969, the Council and/or Indianescom contracted its services in residential schools to Canada and, in particular, with respect to Sechelt IRS (the "Service Contract").

94. Pursuant to Order in Council P.C. 1969-613, administrators and child care workers at the Schools were exempted from the provisions of the *Public Service Employment Act*, S.C. 1966-67, c. 71, as amended. As a result of the Service Contract, the Congregation in Canada and in particular the Congregation in BC

and the Oblates were responsible for, among other things, the hiring, supervision and discipline of all administrators and child care workers for Sechelt IRS.

95. At all material times after April 1, 1969, the Sechelt Church Organizations continued to have a major role in and be responsible for the operation and management of SIRS and the religious teachings, caring, upbringing, safety and protection of the students at SIRS.

Attendance of Class Members at SIRS

96. Throughout the Class Period, the majority of students attending SIRS were residential students. Day students were only in attendance at SIRS for a limited period of time during the Class Period, between in or about the 1953/54 to the 1962/3 school years.

97. As early as in or about 1948, some students residing at SIRS or from the Sechelt Indian Band were attending the provincial school in Sechelt.

98. After the 1968/69 school year there were no classes held at SIRS. The residence at SIRS was closed on or about June 30, 1975.

99. None of the Plaintiffs or members of the Survivor Class attended SIRS as day students after the 1968/69 school year.

STATEMENT OF RECONCILIATION

100. In response to paragraphs 49 and 50, the Statement of Reconciliation is as found in the "Address by the Honourable Jane Stewart Minister of Indian Affairs and Northern Development on the occasion of the unveiling of Gathering Strength — Canada's Aboriginal Action Plan", made on January 7, 1998 (the "Statement of Reconciliation"). Nothing in the Statement of Reconciliation constitutes an admission or admissible evidence of any of its contents.

THE IRSSA AND RELEASES

101. In response to paragraphs 51-55, the IRSSA was approved by the courts in nine jurisdictions and implemented on September 19, 2007.

102. The IRSSA was reached through a process of negotiation between Canada, former students of the Residential Schools, church organizations involved in running the schools, and the Assembly of First Nations and Inuit representatives. Pursuant to the IRSSA, the parties agreed to the settlement of all actions of the IRSSA Class Members in relation to Residential Schools. This includes various class actions, including the Cloud Class Action (*Marlene C. Cloud et al. v. Attorney General of Canada et al.* (C40771), which was brought on behalf of former students of the Mohawk Institute Residential School, and was certified by the Ontario Court of Appeal on February 16, 2005.

103. The IRSSA contains five key components: Common Experience Payment ("CEP"), Independent Assessment Process ("IAP"), an endowment of $125 million to the Aboriginal Healing Foundation, the establishment of the Truth and Reconciliation Commission, and funding in the amount of $20 million for national and community based commemorative projects.

104. Pursuant to Article 11 of the IRSSA, the claims of all IRSSA Class Members and Cloud Class Members arising from the operation of Residential Schools were fully, finally and forever released as against the defendants in those actions, including Canada, unless the IRSSA Class Member or Cloud Class Member opted out of the IRSSA.

105. Non-resident students of Residential Schools were not eligible for the CEP, but were eligible for compensation under the IRSSA's IAP for sexual abuse, certain serious physical abuse, and "other wrongful acts" suffered while attending a Residential School. The IRSSA required IAP claimants who did not reside at a Residential School to execute a release upon acceptance into the IAP. The release is set out in Schedule "P" to the IRSSA.

106. The Schedule "P" release, signed in consideration for an application being accepted into the IAP, is a full and final release of any cause of action relating in any way to the operation of Residential Schools. The Schedule P release expressly provides that the Defendant can rely on the release as a complete defence to any claim or action relating to the operation of the Residential Schools

107. The claims in these proceedings of all members of the Survivor Class who are also IRSSA Student Class Members or Cloud Student Class Members, and who did not opt out of the IRSSA, have been fully, finally, and forever released. Such claims are barred by Article 11 of the IRSSA and the corresponding paragraphs of the Approval Orders.

108. The claims in these proceedings of all members of the Descendant Class who are also members of the IRSSA Family Class or the family class in the Cloud Class Action, and who did not opt out of the IRSSA have been fully, finally, and forever released. Such claims are barred by Article 11 of the IRSSA and the corresponding paragraphs of the Approval Orders

109. The claims in these proceedings by any member of the Survivor Class who is also a non-resident claimant, as defined in Article 1.01 of the IRSSA, and who has executed a Schedule "P" release, have been fully, finally, and forever released. The Defendant relies on such executed Schedule P releases as a complete defence to these proceedings as against the signatories.

110. To the extent that the Plaintiffs' claims arise from events that occurred during the attendance at Residential Schools as *residents* of any members of the Plaintiff Classes, their family members or members of their communities or any impacts arising therefrom, such claims are barred by the IRSSA and Approval Orders.

THE APOLOGY

111. In response to paragraphs 56 and 57, on June 11, 2008, the Prime Minister of Canada, the Right Honourable Stephen Harper, made a Statement of Apology to

former students of Residential Schools, on behalf of the Government of Canada in the House of Commons ("Apology").

112. Nothing in the Statement of Apology constitutes an admission of liability or fact and the contents of the Statement of Apology are not admissible in evidence.

113. In the alternative, the Defendant pleads and relies upon: the *Apology Act*, S.B.C. 2006, c. 19; *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 26.1; *Evidence Act*, S.S. 2006, as amended, c. E-11.2, c. 23.1; *The Apology Act*, S.M. 2007, c. 25; *Apology Act*, S.O. 2009, c. 3; *Apology Act*, S.N.S. 2008, c. 34; *Apology Act*, SNL 2009, c A-10.1; and *Apology Act*, SNWT 2013, c 14.

LEGAL BASIS

114. Canada admits that it wanted all Aboriginal people to be able to participate fully in all aspects of Canadian society, and that in pursuit of that goal it required that all Aboriginal children receive an education and that they be educated in English or French.

115. If an effect of the attendance of Aboriginal children at Residential Schools and in particular the attendance of Aboriginal children at Residential Schools as day students, was harm to Aboriginal people and Aboriginal culture as alleged by the Plaintiffs, which is denied, this harm was unintended and was not foreseeable at the material time.

116. At all times during the establishment and operation of the Residential Schools and throughout the Class Period, Canada acted with due care, in good faith, and within its legislative authority, including its authority with respect to the education of Aboriginal children. Further, the conduct of Canada must be measured by what was considered reasonable and appropriate at the time of the formulation and implementation of the alleged policies at issue. Moreover, and in any event, to the extent that harm is alleged to have arisen from the formulation and implementation of policy, Canada is immune from suit or liability.

117. The Plaintiffs have particularized their claim as not being based upon any allegation that requiring students to learn English constituted a breach of Canada's duties toward them. Canada denies that it had any other language policy with regard to the Plaintiffs and therefore could have no liability for their claimed loss of their traditional languages.

118. The Defendant denies that Canada sought to destroy the ability of the members of the Plaintiff classes to speak their Aboriginal language or to lose the customs or traditions of their culture by requiring that the formal education of Aboriginal children be conducted in English or French. This requirement was consistent with provincial standards of education during the Class Period. It was also a result of the express desire of some Aboriginal leaders expressed from time to time for schools modelled on the provincial schools, the presence of several Aboriginal nations with different languages at the same Residential School, a lack of teachers capable of teaching in Aboriginal languages and the lack of texts in the Aboriginal languages.

119. If particular members of the Plaintiff classes were in any manner punished or demeaned while in attendance at Residential School for speaking their Aboriginal languages or practicing their cultural or spiritual traditions, such actions were in no way directed by any policy set by Canada and some were directly contrary to policies set by Canada.

120. If individual members of the Plaintiff classes suffered losses of language and culture, such losses occurred as a result of a myriad of historical, personal, societal and community circumstances, as a result of the interaction of Aboriginal communities and mainstream society, as a result of the progressive urbanization of Canadian society, as part of an observable international trend towards the diminishing use of minority languages and culture, and not as a result of any acts or omissions of Canada or its employees or agents with respect to the operation of Residential Schools.

121. In specific answer to paragraph 40, the Defendant denies that Aboriginal culture was strictly suppressed by school administrators in compliance with the policy directives of Canada. Further, the specific acts alleged in paragraph 40, if they occurred, took place prior to the Class Period and were done by the Oblates. The Oblates were not the employees or agents of Canada and the acts alleged were not done at the direction of or in compliance with any policy of Canada. Further, the acts alleged had no connection to SIRS.

No Breach of Fiduciary Duty

122. The Plaintiff alleges a number of breaches of fiduciary duty.

123. The Defendant denies the existence of a fiduciary duty or obligation owed to members of the Plaintiff Classes, or any of them, as alleged in the statement of claim.

124. Governments will owe fiduciary duties only in limited and special circumstances, and these circumstances do not exist in this case.

125. The Defendant acknowledges that the relationship between the federal Crown and the Aboriginal peoples of Canada is a fiduciary one; however, the facts as alleged do not give rise to a fiduciary duty owed by Canada to members of the Plaintiff Classes, or any of them. No specific fiduciary duty is triggered or exists in respect of the circumstances pleaded by the Plaintiffs.

No breach of fiduciary duty through the establishment, funding, operation, supervision, control, maintenance or attendance of Survivor Class Members at Residential Schools

126. The Defendant denies that the establishment, funding, operation, supervision, control, maintenance or attendance of Survivor Class members at Residential School gave rise to a fiduciary duty as alleged or at all.

127. Further, Canada, in providing education to Aboriginal children pursuant to the *Indian Act*, did not put its own interests ahead of Aboriginal children, either at

all or in any way that could be conceived to be a betrayal of trust or loyalty. Further, at no time did Canada act in its own self interest or against the interests of the Plaintiffs or members of the Plaintiff Classes.

128. Further, there is no "cognizable Indian interest" present as asserted by the Plaintiffs. Canada did not exercise "discretionary control" over the Residential Schools and/or members of the Plaintiff Classes, or any of them. The facts necessary to ground a claim in fiduciary duty are not present in this case.

129. Alternatively, even if a fiduciary duty exists as alleged, which is denied, Canada did not breach such a duty through the purpose, establishment, funding, operation, supervision, control maintenance, attendance of Survivor Class members at, or support of, Residential Schools

No breach of fiduciary duty "not to destroy language or culture, aboriginal or otherwise"

130. The Defendant denies the existence of a fiduciary duty owed to members of the Survivor, Descendant and Band Class, or any of them, "not to destroy their language or culture, Aboriginal or otherwise," as alleged in the statement of claim.

131. The Defendant says that the Plaintiffs' claim respecting a fiduciary duty not to destroy language and culture is not cognizable at law.

132. To the extent that the Plaintiffs claim that Canada had a positive duty to promote Aboriginal languages, Canada denies that any such duty is known to law and denies that it had any such duty.

133. Further, the Plaintiffs have failed to properly particularize their claims respecting the various languages or cultural activities at issue. In the absence of the necessary material facts, the claim for breach of fiduciary duty not to destroy the Plaintiffs' languages or cultures ought to be struck

134. Alternatively, even if a fiduciary duty exists as alleged, which is denied, Canada did not breach such a duty.

No breach of fiduciary duty to protect the Survivor Class members from actionable mental harm

135. The Defendant denies the existence of a fiduciary duty to members of the Survivor Class, or any of them, to protect them from actionable mental harm as alleged in the statement of claim. The Plaintiffs have failed to identify sufficient particulars to support this claim. In the absence of the necessary material facts, the claim for breach of fiduciary duty to protect from actionable mental harm ought to be struck

136. Alternatively, even if such a fiduciary duty exists as alleged, which is denied, the Defendant did not breach such a duty.

RESPONSE TO CLAIM FOR CONSTITUTIONALLY MANDATED DUTIES

137. The Defendant denies that Canada breached constitutionally-mandated duties owed to members of the Survivor, Descendant and Band Class, or any of them, as alleged in the statement of claim, including through the purpose, establishment, funding, operation, supervision, control, maintenance, obligatory attendance of Survivor Class members at, and support of, the Residential Schools.

138. The Plaintiffs have alleged that any section of the *Indian Act* or its predecessors that provides statutory authority for the eradication of Aboriginal people is in violation of the *Constitution Act, 1982* and should be treated as having no force and effect. The Plaintiffs have failed, however, to plead any material facts in support of this claim. In the absence of any material facts pled on this issue, this claim should be struck.

139. The Defendant denies the existence of the constitutionally-mandated duties the Plaintiffs allege are owed to the members of the Plaintiff Classes.

140. Alternatively, even if constitutionally-mandated duties exist, Canada did not breach such duties.

141. In the further alternative, if constitutionally-mandated duties exist, and if Canada breached such duties, any such breach is justified.

RESPONSE TO CLAIM FOR BREACH OF STATUTORY DUTIES

142. The Defendant denies that Canada breached statutory duties owed to members of the Survivor, Descendant and Band Class, or any of them, through the purpose, establishment, funding, operation, supervision, control, maintenance, obligatory attendance of Survivor Class members at, and support of, the Residential Schools.

143. The Defendant denies the existence of statutory duties owed to members of the Plaintiff Classes or any of them.

144. To the extent that the Plaintiffs' claim is based upon dissatisfaction with the requirement for mandatory school attendance that was introduced in the *Indian Act*, such a claim is bound to fail. The requirement for mandatory school attendance was created by Parliament through legislation and was not simply imposed by the Crown. As such, the doctrine of Parliamentary Supremacy applies.

145. To the extent that the Plaintiffs have particularized their claim under this heading to one that is actually based upon discretionary statutory authority rather than statutory duties, no legal liability can arise from the exercise or non-exercise of such authority.

146. Alternatively, even if the alleged statutory duties exist, Canada did not breach such duties.

NO BREACH OF ABORIGINAL RIGHTS

147. The Plaintiffs allege the following Aboriginal Rights on their own behalf and on behalf of members of the Plaintiff Classes: (i) to speak their traditional languages; (ii) to engage in their traditional customs; (iii) to engage in their religious practices; and (iv) to govern themselves in their traditional manner.

148. The Plaintiffs have identified four general alleged Aboriginal rights or otherwise in their statement of claim, but have failed to identify any specific pre-contact practice, custom or tradition which supports the claimed rights. Further, the Plaintiffs have failed to identify the modern activity that has a reasonable degree of continuity with the pre-contact practice, custom or tradition. In the absence of the necessary material facts, the claim for breach of Aboriginal rights ought to be struck.

149. In addition, members of the Survivor and Descendant Class are not rights-holding collectives on whose behalf a sustainable Aboriginal rights claim can, as a matter of law, be advanced. Nor do the Plaintiffs have standing to bring any such Aboriginal rights claim on behalf of class members or any rights-holding Aboriginal groups that may be subsumed within the Survivor and Descendant Class.

150. The Defendant denies that the Sechelt Indian Band or the Tk'emlúps te Secwépemc Indian Band are the proper collectives to advance a claim for breach of the Aboriginal rights of the shishalh or the Secwépemc peoples, respectively. The Defendant says further that, while the Plaintiffs claim that "this claim applies to all Aboriginal Nations in Canada who had Day Scholars attend Residential Schools", they have failed to identify any other Aboriginal collectives with the authority to pursue the claim for breach of Aboriginal rights on behalf of their members.

151. The Defendant denies that Canada breached the Aboriginal rights or otherwise of members of the Plaintiff Classes, or any of them to speak their traditional

languages, to engage in their traditional customs and religious practices and to govern themselves in their traditional manner.

152. The Defendant denies the existence, breach or infringement by Canada of the Aboriginal rights asserted by the Plaintiffs in their statement of claim.

153. The recognition and affirmation in 1982 of existing Aboriginal rights under s. 35 of the *Constitution Act, 1982* protects such rights from unjustifiable infringement by legislative action. The Plaintiffs have not asserted an Aboriginal right that is cognizable at law. Further, there has been no infringement of an Aboriginal right of the Plaintiffs by federal legislation or by act of the Federal Crown.

154. The Plaintiffs have particularized their claim as asserting that their Aboriginal right was to "rely on Canada to protect their languages, culture and spirituality". The alleged duty of Canada in this regard does not exist at law.

155. In the alternative, if Canada breached the Aboriginal rights or otherwise of the Plaintiffs to speak their traditional languages, to engage in their traditional customs and religious practices and to govern themselves in their traditional manner, any such breach is justified.

156. In the further alternative, there can be no retroactive or retrospective application of the alleged Aboriginal rights.

NO BREACH OF COMMON LAW DUTIES

157. The Defendant denies that it breached common law duties owed to the Survivor, Descendant and Band Class, or any of them, through the purpose, establishment, funding, operation, supervision, control, maintenance, obligatory attendance of Survivor Class members at, and support of, the Residential Schools.

158. The Defendant denies the existence of common law duties owed to the Plaintiffs.

159. The Statement of Claim fails to identify any common law duties allegedly owed by Canada to the Plaintiffs, and as such, this claim should be struck.

160. Alternatively, even if common law duties exist, Canada did not breach such duties.

RESPONSE TO CLAIM FOR CULTURAL, LINGUISTIC AND SOCIAL DAMAGE AND IRREPARABLE HARM

161. The Plaintiffs allege that the Residential Schools Policy as defined in the statement of claim and the Residential Schools caused "Cultural, Linguistic and Social Damage" and "irreparable harm" to the Survivor, Descendant and Band Class. The plaintiffs do not provide a meaningful definition of what they say is "Cultural, Linguistic and Social Damage," and plead no material facts in support. Insufficient particulars of this claim are provided.

162. Cultural, linguistic and social damage is not a cause of action that is cognizable at law, and this claim therefore ought to be struck.

163. Irreparable harm is not a stand-alone cause of action, but rather forms part of the tripartite test for injunctive relief. As such, this claim ought to be struck.

NO NEGLIGENCE / INTENTIONAL INFLICTION OF MENTAL DISTRESS

164. The Defendant denies that Canada owed a duty of care to members of the Survivor Class, or any of them, to protect them from intentional infliction of mental distress as alleged in the statement of claim.

165. The facts pleaded do not satisfy the legal test for the creation of a duty of care.

166. Alternatively, Canada's conduct did not breach the standard of care.

167. A proximate relationship did not exist between Canada and members of the Survivor Class. 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 members of the Survivor Class at the Residential Schools.

168. In the alternative, if Canada owed a duty of care to members of the Survivor Class, or any of them, to protect them from intentional infliction of mental

distress, which is denied, Canada denies that members of the Survivor Class, or any of them, suffered damages as a result of Canada's conduct.

169. If the Survivor Class suffered damages, which is denied, the damage was not caused by Canada's conduct.

NO BREACH OF DUTY OF CARE TO PROTECT FROM ACTIONABLE MENTAL HARM

170. The Defendant denies that it owed a duty of care to members of the Survivor Class, or any of them, to protect them from actionable mental harm as alleged in the statement of claim. The Plaintiffs have failed to plead the necessary material facts to support this claim. In the absence of the necessary material facts, the claim for breach of duty of care to protect from actionable mental harm ought to be struck.

171. Any claim in negligence against Canada must be grounded in the negligence of individual Federal Crown agents or servants. Canada's liability in tort is limited to vicarious liability only. Canada pleads and relies on the *Crown Liability and Proceedings Act*, and its predecessor legislation.

172. To the extent that the Plaintiffs have claimed negligence directly against Canada, such a direct claim against Canada in negligence does not disclose a reasonable cause of action and ought to be struck.

173. Further, the court has no jurisdiction to consider claims with respect to intentional torts that occurred before May 14, 1953, when the *Crown Liability Act* came into effect.

NO CLAIM FOR BREACH OF INTERNATIONAL CONVENTIONS AND COVENANTS, AND INTERNATIONAL LAW

174. In response to paragraphs 63 and 64, Canada is a party to numerous international human rights conventions. Canada has ratified or acceded to, and is therefore bound at international law by the United Nations *Convention on the Prevention*

and Punishment of the Crime of Genocide (which came into force for Canada on December 2, 1952), the *International Covenant on Civil and Political Rights* (which came into force for Canada on August 19, 1976) and the *Convention on the Rights of the Child* (which came into force for Canada on January 12, 1992). As a member of the Organization of American States, Canada is also bound at international law by the rights of the *American Declaration of the Rights and Duties of Man* (as of January 8, 1990).

175. International human rights treaties binding on Canada may be a relevant and persuasive source for interpreting the scope and content of constitutional rights. Where applicable they may also form the basis of an interpretative presumption of conformity between the treaty and ordinary legislation as well as the common law. However, these treaties are not directly enforceable in Canadian law. A treaty provision alone cannot form the basis of an action in Canadian courts, even where that provision is binding on Canada as a matter of international law. Moreover, as a matter of general international law, States' obligations under treaties cannot be applied retroactively or retrospectively.

176. The Defendant denies that it at any time violated its obligations under the United Nations *Convention on the Prevention and Punishment of the Crime of Genocide* and pleads that the Convention itself does not give rise to a cause of action in Canadian law.

177. The Defendant denies that it at any time violated its obligations under the United Nations *International Covenant on Civil and Political Rights* and pleads that the Covenant itself does not give rise to a cause of action in Canadian law.

178. The Defendant denies that it at any time violated its obligations under the United Nations *Convention on the Rights of the Child* and pleads that the Convention itself does not give rise to a cause of action in Canadian law.

179. The Defendant denies that it at any time violated the obligations contained in the *American Declaration of the Rights and Duties of Man* and pleads that the Declaration does not itself give rise to a cause of action in Canadian law.

180. The Defendant states that the United Nations *Declaration of the Rights of the Child* and the United Nations *Declaration on the Rights of Indigenous Peoples* constitute non-binding instruments and do not impose international legal obligations that are binding on Canada. The Defendant denies that it at any time violated these non-binding Declarations and pleads that they do not themselves give rise to a cause of action in Canadian law nor any interpretive presumption of conformity.

181. Further, to the extent that any of these international instruments may inform the interpretation of Canadian constitutional and legislative provisions and the common law, the Defendant pleads that its conduct has been consistent with the international obligations or norms set out in them.

182. In addition, the Plaintiffs have failed to identify particulars of the alleged breaches of international law.

VICARIOUS LIABILITY

183. The Defendant acknowledges that some individual Plaintiffs were subjected to specific actions as alleged by some individual priests, nuns, brothers and others, but more generally denies that the Plaintiffs and the members of the Plaintiff Classes were subjected to all of the wrongful acts alleged in the statement of claim, including, *inter alia*, attempts to eradicate their languages and culture or the negligent or intentional infliction of mental harm. In the alternative, any wrongful acts were not caused by the breach of any duty of Canada or its employees or agents, but solely by the acts or omissions of the church organizations, their employees or agents, for which Canada is not liable.

184. In the alternative, if any employees or agents of the Canada conducted the wrongful acts alleged, Canada is not vicariously liable for those acts. The alleged

wrongful acts were not authorized by Canada, were not consistent with Canada's policy, and were not sufficiently related to the course or scope of employment or agency by Canada or acts authorized within the course or scope of employment or agency by Canada so as to justify the imposition of vicarious liability on it.

185. If any of the persons alleged to have committed the wrongful acts alleged ever became employees or agents of Canada, the Defendant pleads that the church organizations who selected and trained those persons continue to be liable for their actions on the grounds of negligence or negligent misrepresentation, particulars of which are as follows:

(a) The church organizations were the initial employers of such persons, and had regular contact with them in the course of their day to day management and operation of the Residential Schools. Accordingly, they had or ought to have had, knowledge regarding the qualifications and suitability of such persons for employment at the schools and their treatment of the students who attended the schools.

(b) During the material times, they failed to report any concerns to Canada about the qualifications or suitability of such persons for employment at the Residential Schools, but rather held such persons out as being competent employees and appropriate persons to have contact with the students.

(c) They knew that Canada had very little or no knowledge regarding the qualifications or suitability of such persons for employment at the schools, or their treatment of students who attended the schools, and that Canada relied exclusively upon their knowledge and expertise in retaining such individuals, particularly since Canada was not involved in the day-to-day operations of the Residential Schools. Accordingly, it was reasonable in the circumstances for Canada to rely on the representations made by the church organizations regarding such persons.

186. Canada cannot be held vicariously liable in tort for conduct of Crown servants prior to May 14, 1953, which is the date upon which the subsection 3(1)(a) of the *Crown Liability Act*, S.C. 1952-53, 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 negligence of a Crown servant acting within the scope of his or her duties of employment. Furthermore, prior to the amendment of the *Exchequer Court Act*, Canada could only be held liable for the negligence of a Crown servant on a public work. The Defendant denies any such negligence with respect to the Plaintiffs' claim.

DAMAGES AND CAUSATION

187. If the Plaintiffs or the members of the Plaintiff Classes suffered any damage, losses or injuries as alleged, such 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 other actors and other factors unrelated to Canada's conduct. Those other factors include events prior to and subsequent to the attendance of Survivor class members at Residential Schools. Those other actors include religious organizations that operated the Residential Schools, and their members and employees. Further, the damage, losses and injuries alleged by the Plaintiffs are exaggerated, remote and unforeseeable.

188. The Plaintiffs have limited their claim against the Defendant to that portion of any responsibility for compensable harms for which the Defendant might be severally liable, and have waived their claims against the church organizations that founded and operated the Residential Schools. To the extent that the Plaintiffs have suffered any harm, such harm is entirely attributable to those religious organizations and to the priests, nuns, brothers and others who acted on their behalf and not to the Defendant.

189. In the alternative, to the extent that the Defendant is liable for any portion of the Plaintiffs damage, losses or injuries, the Defendant relies upon paragraph 80(a) of the statement of claim and claims an apportionment of damages.

190. To the extent that members of the Band Class requested that industrial, boarding, day or residential schools be established for the education of their children prior to and during the Class Period, the Defendant says that the members of the Band Class consented to and desired the teaching of English or French to their children. To the extent that such consent was not revoked, it is a defence to the claims of the Band Class, or in the alternative, the Defendant is not liable for any portion of damages, if any, which flow from such consent.

191. To the extent that the parents or families of members of the Survivor Class chose to send their children to Residential Schools as day students when alternatives were available and / or chose not to teach them their Aboriginal languages, the Defendant says that it is not liable for the consequences of those choices.

192. To the extent that members of the Survivor class claim that they have suffered loss of their respective languages, which is not admitted, the Defendant says that such losses would have been attributable to a variety of factors. Most of these were beyond Canada's control and cannot give rise to liability. To the extent that education in English (or French) may have been a contributing factor, Canada says that the Plaintiffs have particularized their claim as not being based upon that factor.

193. If members of the Plaintiff Classes, or any of them, 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 Plaintiff Class members' alleged attendance at the Residential Schools.

194. The Defendant denies that the circumstances alleged, if proven, were such as to give rise to liability for special, punitive, exemplary or aggravated damages.

195. 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 members of the Plaintiff Classes were each 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 statement of claim. The Defendant pleads that the Plaintiffs and members of the Plaintiff Classes, individually or as a group, failed to take reasonable actions which would have tended to mitigate damages

196. In answer to paragraphs 27 to 30, 39-45, 51, 59, 60, 62, 65, 73, 76-77 and 80, the Defendant says that if the Plaintiffs or the members of the Plaintiff Classes suffered any damage, losses or injuries as alleged, which is denied, such losses or injuries were caused by the acts or omissions of the church organizations either prior or subsequent to the establishment of Residential Schools and for which Canada is not liable.

197. The Plaintiffs are seeking the assessment of an aggregate damages award from the Court. The Defendant denies that such an award could be assessed in this case even if liability were found, which is denied. The circumstances of each member of the Plaintiff Classes are unique, as are the circumstances of every potential class member. There was no common experience amongst students at the same Residential School, much less at different Residential Schools. The allegations of breach of cultural and/or linguistic rights, be they Aboriginal rights or otherwise, are infinitely varied for each Class Member. 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.

LIMITATIONS OF ACTIONS

198. In further answer to the whole of the Statement of Claim, the Plaintiffs' claims are statute-barred and Canada pleads and relies on section 39(2) of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

199. In the alternative and in further answer to the whole of the Statement of Claim, the Plaintiffs' claims are statute-barred by provincial and territorial limitations

statutes pursuant to section 39(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and Canada pleads and relies on: *Limitation Act*, R.S.B.C 1996, c. 266; *Limitation Act*, S.B.C. 2012, c. 13; *Limitations Act*, R.S.A. 2000, c. L-12; *The Limitations Act*, S.S. 2004, c. L-16.; *The Limitations of Actions Act*, C.C.S.M, c. L150; *Limitations Act, 2002*, S.O. 2002, c. 24; *Civil Code of Quebec*, C.Q.L.R. c. C-1991; *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5; *Limitations of Actions Act*, R.S. 1989, c. 258; *Statute of Limitations*, R.S.P.E.I 1988, c. S-7; *Limitations Act*, S.N.L. 1995, c. L-16.1; *Limitations of Actions Act*, R.S.Y. 2002, c. 139; *Limitations of Actions Act*, R.S.N.W.T. 1988, c. L-8.

200. The Defendant pleads and relies upon the *Crown Liability and Proceedings Act,* RSC 1985, c. C-50, and the *Crown Liability Act*, SC 1952-53, c. 30. Canada also relies on the equitable doctrines of *laches* and acquiescence.

201. 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 Courts Act*, R.S.C. 1985, c. F-7, and s. 31(6) of the *Crown Liability and Proceedings Act*.

RELIEF SOUGHT

202. The Defendant asks that the Plaintiffs' action be dismissed with costs.

DATE: September 8, 2015

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