

STATEMENT OF CLAIM

C A N A D A) Q.B.G. No. of A.D. 2008
PROVINCE OF SASKATCHEWAN)

IN THE COURT OF QUEEN'S BENCH JUDICIAL CENTRE OF REGINA

Between:

ARNOLD CLAY and GEORGE CLARKE

PLAINTIFFS

- and -

**ATTORNEY GENERAL OF CANADA and
MINISTER OF NATIONAL DEFENCE**

DEFENDANTS

BROUGHT UNDER *THE CLASS ACTIONS ACT*

STATEMENT OF CLAIM

NOTICE TO DEFENDANT

- (1) The plaintiff may enter judgment in accordance with this Statement of Claim or such judgment as may be granted pursuant to the Rules of Court unless
within 20 days if you were served in Saskatchewan
within 30 days if you were served elsewhere in Canada or the United States of America
within 40 days if you were served outside Canada and the United States of America

(excluding the day of service) you serve a Statement of Defence on the plaintiff and file a copy thereof in the office of the local registrar of the Court for the judicial centre above-named.
- (2) In many cases a defendant may have the trial of the action held at a judicial centre other than the one at which the Statement of Claim is issued. Every defendant should consult his lawyer as to his rights.
- (3) This Statement of Claim is to be served within 6 months from the date on which it is issued.
- (4) This Statement of Claim is issued at the above named judicial centre the 2nd day of February, 2009.

Local Registrar

TO: ATTORNEY GENERAL OF CANADA
c/o Deputy Minister of Justice
239 Wellington Street
Ottawa, Ontario
K1A 0H8

AND: MINISTER OF NATIONAL DEFENCE
Department of National Defence
Major-General George R. Perakes Building
101 Colonel By Drive
Ottawa, Ontario K1A 0K2

I. CLAIM

1. The Plaintiffs bring this class action on behalf of a Class that includes members of the Canadian Armed Forces who participated in atmospheric atomic weapons testing in operations that took place in Las Vegas, United States of America, between 1946 and 1963, including surviving dependents of deceased Class Members.

2. The Plaintiffs bring this class action on behalf of a Subclass that includes members of the Canadian Armed Forces who participated in atmospheric atomic weapons testing in various operations within the United States of America, Australia, and the South Pacific, between 1946 and 1963, including surviving dependents of deceased Class Members.

3. Arising from the facts and assertions against the Defendants (jointly the “Government”) contained herein, the Plaintiffs claim, on behalf of Class and Subclass, general damages, special damages, costs of periodic testing for radiation-related illness, aggravated damages, punitive damages, pre-judgment interest, costs of this action, and such further and other relief as may be proved and awarded by this Honourable Court, including a *cy-pres* distribution of unclaimed proceeds of an aggregate monetary award.

II. PARTIES

(1) defendants

4. The Defendant, her Majesty the Queen, is represented by the Attorney General of Canada and the Minister of National Defence pursuant to Section 23 of *The Crown Liability and Proceedings Act*, R.S.C. 1985, c.C-50. The Government acted through agents and servants, but not Class Members. Assertions against the Government herein include assertions against their agents and servants.

(1) clay

5. The Plaintiff, Arnold Clay (herein, “Clay”), currently resides in Calgary, Alberta. However, at all material times, Clay was a resident of Nipawin, Saskatchewan. During all material times, Clay was a member of the Canadian Armed Forces, Serial No. SL162458.

6. Clay was born on November 5th, 1936. When he was 19 years old, he enlisted in the Canadian Armed Forces, and, at all material times, was a member of the Queen's Own Rifles, until he was discharged on September 3rd, 1958.

7. In 1957, Rifleman Clay was part of a 900 man battalion that was stationed at Currie Barracks in Calgary, Alberta. In 1957, they informed Clay and his comrades that the Government was seeking one platoon, comprised of 40 soldiers, to send to the United States to do some type of "training".

8. The Government's agents did not describe the nature of that "training".

9. The Government selected Rifleman Clay to participate in the secret testing. The Government flew Clay and his platoon to Nevada, Las Vegas. After arriving in Las Vegas, they were driven through the desert to Camp Desert Rock.

10. In July and August of 1957, when Clay was 19 years old, Clay and his platoon participated in five atomic bomb tests, as part of Operation Plumbbob, including "Shot Smoky" on August 31st. The Government ordered Clay to enter trenches that were unreasonably near to the atomic bombs. Following the blast, Clay was struck by shock waves that knocked Clay and other Class Members down.

11. After the blasts, the Government's agents commanded Clay to march towards where the atomic bombs had been detonated. The platoon was taken over the blast sites in helicopters where he was further exposed to nuclear fallout and personal impact.

12. During the testing, the Government did not provide Clay with extra equipment for his exposure to nuclear radiation. He wore the same military uniform, called "bush clothing", that he wore during his training exercises at the Sarcee Indian Reserve. The Government provided Clay and other Class Members with inadequate dosimeters.

Although standing side by side and exposed to equal amounts of harmful radiation, each Class Member had widely varied nuclear radiation dosimeter readings.

13. The Government sent Clay to participate in the atomic blasts for the purpose of testing the effects of nuclear radiation on humans.

14. Although decontamination facilities were available and used by senior observational officers, the Government did not put Clay through decontamination procedures. His platoon was cleaned off with ordinary straw brooms, which further spread the contamination and loosened radiologically charged particles which they internally ingested.

15. In the atomic blasts in Nevada, Clay was exposed to harmful doses of atomic radiation. His skin was externally exposed and he ingested radiologically contaminated dust particles from the nuclear fallout.

16. Following one of the atomic bomb tests, Clay was ordered to enter an area unreasonably close to the explosion, and as a result was hospitalized for four days. The reasons for Clay's hospitalization, following his exposure to an atomic bomb test, remain unknown.

17. Clay has developed arthritis in his right shoulder, hip, ankles, and knee, and the effects of his exposure to nuclear radiation remain unknown.

(2) *clarke*

18. The Plaintiff, George Clarke (hereinafter "Clarke"), resides in Victoria, British Columbia. Clarke was born on the 25th day of March, 1936.

19. Clarke had enlisted with the Canadian Armed Forces on June 4th, 1956. As a result of his enlistment, he was exposed to radiation as a test subject during operation Plumbbob.

20. Prior to departing to Nevada, Las Vegas, Clarke was part of a 900 man battalion that was stationed at Currie Barracks in Calgary, Alberta.

21. In 1957, when his Company was engaged in training exercises at Camp Wainwright, Alberta, Clarke was approached by the Government's agents. They informed Clarke and his comrades that the Government was seeking one platoon, comprised of 40 soldiers, to send to the United States to observe military tests.

22. The Government's agents did not describe to Clarke the nature of the commitment of going to Desert Rock, Nevada. No additional documentation was required in respect to security clearance, however all personnel were cautioned not to talk of the activities and their experience while on the testing grounds.

23. A briefing had been given to Clarke prior to his commitment to the Nevada secret testing, however this briefing did not contain any radiological preparation. The only training obtained prior to participating in the Nevada secret testing was basic infantry field operations. Clarke was informed by the Government's agents that he and his platoon would be going to Nevada as observers, and there was no mention or anticipation that they would be employed as actual members involved in atomic bomb testing operations.

24. In 1957, Clarke's battalion was tasked to provide an up to strength platoon for employment to Nevada to observe atomic tests, during the months of July, August, and early September. As part of the Company chosen, "C" Company and 7 platoon, was delegated as the sub-unit for deployment. This platoon moved to Camp Wainwright, Alberta, in early June 1957 to participate in battalion advanced training and with this platoon picked to represent the battalion in a forced march competition. Clarke having completed these tasks, returned with the platoon to Currie Barracks for preparation of clothing and general training equipment.

25. The platoon departed for Nevada in July, 1957. The personnel that made up this platoon, including Clarke, came from all disciplines within the battalion, and at no time was any nuclear, biological, or chemical warfare training carried out in preparation for this deployment.

26. The Government flew him and his platoon to Las Vegas, Nevada. After arriving in Las Vegas, the Class Members were driven through the desert to Camp Desert Rock. It was at this time that Clarke was informed that he would be in the trenches, exposed to nuclear, biological, or chemical warfare testing.

27. Clarke had participated in five atomic bomb detonations during the Operation Plumbbob, from July to September 1957. During this time, Clarke's employment was that of a test subject but the Government's agents had never warned him or prepared him for this employment.

28. During the testing, the Government did not provide Clarke with extra equipment for his exposure to radiation. He wore the same military uniform, called "bush clothing", that he wore during his training exercises at Camp Wainwright, Alberta. The Government provided Clarke and Class Members with inadequate dosimeters. Although standing side by side and exposed to equal amounts of harmful radiation, each Class Member had widely varied nuclear radiation dosimeter readings.

29. In the atomic blasts in Nevada, Clarke was exposed to harmful doses of atomic radiation. His skin was externally exposed and he ingested radiologically contaminated dust particles from the nuclear fallout. The Government did not put Clarke through decontamination procedures.

30. On April 5th, 1981 Clarke was discharged from the Canadian Armed Forces.

31. Following Clarke's discharge, he was diagnosed of hypothyroid. Due to medical problems relating to ionizing radiation (thyroid) and actual gamma radiation exposure, Clarke approached Veterans Affairs. At that time the Government informed Clarke that there was no connection between his medical problems and his military duties in Nevada, and that no help would be forthcoming.

III. FACTS

32. On August 5th, 1963, the United States, Soviet Union, and United Kingdom signed the Atmospheric Test Ban Treaty in Moscow. Between 1946 and August 5th, 1963, the Government exposed Class Members to harmful radiation at atmospheric atomic weapons testing sites in Nevada, Australia, and the South Pacific, including in Human Radiation Experiments ("HRE"), the purpose of which was to observe effects of radiation on soldiers.

33. Each and every Class Member, including surviving dependents of deceased, were exposed to ionising radiation, radiation contamination, radioactivity, radioactive fallout, or biological residue during the conduct of the tests, trials, and experiments which comprised the atomic weapons testing conducted in the United States of America, Australia, or the South Pacific, between 1946 and 1963.

34. During the tests, the Government ordered Class Members to position themselves in evenly calibrated trenches near intended atomic bomb detonation sites. Class Members saw bones in their hands and arms through their flesh when the flash from the blast passed. After the blasts, the Government ordered Class Members to walk towards the atmospheric atomic testing and spend unreasonable amounts of time in areas contaminated with radiological dust and nuclear fallout. The Government recorded the effects of radiation on Class Members.

35. Although initial testing began in 1946, experiments escalated in the 1950's. In early 1953, Dr. Solandt, an employee of the Government (Chairman of the Defence Research Board), asked the Chiefs of Staff Committee ("CoSC") to seek permission of the United States to have Class Members participate in atomic bomb testing.

36. On May 25th, 1953, General Charles Foulkes ("General Foulkes"), chairman of the CoSC, ordered Rear-Admiral De Wolf at the Canadian Joint Staff in Washington to seek such permission.

37. On November 5th and 6th, 1953, after General Foulkes met with American General Matthew Ridgway ("Ridgway"), the United States granted permission to position Class Members as close as possible to the atmospheric atomic testing.

38. The tests, trials, experiments, and clean-up operations were planned and conducted with disregard for the physical consequences upon the Class Members, or alternatively with the stated intent of exposing the Class Members to the potentially devastating consequences of radiation.

39. At the time of the tests, the Government knew or ought to have known of the potentially harmful effects of exposure to radiation by reason of, but not limited to:

(1) The human and biological consequences of the Hiroshima and Nagasaki atomic detonations in 1945;

(2) The Medical Research Council Paper dated the 6th of February 1947, acknowledging that even the smallest doses of radiation produced a genetic effect in various organisms (plants; viruses; bacteria; funghi; insects; and mice) and that there was no threshold dose below which no effect was seen; and

(3) The Medical Research Council report of June 1956 which stated that:

(i) There are two types of radiation effects:

- (A) effects on the individual and (B) genetic effects; and
- (ii) The effects on the individual can be occasioned by a single large dose of, 500 r, in the manner of radiation sickness and possibly death.

40. In December, 2008, Clay acquired a document, now in his possession, entitled “ATOMIC VETERANS” *A Report to the Minister of National Defence regarding Canada’s Participation in Allied Forces’ Nuclear Weapons Trials and Decontamination Work*, by Dr. John Murray Clearwater, for the CWATRP, Department of National Defence, National Defence Headquarters, 101 Colonel By Drive, Ottawa, ON, K1A 0A6, stating:

10. On 6 December 1956 Foulkes made a formal request that Canada be permitted to participate in upcoming nuclear weapons tests in 1957. He asked for several vacancies (at least 1100 places), with emphasis on participants who would undertake decontamination and radiological survey exercises.

[...]

(Letter to the Chairman Canadian Joint Staff from General Foulkes, “Canadian Request for Atomic Information”, CSC 1894.2, 6 December 1956. DHH 73/1430, file 2, vol 2.) (also in RG24, Vol 6633, file S-960-Plumbbob, Vol. 1)

15. During the Pentagon meeting the draft of an inter-service memorandum of agreement had been worked out concerning Canadian participation in Operation Plumbbob. The agreement only covered Camp Desert Rock activities, and did not apply to VIP observers or to those observing the air-to-air firing at Shot John on 19 July. Interestingly and ominously, paragraph eight of the agreement stipulated that “Safety criteria for Canadian participants will not be set at higher limits than those established for U.S. Military participants”. Ottawa was prohibited from using higher safety standards to protect Canadian service personnel during US tests. Canadian officials had to supply their standards to the US for concurrence no later than 17 June.

(Memorandum of Agreement Concerning Canadian Military Participation in

Operation Plumbbob, S-960-100-Plumbbob (DarmE), 25 March 1957. RG24, Vol 6633, file S-960-Plumbbob, Vol.1.) (See also Draft Memorandum of Agreement Concerning Canadian Participation in Operation Plumbbob, c. 02 April 1957. DHH 73/1430.)

43. When it was all over General Foulkes wrote to the US chairman of the joint chiefs, General Twining, to thank him for the co-operation. Foulkes noted that about 500 Canadian service personnel had taken part in Desert Rock VII and VIII during Plumbbob, and that they were all now better equipped to deal with modern war. He characterized the activity as an “outstanding success” and said that joint co-operation “will have a salutary effect out of all proportion to our material investment”.

(Letter to US Chairman JCS General Twining from CcoS General Foulkes, regarding Desert Rock at Plumbbob, 24 September 1957. DHH 73/1223, file 323.)

69. US record show that Canadian troops sustained rather high doses of radiation when compared to other troops in the task force. Averaging of the film badges by the reconstruction team showed that QoR were exposed to nearly twice the amount of airborne radiation experienced by the main body of US forces in Warrior (338 mrem versus 186 mrem). (*Analysis of Radiation Exposure for Task Force Warrior, Short Smoky, Exercise Desert Rock VII-VIII, Operation Plumbbob.* DNA 4747F, Defense Nuclear Agency, Washington, 31 May 1979.)

41. Common to all claims, Class Members were neither adequately warned of, consented to, or protected from the radiation exposure they encountered. The Government did not obtain informed consent from Class Members prior to their participation, or in the alternative any consent obtained from Class Members was vitiated by the lack of warning or protection from radiation exposure they encountered in respective operations.

(1) operation crossroads (1946)

42. Between June 9th and August 2nd, 1946, the Government ordered Class Members to attend Bikini Atoll in the Marshall Islands to observe and participate in the testing of 23kt, plutonium cored, Mk-III "Fat Man" airburst atomic weapons tests, including on July 1st, 1946 ("Able") and July 25th, 1946 ("Baker"). They were struck with shock waves from shots Able and Baker, ordered onto radioactive ships, and exposed to harmful doses of radiation, including through contact with radioactive water and soil.

(2) operation teapot (1955)

43. On May 18th, 1954, the United States informed General Foulkes that the Government could send Class Members to Operation Teapot, which consisted of 14 atomic blasts. On June 7th, 1954, Generals Foulkes and Ridgway met to arrange details. In November of 1954, Lt. Col. Klaehn and Captain Rankin, Government agents, met with Americans to plan Canada's role. Thereafter, the Government ordered Class Members to the Nevada Test Site to participate in Operation Teapot, including the following blasts:

- (1) April 6th, 1955: "HA" (3 kt);
- (2) April 9th, 1955: "POST" (2 kt);
- (3) April 15th, 1955: "MET" (Military Effects Test) (22 kt); and
- (4) May 5th, 1955: Apple Two (Exercise Sapling) (29 kt).

44. The Government positioned Class Members in trenches as close as possible to the explosions and closer than the Americans. In the trenches, Class Members were struck with rocks, sand, dirt, and atomic fallout.

45. After the atomic explosions or "shots", Class Members participated in radiation and fallout tracking tests. They were provided with film badges that did not provide accurate radiation readings, thereby inducing them to remain in dangerous radioactive areas and fallout fields without respirators and dust masks for unreasonably lengthy periods of time. They absorbed toxic doses of radiation.

(3) operation redwing (1956)

46. On April 6th, 1956, General Foulkes accepted an American invitation to send Class Members to observe and participate in Operation Redwing, which consisted of 17 tests at Bikini and Enewatok near the Marshall Islands. On July 21st, 1956, Class Members participated in shot "Tewa", a 5 Mt atomic bomb which produced a mushroom cloud 30 km high, with a flash seen 640 km away, and, on July 22nd, 1956, in shot "Huron" (250 kt).

(4) operation plumbbob (1957)

47. In 1954, the Government and the United States convened to plan the use of Class Members in Operation Plumbbob. In a *Memorandum of Agreement Concerning Canadian Military Participation in Operation Plumbbob*, dated March 25th, 1957, the Government agreed to refrain from setting higher safety standards for Class Members than those established for American participants. On December 6th, 1956, General Foulkes formally requested permission to permit 1,100 Class Members from the Royal Canadian Navy, Air Force, and Army to participate in decontamination and radiological survey exercises.

48. In June, July, and August of 1957, Class Members observed detonations of atomic bombs including shots "Priscilla" (37 kt on June 24th), "Hood" (74 kt on July 5th), "Diablo" (17 kt on July 15th), "John" (2 kt on July 19th), "Kepler" (10 kt on July 24th), "Owens" (10 kt on July 25th), "Stokes" (19 kt on August 7th), "Shasta" (17 kt on August 18th), and "Smoky" (44 kt on August 31st).

49. During these tests, Class Members were struck with shock waves and unreasonable amounts of radioactive contamination at levels higher than their American counterparts. They were ordered to enter areas unreasonably close to where the bombs had exploded and where fallout was thick.

(5) operation hardtack (1958)

50. On March 15th, 1958, the United States invited Canadian participation in Operation Hardtack, a series of 35 atmospheric atomic weapons tests in the Pacific Ocean and Nevada. On April 3rd, 1958, General Foulkes accepted the invitation and briefed the Government. Between May 2nd and 15th, 1958, Class Members participated in Operation Hardtack, including shot Cactus (18 kt) on May 5th. Although he sent Class Members to participate, Faulkes rejected an invitation to personally attend because of the health risks.

(6) operation buffalo (1956)

51. On September 22nd, 1954, General Foulkes offered the services of the No. 1 Radiation Detection Unit to monitor radiation at Operation Buffalo, which consisted of four atomic tests at Maralinga, Australia. On June 22nd and 23rd, 1955, he approved participation. On April 3rd, 1956, the Defence Research Board recommended against setting dosage limits too high. On June 29th, 1956, the Treasury Board declared that Class Members who attended Operation Buffalo were uninsurable due to the danger of the tests.

52. Between June 15th and November 10th, 1956, Class Members were dispatched to Maralinga, where they observed and participated in shots Buffalo Round One, Two, Three and Four (September 27th, October 4th, October 11th, and October 22nd). Major R.E. MacDonald commanded the #1 Radiation Detection Unit in Operation Buffalo. Class Members were impacted by heat flashes, shock waves, and radioactive dust. They were ordered into the centre of the detonation areas to measure fallout radiation levels.

(7) operation grapple (1957)

53. On February 1st, 1957, the Government, through the CofSC, authorized Class Member participation in Operation Grapple, four atomic tests. Class Members witnessed 100-300 kt blasts from shots Grapple One (“Short Granite”), Two (“Orange Herald”), and Three (“Purple Granite”), on May 15th, May 31st, and June 19th, 1957.

(8) operation antler (1957)

54. On February 1st, 1957, the CofSC ordered Canadian participation in Operation Antler (referred to by the Government as “Operation Sapphire”), which consisted of three tests, Antler Round One, Two, and Three, in the fall of 1957 (September 14th, September 25th, and October 9th). Class Members participated in thermal, smoke rocket, gamma spectrometer, and radiological measurements.

IV. CAUSES OF ACTION

55. The Plaintiffs claim all appropriate remedies for the Government’s negligence, breaches of fiduciary duties, battery, honour of the crown, and aggravated, exemplary, and punitive damages.

(1) negligence

(A) duty of care

56. The Government breached its duty to Class Members by ordering them to observe and participate in atmospheric atomic testing. The Class Members were test subjects. The Government systemically failed to take reasonable care to protect Class Members from the foreseeable consequences of exposure to radiation, the particulars of which included failure to:

- (1) provide reasonably effective equipment which would have eliminated or reduced Class Members’ injuries;
- (2) follow available protocols. The Government was aware of the Atomic Energy Commission’s standards for protective equipment, appropriate contamination testing and decontamination procedures, but failed to implement them. The Government set radiation exposure limits, tolerance dosages, and protection standards that were unreasonably dangerous in comparison to those adopted by the United States and below the standard of the day as recommended by the Atomic Energy Commission. The Government’s Maximum Permissible Level regulatory orders were unreasonable;

- (3) provide reasonable contamination testing. The Government provided shoddy quartz-fibre dosimeters, film badges, and radiation survey meters which provided low maximum readings and could not detect true levels of radiological risk; and
- (4) provide reasonable decontamination procedures.

(i) foreseeable harm

57. The Government owed a duty of care upon to Class Members. Particulars of the relationship of proximity include:

- (1) the harms described herein were the reasonably foreseeable consequences of exposure to atomic radiation and the Government's breach of duties;
- (2) Class Members did not expect to be exposed to harmful radiation; and
- (3) the Government controlled the lives of Class Members, except when on leave.

58. The following harms occasioned to the Plaintiffs were the reasonably foreseeable consequence of the Government's failure to provide the Plaintiffs with reasonable equipment in Nevada for the exposure to nuclear, biological, or chemical warfare testing:

- (1) that Class Members would absorb Alpha and Gamma particles ingested or lodged in their pores and hair follicles; and
- (2) the cost of measuring exposure to gamma radiation and to indicate the presence of neutron fields for the Class exposed to radiation;

59. The Government intended, and it was reasonably foreseeable that, members of the proposed Class would enter the radioactive areas and be exposed to Alpha and Gamma particles ingested or lodged in their pores and hair follicles. The radioactive areas after the atmospheric atomic testing, and the exposure to Alpha and Gamma particles ingested or lodged in pores and hair follicles were unreasonable risks of which the Government knew, having placed the Class Members unreasonably near the atomic bombs that exploded.

(ii) proximity factors

(a) the parties' expectations

60. The Plaintiffs and Class Members could not objectively be found as a class to expect that the Government would intentionally and negligently direct them to walk towards atmospheric atomic testing or areas where there was a high risk of absorbing Alpha and Gamma particles ingested or lodged in their pores and hair follicles without reasonable equipment.

(b) representations

61. At various times, including those set out in the particularization of punitive damages below, the Government represented to the Class Members who served with the Canadian Armed Forces that they would be training in the United States, but instead they were human test subjects to atmospheric atomic testing due to the Government's misrepresentations.

(c) reliance

62. The Plaintiffs, and Class Members, having been directed to enter the radioactive areas, were entitled to rely on an objective basis, on the Government to ensure that the risks associated with the operations were reasonable and to take appropriate rescue action once that the risk of having Alpha and Gamma particles ingested or lodged in their pores and hair follicles was known and had materialized.

63. The Government knew that members of the Canadian Armed Forces that were under its charge relied on it to avoid and minimize the risk. Individuals were entitled to rely on the Government, in providing facilities, to take reasonable precautions to reduce the risks associated with exposure to radioactive areas and to pay for the costs resulting from exposure to gamma radiation and presence of neutron fields.

(d) other interests involved

64. Personal and bodily integrity have been jeopardized by the unreasonable risks to health associated with exposure to radiation containing Alpha and Gamma particles which are ingested or lodged in pores and hair follicles.

(e) causal relationship to the origin of the risk of injury

65. The Government allowed and directed the Plaintiffs and Class Members to be exposed to Alpha and Gamma particles at the location of atmospheric atomic testing, and invited individuals, and directed the Plaintiffs, and Class Members, to walk towards the atmospheric atomic testing sites.

(f) any assumed or imposed obligations

66. From time to time, the Government assumed the obligation to assess the radioactivity of the atmospheric atomic testing. If it had exercised the standard of care of a reasonably prudent environmental assessor, the Government would have:

- (1) uncovered the unreasonably high rates of radiation; and
- (2) prohibited the Class from being unreasonably near the atmospheric atomic testing without reasonably effective equipment to protect them from absorbing Alpha and Gamma particles.

(g) formal position of power

67. The Plaintiffs, and Class Members, were in a position of special vulnerability *vis a vis* the Government. The Government assumed complete control and supervision over the movement and activities of the Plaintiffs and class members while they were in the service of the Canadian Armed Forces.

68. The Government systemically commanded the Plaintiffs, and Class Members, to go to radioactive areas, and instructed them not to leave those areas, thereby violating or restricting their autonomy. At all material times, the Government had a right to control the Plaintiffs, and Class Members, and had a correspondingly elevated duty to take care for their safety.

69. The Government carefully monitored and controlled access to the atmospheric atomic testing to civilians and militarials by erecting gates around the perimeter and requiring individuals to sign in through range control. Having assumed control of individuals at the atomic testing operations, the Government had an enhanced responsibility to safeguard against the health risks arising from the radioactive areas.

(h) material implication in the creation and control of a risk to which:

(i) others have been invited

70. The Government created or enhanced the risk of absorbing Alpha and Gamma particles, directing, and enabling individuals to participate in the atmospheric atomic testing. Accordingly, the Government were required to take special steps to protect against the risk of absorbing Alpha and Gamma particles ingested or lodged in their pores and hair follicles.

71. Having created and invited individuals to the radioactive areas, the Government owed a duty to intervene when it became aware of the threat of absorbing Alpha and Gamma particles ingested or lodged in their pores and hair follicles, for those exposed to the radiation. The content of the duty includes payment of the costs which resulted from exposure to radiation in the atmospheric atomic testing.

(ii) statutory proximity

72. All statutory provisions evidencing a relationship of proximity between the Government and the Plaintiffs, and Class Members, over Canadians in general are too prolix for inclusion herein, being derived from all the Statutes and Regulations of Canada in force and effect in 1957 and as amended, repealed, and expanded from time to time thereafter, and are a matter for particulars and discovery, but include:

- (a) Section 2 of the *Pension Act*, R.S.C. 1985, c. P-6 codifies the Government's assumed or imposed obligation to "those members of the forces who have been disabled or have died as a result of military service, and to their dependants"; and
- (b) Section 25 and Subsection 26(2) of the *Pension Act*, R.S.C. 1985, c. P-6 wherein the Government contemplated that members of the Canadian Forces would sue the Government for personal injuries arising from military activities even over and above the award of any pension entitlement arising from the same death or disabilities.

73. The Plaintiffs were bound at all material times by the *National Defence Act*, R.S., 1985, c. N-5, ("*National Defence Act*") and under Section 20(2) were "enrolled as officer cadets or as non-commissioned members for indefinite or fixed periods of service as may be prescribed in Regulations made by the Governor in Council".

74. The Plaintiffs were liable to perform the duties imposed upon them under Section 33 of the *National Defence Act*, and could not refuse to participate in the atmospheric atomic testing.

(iii) stage 2 policy considerations

75. The Government bears an evidentiary burden of showing countervailing policy considerations and their absence need not be pled by the Plaintiffs. However, there are no countervailing policy considerations which would negate the *prima facie* duty of care including:

- (a) the scope of the duty;
- (b) the class of persons to whom it is owed; or
- (c) the damages to which breach may give rise.

(B) standard of care

76. As a result of dealing with inherently dangerous radioactive substances, the Government were subject to an elevated standard of care.

77. When the Government were addressing their mind on whether to undertake the atmospheric atomic testing and in executing the operations once undertaken. The Government owed a duty to:

- (a) take reasonable care to avoid creating an environment that posed an unreasonable risk of causing Alpha and Gamma particles to be ingested or lodged in pores and hair follicles of the Class who were exposed; and
- (b) take reasonable precautions to negate or mitigate the risk to the Class, once created.

78. The standard of care expected of the Government was not materially different in each year between 1957 and 2009.

79. Class Members were employed by the Government, within the regular and reserve forces who were willing and were expected to perform routine and systematic operations, and it was expected that reasonably effective equipment would be provided.

80. Techniques were available, which the Government did not employ, to:

- (a) prevent the Alpha and Gamma particles to be ingested or lodged in pores and hair follicles of Class Members in unreasonable amounts; and
- (b) remove the Alpha and Gamma particles to be ingested or lodged in

pores and hair follicles that had been allowed to accumulate in the clothes of Class Members immediately after their exposure to atmospheric atomic testing.

81. Reasonably effective equipment was available for protection against the exposure effects of atmospheric atomic testing, however it was not provided by the Government, although they had full knowledge of the potential adverse health effects which result from exposure to radiation, and could have been mitigated at a reasonable cost by providing safer equipment in compliance with industry standards.

82. The social utility component of the standard of care included the Government's express recognition of the following:

- (a) the need to protect human health by ensuring the safe and effective use of technology;
- (b) the need to protect human health from the risk of any adverse effects of the exposure to radiation; and
- (c) the need to act expeditiously and diligently to assess level of exposure to radiation and assess the risk that such exposure to radiation has on human life and health.

83. Particulars of the failure to meet the standard of care expected of the Government included:

- (a) providing no reasonably adequate precautions to individuals to guard against exposure to radiation containing Alpha and Gamma particles, and to mitigate the extent of exposure;
- (b) failing to provide adequate washing facilities after exposing individuals to high doses of radiation; and
- (c) failing to manage and implement proper safety measures to ensure expeditious

clean up of radiation containing Alpha and Gamma particles, and minimize the Plaintiffs exposure to radiation.

84. The Government had knowledge of the dangers in 1957 when it ordered the participation of Class Members in the atmospheric atomic testing. At all material times, the Government knew or ought to have known that radiation could cause serious adverse health impacts on Class Members, if not provided reasonably effective equipment.

85. The decision to have the Class Members participate in the atmospheric atomic testing at various times and in various locations was made in a grossly negligent manner, given the quantity of information available to the Government at all material times regarding the radioactivity and deleterious health effects associated with absorbing Alpha and Gamma particles to be ingested or lodged in pores and hair follicles.

(C) causation

86. But for the negligent acts and omissions of the Government, the Plaintiffs' injuries as described herein would not have occurred.

87. In the alternative, the Government's acts and omissions as set out herein materially contributed to the Plaintiffs' injuries. The current limits of scientific knowledge make it impossible for the Plaintiffs to prove that the Government's negligence caused the Plaintiffs' injuries using the "but for" test. The Government clearly breached a duty of care owed to the Plaintiffs, thereby exposing the Plaintiffs to an unreasonable risk of absorbing Alpha and Gamma particles to be ingested or lodged in pores and hair follicles, and the Plaintiffs' have suffered from that form of injury. The Plaintiffs' injuries falls within the ambit of the risk created by the Government's breach. It would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.

88. As a result of exposure to atomic radiation, Class Members suffered harm, including radiation poisoning and acute and chronic radiation syndrome. They developed genetic damage, leukemia, lymphoma, multiple myeloma, and cancers of the pharynx, small intestine, salivary gland, brain, stomach, gall bladder, urinary bladder, colon, thyroid, pancreas, esophagus, bile ducts, and lung. They will incur healthcare and radiological monitoring expenses to facilitate early diagnosis of conditions associated with exposure.

89. The Department of Veterans Affairs has not provided benefits to Class Members for harms suffered as a result of exposure to atmospheric atomic testing.

(2) breach of fiduciary duties

90. The Government owed fiduciary duties to Class Members. By engaging in service, Class Members surrendered their liberty and were totally controlled by the Government. They were trained to have full faith in, and completely rely upon, their officers and superiors, and to obey and not question orders. As a result, Class Members reasonably expected that the Government would fully inform them about, and protect them against, any short and long term harm caused as a result of compliance with orders.

91. At the time it ordered Class Members to participate in the first atomic test, the Government knew about the toxic risks of exposure to any amount of radiation. Between March 30th and April 1st, 1953, the Government participated in the *U.S.-Tri-Partite Conference on Permissible Dose* in New York City where dangers to humans of ionizing radiation were addressed with American and British scientists. The Government set permissible doses having regard to what was appropriate for the sustainability of the atomic power and weapons industry. In February of 1954, the Government attended a tripartite conference on the effects of atomic explosions on humans where the Government was informed that *any* dosage of radiation was harmful.

92. On February 21st, 1958, the Government printed a report called *Future Uses of Atomic Weapons and the Banning of Nuclear Tests* wherein it acknowledged the threat of atomic fallout and dangers of minute radioactive particles. It concluded:

“As long as atomic weapons have a large fission component, their use will always pose a threat to innocent people living great distances from the explosions.”

93. Three days after the detonation of shot Hood, a 74 kt blast which was described to the American Congress as “the dirtiest nuclear explosion in the United States”, the Government detected a fallout cloud in Windsor, Ontario. Radioactive fallout from shots Diablo and John was detected in Saskatchewan and Manitoba. Radioactive particles from shot Stokes entered Manitoba and were detected in Montreal a few days later.

94. On June 3rd, 1957, General Foulkes asked the British Government to refrain from issuing a press release about Canadian participation in atomic testing for the deliberate purpose of keeping the truth about shots from Canadians and Class Members.

95. The Government breached fiduciary duties, after indicating that it was safe to participate in the atomic testing, by ordering Class Members to enter radiologically toxic areas, without at any time providing information it knew, as to the risks of exposure.

96. On February 22nd, 1982, Colonel R.F. Thatcher, Director of Preventive Medicine, wrote a letter to a Sergeant Huntley stating:

“All military personnel exposed or likely to be exposed to radioactivity, including those who attended the nuclear detonations in Australia and Nevada...were monitored for radiation exposure. Records were initially kept by the individual units concerned and none of the information recorded before 1957 was entered on the individuals’ medical records. Permanent records were instituted in 1957 when all recorded exposure levels began to be entered in medical documents.”

97. The Government monitored participants for radiation exposure. It kept a list of all Class Members who participated in the nuclear testing and records of individual exposure, including film badge dosimetry readings, which it entered in individual service files.

98. Since the atomic testing, the Government has concealed radiation readings obtained during the atomic testing from Class Members. It has refused and continues to refuse to release medical records and data related to exposure during the atomic trials which it currently keeps at a repository at Holly Lane in Ottawa, Ontario.

99. At the time of the atomic testing, in the presence of armed guards, the Government ordered Class Members to sign non-disclosure agreements and take a pledge of secrecy about the testing. They were told that they would be imprisoned for life if they discussed their participation in atomic testing. As a result, Class Members have not had, or have been unreasonably hindered in, frank discussions about their exposure to atomic radiation with medical professionals and legal advisors.

100. The Government has unilaterally undertaken to monitor the health of, and provide continual benefits to, Class Members following their discharge from military service.

101. In the early 1980's, the United States undertook to locate its soldiers who participated in the atomic testing and inform them of the risks of testing. In 1990, it offered payments of up to \$75,000 each, and, to date, has paid over \$1 billion. The Government undertook no such reasonable program to locate Class Members and inform them of the risks of their testing.

102. The Government did not provide follow up with respect to diseases with long latency periods that it knew about. It never released Class Members from their pledge of secrecy. Timely disclosure of information would have allowed Class Members to engage in preventative medical care and to bring forward legal claims at an earlier date.

(3) battery

103. With knowledge that radiation was harmful, the Government intentionally and directly exposed Class Members to atomic radiation to observe and record the results. The Government signed pacts that its medical personnel would not attend to any injuries to Class Members during or after the testing.

104. The Class Members consented to service where they could be accidentally injured or killed, but not deliberately exposed to atomic radiation as test subjects. The Government did not inform Class Members of, or deliberately downplayed, the risks of atomic radiation and, in particular, the association between radiation exposure and development of cancer and other maladies.

(4) honour of the crown

105. The Government's acts were such that the honour of the Sovereign may not be upheld and Parliament having taken away by unilateral action and without consideration the rights solemnly assured to the Class that could not refuse to participate in the atmospheric atomic testing and have been disabled or died as a result of military service, and to their dependants. The Government conduct has deprived the Class of their security of the person and the honour of the Crown has not been preserved by the Government conduct. The honour of the Crown refers to the essential commitment that the Class echoes when they call for "justice", which has been ignored by the Government that refuses to compensate the Class for their injuries. It is the surrender of rights by the Class and the failure of the Government to live up to the "honour of the Crown".

(5) aggravated, exemplary, or punitive damages

106. Rather than encourage the Plaintiffs to take all reasonable detection and precautionary steps to minimize the risks of absorbing Alpha and Gamma particles to be ingested or lodged in pores and hair follicles caused by the atmospheric atomic testing, the Government have taken repeated steps to downplay the true nature and extent of the

participation of Class Members in the atmospheric atomic testing and the significance of the health risks posed to individuals who were exposed to radiation in a manner designed to deflect political attention away from its wrongdoing.

107. The subsequent response of the Government following the atmospheric testing, after it had known of the risks to health posed by exposure to radiation containing Alpha and Gamma particles, and its deliberate attempt to mislead Class Members as to the full extent and nature of the atmospheric atomic testing is a wilful and flagrant violation of the standard of conduct expected of a democratic government, contrary to the promotion, preservation and protection of the health of members of the Canadian Armed Forces and the prevention and early detection of physical diseases, disorders, and abnormal physical conditions in violation of the *Canada Health Act*, R.S.C. 1985, c. C-6.

108. The Government made a series of false, reckless, and materially misleading representations about the extent of exposure to radiation and the risks it posed to members of the Canadian Armed Forces. The full particulars of the representations presently known to the Plaintiffs will be set forth in certification and trial of this action.

109. The full facts disclosing a cause of action against the Government were not known to the Class until this current time.

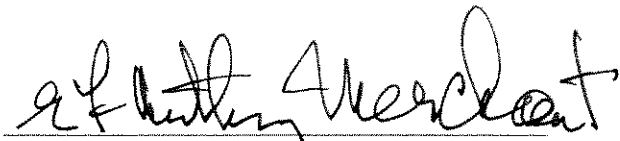
V. RELIEF SOUGHT

110. The Plaintiffs on behalf of themselves and all Class Members claim for the following relief, on a joint and several basis, against the Government:

- (a) an order certifying this action as a class action and naming a Representative Plaintiff for the Class and any Sub-Class or Sub-Classes;
- (b) a judgment on questions of law or fact that are common to a class or subclass;
- (c) costs including the costs of notice and of administering the plan of

- distribution of the recovery in this action plus applicable taxes;
- (d) aggregate assessment of monetary relief to a class or subclass;
 - (e) special and general damages;
 - (f) aggravated, exemplary, or punitive damages;
 - (g) costs;
 - (h) pre-judgment interest pursuant to the *Judgment Interest Act*, R.S.N. 1990 c. J-2; and
 - (i) such further relief as the Court deems fit and proper;

Dated at Regina, Saskatchewan, this 2nd day of February, 2009.



E. F. Anthony Merchant, Q.C.

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