





2006 01T 2880 CCP

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR TRIAL  
DIVISION**

BETWEEN:

**EDWARD RING, SR.  
AND MARY WILLIAMS (deleted)**

PLAINTIFF

AND:

**ATTORNEY GENERAL OF CANADA**

~~**AND THE MINISTER OF NATIONAL DEFENCE (deleted)**~~

DEFENDANT

AND:

**THE DOW CHEMICAL COMPANY AND PHARMACIA CORPORATION**

THIRD PARTIES

*Brought under the Class Actions Act*

Before The Honourable Mr. Justice Carl R. Thompson,  
Case Management Judge

**INDEX**

Statement of Defence .....	1
A. The Parties .....	2
B. Establishment of the Base .....	5
C. Key Features of the Base .....	6
D. Maximizing the Utilization of the Base as a Combat-Training Resource .....	8
E. Clearing and Maintaining the Training Areas .....	9
F. Second-Growth Control Contracts .....	11
G. Consulting and Testing Arrangements with Herbicide Experts .....	13
1) External expertise .....	13
2) Internal Government Expertise .....	14
3) Herbicide Efficacy Testing Under Local Conditions .....	15
H. No Merit To Plaintiff's Claim .....	21
I. Crown Responds to Public Concerns .....	25
J. No Negligence with Respect to the Use of Herbicides .....	28
K. No Duty of Care .....	28
L. Standard of Care .....	29
M. No Exposure .....	29
N. No Causation .....	30

O. No Cause of Action for Pure Economic Loss .....	32
P. No Occupier's Liability .....	33
Q. No Liability for Contractors' work .....	34
R. No Entitlement to Punitive Damages .....	34
1) USDoA trials in 1966 & 1967.....	34
2) No deceit, fraud or misrepresentation .....	35
S. The Plaintiff's Claim is barred .....	37
T. Individual Proof and Assessments Necessary .....	39
U. Additional Defences .....	41

## STATEMENT OF DEFENCE

1. The defendant, the Attorney General of Canada (the "AGC"), admits the allegations contained in the following paragraphs: 1; 9 (first sentence, only); 14; and 26 (first and final sentences, only) of the Fresh Third Amended Statement of Claim (the "Claim").

2. In respect of the first sentence of paragraph 53 of the Claim, the AGC admits that the Crown took due care in monitoring and controlling access to Canadian Forces Base Gagetown ("the Base"). As will be explained in paragraphs 26, and 128 to 129 hereunder, various degrees of access restrictions applied to different sections of the Base.

3. The AGC denies the allegations contained in paragraphs: 2; 4 (second sentence, except as admitted herein); 7; 10; 11 (second sentence, only); 25; 26 (second sentence, only); 27 to 52 (inclusive); 53 (second sentence, only); 54 to 84 (inclusive) of the Claim.

4. The AGC has no knowledge of the allegations contained in paragraphs: 3; 4 (first sentence, only); 5; 6; 8; 9 (second sentence, only); 11 (first sentence, only); 12; 13; 15 to 24 (inclusive) of the Claim.

5. The AGC denies all other allegations contained in the Claim unless stated otherwise in this Statement of Defence.

6. With respect to each of the schedules attached to the Claim, the AGC denies any and all of the allegations of fact contained therein or any allegation of the plaintiff based thereon, save and except as may otherwise be admitted herein.

#### **A. THE PARTIES**

7. The plaintiff, Edward Ring, Sr. ("Ring"), was a member of the Canadian regular armed forces between August 27, 1971 and October 14, 1992 and the primary reserve forces between October 15, 1992 and August 18, 2004. The AGC admits that at the time of Ring's retirement, he was Deputy Commander, Land Force Atlantic Area, holding the rank of Brigadier General, but pleads he was promoted to this rank in August 2001.

8. With respect to the allegation at paragraph 10 of the Claim that Ring was posted at the Base during each of the last four decades, the AGC responds that Ring was posted or assigned temporary duties at the Base on the following dates and for the following periods:

- a) May 28, 1973 to August 14, 1975 (2 years and 2.5 months);
- b) September 18, 1979 to July 11, 1982 (2 years and 10 months);
- c) August 23 to 26, 1995 (4 days); and
- d) August 19 to 23, 2000 (5 days).

9. With respect to paragraphs 25 and 27 of the Claim, the AGC states that Ring requested to be released from the reserve forces on account of the state of his health and the release was granted.

10. The AGC has no knowledge regarding the allegation in the first sentence of paragraph 4 of the Claim. The AGC denies the second sentence of paragraph 4, except as follows: that John Williams ("Williams"), husband of Mary Williams, was a member of the Canadian Forces; that he was stationed at the Base for a period of his service; and that permanent married quarters ("PMQ") were assigned to Williams while he was stationed at the Base. The PMQ are military housing units located within the boundaries of the Town of Oromocto, New Brunswick, which is adjacent to the Base. The PMQ are subject to the By-Laws of the Town of Oromocto.

11. The AGC states that within the twenty-year period from November 1957 to October 1977 when Williams served in the Canadian Forces, his postings at the Base occurred:

- a) from February 1967 to July 1973; and
- b) from August 1976 to October 1977.

12. With respect to the allegations at paragraph 5 that Mary Williams gave birth to a number of children who suffer or suffered from illnesses, the AGC pleads that such allegations are irrelevant and states that he has no knowledge

of the allegations contained therein. The AGC has knowledge of the following events regarding Williams, Mary Williams and their children:

- a) July 1954 to November 1957: Williams (born April 9, 1928; died July 1, 1995) and Mary Williams (née Jenkins) (born March 19, 1937), both natives of Newfoundland, married in July 1954. They had two sons, John (born August 23, 1954) and Walter (born September 27, 1955).
- b) November 1957 to May 1958: Williams enrolled in the Canadian Forces in November 1957 and was posted to the Winnipeg Royal Canadian Artillery Depot, where he served until May 1958.
- c) May 1958 to January 1961: Williams was posted to Picton, Ontario, where PMQ were assigned to him. Two more sons were born: Kenneth Wayne on Oct. 16, 1959 and Perry James on January 20, 1961. Their son Walter died on June 23, 1959.
- d) February 1961 to March 1962: In February 1961, Williams was posted to Egypt.
- e) January 1962 to February 1964: Williams was posted to Petawawa, Ontario, where PMQ were assigned to him.
- f) February 1964 to February 1967: Williams was posted to Germany, where PMQ were assigned to him. Another son, Derrick Daniel, was born on August 1, 1964.
- g) January 1967 to July 1973: Williams was posted to CFB Gagetown where he was assigned PMQ in adjacent Oromocto. A daughter, Sherry Lynn, was born on March 14, 1968. From 1967 to 1970, among his jobs, Williams worked as a communicator and in the officers' mess as a waiter/steward. From 1970 to 1973, he worked at the CFB Gagetown Winter Warfare School. His jobs included operating the T-Bar at the CFB Gagetown Ski Hill, daily maintenance of the tow and the training of personnel as T-bar loaders.
- h) August 1973 to July 1974: Williams was posted to Shilo, Manitoba, where he served with the 3rd Royal Canadian Horse Artillery. PMQ were assigned to him at Shilo.
- i) July 1974 to August 1976: Williams was posted to the Wainright detachment in Alberta, where PMQ were assigned to him.

- j) August 1976 to October 1977: Williams was posted to CFB Gagetown where he worked as a ration driver. PMQ were assigned to him. His eldest son John appeared to be living in Alberta in June 1977. Williams was released in 1977.

13. The AGC is the legal representative of Her Majesty the Queen in Right of Canada (the "Crown"). By section 15 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) (R.S.C. 1985, Appendix II, No. 5), the Command-in-Chief of all armed forces of and in Canada is declared to continue and be vested in the Queen. The Minister responsible for defence is the Minister of National Defence.

## **B. ESTABLISHMENT OF THE BASE**

14. Acting under powers and authorities conferred by Crown prerogative and by legislation in furtherance of the defence of Canada, the Crown created and has continued to operate at all material times the 1,100 square-kilometre, armed-forces training Base.

15. With good access to nearby rail and deep-water port facilities that assisted swift deployments of large numbers of soldiers and heavy military equipment to overseas theatres in Europe, the Base was brought into existence in the early 1950s as a hub location for the combat-training activities of the Canadian Army. That critical defence function has not changed in half a century.

16. The Base played and continues to play a central role in ensuring defence preparedness and in making possible the fulfillment of international

military commitments. At the time of its inception, its extraordinarily large surface area and varied terrain offered a venue for large-scale, live-fire training exercises that remains unique in the entire Commonwealth today. The training area of the Base is licensed for conducting exercises involving all weapons and ammunitions in the Canadian Forces inventory up to 2,000-pound bombs.

17. Accordingly, contrary to paragraph 65 of the Claim, there were and continue to be very sound policy reasons for situating the Base where it stands today.

### **C. KEY FEATURES OF THE BASE**

18. The smallest part of the Base is the 70 square-kilometre garrison area situated in its northwest corner. The west side of the garrison area abuts the Town of Oromocto, where the PMQ are located. The east side of the garrison area abuts the area known as Lindsay Valley.

19. Almost the entire expanse of the Base lies to the south and east of the garrison area. This area of approximately 1,000 square kilometres contains the Range and Training Area ("RTA") where nearly all the herbicide applications have taken place.

20. The gunnery areas known collectively as the Static Range Impact Area ("SRIA"), which occupy the north quarter of the RTA, are strewn with unexploded ordnance from years of artillery training. Accordingly, surface travel in these

areas is hazardous, causing access to them to be strictly controlled at all times. A smaller SRIA known as the Mountain Impact Area stands on the south-eastern flank of the Base. It too is a so-called "dirty fire" area with restricted surface access. Armoured vehicles do enter these areas during battle training as part of so-called "mounted" exercises.

21. A former SRIA standing in the south-western quarter of the Base, and known as the Enniskillen Range Complex, no longer is used for "dirty fire" exercises. In recent years its terrain has been scoured for unexploded ordnance so that infantry manoeuvres once again can be conducted safely within its bounds in so-called "dismounted" exercises.

22. The remainder of the training area consists of the general manoeuvre and dismounted manoeuvre areas. Armoured units do travel through the general manoeuvre area but restrict their fire to so-called "clean" fire which does not create explosive hazards for future troop movements. The dismounted manoeuvre areas are restricted to training by infantry and light vehicles.

23. New Brunswick provincial Highway No. 7 runs in a north-south direction through the western portion of the RTA. A portion of the Trans-Canada Highway skirts the northern periphery of the RTA. Responsibility for maintenance of these road allowances, including brush control, lies with the Province of New Brunswick.

#### **D. MAXIMIZING THE UTILIZATION OF THE BASE AS A COMBAT-TRAINING RESOURCE**

24. As a cornerstone of Canada's military preparedness, the Base's principal function is to train and maintain the efficiency of the Canadian Forces. Division-strength manoeuvres coordinating armour, artillery, infantry and air power are within the capacity of the training facilities of the Base. The Combat Training Centre at the Base coordinates and oversees its Armour School, Artillery School, Infantry School and Tactics School, all of which teach soldiers to use the various weapons systems, gunnery and small arms, including sniper and anti-armour devices, which make them battle-ready for deployment in theatres of war.

25. Since the Base's inception, the Crown has been faced with the challenge of maximizing the available resources of the Base to accomplish the purposes for which the Base had been created. The plaintiff's allegation that the Base provided "a welcome and open invitation" at paragraph 2 of the Claim belies the true purposes and priorities of the Base.

26. The access priorities assigned to the use of the Base reflect the combat-training purpose for which the Base was created as a Crown resource. Live-fire combat training and exercises pre-empt any and all other uses of the Base. Maintenance and support activities for those exercises are assigned the second general level of priority. If no need is identified for a training or training-support activity, the Range Control Officer may authorize other permitted

activities to occur on those parts of the training areas where the hazard of unexploded ordnance is not present. Lower priority uses are granted access only while no higher priority uses are proceeding.

#### **E. CLEARING AND MAINTAINING THE TRAINING AREAS**

27. The Base lies in an area of New Brunswick where extensive tracts of forest lands have made commercial forestry, particularly in connection with the pulp and paper industry, one of the principal economic activities of the region. Many of the lands assembled by the Crown for the formation of the Base contained heavily forested areas.

28. To serve as an intensive-use, combat-training facility, the Base required open space for equipment-manoeuve corridors, clear sight lines for artillery-firing exercises and forest-fire suppression barriers, all of which necessitated the removal of unwanted subsisting woody-stemmed vegetation and the prevention of recurrent second-growth forest cover. This vegetation presented concerns for safety as well as physical impediments to the efficient performance of combat exercises. It also created a constant forest-fire hazard during live-shell gunnery training.

29. Almost all initial clearance, grubbing and stump-removal of the forested lands, as well as second-growth vegetation control, were performed by civilian contractors who were granted fixed-price contracts through a process of

competitive bidding. Because the forested tracts extend over a vast area, they have had to be cleared in prioritized stages, year by year.

30. For most of the history of the Base, Defence Construction (1951) Limited ("DCC"), a Crown corporation accountable to the Minister of Public Works and Government Services, acted on behalf of the Crown by entering into contracts with successful bidders from the private sector. The second-growth control program responded to site-specific assessments of the need to curb vegetation at identified locations for which DCC normally sought tenders for rectification work to be undertaken in the subsequent year.

31. Contrary to the allegation at paragraph 61 of the Claim that combat-training terrain was cleared "at a reasonable cost and with reasonable efficacy by non-chemical means", manual and machine clearing was time-consuming and left stubble which injured soldiers. In addition, once the SRIAs began to be used in the mid-1950s for training exercises involving dirty fire, manual and machine control of regrowth was no longer an option due to safety concerns over unexploded ordnance.

32. In paragraphs 61 to 63 of the Claim, the plaintiff presents a simplistic and hence distorted view of the means which were adopted to clear the Base and then maintain those cleared areas. Mechanical removal, controlled burning and herbicidal applications have never been exclusive alternatives. Alone and in

combination, each approach, as modified by evolving technologies, offered certain advantages in relation to different types of vegetation.

33. Across the class period, experience has shown that mature root systems in woodlands must be eliminated in order to manage effectively second-growth underbrush after an initial clearance of mature timber. For several indigenous species at the Base, fully-developed root systems that survived the clearance of timber sustained the regeneration of saplings at an accelerated pace.

34. Re-growth rates and densities following herbicide application varied between species. By late 1963 the resurgence of second-growth underbrush posed such a problem that new strategies for long-term vegetation management on the RTA had to be devised and implemented.

#### **F. SECOND-GROWTH CONTROL CONTRACTS**

35. Acting on behalf of the Crown at all material times, DCC used contract-management techniques to procure operational expertise for control of second-growth vegetation on the Base. By incorporating the engineering standards and legislative standards of the day into its specification statements, DCC was able to realize the best contemporary forest-management strategies.

36. Since 1939, the national standards for the prudent use and management of commercial herbicides have been legislated under the federal *Pest Control Products Act* and the *Regulations* promulgated thereunder.

37. In 1973, the Province of New Brunswick legislated the *Pesticides Control Act*, S.N.B. 1973, c. 15, to control the sale, supply and use of, *inter alia*, herbicides in that province.

38. The federal legislative scheme restricts the availability of products to federally registered herbicides, which only can be used in compliance with the approved registration. Under the New Brunswick legislative scheme, only these federally registered products can be used, stored or disposed of by the commercial end-users that hold provincial licences.

39. In contracting during the past half century for the application of herbicides on the Base, DCC always adopted a contractual framework that required its contractors to perform contractual obligations mirroring or satisfying the standards of the day for the registration and use of commercial herbicides.

40. The specification statements for contract materials, including mandatory inspection to ensure that the contractor-supplied chemicals were properly registered under governing legislation and that they were the type, strength and quality specified therein, reflect the quality control that DCC typically exacted from its external contractors. Satisfactory contractual performance required the

commercial operator to demonstrate to DCC that it had applied properly registered chemicals of the type and in the quantity stipulated.

41. Federal registration requirements for commercial herbicides tied product availability to acceptable levels of safety and efficacy. Operating within an evolving legislative framework for commercial herbicide use, DCC stipulated the contractual terms and oversaw the contractors' performance of the annual second-growth program whose purpose was to keep the terrain of the Base suitable for military training. In setting the contract terms and gauging the effectiveness of the annual second-growth program, DCC was able to rely on the availability of approved published registration information furnished by the herbicide manufacturer and approved by the regulator.

## **G. CONSULTING AND TESTING ARRANGEMENTS WITH HERBICIDE EXPERTS**

### **1) External expertise**

42. Throughout the class period, specialized knowledge and resources for forest management strategies were improving year by year. On behalf of the Crown, DCC engaged the services of scientists and others who possessed such expertise so that specification statements for future operational second-growth control contracts might employ recently introduced and improved products and techniques. Of particular importance was the deployment of experts to test the effectiveness of such new products and techniques under local conditions.

43. Amongst those forestry specialists from whom the Crown obtained advice were experts external to the federal government, such as the Dow Chemical Company ("Dow"), the Crops Department at the Biological Sciences Laboratory of the United States Department of the Army ("USDoA"), located in Frederick, Maryland, and the University of New Brunswick. In the mid-1960s, their studies of herbicide effectiveness under local conditions contributed to the Crown's decision to stop using 2,4,5-T as an active ingredient at the Base many years before it was eliminated from use as a registered herbicide in Canada generally.

## **2) Internal Government Expertise**

44. From 1955 onward, the Department of National Defence ("DND") had also looked to specialized agencies within the federal government to provide guidance and forestry management skills. The Crown agency responsible for the forestry branch of today's Department of Natural Resources ("DNR") is called Canadian Forestry Services ("CFS").

45. CFS and its predecessors within the forestry branch have served in a variety of capacities, including the provision of expert assessments of the effectiveness of operational-scale spraying for the second-growth control program at the Base; planning and managing fire protection on the military-training area of the Base; and the planning and conduct of trials of some commercially available herbicides in order to determine the effectiveness under local conditions of the various products for the control of second-growth, woody-stemmed vegetation.

46. As early as 1956 the forestry branch was asked to conduct trials of various herbicides to determine which would be the most effective against the vegetation species commonly found in the Base area. Trials were also conducted in 1966, 1967 and in 1968, as discussed below. These tests were equally instrumental in the discontinuance of the use of 2, 4, 5-T.

47. The need for expert forest-management services, including proper timber-management practices and detailed fire-prevention programs, became apparent as early as 1955 when 4,833 acres of the Base burned. The Department of Northern Affairs and Natural Resources agreed to provide these management and fire protection services. Throughout, however, the training of military personnel was required to take precedence over the provision of all such services.

### **3) Herbicide Efficacy Testing Under Local Conditions**

48. As contractors completed their annual work to control second-growth vegetation at specific locations within the Base, CFS reviewed the results that had been achieved. During the decade from 1955 to 1965, efforts to control re-growth produced generally disappointing results, whether the technique adopted was controlled burning, mechanical brush-cutting, aerial herbicide applications or surface herbicide applications. From 1955 onward, CFS reported to DCC on its assessments of the results which were achieved each year by contractors and others who were engaged in the second-growth control program. By the early 1960s the Crown, through DCC, recognized the need for testing the efficacy of a

range of commercially available herbicides by applying them to the variety of species growing on the Base.

49. The forest scientists who designed these efficacy trials had to be able to examine the impact of the various sample applications on otherwise undisturbed woodland plots over a period of months and years. Thus the herbicide-assessment areas selected for such trials were compact and also sufficiently removed from human traffic and the operational needs of the Base to be left unaltered for the duration of the post-application assessment process.

50. In order to obtain reliable efficacy data for each test plot, it was necessary that the compounds be applied uniformly without any overspray into adjacent test plots. An objective of all these trials was to obtain comparative data of product performance under local conditions so that optimal operational programs might be designed for future implementation at the Base.

#### **1956 – CFS tests**

51. As early as 1956 the forestry branch was asked to conduct trials of various registered herbicides to determine which would be the most effective against the vegetation species commonly found on the Base.

### **1964 - Dow tests**

52. In 1964, Dow's application of pelletized herbicides on small test plots demonstrated the way of the future by combining a new generation of systemic herbicide with mechanical clearance techniques.

### **1966 and 1967 CFS tests**

53. The objective of the CFS trials in 1966 and 1967 was to discover suitable treatments for long-term control of all species growing on the Base. The 1966 CFS herbicide trials were conducted on 15 half-acre plots located in the Medium Machine-Gun ("MMG") Field Firing Area within the Enniskillen SRIA. CFS personnel prepared the test plots at the site, supervised the spray application and collected the data resulting from the applications. The chosen site was selected having regard to its compact dimensions, location and localized climatological factors. Three concentrations of each of three herbicides, mixed with water, were applied by helicopter in known quantities of spray volume.

54. For the 1967 CFS trials, an additional 54 one-quarter acre test plots were laid out in the MMG Field Firing Area. Only minimal quantities of six commercial herbicides in three concentrations, all registered under the federal *Pest Control Products Act*, were applied in the trials. The same strict controls over type, strength and quality of the chemicals as apply to the operational-spraying contracts were applied to these trial applications. Entry and exit barrel counts

were maintained. In the years following the test applications, CFS observed and measured the destructive effect on second-growth foliage covering the two sets of test plots.

55. The CFS trials in 1966 and 1967 demonstrated Tordon 101 to be more effective product for controlling second-growth vegetation under local conditions than were the phenoxy-based combinations of 2,4-D and 2,4,5-T. A similar result was obtained from a trial of federally registered and approved Tordon 10K pellets which Dow conducted on two very small test plots on June 9, 1966. Other small-scale trials were conducted by CFS in 1968 and 1969.

#### **1966 and 1967 USDoA tests**

56. In light of the problems experienced with seedling growth and timber re-growth at the Base, the Crown entered into a cooperative venture with the USDoA for the benefit of both countries. USDoA would provide technical assistance and defoliant chemicals for purposes of tests to be conducted on the Base. The Crown would provide North Temperate Zone forested tracts, similar to those existing in the northern United States, where the effectiveness of new herbicides could be tested for the first time under such conditions.

57. In the 3 year preparatory pre-trial period the USDoA scientists reviewed existing Base practices and products and provided recommendations for

improved procedures, provisions and chemicals to be incorporated in specifications and contracts for future years.

58. The test site for the 1966 test was located in Dismounted Manoeuvre Area in the western quarter of the Base, an isolated area not in operational use for combat training. Each test plot was small in area, having a frontage of 200 feet and a depth of 600 or 660 feet with 100-foot buffer strips between adjacent plots. The 1966 trials laid out 116 such plots in parallel series along two sides of a remote laneway, of which 107 received a herbicide application. The trials were effected on June 14, 15 and 16, 1966.

59. The 1966 study of the effectiveness of various herbicidal compounds and combinations tested commercially available formulations for the most part. Only 14 of the 116 test plots received applications, in three different concentration ratios with different diluents, of the non-commercially available compound identified as Orange. A further 14 plots received applications of non-commercially available Purple in a similar array of concentration ratios and diluents. Each of the 28 plots receiving non-commercial formulations had dimensions of 200 by 600 feet or less than 3 acres.

60. The 1967 test site was equally remote being approximately 10 miles from the western boundary of the Base. Inclement weather during the June 21 – 24, 1967 spray dates allowed only 37 of 50 test plots, similar in size to the 1966 test plots, separated by buffer zones of 200 feet, to be sprayed with herbicides.

Fifteen different herbicidal compounds and combinations applied to the test plots were commercially available products. Listed among the herbicidal compounds for the 1967 tests are two non-commercially available variants of commercial herbicides, Orange and White. Orange is the only non-commercially available herbicide for which test results have been reported. The quantities applied and coverage areas were insignificant: less than 10 gallons was sprayed on each of the two subject three-acre test plots.

61. In both years the USDoA tests were conducted by an experienced team of crop scientists and other personnel from the Plant Physiology Division of the Plant Sciences Laboratory of the Biological Laboratories at Fort Detrick, Maryland, with support from Canadian Forces personnel. The American scientists brought with them to the Base the chemical compounds to be tested and took with them from the Base all surplus volumes and containers.

#### **1985 UNB Forestry Department**

62. In 1985 the University of New Brunswick Forestry Department conducted research on vegetation management at the Base, from which it was able to provide the Crown with advice concerning best management practices which included chemical control, mechanical control, controlled burns and the forecasting of vegetation growth patterns.

### **1990 DowElanco Canada Inc.**

63. On August 8-10, 1990, DowElanco Canada Inc. conducted a federally and provincially approved herbicide research and testing project to compare the effectiveness of a new chemical herbicide, Garlon 4, with two established products, Tordon 101 and Vision.

### **H. NO MERIT TO PLAINTIFF'S CLAIM**

64. The plaintiff bases his claim for liability solely on the Crown's use of herbicides containing as their active ingredients, alone or in combination, three chemical compounds by means of which two different contaminants allegedly were introduced onto the Base. From the application of herbicides containing 2,4-D or 2,4,5-T as an active ingredient, the plaintiff alleges that 2,3,7,8-TCDD ("TCDD") was released so that class members might have been exposed to it. From the application of herbicides containing picloram as an active ingredient, the plaintiff alleges that hexachlorobenzene ("HCB") was released so that class members might have been exposed to it. The plaintiff also asserts that the operationally applied herbicides were functionally equivalent to military defoliation agents used by the American military in foreign wars and known colloquially by their colour codes such as Orange, Purple, and White.

65. At no time within the class period have any class members been exposed, directly or indirectly, to sources of unusual or unreasonable danger on account of the alleged presence of TCDD and HCB contaminants purportedly introduced

onto the Base by operational second-growth, brush-control programs or by vegetation-management trials. As an end-user of registered herbicides in conjunction with other means of brush control at the Base, the Crown used products that fully met the prescribed regulatory requirements for their acceptable use.

66. Moreover, the purpose for which the herbicide applications and other brush-clearing operations were undertaken went directly to making feasible the same combat-training objectives that had prompted the establishment of the Base.

67. The Crown has at all times had in place a comprehensive system of herbicide management and control designed to ensure compliance with evolving applicable regulatory standards. The application of herbicidal compounds that contained as their active ingredients one or a combination of 2,4-D, 2,4,5-T and picloram occurred on the Base only at times when such chemicals were scientifically considered to be acceptable components of herbicidal compounds.

68. Since 1983 the manufacturing process for 2,4-D has been carefully controlled to avoid the production of furans and dioxins. Federal regulators require manufacturers of the registered product to produce 2,4-D wherein the presence of TCDD is no greater than at 1 part per billion. In 2008 regulatory authorities completed a full re-evaluation of the acceptability of 2,4-D as an active

ingredient for herbicides and approved its continued registration for use in that capacity.

69. The application of herbicides containing 2,4,5-T among their active ingredients ceased at the Base in or around 1967 when evolving vegetation-management strategies led to the adoption of other, more efficacious products for operational herbicide applications. The Crown ceased to apply the compound well before TCDD contamination in 2,4,5-T was identified in the early 1970s and some 15 years before the 1982 withdrawal of 2,4,5-T from forestry use in Canada and the subsequent discontinuation of the registration of 2,4,5-T as a control product in 1985.

70. A combination of picloram and 2,4-D had served as the active ingredients in the Tordon line of herbicides which was used widely in Canada and at the Base in the late 1960s and for most of the 1970s. Use of picloram as an active ingredient for herbicide applications at the Base was decreased in the late 1970s and discontinued altogether in or about 1993.

71. Thus across the entire class period the Crown's operational use of the three active ingredients upon which the plaintiff founds his complaint was in accordance with all regulatory requirements.

72. With the possible exception of Orange and Purple, small quantities of which were applied solely for testing purposes, the compounds tested at the

1966-1967 trials always were registered herbicides that were available for commercial use across Canada.

73. The USDoA tests, in which those compounds were applied, were conducted by an experienced team of American crop scientists and other personnel, with support from Canadian Forces personnel. All of the chemical compounds to be tested were brought to, and taken from, the base by the American scientists together with all surplus volumes and containers. Only 14 of the 1966 test plots received Orange and 14 received Purple. The 1967 tests were weather restricted. Some 123 U.S. gallons of Orange was used in these tests over the two-year period. Some 55 U.S. gallons of Purple were used in 1966.

74. The commercially available herbicides used in the USDoA tests did include compounds whose active ingredients were 2,4-D, 2,4,5-T or picloram, either alone or in combination.

75. The AGC denies that any product then applied contained hexachlorobenzene or TCDD impurities. No residual dioxin exists in the test plots beyond the traces that might be found as ambient-background levels from a variety of naturally occurring and other sources almost anywhere in Canada. Contrary to the plaintiff's allegations, the sites of the 1966 and 1967 USDoA herbicide trials are not today, and never have been, toxic or contaminated sites.

76. The several small-scale herbicide trials conducted by the Crown and its contracting agents over the class period also applied registered products in full compliance with regulatory requirements. While technical reports of the American trials in 1966-67 do indicate that very limited quantities of specially formulated herbicides were applied as a small part of those trials, the scale makes the effect *de minimis*.

77. Nowhere on the Base or its environs has the Crown at any time applied herbicides in a manner or in quantities which would create a situation of unusual or unreasonable danger for the health of persons occupying or traversing the subject lands, a significant proportion of which were usually subject to quite restrictive access for reasons unrelated to herbicide use.

78. The operational spray programs always have targeted those specifically identified areas within the RTA of the Base which suffer from acute, second-growth encroachment rather than being directed to cleared areas generally. No more than five per cent of the RTA was sprayed with these registered herbicides in any given year of the class period. In later years, less than one per cent of the Base was sprayed in any given year. In some years, there was no spraying at all. Currently, approximately 0.04% of the Base is sprayed per year.

## **I. CROWN RESPONDS TO PUBLIC CONCERNS**

79. On three occasions between 1981 and 2005 public issues relating to herbicide use at the Base have been raised in Parliament or in the media. On

each of these occasions the Crown has responded to the issues raised in an appropriate, candid and transparent manner.

80. In 1981 Members of Parliament raised in the House questions as to the nature of the USDoA trials. In fully responding to those questions the then Ministers of Health for Canada and New Brunswick convened an *ad hoc* federal-provincial committee to study the potential adverse health effects of those trials. That committee concluded there were no such adverse health effects. Those conclusions were reported in the House and were widely distributed to the media.

81. Public concerns were raised by local interests in 1984-1985. The concerns at that time focussed on the burial of herbicide containers which, throughout the class period, had been disposed of in accordance with federal and provincial regulations in effect at all relevant times. In response to those concerns herbicide drums were excavated at the Shirley Road landfill site and elsewhere on the Base. Independent tests conducted on the residue in those drums determined that "only 2,4-D was found in any of the samples with no 2,4,5-T or picloram detected." Soil sample tests conducted at that same time concluded that there was no major soil contamination and that "only 2,4-D was detected in the part per billion range at two locations (#3 and #6) and no 2,4,5-T or picloram was detected at any of the sites". The results of these tests were made available to the community and also widely distributed to the media.

82. The issue of herbicide use at the Base was again raised publicly in 2005. In response, the Crown caused an independent fact-finding inquiry to be instituted to examine all aspects and consequences of the herbicidal spray program at the Base. Dr. Dennis Furlong was appointed as the Fact-Finder and Outreach Co-ordinator. He retained independent experts to complete a series of reports and studies designed "to identify what was sprayed, how it was sprayed, by whom it was sprayed, and to determine the health risks related to the herbicide spray program at CFB Gagetown". The final Reports prepared for Dr. Furlong included:

- a) a comprehensive study to identify individuals who may have been present during spraying between 1952 and the present;
- b) an environmental site assessment;
- c) a history of herbicide use between 1952 and the present;
- d) a groundwater and surface water migration study;
- e) a multi-faceted toxicological human health risk assessment;
- f) a contaminated site human health risk assessment;
- g) a barrel investigation, excavation and analysis study;
- h) a descriptive epidemiological study; and
- i) a fish tissue sampling study.

83. These studies, in summary, concluded that people who lived near or worked at the Base, including most soldiers, were not at risk for long term adverse health effects and that there were no adverse environmental effects from the herbicide products used.

## **J. NO NEGLIGENCE WITH RESPECT TO THE USE OF HERBICIDES**

84. The Crown is immune from liability at law save and except as permitted by Parliament and prescribed in the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 ("*CLPA*") and in particular sections 3 and 10 thereof. The AGC states that the Crown is not liable to the plaintiff or any class member in respect of any allegation found in the Claim.

## **K. NO DUTY OF CARE**

85. The AGC states that the Crown did not owe the plaintiff or any class member any private law duty of care in connection with the application of herbicides containing 2,4-D or 2,4,5-T or picloram at the Base.

86. The AGC denies that any of the harms alleged by the plaintiff were reasonably foreseeable by the Crown given the state of scientific knowledge at various points over the class period. At all material times the Crown acted with the *bona fide* and reasonable belief that the herbicides were safe for the use to which they were put.

87. The plaintiff's claim does not fall within and is not analogous to any of the cases listed in paragraph 41 of the Claim in which a duty of care has been previously recognized or any category otherwise known to the law.

88. The establishment and continuation of the Base as a military training facility resulted from policy decisions made in the interest of, and for the purpose of Canada's national defence, the meeting of Canada's international military obligations, and maintaining the training and efficiency of the Canadian Forces. Thus, the AGC states that no liability can attach to those policy decisions.

#### **L. STANDARD OF CARE**

89. If the Crown did owe a private law duty, which is not admitted but denied, then any such duty was not subject to an elevated standard of care as alleged by the plaintiff in paragraph 58 of the Claim.

90. Further, the AGC denies the allegation in paragraph 60 of the Claim that the Crown was subject to the same standard of care throughout the class period. The standard of care evolved in accordance with the development and application of scientific knowledge respecting the safe use of herbicides.

#### **M. NO EXPOSURE**

91. The AGC denies that the plaintiff was exposed to 2,4-D, 2,4,5-T, picloram, TCDD or HCB as a result of any act or omission of the Crown.

92. In the alternative, in the event that the plaintiff was exposed to 2,4-D, 2,4,5-T, picloram, TCDD or HCB, as a result of any act or omission of the Crown, which is not admitted but denied, the AGC states that the plaintiff did not receive a dose of sufficient strength or toxicity, nor was the plaintiff exposed for a

sufficient period of time, so as to have been caused any harm or injury as a result of any such act or omission of the Crown.

93. In the further alternative, steps were taken by the Crown to minimize any possible exposure, which included:

- a) Using registered, widely-used herbicides;
- b) Applying the said herbicides in accordance with manufacturers' recommendations;
- c) Applying the herbicides in a manner that minimized spray drift;
- d) Limiting the number and extent of herbicide applications;
- e) Restricting access to sprayed areas for a reasonable time following the applications; and
- f) Employing other means of vegetation control where appropriate.

94. The use of herbicides containing 2,4-D or 2,4,5-T or picloram at the Base did not create any risk, let alone an unreasonable risk, to the plaintiff of developing a lymphoma.

#### **N. NO CAUSATION**

95. The AGC denies the plaintiff's assertion found at paragraph 70 of the Claim that but for the Crown's negligence the plaintiff's injuries would not have occurred. Further, the assertion in paragraph 71, that the Crown's negligence materially contributed to the plaintiff's injuries, is denied.

96. The AGC states that exposure to TCDD or HCB from herbicides containing 2,4-D, 2,4,5 –T or picloram does not cause, contribute to or contribute to the risk of causing, lymphoma in the plaintiff.

97. The AGC states that any alleged exposure to TCDD or HCB from herbicides containing 2,4-D, 2,4,5–T or picloram as a result of any act or omission of the Crown is not capable of causing, contributing to or contributing to the risk of causing, lymphoma in the plaintiff.

98. In the alternative, the AGC states that if 2,4-D, 2,4,5 –T or picloram can cause, materially contribute or materially contribute to the risk of causing, lymphoma, which is not admitted but denied, then any exposure of the plaintiff to any of those chemicals as a result of the use of herbicides at the Base could not have had such an effect.

99. Similarly, the AGC denies the plaintiff's assertion in the alternative that the injuries alleged by the plaintiff fall within the ambit of risk created by the breach alleged by the plaintiff and that as a result the plaintiff should be excused from proving – as the plaintiff must do – that he would not have developed lymphoma but for his alleged exposure to TCDD or HCB at the Base. The AGC puts the plaintiff to the strict proof of causation.

100. The AGC states that if the plaintiff has developed lymphoma or is at an increased risk of developing a lymphoma, then that condition was caused by

factors completely unrelated to the use of herbicides containing 2,4-D or 2,4, 5-T or picloram at the Base. The AGC states that these other causes include genetic factors and predispositions, lifestyle factors, exposure to cigarette smoke and other environmental exposures.

101. The Crown states that the damages claimed are too remote to be recoverable at law; and any such damages claimed are due to physical or psychological conditions unrelated to the use of herbicides.

102. Dioxins and HCB are ubiquitous in the environment such that Canadians are exposed to them in low levels from many sources. Consequently, all Canadians have background levels of dioxins and HCB as a result of their normal daily living activities.

#### **O. NO CAUSE OF ACTION FOR PURE ECONOMIC LOSS**

103. Claims for pure economic loss are not compensable at law. Hence, the AGC denies that the plaintiff is entitled to damages for pure economic loss equivalent to the cost of testing for TCDD and HCB as asserted in paragraph 42(2) of the Claim. The plaintiff's claim does not fall into any of the categories of negligence which can give rise to such damages. The AGC repeats and relies upon his response to the allegations of negligence.

104. The AGC states that any class member, who is a person without a presently existing, compensable physical injury, does not have a cause of action that is recognized by the law.

105. Further, the AGC states that all claims for and in respect of an enhanced risk of harm are not actionable.

106. There is no scientific or medical evidence that TCDD causes lymphoma in humans. Lymphomas are a heterogeneous group of diseases which have various causes and have been linked to genetic factors and to cigarette smoke. Testing class members for the presence of TCDD and HCB will not establish when or where their exposure to these chemicals occurred, or their likelihood of developing lymphoma.

#### **P. NO OCCUPIER'S LIABILITY**

107. The AGC denies that the Crown is liable to the plaintiff under the law of occupier's liability, as is alleged in paragraphs 72-77 of the Claim. In particular, the AGC denies that the plaintiff was an invitee of the Crown when he entered upon the Base. Further, the AGC denies that the use of herbicides containing 2,4-D or 2,4,5-T or picloram on the Base constituted an unusual danger, and that this alleged unusual danger was hidden to the plaintiff but otherwise known to, or ought to have been known to, the Crown.

108. The AGC pleads and relies upon the principle of *ex turpi causa*.

## **Q. NO LIABILITY FOR CONTRACTORS' WORK**

109. The AGC states that in the event any harm was caused to the plaintiff, which harm is not admitted but denied, arising from the acts or omissions of the independent contractors whom the Crown engaged to perform the application of the herbicides, then the Crown is not liable for any such harm. If the Crown owed any duty of care, which is not admitted but denied, such a duty was discharged by the Crown by exercising reasonable care in the selection and supervision of the independent contractors qualified to undertake the work.

## **R. NO ENTITLEMENT TO PUNITIVE DAMAGES**

### **1) USDoA trials in 1966 & 1967**

110. The AGC denies the allegation at paragraph 78 of the Claim that there was little or no value to the spraying. The Crown's policy objective in allowing the 1966 and 1967 herbicide trials by the USDoA was to test the effectiveness of herbicides in controlling vegetation so that safe and effective training could take place in the RTA.

111. The AGC denies the allegations at paragraphs 78 and 79 that the herbicide trials were contrary to Canadian values, or that the Crown knew that the government of the United States intended to use information derived from the tests to "facilitate the killing and maiming of individuals in Vietnam." These allegations are without foundation, entirely irrelevant and scandalous.

**2) No deceit, fraud or misrepresentation**

112. The AGC denies that the Crown took steps to deceive the plaintiff respecting the nature and extent of the spray program or the health risks allegedly associated therewith. On the contrary, the Crown has communicated openly and honestly with the plaintiff, and the public at large, regarding these issues.

113. The AGC denies that the Crown made the representations as alleged by the plaintiff and set out in paragraphs 80 to 82, inclusive, of the Claim. In particular the AGC denies the allegation in the opening sentences of paragraph 82 that the defendant made "false, reckless or misleading representations about the extent of the contamination at CFB Gagetown and the risks it posed to individuals and property." With respect to the allegations in the balance of paragraph 82, the AGC states that:

- The plaintiff has selectively excerpted the statements particularized at subparagraphs 82(a) and (e) in a manner that attempts to distort the statements.
- Contrary to the allegation in subparagraph 82(b), the Crown did not engage in any "wrongdoing" and Colonel R.G. Hurley did not refuse to allow Jerry White and others access to the RTA to investigate any alleged wrongdoing. Colonel Hurley offered to allow them to investigate their concerns on the condition that, for safety reasons, they access the RTA in an appropriate military vehicle and be accompanied by military personnel. Colonel Hurley's offers were refused.
- Colonel Hurley made comments of the nature alleged at subparagraph 82(c)(1), (2) and (4) of the Claim. Colonel Hurley did not represent that "the chemicals could be gargled in human mouths and applied to human flesh without injury" as alleged in

subparagraph 82(c)(3), only that he was aware that someone said he had gargled the chemical.

114. The Crown did not make any representations at the meeting at the theatre at CFB Gagetown on June 23, 2005 that were intended to mislead or have the effect of misleading potential class members as alleged in subparagraph 82(f) of the Claim. On the contrary, the purpose of the meeting was to openly and honestly communicate the facts that were known at the time about the 1966 and 1967 herbicide trials by the USDoA.

115. Furthermore, the Crown's representatives did not represent at the June 23, 2005 meeting that dioxin evaporates in air as alleged in subparagraph 82(f)(i), but one of them did indicate that it degrades in sunlight. Another of the Crown's representatives did in fact make the comments set out at subparagraphs 82(f)(ii) and (ii) (*sic*) of the Claim, based on the information available to her at the time. Those comments are in fact accurate.

116. In the alternative and in any event, the AGC denies that the plaintiff suffered any damage. Further, the AGC denies that any damage allegedly suffered by the plaintiff, which damage is not admitted but denied, was occasioned by the alleged or any representation of the Crown.

117. In the further alternative, the Crown denies that the plaintiff or any class member relied on any representations to their detriment.

## S. THE PLAINTIFF'S CLAIM IS BARRED

118. The AGC denies the allegation at paragraph 83 of the Claim that the facts disclosing the cause of action were not known until 2005. The AGC states that, on the contrary, the facts, as have been alleged, have been a matter of public knowledge for decades and were especially well-known among persons who trained, worked or participated in activities at the Base.

119. At paragraph 81 of the Claim, the plaintiff pleads knowledge of facts as early as 1981. Further, Ring was posted at the Base when Members of Parliament informed the House of Commons in January 1981 that Orange and other defoliants had been tested at the Base in 1966 and 1967.

120. The plaintiff pleads in paragraph 13 of the Claim that he was diagnosed with Non-Hodgkins lymphoma in December, 1995, while in paragraph 4 of the Claim it is asserted that Mary Williams was diagnosed with type-2 diabetes in 1975.

121. The AGC pleads and relies on section 32 of the *CLPA*, and through it, all applicable provisions in provincial legislation pertaining to prescriptions and limitations of actions.

122. The plaintiff knew or, in the alternative, ought reasonably to have known of all the necessary facts giving rise to the allegations in the Claim, including alleged acts or omissions and the plaintiff's alleged damages, more than six

years prior to the issuance of the claim. Accordingly, the plaintiff's claims are statute-barred. The AGC pleads and relies on the New Brunswick *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, which prescribes that an action shall be commenced within six years after the cause of action arose.

123. In addition, the AGC pleads and relies on the provisions of the *Limitations Act*, S.N.L. 1995, c. L-16.1, as amended, and the *Trustee Act*, R.S.N.L. 1990, c. T-10, as amended, as well as the statutes of limitations of the other Canadian provinces.

124. The AGC states that the alleged acts or omissions of the Crown complained of by the plaintiff in respect of the use of herbicides at the Base were done for the purpose of the defence of Canada or of training or maintaining the efficiency of the Canadian Forces. As such, the within action cannot succeed at law as the Crown is not liable by virtue of the immunity described in section 8 of the *CLPA*.

125. The actions of the plaintiff and certain class members are also barred or stayed on the following grounds:

- a) Section 9 of the *CLPA* prescribes that no proceedings lie against the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.
- b) Section 111(2) of the *Pension Act*, R.S.C. 1985, c. P-6, as amended, stays the claims of class members who are eligible to

apply to for a pension on the same factual basis until they have exhausted their *Pension Act* and judicial review remedies.

- c) Sections 4 and 12 of the *Government Employees Compensation Act*, R.S.C. 1985, c. G-8, as amended bars the action of class members who are or were civil servants as the alleged injuries arose out of their employment.
- d) Section 16 of the *Visiting Forces Act*, R.S.C. 1985, c. V-2 bars the action of any class members who are or were members of foreign armed forces if compensation has been paid or is payable by a designated state.

126. The AGC states that private contractual terms of employment and provincial statutes govern any claims of class members who were or are employed by those civilian contractors who were awarded or performed contracts to apply licensed herbicidal products on designated areas of the Base. Hence, those members do not have any claim against the Crown.

#### **T. INDIVIDUAL PROOF AND ASSESSMENTS NECESSARY**

127. The plaintiff seeks aggregate damages on behalf of the class. The AGC pleads that such an award is not available given the diverse range of individual exposures, doses and resulting damages, if any. The nature and extent of any such potential claim is thus unique to each class member and will require individual determination. The absence of any degree of commonality precludes an aggregate damages award.

128. Individuals are not permitted to access the SRIAs at any time for recreational purposes. Range Control may grant individuals, at their request, permission to use other sections of the RTA for certain non-military purposes.

129. The limited use which can be made of the RTA for non-military purposes is always at the particular user's own risk. In consideration for access to a specifically designated area of the RTA, the user must sign a waiver releasing and forever discharging Her Majesty, her officers, servants, employees and members of the Canadian Forces from any and all claims arising from his or her use of the RTA, and agreeing to indemnify and hold them harmless against all claims arising from that use.

130. The AGC pleads and relies upon all such waivers of liability and promises of indemnification, including those signed by the plaintiff or a class member, together with the restrictions set forth in the *Defence Controlled Access Area Regulations* SOR/86-957 and its predecessor the *Defence Establishment Trespass Regulations*.

131. The AGC pleads and relies on the doctrines of laches and acquiescence.

132. The AGC pleads and relies upon any and all applicable contractual exclusions and releases of the Crown's alleged liability, including a declaration

executed by Ring on November 23, 2003 to the effect that he has not suffered any injury, disease or illness attributable to military service in the Reserve Force.

#### **U. ADDITIONAL DEFENCES**

133. The AGC denies that the plaintiff is entitled to prejudgment interest. In the alternative, pursuant to section 31(6) of the *CLPA*, prejudgment interest may not be awarded for any period prior to February 1, 1992.

134. The AGC pleads and relies upon the *National Defence Act*, R.S.C. 1985, c. N-5, the *Defence Production Act*, R.S.C. 1985, c. D-1, all regulations made thereunder, and the *Queen's Regulations and Orders for the Canadian Forces*. He relies on these statutes and regulations as they have been amended and as they were in force during the material times of this Claim. In particular, the AGC pleads and relies upon section 269 and section 270 of the *National Defence Act*, R.S.C. 1985, c. N-5. The AGC also pleads and relies upon the *Visiting Forces (North Atlantic Treaty) Act*, S.C. 1951 c.28.

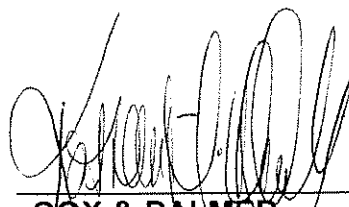
135. The AGC pleads and relies upon the *Pest Control Products Act*, S.C. 2002, c. 28, all regulations made thereunder, relying upon this Act as amended and as it was in force during the material times of this Claim. In particular, the AGC pleads and relies upon the *Pest Control Products Act*, S.C. 1939, c. 21, *Pest Control Products Act*, R.S.C. 1952, c. 209, *Pest Control Products Act*, S.C. 1968-1969, c. 50, *Pest Control Products Act*, R.S.C. 1970, c. P-10, *Pest Control Products Act*, R.S.C. 1985, c. P-9 and all regulations thereunder.

136. The AGC pleads and relies upon the *Pesticides Control Act*, S.N.B. 1973, c. 15, as amended and the regulations thereto and applicable from time to time.

137. The AGC pleads and relies on section 24 of the *CLPA*.

138. The AGC requests that the Claim be dismissed with costs to the Crown.

Dated at St. John's this 5<sup>th</sup> day of September 2008.



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