

**NO. L040820  
VANCOUVER REGISTRY**

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**BETWEEN:**

**JUSTIN McGIVERN-ROBERSON, an infant by his Guardian Ad Litem LYNNE  
McGIVERN and the said LYNNE McGIVERN**

**PLAINTIFFS**

**AND:**

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH  
COLUMBIA**

**DEFENDANT**

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c.50

**AFFIDAVIT OF KENNETH J. BAXTER**

I, Kenneth J. Baxter, Barrister & Solicitor of, #408 – 145 Chadwick Court,  
in the City of North Vancouver, Province of British Columbia, **MAKE OATH AND  
SAY AS FOLLOWS:**

**INTRODUCTION**

1. I am a partner with the law firm of Poyner Baxter LLP, Barristers & Solicitors, for the Plaintiff herein and as such have personal knowledge of the matters hereinafter deposed to, save and except where the same are stated to be upon information and belief and as to such matters I verily believe them to be true.

## **STATEMENT OF CLAIM AND BACKGROUND OF ACTION**

2. Attached hereto and marked **Exhibit "A"** to this my Affidavit is a copy of the Writ of Summons and Statement of Claim herein which was filed in the Vancouver Registry of this Honourable Court on March 30<sup>th</sup>, 2004.

3. The allegations in this action relate to the failure of the Province of British Columbia to fulfill its responsibility in the provision of educational services as set out in the School Act RSBC 1996, c. 412 and amendments thereto. The preamble of the Act states the underlying goal and purpose of the Act as follows:

**...it is the goal of a democratic society to ensure that all its members receive an education that enables them to become personally fulfilled and publicly useful, thereby increasing the strength and contributions to the health and stability of that society:**

**[and]**

**...the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy.**

4. The Province of British Columbia is bound to discharge its obligations to the people of the Province of British Columbia under the provisions of the School Act in accordance with the constitutional requirements set out in the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11 (the Canadian Charter of Rights and Freedoms).

5. It is alleged in this action that the Province of British Columbia has either failed, or refused to provide adequate and proper testing of the infant Plaintiff for the determination of his learning disability, namely, dyslexia, and has failed, or

has refused and continues to fail or refuse to provide proper, effective and recognized remedial education as required by the infant because of his **dyslexic** condition. This failure or refusal by the Defendant to provide services is in breach of the rights of the infant Plaintiff to receive educational and other government services under applicable provincial legislation and is in breach of the infant Plaintiff's rights under the Canadian Charter of Rights and Freedoms to be treated equally with all other individuals before and under the law and to be afforded equal protection and equal benefit of the law without discrimination.

### **EXPERIENCE OF CLASS COUNSEL**

6. James Poyner and myself, have both been engaged as counsel in the practice of law in the Province of British Columbia and have been members in good standing of the Law Society of British Columbia for more than 35 years. Patrick J. Poyner the other member of our firm has been in practice and a member of the bar for almost 9 years.

7. Our firm has been actively engaged in proceedings brought under the *Class Proceedings Act* for over 10 years and have successfully resolved 19 actions on behalf of several hundreds of thousand of class members including actions brought against Sun Life, Manulife, Mutual of Omaha, Bausch & Lomb, Primerica, Canada Life, London Life, E.I. DuPont de Numours & Company, Shell Oil Company and others.

### **CLASS CERTIFICATION**

8. This proceeding is suitable for class certification pursuant to the provisions of the *Class Proceedings Act* RSBC 1996, c.50 for the following reasons:

(a) ***Cause of Action (s. 4(1)(a))***

The Statement of Claim discloses allegations by the Plaintiff that she and other members of the proposed Class have suffered damages as a result of the Defendant's failure to provide adequate and proper testing of the infant Plaintiff and other members of the proposed Class for the determination of their learning disability, namely, **dyslexia**, and has failed, or has refused, and continues to fail or refuse to provide proper, effective and recognized remedial education as required by the infant Plaintiff and other members of the proposed Class because of their **dyslexic** condition.

(b) ***Identifiable Class (s.4(1)(b))***

There is an identifiable Class which consists of the Plaintiff in this action, and in addition, our office has been contacted by and has been in direct communication with at least fifty (50) other individuals who may qualify as Class Members. The Plaintiff proposes that the Class be defined as follows:

All students for whom, while resident in the Province of British Columbia, the Defendant has failed to provide proper testing and remedial education for their **dyslexic** condition.

(c) ***Common Issues (s.4(1)(c))***

The Statement of Claim raises a number of common issues. The common issues proposed for the purposes of this action are as follows:

1. Is the defendant in breach of its obligations as set out in the *School Act* RSBC 1996, c. 412 by either failing or refusing to provide adequate and proper testing of students while resident within the Province of

British Columbia for the determination of their learning disability, **dyslexia**?

2. Is the Defendant in breach of its obligations as set out in the School Act by failing or refusing to provide proper, effective and recognized remedial education as required by students while resident within the Province of British Columbia because of their **dyslexic** condition?
3. By virtue of the Defendant's failure to comply with the provisions of the School Act, as set out in questions 1 and 2, is the Defendant in breach of its obligations under the Canadian Charter of Rights and Freedoms to treat students who are resident in the Province of British Columbia and who are suffering from the condition of **dyslexia** equally with all other individuals before and under the law and who are entitled to be afforded equal protection and equal benefit of the law without discrimination?
4. If the answer to one or more common issues numbered 1, 2 or 3 is "yes", is the Defendant guilty of conduct that justifies an award of punitive damages?
5. If the answer to common issue number 4 is "yes", what amount of punitive damages is to be awarded?

(d) **Preferable Procedure (s.4(1)(d))**

A Class Proceeding is the preferable procedure for the resolution of the common issues as outlined above for the following reasons:

- (i) The class will consist largely of people who, by virtue of their dyslexia, have been substantially compromised through their inability to take advantage of the educational system in British Columbia. The personal circumstances surrounding the majority of these people will have rendered them financially, intellectually and educationally deprived and therefore incapable of pursuing litigation of this nature on a competitive individual basis.
- (ii) Individual litigation would be repetitive and expensive and would place an enormous burden on the judicial system.

- (iii) The claims would be onerous and expensive to bring on an individual basis.
- (iv) Most Class Members would not, in fact, bring their claims forward because of the risks, costs and delays involved in litigation and particularly in view of the disadvantaged educational status that most of them suffer from.
- (v) A Class Proceeding will result in increased access to justice and judicial economy.

(e) ***Representative Plaintiff (s.4(1)(e))***

I am satisfied that Lynne McGivern as Representative Plaintiff will fairly and adequately represent the Class. To the best of my knowledge, information and belief, she does not have an interest in conflict with the interests of other Class Members in respect of the proposed common issues or in any other respect. A draft plan for the prosecution of this proceeding is attached hereto as **Exhibit “B”** to this my Affidavit.

**CLASS SIZE**

9. I have no direct knowledge as to the number of persons who comprise the potential class. However, members of our office have talked directly to and have communicated with at least fifty (50) potential Class members and it is my impression based on discussions with the said Dr. Linda Siegel, as well as the review of recent newspaper articles, that there are many thousands of people within the proposed class definition previously set out in paragraph 8 (b) herein who would form the Class if the within action is certified under the *Class Proceedings Act*. Attached hereto and marked **Exhibit “C”** to this my Affidavit is a copy of such a newspaper article recently published in the December 22<sup>nd</sup>, 2005, edition of the Vancouver Sun newspaper.

10. I make this Affidavit in support of an Order as requested in the Notice of Motion and for no other or improper purpose.

**SWORN BEFORE ME** at the )  
City of North Vancouver, in the )  
Province of British Columbia, this )  
20<sup>th</sup> day of March, 2006. )  
\_\_\_\_\_ )

\_\_\_\_\_  
**KENNETH J. BAXTER**

Names \_\_\_\_\_  
A Commissioner for taking  
Affidavits within the Province of  
British Columbia.

# Full funding ordered for learning disabled

Public schools required by law to provide proper education: tribunal

BY JANET STEFFENHAGEN  
VANCOUVER SUN

**THE PROVINCE** | The B.C. Education Ministry discriminates against learning-disabled students when it fails to give them proper support in the public school system, the B.C. Human Rights Tribunal ruled Wednesday.

In a decision arising from the troubles of a young boy in the mid-1990s, the tribunal ordered the ministry to provide full funding for the education of severely learning-disabled students and to monitor districts to ensure they deliver the necessary service.

The decision is a victory for Rick Moore, a North Vancouver father who filed the complaint years ago after watching his dyslexic son, Jeff, struggle for four years in a public school.

"It's a wonderful Christmas present," Moore said of the 308-page ruling that has implications for all public schools but not private schools.

"We're walking on air," Moore said.

His lawyer, Frances Kelly of the Community Legal Assistance Society, said the ruling is also a victory for thousands of children with severe learning disabilities throughout B.C.

"This is a significant victory that ensures that severe learning-disabled students have equal access to education," she said.

Education Minister Shirley Bond refused to comment. The ministry issued a statement saying it was still reviewing the decision and noted it has 60 days to file an appeal with the courts.

The tribunal said the ministry and North Vancouver school district discriminated against Jeff based on mental ability when it closed a special diagnostic centre for learning-disabled students in 1994.

The controversial decision was made by the cash-strapped district to save \$292,500, just weeks after Jeff was designated as a special-needs student and referred to the centre for help.



IAN SMITH/VANCOUVER SUN

Rick and Michelle Moore had to send their dyslexic son Jeffrey Moore (sitting) to a private school when his North Vancouver public school failed to teach him to read.

# Nine years tuition reimbursed in ruling

From B1

Without the centre, special help for Jeff was limited to 30 or 40 minutes three times a week at his neighbourhood school, Braemar elementary. He was still unable to read by Grade 3.

Eventually, Braemar teachers told Rick and Michelle Moore they would have to send Jeff to private school, and they followed

that advice, transferring him to Kenneth Gordon school, despite its hefty tuition. The Burnaby school's program is designed to meet the needs of children with specific learning disabilities.

In her ruling, tribunal chairwoman Heather MacNaughton noted public schools are required by law to provide an education for all students to the point of undue hardship.

"It would be only in the rarest

of circumstances, which I am satisfied do not exist here, that the failure to provide appropriate supports and accommodations to a vulnerable group could be justified on the basis of cost," she wrote.

The tribunal ordered the ministry and the district to reimburse the Moores for tuition they paid during the nine years Jeff attended private school, and other out-of-pocket costs.

As well, they were ordered to give Jeff — now 19, a recent B.C. Institute of Technology graduate and an apprentice plumber — \$10,000 for injury to dignity.

MacNaughton said Jeff's story is one of personal success, but added that he suffered unnecessarily because of the school's failure to identify his problem early and provide sufficient learning support.

"The personal and social costs

## Provisions for severely disabled students

The B.C. human rights tribunal has ordered the B.C. education ministry to provide the following within one year:

- Full funding for all severely learning disabled students.
- Mechanisms for ensuring that services in schools are appropriate.
- Guarantees that all districts have early intervention programs and a range of services for severely disabled students.

occasioned by a failure to provide adequate services to severely learning disabled] students are incalculable," she added.

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