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

Citation: *Anderson v. Canada (Attorney General)*, 2013 NLTD(G) 46
Date: 20130319
Docket: 200701T4955CCP

Brought under the *Class Actions Act*,
S.N.L. 2001 c. C-18.1

BETWEEN:	**CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**GOVERNMENT OF NEWFOUNDLAND AND LABRADOR**	THIRD PARTY

Docket: 2007 01T 5423

BETWEEN:	**TOBY OBED, WILLIAM ADAMS AND MARTHA BLAKE**	PLAINTIFFS
AND:	**ATTORNEY GENERAL OF CANADA**	DEFENDANT

Docket: 2008 01T 0844

BETWEEN:	**ROSINA HOLWELL AND RITA CHIDO**	PLAINTIFFS
AND:	**ATTORNEY GENERAL OF CANADA**	DEFENDANT

Docket: 2008 01T 0845

BETWEEN:	**SARAH ASIVAK AND DELANO FLOWERS**	PLAINTIFFS
AND:	**ATTORNEY GENERAL OF CANADA**	DEFENDANT

Docket: 2008 01T 0846

BETWEEN:	**EMILY DICKMAN AND DOMINIC DICKMAN**	PLAINTIFFS
AND:	**ATTORNEY GENERAL OF CANADA**	DEFENDANT

Before: The Honourable Madam Justice Gillian D. Butler

Place of Hearing:	St. John's, Newfoundland and Labrador
Submissions Received:	November 19 and 26, 2012; December 3, 2012; January 14, 2013; and February 1, 2013

Summary:

Counsel of Record:

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Rolf Pritchard, Q.C.	Counsel for the Third Party

Authorities Cited:

CASES CONSIDERED: **Miawpukek Band v. Ind-Rec Highway Services Ltd.**, 1999 NFCA 19592, 172 Nfld. & P.E.I.R. 245; **Anderson v. Canada (Attorney General)**, 2011 NLCA 82, 315 Nfld. & P.E.I.R. 314; **Alberta v. Elder Advocates of Alberta Society**, 2011 SCC 24, [2011] 2 S.C.R. 261; **Guerin v. Canada**, [1984] 2 S.C.R. 335, 1984 CarswellNat 813; **Weywakum Indian Band v. Canada**, 2002 SCC 79, [2002] 4 S.C.R. 245; **Haida Nation v. British Columbia (Minister of Forests)**, 2004 SCC 73, [2004] 3 S.C.R. 511; **Quinlan v. Newfoundland (Minister of Natural Resources)**, 2000 NFCA 49, 192 Nfld. & P.E.I.R. 144; **Small v. Newfoundland (Department of Human Resources and Employment)**, [2002] N.J. No. 12, 211 Nfld. & P.E.I.R. 175 (S.C.T.D.); **Dolmage v. Ontario**, 2012 ONSC 4329, [2012] O.J. No. 3575; **Leyte v. Newfoundland (Minister of Social Services)** (1998), 164 Nfld. & P.E.I.R. 278, 54 C.R.R. (2d) 114 (Nfld. C.A.); **Dawson v. John Cabot (1997) 500th Anniversary**

Corp., [1998] N.J. 328, 169 Nfld. & P.E.I.R. 50 (C.A.); **Binder v. Royal Bank of Canada**, 1996 N.S.C.A. 5599, 150 N.S.R (2d) 234; **Anns v. Merton London Borough Council**, [1978] A.C. 728 (H.L.); **Bank of Montreal v. Mercer**, [1998] N.J. No. 123, 1998, 163 Nfld. & P.E.I.R. 119 (C.A.).

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001 c. C-18.1

RULES CONSIDERED: *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42 Sch. D.

TEXT CONSIDERED: J. Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Markham, ON: LexisNexis, 2008)

REASONS FOR JUDGMENT

BUTLER, J.:

INTRODUCTION

[1] In this class action the Plaintiffs seek a preliminary determination of questions of law in advance of the trial of the certified common issues, pursuant to Rule 38.01 of the *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42 Sch. D. The Defendant objects and denies that the Plaintiffs can meet the threshold test required for a preliminary determination of a question of law. The Third Party supports the Defendant's opposition.

[2] The questions pertain to the existence of an alleged fiduciary duty and alleged duty of care owed by the Defendant, the Attorney General of Canada ("Canada") to one of the certified classes of Plaintiffs, being the students who attended the schools in question (the "Survivor Class").

[3] I accept that:

(i) The certified common issues in these actions pertain to claims in both negligence and breach of fiduciary duty based on the manner in which Canada participated in the operation, funding, oversight and control of (or its failure to properly operate and oversee) five residential schools for aboriginal children in Labrador ("the Schools") following Confederation in 1949;

(ii) An affirmative determination by this Court of the existence of a fiduciary duty or duty of care owed by Canada to the Survivor Class would dispose of a key question raised by the pleadings (subject to appeal);

(iii) Similarly, an order declaring that no fiduciary duty or duty of care was owed by Canada to the Survivor Class would dispose of the entire proceedings (subject to appeal); and

(iv) Canada's defenses to both the certification application and the merits of the claim itself have centered entirely around the allegation that it owed no duty at all, of any kind, at any time during the class period.

[4] Rule 38.01 states:

38.01. (1) The Court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,

(a) determine any relevant question or issue of law or fact, or both;

(b) determine any question as to the admissibility of any evidence;

(c) order discovery or inspection to be delayed until the determination of any question or issue;

(d) give directions as to the procedure to govern the future course of any proceeding, which directions shall govern the proceeding notwithstanding the provision of any rule to the contrary;

(e) where the pleadings do not sufficiently define the issues of fact, direct the parties to define the issues or itself settle the issues to be tried, and give directions for the trial or hearing thereof; or

(f) order different questions or issues to be tried by different modes and at different places or times.

(2) Where in the opinion of the Court, the determination of any question or issue under rule 38.01(1) substantially disposes of the whole proceeding, or any cause of action, ground of defence, or counterclaim, the Court may thereupon order the entry of such judgment or make such order, as is just.

(3) Unless the Court otherwise orders, a trial or hearing shall not be stayed pending an appeal from an order under Rule 38.

[5] The relief sought by the Plaintiffs is discretionary and represents a detraction from the general principle that "... all issues relating to a particular proceeding should be disposed of at one time" (see **Miawpukek Band v. Ind-Rec Highway Services Ltd.**, 1999 NFCA 19592, 172 Nfld. & P.E.I.R. 245 at para. 11).

[6] Counsel agree that Rule 38.01 requires the Court to address a threshold question, namely, whether an application in advance of the trial is an appropriate mechanism for the proper determination of these questions of law. In fact, counsel also agree that the considerations for the assessment of this threshold question are as follows:

A. There should be some discernable advantage such as the disposition of the case or determination of a discrete issue, which would simplify the trial;

B. Whether a sufficient record can be provided to consider the point of law to be determined;

C. Whether the facts underlying the resolution of a pure question of law are a matter of public record;

D. Whether the issue is intermingled with other issues and whether resolution depends on the credibility of witnesses;

E. Whether consideration of the issue would merely result in a trial in a different form or, alternatively, could create a reasonable prospect of resolution of other issues;

F. Whether any directions are necessary respecting the future conduct of the action, if the Rule 38.01 determination does not dispose of the entire proceeding; and

G. Whether the preliminary point involves the status of a party.

[7] I shall address each of these components in a later section of these Reasons for Judgment but first I shall review some background facts.

NATURE OF THE ACTION

[8] Our Court of Appeal reviewed the nature of the Plaintiffs' claims and the historical facts on which the Plaintiffs rely in its decision to uphold Fowler, J's certification order. I set out paragraphs 3–12 of the December 21, 2011 decision of our Court of Appeal in **Anderson v. Canada (Attorney General)**, 2011 NLCA 82, 315 Nfld. & P.E.I.R. 314, ("**Anderson** 2011") below:

> 3 Before the 1949 Terms of Union between Newfoundland and Canada, two delegations from this Province in 1947 and 1948 met with Canadian delegations to negotiate the terms of Confederation. Reports admitted without objection by the parties indicate that, initially, documents exchanged by the delegations included express reference to federal responsibility for the welfare of "Indians and Eskimos", including education, as well as a description of the day and residential school systems in place in the rest of Canada. The final Terms, however, included merely a general clause in Term 3 that the provisions of the *British North America Act* shall apply to Newfoundland except insofar as varied by the Terms.
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> 4 A decision of the Supreme Court of Canada, *Reference re: British North America Act, 1867 (U.K.)* s. 91, [1939] S.C.R. 104, had decided ten years before Confederation that the "Eskimo" people of Quebec, and by implication throughout Canada, were "Indians" as that term was used under s. 91(24) of the *British North America Act, 1867.*

5 A 1951 memorandum prepared by the chairman of Canada's Inter-Departmental Committee on Newfoundland Indians and Eskimos noted that since the Terms of Union do not refer to Indians and Eskimos and since head 24 of Section 91 of the *BNA Act* places "Indians and lands reserved for Indians" exclusively under federal jurisdiction, Canada is responsible for the native population resident in Labrador. By 1951, Canada had agreed to pay bills submitted by Newfoundland for "Indians and Eskimos".

6 A 1954 agreement between this Province and Canada stipulated that Canada would assume 66% of capital expenditures on behalf of Eskimos in Newfoundland and 100% of capital expenditures on behalf of Indians in the fields of health, welfare and education.

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

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

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

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

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

(b) Canada's involvement in aboriginal education

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

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

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

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

[9] The Court of Appeal held that Fowler, J. had correctly concluded that it was not plain and obvious that no cause of action had been disclosed in the plaintiff's

statement of claim and that the claims should be certified as a class action (see para. 123).

[10] I will now review the two principal claims made by the Plaintiffs against Canada in these class actions.

NATURE OF DUTIES CLAIMED

A) Non-Delegable Fiduciary Duty

[11] Our Court of Appeal in **Anderson** 2011 noted at paragraphs 51 and 52 that:

> 51 Because of their unique position, governments, such as the government of Canada, will only owe fiduciary duties in limited and special circumstances; see *Elder Advocates* at para. 37. The Supreme Court of Canada has, however, recognized such a fiduciary duty existing between aboriginal peoples and the Crown in certain instances. With respect to when such a duty might be imposed, Binnie J. noted in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245:
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> > [81] ... [T]here are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. Land was also the subject matter of *Ross River*, [2002] 2 S.C.R. 816 ("the lands occupied by the Band"), *Blueberry River*, [1995] 4 S.C.R. 344, and *Guerin* (disposition of existing reserves). Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*.
> >
> > ...
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> > [83] ... I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals*, [1989] 2 S.C.R. 574, *supra*, at p. 597), and that this principle applies to the

> relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

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

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

[12] The Plaintiffs allege that Canada had a constitutional responsibility and fiduciary duty for the welfare of all aboriginal peoples, including members of the Survivor Class, from the date of Confederation in 1949. In support of the special circumstances required (see **Alberta v. Elder Advocates of Alberta Society**, 2011 SCC 24, [2011] 2 S.C.R. 261 at para. 37), the Plaintiffs will rely on undisputed historical records. I have already referenced some of these in paragraph [8] herein where I cite **Anderson** 2011. I will repeat two below:

(i) Minutes of the Sub-Committee on Indians and Eskimos shows that in September 1947, Canadian officials responsible for federal Indian Affairs advised that if Newfoundland became a province of Canada, the Province's Indians and Eskimos would be the full responsibility of the federal government, including the provision of education (National Archives of Canada, MG 30e, 159, vol. 4, file "Indians and Eskimos of Newfoundland", submitted 1950, Minutes, September 1947, Record of the Indian and Eskimo Sub-Committee);

(ii) The 1954 Canada-Newfoundland Agreement provided that Canada would assume 66 2/3 percent of costs in respect of Eskimos and 100 percent of the costs in respect of Indians relating to "capital

> expenditures ... in the fields of welfare, health and education" (J.W. Pickersgill to H.L. Pottle, April 12, 1954; Pottle to Pickersgill, April 26, 1954, to come into effect April 1, 1954).

[13] The categories of fiduciary duty are not closed (see para. 80 of **Weywakum** citing **Guerin v. Canada**, [1984] 2 S.C.R. 335, 1984 CarswellNat 813, at 384). However, Canada's response to the alleged non-delegable fiduciary duty has not changed since its appeal of the certification order of Fowler, J. to our Court of Appeal. Canada maintains that the Plaintiffs cannot establish the limited and special circumstances necessary for a fiduciary obligation in the circumstances of this case.

[14] Canada suggests that the facts relied upon by the Plaintiffs do not support a conclusion that Canada played a central role in the operations of the Schools in question. Canada's defence is that its sole role respecting the operations of the Schools was only to making funding contributions under the auspices of Newfoundland's exclusive constitutional role in education regarding all persons within the Province. Canada asserts that it had no agreements regarding the operation of the Schools; instead, it had funding arrangements for capital expenditures only. It says that the provision of funding (as exemplified in the 1954 Agreement referred to above) with no accountability requirements is insufficient.

B) Direct Negligence Claim

[15] The second basis for the Plaintiffs' claim for the existence of a duty is the common negligence claim. However, as our Court of Appeal in **Anderson** 2011 noted:

> 64 The duty of care alleged to exist in this case has not been "settled by existing authority" and must therefore meet the two stage test for determining whether a novel duty of care could be recognized in these circumstances ... That test was described in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537. There, McLachlin C.J. and Major J. stated:
>
> > [30] In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis, [1978] A.C. 728, is

> best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, [1988] 1 A.C. 175, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
>
> [31] On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.
> (Emphasis in original.)

[16] The Plaintiffs assert that the records upon which they rely are sufficient to establish the proximity and foreseeability required for a finding of a general duty of care and the extent of the duty owed. The Plaintiffs also assert that Canada has not raised any policy defences to negative the imposition of the duty.

[17] Canada defends on the same basis as it did to the fiduciary duty alleged and asserts that funding is insufficient to ground a duty of care. Acknowledging the agency relationships alleged in the statements of claim, Canada asserts that it may only be found liable vicariously for the negligent actions of Crown servants acting in the scope of their employment and that the Plaintiffs have not identified such a Crown servant. Canada's defence also contends that any actions it undertook were

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dictated by *bona fide* policy choices made by successive Canadian governments which cannot give rise to liability at law.

C) Summary of Duties of Care Alleged

[18] There is a substantial historical evidentiary record upon which the Plaintiffs will rely and I have no doubt that the funding arrangements and the agreements entered into between the federal and provincial governments will be the focus of the liability questions in these class actions.

[19] A fair interpretation of these records will require an understanding of events occurring prior and subsequent to Confederation in 1949, the federal and provincial division of powers, and the alleged *sui generis* relationship alleged between the Crown and aboriginal peoples in this province. I also accept that these issues will require consideration of legal and factual issues such as vicarious liability, agency and delegation.

[20] In short, I accept that this case addresses a very dynamic area of Canadian law and that the nature and extent of the particular obligations that may arise out of the relationship between the parties are matters that remain largely unsettled in the jurisprudence (see para 53 of **Anderson** 2011 citing Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Markham, ON: LexisNexis, 2008) at 190–191).

ANALYSIS

[21] The questions posed for a preliminary question of law are:

(i) Did Canada owe a duty of care to the Resident Class?

(ii) Did Canada owe a fiduciary duty to the Resident Class? and

(iii) If so, when did those duties arise and what was the extent of those duties?

[22] The reference in the questions to "Resident Class" initially caused me some confusion which, following enquiry, was clarified in emails from respective counsel on March 12, 2013. Relying on these emails I confirm that "Resident Class" is not a class certified in this action. The Plaintiffs' Rule 38 application deals only with the Survivor Class (students of the Schools) and not the Family Class (being the families and siblings of the students who attended the Schools).

A) Discernable Advantage

[23] The Plaintiffs allege that there are only two outcomes to their proposed application; either the actions will be disposed of in their entirety (if the Court determines that Canada owed neither a duty of care nor a fiduciary duty) or the common issues trial will be significantly shortened and less costly. In either case, Plaintiffs' counsel characterizes their application as the classic case of achieving an obvious advantage to having preliminary questions determined prior to trial.

[24] Because the Plaintiffs have not included the question of the alleged fiduciary or other duty owed to the families and siblings of the students (the "Family Class") in their Rule 38 application, I do not agree with the Plaintiffs' submission that a determination of the preliminary questions posed would mean that the common issues trial would focus only on evidence of alleged breaches. Were the preliminary issues of duty and extent of duty determined in the Plaintiffs' favour for the Survivor Class, there remain the questions of whether a duty was owed to the Family Class and, if so, the extent of that duty as well as alleged breach of duty.

[25] Canada asserts that there is no discernable advantage where the application is being brought within the context of a class action and where discrete common issues have already been certified and will have to be decided before the individual trials. Counsel for Canada submits that none of the cases upon which the Plaintiffs rely involve class actions which by their very nature and procedure have already narrowed the issues for determination at the common issues trial (those issues that

have been certified by the Court). Canada submits therefore that the discernable advantage is reduced, if not entirely eliminated, in light of this important procedural difference.

[26] Canada also asserts that the Plaintiffs' proposed course of action would add an additional and unnecessary layer in the litigation process that would delay, rather than expedite, the proceedings. They assert that depending on the outcome of the Rule 38 application, one of the parties may decide to appeal or bring applications to amend pleadings or possibly to decertify the class actions, any of which could lead to further delay of the common issues trial as well as to any individual trials.

[27] Finally, on this component, Canada asserts that the certified common issues are not the same as the questions submitted for determination on the Rule 38 application. They suggest that the key certified common issues are:

(i) By its operation or management of the Schools, did the Defendant breach a duty of care owed to the students of the Schools to protect them from actionable physical and emotional harm; and

(ii) By its purpose, operation or management of the Schools, did the Defendant breach a fiduciary duty owed to the students of the Schools to protect them from actionable physical and mental harm.

[28] I have already noted that there is a third certified common issue of relevance to my consideration of the threshold issue, that being whether the Defendant breached a fiduciary duty owned to the families and siblings of the students of the Schools, to protect them from physical and mental harm.

[29] Canada asserts that the certified common issues demand an evaluation of the circumstances of the alleged relationships and the specific actions of Canada. In comparison, they assert that the questions proposed by the Plaintiffs on the Rule 38 application ask the Court to find a free-standing fiduciary duty and/or duty of care

(in the absence of any alleged circumstances or specific conduct) albeit for only one of the classes.

[30] Relying on **Weywakum Indian Band v. Canada**, 2002 SCC 79, [2002] 4 S.C.R. 245, Canada asserts that the Supreme Court of Canada has made it clear that a contextual analysis is required in order to determine if a fiduciary duty exists. It further asserts that the Supreme Court of Canada has established that a fiduciary duty arises only when the Crown has assumed discretionary control over specified Aboriginal interests (see **Haida Nation v. British Columbia (Minister of Forests)**, 2004 SCC 73, [2004] 3 S.C.R. 511 at para. 18). Canada alleges that the proposed questions for determination do not engage this contextual analysis because they are not based on the certified common issues. As a result, it asserts that determination of the issues would not significantly advance the conduct of either the common issues or individual trials.

[31] With respect, Canada's position on the wording of the proposed questions ignores the reality that any court adjudicating the common issues set out in paragraphs [27] and [28] herein would be required to address both the alleged duty and the alleged breach for both classes of Plaintiffs. Context is not only relevant to issues of duty, it is relevant also to extent of duty and breach of duty. The Supreme Court of Canada has held that "a fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples" and that "the content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected" (**Weywakum** at headnote and para. 86).

[32] Thus, I accept that whether a fiduciary duty exists and, if so, what obligations such an alleged duty created, are both questions requiring an understanding of the circumstances. However, I do agree with Canada that the Plaintiffs' choice to have the initial component of two only of the three certified issues referred to in paragraphs [27] and [28] herein (whether a duty of care or a fiduciary duty was owed to the Survivor Class) addressed as a preliminary question is akin to having at least two common issues hearings. In other words, the proposed questions engage the contextual analysis but are restricted to the "duty" component for the Survivor Class.

B) Sufficient Evidentiary Record

[33] The Plaintiffs assert that they will rely solely on historical records in asserting that a duty was owed to the Survivor Class. However, Canada asserts that most of the key facts remain in dispute, for example, what clearly identifiable interest was the subject of discretionary control and whether Canada exercised discretionary control over such interests. It suggests that an agreed statement of facts is required and will not be possible.

[34] I note, however, that in his discussion of this factor in **Miawpukek**, at paragraph 16, Green, J.A. (as he then was) did not determine that an agreed statement of facts was a firm requirement of the threshold test under Rule 38. Instead, he said "generally" and he recognized that, in the alternative, the underlying facts may be a matter of public record.

[35] The Plaintiffs' position is that, relative to the fiduciary duty component, the circumstances or context can be established through historical public records and the pleadings. The Plaintiffs do not seek to present oral evidence. Instead, as they assert was the case in **Quinlan v. Newfoundland (Minister of Natural Resources)**, 2000 NFCA 49, 192 Nfld. & P.E.I.R. 144, at paragraph 12, the pleadings, orders and reasons for judgment alone may be relied upon.

[36] The Plaintiffs assert that the facts of the within case are not akin to those before the Court in **Small v. Newfoundland (Department of Human Resources and Employment)**, [2002] N.J. No. 12, 211 Nfld. & P.E.I.R. 175 (S.C.T.D.), at paragraph 15 where *viva voce* evidence was required from witnesses to determine the question of law (whether the dispute arose from the interpretation, application, administration, or violation of a collective agreement).

[37] I agree with the Plaintiffs that the **Small** case can be distinguished on the basis that Canada has not indicated its need to call *viva voce* evidence on the question of whether a duty exists. In this regard the facts can also be distinguished from those in the class action case to which Canada refers (see **Dolmage v. Ontario**, 2012 ONSC 4329, [2012] O.J. No. 3575, at para. 10).

[38] As anticipated by the Plaintiffs, Canada asserts that the allegations go back well over 60 years and concern events occurring both prior and subsequent to Confederation in 1949. Canada relies on the "constitutional dimension of the claims" to support their position that there must be an agreed statement of facts before proceeding with any application to determine a question of law.

[39] However, the Plaintiffs suggest and I agree that the conclusion that a "proper record is particularly important in constitutional cases" was restricted to cases involving *Charter* challenges (see **Leyte v. Newfoundland (Minister of Social Services)** (1998), 164 Nfld. & P.E.I.R. 278, 54 C.R.R. (2d) 114 (Nfld. C.A.)).

[40] Finally, Canada asserts that funding and the agreements entered into between the federal and provincial governments will be the focus of the class action and that courts have shown caution and reluctance in interpreting contracts through Rule 38 applications.

[41] I agree that our Court of Appeal in **Dawson v. John Cabot (1997) 500th Anniversary Corp.**, [1998] N.J. 328, 169 Nfld. & P.E.I.R. 50 (C.A.) at para. 19 held that:

> The use of Rule 38 for the purposes of construction of a contract is appropriate only where interpretation or meaning can be clearly arrived at on the basis of the information presented and without the potential need to resort to extrinsic evidence.

[42] The first difficulty I have with this consideration is that on the limited information before me (and notwithstanding that Canada has not indicated a need to call *viva voce* evidence) I cannot make a conclusion on whether interpretation of the documents in question will be clear without the need to resort to extrinsic evidence. Indeed, Canada asserts that the facts are in dispute and that the legal issues raise intertwined legal and factual issues that will guide the interpretation of the undisputed historical records.

[43] I have a further concern in this area. Even if the Plaintiffs could satisfy me that the historical records and pleadings are sufficient evidence of *the existence* of a duty of care and/or fiduciary duty and the date on which such a duty arose for the Survivor Class, that leaves the related issue of whether the records and pleadings are sufficient evidence of the *extent* of the duty for the Survivor Class. Without seeing the records, I have some doubt.

[44] Further, if these issues were to be addressed in favour of the Survivor Class, the Court would have to re-address the same issues for the Family Class, at a later date because the Plaintiffs have not included the Family Class in their proposed questions.

C) Underlying Facts a Matter of Law and Public Record

[45] The Plaintiffs assert that the underlying facts respecting the alleged legal duty of care are matters of law and public record (see **Binder v. Royal Bank of Canada**, 1996 N.S.C.A. 5599, 150 N.S.R (2d) 234 at para. 10).

[46] I have addressed Canada's position on the twofold **Anns** analysis (see **Anns v. Merton London Borough Council**, [1978] A.C. 728 (H.L.)) at paragraph [17] herein. Step one requires the Court to address issues of proximity and foreseeability in assessing if a *prima facie* duty of care exists. Step two invokes an inquiry of whether there are policy reasons why such a duty should not be recognized.

[47] Canada relies on paragraphs 30–31, 35 and 47 of its Defence, and submits that it has pleaded:

(i) that any actions it undertook were dictated by *bona fide* policy choices made by successive Canadian governments, which cannot give rise to liability at law; and

(ii) that the provision of funding by the federal government to the provincial government does not give rise to liability, and that it owed no duty of care to the Plaintiffs.

[48] The Defendant suggests therefore that the evidence relevant to the policy issues component is not a matter of public record and there are no admissions of fact that can be relied upon for this evidence.

[49] There is another issue of relevance to me on this principle. In **Alberta v. Elder Advocates of Alberta Society**, McLachlin, C.J. at paragraph 33 stated:

> Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties.

[50] Using the Amended Statement of Claim in 2007 01T 4955 CCP as an example, it is asserted that Canada assumed exclusive, legislative and executive responsibility over aboriginal persons including the Survivor and Family Classes. It alleges further that Canada's participation in the funding and operation of the Schools breached its exclusive duty of care, its non-delegable fiduciary and its constitutional obligations owed to both classes (see paras. 9–10 and 46–48).

[51] The particulars of neglect and breach of duty alleged are similar for both classes (i.e., wrongful delegation of fiduciary responsibility, inadequate supervision and chronic deprivation) (see paras. 66 and 68).

[52] I conclude, however, that any proximity and foreseeability analysis required for the duty of care alleged owed to the Survivor Class may differ for the Family Class. This may give rise to the need to refer to different evidence for different types of class members. This reality may lie behind the Plaintiffs' decision to submit for a Rule 38 Application, questions that affect only the Survivor Class. However, as I have already determined, if the Plaintiffs were to succeed on their current Rule 38 application, this would mean that a proximity and foreseeability analysis would have to be conducted at a later date for the Family Class.

D) Intermingled Issues and Credibility

[53] The Plaintiffs' assertion (that because the underlying facts surrounding the claim are a matter of historical record, the resolution of the duty of care issue does not depend on the credibility of witnesses) was not denied or in fact addressed by Canada in its response to the application. I proceed therefore on the basis that this point is conceded.

[54] As to intermingled issues, while the Plaintiffs suggested that whether a duty was owed to the Survivor Class is a watertight compartment, unrelated to breach and damages, I have already stated my concern that existence and extent of duty to the Survivor Class and existence and extent of duty to the Family Class are intermingled issues. Bifurcating the issues of duty and extent of duty the Survivor Class potentially leaves issues of duty and extent of duty for the other Family Class, as well as breach of duty for both classes, to be addressed at a later date.

[55] A trial judge has not yet been assigned to this class action. Were I to hear the Rule 38 application as case management judge and were the other matters heard by the trial judge, the judges assigned would be tasked with assessing similar evidence to determine related questions. I conclude that this could result in an inefficient approach to the administration of justice (see **Bank of Montreal v. Mercer**, [1998] N.J. No. 123, 1998, 163 Nfld. & P.E.I.R. 119 (C.A.) at para. 6).

E) Determination Would Dispose of Action or Substantially Simplify Trial

[56] Any discussion of this factor would largely require a repetition of my analysis under issue A) herein.

48

F) If Rule 38 Application Does Not Dispose of the Action, What is Effect on Future Conduct of the Action?

[57] The Plaintiffs assert that directions are not required with respect to how the remainder of these actions would proceed in the event that the preliminary determination does not dispose of the entire case. They suggest that the balance of the trial timetable would remain in place and the common issues trial would turn entirely on whether the duties were breached and, if so, what damages arose from such breach.

[58] Canada, however, suggests that the outcome of the Rule 38 application may lead to further applications to amend pleadings, to decertify the class actions, and requests for other relief could serve only to delay any future trials.

[59] I have addressed this issue in part in my discussion on issue A) herein. At this stage, the parties are in the final stages of discovery of lay witnesses on the common issues. Discoveries of experts were expected to be completed by May 31, 2013, but Canada's final expert report will not be filed until May 31, 2013 and discoveries will therefore follow. Counsel are running behind on the amended litigation timetable attached to Fowler, J's orders of April 18, 2012.

[60] Further, the Province has not yet determined if it intends to engage expert witnesses and will not be in a position to file its list of documents until April 30, 2013.

[61] Finally, while the Plaintiffs intend to seek severance of the Third Party matters (out of concern that they will delay the main action) this application has not yet been filed.

[62] At our last case management meeting it was agreed that if all pre-trial matters were addressed by August 31, 2013, trial dates currently anticipated for September–October 2013 may be found between November 2013 and January 2014. This would not be a significant delay.

G) Does the Issue Involve Determination of Status of a Party?

[63] The Plaintiffs acknowledge that the bringing of Rule 38 applications has been denied in situations where the applicant is attempting to circumvent the operation of Rule 7 by posing an abstract legal question under Rule 38 "with respect to standing issues" (see **Miawpukek** at paras. 24-28). Unlike **Miawpukek**, the Plaintiffs claim that these actions do not require assessment of the standing of a party.

[64] I agree with the Plaintiffs' position. Admittedly, the thrust of the question (Is a duty owned?) would result in either Canada being confirmed as an appropriate party or the Plaintiffs' action being dropped. However, I would not characterize the Plaintiffs' application for determination of the "duty" question as a Rule 7 application in disguise.

[65] Canada did not address this specific component in its brief and I proceed therefore on the basis that they concur with the Plaintiffs' position on this point.

H) Application is Premature

[66] While this was not a specific component identified in the **Miawpukek** case, Canada claims that:

(i) since it has brought an application under Rule 30 regarding the examination for discovery of two representative plaintiffs; and

(ii) it has subsequently served the Province of Newfoundland and Labrador with a Third Party Notice,

the Rule 38 application is premature until all applications are addressed and the Third Party pleadings are closed.

[67] However, Plaintiffs' counsel has always maintained that a conscious decision was made to sue Canada only and that, notwithstanding the Third Party claim made by Canada against Her Majesty in Right of Newfoundland and Labrador, the Plaintiffs do not seek redress against the Province. They continue to rely on the sole assertion that the duty owed to both classes of the Plaintiffs was by Canada alone. They assert that the Defendant's Third Party claim cannot delay the Plaintiffs' pursuit of its claim against Canada.

[68] I agree that this factor does not speak against the Plaintiffs' entitlement to have the duty questions for the Survivor Class addressed as a preliminary question of law.

CONCLUSION

[69] Having addressed the principles set out by Green, J.A. in **Miawpukek**, the broad question I must answer is whether this is a case where "carving out stated issues for preliminary determination would cause more problems than it would solve" (see **Miawpukek** at para. 11). Where appropriate, I have already indicated those individual considerations that favour either the Plaintiffs or Canada. Overall, my greatest concern is with the following:

(i) Resolution of the duty and extent of duty questions for the Survivor Class may not resolve the questions of duty and extent of duty for the Family Class thus necessitating a further hearing on the remaining certified common liability issue;

(ii) Since I may not be the trial judge, determination by me of the questions posed may not result in the most efficient application of judicial resources. Were I to find that a duty was owed to the Survivor Class, another judge may be required to address either the same question for the Family Class or the question of whether such duty (if any) was breached for either class; and

(iii) An appeal by either party from the determination of the preliminary questions of law posed would seriously derail the Court's litigation timetable, which is already at considerable risk.

[70] For the reasons stated, I would not accede to the Plaintiffs' request to have the questions posed determined as preliminary questions under Rule 38.

GILLIAN D. BUTLER
Justice