2007 01T4955 CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER and JOYCE WEBBER

Plaintiffs

AND:

THE ATTORNEY GENERAL OF CANADA

Defendant

AND IN THE FOLLOWING 4 ACTIONS:

TOBY OBED, WILLIAM ADAMS and MARTHA BLAKE - and - **THE ATTORNEY GENERAL OF CANADA**	2007 01T5423 CP
SELMA BOASA and REX HOLWELL - and - **THE ATTORNEY GENERAL OF CANADA**	2008 01T0844 CP
SARAH ASIVAK and JAMES ASIVAK - and - **THE ATTORNEY GENERAL OF CANADA**	2008 01T0845 CP
EDGAR LUCY and DOMINIC DICKMAN - and - **THE ATTORNEY GENERAL OF CANADA**	2008 01T0846 CP

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

PLAINTIFFS' FACTUM

(Certification Applications returnable June 1 – 5, 2009)

KOSKIE MINSKY LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3
Kirk M. Baert
Celeste Poltak
Tel.: (416) 977-8353
Fax: (416) 204-2889

CHESLEY F. CROSBIE, Q.C.
169 Water Street
St. John's, NL A1C 1B1
Tel.: (709) 579-4000
Fax: (709) 579-9671

AHLSTROM WRIGHT OLIVER & COOPER LLP
Suite 200
80 Chippewa Road
Sherwood Park, AB T8A 4W6
Steven Cooper
Tel: 780-464-7477 ext 233
Fax: 780-467-6428

Solicitors for the Plaintiffs

TO: DEPARTMENT OF JUSTICE CANADA
Civil Litigation & Advisory
Duke Tower
Suite 1400
5251 Duke St.
Halifax, NS B3J 1P3

Jonathan D. Tarlton
Tel.: (902) 426-5959
Fax: (902) 426-8796
Mark Freeman
Tel.: (902) 426-5961
Fax: (902) 426-2329

Solicitors for the Defendant

PART I - OVERVIEW

"Government has a responsibility to act in fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, ... in light of this historic relationship."[1]

1. While the legacy of residential schools was addressed by way of political and legal settlement in 2006 of claims by former students across Canada, individuals who attended schools in Newfoundland and Labrador have no recourse for redress under the terms of that settlement. Accordingly, certification of actions pertaining to the schools at issue in these actions is warranted. Not only have the Plaintiffs satisfied the statutory criteria but without a class action, the doors of justice will remain closed to the Plaintiffs, despite the strength of their claims. The issue of abuse in residential schools in Newfoundland and Labrador must be addressed and resolved.

PART II - NATURE OF THE APPLICATION

A. OVERVIEW OF THE CLAIMS AND APPLICATIONS

2. The Plaintiffs seek an order certifying these five companion actions which arise out of allegations concerning the operation, management and control of five schools attended by Innu and Metis[2] persons in Newfoundland, located in Cartwright[3], Northwest River[4], St. Anthony[5], Nain[6] and Makkovik[7] (the "Schools").

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1 *R. v. Sparrow*, (1990) 70 D.L.R. (4th) 385 (S.C.C.); *Guerin v. Canada*, (1984) 13 D.L.R. (4th) 321 (S.C.C.), Plaintiffs' Book of Authorities, Tabs 7 and 8.

2 The following Plaintiffs are of the Metis Nation: Carol Andrerson, Allen Webber, Joyce Webber. All other Plaintiffs are Inuit.

3 Lockwood School: *Anderson et al. v. Canada*

3. The Plaintiffs, both former students and family members of students, are all either Innu or Metis persons, currently residing in Newfoundland and Labrador. Amongst other things, the pleadings in the five actions allege that Canada participated in the operation, funding and administration of each of the Schools, until their closures, Schools where aboriginal children were often forced to attend, punished for speaking their native languages and a culture of imposing varying forms of abuse upon students existed for decades.

4. Canadian courts have had many opportunities to consider Canada's role, responsibility and liability arising out of the Indian Residential School policy which was a lengthy piece of fabric of Canada's history, visiting untold and long lasting detriment and harm on generations of aboriginal persons. The evidence tendered on behalf of the Plaintiffs in these actions describes the experiences suffered through at the Schools by former students which include, amongst other things, sexual, physical and emotional abuse. The lasting effects of their time at the Schools and these damaging experiences have irrevocably altered the course of these former students' lives. This particular evidence was not cross-examined upon nor has it been contradicted. There is no basis upon which to reject its truth or significance.

5. Most recently, Winkler R.S.J. (as he then was) described this piece of Canadian history and acknowledged that:

> 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

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[4] Yale School: *OBed et al. v. Canada*

[5] St. Anthony School: *Boasa et al.v. Canada*

[6] Nain School: *Asivak* et al.v.Canada

[7] Makkovik School: *Edgar et al. v. Canada*

> required to reside at these institutions, in isolation from their families and communities, for varying points 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. … The flaws and failures of the policy and its implementation are at the root of the allegations of harm suffered by the class members. Upon review by the Royal Commission on Aboriginal Peoples, 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'…
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> *Baxter et al v. The Attorney General of Canada* (2006), 83 O.R. (3d) 481 (S.C.J.) at paras. 2–3, Plaintiffs' Book of Authorities, Tab 25.

6. Despite Newfoundland's unique circumstances surrounding its entry into Confederation, the pleadings allege that Canada also participated in the operation, care, control, funding and management of residential schools in Newfoundland after 1949. The Plaintiffs' allege that Canada's participation in the operation of the Schools breached the duty of care they owed to students and was in breach of its fiduciary obligations owed to aboriginal persons at common law. Alternatively, even if Canada did not materially operate or manage the Schools, it breached its fiduciary duties to the students by failing to do as it alone possesses singular and exclusive jurisdiction over aboriginal people in Canada.

7. Even if these Schools do not bear the traditional indicia of an "Indian Residential School", (as defined on consent and through negotiation of parties to the National Settlement Agreement), Canada nevertheless contributed to the funding and was involved in the operation of the Schools. As a result of having been omitted from the 2006 pan-Canadian National Settlement, former students ought to be given the opportunity to have their day in court and prosecute these actions collectively as a class.

8. Otherwise, the claims of negligent operation of the schools and breach of fiduciary duty, will never be adjudicated upon for persons living in Newfoundland and Labrador. There is no other way by which these individuals can have their claims determined on the merits.

B. THE PLAINTIFFS' HISTORY AND EXPERIENCES AT THE SCHOOLS

9. Each Class Member, on behalf of the both the Survivor[8] and Family Classes[9], has sworn and filed an affidavit in support of these applications.[10] Many of these persons were also cross-examined by Canada.

10. Irrespective of the School attended, certain common threads and experiences present themselves in the evidence. During their time at the Schools, the Survivor Class Members were prohibited from speaking their native languages[11] and beaten for speaking Inukitut[12] or any other language but English.[13] A number of former students were also sexually abused either at the hands of other students, dormitory supervisors or principals[14] and many experienced physical abuse on a frequent daily basis.[15] As a result of their attendance at the Schools, Survivor Class Members were deprived of a childhood and grew ashamed of their

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8 All persons who attended the School, presently resident in Newfoundland and Labrador, between 1949 and the date of the School's closure.

9 All persons who have a derivative claim on account of a family relationship with a person in the Survivor Class, who resides in Newfoundland and Labrador.

10 Plaintiffs' Motion Records in support of Certification.

11 Affidavit of Sarah Asivak, sworn October 22, 2008, Asivak Motion Record, Tab 3, para. 8;

12 Affidavit of Tony Obed, sworn October 21, 2008, Obed Motion Record, Tab 3, para. 8; Affidavit of William Adams, sworn October 22, 2008, Obed Motion Record, Tab 4, para. 8; Affidavit of Selma Boasa, sworn October 22, 2008, Boasa Motion Record, Tab 3, para. 8.

13 Affidavit of Carol Anderson, sworn November 20, 2008, Anderson Motion Record, Tab 3,para. 7; Affidavit of Allen Webber, sworn November 24, 2008, Anderson Motion Record, Tab 4, para. 8

14 Affidavit of Tony Obed, sworn October 21, 2008, Obed Motion Record, Tab 3, para. 12; Affidavit of William Adams, sworn October 22, 2008, Obed Motion Record, tab 4, para.10.

15 Affidavit of Carol Anderson, sworn November 20, 2008, Anderson Motion Record, Tab 3,para. 11; Affidavit of Allen Webber, sworn November 24, 2008, Anderson Motion Record, Tab 4, para. 12

aboriginal identities,[16] the after-effects of which many Class Members continue to grapple with to this day.

11. Family Class Members have given evidence of the damages suffered by Survivor Class Members, as a result of attendance at the Schools, which has included, in their experiences, substance abuse, depression, failure to form familial relationships, suicidal tendencies and deep-rooted anger, resulting in both verbal and physical abuse to family members.[17]

12. The impact of future generations of survivors of residential schools has been well-documented and recognized by Canadian courts and civil society, and typically manifests itself in an ability to healthily raise children, having had virtually no parental bonds as children, no role models with respect to parenting, exacerbated by the constant struggle to deal with the memories and the virtual theft of a childhood and cultural identity, often leading to substance abuse.

13. These inter-generational impacts of residential schools have profoundly impaired both the Survivor Class' and Family Class' ongoing familial and personal bonds and relationships.

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16 Affidavit of Selma Boasa, sworn October 22, 2008, Boasa Motion Record, Tab 3, paras. 12 – 14; Affidavit of Allen Webber sworn November 24, 2008, Anderson Motion Record, Tab 4, paras. 13–15; Affidavit of Carol Anderson sworn November 20, 2008, Anderson Motion Record, Tab 3, paras. 12–14; Affidavit of William Adams sworn October 22, 2008, Obed Motion Record, Tab 4, paras. 11–13, Affidavit of Tony Obed sworn October 21, 2008, Obed Motion Record, Tab 3, paras. 13–15.

17 Affidavit of Martha Blake, sworn October 22, 2008, Obed Motion Record, Tab 5, para. 7.

C. HISTORY OF THE PROVINCE'S ENTRY INTO CONFEDERATION & ENSUING LEGAL RESPONSIBILITY FOR ABORIGINALS IN NEWFOUNDLAND AND LABRADOR

14. Around the time of Confederation, two separate legal opinions commissioned by the Federal Department of Justice confirm that the Federal Crown possessed exclusive legislative and executive responsibility in relation to aboriginal persons, including the Innu. Any other position can be characterized as an attempt by the Federal Crown to avoid its legal responsibility and improperly transfer its jurisdiction to Newfoundland. The records of the Federal departments, agencies, ministers and bureaucrats responsible for negotiating the *Terms of Union* "clearly show that from 1946 the Federal Government recognized that under the terms of the *British North America Act*, section 91(24), it would have to assume full responsibility for the native people of the new province".

> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992, Plaintiffs' Book of Authorities, Tab 49.
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> *"Pencilled Out":* Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954, A Report prepared for Jack Harris, M.P. on the impact of the exclusion of Newfoundland and Labrador's native people from the Terms of Union in 1949, March 31, 1988, at p. 3, Plaintiffs' Book of Authorities, Tab 54.

15. In 1947, in advance of preparing for the *Terms of Union* negotiations, the Federal Government prepared a document for the Newfoundland delegation which outlined the nature of Federal involvement with and for native peoples. Amongst other things, "under classes of subjects in which the Federal Parliament exercised exclusive jurisdiction, 'Indians and lands reserved for Indians' was listed" and "when outlining the responsibilities that the various Federal departments would have for Newfoundland, 'Indian Affairs' was listed under the Department of Mines and Resources." The function of the Indian Affairs Branch was described as administering the "affairs of the Indians of Canada [which] included the control

of their education". The Federal Department of Mines and Resources clearly stated, at that time, that "the Dominion assumes full responsibility for the welfare, *including education*, of Indians and Eskimos", a response which went on at length to describe the day and residential school system. [emphasis added]

> *"Pencilled Out"*: Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954, A Report prepared for Jack Harris, M.P. on the impact of the exclusion of Newfoundland and Labrador's native people from the Terms of Union in 1949, March 31, 1988, at page 12–14, Plaintiffs' Book of Authorities, Tab 54.

16. In and around the time of Confederation, a number of Federal legal opinions on the question were prepared, "most of them acknowledging sole federal responsibility for Newfoundland aboriginal people. Under Term 3 of the *Terms of Union*, for matters not specifically referred to, things are deemed to be as if Newfoundland had joined under the terms of the *Constitution Act, 1867*."

> *Aboriginal Peoples and Governance in Newfoundland and Labrador,* authored by Adrian Tanner, John C. Kennedy, Susan McCorquodale and Gordon Inglis, October 1994, at pg. 33, see also Tompkins, Plaintiffs' Book of Authorities, Tab 50..
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> *"Pencilled out":* Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954, A Report prepared for Jack Harris, M.P. on the Impact of the Exclusion of Newfoundland and Labrador's native people from the Terms of Union in 1949, March 31, 1988,, Report prepared for Jack Harris, M.P., 1988, Plaintiffs' Book of Authorities, Tab 54.

17. When Canada sent its official version of the proposed *Terms of Union* to the National Convention in Newfoundland in October 1947, it had already acknowledged that under the terms of the *British North America Act* that it had exclusive jurisdiction in the area of native peoples: "[b]y deleting the reference to native people in the *Terms of Union* and writing in Federal responsibility as outlined in the *British North America Act* the Federal Government unintentionally acknowledged *de facto* jurisdiction for the Indians and Eskimos of Newfoundland and Labrador."

> *"Pencilled Out"*: Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954, A Report prepared for Jack Harris, M.P. on the Impact of the Exclusion of Newfoundland and Labrador's native people from the Terms of Union in 1949, March 31, 1988, at page 18, Plaintiffs' Book of Authorities, Tab 54.

18. Following Confederation, in December 1949, Canada established an Interdepartmental Committee on Labrador Indians and Eskimos which requested another legal opinion from the Justice Department which stated that in the matter of Newfoundland "Indians and Eskimos":

> ...the federal Parliament has exclusive legislative authority in relation to Indians ... which, of course, means that the provincial legislature has no authority to enact legislation directed at or dealing with [matters] in relation to Indians.... It is the responsibility of the federal government to formulate and carry out all policies that are directed at dealing with Indian or Indian problems. Such policy is to be formulated by Parliament and the executive. This responsibility carries with it the responsibility or providing money to be devoted to the carrying of our policies in relation to the Indians.
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> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992, Plaintiffs' Book of Authorities, Tab 49.
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> *NAC, RG 2/18,* vol. 172, file: N-18-3 (1949 – 1951). Ottawa, April 14, 1950, F.P. Varcoe, Deputy Minister of Justice to the Secretary to the Cabinet, Privy Council Office.
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> *"Pencilled out":* Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954, A Report prepared for Jack Harris, M.P. on the Impact of the Exclusion of Newfoundland and Labrador's native people from the Terms of Union in 1949, March 31, 1988, at p. 33, Plaintiffs' Book of Authorities, Tab 54.

19. This opinion provided by the Justice Department is entirely consistent with the assumptions made during the pre-Confederation talks, that is, that aboriginal persons, pursuant to the *British North America Act*, were Canada's responsibility.

> *"Pencilled out":* Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954, A Report prepared for Jack Harris, M.P. on the impact of the exclusion of Newfoundland and Labrador's native people from the Terms of Union in 1949, March 31, 1988, pg. 33, Plaintiffs' Book of Authorities, Tab 54.

20. Even before Newfoundland's entry into Confederation, various federal departments had included in their departmental estimates sizeable amounts towards relief, services and expenditures for the native population in Newfoundland and Labrador. This evidences that

"the federal government believed it had a responsibility to fulfill in regard to the Innu and Inuit in Labrador and that they would be called upon to provide programs and assistance to them".

> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992, p. 3, Plaintiffs' Book of Authorities, Tab 49.

21. In fact, the *Terms of Union* indirectly provided that the then Aboriginal population in Newfoundland fell under federal jurisdiction. Section Three of the Terms affirms that: "[t]he *Constitution Acts, 1867* to *1940* apply to the Province of Newfoundland in the same way, and to the like extent as they apply to the provinces heretofore comprised in Canada". The *Constitution Act, 1867* itself states that "the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say … Indians, and Lands reserved for the Indians".

> *Terms of Union*, 1949, Plaintiffs' Book of Authorities, Tab 48.

22. Following Confederation in 1949, and by 1951, Canada had agreed to pay the bills submitted by Newfoundland for "Indians and Eskimos" for the period 1949-1950. At that same time, Newfoundland also provided Canada with an estimate of provincial expenditures with respect to Innu and Inuit in Labrador for which it expected payment.

> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992, p. 2, Plaintiffs' Book of Authorities, Tab 49.

23. A 1951 memorandum prepared by the Chairman of the Inter-departmental Committee on Newfoundland Indians and Eskimos formed the basis of much of Canada's position for the future:

> Section 3 of the *Terms of Union* stipulates that the provisions of the *BNA Act* shall apply to Newfoundland except insofar as varied by the Terms. Since the Terms of Union doe 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, it seems clear that the Federal Government is responsible for the native population resident in Labrador.
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> *"Pencilled Out"* at pg. 34, relying on *NAC, RG 22*, vol. 254, file 40-8-4 part 1. January 16, 1951, Paul Pelletier, Privy Counsel Office: Memorandum re "Notes on Labrador Indians and Eskimos and possible measures which might be adopted to discharge federal responsibility in the field", Plaintiffs' Book of Authorities, Tab 54.

24. By 1954, Newfoundland requested that Canada provide both operating and capital expenditures towards education for the Innu and Inuit. The 1954 Agreement between Newfoundland 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.

> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992, p.9, , Plaintiffs' Book of Authorities, Tab 49.

25. Just four years into this Agreement, Newfoundland requested further funds from Canada to provide education and housing for both the Innu and Inuit. Shortly thereafter, in 1964, the Premier of Newfoundland asked Prime Minister Pearson, to either have Canada assume sole and full responsibility for the Innu and Inuit or to at least increase funding to the level of support being provided by Canada to other provinces in Canada.

> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992, p.11, , Plaintiffs' Book of Authorities, Tab 49.

26. At the same time, the Pearson government requested a second legal opinion from the Justice Department. On November 23, 1964, the Deputy Attorney General provided that opinion and determined that:

> ...there is no provision in the *Indian Act* excluding any portion of Canada from its application. Mr. Varcoe's opinion [the 1950 Justice Department opinion] as to the constitutional position is, in my opinion, correct. The fact that there is no mention of Eskimos or Indians in the *Terms of Union* means only that the constitutional position with respect thereto has not changed with regard to Newfoundland.
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> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992, Appendix 2, see also pg. 36, Plaintiffs' Book of Authorities, Tab 49.

27. As a result, by 1965, 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. The proposed agreements were to be: (a) renegotiated and reviewed every five years; (b) a Federal-Provincial committee was to be established to monitor expenditures and propose budgets for approval by both governments; (c) Newfoundland would be reimbursed for 90% of the Provinces' capital expenditures for Indians and Eskimos for the period 1954 – 1864; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives both governments.

> *Summary of the Report of the Royal Commission on Labrador*, 1974, at p. 96, Plaintiffs' Book of Authorities, Tab 52.

28. Amongst other things, this "Contribution Agreement" was designed to provide services to the Innu communities of Sheshatshit and Davis Inlet, although these are identified as "supplementary programs and services". The Agreement identified the amount of funding available as (i) 90% from Canada and (ii) 10% from Newfoundland and also established a

management committee composed of federal officials, provincial officials and representatives of the Davis Inlet and Sheshatshit communities.

> *Report on the Complaints of the Innu of Labrador to the Canadian Human Rights Commission Report,* by Donald M. McRae, August 18, 1993, at p. 8, Plaintiffs' Book of Authorities, Tab 51.

29. At the same time, the Prime Minister also proposed certain increases in Canadian contributions for "Indians and Eskimos" in Newfoundland and Labrador which ultimately constituted an agreement between Canada and Newfoundland, providing, amongst other things, for:

> (i) Canada to pay Newfoundland up to $1,000,000.00 per annum for 90% of the Province's Innu and Inuit expenditures (except where otherwise covered under other federal-provincial agreements);
>
> (ii) establishment of a federal-provincial committee to monitor provincial expenditures;
>
> (iii) continuation of federal funding for Inuit communities in Labrador; and
>
> (iv) agreements to be reviewed and renegotiated every five years to "ensure that they continued to meet the changing circumstances and needs of the Eskimo and Indian residents in Labrador".
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> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992, p. 17, Plaintiffs' Book of Authorities, Tab 49.

30. A Royal Commission on Labrador was convened in 1973 with a mandate to conduct a full inquiry into the economic and sociological conditions in Labrador. In addition to recommending to Newfoundland that it immediately renegotiate its funding agreements with Canada, given that amounts paid there under were inadequate and insufficient, the Commission also made the following determination:

> The Commission finds itself unable to determine a sound rationale for the practice under this Agreement of having the Province pay a percentage of cost for services to Indians and Eskimos. This is not the practice in other parts of Canada. In the view of the Commission, the Federal Government, as it does elsewhere, should be prepared to

> accept full fiscal responsibility unless the Province wishes to ensure its continued direct involvement in the program for Indians and Eskimos through sharing part of the cost…
>
> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992, p. 24, , Plaintiffs' Book of Authorities, Tab 49.

31. Many of the recommendations of the Royal Commission were implemented through the Federal-Provincial funding agreements which were ratified in the years following publication of the Commission Report. For example, an interim agreement was in place between 1976 and 1981 and funded projects which were valued at $22 million in Labrador. Negotiations between the Province and Federal government led to the signing of two agreements in July 1981:

> (i) Canada-Newfoundland Community Development Subsidiary Agreement, valued at $38,996,000.00, payable by the Federal government; and
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> (ii) Native People's of Labrador Agreement, valued at $38,831.00.00 federal payments/contributions.
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> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992, p. 27, Plaintiffs' Book of Authorities, Tab 49.

32. Canada has vacillated between acknowledging its own sole singular responsibility over Innu and Inuit in Newfoundland and accepting an obligation to financially assist or contribute. In any event, Canada has always assumed some level of legal responsibility for aboriginal persons in Newfoundland and Labrador.

33. The overreaching question to be determined at the common issues trial, is therefore only one of the degree of Canada's involvement in the education of aboriginal persons in Newfoundland over varying points in time: by its operation or management of the Schools, did Canada breach a duty of care or a fiduciary duty towards the students to protect them from actionable physical or mental harm?

34. It is a question of critical important to former students of the Schools - a class action is the only vehicle by which such an adjudication can be satisfactorily made.

PART III - ISSUES OF LAW

A. CERTIFICATION : GENERAL LEGAL PRINCIPLES

35. The statutory test for certification, pursuant to the *Class Actions Act*, is as follows:

> When court shall certify class action
>
> **5.** (1) On an application made under section 3 or 4 , the court shall certify an action as a class action where
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;
>
> (d) a class action is the preferable procedure to resolve the common issues of the class; and
>
> (e) there is a person who
>
> (i) is able to fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

Class Actions Act, S.N.L. 2001, c. C-18.1, section 5(1), Plaintiffs' Factum, Schedule B.

36. As articulated by the Honourable Justice Barry, "[c]lass certification is not a trial. It is not a summary judgment motion. Class certification is a procedural motion which concerns the form of an action, not its merits. Contentious factual and legal issues between the parties cannot be resolved on class certification motion."

Wheadon v. Bayer Inc., [2004] N.J. No. 147 (S.C.T.D.) at para. 92, Plaintiffs' Book of Authorities, Tab 20.

37. It is well-settled law in both Newfoundland and the rest of Canada that the statutory test is intended to set a low threshold, given that the statute is only procedural in nature:

> I agree with the Plaintiffs that this test establishes a 'low threshold' for class certification. This was confirmed in *Hollick* where the Chief Justice noted the evidentiary threshold is not an onerous one. Canadian courts have tended to give class proceedings legislation a large and liberal interpretation to ensure that its policy goals are realized. Courts must be mindful not to impose undue technical requirements on plaintiffs. [emphasis added]
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> *Wheadon v. Bayer Inc.*, [2004] N.J. No. 147 (S.C.T.D.) at para. 91, Plaintiffs' Book of Authorities, Tab 20.

38. This Honourable Court has determined and acknowledged that:

> The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. ... [it] provides three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve a judicial economy by avoiding unnecessary duplication of fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class members would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.
>
> *Pardy v. Bayer*, [2003] N.J. No. 210 (S.C.T.D.), at para. 12, Plaintiffs' Book of Authorities, Tab 22.
>
> *Hollick v. Toronto* (2001), 205 D.L.R. (4th) 19 (S.C.C.) at para. 25, Plaintiffs' Book of Authorities, Tab 2.

39. Newfoundland courts have acknowledged that the *Class Action Act* is, in all material respects, identical to Ontario's *Class Proceedings Act, 1992*, which was discussed and relied upon at length by the Supreme Court of Canada in *Hollick*, making Ontario's jurisprudence relevant, persuasive and informative to the determination of issues on these particular applications in this court.

> *Pardy v. Bayer*, [2003] N.J. No. 210 (S.C.T.D.), at para. 12, Plaintiffs' Book of Authorities, Tab 22.

B. SECTION 5(1)(A) CAUSE OF ACTION – HIGH THRESHOLD TO STRIKE

40. Section 5(1)(a) of the Act provides that it must be plain and obvious to the court that the action "cannot possibly succeed". This threshold mirrors that of Rule 14.24 of the Newfoundland *Rules of Civil Procedure*.

> *Hollick v. Toronto* (2001), 205 D.L.R. (4th) 19 (S.C.C.) at para. 25, Plaintiffs' Book of Authorities, Tab 2.
>
> *Rule 14.24* of the Newfoundland *Rules of Civil Procedure*, SNL 1986 c 42 Schedule D., *Rules of the Supreme Court, 1986 under the Judicature Act*, Plaintiffs' Factum, Schedule B.

41. The test applicable to whether a reasonable cause of action is disclosed is well-settled: neither the length or complexity of the issues, the novelty of the cause of action nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with an action.

> *Hunt v. T & N plc,* [1990] 2 S.C.R. 959 at para. 33, Plaintiffs' Book of Authorities, Tab 6.

42. An order denying certification can effectively terminate a claim on behalf of thousands of individuals. It has the effect of finally disposing of the action. Accordingly, a particularly cautious approach to striking pleadings in this context has been adopted by the courts.

43. While Canada has sought to tender certain affidavit evidence with respect to the sustainability of the causes of action presented, the consideration of any evidence in a Rule 14.24 or section 5(1)(a) analysis is strictly prohibited.

44. This approach is also consistent with the fact that the Newfoundland Legislature rejected a proposal that there be a "preliminary merits test" as part of the certification requirements. Rather, the Act includes a test that merely requires the statement of claim to disclose a cause of action and section 6(2) specifically codifies this aspect of the test:

> Section 6(2) An order certifying an action as a class action is not a determination of the merits of the action.
>
> *Class Actions Act,* S.N.L. 2001, c. C-18.1, section 6(2), Plaintiffs' Factum, Schedule B.
>
> *Pardy v. Bayer*, [2003] N.J. No. 210 (S.C.T.D.), at paras. 13 - 14, Plaintiffs' Book of Authorities, Tab 22.

45. In order to find that no cause of action presents itself in these pleadings, this court must find that the Plaintiffs' claim is "doomed to failure". At this stage of the proceedings, it is far from clear that the Plaintiffs' claim has no chance of success given the pleadings and prior jurisprudence. "Such issues should be decided at trial on the basis of a full evidentiary record."

> *Reynolds v. Kingston (City) Police Services Board,* [2007] O.J. No. 900 (C.A.) at paras. 7 and 13, Plaintiffs' Book of Authorities, Tab 9.

46. Where there is any doubt about the viability of a particular cause of action, it should be permitted to proceed to trial which will:

> Allow the appellant [plaintiff] to air all aspects of his complaint and develop a full records to afford the court the opportunity to rationalize the appropriate scope and limited of this tort in relation to the other causes of action advanced by the appellant [plaintiff].
>
> *Reynolds v. Kingston (City) Police Services Board* (2007), 84 O.R. (3d) 738 (C.A.) at para. 25, Plaintiffs' Book of Authorities, Tab 9.

47. This is consistent with the admonition of the Supreme Court of Canada with respect to the balance of the statutory certification test, which rejects a preliminary merits test. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action.

> *Hollick v. Toronto (2001)*, 205 D.L.R. (4th) 19 (S.C.C.) at para. 16, Plaintiffs' Book of Authorities, Tab 2.

48. The Plaintiffs have met the s. 5(1)(a) requirement: the pleadings disclose a cause of action.

C. PLEADINGS IN THIS CASE PERTAIN TO THE PARTICULARLY SPECIAL CROWN/ABORIGINAL RELATIONSHIP

49. This case involves allegations of negligence and breach of fiduciary duty. The categories in which a duty of care is owed are never closed. It is also evident that the law is in transition with respect to delineating the scope and content of duties owed by the Crown to aboriginal peoples. As this Honourable Court has determined: "when the areas of fiduciary obligations and aboriginal law intersect, as is claimed here, then clearly a defendant has a particularly heavy burden in seeking to strike a pleading." [emphasis added]

> *Davis v. Canada (Attorney General),* [2004] N.J. No. 274 (S.C.T.D.) at para. 11, Plaintiffs' Book of Authorities, Tab 21.

50. As a result, when dealing with pleadings involving aboriginal law, courts have taken a particularly cautious approach to striking pleadings:

> ...the Statement of Claim is to be read generously and with an open mind and it is only in the very clearest of cases that the Court should strike out the Statement of Claim, This, in my view, is especially the case in this field, that is the field of aboriginal law, which in recent years in Canada has been in a state of rapid evolution and change. Claims which might have been considered outlandish or outrageous only a few years ago are now being accepted. If there is in a pleading a glimmer of a cause

> of action, even though vaguely or imperfectly stated, it should, in my view, be allowed to go forward.
>
> *Shubenacadia Indian Band v. Canada (Minister of Fisheries and Oceans),* [2001] F.C.J. No. 347 at paras. 5 – 6 (T.D.), affirmed, [2002] F.C.J. No. 880 (C.A.), Plaintiffs' Book of Authorities, Tab 47.

51. It is already well-accepted in Canadian law that fiduciary obligations are owed by the Crown to "Aboriginal" peoples, which, by terms of section 35(2) of the *Constitution Act, 1982*, include Indian, Inuit and Metis peoples of Canada. The Royal Commission on Aboriginal Persons itself acknowledges that Canadian courts have already described this fiduciary relationship as *sui generis* in nature.

> *Fiduciary Law,* authored by Dr. Leonard I. Rotman, 2005, p. 524 and 597, also relying on *Royal Commission on Aboriginal Persons*, vol. 5 at p. 162 (1996), Plaintiffs' Book of Authorities, Tab 53.

52. The non-inclusion or failure to extend the scope of the *Indian Act* to these Class Members, which would have given exclusive jurisdiction over Indians and Eskimos to Canada, does not affect or obviate Canada's common law duties and obligations to these persons.

53. Even if there is "concurrent jurisdiction", over these classes of persons in Newfoundland and Labrador, Canada is nevertheless still charged with certain duties towards these individuals, and certainly to children attending schools for which Canada provided substantial funding and management.

54. Accordingly, Canada cannot argue that these particular Plaintiffs and their concomitant classes are owed no duty on the technical basis that they are not "Indians" as defined under the *Indian Act*:

> Non-status Indians are those who self-identify as Aboriginal but who are ineligible for registration under the [*Indian*] Act. Since the Crown's fiduciary duties are rooted in historical interaction between the groups that predate the current status/non-status regime, that may create a basis for arguing that the Crown owes collective duties to non-status Indians as well, ending the distinction between status and non-status in this respect.
>
> *Fiduciary Law,* authored by Dr. Leonard I. Rotman, 2005, pg. 597, Plaintiffs' Book of Authorities, Tab 53.

55. Moreover, Inuit fall under the category of "Indian" for section 91(24) of the *Constitution Act* purposes, extending responsibility for Inuit affairs to Canada. The Supreme Court of Canada determined long ago that Inuit people are Indians for the purposes of section 91(24), an inclusion which is broader than the same term used in the *Indian Act*. The inclusion of Inuit in this section could be understood as an assumption of Canada's fiduciary responsibility for the Inuit.

> *Fiduciary Law,* authored by Dr. Leonard I. Rotman, 2005, pg. 597, Plaintiffs' Book of Authorities, Tab 53.
>
> *Reference Re British North America Act*, 1867 (U.K.) s. 91 [1939] S.C.R. 104, Plaintiffs' Book of Authorities, Tab 55.

56. In terms of Metis members of the proposed classes, both the Ontario Court of Appeal, and the Royal Commission on Aboriginal Persons have affirmed that the Crown has a trust-like or fiduciary relationship with Metis peoples. While the specific parameters of the scope and content of that duty may remain to be definitively determined, novelty of an action, particularly in this area of law, cannot be relied upon to strike a claim. In fact, novelty of a claim ought to militate in favour of permitting the claim to be determined on its merits.

> *R. v. Powley*, [2007] O.J. No. 607 (C.A.) at para. 159, Plaintiffs' Book of Authorities, Tab 17.

57. In any event, it is without question that the "federal government does not see its responsibilities under Section 91(24) [of the BNA Act] as being fulfilled solely by registration under the *Indian Act*.". Accordingly, "the federal government can only argue that it has carried out or fulfilled its constitutional responsibilities in respect of the Innu by its arrangements with the government of Newfoundland if it can show that is has thereby properly executed its fiduciary obligation". Newfoundland itself has no constitutional or fiduciary responsibilities for aboriginal peoples.

> *Report on the Complaints of the Innu of Labrador to the Canadian Human Rights Commission Report,* by Donald M. McRae, August 18, 1993, at p. 21, Plaintiffs' Book of Authorities, Tab 51.

58. Nor may Canada argue that it somehow ceded its duties to Newfoundland at Confederation in order to strike the pleading at this stage of the action. The divisions between federal and provincial fiduciary duties to Aboriginal peoples reflect the divisions of powers in the *Constitution Act*. From aboriginals' perspective, whether the federal or provincial Cowns (whether singly or jointly) are responsible for discharging the fiduciary duties owed to them is secondary to ensuring the duties are fulfilled.

> *Fiduciary Law,* authored by Dr. Leonard I. Rotman, 2005,at p. 583, referring also to *Mitchell v. Peguis Indian Band* (1990), 71 D.L.R. (4th) 193 (S.C.C.), Plaintiffs' Book of Authorities, Tab 53.

59. As the Supreme Court of Canada stated in *Mitchell*, "the Indians' relationship with the Crown or sovereign has never depended upon the particular representative of the Crown involved. From the aboriginal perspective, any federal-provincial distinctions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations."

Mitchell v. Peguis Indian Band (1990), 71 D.L.R. (4th) 193 (S.C.C.) at p. 209, para. 35, Plaintiffs' Book of Authorities, Tab 4.

60. Given the applicable jurisprudence, the nature of the pleadings and the historical background concerning Canada's role in these Schools following Confederation, it cannot be said that, on a full evidentiary record, the Plaintiffs' claims have no chance of success.

61. The Plaintiffs have met the s. 5(1)(a) test: the pleadings disclose a cause of action.

D. SECTION 5 (1)(b) – THE PRESENCE OF AN IDENTIFIABLE CLASS

62. Section 5(1)(b) of the Act requires that there be an identifiable class. To satisfy this requirement, the class must be composed of "two or more persons". The class must also be objectively defined and limited by rational criteria. Both requirements are met here.

Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.J. No. 534, (S.C.C.) at para. 37, Plaintiffs' Book of Authorities, Tab 3.

Class Actions Act, section 5(1)(b), Plaintiffs' Factum, Schedule B.

63. The Plaintiffs propose the following class definitions:

(i) all persons who attended the School between 1949 and the date of its respective closure (the "Survivor Class");

(ii) all persons who have a derivative claim on account of a family relationship with a person in the Survivor Class (the "Family Class").

64. In order to meet this component of the certification test, the class must be capable of clear definition. It must identify members of the proposed class by objective criteria. While that criteria ought to bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation and it is not necessary that every class member be named or even known.

Western Canadian Shopping Centres v. Dutton, [2001] 2 S.C.R. 534, at para. 38, Plaintiffs' Book of Authorities, Tab 3.

65. There is no doubt that the proposed members of the class can be identified by objective criteria of attendance at the Schools during a fixed time period. These identifying factors set clear boundaries for the class so that it is not unlimited. Membership can be determined without reference to the merits of the action.

66. The Honourable Justice Barry approved an almost identical class definition in *Wheadon*, with reliance on the Supreme Court of Canada decision in *Rumley* where the class in a sexual abuse case was defined by reference to students attending a school, between certain years, and claimed to have suffered injury as a result of misconduct at the School. The approved class was:

> Students at the Jericho Hill School between 1950 and 1992 who reside in British Columbia and claim to have suffered injury, loss or damages as a result of misconduct of a sexual native occurring at the school.

Wheadon v. Bayer Inc., [2004] N.J. No. 147, (Nfld. S.C.T.D.) at paras. 105 – 106, Plaintiffs' Book of Authorities, Tab 20.

Rumley v. British Columbia, (2002), 205 D.L.R. (4th) 39 (S.C.C.) at para. 27, Plaintiffs' Book of Authorities, Tab 1.

67. In *Cloud*, the Ontario Court of Appeal approved a class definition of former residential school survivors which was defined by attendance at the school within a certain time period. Given this criteria, the court determined that the proposed class was not open-ended but rather, "circumscribed by their defining criteria" and were rationally linked to the common issues because, as in this case, "all class members claim breach of these duties and that they all suffered at least some harm as a result". The approved class was:

(a) All persons who attended the Mohawk Institute Residential School between 1922-1969;

(b) All parents and siblings of all persons who attended the Mohawk Institute School between 1992-969; and

(c) All spouses and children of all persons who attended the Mohawk Institute Residential School between 1992-1969.

Cloud v. Canada (Attorney General) (2004), 247 D.L.R. (4th) 667 (C.A.) at para. 47, leave to appeal to the Supreme Court of Canada was dismissed, Plaintiffs' Book of Authorities, Tab 14.

68. In the 2006 Pan-Canadian Residential School Settlement, nine courts across the country accepted the following class definition for the purposes of consent certification and settlement approval, bounded by attendance, a temporal period and place of residence:

> All persons who resided at an Indian Residential School in Canada at anytime prior to December 31, 1997, who are living, or who were living as of May 30, 2005, and who, as of the date hereof, or who, at the date of death resided in [the province over which that particular court possessed territorial jurisdiction].
>
> *Order of the Ontario Superior Court of Justice*, Honourable Justice Winkler, dated December 15, 2006, Plaintiffs' Factum, Schedule B.

69. Accordingly, on the same basis as proposed by the Plaintiffs herein, courts, in the context of both contested certification and settlement approval motions, have accepted similar class definitions, limited by the same criteria.

70. Section 5(1)(b) is met: there is an identifiable class of two or more persons.

E. SECTION 5(1)(C): THE CLAIMS OF THE CLASS RAISE COMMON ISSUES

71. Section 5(1)(c) of the Act requires that the proposed class proceeding raises common issues of fact or law. These common issues need not be determinative of liability and need not even form the dominant issues in the litigation. Rather,

> [w]hen examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they

> need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief.
>
> *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (C.A.), p. 359 or para. 53, leave to appeal to the Supreme Court of Canada dismissed, [1998] S.C.C.A. No. 13, Plaintiffs' Book of Authorities, Tab 18.
>
> *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.), at para. 41, leave to appeal to the Supreme Court of Canada dismissed, [2000] S.C.C.A. No. 660, Plaintiffs' Book of Authorities, Tab 15.

72. The Plaintiffs need only proffer a minimal evidentiary basis to establish the existence of common issues to meet the test for certification:

> Once provided, the question whether the defendants could obtain summary judgment by providing additional conflicting evidence that demonstrates that there are no genuine issues for trial will not arise and evidence directed at the questions is irrelevant and inadmissible. If this were not correct, every opposed certification motion would be likely to involve, in effect, the same test of the merits as on a motion for summary judgment, and the evidential burden on plaintiffs would be increased enormously.
>
> *Tiboni v. Merck Frosst Canada Ltd.,* [2008] O.J. No. 2996 (S.C.J.) at para. 52, Plaintiffs' Book of Authorities, Tab 32.

73. The Plaintiffs' proposed common issues are:

a) by is operation or management of the School did the defendant breach a duty of care owed to the students of the School to protect them from actionable physical or mental harm?;

(b) by its purpose, operation or management of the School, did the defendant breach a fiduciary duty owed to the students of the School to protect them from actionable physical or mental harm, or the aboriginal rights of those students?;

(c) by its purpose, operation or management of the School, did the defendant breach a fiduciary duty owed to the families and siblings of the students of the School;

(d) if the answer to any of the above common issues is "yes", can the court make an aggregate assessment of the damages suffered by all class members as part of the common trial?;

(e) if the answer to any of these common issues is "yes", was the defendant guilty of conduct that justifies an award of punitive damages?; and

(f) if the answer to common issue (e) is "yes", what amount of punitive damages ought to be awarded?

74. A review of these common issues demonstrates that the only matters to be determined on an individual basis would be individual causation, individual damages and the applicability of limitations period. All other issues, as proposed: (a) presence of a duty of care; (b) the standard of care owed in the circumstances; (c) the breach of the duty of care; (d) the scope of duties owed to the Family Class; and (e) the availability of punitive damages, are common to all class members. Their resolution would advance the litigation in a material way.

75. Even on Canada's view of the case: (a) the history or scope of Canada's legal responsibilities, if any, to aboriginal persons in Newfoundland; (b) the nature of legal duties owed to class members; and (c) whether those duties were breached, are of primary importance to the action as framed. For any single class members to recover, they must first succeed on these issues. A single trial of these issues would make it unnecessary to adduce evidence more than once of the Crown's conduct in relation to these persons and the Schools:

> [a]s in *Cloud*, the resolution of the debate about the essential legal duties on which the claim is founded and whether these duties were breached, would significantly advance the action to the point where, on my view of the case, only an assessment of damages would remain.
>
> *Sauer v. Canada (Attorney General),* [2008] O.J. No. 3419 (S.C.J.) at para. 57, Plaintiffs' Book of Authorities, Tab 30.

76. The common issues proposed by the Plaintiffs are essential ingredients of the claims of all Class Members and are consistent with the principles enumerated by the Supreme Court of Canada in *Hollick* and *Rumley.* Resolution of the proposed common issues would greatly advance the litigation as a whole. The determination of these issues would avoid the need for each Class Member, at tremendous expense, to prove these elements at the trial or his or her own individual claim. In fact, the focus of the common issues, the conduct and duties owed by

the Crown, are entirely independent of any particular Class Member's experiences. The determination of these issues would be dispositive of many key elements of liability.

77. The common issues need not predominate over non-common issues but the court must consider the significance of the common issues in relation to the individual issues. The critical question is whether resolution of the common issues would significantly advance the action. This is not a case where the common issues could be said to be negligible in comparison to the individual issues. The common issues are at the core of the case.

> *Hollick v. Toronto* (2001), 205 D.L.R. (4th) 19 (S.C.C.) at para. 21, Plaintiffs' Book of Authorities, Tab 2.
>
> *Cloud v. Canada (Attorney General),* (2004), 247 D.L..R. (4th) 667 (C.A.), at para. 65, leave to appeal to the Supreme Court of Canada dismissed, Plaintiffs' Book of Authorities, Tab 14.

78. The Supreme Court of Canada has rejected arguments that questions surrounding whether a defendant's conduct fell below acceptable standards are inescapably individualistic: "class members share an interest in the question of whether the appellant breached a duty of care. On claims of negligence and breach of fiduciary duty, no class member can prevail without showing duty and breach. Resolving those issues, therefore is necessary to the resolution of each class member's claim."

> *Rumley v. British Columbia* (2002), 205 D.L.R. (4th) 39 (S.C.C.) at para. 27, Plaintiffs' Book of Authorities, Tab 1.

79. As determined by the Honourable Justice Orsborn in *Davis v. Canada (Attorney General),* "the common issues criterion focuses on <u>what is</u> rather than on <u>what is left</u> or <u>what should be</u>. Simply put, are there one or more common issues the resolution of which would be the same for each class member's claim?". In this case, the answer to that question is clearly "yes".

Davis v. Canada (Attorney General), [2004] N.J. No. 271 (S.C.T.D.) at para. 111, Plaintiffs' Book of Authorities, Tab 21.

80. In this case, the proposed common issues demonstrate that their resolution will require a factual and legal inquiry which need not involve any class members but will at the same time, significantly advance their claims. If Canada owed no duty to the proposed class, this finding would dispose of the entire proceeding.

81. Conversely, if Canada did owe a duty, then the trial judge can proceed to consider whether Canada breached its common law or fiduciary duties. This would substantially reduce the work to be done by the trial judge at individual trials. Once the common issues were determined, each individual would only need to establish that he or she attended the School at the appropriate time and suffered damages as a result of attendance.

82. Canada cannot argue that the applicable limitation periods with respect to each of the Class Members' claims constitute individual issues that somehow diminish the commonality of the proposed common issues. The Ontario Court of Appeal has made it clear that the resolution of the common issues can still an action "up to the point where only harm, causation and individual defences such as limitations remain for determination [which] moves the action a long way."

Cloud v. Canada (Attorney General) (2004), 247 D.L.R. (4th) 667 (C.A.) at para. 82, leave to appeal to the Supreme Court of Canada dismissed, Plaintiffs' Book of Authorities, Tab 14.

83. Numerous actions have been certified as class proceedings despite the fact that complex issues of damages or causation might require individual trials.

Anderson et al v. Wilson et al (1999), 44 O.R. (3d) 673 (C.A.), at 683 – 684 (p. 9 QL), Plaintiffs' Book of Authorities, Tab 13.

Carom v. Bre-X Minerals Ltd. (2000), 51 O.R. (3d) 236 (C.A.), at paras. 41, 49, 56, 58 – 61, Plaintiffs' Book of Authorities, Tab 15.

Sauer v. Canada (Attorney General), [2008] O.J. No. 3419 (S.C.J.) at para. 58, Plaintiffs' Book of Authorities, Tab 30.

84. Even in cases such as *Rumley* or *Cloud*, where large numbers of individual class members had suffered a variety of damages as a result of physical, emotional or sexual abuse over many decades, the Supreme Court of Canada and the Ontario Court of Appeal nevertheless certified the actions as class proceedings, holding that the individual issues such as causation and damages were "relatively minor aspect[s] of the case", in terms of both complexity and duration.

Rumley v. British Columbia (2001), 205 D.L.R. (4th) 39 (S.C.C.) at para. 36, Plaintiffs' Book of Authorities, Tab 1.

Cloud v. Canada (Attorney General) (2004), 247 D.L.R. (4th) 667 (C.A.) at para. 69, leave to appeal to the Supreme Court of Canada dismissed, Plaintiffs' Book of Authorities, Tab 14.

85. The scope of a duty owed and its concomitant breach has been repeatedly certified as a common issue in class proceedings and this Honourable Court has held that:

> It is an appropriate common issue because it focuses upon the Defendant's knowledge and conduct, and can be resolved without the participation of class members, and, depending on its resolution, will either advance or dispose of their claims.

Wheadon v. Bayer Inc., [2004] N.J. No. 147, (S.C.T.D.) at para. 133, Plaintiffs' Book of Authorities, Tab 20.

86. It is perfectly appropriate for a plaintiff's litigation plan to contemplate resolution of individual issues following a common issues trial. For example, if the Plaintiffs proved that a duty was owed by Canada and that duty was breached, they may still need to prove individual causation and damages in the course of individualized hearings. As the Honourable Justice Barry has recognized, "this approach is consistent with Canadian class action jurisprudence.

Canadian courts have repeatedly certified breach of duty as a common issue, leaving issues of causation and damages to individualized hearings."

> *Wheadon v. Bayer Inc.*, [2004] N.J. No. 147, (S.C.T.D.) at para. 134, Plaintiffs' Book of Authorities, Tab 20.

87. The very presence of individual issues does not defeat the purpose or propriety of certification. The Act contemplates such a bifurcated process, where necessary and appropriate. Moreover, the "existence of individual issues does not detract from the reality that there are significant common issues, the resolution of which will advance the progress of the litigation".

> *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.),at paras.111- 112, leave to appeal denied, (2000), 52 O. R. (3d) 20 (Div. Ct.), leave to appeal to the Supreme Court of Canada dismissed, Plaintiffs' Book of Authorities, Tab 28.

88. The jurisprudence has evolved to a stage where "idiosyncratic causation and damages issues did not prevent certification in *Bywater, Cloud, Tiboni*, or in other negligence cases, where disparate harm to class members required individual assessments of both causation and damages."

> *Sauer v. Canada (Attorney General),* [2008] O.J. No. 3419 (S.C.J.) at para. 58, Plaintiffs' Book of Authorities, Tab 30.

89. Moreover, the Act also provides a process for determining aggregate monetary relief for a class pursuant to sections 29 and 30, which may render the necessity of any individualized claims analysis unnecessary and irrelevant.

> *Class Actions Act*, S.N.L. 2001, c. C-18.1, sections 29 and 30, Plaintiffs' Factum, Schedule B.

90. Section 29(1) of the Act provides for aggregate monetary relief to class members if liability can established at the common issues trial. Pursuant to that section, Canada may

oppose the entitlement to such relief at the common issues trial and argue that individualized proof is necessary. What is critical to note is that the certification application is not the appropriate stage at which to resolve the question of aggregate relief – this is properly done, pursuant to the statutory framework, at the common issues trial itself.

91. If aggregate monetary relief is in fact granted at the common issues trial, sections 31 and 34 of the Act provide fair and efficient mechanisms for the distribution of this award to class members. Canada would not play a role in this distribution process. Once its total liability was determined, and any judgment owed by Canada paid into court, its involvement in the action would be at an end.

Class Actions Act, S.N.L. 2001, c. C-18.1, sections 31 and 34, Plaintiffs' Factum, Schedule B.

92. Accordingly, the Plaintiffs respectfully submit that they have satisfied the criteria of section 5(1)(c) of the Act. The claims of the Class are substantial common ingredients in the resolution of the common issues, the resolution of which, would significantly move the action forward.

F. SECTION 5(1)(D): A CLASS ACTION IS THE PREFERABLE PROCEDURE

93. The preferability inquiry has three overarching goals at its core: (a) judicial economy; (b) access to justice; and (c) behaviour modification. The preferability requirement is based on two concepts. The first is whether the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the class members' claims.

Hollick v. Toronto (2001) 205 D.L.R. (4th) 19 (S.C.C.), at paras. 27 – 28, Plaintiffs' Book of Authorities, Tab 2.

> *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 (C.A.) at para. 73, leave to appeal to the Supreme Court of Canada dismissed, Plaintiffs' Book of Authorities, Tab 14.

94. The evidence filed on behalf of the Plaintiffs in these actions demonstrates that both access to justice and judicial economy concerns are paramount to these applications and can only be realized by way of a class proceeding.[18]

95. It is necessary to assess the litigation as a whole and to adopt a practical cost-benefit approach to the preferability requirements. In this case, a determination of the common issues would determine the major liability issues once and for all. Canada has not proposed any alternatives:

> In order for counsel to be persuasive in developing a submission that another procedure is to be preferred, it is essential that the defendant provide the court with a concrete, workable alternative litigation proposal which demonstrates that the plaintiffs will not be deprived of their day in court. [emphasis added]
>
> *The Honourable Justice W.K. Winkler* (as he then was), "Managing the Class Action Lawsuit: The Judicial Perspective", Canadian Institute Conference on Class Actions, (October 4, 1996) at 11, Plaintiffs' Book of Authorities, Schedule B.

96. While applications have been made to add the Schools to the list of "Eligible Indian Residential Schools", pursuant to the terms of the 2006 National Settlement, these applications have been repeatedly denied by Canada. It cannot be said that repeated, further applications in this respect, ought to be regarded as preferable to a class proceeding. Canada has not asked that further information be provided about these Schools or stated that the

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[18] Affidavit of Carol Anderson sworn November 20, 2008, Anderson Motion Record, Tab 3, at paras. 28–29; Affidavit of Allen Webber sworn November 24, 2008, Anderson Motion Record, Tab 4, at paras. 29–20; Affidavit of Joyce Webber sworn November 24, 2008, Anderson Motion Record, Tab 5, at paras. 20–21; Affidavit of Selma Boasa sworn October 22, 2008, Boasa Motion Record, Tab 3, at paras. 28–29; Affidavit of Rex Holwell sworn November 28, 2008, Boasa Motion Record, Tab 4, at paras. 20–21; Affidavit of Dominic Dickman sworn December 3, 2008, Dickman/Lucy Motion Record, Tab 4, at paras. 19–20; Affidavit of Sarah Asivak sworn October 22, 2008, Asivak Motion Record, Tab 3, at paras. 29–20; Affidavit of James Asivak sworn November 26, 2008, Asivak Motion Record, Tab 4, at paras. 18–19; Affidavit of Tony Obed sworn October 21, 2008, Obed Motion Record, Tab 3, at paras. 29–20; Affidavit of William Adams sworn October 22, 2008, Obed Motion Record, Tab 4, at paras. 27–28; Affidavit of Martha Blake sworn October 22, 2008, Obed Motion Record, Tab 5, at paras. 21-22; Affidavit of David Rosenfeld sworn December 10, 2008, Anderson Motion Record, Tab 6, at paras. 19-20.

applications were somehow incomplete, to be visited again upon the provision of additional documentation of research.

97. Quite the contrary. Canada continuously insists, as it does with respect to hundreds of other schools across Canada for which such applications have been similarly made, that it bears no legal responsibility at all for the operation or control of these Schools. To that end, it takes the position that these Schools do not meet the criteria or indicia of Article 12 of the National Settlement Agreement for addition to the list of "Eligible Indian Residential Schools". As Canada has never advised that it might reconsider this position, it is preferable that the Plaintiffs pursue civil litigation in class action form, as soon as is possible.

98. Accordingly, it is not open to Canada to argue that there are any other legitimate means of redress other than litigation. Even where there existed an alternative dispute resolution procedure for which class members were in fact entitled and eligible to access, (unlike the benefits in the National Settlement Agreement, as in this case), the Ontario Court of Appeal still found that a class proceeding was preferable. The reasoning in *Cloud* applies with even more force in this case as the alternative dispute resolution process upon which Canada relies to suggest the Class can access and seek redress, is also a process for which Canada has denied these individuals' eligibility.

> *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 (C.A.) at paras. 92 – 93, leave to appeal to the Supreme Court of Canada dismissed, Plaintiffs' Book of Authorities, Tab 14.

99. The evidence before the courts during the national settlement hearings during the fall of 2006 showed that approximately five (5) class members, or survivors of residential school,

die every day in Canada. Justice Winkler determined in the *Baxter* proceeding (the Ontario class proceeding commenced on behalf of all residential school survivors in Canada) that:

> The class period spans a period of over 75 years. At this point, a reasonable inference can be drawn that there are elderly potential class members for whom further delay represents significant prejudice. Those members of the potential class are entitled to have a determination of whether this proceeding is certifiable as a class action in a timely manner.

Baxter v. Canada, [2005] O.J. No. 2165 (S.C.J.) at para. 13, Plaintiffs' Book of Authorities, Tab 29.

100. For all of these reasons, the best avenue by which to have these claims adjudicated upon swiftly, fairly and for all, is by way of class action. This would ensure the Class has access to meaningful redress, in an arena where it can the inherent inequalities of bargaining powers of these parties may be equalized.

(i) Access to Justice

101. Access to justice has consistently been found by Canadian courts to be the overriding consideration in making a preferability assessment.

102. In this case, the failure to certify the actions as class proceedings would effectively deny access to the courts for hundreds of elderly claimants, largely due to their respective financial circumstances. The legal costs of proceeding individually, especially against an adversary as formidable as Canada, would exceed the class members' individual damages, making it financially impossible to bring separate individual actions. Each of the Class Members has given evidence that the costs and expenses associated with complex litigation, particularly against Canada, makes individual litigation an impossibility.

103. For these Class members, there are no "alternative avenues of redress apart from individual actions". Furthermore, "individual actions would be less practical and less efficient than a class proceeding". Certification would therefore go some distance in increasing access to justice in the present case.

> *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.) at para. 37, 38, Plaintiffs' Book of Authorities, Tab 1.
>
> *Hollick v. Toronto* (2001), 205 D.L.R. (4th) 19 (S.C.C.), at para. 31, Plaintiffs' Book of Authorities, Tab 2.

104. If each individual class members were required to commence a separate action, such litigation would be grossly duplicative and costly. The costs of prosecuting such an action to trial could easily be well in excess of $500,000.00 for fees and disbursements, a range of costs that places individual litigation beyond the reach of all class members.

105. Furthermore, the transactional expenses in terms of judicial time, court costs, legal fees and experts would overwhelm both the parties and the court. In the context of this action, the twin objectives of judicial economy and increased access to justice require a class proceeding and lead inexorably to the conclusion that a class proceeding is the preferable procedure.

106. Where a defendant is vigorously denying liability, the costs of proving the common issues are an overwhelming and prohibitive deterrent to the bringing of individual claims. Only a class proceeding would place the parties on an even footing. Absent a class action, "who could individually afford this type of litigation?"

> *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Gen.Div.) at 744, Plaintiffs' Book of Authorities, Tab 44.

107. Canada cannot suggest that no individual litigation at all would be preferable to a class action. The Supreme Court of Canada has explicitly rejected this proposition: "[a]rguments that no litigation is preferable to a class proceeding cannot be given effect".

> *1176560 Ontario Limited et al v. The Great Atlantic and Pacific Company of Canada Limited* (2002) O.R. (3d) 535 at para. 45, upheld by Div. Ct., Plaintiffs' Book of Authorities, Tab 33.
>
> Order of the Ontario Superior Court of Justice, Honourable Justice Winkler, dated December 15, 2006, Plaintiffs' Book of Authorities, Schedule B.

108. If individual trials were required as a means to resolve these matters, each student who attended a School would have to prove the legal relationship of Canada and the School, the legal relationship of the defendant to the student, the scope and content of the duty of care, the standard of care, the conditions of the School and the treatment experienced. A common issues trial would make it unnecessary to adduce evidence of the history or the establishment and operation of the Schools more than once. As the Supreme Court of Canada determined:

> Issues relating to policy and administration of the school, qualification and training of staff, dormitory conditions and so on are likely to have common elements....The overall history and evolution of the school is likely to be importance background for the claims generally and it would be needlessly expensive to require proof in separate individual cases.
>
> *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.) at para. 38, Plaintiffs' Book of Authorities, Tab 1.

109. These findings were echoed by the Court of Appeal in *Cloud*, which held that:

> The commons issues require resolution one way or the other. It is no less fair to the respondents to face them in a single trial than in many individual trials. Nor, at this stage, is there any reason to think that a single trial would be unmanageable. The common issues centre on the way the respondents ran the School and can probably be dealt with even more efficiently in one trial than in 1,400.
>
> *Cloud v. Canada (Attorney General)* (2004) 247 D.L.R. (4th) 667 (C.A.) at para. 89, leave to appeal to the Supreme Court of Canada dismissed, Plaintiffs' Book of Authorities, Tab 14.

110. Furthermore, the particular vulnerability of the Class Members in this case cannot be overemphasized. The individual Class Members are all aboriginal persons, living in fairly remote areas and the vast majority are of advanced age. The Plaintiffs have little experience with individual litigation. While litigation is always a difficult and challenging process, it would prove to be even more so for this constituency of individuals. Permitting the action to proceed as a class action may assist in mitigating these difficulties that would be faced by individuals in this case.

> *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.) at para. 39, Plaintiffs' Book of Authorities, Tab 1.
>
> *Cloud v. Canada (Attorney General),* (2004), 247 D.L.R. (4th) 667 (C.A.) at paras. 87-88, leave to appeal to the Supreme Court of Canada dismissed, Plaintiffs' Book of Authorities, Tab 14.

111. Lastly, the social and communication barriers faced by former students favour a common, collective process to both explain and deal with the significance of those barriers, and to elicit the relevant evidence. A class proceeding it the only way to marshal the expertise required to assist individual students in communicating their testimony effectively.

> *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.) at para. 39, Plaintiffs' Book of Authorities, Tab 1.
>
> *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 (C.A.) at para. 87, leave to appeal to the Supreme Court of Canada dismissed, Plaintiffs' Book of Authorities, Tab 14.

(ii) Judicial Economy

112. The central issue in this action will be the nature and extent of the duty owed by Canada to the Class Members and whether that duty was breached. Those issues are most amenable to collective resolution in a class proceeding. While certain issues of injury and

causation may have to be litigated individually following resolution of the common issues, the individual issues will be, as in *Rumley,* a "relatively minor aspect of this case".

> *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.), at para. 37 B 38, Plaintiff's Book of Authorities, Tab 1.

113. There are no other means of resolving these claims that would be more practical or more efficient. Individual actions would be far less practical and far less efficient. If individual trials were required, each individual who attended one of the Schools would have to prove the legal relationship of Canada in relation to the former students, including Canada's relationship with the Province of Newfoundland, the extent of the duty of care and the standard of care.

114. This course of proceeding would require that all of the same parties' evidence, technical, expert or otherwise, would have to be repeated in thousands of individual actions. This gives rise to the very real potential that individual actions by Class Members, who attended the Schools, over the same time period, would yield inconsistent findings of fact and law on these issues.

> *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.)., at para. 38, Plaintiff's Book of Authorities, Tab 1.

115. There would be no purpose served in requiring each Class Member to advance a separate challenge to Canada's conduct in this case. The determination of the issues that are common to all Class Members should be made in one action. There is no point in the court assessing these issues more than once and expending scarce judicial resources to do so.

> *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), at para. 124, Plaintiff's Book of Authorities, Tab 28.

116. Judicial economy is also served given that Class Members will not need to participate in the initial discovery process or the trial of the common issues, as defined above. If Canada is successful, the court and the Class Members, would also be saved from addressing these procedures.

> *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Gen.Div.), at p. 339 – 340 (p. 8 QL), Plaintiff's Book of Authorities, Tab 45.
>
> *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), at para. 125, Plaintiff's Book of Authorities, Tab 28.

117. Where the duplication of productions, discovery and trials to establish common, and generally identical background facts and circumstances can be avoided for thousands of individual claims, a class proceeding is the preferable procedure. In this case, a class proceeding would achieve the aim of judicial economy as the determination of whether Canada owed a legal duties to aboriginal persons in Newfoundland following Confederation, and whether Canada breached a duty of care in its participation in the operation of the Schools, would (i) avoid duplication in the determination of these issues for hundreds of Class Members, (ii) spread the costs of prosecution over the entire class and (iii) only require the Defendant to defend one, rather than a multitude of individual actions.

118. Any other means of resolving the claims through some type of alternative court procedure would be much less practical and far less efficient. Individual litigation in any form affords no advantages over a class proceeding. Rather, to the contrary, a class proceeding offers a number of benefits, to all parties, making it the preferable procedure:

(a) whatever limitation period if found to be applicable to the claim is tolled for the entire class;

(b) a formal notice program is created which will alert all interested persons to the status of the litigation;

(c) the class is able to attract a sophisticated counsel through the aggregation of potential damages and the availability of contingency fee arrangements;

(d) a class proceeding prevents the defendant from creating procedural obstacles that individual litigant may not have the resources to clear;

(e) class members are given the ability to apply to participate in the litigation if desired;

(f) the action is case-managed by a single judge;

(g) the court is given a number of powers designed to protect the interests of absent class members;

(h) class members are protected from any adverse cost award in relation to the common issues stage of the proceedings;

(i) in terms of the resolution of any remaining individual issues, a class proceeding allows the court to create simplified structures and procedures; and

(j) through the operation of statute, any order or settlement will accrue to the benefit of the entire class, without the necessity of resorting to principles of estoppel or abuse of process.

Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219 (S.C.J.) per Cumming J., at para. 116, Plaintiff's Book of Authorities, Tab 28.

119. As stated by the Honourable Mr. Justice Smith in *Endean*:

> [The] object of the Act is not to provide perfect justice, but to provide a 'fair and efficient resolution' of the common issues. It is a remedial, procedural statute and should be interpreted liberally to give effect to its purpose. It sets out very flexible procedures and clothes the court with broad discretion to ensure that justice is done to all parties.
>
> The suggested problems identified by counsel with respect to the assessment of damages can be accommodated with the flexible procedures made available by the Act.

Endean v. Canadian Red Cross Society (1997), 148 D.L.R. (4th) 158 (B.C.S.C.) per Smith J., at 172, at para. 58 and 60, Plaintiff's Book of Authorities, Tab 42.

120. Given all of the circumstances, a class proceeding is the preferable procedure for the resolution of the common issues.

G. SECTION 5(1)(E): THE PROPOSED REPRESENTATIVE PLAINTIFFS ARE ADEQUATE, COMPETENT AND HAVE NO CONFLICT WITH THE CLASS

121. In determining the adequacy of a proposed representative plaintiff, the court should consider the motivation of the individual and the competence of counsel. A proposed representative need not be 'typical', an American concept which has been rejected by Canadian legislators and courts, and need not even be the best possible representative.

> *Pardy v. Bayer*, [2003] N.J. No. 210 (S.C.T.D.), at para. 22, relying on *Western Canadian Shopping Centres*, at para. 41,Plaintiffs' Book of Authorities, Tab 22.
>
> *Wheadon v. Bayer Inc.*, [2004] N.J. No. 147, (S.C.T.D.) at para. 165, Plaintiffs' Book of Authorities, Tab 20.

122. The test for whether a proposed representative plaintiff is deemed adequate has been described by the courts in the following manner:

> ...the most important considerations in determining whether a plaintiff was appropriate were whether there was a common interest with other class members and whether the representative plaintiff would 'vigorously prosecute' the claim. It has been established that there is a common interest and I can see no reason why the representative plaintiff would not vigorously prosecute the claim. Any individual plaintiffs who feel that the representative plaintiffs would not represent them may opt out of the class proceeding and pursue individual actions.
>
> *Campbell v. Flexwatt* (1998), 44 B.C.L.R. (3d) 343 (C.A.)., p. 364, Plaintiffs' Book of Authorities, Tab 18.
>
> *Wheadon v. Bayer Inc.*, [2004] N.J. No. 147 (S.C.T.D.) at paras. 163 - 164, Plaintiffs' Book of Authorities, Tab 20.

123. The fact that different class members may have had varying experiences of suffered different injuries "is a matter for subsequent individualized damage hearings and is not an obstacle to the appointment of a representative plaintiff".

> *Wheadon v. Bayer Inc.*, [2004] N.J. No. 147 (S.C.T.D.) at para. 165, Plaintiffs' Book of Authorities, Tab 20.

124. The proposed representative plaintiffs are capable of representing the Classes. They have all given evidence of their support for the conduct of this litigation to date. The evidence demonstrates that to date, these proposed Plaintiffs have undertaken the following steps, amongst other things, to advance this litigation on behalf of the Classes:

(i) retention of Class Counsel;

(ii) working with counsel to prepare affidavits and instructing counsel as required;

(iii) executing retainer agreements with Class Counsel;

(iv) obtaining documents and other information relevant to the litigation at the request of counsel;

(v) learning the general conduct of a class action to instruct counsel and represent the Classes; and

(vi) attended cross-examination on their affidavit evidence.

125. The proposed representative Plaintiffs have also given evidence of their willingness and ability to act for the Class, having shared many of the same experiences in relation to their time spent at the Schools, or their knowledge of how that has affected their family members who attended, consequently affecting them. There is no apparent impediment to their ability to fairly and adequately represent the interests of the Class, nor is there any indication of a conflict between them and other similarly situated Class Members.

H. SECTION 5(1): AN APPROPRIATE LITIGATION PLAN HAS BEEN TENDERED

126. Section 5(1)(c) of the Act also requires a representative plaintiff to develop and tender a reasonable plan for litigating the action and providing notice.

127. However, courts have also founds that "neither the parties nor the court is blessed with perfect foresight at this stage of the proceeding and the future courts of the litigation may depend upon the findings of fact and the decisions made at the trial of the common issues". For this reason, sections 12 and 13 of the Act confers wide discretion on the trial judge to decide how the individual issues ought to be dealt with. The primary importance of this statutory provision has been emphasized and relied upon by the Ontario Court of Appeal.

> *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.) at para. 97, Plaintiffs' Book of Authorities, Tab 26.
>
> *Cassano v. Toronto-Dominion Bank,* [2007] O.J. No. 4406 (C.A.) leave to appeal to the Supreme Court of Canada dismissed, at paras. 62, 64, Plaintiffs' Book of Authorities, Tab 12.
>
> *Sections 12 and 13, Class Action Act*, S.N.L. 2001, c. C-18.1, Plaintiffs' Factum, Schedule B.

128. The Plaintiffs have proposed a plan to the prosecution of this action. Generally, the litigation plan involves the following:

(a) assuming the action is certified, the Court will be asked to approve a notice program to apprise the Class members of the certification of the action as a class proceeding;

(b) the Court will be asked to appoint an independent person to receive opt-out notices and provide to the court the names of all persons opting out;

(c) the Court will be asked to give directions with respect to the delivery of documentary production, examinations for discovery and the trial of the common issues; and

(d) counsel will post notices of the website.

> *Litigation Plan & Notice Plan, Exhibit "I"* to the Affidavit of David Rosenfeld, sworn December 10, 2008, Anderson Motion Record, Tab 6(I).

129. If the common issues are determined in favour of the Class:

(a) the court will appoint an administrator who will distribute damages as directed by the Court;

(b) the Administrator will calculate the damages of each eligible Class member in accordance with the provisions of the Damages Points, as proposed, including prejudgment and post judgment interest and a share of punitive damages, if awarded;

(c) the Court will appoint a trustee to hold the recovered monies in accordance with investment guidelines approved by the Court; and

(d) the Court will appoint a referee to review any issues as to eligibility, the amount of the base awards, provide any preliminary determinations on entitlement to an assessment of damages and conduct the assessments of damages for personal injury; and

(e) the Court will determine the recipients and the proportions of the cypres distribution.

Litigation Plan & Notice Plan, Exhibit "I" to the Affidavit of David Rosenfeld, sworn December 10, 2008, Anderson Motion Record, Tab 6(I).

130. The Plaintiffs have also developed a comprehensive Claims Administration Process for the processing and determining residual individual issues:

(a) an Approved Claimant will have the option of applying to seek individual damages for serious physical, sexual and mental abuse suffered;

(b) Further forms will be developed and approved by the Court and will address the issue of individual damages ("Individual Damages Forms") and will be sent to those Approved Claimants wishing to seek individual damages ("Individual Approved Claimants");

(c) The Administrator already appointed will receive and process Individual Damages Forms;

(d) Class Members who seek compensation must complete and deliver Individual Damages Forms to the Administrator within eight (8) months of the Notice of Resolution;

(e) The Individual Damages Forms will require a claimant to provide an affidavit setting out their experiences, any applicable expert evidence and written submissions of no longer than five (5) pages in total except with leave of the trial judge, including the amount sought by way of damages;

(f) The defendant will be provided with the Individual Damages Forms;

(g) Within thirty (30) days the defendant (and any potential third parties) will advise the Administrator whether they will choose to either accept the claim or dispute the claim made;

(h) Should the defendants choose to accept the claims made by the claimant and amounts sought by way of damages, they shall provide payment to the claimant within thirty (30) days in exchange for a release in a form to be agreed between the parties acting reasonably;

(i) Should the defendants choose to dispute the claims made("Disputed Claims"), they will be required to, within thirty (30) days provide the Administrator with responding evidence, expert evidence and written submissions, not to exceed five (5) pages in total except with leave of the court;

(j) Failure to register an objection will result in a claim being treated as a judgment by the Court;

(k) All Disputed Claims shall proceed to a mediation, not to exceed 2 hours, before a mediator selected by the Administrator from a list of mediators agreed to between the parties and ordered by the Court. The costs of the mediator and mediation are to be paid by the defendants and third parties. All mediations must be scheduled within thirty (30) days of the defendant or third parties filing their responding materials with the Administrator;

(l) If the dispute is resolved at mediation, the mediator shall file a settlement report with the Administrator which shall set-out the terms of settlement. All settlement amounts and terms are to be paid and completed within thirty (30) days of the mediator's settlement report;

(m) If the dispute cannot be resolved by mediation, the mediator will file a report of no settlement with the administrator.

(n) All claims not resolved by mediation will be decided by an adjudicator, agreed to by the parties or appointed by the court, and such adjudications shall be conducted by a process to be approved by the court.

Plaintiffs' Litigation Plan, Exhibit "I" to the Affidavit of David Rosenfeld sworn December 10th, 2008, Anderson Motion Record, Tab 6 (I).

131. The proposed plan and Claims Administration Process offers an efficient, workable, fair, manageable, timely and comprehensive alternative to litigation, operating as a fair and consistent mechanism for the calculation of damages awards. The Plaintiffs submit that the proposed plan offers more than sufficient level of detail for this stage of the proceedings, a plan which can be modified, altered or revised by this Honourable Court as various litigation exigencies arise both prior to and following a trial of the common issues.

PART IV - RELIEF REQUESTED

132. The Plaintiffs seek an order in each of the five proceedings, certifying the actions as class actions, granting costs in favour of the plaintiffs, payable forthwith, and setting a timetable for the conduct of the common issues trials.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of **May, 2009.**

Kirk M. Baert
Of counsel for the Plaintiffs

Celeste B. Poltak
Of counsel for the Plaintiffs

Chesley Crosbie, Q.C.
Of counsel for the Plaintiffs

Steven Cooper
Of counsel for the Plaintiffs

SCHEDULE "A"
LIST OF AUTHORITIES

1.	*Rumley v. British Columbia*, (2002), 205 D.L.R. (4th) 39 (S.C.C.)
2.	*Hollick v. Toronto* (2001), 205 D.L.R. (4th) 19 (S.C.C.)
3.	*Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534
4.	*Mitchell v. Peguis Indian Band* (1990), 71 D.L.R. (4th) 193 (S.C.C.)
5.	*British North American Act*, 1867 (U.K.) s. 91 [1939] S.C.J. 104
6.	*Hunt v. T & N plc*, [1990] 2 S.C.R. 959
7.	*R. v. Sparrow*, (1990) 70 D.L.R. (4th) 385 (S.C.C.)
8.	*Guerin .v Canada*, (1984) 13 D.L.R. (4th) 321 (S.C.C.)
9.	*Reynolds v. Kingston (City) Police Services Board,* [2007] O.J. No. 900 (C.A.)
10.	*Hickey-Button v. Loyalist College of Applied Arts & Technology,* [2006] O.J. No. 2393 (C.A.)
11.	*Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684 (C.A.)
12.	*Cassano v. Toronto-Dominion Bank*, [2007] O.J. No. 4406 (C.A.)
13.	*Anderson v. Wilson*, (1999), 44 O.R. (3d) 673 (C.A.)
14.	*Cloud v. Canada (Attorney General),* (2004), 247 D.L.R. (4th) 667 (C.A.)
15.	*Carom v. Bre-X Minierals Ltd.*, (2000), 51 O.R. (3d) 236 (C.A.)
16.	*Prete v. Ontario*, [1993] O.J. No. 2794 (C.A.)
17.	*R. v. Powley*, [2001] O.J. No. 607 (C.A.)
18.	*Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (C.A.)
19.	*Nanaimo Immigrant Settlement Society and Sooke Marine Rescue Society v. R.*, 2001 BCCA 75
20.	*Wheadon v. Bayer Inc.,* [2004] N.J. No. 147 (S.C.T.D.)
21.	*Davis v. Canada (Attorney General),* [2004] N.J. No. 271 (S.C.T.D.)
22.	*Pardy v. Bayer*, [2003] N.J. No. 210 (S.C.T.D.)
23.	*Davis v. Canada (Attorney General),* [2007] N.J. No. 42 (S.C.T.D.)
24.	*Ring et al v. Attorney General of Canada et al* (2007) N.L.T.D. 146
25.	*Baxter et al v. The Attorney General of Canada* (2006), 83 O.R. (3d) 481 (S.C.J.)
26.	*LeFrancois v. Guidant Corp.* [2008] O.J. No. 1397 (S.C.J.)
27.	*LeFrancois v. Guidant Corp.* [2009] O.J. No. 36 (S.C.J.)
28.	*Wilson v. Servier Canada Inc.* (2000) 50 O.R. (3d) 219 (S.C.J.)
29.	*Baxter v. Canada,* [2005] O.J. No. 2165 (S.C.J.)

30.	*Sauer v. Canada (Attorney General),* [2008] O.J. No. 3419 (S.C.J.)
31.	*Sauer v. Canada (Attorney General),* [2009] O.J. No. 402 (S.C.J.)
32.	*Tiboni v. Merck Frosst Canada Ltd.* [2008] O.J. No. 2996 (S.C.J.)
33.	*1176560 Ontario Limited et al v. Great Atlantic & Pacific Co. of Canada Ltd.,* [2002] O.J. No. 4781 (S.C.J.)
34.	*Anderson v. St. Jude Medical Inc.*, 2003 CanLII 5686 (ON S.C.)
35.	*Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (S.C.J.)
36.	*Peter v. Medtronic Inc.*, [2008] O.J. No. 1916 (S.C.J.) (Div. Ct.)
37.	*Lambert et al v. Guidant Corporation et al* (2009) (S.C.J.) unreported
38.	*Howard et al v. Eli Lilly & Company et al*, [2008] O.J. No. 2610 (Div. Ct.)
39.	*Taylor v. Canada (Minister of Health),* [2007] O.J. No. 3312 (S.C.J.)
40.	*Matoni et al v. C.B.S. Interactive Multimedia Inc. et al*, [2008] O.J. No. 197 (S.C.J.)
41.	*Axiom Plastics Inc. v. E.I. Dupont Canada Company*, [2007] O.J. No. 3327 (S.C.J.)
42.	*Endean v. Canadian Red Cross Society (1997),* 148 D.L.R. (4th) 158 (B.C.S.C.)
43.	*Richard v. HMTQ* (2005) 372 (B.C.S.C.)
44.	*Bendall v. McGhan Medical Corp.* (1993) 14 O.R. (3d) 734 (Gen. Div.)
45.	*Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Gen. Div.)
46.	*Anderson v. Wilson,* [1998] O.J. No. 671 (S.C.J.) (Div. Ct.)
47.	*Shubenacadia Indian Band v. Canada (Minister of Fisheries and Oceans),* [2001] F.C.J. No. 347
48.	*Terms of Union of Newfoundland with Canada*
49.	*Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992
50.	*Aboriginal Peoples and Governance in Newfoundland and Labrador*, authored by Adrian Tanner, John C. Kennedy, Susan McCorquodale and Gordon Inglis, October 1994
51.	*Report on the Complaints of the Innu of Labrador to the Canadian Human Rights Commission Report*, by Donald M. McRae, August 18, 1993
52.	*Summary of the Report of the Royal Commission on Labrador, 1974*
53.	*Fiduciary Law*, authored by Dr. Leonard I. Rotman, 2005
54.	*"Pencilled Out":* Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954, A Report prepared for Jack Harris, M.P. on the impact of the exclusion of Newfoundland and Labrador's native people from the *Terms of Union* in 1949, March 31, 1988
55.	*Reference Re British North America Act*, 1867 (U.K.) s. 91 [1939] S.C.R. 104

SCHEDULE "B"
RELEVANT STATUTES

1.	*Class Actions Act,* S.N.L. 2001, c. C-181
2.	Rule 14.24 of the Newfoundland Rules of Civil Procedure, SNL1986 c42 Schedule D., Rules of the Supreme Court, 1986 under the Judicature Act
3.	*Order of the Ontario Superior Court of Justice*, Honourable Justice Winker, dated December 15, 2006