2007 01T4955CP

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

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER
and JOYCE WEBBER

PLAINTIFFS/APPLICANTS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT/RESPONDENT

BROUGHT UNDER THE *CLASS ACTIONS ACT*, S.N.L. 2001, C. C-18.1

AND BETWEEN:

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

APPLICATION RECORD OF THE PLAINTIFFS
(SEVER/STAY MOTION)

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Solicitors for Third Party

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B E T W E E N:

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THE ATTORNEY GENERAL OF CANADA	

INTERLOCUTORY APPLICATION
(INTER PARTES)

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2007 01T4955CP 2007 01T5423 CP 2008 01T0844 CP 2008 01T0845 CP 2008 01T0846 CP
Date of Filing Document:	March ___, 2013
Name of Filing Party or Person:	Anderson, et al. (Applicants)
Application to which Documents being filed relates:	Application under Rule 7.03
Statement of purpose in filing:	Applicants seek to sever or stay third and fourth party claims.
Court Sub-File, if any:	N/A

THE PLAINTIFFS will bring an application to the Honourable Justice Butler on May 27 and 28, 2013 at Trial Division (General), Supreme Court of Newfoundland and Labrador, 309 Duckworth Street, St. John's, NL A1C 1G9, seeking to sever or stay all third and fourth party claims from the main action pursuant to Rule 7.03 of the *Rules of the Supreme Court, 1986.*

THE APPLICATION shall be heard orally.

THE APPLICATION IS FOR:

(a) an order requiring that any third or fourth party claim be severed from this action and if asserted, to be prosecuted in a separate proceeding to be conducted independently of the main action;

(b) in the alternative, an order staying the third and fourth party proceedings until the disposition of the main action;

(c) the costs of this motion, fixed and payable forthwith to the plaintiffs; and,

(d) any further and other relief that counsel may advise and this Honourable Court may permit.

GROUNDS FOR THE APPLICATION:

(a) this consolidated class proceeding brought by the plaintiffs concerns claims in both negligence and breach of fiduciary duty based on the manner in which Canada participated in the operation, funding, oversight and control (or its failure to properly operate and oversee) five residential schools for aboriginal children following Confederation in 1949;

(b) this Honourable Court, and the Newfoundland and Labrador Court of Appeal, have acknowledged that the claims advanced by the plaintiffs are exclusively against Canada for its several liability to the plaintiffs;

(c) the plaintiffs consciously chose to focus on specific common issues related to a specific defendant, the resolution of which advances the interest of the class;

(d) this action was commenced six years ago, in November 2007, and the only matter that has been finally settled is certification;

(e) the action was certified on June 7, 2010 and upheld by the Newfoundland and Labrador Court of Appeal on December 21, 2011;

(f) a litigation timetable was established by order of the Honourable Justice Butler on March 27, 2012, providing for a common issues trial between September to October, 2013;

(g) Canada brought an unsuccessful application to join various parties to the main action, including the International Grenfell Association (the "IGA"), the Moravian Church (the "Moravians"), the Labrador School Board and Western School Board (the "School Boards") and Her Majesty in Right of Newfoundland and Labrador (the "Province");

(h) following the denial of the joinder application, Canada issued a Third Party Claim against the Province on November 21, 2012;

(i) the Province delivered its Third Party Defence on or about January 31, 2013 and intends to issue further Third or Fourth Party Claims against the IGA and the Moravians;

(j) the proposed Third and Fourth Party Claims are not reasonably, factually, or legally related to the plaintiffs' claims against Canada as outlined in the common issues certified in the main action;

(k) the key common issues to be determined in the main action are:

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

  (ii) by its purpose, operation or management of the schools, did the defendant

breach a fiduciary duty owed to the students of the schools to protect them from actionable physical or mental harm?; and,

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

(l) the common issues address the plaintiffs' claim against Canada only and are not interwoven with the issues as between Canada and the Province or any other third or fourth party;

(m) the common issues relate to Canada's non-delegable constitutional fiduciary duty and duty of care to aboriginal persons in Newfoundland and resolution of these common issues will require evidence that is only within Canada's knowledge;

(n) this is not a case where the relationship between Canada and the Province and other third or fourth parties are inextricably connected to the common issues;

(o) the common issues do not put any third or fourth party interests at issue;

(p) there will be no overlap of evidence or witnesses in the main action and third or fourth party proceedings;

(q) the issues between Canada and the third or fourth parties are not issues that relate to the main proceeding and there is therefore no need to dispose of those issues at the same time as the main action;

(r) the basis of Canada's Third Party Claim against the Province is for contribution and indemnity only, which does not involve determination of the same issues as between the plaintiffs and Canada;

(s) the issues raised in Canada's Third Party Claim against the Province and the Province's Third or Fourth Party Claims against the IGA and the Moravians will require proof and/or evidence that is not relevant to the common issues;

(t) the Third or Fourth Party Claims will divert the focus of the plaintiffs' inquiry into whether Canada owed a duty of care and fiduciary duty to the plaintiffs and class members and whether those duties were breached by Canada;

(u) the resolution of the Third or Fourth Party Claims will unduly complicate and delay the hearing of the main action, thereby prejudicing the plaintiffs' prosecution of the main action;

(v) Canada's Third Party Claim against the Province is at a very early stage;

(w) the Province's Third or Fourth Party Claims against the IGA and Moravians are only contemplated at this time;

(x) by contrast, the main action is at the eve of trial;

(y) if the parties in the main action are to wait for the Third or Fourth Party Claims to catch up, it could be several years before a common issues trial commences;

(z) until the major constitutional issues are resolved as between the plaintiffs and Canada in the main action, there is no place for the third or fourth parties in the main proceeding, because if the answers to the first two common issues as certified are "no", this litigation will be over;

(aa) if the third and fourth party proceedings are allowed to progress with the main action, the costs of the litigation will increase exponentially, whereas severing or staying the third party proceedings will ensure that all parties do not incur costs that are unnecessary;

(bb) it will not serve the interests of justice and judicial economy to embroil the Province and other third or fourth parties in the issues involved in the main action, particularly where Canada only seeks contribution and indemnity in its Third Party Claim against the Province;

(cc) severance of the third and fourth party proceedings would not result in inconsistent verdicts or duplicative litigation as Canada's Third Party Claim for contribution and indemnity against the Province is not an issue raised in the main action, this is a separate legal issue as between Canada and the Province;

(dd) Rule 7.03 of the *Rules of the Supreme Court, 1986*;

(ee) Section 97 of the *Judicature Act*, R.S.N.L. 1990, c. J-4;

(ff) Sections 13 and 14 of the *Class Actions Act*, S.N.L. 2001, c. C-18.1; and,

(gg) such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the return of the application;

(a) the affidavit of Sean O'Donnell, sworn March 25, 2013;

(b) the pleadings and proceedings in this action; and,

(c) such further and other material as counsel may advise and this Honourable Court permit.

DATED at St. John's, Newfoundland and Labrador, this 26 day of March, 2013.

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Solicitors for the Third Party

ISSUED at St. John's, Newfoundland and Labrador, this 26 day of March, 2013.

Sgd M Marie Nellies
Trial Co-ordinator (A)

2007 01T4955CP

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BROUGHT UNDER THE *CLASS ACTIONS ACT*, S.N.L. 2001, C. C-18.1
BEFORE THE HONOURABLE MADAM JUSTICE BUTLER
CASE MANAGEMENT JUDGE

AND BETWEEN:

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- and -	
THE ATTORNEY GENERAL OF CANADA	

AFFIDAVIT

I, Chesley F. Crosbie, Q.C., of St. John's, in the Province of Newfoundland and Labrador, co-counsel for the Plaintiffs, make oath and say as follows:

1. THAT I have read and I understand the foregoing application.

2. THAT the facts contained therein are true to the best of my knowledge, information and belief.

3. THAT I make this Affidavit in support of the Plaintiffs' application of even date.

SWORN TO at the City of St. John's, in the Province of Newfoundland and Labrador, this 26 day of March, 2013, before me:

CHESLEY F. CROSBIE, Q.C.

S Geehan

SHERI GEEHAN
A Commissioner for Oaths in and for
the Province of Newfoundland and Labrador.
My commission expires on December 31, 2016.

2007 01T4955CP

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- and -

THE ATTORNEY GENERAL OF CANADA

NOTICE TO THE PARTIES

You are hereby notified that the foregoing application will be heard on the 27th and 28th days of May, 2013, at the hour of ten o'clock in the forenoon or so soon thereafter as the application can be heard.

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- and -	
THE ATTORNEY GENERAL OF CANADA	

AFFIDAVIT OF SEAN O'DONNELL
(sworn March 25, 2013)

I, Sean O'Donnell, of the City of Toronto, in the Province of Ontario MAKE OATH AND SAY AS FOLLOWS:

1. I am an associate with the law firm Koskie Minsky LLP, class counsel for the plaintiffs, and as such have knowledge of the matters to which I hereinafter depose. Where I make

statements in this affidavit that are not within my direct and personal knowledge, I have been informed of such matters by Celeste Poltak, the lawyer at Koskie Minsky LLP with primary carriage of this action. All of the information deposed to below I verily believe to be true.

PLAINTIFFS' CLAIM AGAINST CANADA ONLY

2. This consolidated class proceeding brought by the plaintiffs concerns claims in both negligence and breach of fiduciary duty based on the manner in which Canada participated in the operation, funding, oversight and control (or its failure to properly operate and oversee) five residential schools for aboriginal children following Confederation in 1949.

3. Attached as **Exhibit "A"** is a copy of the Amended Statement of Claim filed on April 18, 2012, in Court File No. 2007 01T4955CP.

4. Attached as **Exhibit "B"** is a copy of Canada's Statement of Defence filed on November 21, 2012.

5. This action was certified as a class action by order of the Honourable Justice Fowler dated June 7, 2010. Attached as **Exhibits "C"** and **"D"** are copies of Justice Fowler's Reasons for Judgment dated June 7, 2010 and the certification order.

6. The defendant, Attorney General of Canada ("Canada") appealed Justice Fowler's certification order and on December 21, 2011, the Newfoundland and Labrador Court of Appeal upheld the order below. Attached as **Exhibits "E" and "F"** are copies of the Reasons for Judgment of the Court of Appeal, as well as the Court of Appeal's orders in this regard.

7. The essence of the plaintiffs' claim is that Canada possessed a singular and non-delegable duty over Indians and Eskimos in Newfoundland as a constitutional matter. Once Canada acknowledged and assumed a level of legal responsibility for such persons in the new province in 1949, it undertook discretionary control over a cognizable Indian interest, giving rise to a fiduciary duty between Canada and the plaintiffs. The claims advanced by the plaintiffs turn solely on the scope and content of certain Federal duties to aboriginal persons.

8. The plaintiffs have staked their claim on the basis of owed and assumed Federal duties. In the alternative, the plaintiffs allege that if Canada did not have any control over the schools or

persons at issue, Canada failed to properly assume its common law and constitutional obligations. By failing to assume its legal responsibilities, Canada breached fiduciary and common law duties owed to the plaintiffs and class members.

9. This Honourable Court has acknowledged that the claims made by the plaintiffs are exclusively against Canada. Attached in this regard as **Exhibit "G"** is a copy of the Reasons for Judgment of the Honourable Justice Butler dated December 19, 2012.

10. Furthermore, Justice Fowler, in certifying the action and the Court of Appeal in upholding the certification order, also judicially noted that the nature of the claims asserted on behalf of the class are unique to Canada; torts for which the plaintiffs seek to hold Canada only severally liable.

11. The Reasons for Judgment of the Court of Appeal sets out the historical facts on which the plaintiffs rely. These facts are based on undisputed historical records.

LONG HISTORY OF THIS PROCEEDING

Certification

12. These claims were commenced in November 2007, six years ago. The only matter that has been finally settled in this proceeding is certification.

13. On October 28, 2008, Justice Fowler released Reasons for Judgment regarding Canada's application to determine whether certain motions could be heard pre-certification. Justice Fowler denied that application. Attached as **Exhibit "H"** is a copy of those Reasons for Judgment.

14. The plaintiffs' certification application was heard on June 1, 2009 and granted on June 7, 2010. I am advised by Ms. Poltak that Canada's appeal of Justice Fowler's certification order was expedited on agreement of the parties, and was heard on November 7, 2010. The Court of Appeal's Reasons for Judgment were not released until December 21, 2011.

15. I am advised by Ms. Poltak that as soon as the leave to appeal period to the Supreme Court of Canada expired, the parties brought an application to the case management judge to

establish an aggressive litigation timetable, establishing deadlines for documentary productions, examinations for discovery and the ultimate return of the common issues trial. Attached in this regard as **Exhibit "I"** is a copy of the March 27, 2012 order of Justice Butler, approving the litigation timetable. The timetable provided that the common issues trial would commence between September to October, 2013.

Canada's Unsuccessful Joinder Application

16. On July 25 and 26, 2012, Canada brought an application to have certain entities added as defendants to this proceeding on the basis that three schools were established and operated by the International Grenfell Association (the "IGA") and two were established and operated by the Moravian Church (the "Moravians"). Canada also sought to add the Labrador School Board and the Western School Board (the "School Boards"), who Canada alleged oversaw the schools. Furthermore, Canada sought to add the Her Majesty in Right of Newfoundland and Labrador (the "Province"), alleging that the schools existed under the jurisdictional purview of the Province.

17. The plaintiffs opposed that application on the basis of how the plaintiffs framed their claim: Canada's several liability to the plaintiffs. The claim advanced by the plaintiffs alleges duties owed by Canada at the time of Newfoundland's entry into Confederation in 1949 as a constitutional matter and alleges that Canada is exclusively liable for breaches of those duties. I am advised by Ms. Poltak that the plaintiffs, in opposing the application, submitted that given the unique claims asserted against Canada, there were no grounds upon which Canada could seek contribution from third parties on the basis of joint liability.

18. The essence of the plaintiffs' claim is that any attempt by Canada to delegate its duties, responsibilities or obligations to the class members to the Province is unlawful and in breach of its exclusive and non-delegable fiduciary duties owed to the class.

19. The joinder application was denied by the Honourable Justice Butler on October 17, 2012. Attached as **Exhibit "J"** is a copy of Justice Butler's Reasons for Judgment dated October 17, 2012.

Third and Fourth Party Claims Ensue

20. On November 21, 2012, Canada issued a Third Party Claim against the Province, alleging that the schools were created and run by the Province, the IGA, the Moravians, the School Boards and the Province. Canada seeks contribution and indemnity from the Province to the extent that Canada is found liable to pay damages to the plaintiffs. Attached as **Exhibit "K"** is a copy of Canada's Third Party Claim against the Province.

21. On or about January 31, 2013, the Province delivered its Third Party Defence, denying that the Province created or ran the schools. The Province relies therein on the plaintiffs' allegation that Canada's duties are the focus of the plaintiffs' claims, and alleges that liability for the plaintiffs' claims is uniquely and solely Canada's as a result of Canada's duties, constitutional or otherwise. The Province also alleges that Canada should seek contribution and indemnity from the IGA, the Moravians and the School Boards as they managed the day to day operations of the schools. Attached as **Exhibit "L"** is a copy of the Province's Third Party Defence.

22. On February 7, 2013, at a case management conference before Justice Butler, counsel for the Province advised that the Province expected to serve further Third or Fourth Party Claims on the IGA and the Moravians. When the plaintiffs learned of this possibility, they immediately placed the parties and the court on notice of their intention to bring this application and a timetable was set down at the case management conference with the agreement of both Canada and the Province.

THIRD/FOURTH PARTY ISSUES NOT RELEVANT TO MAIN ACTION

23. As noted above, and judicially acknowledged, the plaintiffs consciously chose to focus on specific common issues related to Canada alone. The plaintiffs do not seek redress against the Province. The plaintiffs rely on the assertion that the duty owed to class members was Canada's alone.

24. The common issues relate to Canada's non-delegable constitutional fiduciary duty and duty of care to aboriginal persons in Newfoundland and resolution of these common issues will require evidence that is within Canada's knowledge alone. The constitutional issues that are at

play in the main action are not within the knowledge of the Province or other third and fourth parties. The Plaintiffs have consistently asserted that only Canada owed duties to the class.

25. Any relationship between Canada and the Province or other third or fourth parties is not connected to any common issues as certified. The common issues do not put any third or fourth party interest at issue, as the plaintiffs have alleged that Canada alone owed certain duties to the plaintiffs and class members. In fact, the Plaintiffs' claim, as advanced, is for Canada's several liability only.

26. The basis of Canada's Third Party Claim against the Province is for contribution and indemnity only, which does not involve determination of the same issues as between the plaintiffs and Canada in the main action. There is no need to dispose of those issues at the same time as the main action as they are not inextricably connected to the main action.

27. The issues raised in Canada's Third Party Claim against the Province and the Province's Third or Fourth Party Claims against the IGA and the Moravians will require proof or evidence that is not relevant to the common issues in the main action. For example, the degree of agency relationships as between the Province and proposed other third or fourth parties.

DISADVANTAGES OF HEARING ALL CLAIMS TOGETHER

28. The claims advanced by the plaintiffs relate to events that took place over 60 years ago, when Newfoundland entered Confederation in 1949. The class members are at an advanced age and survivors of these residential schools, and their family members who are part of the family class, are dying every day.

29. The Third or Fourth Party Claims will divert the focus of the plaintiffs' inquiry into whether Canada owed a duty of care and fiduciary duty to the plaintiffs and class members and whether those duties were breached by Canada.

30. If the third and fourth party proceedings are allowed to progress with the main action, the costs of the litigation will increase exponentially as will the time required to adjudicate upon the common issues trial, to the detriment of all parties in the main action and other derivative proceedings.

31. The resolution of the Third or Fourth Party Claims will unduly complicate and delay the hearing of the main action, thereby prejudicing the plaintiffs' prosecution of the main action.

32. Canada's Third Party Claim against the Province is at a very early stage: pleadings have been exchanged; the Province does not expect to produce any documents in the third party proceeding until April 30, 2013; the Province may or may not retain experts who will have to be examined for discovery as well as a representative of the Province; and there may be applications arising from those discoveries. The Province's Third or Fourth Party Claims against the IGA and Moravians are only contemplated at this time; neither party has been served with an originating process.

33. By contrast, the main action is significantly more advanced and is closing in on a trial of the common issues: this Honourable Court has acknowledged that the parties have completed discovery of lay witnesses on the common issues; the plaintiffs have served expert reports; Canada's expert reports are to be filed by May 31, 2013; discovery of all experts shall be completed shortly thereafter, and the common issues trial is expected to commence as early as November, 2013. Attached in this regard as **Exhibit "M"** is a copy of Justice Butler's Reasons for Judgment dated March 19, 2013. If the parties in the main action are to wait for the Third or Fourth Party Claims to catch up, it could be several years before a common issues trial commences, let alone is disposed of, with all the attendant appeals arising.

34. If the third or fourth party proceedings are allowed to proceed along with the main action, it will be impossible for the third and fourth parties to produce documents, serve expert reports, conduct discoveries and any applications arising therefrom to meet a trial date in 2013 or 2014. This would be highly prejudicial to the plaintiffs, leaving any disposition of the actual merits of these proceedings to the distant future.

ADVANTAGES TO SEVERANCE/STAY

35. Severing or staying the third party proceedings will allow the parties to focus on the issue at the heart of the main action: the non-delegable constitutional duties owed by Canada to the plaintiffs.

36. Severing or staying the third or fourth party proceedings will ensure that all parties do not incur costs that are unnecessary, particularly if the plaintiffs are not successful at the common issues trial. In that event, the litigation will come to an end as between all parties.

37. Severance of the third and fourth party proceedings would not result in inconsistent verdicts or duplicative litigation. Canada's Third Party Claim for contribution and indemnity against the Province is not an issue raised in the main action, this is a separate legal issue as between Canada and the Province.

38. A decision at the common issues trial that Canada owed non-delegable constitutional duties to Indians and Eskimos in Newfoundland will not be re-considered in the third and fourth party proceedings, as those derivative proceedings relate to contribution and indemnity only. Hence, there is no possibility of an inconsistent verdict.

40. No prejudice would be visited upon Canada if the Third Party Claim is stayed as Canada can seek contribution and indemnity from the Province after the conclusion of the common issues trial, if the plaintiffs are successful in obtaining judgement. Conversely, if the plaintiffs are unsuccessful at trial, any third or fourth party participation in this action would have been redundant, wasteful and time consuming.

41. I make this affidavit in support of the plaintiffs' application to sever or stay the third or fourth party proceedings.

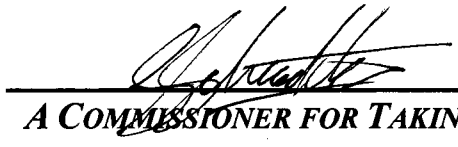
SWORN BEFORE ME at the
City of Toronto,
in the Province of Ontario
on March 25, 2013.

Commissioner for Taking Affidavits

Jonathan [illegible] Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

SEAN O'DONNELL

THIS IS EXHIBIT "A" REFERRED TO IN THE
AFFIDAVIT OF SEAN O'DONNELL
SWORN BEFORE ME, THIS 25TH DAY OF MARCH, 2013



A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

Jonathan Reuben Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

leave granted
RTA 08, Apr 12/12

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

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

AMENDED STATEMENT OF CLAIM

A. RELIEF SOUGHT BY THE PLAINTIFF AGAINST CANADA

1. The Representative Plaintiffs, on their own behalf, and on behalf of the members of the Survivor Class and Family Class claim:

(a) an Order certifying this proceeding as a Class Proceeding pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 and appointing Carol Anderson and Allen Webber as Representative Plaintiffs for the Survivor Class and any appropriate subgroup thereof;

(b) a Declaration that Canada owed ~~and was in breach of~~ exclusive non-delegable fiduciary, and ~~statutory and common law~~ duties of care to the Plaintiffs and the other Survivor Class Members in relation to the ~~establishment~~, funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the Lockwood School in Cartwright, Labrador (the "School");

(c) a Declaration that Canada was negligent in the ~~establishment~~, funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

Filed | Apr 18/12 | mcd

(d) a Declaration the Canada was or is in breach of its exclusive and non-delegable fiduciary obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its ~~establishment~~, funding, operation, supervision, control, maintenance, oversight, ~~confinement in, transport of Survivor Class Members, to obligatory attendance at the School~~ of the School;

~~(e) a Declaration that Canada was or is in breach of its statutory duties pursuant to the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act") and its Treaty obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;~~

~~(f) a Declaration that the School caused cultural, linguistic and social damage and irreparable harm to the Survivor Class;~~

(g) a Declaration that Canada is liable to the Plaintiffs and other Survivor Class Members for the damages caused by its breach of exclusive non delegable~~,~~ fiduciary and~~, statutory and common law~~ duties of care and for negligence in relation to the ~~establishment~~, funding, operation, supervision, control, maintenance, oversight, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

(h) non-pecuniary general damages for negligence, ~~loss of language and culture~~, breach of non-delegable exclusive fiduciary and duties of care, ~~statutory, treaty and common law duties~~ in the amount ~~of $500 million or such other sum as~~ this Honourable Court finds appropriate;

(i) pecuniary general damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, breach of non-delegable exclusive fiduciary and~~, statutory, treaty and common law~~ duties of care in the amount ~~of $500 million or such other sum as~~ this Honourable Court finds appropriate;

(j) exemplary and punitive damages in the amount ~~of $100 million or such other sum as the~~ this Honourable Court finds appropriate;

(k) damages in the amount of ~~$100 million or such other sum as~~ this Honourable Court finds appropriate, pursuant to the *Family Law Act*, R.S.N., 1990, and its predecessors;

(l) prejudgment and post judgment interest pursuant to the provisions of the *Judicature Act*, R.S.N. 1990, c. J-4 ; and

(m) the costs of this action on a substantial indemnity scale.

B. DEFINITIONS

2. The following definitions apply for the purposes of this Claim:

(a) "Aboriginal", "Aboriginal People(s)" or "Aboriginal Person(s)" means a person whose rights are recognized and affirmed by the *Constitution Act*, 1982, s. 35, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982. c. 11, specifically, members of the Metis and Inuit nations;

(b) "Aboriginal Right(s)" means rights recognized and affirmed by the *Constitution Act*, 1982, s. 35, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982. c. 11;

(c) "Agents" mean the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of the School;

(d) "Canada" means the Defendant, the Government of Canada as represented in this proceeding by the Attorney General of Canada;

(e) "Class" or "Class Members" means all members of the Survivor Class and the Family Class;

(f) "Class Period" means March 31, 1949 ~~to December 31, 1996~~ and the date of closure of the Lockwood School;

(g) "Excluded Persons" means all persons who attended an Eligible Indian Residential School as defined by the Settlement Agreement dated May 10, 2006, executed between Canada, as represented by the Attorney General of Canada (the "Agreement") and all persons who are otherwise eligible, pursuant to the Agreement, to receive a Common Experience Payment or pursue a claim through the Individual Assessment Process, as defined by the Agreement;

(h) "Family Class" means:

(i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

~~(ii) the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;~~

(iii) a former spouse of a Survivor Class Member;

(iv) a child or other lineal descendent of a grandchild of a Survivor Class Member;

(v) a person of the same or opposite sex to a Survivor Class Member who cohabited for a period of at least one year with that Survivor Class Member immediately before his or her death;

(vi) a person of the same or opposite sex to a Survivor Class Member who was cohabiting with that Survivor Class Member at the date of his or her death and to whom that Survivor Class Member was providing support or was under a legal obligation to provide support on the date of his or her death;

(vii) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death;

(i) "School" means the Lockwood School, located in Cartwright, Labrador;

(j) "Survivor Class" means:

All persons who attended the School between March 31, 1949 and ~~December 31, 1996~~ the date of closure of the Lockwood School.

C. THE PARTIES

i. Representative Plaintiffs

3. The Plaintiff, Carol Anderson ("Anderson"), resides in Goose Bay, Newfoundland and is a Metis First Nation. Anderson attended the School in Cartwright between 1958 and 1959. Anderson is ~~a proposed~~ the representative plaintiff for the Survivor Class.

4. The Plaintiff, Allen Webber ("Allen"), resides in Goose Bay, Newfoundland and is a Metis First Nation. Allen attended the School in Cartwright between 1958 and 1959 Allen is ~~a proposed~~ the representative plaintiff for the Survivor Class.

5. The Plaintiff, Joyce Webber ("Webber") resides in Goose Bay, Newfoundland and is a Metis First Nation. Joyce was born on June 2, 1954. Her husband Allen attended the School in Cartwright, Newfoundland between 1958 and 1959. Joyce is ~~a proposed~~ the representative plaintiff for the Family Class.

6. The ~~proposed~~ Representative Plaintiffs do not purport to advance claims on behalf of any persons who are otherwise entitled to compensation pursuant to the terms of the Agreement.

7. In particular, the proposed Representative Plaintiffs' claim and the class they ~~propose to~~ represent, do not overlap with the terms of the order granted by Justice Winkler of the Ontario Superior Court of Justice, dated March 8, 2007, attached hereto as Schedule "A".

ii. The Defendant

8. The Defendant, the Government of Canada, is being represented in this proceeding by the Attorney General of Canada. Canada represents the interests of the Minister of the Department of Indian Affairs Canada, who was, at all material times, responsible for the maintenance, funding, oversight or management ~~and operation~~ of the School, either on its own or in combination with other of its agents or servants.

9. Once the Province of Newfoundland and Labrador entered Confederation in 1949, Canada assumed and possessed exclusive Legislative and executive responsibility over aboriginal persons, including the Classes. As aboriginal persons in the 'new' province in 1949 were legally "Indians" for the purposes of section 91(24) of the *British North America Act, 1867*, they were proper subjects of federal jurisdiction.

10. Canada's participation in the funding and operation of the School breached its exclusive duty of care owed to the Classes which was also in breach of its non-delegable fiduciary obligations and constitutional obligations owed to aboriginal persons.

11. Alternatively, even if Canada did not materially operate or manage the school, it nevertheless breached its fiduciary duties by failing to properly do so and protect the Class as it alone possessed singular and exclusive legal jurisdiction over aboriginal persons.

D. RESIDENTIAL SCHOOL SYSTEM – OPERATION OF THE SCHOOL

i. Background - Residential School History Generally

12. Residential Schools were established by Canada as early as 1874, for the education of Aboriginal children. These children were taken from their homes and their communities and transported to Residential Schools where they were often confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them.

13. Commencing in 1911, Canada entered into formal agreements with the Churches for the operation of such schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of the Residential Schools. The Churches assumed the day-to-day operation of the Residential Schools under the control, supervision and direction of Canada, for which the Canada paid the Churches a per capita grant calculated to cover part of the cost of the Residential School operation.

14. As of 1920, the Residential School Policy included compulsory attendance at Residential Schools for all Aboriginal children aged 7 (seven) to 15 (fifteen). This approach to the control and operation of the Residential Schools system continued until April 1, 1969, at which time Canada assumed the sole operation and administration of the

Residential Schools from the Churches, excepting certain cases where Churches continued to act as agents of Canada.

15. Canada removed Aboriginal Persons, usually young children, from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. Canada controlled all aspects of the admission of Aboriginal Persons to the Residential Schools including arrangements for the care of such persons over holiday periods and the methods of transporting children to and from Residential Schools.

16. ~~The same~~ A Similar Residential Schools ~~policy was implemented and effected in~~ existed in Newfoundland and Labrador which joined Canada on March 31, 1949. Accordingly, the claim against Canada is limited temporally to the time when the Canada became legally responsible for Aboriginal Persons residing in that province, or 1949, and beyond.

17. Aboriginal Persons were often taken from their families without the consent of their parents or guardians. While the stated purpose of the Residential Schools from their inception was the education of Aboriginal children, their true purpose was the complete integration and assimilation of Aboriginal children into mainstream Canadian society and the obliteration of their traditional language, culture and religion. Many children attending Residential Schools were also subject to repeated and extreme physical, sexual and emotional abuse, all of which continued until the year 1996, when the last federally operated Residential School was closed.

18. During the Class Period, children at the school were subjected to systemic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

19. The accommodation was crowded, cold and sub-standard. Aboriginal children were underfed and ill nourished, forbidden to speak their native languages or to practice the customs and traditions of their culture. They were deprived of love and affection from their families and of the support that a child would normally expect to have from those in positions of trust and authority. Aboriginal children were also subjected to corporal punishment, assaults, including physical and sexual and systematic child abuse.

E. CANADA'S ASSUMPTION OF DUTIES WHEN NEWFOUNDLAND JOINED CONFEDERATION IN 1949

20. Around the time of Confederation, two separate legal opinions commissioned by the Federal Department of Justice confirmed that the Federal Crown possessed exclusive legislative and executive responsibility in relation to Aboriginal persons, including the Inuit and Eskimo, living in Newfoundland and Labrador.

21. The records of the Federal departments, agencies, ministers and bureaucrats responsible for negotiating the *Terms of Union* 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.

22. As Canada's legal responsibility to Aboriginals was constitutional in nature, it was prohibited from attempting to cede or delegate such duties to any other entity, including the Province itself. Given the broad duties owed by Canada to Aboriginal persons, the welfare and education of Aboriginal children cannot be said to have resided with the Crown in right of the Province of Newfoundland after March 31, 1949.

23. The entry of Newfoundland and Labrador into Confederation brought its Aboriginal population fully within exclusive federal jurisdiction. At the time of Confederation, Canada was aware that any union with Newfoundland and Labrador would have had an Aboriginal component and legal responsibility associated with it.

24. 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 Aboriginal 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.

25. 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 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.

26. 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's Aboriginal people. Under Term 3 of the *Terms of Union*, for matters not specifically referred to, things were deemed to be as if Newfoundland had joined under the terms of the *Constitution Act, 1867*.

27. 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* it had exclusive jurisdiction in the area of Aboriginal peoples. By deleting the reference to native people in the proposed draft *Terms of Union* and writing in Federal responsibility, as outlined in the *British North America Act*, the Federal Government acknowledged *de facto* jurisdiction for the Indians, Inuit and Eskimos of Newfoundland and Labrador.

28. At the time of Confederation, the Premier, Joseph Smallwood, actually refused to sign an agreement with Canada which would have transferred federal responsibility for native persons to the Province. The Province maintained that the fiduciary obligations for Aboriginal persons remained, and belonged to the federal government.

29. 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."

30. This opinion provided by the Justice Department is consistent with the assumptions made during the pre-Confederation talks: Aboriginal persons, pursuant to the *British North America Act*, were Canada's responsibility. 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 populations in Newfoundland and Labrador. This demonstrates that the federal government believed it had a responsibility to fulfill in regard to the Eskimo and Inuit in Labrador and that it would be called upon to provide programs and assistance, funding, oversight and implementation of certain programs, including education.

31. In fact, the *Terms of Union* indirectly provided that the then Aboriginal population in Newfoundland fell under federal jurisdiction. Section three of the *Terms of Union* 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".

32. 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".

33. 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 Eskimo and Inuit in Labrador for which it expected payment. Throughout the 1950's and 1960's, programs for aboriginal education in Newfoundland and Labrador were paid for by Canada at the rate of 90% for Indian communities and 40% in Inuit communities.

34. 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 do not refer to Indians and Eskimos and since head 24 of section 91 of the *BNA Act* places 'Indians and lands reserved for Indians' exclusively under Federal jurisdiction, it seems clear that the Federal Government is responsible for the native population resident in Labrador."

35. By 1954, Newfoundland requested that Canada provide both operating and capital expenditures towards education for Eskimos 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. This agreement reached between the Premier of Newfoundland and Canada in 1954 provided for the re-assumption of federal constitutional responsibility over aboriginal persons in the new province of Newfoundland and Labrador.

36. Just four years into this Agreement, Newfoundland requested further funds from Canada to provide education and housing for both Indians and Inuit. Shortly thereafter, in 1964, the Premier of Newfoundland asked Prime Minister Pearson, to either have Canada

assume sole and full responsibility for Indians and Inuit or to at least increase funding to the level of support being provided by Canada to other provinces in Canada.

37. 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."

38. As a result, by 1965, Canada had agreed to provide the same resources and programs to Indians, Inuit 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 – 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments.

39. Amongst other things, this "Contribution Agreement" was designed to provide services to the communities of Sheshatshit and Davis Inlet, including education. The Contribution Agreement identified the amount of funding available as (a) 90% from Canada; and (b) 10% from Newfoundland. The Contribution Agreement also established a management committee composed of federal officials, provincial officials and representatives of the Davis Inlet and Sheshatshit communities.

40. At the same time, the then 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:

(a) 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);

(b) establishment of a federal-provincial committee to monitor provincial expenditures;

(c) continuation of federal funding for Inuit communities in Labrador; and

(d) 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.

41. 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..."

42. 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

(ii) Native People's of Labrador Agreement, valued at $38,831,00.00 federal payments/contributions.

43. The Labrador Agreement covered the following Indian and Inuit communities: Davis Inlet, Northwest Rivet, Nain, Hopedale, Makkovik, Rigolet and Postville. Pursuant to that Agreement, between 1981 and 1986, Canada contributed 90% of the costs of the programs and services in these Indian communities and 60% of the costs of those delivered in the Inuit communities. In total, Canada contributed $29,135,100.00 in this respect between 1981 and 1986.

44. In August 1985, Canada entered into a further contribution agreement with Newfoundland and Labrador, "for the benefit of native peoples in Labrador", recognizing Canada's "special interest in the social and economic development of Inuit and Indian People." The operation of education was the largest budget allocation item pursuant to this Agreement, for a total of $1,530,000.00 (1985/1986 fiscal year), 71% of which was Canada's responsibility.

45. Fiduciary obligations are and were owed by Canada to Aboriginal persons, peoples who, pursuant to section 35(2) of the *Constitution Act 1982* include the Indian, Inuit and Metis. This fiduciary relationship between Canada and Aboriginal persons was and is *sui generis* in nature. Accordingly, a fiduciary duty between Canada and

Aboriginal persons in Newfoundland and Labrador arose at the moment of Confederation in 1949.

46. Canada has acknowledged its own sole singular responsibility over Indians and Inuit in Newfoundland by accepting its 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. Having undertaking discretionary control over a cognizable Indian interest, a fiduciary duty existed between Canada and the Class in these circumstances.

47. As the nature of Canada's relationship with Aboriginal persons gives rise to a non-delegable duty to preserve, protect and promote welfare and education of Aboriginal children, the responsibility for its execution rested solely with Canada.

48. In the alternative, if Canada failed to properly assume those common law and constitutional obligations, it breached its, fiduciary and common law duties owed to the class by failing to do so.

ii. Canada's Operation of the School in Labrador

49. The School was located in Cartwright, Labrador. It was first established in 1949 and ceased operation as a residential school for Aboriginal children in 1979.

50. The purpose of the School was to provide education to Aboriginal children between the ages of 6 and 16 years who attended the School from various First Nations bands and communities in Newfoundland and Labrador. The School eventually became a

vehicle for assimilating Aboriginal children through the eradication of their native languages, cultures and spiritual beliefs.

51. The School was initially founded and established by the International Grenfell Association. Once Confederation occurred in March 1949 and Newfoundland joined Canada, the International Grefnell Association began ceasing its involvement, funding and role in the School. ~~At all material times, the staff members at the School were employees, servants and/or agents of Canada~~. The funding provided by Canada following Confederation was inadequate to meet the costs of operating and maintaining the School, and in particular, to meet the daily and educational needs of the students at the School. As a result, the care provided to the students and the conditions at the School were poor, the staff hired were unskilled and/or unsuitable for dealing with children and the conditions at the School were unsuitable and inappropriate for an educational facility for children.

~~52. In many cases, the Aboriginal children were forced to attend the School by representatives, agents or servants of Canada. The Aboriginal children who attended the School were separated from their families, uprooted and taken to the School, where they were placed within the control of Canada. For all intents and purposes, the children who attended the School, were wards of the School and/or Canada.~~

53. Canada participated in the funding, oversight ~~carried out that operation~~ and administration of the School until 1979. These operative and administrative responsibilities, carried out on behalf of Canada or by its agents included:

(a) the operation and maintenance of the School during the Class Period;

(b) the care and supervision of all members of the Survivor Class, and for supplying all the necessaries of life to Survivor Class members *in loco parentis*;

(c) the provision of educational and recreational services to the Survivor Class while in attendance at the School and control over all persons allowed to enter the School premises at all material times;

(d) the selection, supply and supervision of teaching and non-teaching staff at the School and reasonable investigation into the character, background and psychological profile of all individuals employed to teach or supervise the Survivor Class;

(e) inspection and supervision of the School and all activities taking place therein, and for full and frank reporting to Canada respecting conditions in the School and all activities taking place therein;

(f) transportation of Survivor Class members to and from the School; and

(g) communication with and reporting to the Family Class respecting the activities and experiences of Survivor Class members while attending the School.

54. Attempts to provide educational opportunities to children confined in the School were ill-conceived and poorly executed by inadequately trained teaching staff. The result was to effectively deprive the Aboriginal children of any useful or appropriate education. Very few survivors of the School went on to any form of higher education.

55. The conditions and abuses in the School during the Class Period were well-known to Canada.

56. Any attempt by Canada to delegate its duties, responsibilities or obligations to the Class to the Province of Newfoundland is unlawful and in breach of its exclusive and non-delegable fiduciary duties owed to the class.

F. CANADA'S BREACHES OF DUTIES TO THE CLASS MEMBERS

57. The Defendant Canada, as represented by the Attorney General of Canada, has a fiduciary relationship with Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled and regulated the School during the Class Period, either on its own or in conjunction with the Province.

58. Canada, and its respective servants and agents compelled members of the Survivor Class to leave their homes, families and communities, and forced members of the Survivor Class to attend (and sometimes live in) the School, all without lawful authority or the permission and consent of Survivor Class members or that of their parents. Such confinement was wrongful, arbitrary and for improper purposes.

59. Survivor Class members were systematically subjected to the institutional conditions, regime and discipline of the School without the permission and consent of Survivor Class members or that of their parents, and were also subjected to wrongful acts at the hands of Canada while confined therein.

60. In particular, Anderson experienced severe physical abuse and verbal abuse during her time at the School by teachers, "caregivers" and other students. Anderson was hospitalized for a period of two weeks during her residence at the School due to her kidney ailments as a child, exacerbated by the substandard care, poor nutrition and abuse. Webber also suffered from serious physical and mental abuse during his time at the School from both teachers and students. Many of the children at the School also experienced sexual abuse, perpetrated against them by teachers, adults in positions of authority or from other students.

61. All persons, including Anderson and Webber, who attended the School ~~did so as wards of Canada, with Canada as their guardian, and~~ were persons to whom Canada owed the highest non-delegable~~,~~ fiduciary, ~~moral, statutory~~ and common law duties, which included, but were not limited to, the duty to ensure that reasonable care was taken of the Survivor Class while at the School, the duty to protect the Survivor Class while at the School and the duty to protect the Survivor Class from intentional torts perpetrated on them while at the School. These non-delegable ~~and~~ fiduciary duties were performed negligently and tortiously by Canada, in breach of its special responsibility to ensure the safety of the Survivor Class while at the School.

62. Canada was responsible for:

~~(a) the administration of the Act and its predecessor statutes as well as any other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;~~

(b) the promotion of the health, safety and well being of Aboriginal Persons in Newfoundland during the Class Period;

(c) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessor Ministries and Departments during the Class Period;

(d) decisions, procedures, regulations promulgated, operations and actions taken by the Department of Indian Affairs and Northern Development, its employees, servants, officers and Agents in Canada their predecessors during the Class Period;

(e) <u>overseeing</u> the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the School and for the creation, design and implementation of the program of education for Aboriginal Persons confined therein during the Class Period;

(f) the selection, control, training, supervision and regulation of the designated operators and their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons confined in the Residential School during the Class Period;

(g) the provision of all educational services and opportunities to the Survivor Class members, pursuant to the provisions of the Act and any other statutes relating to Aboriginal Persons during the Class Period;

~~(h) transportation of Survivor Class Members to and from the School and to and from their homes while attending the School during the Class Period;~~

~~(i) preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities;~~

(j) the care and supervision of all members of the Survivor Class while they were in attendance at the School during the Class Period and for the supply of all the necessities of life to Survivor Class Members, *in loco parentis*, during the Class Period;

(k) the provision of educational and recreational services to the Survivor Class while in attendance at the School during the Class Period;

(l) inspection and supervision of the School and all activities that took place therein during the Class Period and for full and frank reporting to Canada and to the Family Class Members with respect to conditions in the School and all activities that took place therein during the Class Period; and

~~(m) communication with and reporting to the Family Class with respect to the activities and experiences of Survivor Class Members while attending the School during the Class Period.~~

63. During the Class Period, male and female Aboriginal children, including Anderson, were subjected to gender specific, as well as non-gender specific, systematic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

64. At all material times, the children who attended the School were within the knowledge, contemplation, power or ~~and~~ control of Canada and were subject to the unilateral exercise of Canada's (or its delegates') power or discretion. By virtue of the

relationship between the children and Canada, being one of trust, reliance and dependence, by the Aboriginal children, Canada owed a fiduciary obligation to ensure that the students who attended the School were treated fairly, respectfully, safely and in all other ways, consistent which the obligations of a parent or guardian to a child under his care and control.

65. At all material times, Canada owed a fiduciary obligation to the students who attended the School to act in the best interests of those students and to protect them from any abuse, be it mental, emotional, physical, sexual or otherwise. The children at the School relied upon Canada, to their detriment, to fulfill its fiduciary obligations.

66. Through its servants, officers, employees and agents, Canada was negligent and in breach of its non-delegable fiduciary, ~~moral, statutory,~~ and common law duties of care to the Survivor Class and the Family Class during the Class Period. Particulars of the negligence and breach of duty of Canada include the following:

(a) it systematically, negligently, unlawfully and wrongfully delegated its fiduciary and other responsibility and duties regarding the education of and care for Aboriginal children to others;

(b) it systematically, negligently, unlawfully and wrongfully admitted and confined Aboriginal children to the School;

~~(c) it acted without lawful authority and not in accordance with any statutory authority pursuant to or as contemplated by the provisions of the Act or any other statutes relating to Aboriginal Persons as:~~

~~(i) said provisions are and were *ultra vires* the Parliament of Canada and of no force and effect in law;~~

~~(ii) the conduct of Canada in placing the Aboriginal children in the School, confining them therein, and treating or permitting them to be treated there as set forth herein was in breach of Canada's fiduciary obligations to the Survivor Class and Family Class Members, which was not authorized or permitted by any applicable~~

~~legislation and was, to the extent such legislation purported to authorize such fiduciary breach, of no force and effect and/or *ultra vires* the Parliament of Canada; and~~

~~(iii) Canada routinely and systematically failed to act in accordance with its own laws, regulations, policies and procedures with respect to the confinement of Aboriginal children in the School, which confinement was wrongful.~~

(d) it delegated to and contracted with the Churches, ~~and~~ other Religious organizations and the Province to implement its program of forced integration, confinement and abuse;

(e) it failed to adequately screen and select the organizations and individuals to which it delegated the implementation of its Residential School program;

(f) it failed to adequately supervise and control the School and its agents operating same under its jurisdiction;

(g) it deliberately and chronically deprived the Survivor Class Members of the education they were entitled to or were led to expect from the School or of any adequate education;

(h) it designed, constructed, maintained and operated the School buildings which were sub-standard, inadequate to the purpose for which they were intended and detrimental to the emotional, psychological and physical health of the Survivor Class;

(i) it failed to provide funding for the operation of the School that was sufficient or adequate to supply the necessities of life to Aboriginal children confined to them;

(j) it failed to respond appropriately or at all to disclosure of abuses in the School during the Class Period;

~~(k) it conspired with the operators of the schools to suppress information about abuses taking place in the School during the Class Period;~~

(l) ~~it assaulted and battered the Survivor Class Members and~~ permitted them to be assaulted and battered during the Class Period;

(m) it permitted an environment to which permitted and allowed student-upon-student abuse;

(n) ~~it forcibly confined the Survivor Class Members and~~ permitted them to be forcibly confined during the Class Period;

(o) it was in breach of its fiduciary duty to ~~its Wards~~ the Survivor Class Members by reason of the misfeasances, malfeasances and omissions set out above;

(p) it failed to inspect or audit the School adequately or at all;

(q) it failed to implement an adequate system of evaluation, monitoring and control of teachers, administrators and non-teaching staff of the School during the Class Period;

(r) it failed to periodically reassess its regulations, procedures and guidelines for the School when it knew or ought to have known of serious systemic failures in the School during the Class Period;

(s) it failed to close the School and otherwise protect and care for those persons confined therein when it knew or ought to have known that it was appropriate and essential to do so in order to preserve the health, welfare and well being of the Survivor Class Members;

(t) it delegated, attempted to delegate, continued to delegate and improperly delegated its non delegable duties and responsibility for the Survivor Class when it was incapable to do so and when it knew or ought to have known that these duties and responsibilities were not being met;

(u) it failed to recognize and acknowledge harm once it occurred, to prevent additional harm from occurring and to, whenever and to the extent possible, provide appropriate treatment to those who were harmed;

~~(v) it undertook a systematic program of forced integration and assimilation of the Aboriginal Persons through the institution of the School when it knew or ought to have known that doing so would cause profound and permanent cultural, psychological, emotional and physical injury to the members of the Survivor Class during and following the Class Period; and~~

~~(w) it was in breach of its obligations to the Survivor Class Members and Family Class Members as set out in the Act and its Treaties with various First Nations providing a right to education at a school to be established and maintained by Canada and which implicitly included the right to education in a safe environment free from abuse and the right to an education which would recognize Aboriginal beliefs, traditions, culture, language and way of life in a way that would not denigrate or eliminate these beliefs, traditions, culture, language and way of life.~~

67. Canada, through its employees, agents or representatives also breached its duty of care to protect the Survivor Class Members from sexual abuse by the student perpetrators while those particular Plaintiffs and the Survivor Class Members were attending and

residing at the School with the result that the student perpetrators did in fact commit sexual abuse upon certain Plaintiffs and the Survivor Class Members.

68. Canada breached its fiduciary duties to the Plaintiffs and the Class and their families by failing to take any steps to protect the Survivor Class Members from sexual abuse.

69. In breach of its ongoing fiduciary duty to the Class, Canada failed and continues to fail, to adequately remediate the damage caused by its failures and omissions set out herein. In particular, Canada ~~has failed to take adequate measures to ameliorate the cultural, linguistic and social damage suffered by the class, and further~~ has failed to provide compensation for the physical, sexual and emotional abuse suffered by the Class.

~~70. The Plaintiffs plead that Canada was in breach of its various treaty obligations set out through the establishment and operation of the School and are liable for such breaches. In contravention of the Treaties between the Government and First Nations and in contravention of the *United Nations Genocide Convention*, particularly Article 2(e) thereof to which Canada is a signatory, the Plaintiffs and other Aboriginal children were to be systemically assimilated into white society. In pursuance of that plan, they were forced to attend the School and contact with their families was restricted. Their cultures and languages were taken from them with sadistic punishment and practices.~~

~~71. The systemic child abuse, neglect and maltreatment sustained by the children at the School during the Class Period, the effect and impact of which is still being felt by Survivor Class Members and Family Class Members, was in violation of the rights of children, specifically, but not limited to, the rights set out in the *United Nations*~~

~~*Convention on the Rights of the Child*, adopted by the United Nations in 1989, and ratified by Canada in December of 1991.~~

G. DAMAGES SUFFERED BY CLASS MEMBERS

72. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Survivor Class Members, including Anderson, Allen and Webber, suffered injury and damages including:

(a) isolation from family and community;

~~(b) prohibition of the use of Aboriginal language and the practice of Aboriginal religion and culture and the consequential loss of facility and familiarity with Aboriginal language, religion and culture;~~

(c) forced confinement;

(d) assault and battery;

(e) sexual abuse;

(f) emotional abuse;

(g) psychological abuse;

(h) deprivation of the fundamental elements of an education;

(i) an impairment of mental and emotional health amounting to a severe and permanent disability;

(j) a propensity to addiction;

(k) an impaired ability to participate in normal family life;

(l) alienation from family, spouses and children;

(m) an impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;

(n) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the School experience;

(o) depression, anxiety and emotional dysfunction;

(p) suicidal ideation;

(q) pain and suffering;

(r) deprivation of the love and guidance of parents and siblings;

(s) loss of self-esteem and feelings of degradation;

(t) fear, humiliation and embarrassment as a child and adult, and sexual confusion and disorientation as a child and young adult;

(u) loss of ability fulfill cultural duties;

(v) loss of ability to live in community; and

(w) constant and intense emotional, psychological pain and suffering.

73. The foregoing damages resulted from Canada's breach of fiduciary duty, and/or negligence. ~~assault, battery and/or breach of Aboriginal treaty rights.~~

74. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Family Class Members, including Webber, suffered injury and damages including:

(a) they were separated and alienated from Survivor Class Members for the duration of their confinement in the School;

(b) their relationships with Survivor Class Members were impaired, damaged and distorted as the result of the experiences of Survivor Class members in the School;

(c) they suffered abuse from Survivor Class members as a direct consequence of their School experience;

(d) they were unable to resume normal family life and experience with Survivor Class Members after their return from the Schools;

~~(e) their culture and language was undermined and in some cases eradicated by, amongst other things, as pleaded herein, the forced assimilation of Survivor Class Members into non-aboriginal culture through the School.~~

75. Canada knew, or ought to have known, that as a consequence of its mistreatment of the children at the School, these Plaintiffs and class members would suffer significant mental, emotional, psychological and spiritual harm which would adversely affect their relationships with their families and their communities. ~~In fact, one of the purposes behind the operation of the School was to eliminate and damage relationships within families and communities with a view to promoting the assimilation of Aboriginal children into non-Aboriginal society.~~

H. PUNITIVE AND EXEMPLARY DAMAGES

76. The Plaintiffs plead that Canada, including its senior officers, directors, bureaucrats, ministers and executives, had specific and complete knowledge of the widespread physical, psychological, emotional, cultural and sexual abuses of Survivor Class Members which were occurring at the School during the Class Period. Despite this knowledge, Canada continued to operate the School and permit the perpetration of grievous harm to the Survivor Class Members.

~~77. In addition, Canada deliberately planned the eradication of the language, religion and culture of Survivor Class Members and Family Class Members. Their actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.~~

78. The Plaintiffs plead and rely upon the following:

~~*Canadian Charter of Rights and Freedoms*, ss. 7, 15 and 24;~~

Class Actions Act, S.N.L. 2001, c. C-18.1.

Constitution Act, 1982, s. 35(1), being Schedule "B" to the *Canada Act, 1982* (U.K.), c. 11.

~~*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, ss. 3, 21, 22, and 23;~~

~~*The Indian Act*, S.C. 1951, c. 29, ss. 113-118;~~

~~*The Indian Act*, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122;~~

The Newfoundland Act, 1949 (U.K.), c. 22;

~~*United Nations Genocide Convention*; and~~

~~*United Nations Convention on the Rights of the Child*, adopted by the United Nations in 1989, and ratified by Canada in December of 1991.~~

79. The Plaintiffs propose this action be tried in the City of St. John's, in the Province of Newfoundland.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of April, 2012.

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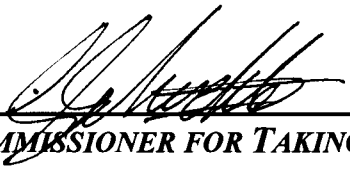
THIS IS EXHIBIT "B" REFERRED TO IN THE
AFFIDAVIT OF SEAN O'DONNELL
SWORN BEFORE ME, THIS 25TH DAY OF MARCH, 2013



A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

Jonathan Reuben Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

2007 01T4955 CP

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

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER and JOYCE WEBBER

PLAINTIFFS

-and-

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

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

DEFENCE

2008 01T0845 CP

BETWEEN:

SARAH ASIVAK and JAMES ASIVAK

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

2008 01T0844 CP

BETWEEN:

SELMA BOASA and REX HOLWELL

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

2008 01T0846 CP

BETWEEN:

EDGAR LUCY and DOMINIC DICKMAN

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

2007 01T5423 CP

BETWEEN:

TONY OBED, WILLIAM ADAMS AND MARTHA BLAKE

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Filed Nov. 21/12 DP

Introduction

1. The Defendant, the Attorney General of Canada ("Canada"), denies the allegations in the Statements of Claim (the "Claim"), as though each was set out here and individually and specifically denied. Canada puts the Plaintiffs to the strict proof of the allegations in the Claim.

2. The Claim, which is brought as five class actions, alleges abuses and breaches of duties at five schools (the "Schools") in Newfoundland and Labrador. The Plaintiffs state they are either former students of the Schools or their family members.

3. The International Grenfell Association (the "IGA"), the Moravian Church (the "Moravians") the Labrador and Western School Boards (the "Boards") and the Government of Newfoundland and Labrador (the "Province"), by their purpose, operation and management, created and ran the Schools (hereinafter we refer to these parties collectively as the "Operators").

4. The Schools existed and were operated prior to 1949, the year of Confederation between Canada and Newfoundland. The Schools continued to operate for several decades post Confederation.

5. The Plaintiffs allege that Canada ran the Schools and/or was responsible for the Schools. The Plaintiffs allege that Canada, by its purpose, operation or management, of the Schools breached certain duties to protect the Plaintiffs from harm. Canada denies these allegations. Canada did not owe any legal duties to the Plaintiffs, nor did Canada breach any such duties or cause any harm to the Plaintiffs.

The Operators

6. The IGA, by its purpose, operation and management, created and ran three of the Schools, which were located in St. Anthony, Cartwright and North West River. The IGA was incorporated in 1914 under the *Companies Act* of 1899. The IGA is currently recognized as an "incorporation without share capital - in good standing".

7. The Moravians, by their purpose, operation and management, created and ran two of the Schools, which were located at Nain and Makkovik. According to the Moravians' website, the Moravian Union (Incorporated) is a legally incorporated body. The Moravian Union (Incorporated) is part of the world wide Moravian Church of the Christian religion with its head office located in London, England. It is responsible for the direction and control of its Churches, missionaries, and employees worldwide including, but not limited to, the Moravian Church in Newfoundland and Labrador. The Moravian Church in Newfoundland and Labrador was incorporated under the *Moravian Church in Newfoundland and Labrador Act,* SNL 1970, c. 40.

8. The Boards, by their purpose, operation and management, created and ran the Schools. The Labrador School Board created, operated and managed four Schools at Cartwright, North West River, Nain and Makkovik. The Western School Board created, operated and managed one School at St. Anthony. The Boards were incorporated in 1969. Provincial legislation provides for the assumption of liabilities of past boards by successor boards.

9. The Province, by its purpose, operation and/or management, created and ran the Schools. Upon entering Confederation in 1949, the Province continued to have exclusive legislative authority over education. The Province's exclusive legislative authority over education remains in effect today. Both before and after Confederation, the Schools existed and were run in accordance with Provincial legislation, regulations and policy.

10. For example, the Province enacted a statute in 1970 giving the Minister of Social Services and Rehabilitation the power to erect a dormitory in North West River to provide accommodation for Aboriginal people; provide financial assistance for its operation; set up an administrative board to operate it; and conduct inspections (*The Northern Labrador (Social Services and Rehabilitation) Act*, SNL 1970, No. 23, s. 11 (1)).

11. The first provincial *Education Act* was passed in 1836. Subsequent acts and amendments gradually formalized the role played by the Province, Boards, philanthropic organizations and religious denominations in the administration and delivery of education to students in

Newfoundland and Labrador. Canada pleads and relies on the *Schools Act, 1997*, SNL 1997, c. S-12.2, and its predecessor legislation.

12. Canada did not take any of the following actions, undertaken by the Operators, such actions include, but are not limited to:

    a. admission of children to the Schools;
    b. transportation of children to and from the Schools;
    c. living conditions and food within the Schools;
    d. selection, hiring, supervision, discipline and dismissal of staff at the Schools;
    e. academic, vocational, religious, and moral teaching of the students at the Schools;
    f. school curriculum and attendance at the Schools;
    g. medical treatment at the Schools; and
    h. supervision, day-to-day care, guidance and discipline of the students at the Schools.

Alleged duties

13. The following is Canada's attempt to summarize the myriad duties the Plaintiffs allege were owed and were breached by Canada in relation to the Schools:

    a. "non-delegable" fiduciary duty to protect the Plaintiffs from harm;

    b. duty of care (in negligence) to protect the Plaintiffs from harm.

14. Canada denies that it owed these duties. If anyone owed a fiduciary duty or duty of care to the Plaintiffs, it was the Operators, who, by their purpose, operation and management, created and ran the Schools at all times.

15. The Operators controlled the Schools on a day to day basis such that only they could have owed a duty of trust and loyalty to the Plaintiffs. Similarly, only the Operators could have been close enough to the Plaintiffs to potentially owe a duty of care.

16. While Canada, at various times and for various purposes, provided money to the Province for Aboriginal Peoples generally, the Province maintained authority over how such money was spent.

Agents

17. The Plaintiffs allege that Canada had "agents" or who acted on its behalf in relation to the Schools. Canada denies this allegation.

18. Canada did not create express or implied agency relationships with the Operators or anyone else in relation to the Schools. The facts do not satisfy the legal test for the existence of an express or implied principal/agent relationship between Canada and the Operators, or any other party.

19. Alternatively, even if some form of agency relationship could have existed, if the "agents" were causing harm to the Plaintiffs, then they were clearly acting outside the scope of any express or implied agency relationship or authority.

20. At law, Canada may only be found liable in tort for the negligent actions of a Crown servant that is acting in the scope of their employment. The Plaintiffs have not identified a Crown servant through whom any potential alleged liability could flow. Canada pleads and relies on the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, ss. 3(b).

21. It was the Operators, by their own authority, purpose, operation and management that created and ran the Schools at all times. Canada had no role whatsoever in the purpose, operation or management of the Schools.

Delegates and "Non-delegable Duty"

22. The Plaintiffs allege that Canada had "delegates" who acted on Canada's behalf in relation to the Schools. Canada denies these allegations.

23. Canada did not make express or implied delegations to the Operators or anyone else in relation to the Schools. The facts do not satisfy the legal test for the delegation of any duty by way of express or implied delegation by Canada to the Operators, or any other party.

24. The Plaintiffs allege what they call at various times a "non-delegable" duty and a "non-delegable fiduciary duty". However, at law, "non-delegable duties" arise from statute; fiduciary duties, which are entirely different, arise only in certain factual circumstances.

25. "Non-delegable duties" require a statute that places full responsibility on one party for some activity. Where there is such a statute, the duty is "non-delegable" in the sense that the party that owes the duty cannot discharge its responsibility simply by delegating the activity to someone else. No such statute exists in this case, and the facts do not support the existence of a "non-delegable duty" owed to the Plaintiffs by Canada.

26. Canada did not owe a "non-delegable duty" or a "non-delegable fiduciary duty" to the Plaintiffs; therefore, Canada could not have inappropriately delegated such a duty. The facts do not satisfy the legal test for the existence of a "non-delegable duty" between Canada and the Plaintiffs, nor do the facts show the breach of any such duty by Canada.

Fiduciary Duty

27. Canada did not owe a fiduciary duty to the Plaintiffs. The Plaintiffs allege that the legal test for the existence of a fiduciary duty between Canada and the Plaintiffs has been satisfied. Canada denies this. The facts plead do not satisfy the legal test for the existence of a fiduciary duty between Canada and the Plaintiffs.

28. There is no "cognizable Indian interest" present as asserted by the Plaintiffs. Canada did not exercise "discretionary control" over the Schools and/or the Plaintiffs. The facts necessary to ground a claim in fiduciary duty are not present in this case.

29. Alternatively, even if a fiduciary duty exists, Canada did not breach such a duty. If the Plaintiffs were owed a fiduciary duty, it would have been owed by the Operators, who by their purpose, operation and management actually created and ran the Schools.

Negligence

30. Canada did not owe a duty of care to the Plaintiffs. The Plaintiffs allege that the legal test for the creation of a duty of care has been satisfied. Canada denies this; the facts plead do not satisfy the legal test for the creation of a duty of care.

31. A proximate relationship did not exist between Canada and the Plaintiffs; proximity is necessary to give rise to a duty of care. Furthermore, Canada could not have reasonably foreseen the acts and harms allegedly suffered by the Plaintiffs at the Schools.

32. Furthermore, Canada was not and could not have been the "but for" cause of any harm allegedly suffered by the Plaintiffs at the Schools.

33. Alternatively, even if Canada owed a duty of care, Canada did not fall below any applicable standard of care. Canada says that the standard of care at the Schools can only be judged by the applicable "standards of the day". Even if Canada owed a duty of care (which is denied), the applicable "standards of the day" were not breached.

34. If anyone could have owed a duty of care that could have been negligently breached in the circumstances, it was the Operators. By their purpose, operation and management, the Operators created and ran the Schools.

Allegations of abuse and duties

35. Canada denies that it owed the duties alleged by the Plaintiffs. In particular, Canada denies that it owed a duty to promote the health, safety and well-being of Aboriginal persons, or their language, cultural and spiritual traditions, or to provide an education or educational services to the Plaintiffs. In the alternative, any actions undertaken by Canada were dictated by *bona fide* policy choices made by successive Canadian governments, which cannot give rise to liability at law.

36. Canada denies that the Plaintiffs were in Canada's custody, or wards of the state whose care and welfare required Canada to stand *in loco parentis* to them. The evidence shows the Plaintiffs' care while at the Schools was the responsibility of the Operators.

37. Canada denies that the living conditions at the Schools were inadequate or were below acceptable standards for the time periods and circumstances in question. In any event, Canada was not responsible for the living conditions at the Schools. The Operators were responsible for the daily operations of the Schools, including the food and living conditions. According to the documents, the conditions at the Schools varied by School, time period, relative wealth of the Operator responsible for the administration of the School, and the general level of economic health of the economy in any particular era.

38. Canada denies that the Plaintiffs were subjected to emotional, cultural, or spiritual abuse. In any event, such allegations disclose no cause of action in law. If any such cause of action exists, then only the Operators could have owed such a duty in the circumstances as the parties whose purpose, operation and management resulted in the creation and running of the Schools.

39. Canada denies that it sought to destroy the Plaintiffs' ability to speak their native language, or to lose the customs and traditions of their culture, by requiring that the formal education of the Plaintiffs be conducted in English. The first language learned by many of the Plaintiffs, often from their parents, was English.

40. Canada says there was extensive cultural intermingling between Aboriginal and non-Aboriginals communities in Newfoundland and Labrador. For example, both before and for decades after Confederation, there was no reserve system in the Province. In addition, Aboriginal children and non-Aboriginal children often attended the Schools together. It was the Province's policy not to treat Aboriginal and non-Aboriginal people differently.

41. Canada had no role in setting the curriculum at the Schools. The Operators were solely responsible for the curriculum at Schools. If particular Plaintiffs were in any manner

punished or demeaned for speaking their native languages, or for practicing their cultural or spiritual traditions, such actions were in no way directed by any policy or systemic practice by Canada.

42. If individual Plaintiffs suffered losses of language or culture, which is not admitted, such losses occurred as a result of myriad historical, personal, societal and community circumstances, as a result of the interaction of Aboriginal communities with non-Aboriginal communities, along with the progressive urbanization of Canadian society, as part of an observable international trend towards diminishing use of minority languages and culture, and not as a result of any acts or omissions of Canada. In any event, the Plaintiffs' allegations concerning loss of language and culture disclose no cause of action in law.

43. Canada denies that the students suffered systemic child abuse, neglect or maltreatment. Any instances of abuse, neglect or maltreatment were isolated and not incidents of a systemic problem that involved Canada in any way. Any abuse, neglect or maltreatment of students was caused not by the breach of any duty by Canada but solely by the acts or omissions of the Operators, for whose actions Canada is not liable.

44. The Operators accused of abusing, neglecting or otherwise mistreating the Plaintiffs were at no time employees, agents or delegates of Canada. The Operators were responsible for the actions of any persons who committed the alleged abuse.

45. In the alternative, if any employees or agents of Canada did abuse, neglect or mistreat students, Canada is not vicariously liable for those acts, as they were not authorized by Canada. None of the alleged acts of abuse were sufficiently related to the course or scope of employment or agency allegedly granted by Canada so as to justify the imposition of vicarious liability on it.

46. Canada is not and cannot at law be held directly liable in negligence, or breach of fiduciary duty, for any abuses which may have taken place. The Plaintiffs allege that Canada had a "duty to protect" the Plaintiffs from harm that was allegedly visited upon

them at the Schools. There is no such at large "duty to protect" Aboriginal people from harm imposed by Canada at law. It was not Canada's purpose, operation or management that led to the creation or running of the Schools. Canada owed no duty to the Plaintiffs.

Canada only provided funding to the Province

47. Canada admits it has provided some funding to the Province for use in programs for Aboriginal people. Canada did not administer any programs or services relating to education of Aboriginal people in respect of the Schools. The provision of funding by the Federal government to the Provincial government does not give rise to liability.

48. Canada had no agreements regarding the operation of the Schools. Canada did enter into agreements with the Province regarding funding arrangements for capital expenditures. Canada did not mandate the implementation of federal policy or guidelines with respect to the operation of the Schools. Over the years, Canada participated in various committees with the Province and, later, with Aboriginal Peoples. These committees discussed funding, but did not require mandatory reporting to Canada regarding the daily operations of the Schools. Canada was not responsible for and did not undertake the day-to-day operation and management of the Schools. At no time was Canada ever made aware of any allegations of abuse at the Schools.

49. Canada had no agreements, policies or guidelines regarding the daily operation of the Schools. Canada did not inspect or audit the Schools, and did not have the power or authority to do so. Canada reviewed the Province's expenditures in order to determine whether the money was spent in accordance with the terms of applicable agreements. Canada was not responsible for and did not undertake the day-to-day purpose, operation or management of the Schools

The Indian Residential Schools Settlement Agreement ("IRSSA") and the Schools

50. By authority of the *Indian Act*, RSC 1985, c I-5, Canada and certain religious organizations did operate some "Indian Residential Schools" for the education of Aboriginal children. Certain abuses were committed against the children that attended

the Indian Residential Schools. None of these Indian Residential Schools were located or operated in Newfoundland and Labrador.

51. The IRSSA was approved by the Courts and came into effect on September 19, 2007. Canada concluded the IRSSA with former students of Indian Residential Schools, the Churches involved in running those schools, the Assembly of First Nations, and other Aboriginal organizations. The IRSSA includes the individual and collective measures to address the legacy of the Indian Residential School system.

52. The Plaintiffs' Claim fundamentally misconstrues the nature of the Schools in this case. The Claim alleges, both expressly and impliedly, that the Schools are akin to Indian Residential Schools that existed under the *Indian Act* and that were the subject of the IRSSA. This characterization of the Schools is inaccurate and Canada denies such allegations. The Schools in this case were not Indian Residential Schools. Canada did not, either under the *Indian Act* or by other purpose or authority, create, operate or manage the Schools.

53. Canada was involved with the *Indian Act* based Indian Residential Schools. In the context of the IRSSA, if the Schools in question were Indian Residential Schools, then they would be eligible for admission to the IRSSA. Article 12 of the IRSSA allows for the addition of an institution to the settlement if Canada was jointly or solely responsible for the operation of the institution. Contrary to the Plaintiffs' allegations, Canada was not jointly or solely responsible for the operation of these Schools. If there were facts and evidence showing that Canada was jointly or solely responsible for the Schools, then the Schools would be included in the IRSSA.

54. Canada was not jointly or solely responsible for the operation of the Schools and the care of the Plaintiffs there. It was not Canada's purpose, operation or management that led to the creation or running of the Schools, for example:

    a. the Schools were not federally owned;
    b. Canada did not stand *in loco parentis* as parent to the children at the Schools;

c. Canada was neither wholly nor partially responsible for the administration of the Schools;

d. Canada did not inspect, nor did it have the right to inspect, the Schools;

e. Canada did not stipulate that the Schools were Indian Residential Schools in accordance with the *Indian Act*.

55. It is not surprising that there were no Indian Residential Schools, under the *Indian Act*, in Newfoundland and Labrador. The Plaintiffs identify as Inuit and Métis people. The *Indian Act* does not apply to Inuit and Métis people. The *Indian Act* did not and does not provide the statutory authority to create, operate or manage a hypothetical "Inuit/Métis Residential School" in Newfoundland and Labrador.

Family Class Claims

56. The Plaintiffs' Claim alleges that Canada owed and breached duties to certain family members of persons that allegedly attended the schools (the "Family Class"). Canada denies theses allegations.

57. With respect to the claims of the Family Class, Canada denies that it owed any duties to this group arising out of the Plaintiffs' alleged attendance at the Schools. In particular, Canada denies that it owed any duty of care or fiduciary duty to the Family Class. Canada denies that the Family Class has any cause of action at law whatsoever against Canada.

Damages

58. If the Plaintiffs suffered any of the damage, losses or injuries alleged, such damage, losses or injuries were not caused by any acts or omissions of Canada or for which Canada is liable. Rather, such damage, losses or injuries were caused by factors unrelated to Canada's conduct, including but not limited to events prior and subsequent to the Plaintiffs' alleged attendance at the Schools. Furthermore, the damage, losses and injuries alleged by the Plaintiffs are exaggerated, remote and unforeseeable.

59. Canada pleads and relies upon the *Contributory Negligence Act*, RSNL 1990, c. C-33.

60. Canada denies that the circumstances alleged, if proven, were such as to give rise to liability for punitive, exemplary, or aggravated damages.

61. If the Plaintiffs suffered any of the damage, losses or injuries alleged as a result of any acts or omissions of Canada for which Canada is liable, which is not admitted but denied, the individual Plaintiffs, and the Plaintiffs as a whole, were under a duty to exercise reasonable diligence and ordinary care in attempting to minimize their damages after the occurrence of damage, losses or injury as alleged in the claim. Canada pleads that the Plaintiffs, individually or as a group, failed to take reasonable actions which would have tended to mitigate any damages.

62. The Plaintiffs are seeking the assessment of an aggregate damages award from the Court. Canada denies that such an award could be assessed in this case even if liability were found (which is denied). The circumstances of each Representative Plaintiff are unique, as are the circumstances of every potential class member. There was no common experience amongst students at the same School, much less at different Schools. The allegations of cultural loss, language loss, physical abuse and sexual abuse are infinitely varied for each class member. Furthermore, the size of the potential classes is undefined in the Claim. Therefore, even if liability could be found (which is denied) it is simply not possible for the Court to assess an aggregate damages award in the circumstances.

Limitation periods

63. The Plaintiffs' Claims are not timely and, consequently, are statute-barred. Canada pleads and relies upon the *Limitations Act*, SNL 1995, c. L-16, the *Crown Liability and Proceedings Act*, RSC 1985, c. C-50, and the *Crown Liability Act*, SC 1952-53, c. 30. Canada also relies upon the equitable doctrines of *laches* and acquiescence.

64. Canada cannot be held vicariously liable in tort for conduct of Crown servants prior to May 14, 1953, which is the date upon which subsection 3(1)(a) of the *Crown Liability*

Act, S.C. 1952-53, c. c.30, came into force. Prior to that time, pursuant to the *Exchequer Court Act*, RSC 1927, c. 34, as amended by S.C. 1938, c. 28, Canada could only be held liable for the negligence of a Crown servant acting within the scope of his or her duties of employment. Furthermore, prior to amendment of the *Exchequer Court Act*, Canada could only be held liable for the negligence of a Crown servant on a public work. Canada denies any such negligence with respect to the Plaintiffs' Claim.

65. The Plaintiffs claim prejudgment interest; however, the failure of the Plaintiffs to give sufficient particulars of the damages claimed and the basis of such claims causes Canada to be unable to evaluate such claims. Consequently, the Plaintiffs are disentitled from claiming prejudgment interest. In the alternative, if the Plaintiffs are entitled to prejudgment interest, such interest may be awarded only for a period beginning on February 1, 1992, at the earliest by virtue of s. 36(6) of the *Federal Court Act*, RSC 1985 c. F-7, and s. 31(6) of the *Crown Liability and Proceedings Act*.

Relief sought

66. Canada repeats the foregoing denial of liability and requests that the Plaintiffs' action be dismissed with costs.

DATED at Halifax, Nova Scotia, this 16th day of November, 2012.

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Solicitor for the Third Party Defendant

THIS IS EXHIBIT "C" REFERRED TO IN THE
AFFIDAVIT OF SEAN O'DONNELL
SWORN BEFORE ME, THIS 25TH DAY OF MARCH, 2013

A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

Jonathan Reuben Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

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

Citation: *Anderson v. Canada (Attorney General)*, 2010 NLTD(G) 106
Date: 20100607
Docket: 200701T4955; 200701T5423; 200801T0844; 200801T0845; 200801T0846

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER

PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA

DEFENDANT

AND

BETWEEN:

TOBY OBED, WILLIAM ADAMS AND MARTHA BLAKE

PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA

DEFENDANT

AND

BETWEEN:

SELMA BOASA AND REX HOLWELL

PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA

DEFENDANT

AND

BETWEEN:

SARAH ASIVAK AND JAMES ASIVAK

PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA

DEFENDANT

AND

BETWEEN:

EDGAR LUCY AND DOMINIC DICKMAN

PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA

DEFENDANT

Corrected Decision: The text of the original was corrected on July 26, 2010 and a description of the correction is appended.

Before: The Honourable Mr. Justice Robert A. Fowler

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: June 1, 2 and 3, 2009

Summary: Class Action Certification Hearing. **Result:** Application to certify the within matter as a Class Action Trial is granted.

Appearances:

Kirt Baert, Celeste Poltak Chesley Crosbie, Q.C. and Steven Cooper	Appearing on behalf of the Plaintiffs
Jonathan Tarlton and Mark Freeman	Appearing on behalf of the Defendant

Authorities Cited:

CASES CONSIDERED: Blackwater v. Plint, [2005] 3 S.C.R. 3; **Dow Chemical v. Ring**, 2010 NLCA 20; **Hunt v. Carey**, [1990] 2 S.C.R. 959; : **Cloud v. Canada (Attorney General)**, (2004), 247 D.L.R. (4th) 667 (Ont. C.A.); **Richard v. British Columbia**, 2009 BCCA 185; **Wheadon v. Bayer Inc.**, 2004 NLSCTD 72; **Davis v. Canada (Attorney General)**, [2007] N.J.

No. 42 (S.C.T.D.); **Guerin v. Canada,** [1984] 2 S.C.R. 335; **R. v. Sparrow,** [1990] S.C.J. No. 49; **R. v. Agawa** (1988), 28 O.A.C. 201; **R. v. Van der Peet,** [1996] S.C.J. No. 77; **Reference re: British North America Act, 1867 (U.K.) s. 91,** [1939] S.C.R. 104; **Blackwater v. Plint,** [2005] 3 S.C.R. 3; **Rumley v. British Columbia,** [2001] 3 S.C.R. 184; **Western Canada Shopping Centres Inc. v. Dutton,** [2001] 2 S.C.R. 534, 2001 SCC 45; **Hollick v. Toronto (City),** [2001] 3 S.C.R. 158; **Davis v. Canada (Attorney General),** 2008 NLCA 49; to **Hoffman v. Monsanto Canada Inc.,** 2005 SKQB 225; **Campbell v. Flexwatt** (1998), 44 B.C.L.R. (3d) 343 (C.A.).

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18.1, sections 3, 4, 5, 5(1)(a-e); 8; *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, sections 91, 91.4, 91(24) 92, 93 reprinted in R.S.C. 1985, App. II, No. 5; *Indian Act*, R.S.C. 1985, c. I-5, s. 4(1); *Crown Liability Act*, S.C. 1952-53, c. 30.

RULES CONSIDERED: *Rules of the Supreme Court*, 1986, S.N.L. 1986, c. 42, Sch. D, r. 7A.

REASONS FOR JUDGMENT

FOWLER, J.:

INTRODUCTION

[1] The Plaintiffs in the above actions are seeking an order from this court certifying that the matters proceed by way of a class action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 and Rule 7A of the *Rules of the Supreme Court*, 1986, S.N.L. 1986, c. 42, Sch. D.

[2] The class is identified by the Plaintiffs as being all persons who between 1949 and the date of their respective school closures 1) attended residential schools

listed in the action as being the Lockwood School, Yale School, Makkovik School, Nain School and St. Anthony School (the "Survivor Class") and; 2) all persons who have a derivative claim on account of a family relationship with a person in the Survivor Class (the "Family Class").

BACKGROUND

[3] These matters came about as a result of the aboriginal people of Newfoundland and Labrador having been excluded from the 2006 National Settlement program put in place by the Federal Government of Canada to address the national legacy of the aboriginal residential school system. This settlement included the resolution of the lawsuits which were then pending against the Federal Government across Canada. A short overview of this program is found in the affidavit of David Rosenfeld forming part of the motion record for each of the five claimants and the five schools involved. He states at paragraphs 7 to 9 of his affidavit that:

> On May 30, 2005, the Federal Government appointed the Honourable Frank Iacobucci to be its negotiator in negotiations to resolve all extant Residential School Litigation, both individual actions and class actions, across Canada. Those negotiations commenced in July, 2005 and took place in various cities across Canada through the summer of 2005, ultimately culminating in an agreement in principle on November 20, 2005. The final Settlement Agreement was approved by the Federal Cabinet in May 2006 and between August 25, 2006 and October 23, 2006, courts in nine jurisdictions across Canada heard settlement approval motions. By Reasons dated December 15, 2006 and March 7, 2007, the courts unanimously approved the Settlement Agreement. On September 20, 2007, the implementation process of the settlement commenced and settlement monies began to be paid to eligible class members across Canada. That process continues today.
>
> An important component of the national settlement was that all former students who attended an eligible Indian Residential School, as defined in the Settlement Agreement, are entitled to receive a Common Experience Payment equal to $10,000 for their first year (or any part thereof) of attendance at a Residential School and $3,000 per year (or any part thereof) for each school year of attendance at a Residential School. The eligibility is based on the fact and duration of attendance alone. In addition, the settlement contains an Individual Assessment Process through which former students who were sexually abused or

> who were physically abused above the threshold specified in the Agreement may receive additional compensation.
>
> As the Lockwood School (and the other four schools named in these matters) are not eligible Indian Residential Schools under the terms of the Settlement Agreement, former students of these Schools are neither eligible to receive the Common Experience Payment nor eligible to pursue their abuse claims pursuant to the Individual Assessment Process. Application to have these schools added to the Settlement Agreement as Eligible Indian Residential Schools was denied by Canada.

[4] I should note that the quote from Mr. Rosenfield's affidavit has been modified by me to reference all five residential schools that form this complete action since the same affidavit is included in each of the five motion records.

[5] The Plaintiffs' Factum at paragraphs 6 to 13 begins to set out the circumstantial backdrop against which the legal arguments will be evaluated. It states:

> 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 owned 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.
>
> 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.
>
> 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.

> 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 and beaten for speaking Inukitut or any other language but English. A number of former students were also sexually abused either at the hands of other students, dormitory supervisors or principles. And many experienced physical abuse on a frequent daily basis. As a result of their attendance at the Schools, Survivor Class Members were deprived of a childhood and grew ashamed of their aboriginal identities, the after-effects of which many Class Members continue to grapple with to this day.
>
> 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.
>
> 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.
>
> These inter-generational impacts of residential schools have profoundly impaired both the Survivor Class' and Family Class' ongoing familial and personal bonds and relationships [Footnotes omitted]

ISSUE

[6] Should the Plaintiffs have their claims certified as a single class action? That is, have the Plaintiffs satisfied the criteria set out by section 5(1) of the *Class Actions Act*?

RELEVANT LAW

[7] The applicable sections of the *Class Actions Act* are:

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.

(2) In determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether

(a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) the class action would involve claims that are or have been the subject of another action;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

...

8. The court shall not refuse to certify an action as a class action solely for one or more of the following grounds:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not determined or may not be determined; or

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

POSITION OF THE PLAINTIFFS

[8] While the full legal position of the Plaintiffs is set out in the Plaintiffs' Factum, filed with this court, I will only deal with it in summary form at this point.

[9] It is the position of the Plaintiffs that all Plaintiffs are Inuit persons or Métis, ie: of mixed Inuit and European ancestry and represent a class of people who themselves attended or were related to those who attended certain residential schools on the coast of Labrador and the northern tip of Newfoundland from 1949 to the closure of these schools.

[10] The Plaintiffs say that because of this forced attendance at these schools they have experienced cultural deprivation, physical and emotional abuse and in some cases sexual abuse. As to the appropriateness of the cause of action against Canada, the critical issue here, according to the Plaintiffs, is that Canada, having a constitutional duty of care in relation to all aboriginal peoples of this country, systematically failed in that duty of care and were specifically negligent in failing to exercise that duty owed to the aboriginal people of coastal Labrador. The Plaintiffs claim that Canada, at the moment of confederation in 1949, assumed a fiduciary duty toward the aboriginal children who attended the residential schools

as named in these matters. The Plaintiffs take the position that even if Canada did not directly manage or operate these residential schools it was still in breach of its fiduciary duty to those aboriginal students by failing to ensure that these schools were properly run to avoid the resulting abuse.

[11] Counsel for the Plaintiffs reminds the court that it is not to engage itself in any fact-finding analysis or determination of the merits at this time but rather to decide only whether or not a class action is the proper vehicle to carry these matters forward. This is a critical issue and I am mindful of the court's limited role at this point in the process.

[12] It is the position of counsel for the Plaintiffs that when Newfoundland entered into confederation in 1949 the terms of union did nothing to detract from the exclusive jurisdiction of the federal parliament over Indians and lands reserved for Indians as found in section 91(24) of the *British North America Act*, now the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[13] The Plaintiffs state in relation to the identifiable class that it encompasses:

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").

[14] Because the class definition cannot be a "merits based" definition, counsel for the Plaintiffs state that the above criteria adequately identifies the class by their attendance and time of attendance at the five schools forming the locus of these actions.

[15] Counsel for the Plaintiffs take the position that there is a common set of circumstances applicable to all Plaintiffs having similar historical, legal and factual background but, it is for the trial judge to determine what the legal obligations were

at the time the Plaintiffs attended the residential schools. He argues that, since there are common issues to all Plaintiffs there is no need to have multiple hearings, In fact, if that were the case there would be no realistic end date to have the matters heard on a case by case basis and would, in effect, bar the Plaintiffs from court. Also, according to the Plaintiffs' counsel, there is a real danger that if the matters are forced to proceed on an individual basis, with identical evidence and common defences, the outcomes still could be different, that is, different judges could arrive at different conclusions. The result of that situation, if allowed to proceed in that manner, would tie the matters up in infinite appeals and re-hearings. Counsel for the Plaintiffs in his oral submissions state that this simply makes no sense.

[16] Counsel for the Plaintiffs further argue that proceeding by way of a class action is the preferable procedure on the basis that it affords a greater degree of manageability than would be available through any other form of litigation. The *Class Actions Act*, according to counsel for the Plaintiffs, provides for flexible procedures and is remedial in its application and should be interpreted liberally. Counsel further argues that since this is clearly complex litigation it only makes sense to use the most comprehensive tool, which is the *Class Actions Act*, to deal with any procedural issues that might arise.

[17] Counsel for the Plaintiffs argue that the named Plaintiffs in these matters are appropriate representative Plaintiffs in that there is no conflict on the common issues and that no group could benefit at the expense of any other and success for one is success for all.

[18] Because of the historical colour of these claims it can be expected, according to counsel for the Plaintiffs, that some of the Plaintiffs will be older, some are sick, but that is to be expected in a case such as this, however, this does not distract from these people being appropriated representative Plaintiffs.

[19] Counsel for the Plaintiffs state in oral argument that what this comes down to is whether or not a class action is the most sensible and fair way to proceed?

POSITION OF THE DEFENDANT

[20] The full legal arguments of the Defendant have been set out in the Defendant's Memorandum of Fact and Law, and as I stated in relation to the Plaintiffs' Factum, I intend to only summarize it at this point.

[21] The main thrust of the Defendant's argument is that the pleadings do not disclose a cause of action against Canada in relation to residential schools in Newfoundland and Labrador. Counsel for the Defendant in his oral argument stated that Canada takes no issue with the fact that the Plaintiffs attended these residential schools on the coast of Labrador and that they suffered awful things, however, Canada owed no legal duty to these people. He states that the schools identified by the Plaintiffs existed prior to 1949 and were operated, in the case of three of them, by the International Grenfell Association and the other two by the Moravians. Canada, he stated, did not operate these schools since 1949 and it is simply wrong to affix any liability to Canada as a result of what happened in these schools prior to or following 1949 being the date of confederation between Newfoundland and Canada.

[22] Counsel for Canada argues that the *Indian Act*, R.S.C. 1985, c. I-5 specifically states that the term "Indian" does not include "Eskimo" or "Inuit" so that none of the class members could be Indians under the *Indian Act*.

[23] Counsel for Canada states that the *Indian Act* is the only enabling authority for Canada to enter into agreements in relation to schools for Indians and since it does not apply to Inuit or Métis then there is no duty of care owed by Canada to the Inuit or Inuit Métis of Labrador.

[24] He further states that there was also no relationship whatsoever between Canada and anyone else to run these schools. He continues that, in the absence of any statutory authority, there is no duty of care owed by Canada and that simply saying so does not create such a duty toward Inuit or mixed Inuit and European Métis of coastal Labrador.

[25] Counsel for Canada, in their Memorandum of Fact and Law, in relation to the constitutional separation of powers under sections 91 and 92 of the *Constitution Act* states at paragraph 53 that, "This constitutional division of power assigns jurisdiction only" and creates no obligation on the part of the federal government to act on that jurisdiction. So that section 91(24) in giving the federal government the power to legislate in relation to Indians "does not, in and of itself, create an obligation to legislate; nor does it convey or bestow any substantive rights on Indians."[1]

[26] It is also the position of the Defendant that apart from the absence of any duty to legislate under section 91(24) of the *Constitution Act*. Section 93 of that *Act* gives each province exclusive jurisdiction to make laws in relation to education. Counsel for Canada stated in his oral argument that this simply means that the federal government, even if it wanted to, has no authority over educational matters within any province, including Newfoundland at the point of Confederation in 1949. In Newfoundland, prior to and following its confederation with Canada, all schools were under the authority of the province and not Canada and remained so. Counsel for Canada argues that term 17 of the union between Newfoundland and Canada made it clear that Newfoundland was to have exclusive jurisdiction to make laws concerning education and such laws were never repealed.

[27] Counsel for Canada states that since the federal *Indian Act* did not come into force in Newfoundland until 1952 and not at Confederation in 1949 it had no bearing on the status of any aboriginal people of Newfoundland and Labrador at that time. Counsel for Canada states in oral argument that at Confederation in 1949 there was no overlap or control over education between the province and Canada and that the terms of union did not create any such shared jurisdiction. The schools of Newfoundland and Labrador, he states, did not give up to Canada any jurisdiction over them via the terms of union; and further as there were no registered Indian bands in Newfoundland and Labrador at the time of Confederation, Canada had no duty of care to the Plaintiffs in these matters. Counsel for Canada states therefore that these pleadings are doomed to fail and ought not to be certified as a class action because Canada is the wrong Defendant.

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[1] Paragraph 55 of the Defendant's Memorandum of Fact and Law.

[28] In relation to any liability by the federal crown in tort law, counsel for Canada state in oral argument that such liability must be fault based and that Canada is only liable if there is a legal cause of action against it. He argues that the essence of these claims here is a breach of duty which he claims does not belong to Canada. Counsel for Canada takes the position that any duty of care owed to the Plaintiffs in these matters rests with the province of Newfoundland and Labrador. He further states that someone caused harm to these people but it was not Canada since Canada was not involved in these schools by any agreement or by way of the *Indian Act*. He argues that for Canada to be held vicariously liable, there must be some connection in agency or service connecting Canada to these people.

[29] Counsel for Canada further states that it was the International Grenfell Association and the Moravian Church, with the authority and approval of Newfoundland, who ran and managed those schools on the coast of Labrador. The fact that the federal government did provide money to the province of Newfoundland and Labrador to provide for the needs of the aboriginal people of Labrador does not make Canada responsible or trigger any liability according to counsel for Canada. That money, he argues was given to the government of Newfoundland for its discretionary use in matters of educational jurisdiction within the province.

[30] In relation to a non-delegable duty, that is, a duty of care mandated by statute and which cannot be delegated to anyone else, counsel for the defendant takes the position that the *Indian Act* sections dealing with education and schools are permissive only and, following the reasoning in **Blackwater v. Plint,** [2005] 3 S.C.R. 3, stated that the government could in fact enter into agreement with religious organizations for the care and education of Indian children, such arrangements being "eminently delegable".[2]

[31] In relation to Canada owing a duty to legislate, counsel for the defendant agrees that in essence this is what this case is all about and no matter how strongly felt is the need for such ownership by Canada of aboriginal matters that is a matter to be left exclusively in the political area. Simply put, he argues there is no duty to

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[2] Defendant's Memorandum of Fact and Law, paragraph 84.

legislate or not to legislate. He states at paragraphs 93 and 94 of his Memorandum of Fact and Law that:

> While the Plaintiffs have tried to characterize their claims as being brought in negligence and other breaches of duty, the nature of their dispute with Canada involves the fact that as Inuit, Métis and non-status Indians living outside of the reserve land system Parliament has chosen not to legislate with respect to their education, instead leaving the matter to the Province in accordance with the Constitution.
>
> It is the Parliament of Canada that has the power to enact legislation. In particular, Parliament's legislative authority does not carry with it a duty to legislate. In the case of *Apsassin v. Canada* (*Department of Indian Affairs and Northern Development*), Mr. Justice Addy stated: [Footnotes omitted]
>
> > Finally, the provisions of our Constitution are of no assistance to the plaintiffs on this issue. The *Indian Act* was passed pursuant to the exclusive jurisdiction to do so granted to the Parliament of Canada by subsection 91(24) of the Constitution Act 1867 ... This does not carry with it the legal obligation to legislate or to carry out programs for the benefit of Indians any more than the existence of various disadvantaged groups in society creates a legally enforceable duty on the part of governments to care for those groups although there is of course a moral and political duty to do so in a democratic society where the welfare of the individual is regarded as paramount.

[32] As to any breach of a fiduciary duty to the plaintiffs, counsel for Canada states that since a fiduciary duty can only arise out of some legal relationship between the parties; and since the plaintiffs attended schools which were not under federal government control, there is no fiduciary duty owed. There was no fault that can be directed at the federal crown he states. Counsel for Canada states in his oral argument that in order for the class action to work, the plaintiffs must be able to show that Canada had a duty of care to the plaintiffs and that simply has not been shown to be the case.

[33] As to the impact of federal funding to assist the province to provide educational services to aboriginal people, counsel for the defendant states that these monies went directly to the provincial government thus creating no fiduciary duty in Canada toward the plaintiffs. Counsel for Canada states that it is not enough to say that because these people are aboriginal, the federal crown has a fiduciary

relationship with them. Further, counsel for the defendant argues that a fiduciary duty is always very fact specific and must be based on fault and not on the status of the person claiming such duty. He further argues that there is no overall collective Inuit interest here as would be the case in a lands claims matter. As well, he argues, these schools are not federal schools and never have been. Counsel for Canada states that at best the plaintiffs are only making an assertion without any material facts to support its position.

[34] Counsel for Canada states that the claim by the plaintiffs is fatally flawed and has no hope of success.

ANALYSIS

[35] The determination of whether or not a class action should be certified is a procedural matter only, not a merit based or full evidentiary based trial. The Newfoundland and Labrador Court of Appeal in a very recent decision **Dow Chemical v. Ring,** 2010 NLCA 20 stated at paragraphs 10 and 11 in relation to the test to be applied to determine certification stated:

> The onus is on the applicant for certification (in this case Rind and Williams) to establish the criteria for certification. All 5 criteria must be met by the applicant: **David**, para. 23.
>
> There is a different standard of proof applied to the first of the criteria (that the pleadings disclose a cause of action) than to the remaining four. The test applied in this Province to an application to strike a pleading (the plain and obvious test) is applied to the determination of the first criterion except, of course, the onus is upon the plaintiff applying for certification to show that the pleading is sufficient. The parties differ about the standard of proof applicable in respect of the criteria set out in s. 5(1)(b) to (e). [Emphasis mine]

[36] And at paragraph 14:

> When, in **Hollick**, the Supreme Court established "some basis in fact" as the evidentiary threshold it was signaling a lesser standard of proof that that required for the determination of the merits of the claim. This position is consistent with

> the fact that at the certification stage the court is dealing with procedural issues, not substantive ones: **Bisaillon v. Concordia University**, [2006] 1 S.C.R. 666, para 17. The fact that opposing parties may also provide evidence does not lead to the conclusion that the standard of proof must be the balance of probabilities. The Trial Division judge was correct when he stated that the evidentiary threshold for certification applications was "some basis in fact." [Emphasis mine]

[37] It will be in keeping with these directions that I will be considering the submissions of the parties in this matter. That is I will determine the section 5(1)(a) provision on the "plain and obvious" test and subsection 5(1)(b), (c), (d) and (e) on the "same basis in fact" test.

Cause of Action

[38] As stated earlier, counsel for Canada takes the position that the plaintiffs have the wrong defendant. The test to be applied he states is that which is set out by the Supreme Court of Canada in **Hunt v. Carey**, [1990] 2 S.C.R. 959 where at paragraph 33 Wilson, J. stated:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and 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 his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[39] Counsel for Canada argues, in effect, that the "radical defect" is that there is no connection between Canada and the Labrador Inuit or Inuit Métis who represent themselves as the plaintiffs in these matters. He argues that at Confederation in 1949 the federal government did not assume any responsibility or duty of care over

the plaintiffs. He states that the federal government had nothing to do with the residential schools in issue here. As well, the *Indian Act*, being the only enabling legislation permitting contractual arrangements in relation to schools for aboriginal people did not come into effect in Newfoundland until 1952 and even then, the *Act* states clearly that the term "Indian" does not include "Inuit". Counsel for Canada further argues that the same has been carried forward in the *Indian Act* where at section 4(1) it states: "A reference in the Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit".

[40] Therefore, counsel for Canada argues, the plaintiffs have named the wrong defendant and the matter has no chance of success. As well, the Defendant, Canada, states that the *Crown Liability Act*, S.C. 1952-53, c. 30 prohibits any action against Canada prior to the coming into force of that *Act*, so that; issues arising in 1949 cannot succeed on that basis.

[41] The *Crown Liability Act* was considered by the Ontario Court of Appeal in **Cloud v. Canada (Attorney General)** (2004), 247 D.L.R. (4th) 667 (Ont. C.A.) and held, "there was no bar regarding the date from which claims could be brought for vicarious liability of the Crown for breach of fiduciary duty under the *Crown Liability Act*." In **Cloud**, Goudge J.A. of the Ontario Court of Appeal in upholding the dissenting judgment of Cullity, J. of the Ontario Divisional Court below stated at paragraphs 23 to 25:

> In addressing whether the pleadings disclose a cause of action as required by s. 5(1)(a) he found that claims against the Crown for vicarious liability for the actions of its employees prior to May 14, 1953, can be brought in the Supreme Court of Justice because of the jurisdiction given to that court by the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 as amended, and because the ban in s. 24(1) of the *Crown Liability Act* does not extend to claims like this because they could have been brought against the Crown before May 14, 1953, in the Exchequer Court.
>
> Similarly, he found that the claim against the Crown for breach of fiduciary duty is a claim in equity that could have been brought against the Crown in the Exchequer Court before May 14, 1953, and can therefore now be brought in the Superior Court even if it arises before that date. Although he does not say so expressly, it is implicit in his reasons that he treated the claim for breach of aboriginal rights in the same way, because he found it to be a common issue as well.

> However, he agreed with the motion judge that the claims in tort for breach of duty owed by the Crown directly to class members can only be advanced if they arose after May 14, 1953.

[42] Counsel for Canada points out however that a more recent case, **Richard v. British Columbia**, 2009 BCCA 185, went the other way where Madam Justice Saunders of the British Columbia Court of Appeal stated at paragraph 64:

> ... a claim for damages for breach of fiduciary duty is blocked by Crown immunity in the same way as an action for damages in tort, and it is as Madam Justice Satanove found, plain and obvious the claim cannot succeed.

[43] Having considered both cases and without engaging in any meritorious analysis, I am satisfied that a rational argument can be made to support the Plaintiffs' position based on the Ontario Court of Appeal decision in **Cloud**. I agree that in the present case it is necessary in order for certification that a link be established by the plaintiffs between the federal government and the Inuit people of Labrador at the time of confederation such that a fiduciary duty was created. The strength of that link is not to be decided at this time. That is for any trial proceedings which may follow however, the test is not onerous and it is not plain and obvious that on the narrow issue of Crown liability that the Plaintiffs would fail.

[44] Barry J. in **Wheadon v. Bayer Inc.,** 2004 NLSCTD 72 in relation to the evidentiary threshold, stated at paragraphs 91 and 92 that:

> 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.[6] Canadian courts have tended to give class proceedings legislation a large and liberal interpretation to insure that its policy goals are realized.[7] Courts must be mindful not to impose undue technical requirements on plaintiffs.

Class 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 a class certification motion. The Supreme Court of Canada has stated:

> Thus the certification stage is decidedly not meant to be a test of the merits of the action: see Class Proceedings Act, 1992, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding")... Rather the certification stage focuses on the form of the action. 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: see generally Report of the Attorney General's Advisory Committee on Class Action Reform, at pp. 30-33.

[45] And further at paragraph 98:

> Section 5(1)(a) of the Act requires that the Plaintiffs have a cause of action. This requirement is determined solely on the pleadings. The allegations in the Statement of Claim are accepted as true. The Plaintiffs will satisfy this test unless it is shown that it is "plain and obvious" from the pleadings that the action must fail.

[46] Orsborn J. reaffirmed this thinking in **Davis v. Canada (Attorney General)**, [2007] N.J. No. 42 (S.C.T.D.) where at paragraphs 34 to 35 he stated as to the nature of a class proceeding that:

> A class proceeding enables litigation to be conducted by one or more representative plaintiffs on behalf or class or group of individuals. A class action is a procedural mechanism only; the fact that a matter is conducted as a class action has no effect on the determination of the substantive rights and remedies in issue. In its simplest terms, the class action is an alternative to multiple individual proceedings involving one or more common issues. In **Hollick v. Toronto (City)**[6], McLachlin, C.J. outlined the advantages of a class proceeding. At par. 15:
>
> > Class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in 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 member 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.
>
> The certification proceeding provides the court with the opportunity to review the issues raised by the pleadings and to determine whether or not it is appropriate to allow the claim to be litigated as a class action. At certification, the issue is the form of the action and not whether the claim is likely to succeed (see **Hollick**, supra at par. 16).

[47] In the matter before me the basis upon which a fiduciary relationship is said to exist has to begin with an examination of the historical context in which the parties interacted. In its most simple narrative it has been accepted as an historical fact that Inuit people formerly referred to an Eskimo or Esquimaux existed and occupied the coast of Labrador as well as other northern parts of Canada as aboriginal people from time immemorial; and were there for hundreds of years prior to any contact with European people including the Norse or Vikings. These were people of the land. They were here first, they had a culture, a language, and the means of survival in a hostile environment. The Europeans came in the mid-thirteenth century and simply encroached on this culture as well as other aboriginal cultures such that over the generations a whole new Canadian nation evolved. Canada subsequently assumed jurisdiction over all aboriginal peoples with the possible exception of the Inuit of Labrador. It is not surprising then, that there would be a conflict of cultures and the development of relationships to resolve such conflict. In our case the Crown, originally the British Crown, now the Crown in right of Canada assumed the dominant role of protecting these first inhabitants, then thought of as primitive people.

[48] One of the major responsibilities assumed by Canada in its Constitution as it grew into a nation was to reserve unto itself the exclusive jurisdiction over "Indians and Lands reserved for Indians" (*Constitution Act, 1867* s. 91(24)).

[49] Newfoundland joined Canada in 1949 with the agreement between them that Newfoundland would have the same benefits and responsibility as if it had always been a part of Canada. Term 3 of the terms of union mandated that:

> The *Constitution Acts*, 1867 to 1940, shall 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, as if the Province of Newfoundland had been one of the provinces originally united except in so far as varied by these Terms and except such provisions as are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more and not all of the provinces originally united.

[50] And at 18(2) of the same terms of union:

> Statutes of the Parliament of Canada in force at the date of Union, or any part thereof, shall come into force in the Province of Newfoundland on a day or days to be fixed by Act of the Parliament of Canada or by proclamation of the Governor General in Council issued from time to time, and any such proclamation may provide for the repeal of any of the laws of Newfoundland that ...

[51] This would tend to explain why the *Indian Act* was not proclaimed in Newfoundland until 1952.

[52] Much has been said in relation to the *Indian Act* and the authority flowing from it to govern aboriginal people; however, it is not the *Indian Act* which creates any potential fiduciary duty between Canada and the aboriginal people of Canada. No doubt, breaches of the *Indian Act* give rise to claims against the Federal Government on those specific issues, however, I am satisfied from the language used by the Supreme Court of Canada in relation to Indians, including Inuit people, that a strong argument can be generated to show that a fiduciary duty between the aboriginal people of Labrador and Canada arose at the instant of Confederation between Canada and Newfoundland in 1949. Prior to that it seems clear that Canada owed no duty whatsoever to any resident of Newfoundland including any aboriginal people. I will refer to the status of Inuit people as Indians further on in these reasons.

[53] In **Guerin v. Canada**, [1984] 2 S.C.R. 335, a case dealing with Indian land surrendered to the Crown and how Canada was to deal with that land, the Supreme Court of Canada referred throughout its decision to the Crown's fiduciary obligation to the Indians. Notwithstanding that this case arose in the context of

how to manage Indian land in compliance with s. 18 of the *Indian Act* for the use and benefit of the Indian bands involved, the Court recognized by the language it used that an overall fiduciary duty was owed by Canada to Indian people to prevent their exploitation.

[54] Wilson J. stated at paragraph 22 that:

> While I am in agreement that s. 18 does not per se create a fiduciary obligation in the Crown with respect to Indian reserves, I believe that it recognizes the existence of such an obligation. The obligation has its roots in the aboriginal title of Canada's Indians as discussed in Calder v. Attorney General of British Columbia, [1973] S.C.R. 313. In that case the Court did not find it necessary to define the precise nature of Indian title because the issue was whether or not it had been extinguished. However, in St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46, Lord Watson, speaking for the Privy Council, had stated at p. 54 that "the tenure of the Indians ... [is] a personal and usufructuary right". That description of the Indian's interest in reserve lands was approved by this Court most recently in Smith v. The Queen, [1983] 1 S.C.R. 554. ...

[55] And further at paragraph 23:

> I think that when s. 18 mandates that reserves be held by the Crown for the use and benefit of the Bands for which they are set apart, this is more than just an administrative direction to the Crown. I think it is the acknowledgment of a historic reality, namely that Indian Bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it. This is not to say that the Crown either historically or by s. 18 holds the land in trust for the Bands. The Bands do not have the fee in the lands; their interest is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree. I believe that in this sense the Crown has a fiduciary obligation to the Indian Bands with respect to the uses to which reserve land may be put and that s. 18 is a statutory acknowledgment of that obligation. It is my view, therefore, that while the Crown does not hold reserve land under s. 18 of the Act in trust for the Bands because the Bands' interests are limited by the nature of Indian title, it does hold the lands subject to a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction.

[56] It seems to me therefore, that what the Supreme Court of Canada is saying is that the fiduciary duty owed to Indians, in that case with respect to land, did not have to wait for the *Indian Act* to come along; it existed from the beginning as a "historic reality". It is not a great leap to realize that if such a fiduciary duty existed from the beginning in relation to the protection of land from invasion or destruction, this duty to protect must logically be extended to protect the people themselves from personal harm visited upon them from non-Indian forces?

[57] And further Dickson J. stated at paragraph 84 that:

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title.

[58] It is significant that Dickson referred to distinct categories of peoples; aboriginal, native or Indian as having a fiduciary relationship with the Crown. He further stated at paragraph 89 in relation to the concept of a "political trust"; "where the distribution of public funds or other property (is) held by the government" that:

> In each case the party claiming to be a beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.
>
> (emphasis added)

[59] And at paragraph 97:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go

> together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties.
>
> (emphasis added)

[60] Continuing at paragraph 100 Dickson J. continued:

> The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.
>
> (emphasis added)

[61] Further, as to the nature of, or category in which a fiduciary duty fits, Dickson J. stated at paragraph 103 that:

> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed. See, e.g. Laskin v. Bache & Co. Inc. (1971), 23 D.L.R. (3d) 385 (Ont.C.A.), at p. 392: Goldex Mines Ltd. v. Revill (1974), 7 O.R. 216 (Ont.C.A.), at p. 224.
>
> (emphasis added)

[62] It seems therefore that since the federal Crown has retained unto itself by way of the *Constitution Act* exclusive jurisdiction over Indians and Lands reserved for Indians it must act at all times in relation to Indians, as a people, as well as toward their lands. It seems that a credible argument can be put forward that this duty is fiduciary in nature and applies to all Indians without exception. As well, it seems that the Supreme Court of Canada has recognized that this duty is not contingent on any statutory authority and has always existed from the moment that Canada assumed unto itself dominion over Indians and Indian Lands. Support for this is found in **R. v. Sparrow**, [1990] S.C.J. No. 49 where the Supreme Court of Canada in examining the impact of s. 35(1) of the *Charter* and having considered **Guerin**, referred to a general principle in relation to fiduciary responsibility. It stated at paragraph 59 that:

> In Guerin, supra, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, Guerin, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.
>
> (emphasis added)

[63] And at paragraph 62:

> There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in Nowegijick, supra, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, supra.
>
> (emphasis added)

[64] It is significant in **Sparrow** that the Supreme Court of Canada refers to "the aboriginal peoples of Canada" and not specifically to Indians as defined by the *Indian Act*. As well in **Sparrow** at paragraph 58 the Court refers approvingly to **R. v. Agawa** (1988), 28 O.A.C. 201 where Blair J.A. referred to the honour of the Crown and the obligation of the Crown to treat Indian people with fairness. He stated:

In R. v. Agawa, supra, Blair J.A. stated that the above principle should apply to the interpretation of s. 35(1). He added the following principle to be equally applied, at pp. 215-16:

> The second principle was enunciated by the late Associate Chief Justice MacKinnon in R. v. Taylor and Williams (1981), 34 O.R. (2d) 360. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian rights "in a vacuum". The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p. 367:
>
> > "The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned.
>
> This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see Guerin v. The Queen, [1984] 2 S.C.R. 335; 55 N.R. 161; 13 D.L.R. (4th) 321.
>
> (emphasis added)

[65] And further at paragraph 64:

> ... The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. ...

[66] In **R. v. Van der Peet**, [1996] S.C.J. No. 77 the Supreme Court of Canada again examined the reach of s. 35(1) of the *Charter* and implied that aboriginal rights are not to be confused with aboriginal practices, and that such rights have existed from the beginning and not at the enactment date of the *Charter*. The Court stated at paragraphs 15 to 20:

I now turn to the question which, as I have already suggested, lies at the heart of this appeal: How should the aboriginal rights recognized and affirmed by s. 35(1) of the Constitution Act, 1982 be defined?

In her factum the appellant argued that the majority of the Court of Appeal erred because it defined the rights in s. 35(1) in a fashion which "converted a Right into a Relic"; such an approach, the appellant argued, is inconsistent with the fact that the aboriginal rights recognized and affirmed by s. 35(1) are rights and not simply aboriginal practices. The appellant acknowledged that aboriginal rights are based in aboriginal societies and cultures, but argued that the majority of the Court of Appeal erred because it defined aboriginal rights through the identification of pre-contact activities instead of as pre-existing legal rights.

While the appellant is correct to suggest that the mere existence of an activity in a particular aboriginal community prior to contact with Europeans is not, in itself, sufficient foundation for the definition of aboriginal rights, the position she would have this Court adopt takes s. 35(1) too far from that which the provision is intended to protect. Section 35(1), it is true, recognizes and affirms existing aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are aboriginal.

In the liberal enlightenment view, reflected in the American Bill of Rights and, more indirectly, in the Charter, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the "inherent dignity" of each individual in society is respected: R. v. Oakes, [1986] 1 S.C.R. 103, at p. 136; R. v. Big M Drug Mart Ltd., supra, at p. 336.

Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the Charter, aboriginal rights must be viewed differently from Charter rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal. As academic commentators have noted, aboriginal rights "inhere in the very meaning of aboriginality", Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991), 29 Alta. L. Rev. 498, at p. 502; they are the rights held by "Indians qua Indians", Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at p. 776.

The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The

> Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.
>
> (emphasis added)

[67] And further at paragraphs 30-31:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

[68] From these authorities I take it that the aboriginal people of Canada, no matter their ethnic origin or the date of recognition by Canada, possessed rights and an identity associated with these rights from time immemorial and that these rights existed prior to any Canadian or Crown assumption of dominion over these people. It was therefore the duty of the Crown to recognize and protect the rights of aboriginal peoples as soon as these aboriginal people were subsumed into the Canadian constitutional mosaic.

[69] The honour of the Crown demands that the aboriginal people taken under the Constitutional Wing of s. 91(24) be treated with dignity and fairness.

[70] Counsel for Canada argues that it is important however, to identify the specific right which is being challenged. He relies on the **Van der Peet** case where the Supreme Court of Canada at paragraph 51 stated that:

> Related to this is the fact that in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed; in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support.

[71] In **Van der Peet** the impugned right was framed by a provincial statute which prohibited the selling of fish caught under the authority of an Indian food fish license. This was a specific and discrete rights issue which could be readily identified and challenged as being integral to and representative of a practice, custom, or tradition of the aboriginal people involved. However, where the aboriginal culture itself rather than a single practice within that culture is questioned it is first necessary to determine the cultural identity itself.

[72] In **Van der Peet** the court stated at paragraph 55 that:

> To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.
>
> (emphasis added)

[73] And at paragraph 56:

> This aspect of the integral to a distinctive culture test arises from fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only

> incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).
>
> (emphasis added)

[74] And further at paragraph 60:

> The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

[75] This then begs the question as to the status of the aboriginal people on the coast of Labrador at the time of Confederation in 1949. In the final analysis that question must be decided at trial however for the purposes of this application it is safe to say that Canada was aware at the time of Confederation that any union with Newfoundland would have an aboriginal component associated with it. It is not enough for Canada to say that it simply did not have any duty of care at the time of Confederation. The argument that the Plaintiffs will present at trial is that Canada constitutionally inherited jurisdiction over Indians and their lands including Inuit aboriginal people of Labrador at the moment of Confederation. Once again it is for the trial court to define that duty however at this stage it is clearly not out of the realm of being accepted that a duty of care was owed. In fact ten years prior to Newfoundland joining in Confederation with Canada the Supreme Court of Canada in **Reference re: British North America Act, 1867 (U.K.) s. 91**, [1939] S.C.R. 104 was asked to determine whether the Eskimo people of Quebec were constitutionally Indians? Duff C.J. writing for that Court stated at page 1 that:

> Among the inhabitants of the three provinces, Nova Scotia, New Brunswick and Canada that, by the immediate operation of the British North America Act, became subject to the constitutional enactments of that statute there were few, if any, Eskimo. But the British North America Act contemplated the eventual admission into the Union of other parts of British North America as is explicitly declared in the preamble and for which provision is made by section 146 thereof.

[76] And further:

> In 1867 the Eskimo population of what is now Canada, then between four and five thousand in number, occupied, as at the present time, the northern littoral of the continent from Alaska to, and including part of, the Labrador coast, within the territories under the control of the Hudson's Bay Company, that is to say, in Rupert's Land and the North-Western Territory which, under the authority given by section 146 of the British North America Act, were acquired by Canada in 1871. In addition to these Eskimo in Rupert's Land and the North-Western Territory there were some hundreds of them on that part of the coast of Labrador (east of Hudson Strait) which formed part of, and was subject to the Government of, Newfoundland. [Emphasis mine]

[77] And further at page 5:

> I turn now to the Eskimo inhabiting the coast of Labrador beyond the confines of the Hudson's Bay territories and within the boundaries and under the government of Newfoundland. As regards these, the evidence appears to be conclusive that, for a period beginning about 1760 and extending down to a time subsequent to the passing of the British North America Act, they were, by governors, commanders-in-chief of the navy and other naval officers, ecclesiastics, missionaries and traders who came into contact with them, known and classified as Indians. [Emphasis mine]

[78] And at page 9:

> Having regard to the well established usage of designating the Esquimaux of Labrador as Indians or Esquimaux Indians, evidenced by the Proclamations of the Governors of Newfoundland, and other official and unofficial documents, one finds little difficulty in appreciating the significance of the phraseology of the correspondence, in 1879, between Sir John A. Macdonald and Sir Hector Langevin on the subject of the Eskimo on the north shore of the St. Lawrence. The phrase "Esquimaux Indians" is employed in this correspondence as it had been employed for a hundred years in official and other documents to designate the Labrador Esquimaux. In 1882, three years after the date of this correspondence, the sale of intoxicating liquors to "Esquimaux Indians" was prohibited by an Act of the Legislature of Newfoundland.
>
> Newfoundland, including the territory inhabited by these Labrador Eskimo was, as already pointed out, one of the British North American colonies the union of

> which with Canada was contemplated by the British North America Act. Thus it appears that, through all the territories of British North America in which there were Eskimo, the term "Indian" was employed by well established usage as including these as well as the other aborigines; and I repeat the British North America Act, in so far as it deals with the subject of Indians, must, in my opinion, be taken to contemplate the Indians of British North America as a whole. [Emphasis mine]

[79] Duff C. J. then makes a specific reference to the Eskimo people as to whether or not they came "under the protection" of the Crown. He stated at page 9:

> Then it is said they were never "connected" with the British Crown or "under the protection" of the Crown. I find some difficulty in affirming that the Eskimo and other Indians ruled by the Hudson's Bay Company, under either charter or licence from the Crown, were never under the protection of the Crown, and in understanding how, especially in view of the Proclamations cited, that can be affirmed of the Esquimaux of northeastern Labrador. I cannot give my adherence to the principle of interpretation of the British North America Act which, in face of the ample evidence of the broad denotation of the term "Indian" as employed to designate the aborigines of Labrador and the Hudson's Bay territories as evidenced by the documents referred to, would impose upon that term in the British North America Act a narrower interpretation by reference to the recitals of and the events leading up to the Proclamation of 1763. For analogous reasons I am unable to accept the list of Indian tribes attached to the instructions to Sir Guy Carleton as controlling the scope of the term "Indians" in the British North America Act. Here it may be observed parenthetically that if this list of tribes does not include Eskimo, as apparently it does not, neither does it appear to include the Montagnais Indians inhabiting the north shore of the St. Lawrence east of the Saguenay or the Blackfeet or the Cree or the Indians of the Pacific Coast.
>
> (emphasis added)

[80] The Court went on to conclude that the Eskimo people of Quebec and by implication throughout Canada were indeed Indians as that term was used under s. 91(24) of the then *British North America Act, 1867*.

[81] What is of particular significance in **Re: British North America Act, 1867 (U.K.)** is the reference by Duff C.J. to the fact that the protection of the Crown applied even though the Eskimo and other Indians were ruled under either charter or license by the Hudson's Bay Company.

[82] In the case before this Court, this same argument is being put forward by counsel for Canada in that; since the impugned schools on the Labrador Coast were operated by the International Grenfell Association; or The Moravian Missionaries or the Province of Newfoundland then Canada had no duty of care.

[83] This, of course, is for the trial court to determine; however, I am not convinced at this stage that it is plain and obvious that the Plaintiffs' position cannot succeed. It follows then that this requirement of the five step process under the *Class Actions Act* has been satisfied by the Plaintiffs.

[84] In the present matter counsel for Canada argues that there is no liability vehicle to drive this matter forward. He states at paragraph 64 of his Memorandum that "The Crown is liable in tort to pay damages only if a plaintiff can establish facts that amount to a legal cause of action against the Crown." And that "As a general rule, everybody is responsible for his or her own torts, but no person is responsible for the torts of others."[3] And since the federal Crown had nothing to do with the schools in question there can be no cause of action and no liability flowing in tort. Once again, that is for the trial court to decide, however, at this point the Plaintiffs' argument must be heard since it is not plain and obvious that it will not succeed.

[85] As to any intentional tort liability counsel for Canada argues that whatever was done to the plaintiffs by the employees of those running the schools does not fall on the federal Crown. Counsel for Canada states that there are no material facts pleaded nor is there anything to substantiate any partnership between Canada and those running the schools in Labrador to implicate Canada in the harm alleged by the plaintiffs to have experienced. Counsel for Canada states at paragraph 72 of his memo that: "In the cases at bar, the Plaintiffs are relying on judicial comment instead of pleading the material facts necessary to establish a relationship that would result in a finding of vicarious liability. Such judicial comment cannot be a substitute for evidence and the Plaintiffs cannot use the facts found in another case to buttress what are bald assertions." I don't agree that this is what is happening in this action, since the material facts are dependent on whether or not Canada had a

[3] Paragraph 65 of Defendants Memorandum of Fact and Law.

duty of care toward the Labrador Inuit. Once again this is a clear issue to be decided at trial and for me at this time to enter into that analysis would draw me into the merits of the case. I cannot go there. Suffice to say that this argument has been touched upon by my previous comments and references and should therefore go forward to the trial court.

[86] In relation to their being no Cause of Action for a breach of a non-delegable duty Counsel for Canada relies on **Blackwater v. Plint**, [2005] 3 S.C.R. 3 where at paragraph 50 McLachlin C.J. stated:

> ... the power of the government to enter into agreements with religious organizations for the care and education of Indian children suggests that the duty is eminently delegable ... The *Indian Act* falls far short of creating a mandatory duty to ensure the health and safety of children in residential schools.

[87] It should be noted in **Blackwater** however that the Supreme Court of Canada did uphold the lower courts finding that both the Church and Canada were vicariously liable for the wrongful acts committed against the Indian children by one of the Church employees. It then set about establishing the evidentiary basis for determining whether vicarious liability should be imposed. Again, in the matter before me, that is for any trial court to evaluate as this matter may proceed. It is not for me to engage in such evidentiary analysis on this process based application.

[88] I agree however that the nature of the relationship between the Plaintiffs and the federal Crown will be the driving force in these actions and in that regard I am unable to agree with Counsel for Canada that no relationship at all exists between them. The strength of the relationship, be it fiduciary or otherwise, will be determined by the evidence presented. However, it appears that there were no treaties or agreements existing between the Inuit of coastal Labrador and Canada at the time of Confederation in 1949 and the domination by the Canadian Government over these people was a unilateral action by the federal Crown. What rights and duties were created by this action cannot simply be answered by saying "there were none." What does the evidence show?

[89] Counsel for Canada argues that the Plaintiffs were deficient in pleading the material facts upon which they relied to succeed in their application. Cameron, J.A. in **Dow Chemical v. Ring** set out the general rule on this issue where at paragraph 38 she stated:

> The general rule of pleadings is that a plaintiff must plead the material facts upon which he or she relies in respect of each of the constituent elements of the cause of action. In Horsman and Morley, **Government Liability Law and Practice**, looseleaf (Aurora, ON: Canada Law Book, 2007) at 10:80:10 the authors summarize, in my view correctly, what is required in pleading a case of breach of fiduciary duty against the Crown:
>
> > ... the plaintiff must plead the material facts alleged to give rise to the existence of a fiduciary relationship with the Crown or Crown officer, the existence of the duty owed by the Crown or Crown officer to the plaintiff by virtue of that relationship, the breach of the alleged duty, and the remedies sought. The pleadings must assert not only the general existence of fiduciary relationship, but also that the relationship gave rise to a relevant fiduciary obligation on the facts of the plaintiff's case.

[90] I am satisfied that the Plaintiffs have set out the parameters of their pleadings sufficient to show what it is they will be relying on at trial and to show the degree of the fiduciary relationship they believe exists between Canada and the Inuit of Labrador. In its simplest reduction the Plaintiffs state that because they are Inuit (Indians) there is an assumed fiduciary relationship. Of course that is for the trial judge to decide but at this stage the pleadings, it is not plain and obvious that the Plaintiffs will fail.

INDENTIFIABLE CLASS – SECTION 5(1)(B)

[91] The test to be applied here, as in all other class action criteria other than section 5(1)(a), is the "some basis in fact" test as set out by Cameron, J.A. in **Dow Chemical v. Ring** referenced earlier. This establishes a very low threshold over which the Plaintiff must step in order to advance its position as having the matter proceed by way of a class action. Is the class readily identifiable?

[92] In that regard counsel for the Defendant Canada acknowledges in his oral argument that the Plaintiffs did in fact attend these residential schools on the coast

of Labrador and that they suffered awful things there, however, as stated above Canada's position is that this was never Canada's responsibility.

[93] Cameron, J. A. in **Dow Chemical v. Ring** in addressing the "Identifiable Class" issue stated at paragraphs 60 and 61 that:

> The **Class Actions Act** permits certification of a class comprised of as few as two persons (s. 5(1)(b)).
>
> The objective of the legislation is to limit the class to those who have a claim or an interest in the resolution of the common issues **(Hollick; Cloud v. Canada (Attorney General)** (2004), 73 O.R. (3d) 401 (C.A.), para. 46). In **Western Canadian Shopping Centres Inc v. Dutton**, [2001] 2 S.C.R. 534, para. 38, Chief Justice McLachlin succinctly stated the features of a class definition and their purpose when she said:
>
> > First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.
>
> In deciding if the definition states objective criteria, courts will sometimes ask whether the criteria are subjective. In **Bywater v. Toronto Transit Commission** (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) para. 11, Winkler J. (as he then was) referring to **The Manual for Complex Litigation**, 3d ed. (St. Paul, Minn.: West Publishing Co., 1995) noted that a criterion depending on a class member's state of mind would be subjective.

[94] In the present case counsel for the Plaintiffs set out the class definition as:

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").

[95] He states in the Plaintiffs' Factum that objectively the class members can be identified by their attendance at the impugned schools during a fixed time period.

[96] Counsel for the Plaintiffs in support of his class definition refers to **Wheadon v. Bayer Inc.**, at paragraph 106 where Barry, J. cited approvingly the class definition in **Rumley v. British Columbia**, [2001] 3 S.C.R. 184, Barry, J. stated:

> I find support for this conclusion in **Rumley v. British Columbia**, where the class in a sexual abuse case was defined by reference to students attending a school between certain years who resided in British Columbia and claimed to have suffered injury as a result of sexual misconduct at the school. The class definition was not in issue at the Supreme Court level but had been accepted by the British Columbia Court of Appeal. [Footnotes omitted]

[97] Counsel for the Plaintiffs here argues that the class definition before the Court is almost identical to that set out in **Rumley**. Interestingly, counsel for the Plaintiffs refers at paragraph 68 of the Plaintiffs' Factum to the National Residential School Settlement program where similar group identification was accepted for purposes of settlement. He stated:

> 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.

[98] Counsel for Canada on the other hand argues at paragraph 155 of the Defendant's Memorandum of Fact and Law that the factors set out by the Supreme Court of Canada in **Western Canada Shopping Centres Inc. v. Dutton,** [2001] 2 S.C.R. 534, 2001 SCC 45 and **Hollick v. Toronto (City),** [2001] 3 S.C.R. 158 have not been established by the Plaintiffs. That is:

> 1. The class must be capable of clear definition. The purpose of the definition is to identify the individuals who are entitled to notice, entitled to relief, if relief is awarded, and bound by the judgment;
>
> 2. The class definition should state objective criteria for membership;
>
> 3. The criteria for membership should bear a rational relationship to the asserted common issues;
>
> 4. The proposed representative plaintiff must show that the class is not unnecessarily broad where the class could be defined more narrowly and the courts should either disallow certification or allow certification on the condition that the class definition be amended. (Dutton at paragraphs 38, 29; Hollick at paragraphs 27, 20, 21)

[99] Counsel for the Defendant argues therefore that the Plaintiffs' case is fundamentally flawed because no cause of action exists against Canada in the pleadings. He argues that Canada owes no duty of care in negligence, nor any fiduciary duty to the Inuit and Métis people in this action.

[100] This is precisely the same position taken by the Defendant in its argument in relation to the section 5(1)(a) criteria of the *Class Actions Act* and if he is correct then the matter ends there. However, having found earlier that it is not plain and obvious that the Plaintiffs' case is without merit, especially where aboriginal issues are so interwoven with constitutional issues, I am not convinced on that factor alone that the matter should not move forward on a class action basis.

[101] It seems to me that in this case, perhaps more so than in other aboriginal circumstances, the class is capable of clear definition. Here the circumstances relate to only five small isolated schools in a relatively remote part of Canada. No doubt it will not be a simple task to identify every possible person touched by this litigation; however, this class of people appears for the most part to be a closed set

of about 500 individuals. They are almost unique in their geographical location and their attendance would be expected to have been recorded as part of the school record at the time or at least known in their own communities by people still able to remember that they in fact attended these residential schools and experienced some serious deprivation as a result of that schooling. I note as well that these residential schools were for the most part intended to educate the Inuit people, however, there were also some students in attendance who were not aboriginal, for example the children of transient fisherman.

[102] Counsel for the Defendant as stated earlier acknowledges that the Plaintiffs did attend these residential schools on the coast of Labrador and Northern Newfoundland and that they experienced awful things but that Canada had no part in it.

[103] It seems then, that from an objective assessment there is some basis in fact to support the Plaintiffs' position. It is not for me at this stage to determine the strength of the Plaintiffs' case on the issue of class identity but only to determine if it should proceed as a class action. I am satisfied that there is some basis in fact to accept the class definition as set out by the Plaintiffs and the matter should proceed forward as a result.

COMMON ISSUES

[104] As to the relationship between membership in the class and the asserted common issues, it is clear that what the Plaintiffs are stating is that because they were aboriginal children, that is, Inuit and Métis, they were literally rounded up, taken from their homes and families and forced to attend residential schools set up to accommodate them. Consequently, as a result of attending these schools they collectively allege that they suffered cultural, physical, and in some cases sexual abuse, for which they want access to the courts to address these issues. While there are no guarantees as to the merits of the litigation I find that there is a rational relationship between the class members and the common issues as framed in a breach of fiduciary duty, or negligence. As to whether or not the class is unnecessarily broad, it seems to me at this stage that the class is not open ended and encompasses a discrete group of people who actually were in attendance

during the period claimed and whose family members are themselves readily identifiable. Cameron, J.A. in **Dow Chemical v. Ring** stated at paragraph 62 that:

> Arriving at a class definition may be easier in some types of cases than in others. In **Hollick** it was said that in product liability cases the class might typically be "those who purchased the product" (para. 20). In environmental actions such as **Hollick** and this case, however, "the appropriate scope of the class is not so obvious" and "it falls to the putative representative to show that the class is defined sufficiently narrowly" (**Hollick**, para. 20). On the subject of finding the right balance in defining a class Chief Justice McLachlin said at para. 21 of **Hollick**:
>
> > ... The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad -- that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended ... [Emphasis in original]
>
> It is recognized, however, that it is not intended that the class be limited to those who will be ultimately successful. A purpose of class actions is to deal with all potential claims at the same time so that defendants proceed with the knowledge that "all potential claims are resolved and all potential claimants are bound by the result, including those that may fail." **Attis v. Canada (Minister of Health)** (2007), 46 C.P.C. (6th) 129, (Ont. S.C.J.) para. 53.

[105] I therefore do not agree with the Defendant's position that the class is unreasonably overbroad and therefore unmanageable. On the contrary the class here is a limited and closed set of aboriginal people who lived in a small remote area of Canada. The issues are common to them all and are not brought forward on an individual basis. Having said that, I am aware that there were a number of non-aboriginal children who also attended these schools at the times claimed and who may or may not have any relationship to the litigation. However, this is basically an aboriginal based claim and it could possibly be more focused by the inclusion of the adjective "aboriginal" to modify the collective personal pronoun "persons". Counsel for the Plaintiffs could no doubt seek leave to amend this at trial on the merits if the Plaintiffs so wished. I would only comment that at this point the inclusion of non-aboriginal children is not a fatal flaw to the matter going forward. I need only be satisfied that there is "some basis in fact" to accept the class as set out by the Plaintiffs. For the same reason the omission of those children attending the impugned schools prior to 1949 and who are not part of this action does not

detract from the proper identification of the class forming the basis of this action. Clearly to include those people who attended the residential schools prior to 1949 would broaden the class to such a degree as to make it potentially unmanageable. In any event the Defendant can't have it both ways. Counsel for Canada argues that Canada had no jurisdictional connection to any people, aboriginal or otherwise, who lived in Newfoundland and Labrador prior to 1949. This was exclusively the domain of the Newfoundland government. It is a bit confusing to then claim that this present action is "under inclusive" because it did not refer to pre-confederation students.

[106] With reference to section 5(1)(c) of the *Class Actions Act*, I am satisfied as well that the Plaintiffs share common issues and that the litigation framed in negligence, or breach of a fiduciary duty is common to the entire class. Whether or not the Plaintiffs will be successful at trial is not a concern at this time. It is for the trial judge to decide if Canada owed a duty of care to protect the Inuit and Métis children of Labrador from physical, mental, or social harm. It is for the trial judge to determine whether or not there is a breach of a fiduciary duty to the Plaintiffs and their families and whether Canada was negligent in carrying out its alleged duty of care.

[107] Counsel for the Defendant continuously returns to his main theme and argues that the proposed common issues are difficult because the allegations are incapable of proof on the basis that there is no cause of action. He states at paragraph 196 of his Memorandum of Fact and Law that:

> In this case, Canada is not the correct defendant and no cause of action is capable of proof against Canada. Given the lack of a valid cause of action, the common issues of negligence, fiduciary duty, aboriginal rights and treaty rights are not appropriate for certification in an action against Canada.

[108] I have earlier considered whether or not there is a cause of action and need not consider it further, however, in relation to the common issues I am satisfied that there is some basis in fact to have these issues considered as common issues and that the Plaintiffs have met this entry level test.

PREFERRED PROCEDURE – S. 5(1)(D)

[109] In **Dow Chemical v. Ring**, Cameron, J.A. offered some guidance as to the factors to be considered in determining whether a class action would be the preferable procedure. She stated at paragraph 97:

> Section 5(2) of the **Class Actions Act**, as noted above, provides some guidance regarding the factors to be considered in determining whether a class action would be the preferable procedure. For convenience I shall reproduce the section:
>
> > (2) In determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether
> >
> > (a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;
> >
> > (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> >
> > (c) the class action would involve claims that are or have been the subject of another action;
> >
> > (d) other means of resolving the claims are less practical or less efficient; and
> >
> > (e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

[110] And further at paragraph 100:

> In **Hollick**, the Supreme Court of Canada set out the approach to be taken to the question of preferability. The Court confirmed that preferability incorporated two ideas: "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim" and whether a class proceeding would be preferable (para. 28). The common issues must be considered in the context of the claims as a whole (para. 29). Is the class action preferable to other methods of resolving the claims, including, but not limited to the use of individual proceedings (paras. 30 and 31)? In performing the analysis, one must look at the

> circumstances considering judicial economy (para. 32), access to justice (para. 33), and behaviour modification (para. 34).

[111] The preferable procedure factor is an interesting issue in the present case because of the approach taken by the federal government in relation to these residential schools and these aboriginal people in particular. It seems to me that none of this litigation would have been necessary if the Plaintiffs had been included in the 2006 National Settlement Program as referred to earlier. For its own reasons Canada has determined that the Plaintiffs do not fit the criteria of the settlement Agreement reached with other aboriginal residential school attendees and as a result that procedure was closed to the Plaintiffs. The result of that circumstance, according to counsel for the Plaintiffs, is the present litigation process. Counsel for the Plaintiffs states that of the options open to the Plaintiffs the focus must be on a) judicial economy; b) access to justice and; c) behaviour modification. He further states at paragraph 93 of his factum that:

> 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.

[112] What in fact are the options available other than a class action for these Plaintiffs? Clearly, the National Settlement Program is closed to the Plaintiffs. However, counsel for Canada suggests at paragraph 220 of his Memorandum of Fact and Law that other procedures should be considered "such as joinder, test cases, representative actions, consolidation and so on". What must be kept in mind however in relation to the preferability factor is the purposes for which class actions are designed to meet. In **Hollick** the Supreme Court of Canada stated at paragraph 15 that:

> The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in Western Canadian Shopping Centres (at paras. [page170] 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in 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 member 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. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, Report on Class Actions (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Class Action Reform (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters. [Emphasis mine]

[113] And further at paragraph 16:

> It is particularly important to keep this principle in mind at the certification stage. [Emphasis mine]

[114] In **Hollick**, McLachlin, C.J. agreed that the courts should treat the preferability factor in a broad manner keeping in mind fairness, efficiency and manageability. As well, the court must decide whether a class proceeding would be preferable to other procedures such as "joinder, test cases, consolidation and so on", in achieving the goals of a class action.[4]

[115] However, McLachlin, C.J. adds at paragraph 28:

> In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.

[116] And further at paragraph 29:

> The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues" (emphasis added), and not

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[4] **Hollick, paragraph 28.**

> that a class action be the preferable procedure for the resolution of the class members' claims.

[117] And at paragraph 31:

> In my view, the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.

[118] In **Hollick** the court found that the class action process did not promote judicial economy or advance the action in that the common issues were far outweighed by the individual issues. As well, in **Hollick** the court found that the class action process did not serve the interests of access to justice, since in that case, there were more efficient and appropriate alternatives such as the Small Claims Trust Fund which could handle individual claims if they did not overwhelm that fun or alternatively, if the claims were of sufficient amounts, could be litigated on a normal individual basis. McLachlin, C.J. also found that in **Hollick** behaviour modification was not such a significant factor that a class action would be necessary to promote it in that case.

[119] In the present case I accept that the onus is not on the Defendant to establish why some other procedure, such as a test case, would be preferable to a class action process. On that point the Newfoundland and Labrador Court of Appeal stated at paragraph 44 of **Davis v. Canada (Attorney General)**, 2008 NLCA 49 that:

> It follows that the Claimants cannot rely on the lack of evidence regarding a test case since it was they who had the burden of demonstrating that a class action was preferable to other methods of resolving their claims, including the use of a test case. There was no burden on the Attorney General or the Province to demonstrate that a test case was a viable alternative. Based on the information and evidence provided to him, the applications judge concluded that a test case would, at least, be preferable to a class action. I note in passing that I should not be taken as suggesting that evidence is necessarily required. It is open to the applications judge to make a determination based on experience and general principles where the circumstances permit.

[120] In relation to the common issues as I stated earlier, the Plaintiffs represent a clearly identifiable and closed set of aboriginal people who live in a remote part of Canada. They number only about 5000 at the commencement of this action and they have a direct link to the residential schools in question. The same allegations of physical harm and cultural deprivation are common to all members of the class as are the legal claims of negligence and breach of fiduciary duty against the Defendant Canada. The critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action[5]. I am satisfied that the class action procedure will accomplish this and on that basis I cannot agree with the Defendant's position that some other procedure is more preferable than the present class action application in this case. Here we have a small population of aboriginal people who are seeking access to justice as a single unit, all claiming identical issues to be addressed by the same legal methods open to them.

[121] Many of the class members are elderly and unlikely to survive protracted litigation and inevitable appeals on an individual basis. The commonality of their issues would not warrant this. I see no advantage to a test case which in itself is no guarantee of a less time consuming resolution. A test case in itself is a complete civil trial and will have to be brought forward by one of the Plaintiffs at whatever costs will be involved. This would be an enormous financial burden on any one of the Plaintiffs and would have the potential to bar the test claimant and consequently the entire group from court and prevent access to justice. This is clearly not an acceptable social outcome. In **Cloud**, Goudge, J.A. stated at paragraph 86 that:

> However, I think that a single trial of the common issues will achieve substantial judicial economy. Without a common trial, these issues would have to be dealt with in each individual action at an obvious cost in judicial time possibly resulting in inconsistent outcomes. As Cullity J. said, a single trial would make it unnecessary to adduce more than once evidence of the history of the establishment and operation of the School and the involvement of each of the respondents.

[122] It seems to me that these comments of Goudge, J.A. apply equally well to the circumstances of the present case. I agree as well with the comment of Goudge, J.A. at paragraph 85 in **Cloud** that "Because residential schools for native

[5] **Cloud v. Canada** at paragraph 75.

children are no longer part of the Canadian landscape, the third objective of class proceedings, namely behaviour modifications, is of no moment here". This applies in the same manner to the present application for certification.

[123] I am convinced from the submissions I have before me and the cases presented for my consideration that the class action procedure is tailor-made for the very circumstances of the present case and that it would be a fair, efficient and manageable method of advancing the claim and that no other reasonably available means of resolving the claims of the class members would accomplish the stated objectives of the *Act*.

REPRESENTATIVE PLAINTIFFS – 5(1)(E)

[124] The proposed representative Plaintiffs in this matter are part of a relatively small group of Inuit and Inuit Métis people who attended the impugned residential schools from 1949 until their respective closures. They experienced similar treatment which forms the basis of this action and they are seeking global redress.

[125] The representative Plaintiffs who testified before me were humble people and unsophisticated in the complexities of the Canadian legal system. However, they were very intelligent people who testified in support of their affidavit and were cross-examined on its contents. These were people who appeared to understand what was in issue and were committed to the process. It was clear that as representative Plaintiffs they were intent on representing the class and were competent to do so.

[126] Counsel for the Defendant refers the court to **Hoffman v. Monsanto Canada Inc.**, 2005 SKQB 225, where at paragraph 337, Smith J. stated:

> The representative plaintiff under The Class Actions Act has the responsibility to prosecute the lawsuit, once certified, in the interests of the members of the class. Their duty is akin to that of a fiduciary. They must have adequate knowledge and ability to instruct counsel and they must act in the interests of the members of the class. They are answerable to the Court for the adequate performance of these

> obligations. These are duties that cannot, in my view, be delegated to another party who is not answerable to the Court.

[127] I am not convinced that the responsibility to prosecute the lawsuit as referenced in **Hoffman** is inconsistent with the Plaintiffs' position in the present case. Counsel for Canada refers to the fact that when James Asivak attended for cross-examination he was limited in his ability to speak and read the English language. I heard Mr. Asivak and no doubt there are some language issues however these limitations are not fatal to his ability to carry on, and can be compensated for by proper translation when necessary. The problem is not simply English, it was also evident that the coastal Labrador dialect was in play, and what may be clearly expressed on the streets of Toronto, is not the same in Labrador. I agree some assistance may be needed to ensure proper translation however that is easily provided and no person should be denied access to justice because of a language or cultural issue. I also do not view the efforts spent in listening to Mr. Asviak as a waste of judicial time. The representative plaintiffs who testified on cross-examination were intelligent, yet humble and unsophisticated people who would have had very little knowledge of the political struggles between Canada and Newfoundland at the time of confederation. These people were, for all intents and purposes, simply not an issue. They were an invisible people who were not part of the confederation equation. It has been acknowledged by counsel for Canada that these people suffered harm. The only real issue is; who bears responsibility? These people must not be denied access to the court process on the basis that there may be some language or cultural issues that might cause some difficulties. These issues can be addressed at the trial stage.

[128] Counsel for the Plaintiffs refer the court to **Campbell v. Flexwatt** (1998), 44 B.C.L.R. (3d) 343 (C.A.) where at paragraph 75 Cumming, J.A. stated:

> In Endean v. The Canadian Red Cross Society (1997), 148 D.L.R. (4th) 158 (B.C.S.C.) Smith J. considered the representative plaintiff requirements and held that the two most important considerations in determining whether a plaintiff was appropriate were whether there was a common interest with other class members and whether the representatives would "vigorously prosecute" the claim.

[129] And further at paragraph 76:

> It has been established that there is a common interest and I can see no reason why the representative plaintiffs would not vigorously prosecute the claim. Any individual plaintiffs who feel that the representative plaintiffs would not represent them well may opt out of the class proceeding and pursue individual actions.

[130] I am satisfied in the present case that there is a common interest and that the representative plaintiffs fully intend to and will vigorously prosecute the claim.

APPROPRIATE LITIGATION PLAN – SECTION 5(1)(E)(II)

[131] Counsel for the Defendant Canada argues that the Plaintiffs' litigation plan is inadequate. He states in his Memorandum of Fact and Law that the fundamental problem with certification of this action is that there is no cause of action that is capable of proof against Canada. He further states at paragraph 256 of his memorandum that:

> The following deficiencies appear in the proposed litigation plan put forward by the Plaintiffs:
>
> 1. The plaintiffs have not provided a foundation in the pleadings for the claims proposed; hence it is not possible to determine in any definite way how the proposed litigation could reasonably proceed.
>
> 2. The Plaintiffs have not addressed any of the limitation periods and specific bars to litigation of the alleged causes of action.
>
> 3. The Plaintiffs have not sufficiently defined any specific common issues which could conceivably be determined on behalf of an entire class in the specific circumstances of this case; nor have the Plaintiffs addressed the futility of such determinations if there are other barriers to a finding of liability which have not been addressed.
>
> 4. The Plaintiffs have produced a demonstrably inadequate record for certification. There is nothing in the litigation plan to acknowledge the deficiencies obvious on the face of the material relied on, or to provide an indication that the proposed Plaintiffs and their counsel

> can meet any higher standard in respect of the proposed class action.

[132] And further at paragraph 257:

> Neither the litigation plan nor the affidavit and cross examination of David Rosenfield provide an adequate basis for the certification of this proposed class action. The primary problems with this proposed class action are that there is no cause of action capable of proof and that the procedure is not preferable. With that in mind, the problems in the litigation plan are mainly a function of these greater issues.

[133] Counsel for the Plaintiffs sets out his litigation plan at paragraphs 126 to 131, inclusive, of the Plaintiffs' Factum. He states at paragraph 127 that:

> However, courts have also found 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.

[134] And further at paragraph 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.

[135] In addition, counsel for the Plaintiffs at paragraph 129 sets out a five point process if the common issues are determined in favour of the Class. And further at paragraph 130 a 14 point process for the processing and determination of residual individual issues.

[136] I am satisfied that in relation to these proposals it cannot be said that there is no workable litigation plan proposed by the Plaintiffs. If, as Defence Counsel argues the whole plan will fail, because it will not get past the "cause of action" stage then so be it. However, that is for the trial judge to determine as I've said above a number of times. As well, the proposed litigation plan is not static and will evolve as the action progresses. On that point, at paragraph 95 in **Cloud**, Goudge, J.A. stated:

> The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any shortcomings due to its failure to provide for when limitations issues will be dealt with or how third party claims are to be accommodated can be addressed under the supervision of the case management judge once the pleadings are complete. Most importantly, nothing in the litigation plan exposes weaknesses in the case as framed that undermine the conclusion that a class action is the preferable procedure.

[137] I am satisfied therefore that the proposed litigation plan satisfied that requirement of the *Class Actions Act.*

CONCLUSION

[138] Having considered the submission of counsel for both parties, and having read the cases presented to me, I am satisfied that the tests for certification as set out by this province's Court of Appeal in **Dow Chemical v. Ring** have been met

by the Plaintiffs and the Application for Certification is therefore granted so that the within action is certified to proceed as a class action.

ROBERT A. FOWLER
Justice

APPENDIX

Corrections made on July 26, 2010:

1. Page 2, under Authorities Cites, line 10, the word **"Rumbly"** was replaced with **"Rumley"**.

2. Page 3, paragraph 1, line 1, the word "Plaintiff's" was replaced with "Plaintiffs".

3. Page 5, paragraph 4, line 2, the word "fine" was replaced with "five".

4. Page 5, paragraph 5, line 1, the word "Plaintiff's" was replaced with "Plaintiffs'".

5. Page 5, paragraph 5, second paragraph of quote, line 1, words "do no bear" was replaced with "do not bear".

6. Page 5, paragraph 5, second paragraph of quote, line 2, "a defined on consent" was replaced with "as defined on consent".

7. Page 6, paragraph 5, seventh paragraph of quote, line 3, "a ability" was replaced with "an ability".

8. Page 8, paragraph 8, line 1, the word "Plaintiff's" was replaced with "Plaintiffs'".

9. Page 9, paragraph 12, line 3, the word "resumed" was replaced with "reserved".

10. Page 10, paragraph 16, line 3, the word "that" was replaced with "than".

11. Page 11, paragraph 20, line 3, the word "Plaintiff's" was replaced with "Plaintiffs'".

12. Page 11, paragraph 21, line 10, the word "fix" was replaced with "affix".

13. Page 11, paragraph 23, line 3, the word "owned" was replaced with "owed".

14. Page 11, paragraph 24, line 3, the word "owned" was replaced with "owed".

15. Page 13, paragraph 28, line 5, the word "owned" was replaced with "owed".

16. Page 14, paragraph 31, second paragraph of quote, line 5, the word "*Norther*" was replaced with "*Northern*".

17. Page 18, paragraph 43, line 2, the word "agreement" was replaced with "argument".

18. Page 18, paragraph 43, line 3, the word "Plaintiff's" was replaced with "Plaintiffs'".

19. Page 21, paragraph 50, line 3 of quote, "Govern-" was replaced with "Governor".

20. Page 22, paragraph 53, line 7, the word "owned" was replaced with "owed".

21. Page 25, paragraph 64, line 4, "at paragraph 58" was deleted.

22. Page 33, paragraph 83, line 2, the word "Plaintiff's" was replaced with "Plaintiffs'".

23. Page 33, paragraph 83, line 4, the word "*act*" was replaced with "*Act*".

24. Page 33, paragraph 84, line 9, the word "Plaintiff's" was replaced with "Plaintiffs".

25. Page 37, paragraph 96, line 3, the word "**Rumbly**" was replaced with "**Rumley**".

26. Page 37, paragraph 97, line 1, the word "th is" was replaced with "the".

27. Page 38, paragraph 100, line 4, the word "Plaintiff's" was replaced with "Plaintiffs'"

28. Page 29, paragraph 103, line 2, the word "Plaintiff's" was replaced with "Plaintiffs'".

29. Page 29, paragraph 103, line 3, the word "Plaintiff's" was replaced with Plaintiffs'".

30. Page 40, paragraph 104, line 13, the word "dury" was replaced with "during".

31. Page 40, paragraph 104, line 14, the word "Cameran" was replaced with "Cameron".

32. Page 40, paragraph 105, line 5, the word "these" was replaced with "there".

33. Page 40, paragraph 105, line 8, the word "possible" was replaced with "possibly".

34. Page 43, paragraph 111, line 6, the word 'no" was replaced with "not".

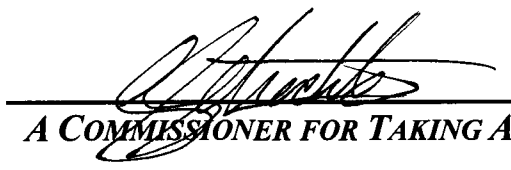
35. Page 47, paragraph 126, line 2, "387" was replaced with "337".

36. Page 48, paragraph 127, line 2, the word "Plaintiff's" was replaced with "Plaintiffs'".

37. Page 48, paragraph 127, line 12, name "Mr.F Asviak" was replaced with "Mr. Asviak".

38. Page 50, paragraph 133, line 1 of quote, the word "founds" was replaced with "found"

THIS IS EXHIBIT "D" REFERRED TO IN THE
AFFIDAVIT OF SEAN O'DONNELL
SWORN BEFORE ME, THIS 25TH DAY OF MARCH, 2013



A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

Jonathan Reuben Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

2007 01T4955CP

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

THE HONOURABLE MR. JUSTICE	) MONDAY THE 7TH
	)
ROBERT A. FOWLER	) DAY OF JUNE, 2010

B E T W E E N:

CAROL ANDERSON, ALLEN WEBBER and JOYCE WEBBER

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

BROUGHT UNDER THE *CLASS ACTIONS ACT*, S.N.L. 2001, C. C-18.1
BEFORE THE HONOURABLE JUSTICE ROBERT A. FOWLER,
CASE-MANAGEMENT JUDGE

June 24/10

ORDER

THIS APPLICATION, brought by the Plaintiffs for an order certifying this action as a class action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1, and other ancillary orders, was heard June 1, 2 and 3, 2009, at St. John's, Newfoundland and Labrador, with written reasons released June 7, 2010.

ON READING the affidavits filed in support of this application by the plaintiffs and in response by the defendant, the facta of the parties, filed, and on hearing the submissions of counsel for the parties,

1. **THIS COURT ORDERS** that this action be and hereby is certified as a class action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1.

Filed June 24, 2010

2. **THIS COURT ORDERS AND DECLARES** that:

(a) The "Survivor Class" shall be defined as:

(i) All persons who attended the Lockwood School, located in Cartwright, Labrador, between March 31, 1949 and the date of closure of the Lockwood School.

(b) The "Family Class" shall be defined as:

(i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

(ii) a former spouse of a Survivor Class Member;

(iii) a child or other lineal descendent of a grandchild of a Survivor Class Member;

(iv) a person of the same or opposite sex to a Survivor Class Member who cohabited for a period of at least one year with that Survivor Class Member immediately before his or her death;

RMF June 24/11

(v) a person of the same or opposite sex to a Survivor Class Member who was cohabiting with that Survivor Class Member at the date of his or her death and to whom that Survivor Class Member was providing support or was under a legal obligation to provide support on the date of his or her death; or

(vi) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death.

3. **THIS COURT ORDERS AND DECLARES** that Carol Anderson, Allen Webber and Joyce Webber be and are hereby appointed as the representative plaintiffs for the Classes and that Koskie Minsky LLP and Ahlstrom Wright Oliver & Cooper LLP be and hereby are appointed as class counsel ("Class Counsel").

4. **THIS COURT ORDERS** that within 45 days of the date of this Order, the defendant shall make its best efforts to deliver to Class Counsel a list of all known members of the Survivor Class and Family Class, including their last known addresses and contact information.

5. **THIS COURT ORDERS AND DECLARES** that the claims asserted on behalf of the Classes to be breach of fiduciary duty and negligence.

6. **THIS COURT ORDERS AND DECLARES** that the relief sought by Class are issues of the defendant's liability and damages, specifically:

(a) declarations with respect to breaches of fiduciary duty and/or negligence;

(b) general damages in the amount of $500,000,000;

(c) special damages in an amount of $500,000,000;

(d) exemplary and punitive damages in the amount of $100,000,000;

June 24/10

(e) damages in the amount of $100,000,000 on behalf of the Family Class;

(f) prejudgment and postjudgment interest pursuant to the provisions of the *Judicature Act*, R.S.N. 1990, c. J-4 ; and

(g) costs of this action.

7. **THIS COURT ORDERS AND DECLARES** that the common issues for the Class are:

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

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

(c) by its purpose, operation or management of the Lockwood School, did the

defendant breach a fiduciary duty owed to the families and siblings of the students of the Lockwood 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 issues 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?

8. **THIS COURT ORDERS** that further orders shall be issued, and a time and place be scheduled, for a hearing, to be heard by September 30, 2010, to determine the issues relating to notice to the Class, opting out and such other matters as may be appropriate under the *Class Actions Act,* and in particular:

June 24/10

(a) the form and content of notice to the Classes;

(b) the appropriate method of dissemination of such notice;

(c) the liability for the cost of the dissemination of such notice;

(d) the form, content, and method for Class Members to opt out;

(e) a deadline for Class Members to opt out of the class action; and

(f) the form, content, method and deadline for Class Members who are not residents of the Province of Newfoundland and Labrador to opt in to the class action.

9. **THIS COURT ORDERS** that costs of the certification application may be spoken to at a time to be arranged between counsel and this court.

Asst Deputy Registrar

CAROL ANDERSON et al	and	**THE ATTORNEY GENERAL OF CANADA**	Court File No: 2007 01T4955CP
Plaintiffs		Defendant	

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR TRIAL DIVISION (GENERAL)
Proceeding commenced at the City of St. John's

BROUGHT UNDER THE CLASS ACTIONS ACT, S.N.L. 2001, C. C-18.1, BEFORE THE HONOURABLE JUSTICE ROBERT A. FOWLER, CASE MANAGEMENT JUDGE

ORDER

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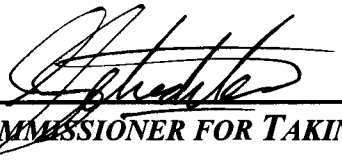
Chesley F. Crosbie, Q.C.

Solicitors for the Plaintiffs

June 24/10

THIS IS EXHIBIT "E" REFERRED TO IN THE
AFFIDAVIT OF SEAN O'DONNELL
SWORN BEFORE ME, THIS 25TH DAY OF MARCH, 2013



A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

Jonathan Reuben Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

Date: 20111221
Docket: 10/88
Citation: *Canada (Attorney General) v. Anderson*, 2011 NLCA 82

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA — APPELLANT

AND:

CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER — RESPONDENTS

Docket: 10/89

BETWEEN:

ATTORNEY GENERAL OF CANADA — APPELLANT

AND:

TOBY OBED, WILLIAM ADAMS AND MARTHA BLAKE — RESPONDENTS

Docket: 10/90

BETWEEN:

ATTORNEY GENERAL OF CANADA — APPELLANT

AND:

SELMA BOASA AND REX HOLWELL — RESPONDENTS

Docket: 10/91

BETWEEN:

ATTORNEY GENERAL OF CANADA — APPELLANT

AND:

SARA ASIVAK AND JAMES ASIVAK — RESPONDENTS

Docket: 10/92

BETWEEN:

ATTORNEY GENERAL OF CANADA — APPELLANT

AND:

EDGAR LUCY AND DOMINIC DICKMAN — RESPONDENTS

Coram: Green, C.J.N.L., Barry and Harrington, JJ.A.
Court Appealed From: Supreme Court of Newfoundland and Labrador Trial Division (G) 2007 01T4955CP; 2008 01T 0845CP; 2008 01T0844CP; 200801T 0846CP; 2007 01T5423CP

Appeal Heard: November 9 and 10, 2010
Judgment Rendered: December 12, 2011

Reasons for Judgment by Barry and Harrington, JJ.A.
Concurred in by: Green, C.J.N.L.

Counsel for the Appellant: Jonathan Tarlton and Mark Freeman
Counsel for the Respondents: Kirk Baert, Celeste Poltak, Stephen Cooper and Chesley Crosbie, Q.C.

Barry and Harrington, JJ.A.:

[1] The federal Crown ("Canada") appeals a decision certifying a class action by the respondents against Canada regarding the operation of five residential schools in Newfoundland and Labrador, three operated by the International Grenfell Association and two others by the Moravian Missions (the "Schools"). The Schools, four in Labrador and one in St. Anthony, on the Northern Peninsula of the Island of Newfoundland, were in operation prior to 1949, the year of Confederation between Newfoundland and Canada. They continued for several decades after Confederation. Canada does not deny that harm may have been caused to the respondents at the Schools but submits that Canada has no responsibility for this.

BACKGROUND FACTS

[2] Certain historical information was placed before the Court without objection by any other party. It is appropriate to make reference to some of that information at the outset to place the issues engaged on this appeal in context.

(a) Canada's funding of expenditures for aboriginals

[3] Before the 1949 Terms of Union between Newfoundland and Canada, two delegations from this Province in 1947 and 1948 met with Canadian delegations to negotiate the terms of Confederation. Reports admitted without objection by the parties indicate that, initially, documents exchanged by the delegations included express reference to federal responsibility for the welfare of "Indians and Eskimos", including education, as well as a description of the day and residential school systems in place in the rest of Canada. The final Terms, however, included merely a general clause in Term 3 that the provisions of the *British North America Act* shall apply to Newfoundland except insofar as varied by the Terms.

[4] A decision of the Supreme Court of Canada, *Reference re: British North America Act, 1867 (U.K.)* s. 91, [1939] S.C.R. 104, had decided ten years before Confederation that the "Eskimo" people of Quebec, and by implication throughout Canada, were "Indians" as that term was used under s. 91(24) of the *British North America Act, 1867*.

[5] A 1951 memorandum prepared by the chairman of Canada's Inter-Departmental Committee on Newfoundland Indians and Eskimos noted that since the Terms of Union do not refer to Indians and Eskimos and since head 24 of Section 91 of the *BNA Act* places "Indians and lands reserved for Indians" exclusively under federal jurisdiction, Canada is responsible for the

native population resident in Labrador. By 1951, Canada had agreed to pay bills submitted by Newfoundland for "Indians and Eskimos".

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

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

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

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

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

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

(b) Canada's involvement in aboriginal education

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

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

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

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

[13] The respondents represent a class identified as being all persons who between 1949 and the date of their respective school closures: (i) attended the Lockwood school, Yale school, Makkovik school, Nain school and St. Anthony school (the "Survivor Class"); and (ii) all persons who have a

derivative claim on account of a family relationship with a person in the Survivor Class (the "Family Class").

THE PARTIES' POSITIONS

(a) The respondents' claim

[14] The respondents say that Canada forcibly confined them to the Schools and systematically deprived them of the essential components of a healthy childhood by causing them to be subjected to child abuse, neglect and maltreatment including physical, emotional, psychological, cultural, spiritual and sexual abuse by those responsible for their well-being.

[15] The respondents more specifically allege they were prohibited from speaking their native language and beaten for speaking any language other than English. The respondents say:

> they were sexually abused either at the hands of other students, dormitory supervisors or principals;
>
> they experienced physical abuse on a frequent basis;
>
> they were deprived of their childhood and grew ashamed of their aboriginal identities, which led them into substance abuse, depression, failure to form familial relationships, suicidal tendencies and deep-rooted anger, acted out by verbal and physical abuse to family members; and their experience at the Schools manifested itself in an inability to properly raise children because of their own lack of parental bonds as children and lack of role models with respect to parenting.

[16] The respondents claim that Canada, having a constitutional duty of care in relation to all aboriginal peoples of this country, systematically failed in that duty of care and were specifically negligent in failing to exercise the duty owed to the aboriginal people of coastal Labrador to protect their physical and mental well-being and their cultural identity.

[17] The respondents also say that Canada, at the moment of Confederation in 1949, assumed a fiduciary duty toward the aboriginal children who in this Province were forced to attend the Schools. The respondents submit that, even if Canada did not directly manage or operate the Schools, it was still in breach of its common law duty of care and its fiduciary duty to those aboriginal students by failing to ensure that these Schools were properly run so as to avoid abuse.

[18] The respondents claim that Canada, with respect to the legal duties alleged to be owed, "attempted to delegate, continued to delegate and improperly delegated its non-delegable duties and responsibility for the Survivor Class when it was incapable to do so and when it knew or ought to have known that these duties were not being met".

(b) Canada's position

[19] Canada submits that the pleadings do not disclose a cause of action against Canada in relation to the Schools. Canada takes no issue with the fact that the respondents attended the Schools and that they suffered various types of abuse. However, Canada submits that it owed no legal duty to the respondents since the Schools existed prior to 1949 and were operated, in the case of three of them by the International Grenfell Association and the other two by the Moravian Missions. Canada also submits that there was no agreement between Canada and anyone else to run the Schools, that Canada merely provided funding to the Province of Newfoundland and Labrador, which has constitutional authority regarding education, and that, in the absence of any statutory authority, there is no duty of care owed by the federal Crown.

[20] Canada submits that, while section 91(24) of the *Constitution Act, 1982* gives the federal government the power to legislate in relation to aboriginals, it does not in and of itself create an obligation to legislate nor does it convey or bestow any substantive rights on individual aboriginals.

[21] Canada relies upon the provincial authority over educational matters within the Province and submits that the federal government, even if it wanted to, could not exercise jurisdiction. Canada argues that Term 17 of the union between Newfoundland and Canada made it clear that Newfoundland was to have exclusive jurisdiction to make laws concerning education and those laws were never repealed. Canada submits that any liability must be fault based and that Canada is only liable if there is a legal cause of action against it. Canada takes the position that any duty of care owed to the respondents in these matters rested with the Province of Newfoundland, and that it was not Canada that caused harm to the respondents since Canada was not involved in the Schools by any agreement or by way of the *Indian Act*.

[22] Canada submits further that, although it provided money to the Province of Newfoundland and Labrador to provide for the needs of the aboriginal people of Labrador this did not make Canada responsible for their welfare or trigger any liability to the respondents.

THE TRIAL DIVISION

[23] The reasons of the applications judge supporting his decision to allow certification under the *Class Actions Act*, SNL 2001, c. C-18.1 ("the *Act*") may be summarized as follows:

> (a) Cause of action
>
> The respondents have made an arguable case that a fiduciary duty between the aboriginal people of Labrador and Canada arose at the instant of Confederation in 1949 and this duty extended to them as a people to protect their cultural identity and not just in relation to their lands.
>
> Whether the federal Crown had sufficient involvement in the running of the Schools to establish a breach of any fiduciary, constitutional or common law duty owed, is a matter to be established by evidence at trial and it is not plain and obvious that the respondents will be unable to prove this.
>
> (b) Identifiable class
>
> In the circumstances, the following class definitions adopted by the respondents meet the requirements of the *Act*:
>
> (i) all persons who attended the Schools between 1949 and the date of its respective closure (the "Survivor Class"); and
>
> (ii) all persons who have a derivative claim on account of a family relationship with a person in the Survivor Class (the "Family Class").
>
> The circumstances involve only five isolated schools in a relatively remote part of Canada. The class as defined appears for the most part to be a closed set of about 500 individuals. They can be readily identified since the attendance of individuals would have been in a school record or known by people in the communities.

(c) Common issues

The pleadings adequately set out the material facts required to support the assertions of breaches of fiduciary duty and negligence common to the entire class.

(d) Preferable procedure

Viewing the common issues in the context of the entire claim, their resolution will significantly advance the action. The appellants have not shown that some other procedure is preferable. Many of the class members are elderly and unlikely to survive protracted litigation and inevitable appeals on an individual basis. A test case would not guarantee a less time consuming resolution. The financial burden on an individual would have the potential to prevent access to justice. Judicial economy would result by making it unnecessary, for example, to adduce more than once evidence of the history of the establishment and operation of the Schools.

(e) Representative plaintiffs

As individual members of the group of Inuit and Metis, who attended the Schools during the period from 1949 until the respective School closures, the respondents are appropriate representative plaintiffs, competent to vigorously prosecute the claims, with an adequate litigation plan.

THE APPLICABLE STATUTORY AND CONSTITUTIONAL PROVISIONS

[24] Section 5 of the *Act* provides:

> **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.

(2) In determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether

(a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) the class action would involve claims that are or have been the subject of another action;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

[25] Sections 35(2) and 91(24)of the *Constitution Act, 1982* read as follows:

35 (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing

> Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) 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, —
>
> ...
>
> 24. Indians, and Lands reserved for the Indians.

[26] Term 3 of the *Terms of Union of Newfoundland with Canada*, attached as a schedule to the Newfoundland Act, 12 & 13 Geo. VI, c. 22 (enacted March 23, 1949), provides:

> 3. The *British North America Acts,* 1867 to 1946, shall 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, as if the Province of Newfoundland had been one of the provinces originally united, except in so far as varied by these Terms and except such provisions as are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more and not all of the provinces originally united.

STANDARD OF PROOF

[27] The onus is on the applicant to establish the five criteria set out in section 5(1) of the *Act*: see *Dow Chemical Company v. Ring, Sr.*, 2010 NLCA 20 at para. 10; *Davis v. Canada (Attorney General)*, 2008 NLCA 49 at para. 23. The test applied in determining whether the pleadings disclose a cause of action is the "plain and obvious" test: see *Ring* at para. 11.

[28] In *Davis*, this Court dismissed an appeal from a refusal by an applications judge to grant certification of a claim asserting that aboriginal rights had been breached. The Court relied upon its reasons in *Walsh v. TRA Co. et al.* (2007), 268 Nfld. & P.E.I.R. 111 at para. 13, for the proper test to be applied as to whether a statement of claim should be struck. It was said to be:

> ... not on the basis that it may not succeed, but only on the basis that it cannot succeed.

[29] In *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 16, McLachlin C.J. wrote:

> ... 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 ...

[30] In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, (filed subsequent to submissions of the parties on this appeal) McLachlin C.J. reiterated:

> [20] The test for striking out pleadings is not in dispute. The question at issue is whether the disputed claims disclose a cause of action, assuming the facts pleaded to be true. If it is plain and obvious that a claim cannot succeed, then it should be struck out: see *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980.

[31] The comments in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 are also instructive on the proper approach to addressing applications to strike claims raising novel duties of care:

> [21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.
>
> [22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[23] Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

[24] This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities — as they sometimes do — the remedy is to amend the pleadings to plead new facts at that time.

[25] Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding.

[32] To establish the last four criteria of s. 5(1), the applicant need only demonstrate "some basis in fact": see *Ring* at para. 14.

THE ISSUES

[33] Three issues arise:

a. Should leave to appeal be granted?

b. What is the standard of review on an appeal of a certification decision?

c. Was the applications judge correct in concluding it was not plain and obvious that no cause of action was disclosed in the statement of claim or did he commit a palpable and overriding error in concluding some basis in fact existed for the other criteria for certification?

LEAVE TO APPEAL

[34] An appeal of a certification decision requires leave of this Court: the *Act*, s. 36(3)(a). In determining whether leave should be granted, this Court may look to, but is not restricted by, the factors set out in rule 57.02(4) of the *Rules of the Supreme Court, 1986*; see *Sparkes v. Imperial Tobacco Canada Limited*, 2010 NLCA 21 at para. 9; *Davis* at paras. 14 to 20; and *Bayer Inc. v. Pardy*, 2005 NLCA 20. That rule provides:

> (4) Leave to appeal an interlocutory order may be granted where
>
> (a) there is a conflicting decision by another judge or court upon a question involved in the proposed appeal and, in the opinion of the Court, it is desirable that leave to appeal be granted,
>
> (b) the Court doubts the correctness of the order in question,
>
> (c) the Court considers that the appeal involves matters of such importance that leave to appeal should be granted,
>
> (d) the Court considers that the nature of the issue is such that any appeal on that issue following final judgment would be of no practical effect, or
>
> (e) the Court is of the view that the interests of justice require that leave be granted.

[35] While the general proposition is that leave to appeal should be sparingly granted where a party is appealing an interlocutory order on a procedural matter, this is particularly true where a certification order has been granted. On this point, Welsh J.A. had previously noted in *Davis*:

> [19] As well, a distinction may be drawn between the circumstances when certification is granted and when it is refused. For example, when certification is granted, certain procedural protections are engaged which may, depending on all the circumstances, support refusal to grant leave to appeal. This point is referenced in the **Pardy** decision:
>
> > [12] A similar reticence to interfere has been expressed by the Ontario Court of Appeal. Carthy, J.A., in **Anderson et al. v. Wilson et al.** (1999), 122 O.A.C. 69; 175 D.L.R. (4th) 409, at para. 12 wrote:
> >
> > > "... I am mindful of the deference which is due to the Superior Court judges who have developed expertise in this very sophisticated area of practice. The **Act** provides for flexibility and adjustment at all stages of the proceeding and any intervention by

> this court at the certification level should be restricted to matters of general principle."
>
> ...
>
> [14] ... There is no reason to doubt the correctness of the certification order, particularly having regard to s. 11(1) of the **Act** which allows for variation of the order, and even decertification, as the action progresses.

[36] It should be noted that "the granting of leave is, in the final analysis, discretionary, even if one or more of the criteria listed in rule 57.02(4) has been established": see *Pardy* at para. 14 and *Davis* at para. 17.

[37] In this case the interests of justice require that leave be granted: rule 57.02(4)(e). Where a claim is based on a novel duty of care or fiduciary duty, allowing it to proceed where it is alleged to be plain and obvious that the statement of claim does not disclose a cause of action would require the parties to engage in costly litigation which might be avoided if leave to appeal were granted and the matter dealt with at this initial stage.

THE STANDARD OF REVIEW

[38] The standard of review with respect to the first criterion for certification set out in s. 5(1) of the *Act*, whether the pleadings disclose a cause of action, "turns on determinations of law and, therefore, it is reviewed on the standard of correctness": see *Ring* at para. 34. All of the other criteria enumerated in section 5(1) are questions of mixed fact and law and the certification judge's determinations on these issues are owed considerable deference. They cannot be reversed absent a palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of a legal standard or its application, in which case the error may amount to an error in law and the applicable standard of review is correctness. See *Ring* at paras. 6-8.

LAW AND ANALYSIS

(a) Did the applications judge err in concluding a certifiable cause of action exists?

(i) The alleged causes of action

[39] In their statement of claim the respondents allege that Canada owed and was in breach of non-delegable, fiduciary, statutory and common law duties owed to the respondents in relation to the establishment, funding,

operation, supervision, control, maintenance and confinement in the Schools.

[40] The respondents submit that the funding provided by Canada was inadequate to meet the costs of operating and maintaining the Schools, and, in particular, to meet the daily and educational needs of the students, with the result that the care provided to the respondents and the conditions at the School were poor, the staff hired were unskilled and unsuitable for dealing with children and the conditions at the Schools were unsuitable and inappropriate for an educational facility for children.

[41] The respondents also claim that Canada had operational and administrative responsibilities, including: the care and supervision of all members of the Survivor Class; the selection, supply and supervision of teaching and non-teaching staff and reasonable investigation into their character, background and psychological profile; and the inspection and supervision of the Schools and all their activities.

[42] The respondents further say that attempts to provide educational opportunities to children confined in the Schools were ill-conceived and poorly executed by inadequately trained teaching staff.

[43] In addition, the respondents allege that the conditions and abuses in the Schools were or should have been well-known to Canada, particularly in light of abuses known to have occurred in residential schools in other parts of Canada.

[44] Regarding Canada's breaches of its fiduciary duty, the respondents allege that Canada wrongfully and arbitrarily compelled members of the Survivor Class to attend the Schools, where they were subjected to wrongful acts, specifically severe physical, mental, emotional and sexual abuse.

[45] The respondents submit that Canada effectively became the guardian of those who attended the Schools and that Canada owed the highest non-delegable, fiduciary, moral, statutory and common law duties to the respondents, which included, but were not limited to, the duty to ensure that reasonable care was taken of the Survivor Class while at the Schools, the duty to protect the Survivor Class while at the Schools and, specifically, the duty to protect the Survivor Class from intentional torts perpetrated on them while at the Schools.

[46] The respondents say that these non-delegable and fiduciary duties were performed negligently and tortiously by Canada, in breach of its

special responsibility to ensure the safety of the Survivor Class while at the Schools.

[47] The respondents further claim that Canada owed a fiduciary obligation to ensure that the students who attended the Schools were treated fairly, respectfully, safely and in all other ways consistent with the obligations of a parent or guardian to a child under his or her care and control and specifically to protect them from any abuse, be it mental, emotional, physical, sexual or otherwise.

[48] The respondents submit that Canada was in breach of its duties owed to the respondents:

> by failing to adequately screen and select the organizations and individuals to which it delegated the implementation of its Residential School program;
>
> by failing to adequately supervise and control the Schools and its agents;
>
> by deliberately and chronically depriving the Survivor Class members of the education they were entitled to;
>
> by failing to respond appropriately or at all to the disclosure of abuses in the Schools;
>
> by failing to inspect or audit the Schools;
>
> by failing to implement an adequate system of evaluation, monitoring and control of teachers, administrators and non-teaching staff;
>
> by failing to periodically re-assess its regulations, procedures and guidelines when it knew or ought to have known of serious systemic failures in the Schools;
>
> and by undertaking a systematic program of forced integration and assimilation of the Aboriginal Persons through the institutions of the Schools when it knew or ought to have known that doing so would cause profound and permanent cultural, psychological, emotional and physical injury to the members of the Survivor Class.

(ii) Breach of non-delegable fiduciary duty

[49] The applications judge relied upon *Guerin v. The Queen*, [1984] 2 S.C.R. 335 to support the conclusion that an overall fiduciary duty was owed by Canada to aboriginal people to prevent their exploitation. Noting that *Guerin* involved the use of land, the applications judge concluded that if a fiduciary duty existed in relation to the protection of the land of aboriginals, "this duty to protect must logically be extended to protect the people themselves from personal harm visited upon them from non-Indian forces".

[50] The applications judge found that the respondents could "generate a strong argument" to show the fiduciary relationship between the aboriginal people of Labrador and Canada arose at the instant of Confederation between Canada and Newfoundland in 1949.

[51] One of the causes of action asserted in the respondents' statement of claim is grounded on a breach of fiduciary duty owed by Canada to the Survivor Class and the Family Class. Because of their unique position, governments, such as the government of Canada, will only owe fiduciary duties in limited and special circumstances; see *Elder Advocates* at para. 37. The Supreme Court of Canada has, however, recognized such a fiduciary duty existing between aboriginal peoples and the Crown in certain instances. With respect to when such a duty might be imposed, Binnie J. noted in *Wewaykum Indian Band v. Canada*, 2002 SCC 7i9, [2002] 4 S.C.R. 245:

> [81] ... [T]here are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. Land was also the subject matter of *Ross River* ("the lands occupied by the Band"), *Blueberry River* and *Guerin* (disposition of existing reserves). Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*.
>
> ...
>
> [83] ... I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals*, *supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the

> Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.
>
> (Emphasis added.)

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

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

[53] While the respondents' claim is not in relation to land or a section 35(1) aboriginal right, Justice Binnie's comments in *Wewaykum* would appear to leave the door open for the assertion of a fiduciary duty where the Crown has "undertaken discretionary control of a 'cognizable Indian interest'" other than a section 35(1) right. See also Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Markham, Ont: Lexis Nexis, 2008) at pages 190-191. McCabe notes, pp. 159-160:

> It must be kept in mind as well that the fiduciary relation is *sui generis*. This enables fiduciary duties that "tolerate conflicts of interest" and that are limited in obligation "rather than [characterized by] the full menu of obligations imposed on a classic private law fiduciary". On the other hand, notwithstanding the several statements of the Supreme Court alluding to the finitude of the fiduciary duties of the Crown to aboriginal peoples, it remains manifest that as *sui generis* duties they are capable of expansion and mutation to meet the needs of justice revealed in future cases. As the Ontario Court of Appeal (*per curiam)* wrote in 2003: [in *Bonaparte v. Canada (Attorney General)* 2003, 64 O.R. (3d) 1]:
>
> > ...as Binnie J.'s review of the law in *Wewaykum Indian Band* reveals, fiduciary law in Canada, particularly in respect of the Crown's relationship with aboriginal peoples, is a very dynamic area of Canadian law. The nature and extent of the particular obligations that may arise out of this relationship are matters that remain largely unsettled in the jurisprudence.

> It appears that in some circumstances the Crown may be in a fiduciary relationship with, and owe fiduciary duties to, individual aboriginal persons. In the Ontario Court of Appeal case just mentioned, a motion to strike a claim as disclosing no reasonable cause of action, it was held that the Crown is in a fiduciary relation with the children of Indians who were students at Indian residential schools before the children were born, "as aboriginal people", and that it is not clear and plain that it had no fiduciary duty to them, as descendants of the students, "to act as a protector of their aboriginal rights, including the protection and preservation of their language, culture, and their way of life". Cullity J. of the Ontario Superior Court of Justice, on a similar motion, held that the Crown is in a fiduciary relationship with on-reserve members of a band and it is not plain and obvious that there is no fiduciary duty to take "reasonable measures to protect the health and safety" of those persons.

Further, at p. 191 McCabe elaborates:

> In addition, the Court has not foreclosed the possibility that the specific interests cognizable for purposes of fixing liability on the Crown as fiduciary can be drawn in very broad terms. In *Blackwater v. Plint* [[2005] 3 S.C.R. 3 at para. 61] it was argued:
>
> > ... that the system of residential schools robbed Indian children of their communities, culture and support and placed them in environments of abuse. This, it is argued, amounted to dishonest and disloyal conduct that violated the government's fiduciary duty to Canada's Aboriginal peoples.
>
> The Court (*per* McLachlin C.J.C.) declined to resolve the issue, not on the ground that the aboriginal interest of which the Crown had taken discretionary control was not cognizable or sufficiently specific but because the evidentiary record was inadequate to deal with the matter.

McCabe makes reference again to the *Bonaparte* decision and on the same page comments further:

> ... The particular cognizable interest of the plaintiffs to be considered "with the benefit of an evidentiary record" was, it may be inferred, preservation of "their culture and identity, [and] ... as and when they became adults, their ability "to pass on to succeeding generations the spiritual, cultural and behavioural bases of their people".

[54] The analysis by McCabe, though not relied on by the applications judge (or cited on this appeal), provides support for the finding by the judge of a certifiable cause of action residing in both the Survivor Class and the Family Class in these proceedings. The Supreme Court's reasons at para. 47 of *Elder Advocates*, which compares fiduciary duties owed by the Crown to

aboriginal peoples to traditional categories of fiduciary relationships such as "guardian-ward or parent-child", provides additional support.

[55] The respondents assert that the nature of Canada's relationship with aboriginal peoples gives rise to a non-delegable duty to preserve, protect and promote the health, welfare and education of aboriginal children. They submit that support for this position is found in the reasons of Cromwell J. in *Reference re Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360, at para. 54:

> As Professor Klar states in his text *Tort Law* (4th ed. 2008), at p. 663, "[t]he essential feature of a non-delegable duty is that responsibility for its execution always rests on the person upon whom the duty is imposed. Although it may be delegated to another, the breach, no matter how committed, by the delegatee, will be treated as a breach by the delegator." See also *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at paras. 30-32. A non-delegable duty may have its source in statute, as the appellants here allege. For example, in *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, the Court found that the relevant legislation imposed a non-delegable duty on the Ministry of Transportation and Highways to ensure that maintenance work on the highways was performed with reasonable care.

[56] The non-delegable duty alleged here does not arise from statute but rather, on the respondents' submissions, from the *sui generis* nature of the relationship between the Crown and aboriginal peoples.

[57] In *Elder Advocates* the class seeking certification relied upon provincial statutory obligations contained in health and welfare legislation to ground an assertion of a private duty of care which was allegedly breached by the Alberta government by its failure to properly audit, supervise and monitor the running of long term care homes. McLachlin C.J., at paragraph 69, wrote:

> Determining whether a duty of care lies on the government proceeds by "review of the relevant powers and duties of the [government body] under the Act": *Cooper*, at para. 45. See also *Broome*, at para. 20; *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 27.

[58] Here the respondents submit that at Confederation Canada reaffirmed its exclusive responsibility for the affairs of aboriginal peoples insofar as its responsibility related to native peoples of Labrador (and northern Newfoundland). These duties would not have been related solely to educational funding contributions to Newfoundland, which is separately alleged to have been woefully inadequate. The respondents claim that

Canada had a duty to manage, monitor, investigate, promote and protect the health and welfare of the Survivor Class, while subject to compulsory attendance at the Schools. It is alleged that Canada knew or ought to have known that they would be at risk of physical, verbal, mental and sexual abuse in an environment of involuntary cultural assimilation in the European tradition.

[59] In *Broome,* at para. 67 the Supreme Court compared the circumstances in the Prince Edward Island Children Aid Societies, where funding was the only role of the provincial government, with the circumstances in its decision in *Blackwater v. Plint*, "... where the Court assumed but did not decide there was a fiduciary duty, the federal government had a central role in running the residential school in which the abuse had taken place, and the children were taken from their families and placed there pursuant to a federal statute, the *Indian Act,* S.C. 1951, c-29."

[60] Canada suggests that the reasons of the Supreme Court in *Blackwater* do not apply here since the facts, assumed to be true, do not indicate a "central role" of the federal government in the operations of the Schools in question, the Schools being operated by charitable entities with financial support and oversight by the Department of Education of the Newfoundland government.

[61] However, the respondents argue that on a broad view of Canada's fiduciary duty the health, welfare and education of aboriginal peoples cannot be said to have resided solely in the Crown in right of Newfoundland after Confederation in 1949.

[62] The respondents support their position by reference to the Supreme Court decision in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193 at 209 where Dickson C.J. wrote:

> ... it is true that, since 1867, the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples. However, the Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations. ...
>
> (Emphasis added.)

[63] Given that there is some basis in fact for the proposition that Canada had an over-arching responsibility for the health and welfare of aboriginal persons attending residential schools, Canada has failed to show at this early stage of the proceeding that a non-delegable fiduciary duty cannot be sustained because Canada's sole role respecting the operations of the Schools was only to make funding contributions under the auspices of Newfoundland's exclusive constitutional role in education regarding all persons within the Province. The respondents have pleaded a greater involvement by Canada and these pleadings must be accepted as true at this stage.

(iii) Direct negligence claim

[64] The duty of care alleged to exist in this case has not been "settled by existing authority" and must therefore meet the two stage test for determining whether a novel duty of care could be recognized in these circumstances: see *Broome* at para. 12. That test was described in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537. There, McLachlin C.J. and Major J. stated:

> [30] In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
>
> [31] On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by

> reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.
>
> (Emphasis in original.)

[65] What is the nature of the relationship in this case? The respondents allege that Canada had a constitutional responsibility for the welfare of all aboriginal peoples including members of the Survivor Class from the date of Confederation in 1949. It is alleged that Canada failed not only to adequately fund the education of the class members but also more broadly failed to monitor, manage, investigate and protect the health and welfare interests of the aboriginal children who were compelled to attend the Schools when Canada knew or ought to have known that abuses and neglect of aboriginal children had occurred at other residential schools in other parts of Canada prior to and after Confederation in 1949.

[66] The respondents contend that the issue of proximity is met by the degree of interaction between Canada and the Newfoundland government pre and post Confederation, which is highlighted by repeated concerns of Government of Newfoundland officials that were expressed to Canada about the inadequacy of financial support for education of aboriginal children living in Labrador, particularly in light of the province's weak financial position at the date of and after Confederation.

[67] Canada contends that there is no duty of care recognizable in law with regard to its limited single purpose role with respect to the Schools after Confederation. Canada submits that funding of the Schools through the provincial government was its only involvement and asserts that this role is not sufficient to create a duty of care owing to the Survivor Class. Canada relies on the Supreme Court's decision in *Broome* in support of its position.

[68] The respondents cannot point to any specific legislation that would support the creation of a duty of care owed to them by Canada. Similarly, the provision of funding with no accountability requirements will not support the finding of a duty of care; see *Broome* at para. 45.

[69] The unique constitutional relationship existing here between Canada and the respondents, however, may give rise to different considerations. While the claim that Canada has a constitutional responsibility for the welfare of all aboriginal peoples including members of the Survivor Class, from the date of Confederation in 1949, might be a novel claim, it has some justification. This is particularly so in light of the respondents' allegations

against Canada set out in paragraph 48 of these reasons including the continuation of "a systematic program of forced integration of aboriginal persons through the institutions of the schools when it knew or ought to have known that doing so would cause profound and permanent cultural, emotional and physical injury to the members of the Survivor Class". Looking at this unilateral exercise of control over aboriginal children, it is at least arguable that an analogy may be drawn between the situation herein existing and one or more of the relationships in which duties of care have been recognized, such as that existing between guardians and wards cited by the Supreme Court in *Broome* and later in *Elder Advocates*.

[70] Considering the special constitutional relationship between the Crown and aboriginals, it is not plain and obvious that the respondents will not be able to establish a *prima facie* duty of care in this case.

[71] Even without a special constitutional relationship, a common law duty of care may arise in the circumstances.

[72] Establishing a breach of duty in the case of governmental malfeasance has been constrained by the threshold requirement that claimants identify a negligent act or omission in an operational context rather than in a policy making mode.

[73] In *Just v. British Columbia*, [1989] 2 S.C.R. 1228, the Supreme Court recognized a duty of care being owed to the motoring public by a government highways department to carry out highway maintenance, which duty could extend to the prevention of injury from falling rock onto the highway.

[74] Cory J. wrote for the majority at 1239:

> ... Over the passage of time the increased government activities gave rise to incidents that would have led to tortious liability if they had occurred between private citizens. The early governmental immunity from tortious liability became intolerable. This led to the enactment of legislation which in general imposed liability on the Crown for its acts as though it were a person. However, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. ...

[75] In setting out ground rules for the determination of policy-based versus operational decision making, Justice Cory wrote at 1244-1245:

> ... a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.

> In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the *bona fide* exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.
>
> The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment.
>
> (Emphasis added.)

[76] The respondents submit that Canada not only had constitutional and statutory obligations to the Survivor Class in a policy context but also had operational and administrative obligations, either separately or jointly with Newfoundland, to inspect and supervise the Schools attended by the Survivor Class to ensure that the residents were healthy and safe from various forms of abuse, after being involuntarily removed from the care of their families. (See paragraph 41 above.) Any inspection could only be meaningful if minimum standards of care were required by Canada and imposed on school authorities. The respondents allege that neither Canada nor the Newfoundland authorities discharged any of these obligations.

[77] Whether Canada moved from the policy stage to assume operational and administrative obligations is a matter for trial. At a preliminary stage of a class action proceeding it is difficult to make these determinations.

[78] Canada relies heavily upon *Hicks v. Saskatchewan Crop Insurance Corp.* (2008), 313 Sask.R. 238 (Q.B.), where the applications judge struck claims against one defendant allegedly involved in administering a weather-based crop insurance program because an affidavit filed established that other defendants in fact did the administration. Canada submits that, in the same way, the evidence before the applications judge in the present case establishes that Canada had involvement only in funding. That submission

ignores the allegations in the pleadings, supported by affidavits of the plaintiffs, asserting greater involvement by Canada in monitoring and supervising the Schools. In the present case, one cannot say that the facts pleaded are "manifestly incapable of being proven": see *Imperial Tobacco* at para. 22.

[79] Based on the facts alleged in the pleadings, it is not plain and obvious that the respondents will not be able to make out a duty of care owed by Canada to the respondents.

(b) Whether the class is identifiable for a class proceeding

[80] Canada submits that the certified class is unnecessarily broad and does not bear a rational relationship with the proposed common issues.

[81] Canada further submits that all the following factors must be considered when assessing whether or not there is an identifiable class:

(a) The class must be capable of clear definition. The purpose of the definition is to identify the individuals who are entitled to notice, entitled to relief if relief is awarded, and bound by the judgment.

(b) The class definition should state objective criteria for membership.

(c) The criteria for membership should bear a rational relationship to the asserted common issues.

(d) The proposed representative plaintiff must show that the class is not unnecessarily broad. When the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the class definition be amended.

[82] Canada also submits that, unless there is a cause of action common to the identified class members, there is no rational relationship between the membership criterion of being a residential school student for the stated period and the common issues. Canada relies on *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.), where Winkler J. (as he then was) rejected a class definition described as "all persons who attended the [s]chool between 1990 and May 1996" on the basis that a rational connection was not established between the class definition and the common issue. Justice Winkler, at paragraph 68, took the position that the mere fact

that a group of people is identifiable is not sufficient to render them a class for the purpose of the *Act*.

[83] Here, Canada points out that the intended class are not using aboriginal ancestry as a limiter but seek to include all children including non-aboriginals who attended the Schools. Canada submits that the pleaded claim is founded in claims of negligence and breach of fiduciary duty arising from section 91(24) of the *Constitution Act, 1867*. Canada says it follows that the definition lacks a "rational connection between the classes defined and the asserted common issues". Canada further asserts that the respondents appear to be espousing a class definition similar to one advanced in the Indian Residential School class action proceeding. However the difficulty here, says Canada, is that it had no direct involvement in the operations or management of the Schools.

[84] Canada further says that the class definition is not sufficiently akin to that certified in *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401 (C.A.), leave to appeal refused at [2005] 1 S.C.R. vi, or in *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184.

[85] The respondents reply that Canada's primary objection to the applications judge's finding that an identifiable class exists is closely connected to arguments regarding the sustainability of the cause of action. In doing so, the respondents suggest that the viability of the cause of action and of the class definition are necessarily interdependent and that if the appellants are unsuccessful with regard to the cause of action it follows that the assertion of no identifiable class must also fall.

[86] The applications judge found that it is possible to objectively identify the proposed class members by reference to their attendance at the Schools during the period described after 1949. For the most part, the class definition is similar to that certified in *Rumley*, although the nature of the misconduct there alleged related solely to sexual abuse affecting students attending a particular school between certain years. The respondents submit that 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 particular time frame. The Court of Appeal was satisfied with the proposed class as having been "circumscribed by defining criteria" and were rationally linked to the common issues because "all class members claimed breach of these duties and they all suffered at least some harm as a result" (para. 47). The approved class in that case was:

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

(b) All parents and siblings of all persons who attended the Mohawk Institute School between 1922 and 1969; and

(c) All spouses and children of all persons who attended the Mohawk Institute School between 1922-1969.

[87] This Court in *Ring* elaborated on the statutory criteria for the identification of the class, at paras. 62, 64 and 67:

(i) It is not intended that the class be limited to those who will be ultimately successful;

(ii) As large as the numbers are, that factor alone does not make the definition too broad; and

(iii) The general rule is that criteria should not depend on the outcome of the litigation.

[88] Canada submits that the class definition certified by the applications judge conflicts with the principles set forth in *Ring*. Counsel for the respondents submit that the class is not defined by any "claims limiter" as was criticized in *Ring*. The class here is defined by reference to attendance at the Schools during a fixed period of time, which is capable of being determined by objective criteria, the latter being a principal concern in *Ring*.

[89] The applications judge made no palpable and overriding error in concluding that the criteria for inclusion in the class have been reasonably defined at this stage and are objectively capable of determination. The applications judge correctly found, at paragraph 101, as follows:

> ... the circumstances relate to only five small isolated schools in a relatively remote area of Canada. No doubt it will not be a simple task to identify every possible person touched by this litigation; however, this class of people is here for the most part to be a closed set of about 500 individuals. They are almost unique in their geographical location and their attendance would be expected and had been recorded as part of the school record at the time or at least known in their community by people still able to remember that they in fact attended these residential schools ... .

[90] The class definition certified by the applications judge is consistent with those certified in *Cloud v. Canada (Attorney General)*, (2004), 247 D.L.R. (4th) 667 (Ont. C.A.), leave to appeal to S.C.C. refused [2005] SCCA 50 and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184. In *Rumley* the Court found that all students at a certain school between 1950 and 1992 shared an interest in the question of whether the government breached a duty of care by systemic negligence in failing to prevent sexual and physical abuse. In *Cloud* the Court followed *Rumley* and certified a class action for harm allegedly caused at an aboriginal residential school between certain years. In the present case, the applications judge did not err in determining that the class meets the identifiably criteria for certification. At a later stage in the proceedings an amendment to the class may be justified. However, as the Supreme Court pointed out in *Hollick*, that is part of the inevitable exercise that may result as a class action progresses.

[91] The applications judge also certified a Family Class allowing family members of claimants to bring derivative claims. A similar class had been certified in *Cloud*. However, Canada says that there is doubt as to whether family members can bring derivative claims in this Province where the family member directly affected by the tort has not died as a result of the tortious activity alleged.

[92] In Ontario, subsection 61(1) of the *Family Law Act*, RSO 1990, c. F-3, provides:

> 61(1) If a person is **injured or killed** by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.
>
> (Emphasis added.)

[93] The Newfoundland and Labrador *Family Law Act*, RSNL 1990, c. F-2, has no similar provision. The *Fatal Accidents Act*, RSNL 1990, c. F-6, subsection 3(1) provides:

> 3(1) Where the **death** of a person is caused by a wrongful act, neglect or default and the act, neglect or default would have entitled the party injured to maintain an action and recover damages, then the person who would have been liable if death

> had not ensued is liable to an action for damages, notwithstanding the death of the person injured.
>
> (Emphasis added.)

The subsection allows dependants to bring actions when the tortious activity has resulted in the death of the person directly affected by the tortious activity, but not when the individual was merely injured. Ontario has no *Fatal Accidents Act*. Instead, section 61(1) of the *Family Law Act* achieves the same result.

[94] The Ontario Superior Court of Justice discussed the impact of section 61 of the Ontario *Family Law Act* in *Lionti v. Toronto Star*, 2000 CarswellOnt 24. At paragraph 25 of that decision, Perkins, J. stated:

> The history referred to in *Munro* is the fact that s. 61, first enacted in 1978, is a direct descendant of the *Fatal Accidents Act*, R.S.O. 1970. That act provided for recovery of damages by family members only when the "injury" complained of caused the death of the person who suffered the injury. In the *Family Law Reform Act, 1978*, the Legislative Assembly of Ontario enacted the predecessor of s. 61 in substantially the same terms as the current provision. In doing so it gave effect to the recommendations of the Ontario Law Reform Commission (whose abolition is regretted) in its landmark Report on Family Law, volume 1, Torts (1969). That volume recounted the history of the various "family" torts such as loss of consortium and loss of services. It recommended the abolition of many of those torts, but when it came to the statutory cause of action created by the *Fatal Accidents Act* the report noted a gap in the law. It was anomalous that a fatal injury gave rise to an action by family members for both out of pocket expenses in caring for or burying the victim and damages for loss of care, guidance and companionship, whereas a nearly fatal injury that left the victim a quadriplegic or lingering in a coma gave rise to no action by the family (perhaps not even for out of pocket expenses). It recommended reforms of the statutory tort. The government responded positively with a discussion paper released in October, 1976 and a bill that was ultimately enacted in March, 1978.

[95] In *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, the Supreme Court of Canada extended the maritime common law to allow claims to be brought by dependants of a person injured but not killed in a boating accident. In that case, the defendants had argued that the *Family Law Act* of Ontario could not apply to maritime claims.

[96] Despite the fact that this Province's legislature has not addressed the "gap" in the law as did the Ontario legislature, prior decisions in certification proceedings in this Province, have applied the reasoning in *Ordon* and have

refused to strike out claims of dependents on the basis that it is plain and obvious that they will fail.

[97] In *Rideout v. Health Labrador Corp.*, 2005 NLTD 116, Russell J. considered a similar argument to the one proposed in *Ordon*, and stated:

> [90] The defendant points out that unlike some jurisdictions, Newfoundland and Labrador does not have legislation in place whereby family members can make this claim as a result of injuries to another family member.
>
> [91] The defendant also submits the spouses did not suffer any damages and, therefore, their claim will fail.
>
> [92] The plaintiff agrees that to date, in this jurisdiction, an award under this claim has only been given in fatal accident cases. However, the plaintiff submits that the decision in *Ordon Estate v. Grail* (1998), 166 D.L.R. (4th) 193 (S.C.C.) has fundamentally altered this area of the law by mandating non-pecuniary awards of damages, in both death cases and personal injury cases.
>
> [93] *Ordon* concerned five separate actions for personal injury and wrongful death arising out of boating accidents in inland waters. The Court was dealing with Federal Maritime law and concluded that no existing common law rule permitted either personal injury or fatal accident claims for damages for loss of guidance, care and companionship. The Court then stated at par. 100:
>
> > That said, the next question, in accordance with the framework established in *Bow Valley Husky, supra*, and in this case, is whether the common law rules barring recovery in both instances should be judicially reformed to allow claims for damages for loss of guidance, care and companionship (and, in the case of dependants of a person injured but not killed in a boating accident, to allow such claims to be brought by a broader class of plaintiffs than is currently permitted under *the actio per quod servitium amisit* and *actio per quod consortium amisit*). We agree with the Court of Appeal for Ontario that they should.
>
> [94] At para. 102, the Court stated:
>
> > It is unfair to deny compensation to the plaintiff dependants in these actions based solely upon an anachronistic and historically contingent understanding of the harm they may have suffered. This is true both for the fatal accident claimants and for the personal injury claimants. In this light, we are of the view that changing the definition of "damages" within the context of maritime accident claims is required to keep non-statutory maritime law in step with modern understandings of fairness and justice, as well as with the "dynamic and evolving fabric of our society"...

> [95] The plaintiff submits that based upon the pronouncements in *Ordon*, it has an arguable case that in this jurisdiction, where the legislature has not addressed derivative or relationship claims, that the common law has been reformed to allow for claims for loss of guidance, care, and companionship. At this early stage, I am unable to conclude that it is plain and obvious that this claim will fail.

[98] In *Doucette v. Eastern Regional Integrated Health Authority*, 2007 NLTD 138, Thompson J. stated:

> [36] I adopt the statements of Russell, J. of this Court in *Rideout, supra* at paragraphs 88-96 and in his consideration of *Ordon Estate v. Grail* (1998), 166 D.L.R. (4th) 193 (S.C.C.), I conclude that it is not plain and obvious that this claim would fail. I am satisfied that the plaintiff has established a basis in fact for this cause of action. I conclude the proposed cause of action meets the requirement of s. 5(1)(a) of the *Class Actions Act*. However, as the defence properly notes, these actions are derivative of the family members whose causes of action are being submitted for certification. The defendant acknowledges in argument that it accepts the approach taken in *Rideout* at this stage.

[99] In Klar, *Tort Law*, 4th ed. (Toronto: Carswell, 2008), at p. 273, the author notes:

> There are three areas where recovery for [economic loss consequent on personal injuries suffered by others] is permitted. First, there is the action for loss of consortium and services which may be brought by one spouse for losses caused as a result of personal injuries suffered by the other... Third, there is the action under provincial legislation which may be brought by dependents of those killed, and, in some provinces, injured, for loss of support, or for expenses incurred as a result of the death, or injury, of their relative.

[100] With respect to the loss of consortium, Klar, at page 274, notes:

> The action [for loss of consortium] was, at common law, an action brought by a husband for a wrong done to his wife which resulted in a loss of her services to him. It has a long history, and originates in a society whose approach to the relationship between husband and wife would clearly be repugnant to us today. Nevertheless, in some jurisdictions the action still survives, changed however by public policies and legislative enactments which have attempted to achieve sexual equality with respect to it. [Footnote: ... It has been extended to wives by the application of the Charter of Rights and Freedoms in *Power v. Moss* (1986), 38 C.C.L.T. 31 (Nfld. T.D.)...] It also must be noted that provincial statutes now provide for a wide range of compensation to relatives of those injured or killed by the torts of others, which render the common law actions unnecessary. [Footnote: Compensation is now frequently provided, for example, for the loss of care, guidance and companionship, of relatives injured or killed in accidents. In the

> case of [*Ordon*], the Supreme Court of Canada extended the common law action for loss of consortium and services to provide for similar compensation to relatives of those injured or killed in boating accidents, which is not governed by the provincial statutes but by maritime common law...]

[101] At common law, a spouse may bring an action for loss of consortium and services. However, this head of damages has not yet been made available to other dependents, such as children. Other dependents have an arguable case that their claims for loss of care, guidance and companionship should be allowed on the basis that *Ordon* mandates an expansion of the types of situations in which such damages may be awarded. The comments in *Imperial Tobacco* regarding novel claims are relevant here. The applications judge made no palpable and overriding error in certifying the Family Class.

(c) Common Issues

[102] With respect to the existence of common issues, the applications judge concluded, at paragraph 104:

> As to the relationship between membership and the class on the asserted common issues, it is clear what the plaintiffs are stating is that because they were aboriginal children, that is, Inuit and Metis, they were literally rounded up, taken from their homes and families and forced to attend residential schools set up to accommodate them. Consequently, as a result of attending these schools they collectively allege that they suffered cultural, physical, and some cases sexual abuse, for which they want access to the courts to address these issues. While there are no guarantees as to the merits of the litigation, I find that there is a rational relationship between the class members and the common issues as framed in a fiduciary duty, or negligence...

[103] The applications judge referred to this Court's reasons in *Ring* at para. 62, which read as follows:

> Arriving at a class definition may be easier in some types of cases than in others. In **Hollick** it was said that in product liability cases the class might typically be "those who purchased the product" (para. 20). In environmental actions such as **Hollick** and this case, however, "the appropriate scope of the class is not so obvious" and "it falls to the putative representative to show that the class is defined sufficiently narrowly" (**Hollick**, para. 20). On the subject of finding the right balance in defining a class Chief Justice McLachlin said at para. 21 of **Hollick**:
>
> > ... The representative need not show that <u>everyone</u> in the class shares the same interest in the resolution of the asserted common issue. There must

> be some showing, however, that the class is not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended ... (Emphasis in original.)

> It is recognized, however, that it is not intended that the class be limited to those who will be ultimately successful. A purpose of class actions is to deal with all potential claims at the same time so that defendants proceed with the knowledge that "all potential claims are resolved and all potential claimants are bound by the result, including those that may fail." **Attis v. Canada (Minister of Health)** (2007), 46 C.P.C. (6th) 129, (Ont. S.C.J.) para. 53.

(Emphasis added.)

[104] The applications judge disagreed with Canada's position that the class is "unreasonably overbroad and therefore unmanageable". He was content that the class was a limited and closed set of aboriginal persons living in remote areas of Labrador and the tip of Newfoundland's Northern Peninsula. While acknowledging that there were a number of non-aboriginal children who had been attending the Schools at the periods claimed to be relevant after 1949, the applications judge was nevertheless satisfied that the claim is primarily an aboriginal based claim. He concluded that the issue could be addressed specifically as the class proceeding progressed, including by the granting of leave to amend at trial if the evolution of the proceeding and the evidence warranted such a step. He concluded, at paragraph 105, that "... the inclusion of non-aboriginal children is not a fatal flaw to the matter going forward". He further emphasized that he only needed to be satisfied that there is "some basis in fact" to accept the class as set out by the plaintiffs in this application. There was no error in making these determinations.

[105] We are satisfied that the essence of Canada's position with regard to the absence of common issues is rooted in its submission, at paras. 88-89 of its factum, which states:

> As a starting point, there is no cause of action against Canada and therefore no class capable of definition in this matter. A rational connection between the proposed class definition, the proposed common issues and the alleged causes of action cannot be proven where the common issues and causes of action themselves are incapable of proof.

> Given that the intended respondents have failed to identify a cause of action that is capable of proof against Canada, it is difficult to evaluate the requisite link between the allege cause of action, the proposed cause of common issues and the proposed class definition.
>
> (Emphasis added.)

[106] Canada relies upon the principles for determination of a common issue set out in *Ring* at para. 80 where "an issue was said to be common 'only where its resolution is necessary to the resolution of each class members' claim': *Hollick* at para. 18. It is not common unless the issue is a substantial ingredient of each members' claim".

[107] The analysis continued in *Ring* as to whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis. Canada submits that the success for one class member must mean success for all and that determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. (See *Ring* at para. 81.)

[108] Ultimately Canada returns to the lack of sustainability of the cause of action as it affects the class definition as well as the common issues, when it makes the following submission:

> As with the proposed class definition, it is a matter of conjecture from the pleadings to isolate specific issues which might be claimed to be capable of common determination or how such a determination is proposed to proceed. That the pleadings do not reveal a cause of action with sufficient factual or legal foundation to proceed exacerbates this difficulty for a court or a party defending the claim. The causes of action pleaded are incapable of proof against Canada – as a result the proposed common issues are, by necessary extension deficient.

[109] The respondents say that Canada's position relies on the fact that an objective view of the pleadings demonstrates that a number of common issues, which are all justifiably part of the certified class action, include:

(i) The history and scope of Canada's legal responsibilities, if any, to aboriginal persons of Newfoundland and Labrador;

(ii) Canada's involvement in education in the Province;

(iii) Canada's agreements and arrangements with the Province;

(iv) The nature of any legal duties owed; and

(v) Whether those legal duties were breached.

[110] From the respondents' perspective the certified common issues affect all class members and include the presence of a duty of care; the standard of care owed; whether a breach of duty of care occurred; the degree of care and control that Canada enjoyed over the Schools; and legal issues surrounding the scope and content of Canada's duties to aboriginals of Newfoundland and Labrador following Confederation. The respondents believe that the only individual matters to be resolved would be those of causation and damages.

[111] The respondents rely on the reasoning of the Ontario Superior Court of Justice in *Sauer v. Canada (Attorney General)*, (2008), 169 A.C.W.S. (3d) 27 at para. 57:

> [A]s in *Cloud*, the resolution of the debate about the essential legal duties of which the claim is founded and whether those duties were breached, will significantly advance the claim to the point where, on my view of the case, only an assessment of damages would remain.

[112] Further support for the respondents' position is found in *Rumley*, at para. 27, where the Supreme Court affirmed the finding of the British Columbia Court of Appeal with regard to commonality of issues while applying the criteria that "all 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".

[113] Considering the above, the applications judge did not err in his determination that common issues exist in this proceeding.

(d) Preferred Procedure

[114] Canada contends that the applications judge erred in his determination that a class action is the preferable procedure as this proceeding will not achieve the goals of judicial economy, access to justice and behaviour modification. It submits that the proceeding will simply allow the respondents to bring claims that are not legally recognized against Canada.

[115] Canada says that the claims will require proof of aboriginal ancestry on an individual basis. This would negate the benefits of the class action process where discovery of class representatives should be sufficient. Canada says that the obvious necessity of individual discovery here militates against a finding of preferability.

[116] Canada also refers to an alternate procedure that was allegedly overlooked by the applications judge which involves a pursuit of an appeal under Article 12 of the *Indian Residential Schools Settlement Agreement* (IRSSA), where a settlement process is provided with regard to native residential schools in Canada. Canada has acknowledged the eligibility of attendees at various residential schools to seek compensation under that agreement does not include attendees at the five schools involved in this proceeding. However, Canada notes there is an appeal process to a judge of the Ontario Superior Court, who has the power to declare eligibility for inclusion in the IRSSA.

[117] The respondents say that Canada's submission is disingenuous on its face since Canada has not been willing to include residents of the Schools as eligible claimants under the IRSSA at the same time it suggests that an appeal should be made under the terms of the agreement. Meanwhile Canada has mounted a vigorous denial of any duties owed to any of the residents of the Schools in its submissions to this Court and the Court below.

[118] The existence of the IRSSA does not of itself establish that there is a legitimate and meaningful avenue of redress other than this litigation as it affects the class claimants in this proceeding. The respondents correctly point out that even if the class claimants had access to the IRSSA process, it would merely involve the threshold question of accessibility but would not resolve any of the common issues raised in this proceeding. They note that the Ontario Court of Appeal in *Cloud* found that a class action was still preferable notwithstanding Canada's submission that the claimants there should seek a determination of eligibility under IRSSA first.

[119] Though not specifically referring to the appeal procedure, the applications judge was satisfied that the national settlement program under the IRSSA was effectively closed to the respondents. He was satisfied that there was no other procedure more preferable than the present class action for what he described as a "small population of aboriginal people who are seeking access to justice as a single unit, all claiming identical issues to be addressed by the same legal methods open to them".

[120] Given the degree of commonality which he found, the applications judge saw no reason why the class action process should not be followed and was skeptical as to whether a test case would be preferable given that it could lead to a full civil trial, which would be time consuming and would create an enormous financial burden on the single claimant in such a process.

[121] The certification judge is owed deference on the issue of preferability. He was satisfied that "some basis in fact" existed for the assertion that a class action is the preferable procedure. There was no palpable and overriding error with respect to that finding.

(e) Whether there is an appropriate representative plaintiff

[122] The appellants provided no basis for concluding the applications judge committed a palpable and overriding error in finding the respondents are appropriate representative plaintiffs.

SUMMARY AND DISPOSITION

[123] In summary:

(a) Leave to appeal should be granted in the interests of justice.

(b) The standard of review is correctness regarding existence of a cause of action and palpable and overriding error regarding an identifiable class, presence of a common issue, the preferable procedure, and an appropriate representative plaintiff.

(c) The applications judge correctly concluded it was not plain and obvious that no cause of action is disclosed and made no palpable and overriding error in concluding some basis in fact was set out for the other certification criteria.

The appeal is dismissed with no order as to costs.

L. D. Barry, J.A.

M. F. Harrington, J.A.

I Concur:

J. D. Green, C.J.N.L.

THIS IS EXHIBIT "F" REFERRED TO IN THE
AFFIDAVIT OF SEAN O'DONNELL
SWORN BEFORE ME, THIS 25TH DAY OF MARCH, 2013

A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

Jonathan Reuben Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

201001H0088

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

APPELLANT

AND:

CAROL ANDERSON, ALLEN WEBBER
and JOYCE WEBBER

RESPONDENTS

O R D E R

THIS MOTION FOR LEAVE TO APPEAL AND THE APPEAL, of the Order of the Honourable Mr. Justice Fowler dated June 7, 2010 certifying this action as a class action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1, was heard November 9 and 10, 2010 before Green ,C.J.N.L, Barry and Harrington ,JJA. with written reasons released December 21, 2011.

ON READING the pleadings and proceedings herein, the Order and reasons given thereof by Justice Fowler dated June 7, 2010, and the facta of the parties, upon hearing the submissions of counsel for the Appellant and Respondents, and for the written reasons delivered this day,

1. **THIS COURT ORDERS** that leave to appeal the order of Justice Fowler dated June 7, 2010 is hereby granted.

2. **THIS COURT ORDERS** that the Appellant's appeal of the order of Justice Fowler dated June 7, 2010 is hereby dismissed with no order as to costs.

Debbie Brennan
Deputy Registrar

Filed | Jan 18, 2012 | DB

201001H0092

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

APPELLANT

AND:

TOBY OBED, WILLIAM ADAMS and MARTHA BLAKE

RESPONDENTS

AMENDED O R D E R

THIS MOTION FOR LEAVE TO APPEAL AND THE APPEAL, of the Order of the Honourable Mr. Justice Fowler dated June 7, 2010 certifying this action as a class action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1, was heard November 9 and 10, 2010 before Green, C.J.N.L., Barry and Harrington, JJA. with written reasons released December 21, 2011.

ON READING the pleadings and proceedings herein, the Order and reasons given thereof by Justice Fowler dated June 7, 2010, and the facta of the parties, upon hearing the submissions of the Appellant and Respondents, and for the written reasons delivered this day,

1. **THIS COURT ORDERS** that leave to appeal the order of Justice Fowler dated June 7, 2010 is hereby granted.

2. **THIS COURT ORDERS** that the Appellant's appeal of the order of Justice Fowler dated June 7, 2010 is hereby dismissed with no order as to costs.

Debbie Brennan
Deputy Registrar

Filed June 30, 2012 DB

201001H0090

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

APPELLANT

AND:

SELMA BOASA and REX HOLWELL

RESPONDENTS

ORDER

THIS MOTION FOR LEAVE TO APPEAL AND THE APPEAL, of the Order of the Honourable Mr. Justice Fowler dated June 7, 2010 certifying this action as a class action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1, was heard November 9 and 10, 2010, at St. John's, Newfoundland and Labrador, with written reasons released December 21, 2011.

ON READING the pleadings and proceedings herein, the Order and reasons given thereof by Justice Fowler dated June 7, 2010, and the facta of the parties, upon hearing the submissions of the Appellant and Respondents, and for the written reasons delivered this day,

1. **THIS COURT ORDERS** that leave to appeal the order of Justice Fowler dated June 7, 2010 is hereby granted.

2. **THIS COURT ORDERS** that the Appellant's appeal of the order of Justice Fowler dated June 7, 2010 is hereby dismissed with no order as to costs.

Debbie Brennan
Deputy Registrar

Filed | Jan. 18, 2012 | DB

201001H0089

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

APPELLANT

AND:

SARAH ASIVAK and JAMES ASIVAK

RESPONDENTS

AMENDED O R D E R

THIS MOTION FOR LEAVE TO APPEAL AND THE APPEAL, of the Order of the Honourable Mr. Justice Fowler dated June 7, 2010 certifying this action as a class action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1, was heard November 9 and 10, 2010 before Green,C.J.N.L., Barry and Harrington,JJA with written reasons released December 21, 2011.

ON READING the pleadings and proceedings herein, the Order and reasons given thereof by Justice Fowler dated June 7, 2010, and the facta of the parties, upon hearing the submissions of the Appellant and Respondents, and for the written reasons delivered this day,

1. **THIS COURT ORDERS** that leave to appeal the order of Justice Fowler dated June 7, 2010 is hereby granted.

2. **THIS COURT ORDERS** that the Appellant's appeal of the order of Justice Fowler dated June 7, 2010 is hereby dismissed with no order as to costs.

Debbie Brenton
Deputy Registrar

Filed | Jan. 30, 2012 | DB

201001H0091

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

APPELLANT

AND:

EDGAR LUCY and DOMINIC DICKMAN

RESPONDENTS

AMENDED O R D E R

THIS MOTION FOR LEAVE TO APPEAL AND THE APPEAL, of the Order of the Honourable Mr. Justice Fowler dated June 7, 2010 certifying this action as a class action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1, was heard November 9 and 10, 2010 before Green, C.J.N.L., Barry and Harrington, JJA. with written reasons released December 21, 2011.

ON READING the pleadings and proceedings herein, the Order and reasons given thereof by Justice Fowler dated June 7, 2010, and the facta of the parties, upon hearing the submissions of the Appellant and Respondents, and for the written reasons delivered this day,

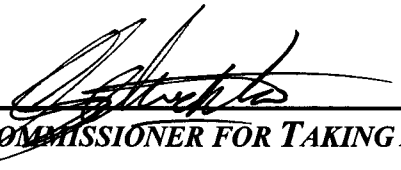
1. **THIS COURT ORDERS** that leave to appeal the order of Justice Fowler dated June 7, 2010 is hereby granted.

2. **THIS COURT ORDERS** that the Appellant's appeal of the order of Justice Fowler dated June 7, 2010 is hereby dismissed with no order as to costs.

Debbie Brennan
Deputy Registrar

Filed | Jan. 30, 2012 | DB

THIS IS EXHIBIT "G" REFERRED TO IN THE
AFFIDAVIT OF SEAN O'DONNELL
SWORN BEFORE ME, THIS 25TH DAY OF MARCH, 2013



A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

Jonathan Reuben Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

The Supreme Court of Newfoundland and Labrador
Trial Division (General)

To: Kirk M. Baert & Celeste Poltak

Date: 27 December 2012

Re: *Anderson v. Canada (Attorney General)*
2007 01T 4955 CCP
Rules 30.08 and 30.11

Attached hereto is a revised cover page of Justice Butler's recent decision on the above-noted matter; the neutral citation was incorrect on the original page.

Please replace with the cover page you currently have.

Thanking you,
Helen

From the desk of: Helen R. Thoms-Walsh,
Judicial Assistant
Ph: 729-4033 / E-mail: HThomsWalsh@supreme.court.nl.ca

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

Citation: *Anderson v. Canada (Attorney General)*, 2012 NLTD(G) 190
Date: 20121219
Docket: 200701T4955CCP

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

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

Docket: 2007 01T 5423

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

Docket: 2008 01T 0844

BETWEEN:	**SELMA BOASA AND RITA CHIDO**	PLAINTIFFS
AND:	**ATTORNEY GENERAL OF CANADA**	DEFENDANT

Docket: 2008 01T 0845

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

Docket: 2008 01T 0846

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

*** This page being replaced by first page due to typo however, this is marked as filed, 1st page is not (citation error)

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

Citation: *Anderson v. Attorney General (Canada)*, 2012 NLTD(G) 190
Date: 20121219
Docket: 200701T4955CCP

BETWEEN: **CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER** PLAINTIFFS

AND: **THE ATTORNEY GENERAL OF CANADA** DEFENDANT

AND: **GOVERNMENT OF NEWFOUNDLAND AND LABRADOR** THIRD PARTY

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

Docket: 2007 01T 5423

BETWEEN: **TOBY OBED, WILLIAM ADAMS AND MARTHA BLAKE** PLAINTIFFS

AND: **ATTORNEY GENERAL OF CANADA** DEFENDANT

Docket: 2008 01T 0844

BETWEEN: **SELMA BOASA AND RITA CHIDO** PLAINTIFFS

AND: **ATTORNEY GENERAL OF CANADA** DEFENDANT

Docket: 2008 01T 0845

BETWEEN: **SARAH ASIVAK AND DELANO FLOWERS** PLAINTIFFS

AND: **ATTORNEY GENERAL OF CANADA** DEFENDANT

Docket: 2008 01T 0846

BETWEEN: **EMILY DICKMAN AND DOMINIC DICKMAN** PLAINTIFFS

AND: **ATTORNEY GENERAL OF CANADA** DEFENDANT

Filed | 2012-12-19 | MEN

Before: The Honourable Madam Justice Gillian D. Butler

Place of Hearing:	St. John's, Newfoundland and Labrador
Date of Hearing:	December 5, 2012

Summary:

There is no fixed rule limiting the scope of discovery in class action proceedings to the issues relevant solely to the stage of the proceedings. However, on the facts it was appropriate to limit the discovery of the Representative Plaintiffs before the hearing of the common issues trial to the common issues set out in the Certification Order. The Court held that questions posed respecting the Representative Plaintiffs' experiences at the residential schools (but not the consequences of their experiences) fell within the scope of the common issues (being allegations of the existence of a duty of care and breach thereof).

Appearances:

Chesley F. Crosbie, Q.C., Kirk M. Baert, & Celeste Poltak	Counsel for Plaintiffs
Jonathan D.N. Tarlton, Mark S. Freeman, & Melissa A. Grant	Counsel for The Attorney General of Canada
Rolf Pritchard, Q.C.	Counsel for Government of Newfoundland and Labrador

Authorities Cited:

CASES CONSIDERED: Canadian Imperial Bank of Commerce v. Deloitte and Touche, [2008] O.J. No. 3304, 47 C.B.R. (5th) 39 (Sup. Ct.); **Ramdath v. George Brown College of Applied Arts and Technology**, 2012 ONSC 2747, [2012] O.J. No. 2475; **Szeto v. Dwyer**, 2010 NLCA 36, [2010] N.J. No. 187; **Kent v. Kent**, 2010 NLCA 53 [2010] N.J. No. 287; **Seascape 2000 Inc. v. Attorney General of Canada**, 2012 NLTD(G) 185.

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

RULES CONSIDERED: *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42, Schedule D (under the *Judicature Act*, R.S.N.L. 1990 c. J-4) r. 30.08 and r. 30.11; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 1.04 and r. 29.2.03.

REASONS FOR JUDGMENT

BUTLER, J.:

INTRODUCTION

[1] On December 5, 2012, I reserved my decision on the Application of the Attorney General of Canada ("Canada"), filed under Rules 30.08 and 30.11 of the *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42, Schedule D (under the *Judicature Act*, R.S.N.L. 1990 c. J-4). Canada seeks an Order compelling two Representative Plaintiffs (Ms. Anderson and Ms. Asivak) to answer questions on discovery regarding their experiences at identified residential schools, such questions having been objected to at their discoveries on September 11–14, 2012.

Discoveries Should be Confined to the Stage of the Class Action

[2] Plaintiffs' counsel relies on sections 12 and 18(3) of the *Class Actions Act*, S.N.L. 2001 c. C-18.1, in support of the position that, in class action proceedings, discoveries prior to the common issues trial must be confined to the common issues certified. I set out these sections below:

> **12.** (1) In a class action,
>
> (a) common issues for a class shall be determined together;
>
> (b) common issues for a subclass shall be determined together; and

(c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 27 and 28.

(2) The court may give a common judgment respecting the common issues and separate judgments respecting another issue.

18. (3) In deciding whether to grant a defendant leave to discover other class members, the court may consider

(a) the stage of the class action and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the examination for discovery is necessary in view of the defence of the party seeking leave;

(d) the approximate monetary value of the individual claims, if any;

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be examined; and

(f) another matter the court considers relevant.

[3] While counsel for Canada is largely in agreement with this general proposition, I note that neither section 12 nor section 18 restrict discovery in this fashion; indeed I conclude that such a restriction is not always appropriate.

[4] In **Canadian Imperial Bank of Commerce v. Deloitte and Touche**, [2008] O.J. No. 3304, 47 C.B.R. (5th) 39 (Sup. Ct.), a motion to restrict discovery before the common issues trial, to the common issues as certified, was denied. On the facts of the case before it, the Ontario Supreme Court held that Deloitte was entitled to ask questions about all relevant facts and circumstances relevant to the issues as pleaded (including damages) (see paragraph 61).

[5] In the **CIBC** decision the Ontario Superior Court held that permitting discovery questions beyond those relevant to the stage of the class proceedings was consistent with the principle of "judicial economy in class actions [as] an important

objective" (see paragraph 55). This led the Ontario Superior Court of Justice at paragraph 56 to conclude:

> ... that restricting Deloitte's discovery rights in the manner proposed by the Plaintiffs would or could in all the circumstances here severely prejudice/abrogate Deloitte's rights without substantially promoting judicial economy.

[6] In the case before me, the ages, health and isolated residences of the Representative Plaintiffs do suggest some judicial economy in discovering them once only, instead of repeating the exercise at each stage of the class action proceeding.

[7] On the other hand, I note that Counsel for the Plaintiffs has filed and will pursue an Application under Rule 38; in this Application the Plaintiffs seek a preliminary determination of whether a fiduciary duty existed between the parties. This is a relevant consideration for me on the question of whether I should limit the scope of discoveries at this stage of the proceeding to matters relevant to the common issues.

[8] In light of the foregoing and notwithstanding my conclusion (that there is no firm rule restricting discoveries to the matters relevant only to the stage of the class action proceeding) as well as my concerns expressed in paragraph [6] above, I shall accept counsels' general agreement that the current discoveries should be confined to matters relevant to the common issues.

[9] I move now to the dispute on whether the objectionable questions are indeed outside of the common issues as defined.

Discoveries Restricted to Defendant's Position in the Pleadings

[10] Paragraph 7 of the Certification Order granted on June 7, 2010 states:

AP

THE COURT ORDER AND DECLARES that the common issues for the Class are:

(a) by its operation or management of the ... School did the defendant breach a duty of care owed to the students of ... 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?;

(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 issues 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 issues (e) is "yes", what amount of punitive damages ought to be awarded?

[11] The Plaintiffs allege that since Canada's Defence asserts that no duty was owed by Canada to the students at the residential schools in question, discovery must be confined to the position in its Defence. I disagree.

[12] It is the pleadings as a whole that provide the backdrop for the assessment of relevancy of questions posed on discovery. The Plaintiffs' own claims give rise to assertions of a duty of care between the parties as well as the allegation that such duties were breached. I conclude therefore that, before the common issues trial, Canada must be permitted to pursue these assertions at discovery in order to assess the risks it faces (if any) on the Representative Plaintiffs' claims.

Questions Are Broader Than the Common Issues and Are Related to Individual Claims

[13] Stated broadly, the common issues are the alleged fiduciary duty, the existence of a duty of care, and alleged breach.

[14] Canada asserts that its outstanding questions are relevant to these issues and that the Representative Plaintiffs are the best source of direct evidence of the alleged experiences of the class members at the schools.

[15] Canada suggests that by restricting questions to experiences that were either personal to or witnessed by the Representative Plaintiffs (as opposed to the consequences of the experiences of the Representative Plaintiffs) the questions posed relate to one of the common issues. Further, Canada asserts that no similar objection to questions of this nature was raised on the examination of Representative Plaintiffs Webber, Lucy, Adams, and Obed.

[16] Plaintiffs' counsel objects on the basis that a Representative Plaintiff's individual experience would not be relevant to the common issues between the parties "at this stage". They suggest that Canada's questions cross over into issues that will be determined at later stages of this litigation.

[17] Plaintiffs' counsel referred to the Ontario decision in **Ramdath v. George Brown College of Applied Arts and Technology**, 2012 ONSC 2747, [2012] O.J. No. 2475, which decision concerned a class action having similar common issues (Was there a special relationship, were representations made and, if so, were they breached?).

[18] I pause to mention firstly that the court in **Ramdath** relied upon Ontario Rules 1.04(1.1) and 29.2.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. These Rules have codified the proportionality principle and required Ontario courts to consider proportionality factors in making a determination that a person is required to answer a question or produce a document.

[19] While Newfoundland and Labrador has not incorporated the proportionality principle in its *Rules*, I conclude that the principle nevertheless applies to procedural matters in this jurisdiction. Our Court of Appeal first addressed it in the context of interrogatories in **Szeto v. Dwyer**, 2010 NLCA 36, [2010] N.J. No. 187, at paragraphs 52-76 and some months later to a subpoena *duces tecum* in **Kent v. Kent**, 2010 NLCA 53 [2010] N.J. No. 287, at paragraph 74. Most recently this Court applied the principle to an Application to strike portions of a statement of claim in **Seascape 2000 Inc. v. Attorney General of Canada**, 2012 NLTD(G) 185 at paragraphs 24-30.

[20] I agree that proportionality is a relevant issue to the breadth and scope of the discovery process, to be applied with the objective of promoting and not frustrating the underlying purposes and objectives of the *Rules* and the class actions legislation. The time and types of processes involved must be proportionate to the expense and convenience of the parties, nature of the issues, nature of the proceedings, amount of money involved, time reasonably necessary to resolve the issue, complexity of the claims, and overall costs of the litigation.

[21] Applying the proportionality principles of the Ontario Rules in **Ramdath,** the Ontario Superior Court required the Plaintiffs to identify any documents they relied upon for their alleged misrepresentation and breach of contract claims (see paragraph 66).

[22] Albeit without reference to the proportionality principle, in **CIBC v. Deloitte** the Ontario Superior Court held that where "liability may hinge on findings relating in part to the specific nature of the relationship between the parties ... it would be grossly unfair to force [the defendant] to proceed to a trial of any or all of the common issues before it has been able to ascertain all facts relevant ..." to the common issues (see paragraph 32).

[23] The issues in the within class action are significant; they concern the management of residential schools in Labrador which the Plaintiffs or their families attended over decades, and at which it is alleged the students suffered mental and physical abuse. The Plaintiffs seek general, punitive and exemplary damages.

[24] In this case I accept that Canada's questions are motivated by a need to determine the factual basis for the Representative Plaintiffs' assertions of a duty owed and breached and not for any improper purpose. This evidence would have significant relevance to the common issues. Further, Canada's discovery of the Representative Plaintiffs is timely; there is no suggestion of unnecessary hardship or oppressiveness in the questions to which the Representative Plaintiffs objected. I conclude that the questions posed by Canada and objected to by the Representative Plaintiffs are consistent with an efficient and fair advancement of these class action proceedings.

[25] On the specific facts of this case only, I conclude that Canada should be entitled to pose on discovery to the Representative Plaintiffs all questions regarding their experiences at the schools but related to the broad common issues of whether a duty was owed by Canada to the students of the residential schools, and any alleged breach of this duty.

[26] To clarify for the benefit of the parties, *at this stage of the proceedings* Canada shall be permitted to pursue questions of the Representative Plaintiffs relevant to the proximity relationship and reasonable foreseeability of harm alleged. As examples only, this would include issues of contact and/or dealings with authorities at the residential school, the operation of the school including routine and schedules (daily, monthly, seasonally and annually), as well as the students' expectations of Canada, any undertakings made by Canada, requests made by students, and responses given to requests made and/or any protections provided.

[27] To further clarify as to the breach of duty alleged, and as examples only, Canada shall be permitted to pursue questioning relative to the general living conditions, health, education, religious instruction, cultural maintenance, safety, socialization, discipline, extracurricular activities, alleged discrimination, and alleged breach of duty. From this line of questioning, I expect Canada to be able to assess how the Representative Plaintiffs consider that Canada fell short of the duty of care they expected of it, relative to the residential schools.

[28] A summary of the discovery questions refused was provided at Tab C of Canada's Brief. I have reviewed each question/issue and conclude that they all fall within the broad parameters of questions related to one of the common issues as certified.

[29] Therefore, in light of the positions of the parties (and notwithstanding my conclusion that there is no firm rule requiring discoveries in class actions to be restricted to issues current to the relevant stage of proceedings) **IT IS ORDERED:**

(i) **THAT** Canada may pursue on oral discoveries of Representative Plaintiffs *at this stage of the proceedings* all questions regarding their experiences at the schools but related to the broad common issues of whether a duty was owed by Canada to the students of the residential schools and any alleged breach of this duty. This shall include but is not limited to the discovery questions refused and which were summarized in Canada's Brief;

(ii) **THAT** Canada may not pursue on discovery of the Representative Plaintiffs *at this stage of the proceedings* any questions relative to the consequences of the Representative Plaintiffs' respective experiences at the residential schools in question; and

(iii) **THAT** in light of my earlier ruling, on the interpretation of section 37 of the *Class Actions Act*, there shall be no order as to costs on this Application.

GILLIAN D. BUTLER
Justice

THIS IS EXHIBIT "H" REFERRED TO IN THE
AFFIDAVIT OF SEAN O'DONNELL
SWORN BEFORE ME, THIS 25TH DAY OF MARCH, 2013

A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

Jonathan Reuben Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

Citation: *Anderson et al v. The Attorney General of Canada* 2008NLTD166
Date: 2008 10 28
Docket: 2007 01T 4955 CP

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Before: The Honourable Mr. Justice Robert A. Fowler

Place of hearing:	St. John's, Newfoundland and Labrador
Summary:	Preliminary applications at the certification hearing stage of a class action suit should be heard following the certification hearing and not prior to such hearing.
Appearances:	
Mr. Kirt M. Baert and Ms. Celeste Poltak	Appearing on behalf of the Plaintiffs
Mr. Jonathan D.N. Tarlton and Ms. Corinne Bedford	Appearing on behalf of the Defendant

Authorities Cited:

CASES CONSIDERED: Hollick v. Toronto (City) [2001] 3 S.C.R. 158, 2001 S.C.C. 68 (CanLII); **Baxter v. Canada,** [2005] O.J. No. 2165 (S.C.J.); **McNaughton Automotive Ltd. v. Co-Operators General Insurance Co.,** (2001) 10 C.P.C. (5th) 1 (C.A.); **Montreal Trust Co. of Canada v. Hickman,** (2001), 204 Nfld. & P.E.I.R. 58; **Miawpukek Band v. Ind-Rec Highway Services Ltd.** (1999) 172 Nfld. & P.E.I.R. 245 (NLCA); **Potter v. Bank of Canada** (2005) 9 C.P.C. (6th) 36 (On S.C.); **Hughes v. Sunbeam** (2002) 61 O.R. (3) 433 (C.A.) and **Re: Holmes and London Life Insurance Company et al** (2000), 50 O.R. (3d) 388 (S.C.).

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

RULES CONSIDERED: *Rules of the Supreme Court,* 1986.

REASONS FOR JUDGMENT

FOWLER, J.:

INTRODUCTION

[1] The issue before me at this time is whether or not to hear and determine certain defence motions prior to or following the certification hearing of a class action application.

[2] Section 3 of the *Class Action Act*, S.N.L. 2001, C-18.1 states:

> 3. (1) One member of a class of persons who reside in the province may commence an action in the court on behalf of the members of that class.
>
> (2) The member who commences the action shall apply to a judge of the court within the time period in subsection (3) for an order

certifying the action as a class action and appointing the member as the representative plaintiff.

(3) An application under subsection (2) shall be made

(a) within 90 days after

(i) the day on which the defence was served, and

(ii) the day on which the time set in the Rules of the Supreme Court, 1986 for filing the defence expires, if a defence is not served,

whichever is later; or

(b) with leave from a judge of the court.

(4) A judge of the court may certify a person who is not a member of the class as the representative plaintiff if it is necessary to avoid a substantial injustice to the class.

[3] While certification is not the issue at this time, it is the main procedural issue that the court will be asked to determine following these preliminary applications. Section 4 of the *Act* makes it mandatory to certify an action as a class action when certain elements have been established.

[4] That section reads as:

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.

(2) In determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether

(a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) the class action would involve claims that are or have been the subject of another action;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

[5] And further at section 13:

Notwithstanding section 12 , the court may make an order it considers appropriate respecting the conduct of a class action to ensure a fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[6] How then does a determination of the sequencing of the defendant's applications advance or impair the courts ability to determine the status of the matter as being a class action or not?

[7] It is apparent from these statutory references that courts are to be sensitive to time expenditures when moving these matters through the certification process to ensure a "fair and expeditious determination" (s. 13).

[8] The very nature and purpose of class action proceedings is to hear the many, as one; rather than one after the other, in order to facilitate time and efficiency without compromising fairness. To that end the *Act* mandates that the certification hearing commence within the 90 day time period set out in section 3, subsection 3.

[9] The Supreme Court of Canada in **Hollick v. Toronto (City)** [2001] 3 S.C.R. 158, 2001 S.C.C. 68 (CanLII) set out the advantages of proceeding by way of class action where McLachin, C.J. stated at paragraph 15:

> ... class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in 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 member 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.

[10] It seems therefore that to engage in procedures that tend to defeat the efficiencies of class action proceedings is to be discouraged unless the court is satisfied that such procedures will advance the fair and expeditious determination of the class action.

[11] In the present case counsel for the Defendant; Attorney General of Canada (Canada) has served the Plaintiffs Carol Anderson, Allen Webber and Joyce Webber with a Demand for Particulars and intends to apply to this court for an order to provide such, pursuant to *Rule 14.23* of the *Rules of the Supreme Court*, 1986 of this province. That *Rule* states:

> 14.23. (1) Where a party, upon receipt of a notice in writing demanding a further and better statement of the nature of the claim or defence of the party, or further and better particulars of any matter stated in any pleading, affidavit or statement of facts of the party, fails to supply them within the time specified in the notice, which time shall not be less than ten days, the Court may, upon such terms as are just, order the particulars to be delivered within a specified time, or, if no time is specified, then the particulars shall be filed and delivered within ten days from the date of the order.

[12] As well, the Defendant Canada intends to apply to the court for an order compelling the Plaintiffs to add other parties as Defendants to the proposed class actions rather than to proceed by way of third party application itself.

[13] The issue before me relates only to the sequencing of these proposed applications, that is; showed they be heard prior to or following the class action certification hearing? It is not for me, at this stage, to determine the merits of these proposed applications.

[14] It is clear that a class action certification hearing is a procedural mechanism only and is not designed to consider or determine the merits of the suit itself. Section 6, subsection (2) makes this very clear when it states:

> An order certifying an action as a class action is not a determination of the merits of the action.

[15] I take this to mean, as well, that I am not to consider the merits of any preliminary applications that would impact on the merits of the class action itself

other than the effect such applications would have on administering the certification hearing itself. I would add that it is easy to slip into an analysis of adding third parties or ordering particulars especially when the respective positions of the parties tend to go in that direction, however at this point I am only concerned with determining when I should hear these applications.

[16] In the instant matter it is the position of the Plaintiffs that these preliminary applications be heard following the certification hearing. On the other hand, it is the Defendant's position that we deal with the preliminary applications prior to the certification hearing. At this stage, therefore, I will not comment on the respective strengths of the Defendant's applications but only decide whether these applications be heard prior to the certification hearing itself as argued by the Defendants.

[17] To argue the merits of the preliminary applications at this time is clearly premature yet much of the authorative references and focus of the parties respective submissions tend to go in that direction.

[18] It seems that the default position is that the first order of business in any class action proceeding is to deal with the certification hearing. The *Act* implies this; however, the *Act* is not to be seen as restricting any application that would more readily promote a fair and expeditious result. In **Hollick v. Toronto (City)**, **supra,**, McLachlin, C.J. stated at paragraph 15 that:

> In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the *Act* in a way that gives full effect to the benefits foreseen by the drafters.

[19] In **Baxter v. Canada**, [2005] O.J. No. 2165 (S.C.J.), W.K. Winkler, J. in dealing with the same issue of the sequencing of motions as is before this court, stated at paragraphs 9 through 12 that:

9 Although the CPA does not expressly require the certification motion to be the first order of business, the 90 day time-frame imposed by section 2(3) provides a clear indication that the certification motion should be heard promptly and normally be given priority over other motions. In another case involving the scheduling of motions in a class proceeding, Attis v. Canada (Minister of Health), [2005] O.J. No. 1337 (S.C.), this court held at para. 7 that "as a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined."

10 Similarly, in Moyes, Nordheimer J. stated at para. 8:
The time limits set out in section 2(3) would strongly suggest that the certification motion is intended to be the first procedural matter that is to be heard and determined. While I recognize that these time limits are rarely, if ever, achieved in actual practice, I do not consider that that reality detracts from the intent to be drawn from the section.
Nordheimer J. ultimately determined that the defendant's motion for summary judgment could not be heard until after the determination of the certification motion. (See also: Ward-Price v. Mariners Haven Inc., [2002] O.J. No. 4260 (S.C.), supra, at para 36).

11 Prior to certification, an action commenced under the CPA is nothing more than an intended class proceeding: Logan v. Canada (Minister of Health) (2003), 36 C.P.C. (5th) 176 (S.C.) at para. 23, aff'd 71 O.R. (3d) 451 (C.A.) (See also: Boulanger v. Johnson & Johnson Corp. (2003), 64 O.R. (3d) 208 (Div. Ct); Attis, supra at para 14.) In the pre-certification period it is not clear whether a proceeding will ultimately be certified. Further there is an element of fluidity in respect of the class definitions and the common issues. Accordingly, motions brought prior to certification may turn out to have been unnecessary, over-complicated or incomplete.

12 Moreover, courts will not always have sufficient information to adequately determine motions at the pre-certification stage. This is particularly apparent with respect to the Jurisdictional Motions.

[20] It was not the position however in **Baxter (supra)** that certain motions or applications that would tend to more efficiently move the certification hearing along would not be permitted in advance of the certification hearing. On that, W.K. Winkler, J. stated at paragraph 14 as:

14 Admittedly, there are instances where, as indicated in both Attis and Moyes, there can be exceptions to the rule that the certification motion ought to be the first procedural matter

> to be heard and determined. It may be appropriate to make an exception where the determination of a preliminary motion prior to the certification motion would clearly benefit all parties or would further the objective of judicial efficiency, such as in relation to a motion for dismissal under Rule 21 or summary judgment under Rule 20. Such motions may have the positive effect of narrowing the issues, focusing the case and moving the litigation forward. An exception may also be warranted where the preliminary motion is time sensitive or necessary to ensure that the proceeding is conducted fairly. (See: Moyes, supra at para. 12; Re Holmes and London Life v. London Life Insurance Co. et al. (2000), 50 O.R. (3d) 388 (S.C.) at paras. 7-8; Hughes v. Sunbeam Corp. (Canada) Ltd. (2002), 61 O.R. (3d) 433 (C.A.), at para. 15, leave to appeal dismissed [2002] S.C.C.A. No. 446; Segnitz v. Royal and SunAlliance Insurance Co. of Canada, [2001] O.J. No. 6016 (S.C.); Stone v. Wellington County Board of Education (1999), 29 C.P.C. (4th) 320 (C.A.), leave to appeal dismissed, [1999] S.C.C.A. No. 336.); Vitelli v. Villa Giardino (2001), 54 O.R. (3d) 334 (S.C.); Pearson v. Inco (2001), 57 O.R. (3d) 278 (S.C)). [Emphasis added]

[21] In **McNaughton Automotive Ltd. v. Co-Operators General Insurance Co.,** (2001) 10 C.P.C. (5th) 1 (C.A.), Sharpe, J.A. writing for the Ontario Court of Appeal acknowledged that there were circumstances when it might be necessary to determine a legal issue prior to the hearing of the certification hearing. In that case both parties had consented to the preliminary issue prior to certification. Even in these circumstances Sharpe, J.A. took the position that such applications should not be entertained without careful consideration. He stated at paragraph 36:

> [36] We must not lose sight of the fact that this proceeding is an intended class proceeding and that, if certified, it will affect the rights of a significant number of individuals. In certain circumstances, it may be appropriate to make a substantive determination of law at the request of the proposed representative plaintiff prior to certification: see e.g. Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.). In the present case both parties were content to have the substantive issue of the interpretation and the effect of the statutory condition resolved before certification. I see no reason why we should not grant declaratory relief determining the appellant's rights. However, we must also exercise a measure of restraint lest we put our substantive cart before the procedural horse. While I think it appropriate to give a declaration as to the effect of the statutory condition, it would be inappropriate to go any further before there has been an order certifying the matter as a class proceeding. In particular, we should avoid attempting to resolve the many controversial issues that flow from the declaration of right. [Emphasis added]

[22] Counsel for the Defendant Canada at paragraph 15 of his Pre-hearing Memorandum submits that "the legislators clearly intended that preliminary applications essential to the objectives of class actions should be heard before the certification hearing". For the reasons I have stated earlier I am not convinced that this is what the framers of the *Class Action Act* intended, but rather; short of some fatal circumstance in the application, certification should be the first order of business.

[23] Counsel for the Defendant Canada refers me to **Montreal Trust Co. of Canada v. Hickman**, (2001), 204 Nfld. & P.E.I.R. 58 at para. 14 (NLCA) where the Newfoundland and Labrador Court of Appeal considered the appropriateness of striking a statement of claim on the ground that no cause of action was disclosed. Green, J.A. (as he then was) stated at paragraph 10 of that decision that:

> **10** "As a starting point, three principles can be stated: (a) a statement of claim will be struck out only if it is 'plain and obvious' that it cannot succeed: **Hunt v. T & N plc et al.**, [1990] 2 S.C.R. 959; 117 N.R. 321" ...

[24] He further added at paragraph 14 that:

> **14** In like manner, where the pleading is deficient in the sense that the pleaded facts disclose a potential cause of action but not in favor of or against the right party, the court must give consideration to whether the litigation can be saved by adding the proper party under Rule 7.04(1) before taking the drastic step of striking out the claim solely on the basis that no cause of action involving the existing parties is disclosed.

[25] In **Montreal Trust** above the Court had to deal with an application to strike certain pleadings on the ground that no cause of action was disclosed by them. Green, J.A.'s reference also related to a pleading that was deficient and risked being struck because the right party had not been identified. In that case the court did consider adding the proper party. That is not the situation before me. In the present case the Plaintiffs have identified the Defendant and none other. The Defendant is not claiming that the wrong party is named but rather that there may

be other defendants who should be included (this may prove to be the case but at this stage it is only suggestion or speculation). Generally, the Plaintiff can choose who it intends to sue and while not absolute, short of scuttling the litigation by not dealing with the issue as a preliminary matter as implied by Green, J.A. in **Montreal Trust (supra)**, or where it can readily be determined that no cause of action exists, the choice should be not interfered with. There are other avenues open to the Defendant in this case to have other parties added as defendants such as *Rule 7.04(1)* or to Third Party these potential defendants. However, the Defendant Canada chooses not to proceed by another route other than have this matter decided prior to the certification hearing itself.

[26] In **Miawpukek Band v. Ind-Rec Highway Services Ltd.** (1999) 172 Nfld. & P.E.I.R. 245 (NLCA), Green, J.A. in determining the circumstances under which it is appropriate for a court to determine preliminary points of law or fact under *Rule 38* of the *Rules of Supreme Court, 1986* acknowledged the profound implications associated with the ruling on the legal structure of community life for not only the Miawpukek Band, but for all other groups of aboriginal peoples in the province ... as well as for governmental agencies ... affecting both the federal and provincial levels of government (see paragraph 5 **Miawpukek Band, supra**).

[27] The specific issue concerning Green, J.A. in **Miawpukek Band (supra)** was whether or not the hearing of the pre-trial application would substantially dispose of the issues between the parties (see paragraph 9 of **Miawpukek Band, Supra**).

[28] At paragraph 11 Green, J.A. stated:

> 11 The decision to deal with an issue or question as a preliminary question under Rule 38 is a discretionary one. See, Bank of Montreal v. Mercer (1998), 163 Nfld. & P.E.I.R. 119 (NFCA). The parties are not entitled, as of right, to carve out a discrete issue or question from a proceeding heading to trial or hearing and have it heard separately. The general principle is that all issues relating to a particular proceeding should be disposed of at one time. There will be many situations where the fragmentation of issues for determination would cause more problems that it would solve. [Emphasis added]

[29] Green, J.A. then went on to identify a number of principles governing whether or not to permit a preliminary question of law or fact prior to the trial or hearing itself. He stated these principles at paragraphs 14 to 20 inclusive as follows:

> 14 First, to justify fragmentation of the determination of the issues, there should be some discernible advantage to proceeding in that way rather than dealing with them as part of an overall trial or hearing. The most obvious example would be if the determination of a preliminary issue will substantially dispose of the case (Henley et al. v. Torbay Estates Ltd. et al. (1993), 109 Nfld. & P.E.I.R. 285 (NFSC,TD), thereby enabling the court to enter a judgment pursuant to Rule 38.01(2) (See Etheridge v. Witless Bay (Town) (1997), 155 Nfld. & P.E.I.R. 346 (NFSC,TD). Even if ordering the hearing of a preliminary issue would not dispose of all of the issues in the litigation, however, it still may be appropriate to have a preliminary determination of one or more discrete issues if those issues are "capable of being compartmentalized and dealt with separately" (Bank of Montreal v. Mercer, at para [6]) and doing so would simplify the remainder of the trial, thereby saving time or costs, in the sense of their being an overall net gain to the litigation process (Bank of Montreal v. Mercer; Druken v. R.G. Fewer and Associates, Inc.; (1996), 138 Nfld. & P.E.I.R. 165 (NFSC,TD); Non-Marine Underwriters, Lloyd's London v. Menchions (1996), 149 Nfld. & P.E.I.R. 61 (NFSC,TD).
>
> 15 Secondly, the court must be satisfied that a hearing conducted pursuant to Rule 38 is a "suitable vehicle" to determine the questions that have been posed (Stagg et al. v. John Cabot (1997) 500 Anniversary Corporation et al., [1998] N.J. No. 328, [1997] No. 185 (NFCA; filed November 26, 1998), per Gushue J.A. at para. [19]). Central to this determination is whether a sufficient evidentiary record can be provided. This is equally important where the questions posed are ones of law, since legal questions are not to be answered in the abstract, but against the factual background of the particular dispute. This requirement of a proper record is particularly important in constitutional cases (Leyte v. Newfoundland (Minister of Social Services) (1998), 164 Nfld. & P.E.I.R. 278 (NFCA) but it is also applicable in other cases (Stagg).
>
> 16 Thirdly, where the issue for determination is a point of law, the discretion to determine the issue as a preliminary matter should generally be exercised only if the evidentiary background can be established by an agreed statement of facts or if the facts underlying the resolution of the legal issue are a matter of public record. (See, Leyte; Henley; Druken)

17 Fourthly, as an exception to the third principle, the court may, in exceptional cases, receive evidence that may be necessary to provide a background for the resolution of the legal issue, but that would only be appropriate where the issues of fact and law on the preliminary issue and on the remaining issues are not "complex and intermingled" (Human Rights Commission (Newfoundland) v. Newfoundland (Minister of Health) et al (1998), 164 Nfld. & P.E.I.R. 251 (NFCA), per Cameron J.A. at para. [21]); or the facts are not in dispute and their resolution does not depend on determination of the credibility of witnesses (Druken; Henley));or the party asserting that the facts are in dispute holds an "untenable position" (Royal Bank of Canada v. Colonial Fire and General Insurance Co. (1996), 146 Nfld. & P.E.I.R. 66 (NFSC,TD), as where the party raising the question as to disputed facts has not presented any evidence to rebut the evidence of the party alleging that the facts are not in dispute (Bank of Nova Scotia v. Marco Limited et al (1998), 169 Nfld. & P.E.I.R. 166 (NFSC,TD). The rationale for this limitation is that if, in order to resolve the legal question the court has to resolve the evidentiary issues as well, it will usually be just as well to hold a trial.

18 Fifthly, although Rule 38.01(1)(a) (as well as Rule 40.04) also contemplates the possibility of preliminary determination of questions of fact as opposed to questions of law, as a practical matter if the result would simply be a trial in another form there would generally be no justification for doing so. If, on the other hand, the determination of one contentious issue has the reasonable prospect of leading to a resolution of other issues thereby obviating the need for a further trial, or has the potential, if decided in a particular way, of disposing of the whole case or substantially simplifying the trial on remaining issues, there might well be justification for invoking the rule. (See, e.g., Mutual Life Assurance Company of Canada v. Porter, [1996] N.J. No. 283, [1994] St. J. No. 2136 (NFSC,TD; filed November 7, 1996).

19 Sixthly, even where the court is persuaded that it is appropriate to make a preliminary determination of law or fact, it should turn its mind to the giving of directions both with respect to the manner of the conduct of the preliminary hearing as well as with respect to how the remainder of the proceeding is to proceed in the event that the preliminary determination does not dispose of the whole case. Thus, if the preliminary issue involves a constitutional question, the court would have to ensure that the appropriate notices were delivered pursuant to s. 57 of the Judicature Act (if not already attended to) or even if the issue is not a constitutional one, to consider, in exceptional cases, notification of others who might have an interest in the issue and might have a claim to intervene, if the issue engaged has public implications extending beyond the parameters of the particular case. Furthermore, the court would have to consider whether, as a result of a ruling on a preliminary question, subsequent amendments to pleadings or changes in the status of parties may be necessary with respect to the remaining issues to be

tried. See, Pelley's Estate v. Pelley's Estate (1987), 65 Nfld. & P.E.I.R. 238 (NFSC,TD) at paras [7],[22].

20 Seventhly, where the issue which is being sought to be determined as a preliminary point, either as a question of law or fact, involves the status of a party, it is generally more appropriate to determine that matter by way of an application under Rule 7.04 relating to misjoinder of parties, rather than an application under Rule 38, even though examples do exist of issues of party status being determined under the rubric of a Rule 38 application (Pelley's Estate). This is because the issue, whenever the status of a party is involved, is not simply whether the existing party is a proper party but also whether another, appropriate, party should be substituted. This follows from Rule 7.04(1) which provides that no proceeding will be defeated by the misjoinder on non-joinder of any party or person, and from Rule 7.04(2) which provides broad powers to the court to add, strike out or substitute parties, even on its own motion, to enable the matter to be effectually adjudicated. The danger in attempting to deal with such issues under Rule 38 is that attention may become deflected from the question as to whether the matter may nevertheless proceed with the addition of or change in status or description of a party and become immediately focused instead on issues of dismissal of the claims under Rule 38.01(2).

[30] In addition to the preliminary question of whether or not the court should entertain submissions on the inclusion of third parties, the Defendant Canada requests the court to allow it to argue on a preliminary application a demand for particulars from the plaintiffs. The physical dimensions of what is being sought consists of a 21 page document requesting expansion on just about every element in the Statement of Claim. Whether or not such clarification is necessary is not for me to comment on except to say that to allow this request for particulars prior to the certification hearing would consume an enormous amount of time and in addition has the real potential to delay the application for certification indefinitely. In that regard, where a large number of the potential class of plaintiffs is aged it would only serve to bog down the process and categorically deny them access to the court. In any event, without commenting on the merits of the Defendant Canada's Demand for Further Particulars, I find that the Statement of Claim is sufficiently stated to inform the Defendant of the case to be met and permit the Defendant to proceed on at least this Application for Certification. If further particulars are necessary to move the matter forward an application can be made following the Certification Hearing in the normal course of the trial. I can see no prejudice to the Defendant Canada's case to proceed in this manner. The

Defendant Canada will retain the opportunity to have its position stated and determined on this issue following the Certification Hearing.

[31] In relation to these two issues; that is, the Defendants Demand for Particulars; and the Defendant's demand to compel the Plaintiffs to add further defendants, I am convinced that the hearing of these preliminary applications would do nothing to advance a fair and expeditious determination of the certification hearing. On the contrary, lengthy preliminary proceedings with their inevitable delays for the serving of notices especially in relation to potential new defendants will almost certainly de-rail the certification hearing and render the *Class Actions Act* ineffective.

[32] There is no discernible advantage such as the substantial disposal of the case that is apparent by permitting these preliminary applications. I cannot agree with counsel for the Defendant when he states that "access to justice, judicial economy, and behaviour modification are all better served by having Canada's applications heard prior to certification" (see para. 35, Pre-hearing Memorandum of the Defendant).

[33] Counsel for the Defendant relies on **Potter v. Bank of Canada** (2005) 9 C.P.C. (6th) 36 (On S.C.), **Hughes v. Sunbeam** (2002) 61 O.R. (3) 433 (C.A.) and **Re: Holmes and London Life Insurance Company et al** (2000), 50 O.R. (3d) 388 (S.C.) as authority where the courts had decided that the preliminary applications could be heard prior to the motion for certification.

[34] In **Potter (supra)** case the court decided to grant the preliminary application on the basis that to do so might result in the certification hearing being an inappropriate vehicle in which to proceed, in other words that it would potentially dispose of the class action in favour of some other procedure. Sanderson, J. stated at paragraph 16 that:

> "If on the preliminary motion this Court were to declare the CPA to have no application, the Plaintiffs' proposed certification motion would be clearly inappropriate".

[35] And further at paragraph 27 he stated:

> "Depending on the result, the hearing of the certification motion may be entirely avoided or the length of the certification motion may be substantially shortened".

[36] In **Hughes (supra)** Laskin, J.A. on the Ontario Court of Appeal once again made it clear that it is appropriate to hear a preliminary motion on the ground that it discloses no reasonable cause of action in relation to a class action proceeding. He stated at paragraph 15:

> [15] Section 35 of the Class Proceedings Act provides that "[t]he rules of court apply to class proceedings." Thus, even before certification, a defendant may bring a motion under rule 21.01(1)(b) to strike a representative plaintiff's claim on the ground that it discloses no reasonable cause of action. See Stone v. Wellington (County) Board of Education (1999), 29 C.P.C. (4th) 320 (Ont. C.A.). And, if the representative plaintiff does not have a cause of action against a named defendant, the claim against that defendant will be struck out. Put differently, as Nordheimer J. said in Boulanger v. Johnson & Johnson, [2002] O.J. No. 1075 (Quicklaw) (S.C.J.): "for each defendant who is named in a class action there must be a representative plaintiff who has a valid cause of action against that defendant."

[37] The same reasoning follows from **Re: Holmes (supra)** where Cumming, J. of the Ontario Superior Court of Justice, in considering the proper sequencing of events in a class action matter stated at paragraphs 6, 7 and 8 inclusive that:

> [6] In my view, there is not any provision in the CPA which requires that the certification motion be heard first when the representative applicant (or plaintiff) so requests. Rather, discretion is conferred by s. 12 upon the court respecting the conduct of the proceeding, with the objective of ensuring "its fair and expeditious determination".
>
> [7] Where the class proceeding is by way of a civil action with a statement of claim, significant issues are routinely dealt with prior to certification. This can include a determination of the merits through summary judgment by way of a Rule 20 motion to the effect that there is no genuine issue for trial. Indeed, the Ontario Court of Appeal has approved the procedure of pre-certification summary judgment motions: Stone v. Wellington (County) Board of Education (1999), 29 C.P.C. (4th) 320 (Ont. C.A.) at p. 322.
>
> [8] It is also not uncommon for a Rule 21 motion to be brought by a defendant asserting that the statement of claim does not disclose any reasonable cause of action.

[38] I agree with the position that where a preliminary application has the potential to dispose of the litigation or more efficiently address the objectives of the *Class Actions Act*, then it should be heard prior to the certification hearing.

[39] That is not the case in the present matter and I am convinced that to permit these two applications to proceed prior to the certification hearing will cause this certification hearing stage of the intended class action to spiral down a timeless rabbit hole wherein one particular application begets another. As well, to permit preliminary submissions on the inclusion of potential third parties will surely necessitate notice to be served on these potential third parties, with their resultant responses and corresponding applications.

SUMMARY

[40] I can find no "discernible advantage" to proceeding on these applications prior to the certification hearing (**Miawpukek Band, Supra** at para. 14).

[41] For these reasons the applications of the Defendant Canada are denied at this certification stage of the class action and are to follow the determination of the certification hearing.

COSTS

[42] The Plaintiffs will be awarded costs in these applications on a taxation basis and to be paid forthwith following taxation.

ROBERT A. FOWLER
Justice

THIS IS EXHIBIT "I" REFERRED TO IN THE AFFIDAVIT OF SEAN O'DONNELL SWORN BEFORE ME, THIS 25TH DAY OF MARCH, 2013

A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

Jonathan Reuben Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

2007 01T4955CP

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

THE HONOURABLE JUSTICE BUTLER) TUESDAY, THE 27TH
)
) DAY OF MARCH, 2012

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER
and JOYCE WEBBER

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

BROUGHT UNDER THE *CLASS ACTIONS ACT*, S.N.L. 2001, C. C-18.1
BEFORE THE HONOURABLE JUSTICE GILLIAN BUTLER,
CASE-MANAGEMENT JUDGE

ORDER

THIS APPLICATION, brought by the parties for an order amending the litigation timetable originally approved by the Honourable Mr. Justice Fowler, by order dated June 24, 2010, was heard this date via teleconference.

ON HEARING the submissions of counsel for the parties, upon being advised of the consent of the parties and that the June 24, 2010 order was stayed pending the disposition of the Defendant's appeal of the certification order to the Newfoundland Court of Appeal, dismissed December 21, 2011,

1. **THIS COURT ORDERS** that the litigation timetable attached hereto as Schedule "A" be and hereby is approved and that the steps and deadlines included therein shall not be varied, altered or changed except with leave of this court.

Filed 18 April 2012 mw

SCHEDULE "A"

TIMETABLE

	Description	Date Due
1.	Plaintiff to serve Amended Statement of Claim by: (unfiled Amended Statement of Claim received by the Defendant March 21, 2012)	March 20, 2012
2.	Defendant to deliver any Demand for Particulars by:	April 23, 2012
3.	Plaintiff to advise whether it will respond to Demand:	April 30, 2012
4.	If Defendant wishes to move on Demand, to do so by:	June 1, 2012
5.	If Defendant wishes to make a Rule 7.04 application to add parties, it must be filed by:	May 15, 2012
6.	If Defendant does not move on Demand, Defence by:	May 31, 2012
7.	Exchange of documentary productions by:	June 30, 2012
8.	If Defendant files Rule 7.04 application by May 15, 2012, the application shall be heard on:	July 26, 2012
9.	Discoveries of Plaintiffs:	September 10, 11, 12, 13 and/or 14, 2012
10.	Discoveries of Defendant:	October 15 (week of) and/or October 22 (week of)
11.	Completion of all discoveries of parties by:	October 31, 2012
12.	Any motions arising from discoveries by:	November 30, 2012
13.	Plaintiffs to serve experts' reports by:	January 15, 2013
14.	Defendant to serve experts' reports by:	March 15, 2013
15.	Discoveries of experts (if any) completed by:	May 31, 2013
16.	Pre-trial conference:	June 2013
17.	Common issues trial (6 weeks):	September-October 2013

CAROL ANDERSON et al Plaintiffs	and	**THE ATTORNEY GENERAL OF CANADA** Defendant	Court File No: 2007 01T4955CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR TRIAL DIVISION (GENERAL)
Proceeding commenced at the City of St. John's

BROUGHT UNDER THE CLASS ACTIONS ACT, S.N.L. 2001, C. C-18.1, BEFORE THE HONOURABLE JUSTICE GILLIAN BUTLER, CASE MANAGEMENT JUDGE

ORDER

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012

THIS IS EXHIBIT "J" REFERRED TO IN THE
AFFIDAVIT OF SEAN O'DONNELL
SWORN BEFORE ME, THIS 25TH DAY OF MARCH, 2013

A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

Jonathan Reuben Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

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

Citation: *Anderson v. Canada (Attorney General)*, 2012 NLTD(G) 147
Date: 20121017
Docket: 2007 01T 4955

BETWEEN:	**CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER**	PLAINTIFFS
AND:	**ATTORNEY GENERAL OF CANADA**	DEFENDANT

Docket: 2007 01T 5423

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

Docket: 2008 01T 0844

BETWEEN:	**SELMA BOASA AND RITA CHIDO**	PLAINTIFFS
AND:	**ATTORNEY GENERAL OF CANADA**	DEFENDANT

Docket: 2008 01T 0845

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

Docket: 2008 01T 0846

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

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Before: The Honourable Madam Justice Gillian D. Butler

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: July 25 and 26, 2012

Summary:

The Defendant sought to add four proposed defendants to five certified class actions. The Plaintiffs objected on the basis that they had made a conscious choice to sue Canada only alleging that it owed an exclusive non-delegable fiduciary duty of care to the Plaintiffs relative to the operation of residential schools in Labrador after March 31, 1949.

Held: Rule 7.04.(2)(b) was the applicable Rule and required the Defendant to establish either the "ought to" or "necessary" branches of the test. The Court concluded that neither branch was met and that therefore no discretion arose under Rule 7.04.(2)(b). To the extent that an independent basis to add the proposed defendants was available under section 7 of the *Contributory Negligence Act*, the Court declined to exercise discretion concluding that to do so would cause substantial prejudice to the Plaintiffs.

Appearances:

Chesley F. Crosbie, Q.C. with Kirk M. Baert and Celeste Poltak	Counsel for the Plaintiffs
Jonathan D.N. Tarlton with Mark S. Freeman and Melissa A. Grant	Counsel for the Defendant
Daniel M. Boone	Counsel for Western School Board and Labrador District School Board
Rolf Pritchard, Q.C. with M. Gerard Quigley	Counsel for Her Majesty is Right of Newfoundland and Labrador

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Philip J. Buckingham	Counsel for The International Grenfell Association
Steven J. May	Counsel for The Moravian Church of Newfoundland and Labrador

Authorities Cited:

CASES CONSIDERED: **10475 Newfoundland Ltd. v. Houston**, 2012 NLCA 34, 323 Nfld. & P.E.I.R. 1; **Tucker v. Unknown Person**, 2012 NLTD(G) 132; **Mandavia v. Central West Health Care Institutions Board**, [2003] N.J. No. 17, 222 Nfld. & P.E.I.R. 265 (S.C.T.D.(G)); **Clearwater Fine Foods Inc. v. Day & Ross Inc.**, 2003 NLSCTD 106, 227 Nfld. & P.E.I.R. 187; **Vardy v. Dufour**, 2008 NLCA 22, 275 Nfld. & P.E.I.R 247; **Amon v. Raphael Tuck & Sons Ltd.**, [1956] 1 Q.B. 357, [1956] 1 All E.R. 273; **C.(Y.) v. Canada (Attorney General)**, 2001 SKQB 217, [2001] S.J. No. 296; **Letvad v. Fenwick**, 2000 BCCA 630, 82 B.C.L.R. (3d) 296); **Schroeder v. DJO Canada Inc.**, 2009 SKQB 169, 77 C.P.C. (6th) 279; **Rice v. Atlantic Lottery Corporation Inc.**, 2011 NLTD(G) 65, 310 Nfld. & P.E.I.R. 234.

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.) (Terms of Union), as amended; *The Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.); *Contributory Negligence Act*, R.S.N.L. 1990, c. C-33.

RULES CONSIDERED: *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42, Rule 7.04.

TEXTS CONSIDERED: A.S. Diamond, I.H. Jacob & P. Adams, *The Annual Practice 1963*, Vol. 1 (London, UK: Sweet & Maxwell, Ltd., 1963) (the "White Book"); Klar, Lewis, *Tort Law*, 3rd ed. (Toronto: Carswell, 2003) at pages 487-488; Klar, "Contribution Between Tort-Feasors" (1975), 13 *Alberta Law Review*, at page 359, fn. 6; *Odgers' Principles of Pleading and Practice*, 21st ed. (London: Stevens & Sons, 1981).

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REASONS FOR JUDGMENT

BUTLER, J.:

INTRODUCTION

[1] The Defendant applies to add The Moravian Church of Newfoundland and Labrador, the Labrador District School Board or the Western School Board ("the Boards"), The International Grenfell Association, and Her Majesty in Right of Newfoundland and Labrador as proposed defendants to the five class actions reflected in the style of cause.

[2] The class actions concern the management of residential schools in Labrador which the Plaintiffs or their families attended and at which it is alleged the students suffered mental and physical abuse. The class actions were initially certified by this Court in June 2010 and the Certification Orders were affirmed by the Court of Appeal in December 2011.

PROCEDURAL HISTORY

[3] The original Statements of Claim were issued between November 2007 and February 2008 and served on the sole Defendant, the Attorney General of Canada (hereinafter referred to as "Canada") immediately. On December 10, 2007, Fowler, J. was designated as the case management judge.

[4] Section 3 of the *Class Actions Act*, S.N.L. 2001, c. C-18.1 ("the *Act*"), requires an application for certification of a class action within 90 days of the service of the defence or the day on which the *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42, require a defence to be filed. However, within that period Canada filed an Application to address the timing of certain defence motions and this was heard by the case management judge in May 2008.

[5] On October 28, 2008, Fowler, J. ordered that Canada's intended applications to add other parties as defendants and to require the Plaintiffs to file replies to particulars should not be heard prior to the certification hearing, which was subsequently scheduled for and heard on June 1, 2009. A year later, in June 2010, each of the five actions were certified as class actions.

[6] Canada appealed the Certification Orders and the appeals were heard on November 7, 2010. On December 21, 2011, the Court of Appeal affirmed the Certification Orders.

[7] Once the leave to appeal period had expired for the Supreme Court of Canada, the parties continued the case management process and on March 21, 2012, I was designated to replace Fowler, J. as case management judge.

[8] A revised Litigation Timetable Order was filed on March 27, 2012. This timetable required (*inter alia*) that Canada deliver any Demands for Particulars by April 23, 2012, and file any Application to add parties by May 15, 2012 which Application would then be heard on July 26, 2012. Discoveries were set for September 10–14 and October 15–31, 2012. The common issues trial (estimated to be six weeks in duration) was tentatively scheduled for September–October 2013.

[9] Canada's Application to add proposed defendants proceeded as anticipated on July 26, 2012, and was coupled with an Application to compel Replies to Demands for Particulars, which caused the hearing to extend to a second day. I gave an oral decision on the Rule 14 Application on July 27, 2012, and reserved this Reasons for Judgment on the Application to add the proposed defendants.

ANALYSIS

Interpretation of Rule 7.04.(2)(b)

[10] At the time of the hearing, counsel agreed that the most recent decision in this jurisdiction to address the issue of adding new party defendants was **10475 Newfoundland Ltd. v. Houston**, 2012 NLCA 34, 323 Nfld. & P.E.I.R. 1. Counsel did not agree however on whether the Court of Appeal's decision altered the approach to be taken on the Application before me. I shall therefore address this as a preliminary issue.

[11] Coincidentally, subsequent to the hearing in this matter, Orsborn, C.J. filed his reasons in **Tucker v. Unknown Person**, 2012 NLTD(G) 132, which decision contains a comprehensive review of the authorities from this and other jurisdictions (including **Houston**) relative to the addition of a proposed party. Following the release of that decision, I invited all counsel to make any additional submissions they felt were required by the release of the **Tucker** decision. I have considered the submissions received from counsel for the Plaintiffs, the Defendant and the Boards in these Reasons.

[12] In **Tucker**, Orsborn, C.J. broadly concluded that the Court of Appeal in **Houston** had not modified the test to be applied to such an Application (see paras. 93 and 137-147). At paragraph 88 he specifically held that:

(a) the only Rule applicable to the addition of a new party defendant to an existing proceeding is Rule 7.04.(2)(b) (at para. 88(3));

(b) to be successful, an applicant must satisfy either or both of the "ought to" and "necessary" branches of the Rule (at para. 88(4)); and

(c) if (but only if) either test was met, the Court had discretion in the relief sought (at para. 88(10)).

[13] I proceed therefore on the basis that the onus is on Canada to satisfy one of the two branches of Rule 7.04.(2)(b) being the "ought to" or "necessary" tests.

[14] I confirm as well that I accept the following related conclusions made by Orsborn, C.J. relative to the interpretation of the branches of this Rule:

(a) Prior to 2008, the "necessary" branch of Rule 7.04 had been subject to two different interpretations (one broader than the other). However, in April 2008, the narrow interpretation espoused in the **Mandavia v. Central West Health Care Institutions Board**, [2003] N.J. No. 17, 222 Nfld. & P.E.I.R. 265 (S.C.T.D.(G)), and the **Clearwater Fine Foods Inc. v. Day & Ross Inc.**, 2003 NLSCTD 106, 227 Nfld. & P.E.I.R. 187, decisions was approved by the Court of Appeal in **Vardy v. Dufour**, 2008 NLCA 22, 275 Nfld. & P.E.I.R 247, as applicable to both paragraphs (a) and (b) (**Tucker** at paras. 30, 31, 37 and 48);

(b) The **Houston** decision did not overrule **Vardy** (**Tucker** at paras. 111 and 144); and

(c) The entitlement to add a new party under this Rule is limited to meeting one of these legal tests and does not extend to the wider factual inquiry that is warranted by the language of "just and convenient" used in other jurisdictions (**Tucker** at para. 61).

[15] I note that there is no suggestion made in the case before me that a limitation period has expired. However, that does not affect either the interpretation or application of Rule 7.04.(2)(b) (**Tucker**, at paras. 21, 76 and 88(2)).

Application of Rule 7.04.(2)(b)

Nature of the Claims Made By the Plaintiffs

[16] The starting point for the application of either branch of the test is the nature of the claim made by the Plaintiffs.

[17] While all five actions have since been consolidated by Consent Orders filed in July 2012, the nature of all claims is expressed in five similar Amended Statements of Claim.

[18] In essence, the Plaintiffs acknowledge that residential schools were in operation in Newfoundland (as it was then known) prior to 1949 but assert that they continued in operation after Newfoundland joined Confederation on March 31, 1949, consistent with a federal policy requiring the attendance of aboriginal children at such schools, a policy that terminated in 1996.

[19] While the Plaintiffs agree that the Terms of Union (*Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), as amended) do not refer to Indians or Eskimos, they allege that section 91(24) of *The Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), placed "Indians and lands reserved for Indians" exclusively under federal jurisdiction. The Plaintiffs allege therefore that effective with the 1949 Terms of Union, Canada assumed exclusive jurisdiction over aboriginal persons in Newfoundland, they being "Indians" under section 91(24) of *The Constitution Act, 1867*.

[20] The Plaintiffs acknowledge the existence of formal agreements between Canada and churches to operate the schools but assert that Canada nevertheless controlled the operation. They also acknowledge Contribution Agreements between Canada and the Province respecting resources and programs to Indians and Eskimos in Labrador but allege that such a cost sharing was a breach of Canada's duty.

[21] The Representative Plaintiffs acknowledge that others had involvement in the operation of the residential schools in question pre- and post-Confederation but they have made a conscious and deliberate choice not to name them as defendants. The Representative Plaintiffs do not seek redress for any wrongs allegedly suffered pre-1949. The pleadings suggest that while there may be agency relationships between Canada and others, liability nevertheless rests with Canada.

[22] Generally, the Plaintiffs allege that Canada owed an exclusive, non-delegable fiduciary duty of care (arising from its constitutional jurisdiction) in relation to the operation of the schools and that Canada did, through its employees, agents or representatives, breach the duty of care owed.

[23] Using the Anderson Amended Statement of Claim as an example, the claims are made solely against Canada on the basis that it:

(a) was at all material times responsible for the maintenance, funding, oversight or management of the relevant residential school, either on its own or in combination with other of its governmental agents or servants; and

(b) assumed and possessed exclusive legislative and executive responsibility over aboriginal persons once Newfoundland (as it was then known) entered confederation in 1949.

[24] The Plaintiffs seek declarations that:

(a) Canada owed an exclusive non-delegable fiduciary duty of care to the Plaintiffs in relation to the funding, oversight, operation, supervision, control, maintenance and support of the schools;

(b) Canada was negligent in its duty aforesaid and breached the duty owed; and

(c) Canada is liable to the Plaintiffs for the damages caused by its neglect and breach of duty.

[25] Paragraph 7 of each of the Certification Orders confirms that the common issues for each Class are:

(a) by its operation or management of the respective 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 respective school, did the Defendant breach a fiduciary duty owed to the students of the school to protect them from actionable physical or mental harm?

(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 issues 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?

[26] Since the Defendant has not yet filed its Defence, its position on these issues is not reflected in the pleadings, however, I can rely upon the submission made by counsel for Canada on July 27, 2012.

[27] Canada maintains that the duties which the Plaintiffs claimed are owed to them are in fact owed to the Plaintiffs by one or more of the proposed defendants and not by Canada. Canada does not seek to add the proposed defendants as third parties but instead seeks a judicial declaration that others are liable - a ruling that would be of significance to Canada.

[28] As a result of the pleadings as presently framed and Canada's position as stated by counsel at the hearing, two potential determinations are obvious:

(a) the actions will fail; or

(b) Canada will be found liable to the Plaintiffs.

[29] Counsel dispute, however, whether (on the basis of the case as currently framed) Canada could be held jointly or partially responsible for the Plaintiffs' alleged losses.

[30] The Plaintiffs assert that their claims are unique to the Defendant, having a constitutional root of liability exclusive to Canada.

[31] The Defendant, however, points to references in the Amended Statements of Claim that raise issues of agency and which may suggest a joint tortfeasor relationship.

[32] Against this backdrop, Canada maintains that the proposed defendants both "ought to" be added and are "necessary" parties.

Ought to be Added

[33] This branch of the Rule had its origins in common law and is stricter than the "necessary" branch which had its creation in equity (**Tucker** at para. 74 citing **Amon v. Raphael Tuck & Sons Ltd.**, [1956] 1 Q.B. 357, [1956] 1 All E.R. 273, at 380).

[34] At paragraph 47, the Court of Appeal in **Houston** acknowledged that this branch was commonly considered to apply in rare cases where a person having a direct or legal interest in the adjudication of the issue had not been named. The frequently cited example is one of joint contractors because (as Orsborn, C.J. stated in **Tucker** at paragraph 78) they make up a single entity. This is confirmed in A.S. Diamond, I.H. Jacob & P. Adams, *The Annual Practice 1963*, Vol. 1 (London, UK: Sweet & Maxwell, Ltd., 1963) (the "White Book") under Order 16, r. 1, at page 308, which states, "Where a contract is made with several persons jointly, all such persons must join in an action upon such contract".

[35] By contrast, the White Book confirms that where a tort is committed by several persons, "the injured plaintiff may sue all or any of them at his election, for the liability of joint tortfeasors is joint and several" (under Order 16, r. 1), at page 315. In other words, joint tortfeasors do not make up a single legal entity (this distinction was made by Orsborn, C.J. in **Tucker** at paras. 79 and 80).

[36] I acknowledge, however, that the Court of Appeal in **Houston** suggested that it saw no reason why the "ought to" branch "could not also apply to an occupiers' liability case where owners and occupiers at common law can be held to be jointly and generally liable for a breach of duty of care respecting dangerous premises", *on the specific facts of that case* (**Houston**, at para. 47).

[37] Counsel for Canada relies on this passage to suggest that the "ought to" branch is satisfied here where negligence is asserted and there could be tortfeasors who may be held to be jointly and severally liable for any damages arising from a finding of negligence. In Canada's supplementary submissions respecting the

Tucker decision, it suggests that Canada is "not fully constituted" in the absence of the proposed defendants.

[38] With the greatest of respect to Canada's position, I do not agree. In addition to the White Book references made above, where the distinction between joint contractors and joint tortfeasors is explained, I note the following.

[39] Firstly, I accept Orsborn, C.J.'s conclusion at paragraph 93 of **Tucker** that the Court of Appeal in **Houston** dealt with the application before it primarily as a Rule 15 application to amend pleadings and to change the name and capacity of the defendants. At paragraphs 56-57 of **Houston**, the Court of Appeal held that the amendment sought (party to be added) was in fact akin to a "capacital correction" under Rule 15.02.(1)(b) where the pleaded cause of action would remain substantially unchanged.

[40] Secondly, in **Houston** it was clear from the pleadings that the plaintiff had intended to sue the owners and occupiers of the walkway on which the fall took place. The Court of Appeal concluded therefore that adding the proposed defendants would not alter the basic nature of the pleaded action. It distinguished this situation from the pleadings in both **Clearwater** and **Vardy** where the addition of new party defendants would have involved consideration of new causes of action not arising out of the same originally pleaded fact scenario (**Houston**, at para. 50).

[41] The pleadings in **Houston** are in stark contrast to those in these class actions. The Representative Plaintiffs have never expressed any intention of suing any of the operators of the residential schools. They chose to limit their claims to breach of duties owed to them exclusively by Canada. The addition of new party defendants here will (like **Clearwater** and **Vardy**) involve consideration of new causes of action not arising out of the same originally pleaded fact scenario.

[42] Thirdly, the Court of Appeal in **Houston** accepted that the plaintiff had experienced difficulties in confirming the parties responsible for the ownership and occupation of the walkway on which she had fallen. The Court of Appeal accepted

that the plaintiff had intended to include the proposed defendant and that it ought now to be added, despite the lapse of the limitation period.

[43] In the class actions before me, Plaintiffs' counsel have engaged in considerable research on the legal and constitutional issues raised by the Terms of Union (including responsibilities for education and aboriginal affairs). They acknowledge that their claims relate to management of residential schools that were in operation prior to 1949, continued for varying periods after confederation and involved other persons.

[44] Unlike **Houston**, the Plaintiffs do not seek a "capacital correction" and they are not deterred by the Defendant's suggestion that they have sued the wrong party. Their pleadings do not reflect any intention to pursue anyone but Canada and the Plaintiffs do not assert any difficulty in identifying the party responsible. It is the Defendant who seeks to add the proposed defendants, over the Plaintiffs' objections.

[45] As Orsborn, C.J. stated in **Tucker** at paragraph 80:

> Clearly a plaintiff may choose to sue only one of a number of potential defendants. The fact that the defendant may seek to bring in others by means of third party proceedings or otherwise goes to the ability to share any losses; it does not go to the integrity of the proceeding as initially structured.

[46] For these reasons, I conclude that the finding at paragraph 47 of **Houston** respecting the "ought to" branch does not assist the Defendant. Applying the narrow construction that the Court of Appeal has confirmed is applicable to Rule 7.04.(2)(b), I conclude that there is no basis on which Canada can succeed to have the proposed defendants added to the within proceedings under the "ought to" branch of Rule 7.04.(2)(b).

Necessary

[47] In **Tucker** (at para. 81), Orsborn, C.J. described the "necessary" branch as the "ought to branch" as adapted by the courts of equity, designed to enable remedies such as specific performance to be effective if and when ordered.

[48] I rely upon and accept the following conclusions of Orsborn, C.J. in **Tucker**:

(a) "Necessary" in Rule 7.04.(2)(b) does not mean simply more convenient but rather necessity in the sense of avoiding dismissal of the proceedings because the proper parties were not before the Court (at para. 30 citing **Mandavia**); and

(b) In other words, the Court must conclude that there cannot be a final determination of the issues raised unless the proposed party is added and is subject to the final and binding effect of the Court's decision (at para. 33 citing **Clearwater** at paras. 14–16).

[49] In the within case the Plaintiffs have not claimed either - that any of the proposed defendants owed them a duty or care, or that there was any breach of duty. In stark comparison to **Houston**, to add the proposed defendants to the existing action would therefore drastically alter the basic nature of each of the class actions that has been certified.

[50] Canada does, however, suggest that while the Plaintiffs have sued only one Defendant, the pleadings raise the concept of joint and/or several tortfeasors. I shall therefore re-address this argument in the context of the "necessary" branch of Rule 7.04.(2)(b).

[51] Professor Lewis Klar offers the following explanation of the terms:

> A joint tort will arise in two general areas. The first is where one person is vicariously liable for the torts committed by another. This occurs as between

> master and servant, and principal and agent. Vicarious liability may also be imposed by statute ... In all of these cases, the tort-feasor and the person who is vicariously liable for the former's acts are joint tort-feasors.
>
> A joint tort will also arise when two or more persons act together in furtherance of a common design or plan, during the course of which a tortious act is committed.
>
> *Tort Law*, 3rd ed. (Toronto: Carswell, 2003) at 487-48

> The expression "joint-tort-feasors" refers to tort-feasors jointly liable, e.g. those engaged in a concerted action who combine to injure the Plaintiff. The expression "several, concurrent tort-feasors" refers to those who independently act and cause the Plaintiff the same damage.
>
> Klar, "Contribution Between Tort-Feasors" (1975), 13 *Alberta Law Review*, at 359, fn. 6

[52] As indicated previously, Canada does not suggest that either of the proposed defendants are several, concurrent tortfeasors or joint tortfeasors with Canada in the second example described by Klar (those engaged in a concerted action who combine to injure the Plaintiff); in fact, Canada asserts instead that the proposed defendants are the *only* parties liable to the Plaintiffs.

[53] I acknowledge that Canada has not yet received particulars of the agency relationships that are alluded to in the pleadings and that this is currently the subject of the Demands for Particulars. Nevertheless, I accept that if Canada can be found vicariously liable for the torts of another (because of a master/servant, principal/agent relationship or by statute) Canada and the other person are joint tortfeasors. In this situation, however, the Plaintiffs have elected (as is their right) to seek relief only from Canada.

[54] Unless and until Canada serves third party notices, the only issue for the Court is whether Canada is liable to the Plaintiffs and, if so, what damage (if any) Canada's actions caused the Plaintiffs to suffer.

[55] The following conclusions made by the Court of Appeal in **Vardy** at paragraphs 27-30 were not affected by the Court of Appeal's decision in **Houston**:

> 27 The first of the four reasons set out at paragraph 65 of the decision is that Ms. Vardy "had a relationship with both the Clarenville and the St. John's Defendants, giving rise to questions of negligence and breach of contract in respect of each Defendant". This factor does not address why the St. John's Defendants are necessary in order to determine the liability of the original parties, that is, the Clarenville doctors, the Clarenville Hospital and the Peninsulas Health Care Corporation (together, "the Clarenville Defendants"). As submitted by the St. John's Defendants, if the evidence and applicable law do not support a finding that the Clarenville Defendants are liable, either fully or partially, for the Vardys' losses, this does not mean that there has been an incomplete adjudication of the original action against the Clarenville Defendants.
>
> 28 The second reason set out by the Trial Division judge is that, "there was persuasive evidence from an expert, Dr. Farrell, that either or both sets of Defendants may have contributed to [Ms. Vardy's] injuries and damages" The fact that another defendant, not named in the original pleadings, may have been responsible for, or contributed to, the Vardys' injuries does not interfere with, or prevent, the court's assessment of the liability of the original defendants, the Clarenville Defendants.
>
> 29 The third reason stated by the Trial Division judge for adding the St. John's Defendants is that, "the evidence of Dr. Farrell points to the fact that the issue of causation may only be determined if both sets of Defendants are parties and subject to any final decision of the Court". This proposition fails to take account of the fact that causation may be determined with respect to the Clarenville Defendants, based on the evidence adduced, without adding the St. John's Defendants as parties. If the St. John's Defendants have evidence that may be relevant in the assessment of the Clarenville Defendants' liability, including the question of causation, that evidence may be called without adding the St. John's Defendants as parties.
>
> 30 The fourth reason stated by the Trial Division judge for adding the St. John's Defendants is that "the evidence of Dr. Farrell points to the requirement that both sets of Defendants be parties for proper determination of the issue of apportionment of damages, should that be an issue". Again, this rationale fails to recognize that the Clarenville Defendants' liability, whether whole, partial or not proven, can be determined without the inclusion of the St. John's Defendants as parties.

[56] Thus, relying on paragraphs 27-30 of **Vardy**, regardless of whether the Plaintiffs:

(a) had a relationship with the proposed defendants; and/or

(b) suffered injuries for which the proposed defendants were responsible,

the alleged liability of the Defendant and the alleged causation of the Defendant for injuries suffered by the Plaintiffs can be determined without adding the proposed defendants as parties to the existing class actions.

[57] The law is settled that being either an alleged joint or several tortfeasor (who a plaintiff chose not to pursue) does not trigger an entitlement to be added under either branch of Rule 7.04.(2)(b) (see **Clearwater** at para. 23, **Vardy** at paras. 27-30, and **Tucker** at para. 34).

[58] If the proposed defendants are not parties, the trial judge can nevertheless determine the constitutional issue, the operational issue, liability, causation, and assessment of any damage caused by Canada because all of these issues are determined on the basis of the evidence.

[59] The Court of Appeal in **Vardy** supported the conclusions of Orsborn, C.J. in **Mandavia** and **Clearwater** that, while the addition of the proposed defendants may provide another party from whom the plaintiff could recover if its claim was made out, this was "opportunity" and not "necessity".

[60] I find it helpful to quote from Lord Devlin's decision in **Amon** at page 363 where he cited the White Book (1955 ed., at page 232) as follows:

> Generally in common law and Chancery matters a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone. He cannot be compelled to proceed against other persons whom he has no desire to sue ... Generally speaking, intervention can only be insisted upon in three classes of case, namely: (A) In a representative action where

> the intervener is one of a class whom plaintiff claims to represent, but who denies that the plaintiff does in fact represent him; (B) Where the proprietary rights of the intervener are directly affected by the proceedings, and (C) In actions claiming the specific performance of contracts where third persons have an interest in the question of the manner in which the contract should be performed.

[61] In a subsequent portion of his reasons, Lord Devlin explained why these three classes represented exceptions to the plaintiff's general right to sue who he pleases. He confirmed that the remedies that were available in a court of equity had wider legal repercussions than a court of common law. For example, if a person was ordered to pay damages at common law, the decision affected him only, but if he was ordered to refrain from doing something (an equitable remedy), third parties may prevent the exercise of the plaintiff's right (page 370).

[62] Starting with this basic premise, Lord Devlin proceeded to review authorities that had taken different approaches to the application of the "necessary" branch and concluded at page 368:

> Accordingly, the present case, in my view, really turns upon the true construction of the rule, and in particular the meaning of the words whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. The beginning and end of the matter is that the court has jurisdiction to join a person whose presence is necessary for the prescribed purpose and has no jurisdiction under the rule to join a person whose presence is not necessary for that purpose.

[63] The decision in **Amon** did not enlarge the three categories of case under which a court of equity (applying the "necessary" branch of the Rule) could add a party.

[64] The relief sought by the Representative Plaintiffs does not fall in either of the categories identified in **Amon**. They seek declaratory relief and damages against Canada alone. I accept the conclusion of Orsborn, C.J., at paragraph 88(8) in **Tucker** as follows:

> ... The authorities do not suggest that an action in which a plaintiff simply seeks damages from a defendant is such as to require the addition of another party to make any award of damages effective as a matter of law. The authorities also do not suggest that in such an action the pre-condition for adding a defendant is satisfied either by providing the plaintiff with an additional and perhaps more successful avenue of recovery or by simply establishing a connection to the subject matter of the proceeding.

[65] Similar to **Tucker**, I conclude that all questions in the actions as presently framed can be effectively and completely settled without adding the proposed defendants as parties.

[66] The facts of the case before me are similar to those in **Vardy**, where the plaintiff sought to join a specialist physician and a medical facility in St. John's to an existing proceeding against other physicians and the Clarenville hospital. The Court of Appeal held that, while it may be convenient to have all alleged tortfeasors involved in the one action, this was not the test. I agree with Canada that the proposed defendants may have an interest in these proceedings, but that is an insufficient reason to add them as parties under the "necessary" branch of the Rule in question.

[67] I note that a similar application was made (albeit not in class proceedings) by the **C.(Y.) v. Canada (Attorney General)**, 2001 SKQB 217, [2001] S.J. No. 296. At issue was the defendant's request to have Missionary Oblates added as proper defendants to the plaintiff's action alleging physical and sexual abuse at a residential school and which relief was opposed by the plaintiff.

[68] In **C.(Y.)** MacLeod, J. addressed "the Crown's solicitous concern" that the plaintiff had sued the wrong party and concluded that the real reason for the application was that the Crown considered that it would be significantly disadvantaged if the Oblates were not added as a defendant (see paras. 10-12). The Court of Queen's Bench concluded at paragraph 16 that it had no authority to "*compel* a plaintiff to seek redress from a person he or she chooses not to sue".

[69] I have not been convinced that there is any basis on which the proposed defendants are "necessary" parties to the actions as currently framed.

Discretion

[70] Orsborn, C.J. confirmed in **Tucker** that if either of the two branches of Rule 7.04.(2)(b) had been met, and a *prima facie* entitlement to add a party was found, the decision (whether or not to add the party) is nonetheless discretionary (at para. 88(9)). It is at this stage of the analysis that issues such as prejudice are considerations.

[71] However, since I have concluded that the Defendant was unable to satisfy either branch of the test, such considerations are not relevant to my analysis under Rule 7.04.(2)(b) and the Defendant's Application under Rule 7.04.(2)(b) is therefore denied.

Rule 7.02(3) and Section 7 of the *Contributory Negligence Act*

[72] I acknowledge that the Defendant also relies on Rule 7.02.(3) and section 7 of the *Contributory Negligence Act* as alternative means to have the proposed defendants added.

[73] Rule 7.02.(1)-(3) states:

> (1) Subject to rule 7.03, two or more persons may be joined together in one proceeding as plaintiffs or defendants where,
>
> (a) if separate proceedings were brought by or against each of them, some common question of law or fact would arise in all the proceedings; and
>
> (b) all rights to relief claimed in the proceeding, whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transactions; or

(c) the Court grants leave to do so.

(2) Subject to the provisions of any statute and unless the Court otherwise orders, a plaintiff, who claims any relief that any other person is entitled to jointly with the plaintiff, shall join all persons so entitled as parties to the proceeding, and any of them who do not consent to be joined as a plaintiff shall be made a defendant.

(3) Where relief is claimed against a defendant who is jointly liable with some other person and also severally liable, the other person need not be made a defendant to the proceeding; but where persons are jointly, but not severally, liable under a contract and relief is claimed against some but not all of those persons in a proceeding in respect of the contract, the Court may stay the proceeding until the other persons so liable are added as defendants.

[74] Joinder is a coupling or consolidation of claims at first instance and not the addition of a party to a single existing claim. For example, *Odgers' Principles of Pleading and Practice*, 21st ed. (London: Stevens & Sons, 1981) at pages 32-35 discusses joinder in a chapter entitled "Matters to be Considered before Writ".

[75] I note also that Orsborn, C.J. in **Tucker** addressed "...the analytical distinction between the ability to name a party when litigation starts and the question of law of whether, when later considering matters in the context of the existing pleadings, a party ought to have been joined or whose participation was necessary." (**Tucker** at para. 58 citing **Letvad v. Fenwick**, 2000 BCCA 630, 82 B.C.L.R. (3d) 296)

[76] Rule 7.02.(3) therefore addresses when it is appropriate to have another person jointly liable added (at first instance). It says, "Where relief is claimed against a defendant who is jointly liable with some other person and also severally liable, the other person need not be made a defendant to the proceeding". Rule 7.02.(3) merely affirms that a plaintiff cannot be compelled to sue all persons jointly and severally liable. This Rule does not assist the Defendant.

[77] Further, I accept the conclusion of Orsborn, C.J. in **Tucker** that the only Rule applicable to the addition of a new party defendant to an existing proceeding

is Rule 7.04.(2)(b) (see **Tucker** at para. 88(3)). I conclude that Rule 7.02.(3) has no application to the issue before me.

[78] The relevant section of the *Contributory Negligence Act* states:

> 7. Where it appears that a person not a party to an action is or may be wholly or partly responsible for the damages claimed, that person may be added as a party defendant or may be made a 3rd party to the action, upon the terms that are considered just.

[79] Canada argues that this section also provides an independent basis upon which the Court can add the proposed defendants.

[80] A similar argument was advanced by plaintiff's counsel in **Clearwater** and addressed by Orsborn, C.J. at paragraphs 25-30. He concluded that section 7 of the *Contributory Negligence Act* did not stand alone and that the application could only succeed if the requirements of Rule 7.04.(2)(b) were met.

[81] I acknowledge, however, that Orsborn, C.J.'s conclusions in **Clearwater** were reached in the context of a plaintiff seeking to add a defendant tortfeasor after the expiry of the relevant limitation period.

[82] Subsequently, at paragraphs 21, 76 and 88(2) of **Tucker**, however, Orsborn, C.J. held that the existence of a limitations period defence was immaterial to an application to add a party under Rule 7.04.(2)(b). I believe therefore that he has since concluded that (regardless of whether any limitation issue arises) there is no independent right under the *Contributory Negligence Act* and that the Application stands or falls under Rule 7.04.(2)(b).

[83] Nevertheless, if I am incorrect and an independent avenue exists under this legislation, there is no doubt that relief is discretionary, the section using the word "may" relative to both forms of relief addressed.

[84] To the extent that section 7 of the *Contributory Negligence* Act gives the Court any discretion to add the proposed defendants, I accept that the following factors require consideration:

(a) Avoidance of multiplicity of actions;

(b) The addition of an issue that might complicate or lengthen the trial of the existing action;

(c) The point in the progress of the existing proceeding when the issue of adding parties arises;

(d) Whether the addition would embarrass or delay the trial;

(e) Inconvenience or prejudice to either of the parties; and

(f) The nature of the claims being class actions.

[85] Since:

- the Plaintiffs have expressed no intention of pursuing a tort claim against either of the proposed defendants;

- the Defendant currently maintains that it is not liable to the Plaintiffs at all; but

- the Defendant has the right to seek to add the proposed defendants as third parties to the existing action,

I conclude that there are no other proceedings that would otherwise be avoided by adding the proposed defendants. For the same reasons, I conclude that there is no prejudice to the Defendant in denying the Application.

[86] Were the Defendant successful in this Application, it would require the Plaintiffs to prepare claims against persons who informed counsel have concluded their clients have no claim. Not only would there be considerable delay in setting down the hearing but the adjudication of the existing claims would take a very different form, which would lengthen the trial. Each of these facts would be both inconvenient and prejudicial to the Plaintiffs.

[87] This is an important claim for the Defendant involving allegations of abuse of children over decades. I accept that Canada would prefer to have everyone who was involved with the residential schools in question named in the actions.

[88] I acknowledge also that, despite the passage of five years, the Defendant has taken this Application at the earliest point possible. There was no delay on Canada's part. The parties are currently in the discovery phase of proceedings with a tentative trial set for the fall of 2013.

[89] I turn finally to the context of the claims as class actions. In **Schroeder v. DJO Canada Inc.**, 2009 SKQB 169, 77 C.P.C. (6th) 279, the Court of Queen's Bench was addressing a proposed class action concerning allegedly defective medical products (disposable pain pumps). The defendant vendor sought to have the manufacturers added as party defendants prior to or at the certification hearing. In dismissing the application, Popescul, J. addressed the issue of exercise of discretion in favour of adding a party defendant against the plaintiff's wishes in a class action. I quote from paragraphs 19–26 as follows:

> 19 In this case the plaintiffs did not sue the McKinley Group and, as the situation stands right now, the McKinley Group is in no jeopardy of being bound by any judgment rendered. The McKinley Group will not be directly affected by any judgment, in either "their legal rights" or "in their pocket".

20 Should the defendants be entitled to indemnification from the McKinley Group, by operation of statute or by virtue of contractual arrangements, the inclusion of the McKinley Group would be better achieved by utilization of the third party procedure available to it in the Rules. Inclusion of the McKinley Group as third parties by virtue of alleged indemnification claims by the defendants results in a more logical process, clearly contemplated by the Rules, and avoids the anomalous situation of having defendants annexed to the claim where they are not mentioned and against whom no relief is sought.

21 There is a myriad of other circumstances where it would be just and appropriate for the court to exercise its discretion in favour of adding a party defendant. However the circumstances of this case, especially in the context of a class action proceeding, is not one of them. Given the nature of class action proceedings and the general deference that ought to be afforded to plaintiffs in drafting their claims as they see fit, it would be contrary to the spirit and intent of the legislation to "force" the plaintiff to sue a party that they chose not to pursue.

22 In arriving at this conclusion, I have kept in mind pronouncements of the Supreme Court of Canada that pertain to the overall objectives of class action legislation and a representative plaintiff's entitlement to frame his or her claim in such a way so as to make it most amenable to class action litigation.

23 In Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, paras. 26-29, McLachlin C.J., speaking for the Supreme Court of Canada, stated the goals of class action legislation as follows:

> 26 The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of enviromental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.
>
> 27 Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also

reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times); see W.K. Branch, Class Actions in Canada (1998), at para. 3.30; M. A. Eizenga, M.J. Peerless and C.M. Wright, Class Actions Law and Practice (1999), at para. 1.6; Bankier, supra, at pp. 230-31; Ontario Law Reform Commission, Report on Class Actions (1982), at pp. 118-19.

28 Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, supra, at para. 3.40; Eizenga, Peerless and Wright, supra, at para. 1.7; Bankier, supra, at pp. 231-32. Ontario Law Reform Commission, supra, at pp. 119-22.

29 Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law -- The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), 113 Harv. L. Rev. 1806, at pp. 1809-10; see Branch, supra, at para. 3.50; Eizenga, Peerless and Wright, supra, at para. 1.8; Bankier, supra, at p. 232; Ontario Law Reform Commission, supra, at pp. 11 and 140-46.

24 The Supreme Court of Canada has put these general objectives into practice by specifying that plaintiffs are entitled to frame their cases as they may see fit in order to make it more fitting for class action litigation. Accordingly, plaintiffs are not required to assert every possible claim open to them. They can construct their action to target only those specific allegations best suited to class action litigation. In Rumley v. British Columbia, [2001] 3 S.C.R. 184, McLachlin C.J. confirmed the right of plaintiffs, in the context of a class action, to advance their case as they see fit. At para. 30, she stated:

... It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS

> [page201] had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9).
>
> 25 While Rumley dealt with the plaintiff's right to limit allegations within their claim, the concept and underlying principles can be interpreted to support the proposition that plaintiffs are also entitled to restrict the parties that they wish to sue in order to make their claim more amenable to class action litigation.
>
> 26 While it might be tempting to second-guess the plaintiffs and question why it would not be to their advantage to have the proposed defendants added to ensure that all entities potentially at fault are within the jurisdiction of the Court and thereby able to benefit from a greater resource pool in the event judgment is obtained, it is not for the Court to interfere in circumstances such as this. The plaintiffs have obviously considered their options and have clearly stated, through their counsel, that they are aware of the consequences of their choices and are nonetheless quite prepared to focus on the current defendants and abide by the results that flow from their decision.

[90] As Popescul, J. stated above, the Supreme Court of Canada has acknowledged that plaintiffs in class actions are entitled to restrict their grounds of negligence in order to advance a claim that is more amenable to class proceedings.

[91] Adding proposed defendants to the existing proceedings would require a comprehensive amendment to the "common issues" identified in the June 2010 Certification Orders. This could conceivably result in an application to decertify the proceedings on the basis that the conditions set out in the *Act* are no longer satisfied. In such a case, the prejudice to the Plaintiffs would be immeasurable (see **Rice v. Atlantic Lottery Corporation Inc.**, 2011 NLTD(G) 65, 310 Nfld. & P.E.I.R. 234).

[92] Considering each of these factors, I conclude that there is significant prejudice to the Plaintiffs and no prejudice to the Defendant in denying the exercise of discretion (if any exists) to add either of the proposed defendants to the within

actions under section 7 of the *Contributory Negligence Act*. I would therefore also deny the Application on this basis.

Third Party Notices

[93] Counsel for Canada was forthright in his submissions. Denial of the right to add the proposed defendants to the within proceedings does not preclude the Defendant's right to issue third party notices to the persons that Canada claims are responsible to the Plaintiffs.

[94] Section 40 of the *Act* confirms that Rule 12.02 is not in conflict with the class action legislation and this option therefore remains available to Canada, subject to Rule 7.03.(2). I note, however, that pursuit of third party claims would require Canada to modify its position on liability since shared responsibility is the underlying concept of such notices.

CONCLUSION

[95] For the reasons stated, I would deny Canada's Application to add either of the proposed defendants to the within certified class actions under both Rule 7.04.(2)(b) and section 7 of the *Contributory Negligence Act*.

[96] Either party or proposed defendant may address the issue of costs on Application.

GILLIAN D. BUTLER
Justice

80

THIS IS EXHIBIT "K" REFERRED TO IN THE
AFFIDAVIT OF SEAN O'DONNELL
SWORN BEFORE ME, THIS 25TH DAY OF MARCH, 2013

A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

Jonathan Reuben Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

2007 01T4955 CP

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

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER and JOYCE WEBBER
PLAINTIFFS/DEFENDANT

-and-

THE ATTORNEY GENERAL OF CANADA

DEFENDANT/APPLICANT

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

THIRD PARTY NOTICE

2008 01T0845 CP

BETWEEN:
SARAH ASIVAK and JAMES ASIVAK
PLAINTIFFS

AND:
THE ATTORNEY GENERAL OF CANADA
DEFENDANT

2008 01T0844 CP

BETWEEN:
SELMA BOASA and REX HOLWELL
PLAINTIFFS

AND:
THE ATTORNEY GENERAL OF CANADA
DEFENDANT

2008 01T0846 CP

BETWEEN:
EDGAR LUCY and DOMINIC DICKMAN
PLAINTIFFS

AND:
THE ATTORNEY GENERAL OF CANADA
DEFENDANT

2007 01T5423 CP

BETWEEN:
TONY OBED, WILLIAM ADAMS AND MARTHA BLAKE
PLAINTIFFS

AND:
THE ATTORNEY GENERAL OF CANADA
DEFENDANT

AND:

HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR

THIRD PARTY

Filed | Dec. 21/12 | DP

TO THE THIRD PARTY:

TAKE NOTICE that this proceeding has been brought by the plaintiff against the defendant and by the defendant against you as a third party. In the proceeding, the plaintiff claims against the defendant the Attorney General of Canada as appears from the originating documents, a copies of which are attached thereto as Schedule A.

AND TAKE NOTICE that the defendant also claims against you in respect of the claim set out in the statement of claim attached hereto as Schedule B.

AND TAKE NOTICE that you will be deemed to admit the plaintiff's claim against the defendant and the defendant's claim against you, and the defendant may enter judgment against you in accordance with the defendant's claim attached hereto as Schedule B without further notice to you, unless within 10 days after the service of this third party notice upon you, excluding the day of service,

(a) you or your solicitor cause your defence to the statement of claim to be filed in the Registry of this Court by either delivering or mailing the defence to the Registry; and

(b) within the same time, you or your solicitor cause a copy of your defence to be served upon the defendant or the defendant's solicitor at the address given in the statement of claim for service either by delivering a mailing the copy to him or her at that address.

DATED at Halifax, Nova Scotia, this 16th day of November, 2012.

Jonathan Tarlton
Mark Freeman
Melissa Grant

Department of Justice Canada
Suite 1400, 5251 Duke Street
Halifax, NS B3J 1P3

Counsel for the Defendant/Plaintiff by 3rd Party Claim, The Attorney General of Canada

ISSUED AT St. John's, Newfoundland and Labrador, this 21st day of November, 2012.

Sgd Debbie Power
~~Registrar~~
Court Clerk

SCHEDULE "A"

Leave granted
R 7A08
April 12/11

2008 01T0844CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

SELMA BOASA and ~~RITA CHIDO~~ REX HOLWELL

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

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

AMENDED STATEMENT OF CLAIM

A. RELIEF SOUGHT BY THE PLAINTIFFS AGAINST CANADA

1. The Representative Plaintiffs, on their own behalf, and on behalf of the members of the Survivor Class and Family Class claim:

(a) an Order certifying this proceeding as a Class Action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 and appointing Selma Boasa and ~~Rita Chido~~ Rex Holwell as Representative Plaintiffs for the Survivor Class and any appropriate subgroup thereof;

(b) a Declaration that Canada owed ~~and was in breach of~~ exclusive non-delegable, fiduciary, and ~~statutory and common law~~ duties of care to the Plaintiffs and the other Survivor Class Members in relation to the ~~establishment,~~ funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the St. Anthony Orphanage and Boarding School in St. Anthony, Newfoundland and Labrador (the "School");

(c) a Declaration that Canada was negligent in the ~~establishment~~, funding, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

Filed | Apr 18/12 | mas

(d) a Declaration the Canada was or is in breach of its exclusive and non-delegable fiduciary obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its ~~establishment,~~ funding, operation, supervision, control, maintenance, oversight, ~~confinement in, transport of Survivor Class Members, to obligatory attendance at the School~~ of the School;

~~(e) a Declaration that Canada was or is in breach of its statutory duties pursuant to the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act") and its Treaty obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;~~

~~(f) a Declaration that the School caused cultural, linguistic and social damage and irreparable harm to the Survivor Class;~~

(g) a Declaration that Canada is liable to the Plaintiffs and other Survivor Class Members for the damages caused by its breach of non-delegable, fiduciary and, ~~statutory and common law~~ duties of care and for negligence in relation to the ~~establishment~~, funding, operation, supervision, control, maintenance, oversight, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

(h) non-pecuniary general damages for negligence, ~~loss of language and culture~~, breach of non-delegable exclusive fiduciary and duties of care, ~~statutory, treaty and common law duties~~ in the amount ~~of $500 million or such other sum as~~ this Honourable Court finds appropriate;

(i) pecuniary general damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, breach of non-delegable exclusive fiduciary and, ~~statutory, treaty and common law~~ duties of care in the amount ~~of $500 million or such other sum as~~ this Honourable Court ~~deems just~~ finds appropriate;

(j) exemplary and punitive damages in the amount ~~of $100 million or such other sum as~~ this Honourable Court ~~deems just~~ finds appropriate;

(k) damages in the amount ~~of $100 million or such other sum as~~ this Honourable Court deems just, pursuant to the *Family Law Act*, R.S.N., 1990, and its predecessors;

(l) prejudgment and postjudgment interest pursuant to the provisions of the *Judicature Act*, R.S.N. 1990, c. J-4 ; and

(m) the costs of this action on a substantial indemnity scale.

B. DEFINITIONS

2. The following definitions apply for the purposes of this Claim:

(a) "Aboriginal", "Aboriginal People(s)" or "Aboriginal Person(s)" means a person whose rights are recognized and affirmed by the *Constitution Act*, 1982, s. 35, being Schedule "B" to the *Canada Act*, 1982 (U.K.), 1982. c. 11, specifically, members of the Metis and Inuit nations;

(b) "Aboriginal Right(s)" means rights recognized and affirmed by the *Constitution Act, 1982*, s. 35, being Schedule "B" to the *Canada Act*, 1982 (U.K.), 1982. c. 11;

(c) "Agents" mean the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of the School;

(d) "Canada" means Her Majesty the Queen in Right of Canada, as represented in this proceeding by the Attorney General of Canada;

(e) "Class" or "Class Members" means all members of the Survivor Class and the Family Class;

(f) "Class Period" means March 31, 1949 to ~~December 31, 1996~~ and the date of closure of the St. Anthony Orphanage and Boarding School;

(g) "Excluded Persons" means all persons who attended an Eligible Indian Residential School as defined by the Indian Residential Schools Settlement Agreement dated May 10, 2006 (the "Agreement") and all persons who are otherwise eligible, pursuant to the Agreement, to receive a Common Experience Payment or pursue a claim through the Individual Assessment Process, as defined by the Agreement;

(h) "Family Class" means:

(i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

~~(ii) the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;~~

(iii) a former spouse of a Survivor Class Member;

(iv) a child or other lineal descendent of a grandchild of a Survivor Class Member;

(v) a person of the same or opposite sex to a Survivor Class Member who cohabited for a period of at least one year with that Survivor Class Member immediately before his or her death;

(vi) a person of the same or opposite sex to a Survivor Class Member who was cohabiting with that Survivor Class Member at the date of his or her death and to whom that Survivor Class Member was providing support or was under a legal obligation to provide support on the date of his or her death;

(vii) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death;

(i) "School" means the St. Anthony Orphanage and Boarding School, located in St. Anthony, Newfoundland and Labrador;

(j) "Survivor Class" means:

All persons who attended the School between March 31, 1949 and ~~December 31, 1996~~ the date of the closure of the St. Anthony Orphanage and Boarding School.

C. THE PARTIES

i. Representative Plaintiffs

3. The Plaintiff, Selma Boasa ("Boasa"), resides in Hopedale, Newfoundland and Labrador ("Newfoundland") and is an Inuit. Boasa attended the School in Northwest River, Newfoundland for one (1) year between 1956 and 1957. Boasa is ~~a proposed~~ the representative plaintiff for the Survivor Class.

4. The Plaintiff, Rex Holwell ("Holwell"), resides in Goose Bay, Newfoundland and was born on September 21, 1950. His wife, Rosina, attended the School for a number of years. Holwell is the representative plaintiff for the Family Class.

~~4. The Plaintiff, Rita Chido ("Chido"), resides in Carson, California (U.S.A.) and was born on October 2, 1933. Her brother, Archibald Rumbolt, attended the School for a~~

~~number of years between 1947 and 1952. Chido is a proposed representative plaintiff for the Family Class.~~

5. The ~~proposed~~ Representative Plaintiffs do not purport to advance claims on behalf of any persons who are otherwise entitled to compensation pursuant to the terms of the Agreement.

6. Neither, the proposed Representative Plaintiffs' claim nor the classes they propose to represent overlap with the terms of the order issued by Regional Senior Justice Winkler of the Ontario Superior Court of Justice, dated March 8, 2007.

ii. The Defendant

7. The Defendant, Her Majesty the Queen in Right of Canada, is represented in this proceeding by the Attorney General of Canada ("Canada"). Canada represents the interests of the Minister of the Department of Indian Affairs Canada, who was, at all material times, responsible for the maintenance, funding, oversight or management ~~and operation~~ of the School, either on its own or in combination with other of its governmental agents or servants.

8. Once the Province of Newfoundland and Labrador entered Confederation in 1949, Canada assumed and possessed exclusive Legislative and executive responsibility over aboriginal persons, including the Classes. As aboriginal persons in the 'new' province in 1949 were legally "Indians" for the purposes of section 91(24) of the *British North America Act, 1867*, they were proper subjects of federal jurisdiction.

9. Canada's participation in the funding and operation of the School breached its exclusive duty of care owed to the Classes which was also in breach of its non-delegable fiduciary obligations and constitutional obligations owed to aboriginal persons.

10. Alternatively, even if Canada did not materially operate or manage the school, it nevertheless breached its fiduciary duties by failing to properly do so and protect the Class as it alone possessed singular and exclusive legal jurisdiction over aboriginal persons.

D. RESIDENTIAL SCHOOL SYSTEM – OPERATION OF THE SCHOOL

i. Background - Residential School History Generally

11. Residential Schools were established by Canada as early as 1874, for the education of Aboriginal children. These children were taken from their homes and their communities and transported to Residential Schools where they were confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them.

12. Commencing in 1911, Canada entered into formal agreements with various Churches and other philanthropic organizations (collectively the "Churches") for the operation of such schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of the Residential Schools. The Churches assumed the day-to-day operation of the Residential Schools under the control, supervision and direction of Canada, for which the Canada paid the Churches a per capita grant calculated to cover part of the cost of the Residential School operation.

13. As of 1920, the Residential School Policy included compulsory attendance at Residential Schools for all Aboriginal children aged 7 (seven) to 15 (fifteen). This approach to the control and operation of the Residential Schools system continued until April 1, 1969, at which time Canada assumed the sole operation and administration of the Residential Schools from the Churches, excepting certain cases where Churches continued to act as agents of Canada.

14. Canada removed Aboriginal Persons, usually young children, from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. Canada controlled all aspects of the admission of Aboriginal Persons to the Residential Schools including arrangements for the care of such persons over holiday periods and the methods of transporting children to and from Residential Schools.

15. ~~The same~~ Similar Residential School~~s~~ ~~policy was implemented and effected in~~ existed in Newfoundland, which joined Canada on March 31, 1949. Accordingly, the claim against Canada is limited temporally to the time when the Canada became legally responsible for Aboriginal Persons residing in Newfoundland, or 1949, and beyond.

16. Aboriginal Persons were often taken from their families without the consent of their parents or guardians. While the stated purpose of the Residential Schools from their inception was the education of Aboriginal children, their true purpose was the complete integration and assimilation of Aboriginal children into mainstream Canadian society and the obliteration of their traditional language, culture and religion. Many children attending Residential Schools were also subject to repeated and extreme physical, sexual

and emotional abuse, all of which continued until the year 1996, when the last Residential School operated by Canada was closed.

17. During the Class Period, children at the school were subjected to systemic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

18. The accommodation was crowded, cold, and sub-standard. Aboriginal children were underfed and ill nourished, forbidden to speak their native languages or to practice the customs and traditions of their culture. They were deprived of love and affection from their families and of the support that a child would normally expect to have from those in positions of trust and authority. Aboriginal children were also subjected to corporal punishment, assaults, including physical and sexual, and systematic child abuse.

E. CANADA'S ASSUMPTION OF DUTIES WHEN NEWFOUNDLAND JOINED CONFEDERATION IN 1949

19. Around the time of Confederation, two separate legal opinions commissioned by the Federal Department of Justice confirmed that the Federal Crown possessed exclusive legislative and executive responsibility in relation to Aboriginal persons, including the Inuit and Eskimo, living in Newfoundland and Labrador.

20. The records of the Federal departments, agencies, ministers and bureaucrats responsible for negotiating the *Terms of Union* 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.

21. As Canada's legal responsibility to Aboriginals was constitutional in nature, it was prohibited from attempting to cede or delegate such duties to any other entity, including the Province itself. Given the broad duties owed by Canada to Aboriginal persons, the welfare and education of Aboriginal children cannot be said to have resided with the Crown in right of the Province of Newfoundland after March 31, 1949.

22. The entry of Newfoundland and Labrador into Confederation brought its Aboriginal population fully within exclusive federal jurisdiction. At the time of Confederation, Canada was aware that any union with Newfoundland and Labrador would have had an Aboriginal component and legal responsibility associated with it.

23. 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 Aboriginal 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.

24. 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 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.

25. 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's Aboriginal people. Under Term 3 of the *Terms of Union*, for matters not specifically referred to, things were deemed to be as if Newfoundland had joined under the terms of the *Constitution Act, 1867*.

26. 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* it had exclusive jurisdiction in the area of Aboriginal peoples. By deleting the reference to native people in the proposed draft *Terms of Union* and writing in Federal responsibility, as outlined in the *British North America Act*, the Federal Government acknowledged *de facto* jurisdiction for the Indians, Inuit and Eskimos of Newfoundland and Labrador.

27. At the time of Confederation, the Premier, Joseph Smallwood, actually refused to sign an agreement with Canada which would have transferred federal responsibility for native persons to the Province. The Province maintained that the fiduciary obligations for Aboriginal persons remained, and belonged to the federal government.

28. 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."

29. This opinion provided by the Justice Department is consistent with the assumptions made during the pre-Confederation talks: Aboriginal persons, pursuant to the *British North America Act*, were Canada's responsibility. 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 populations in Newfoundland and Labrador. This demonstrates that the federal government believed it had a responsibility to fulfill in regard to the Eskimo and Inuit in Labrador and that it would be called upon to provide programs and assistance, funding, oversight and implementation of certain programs, including education.

30. In fact, the *Terms of Union* indirectly provided that the then Aboriginal population in Newfoundland fell under federal jurisdiction. Section three of the *Terms of Union* 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".

31. 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".

32. 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 Eskimo and Inuit in Labrador for which it expected payment. Throughout the 1950's and 1960's, programs for aboriginal education in Newfoundland and Labrador were paid for by Canada at the rate of 90% for Indian communities and 40% in Inuit communities.

33. 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 do not refer to Indians and Eskimos and since head 24 of section 91 of the *BNA Act* places 'Indians and lands reserved for Indians' exclusively under Federal jurisdiction, it seems clear that the Federal Government is responsible for the native population resident in Labrador."

34. By 1954, Newfoundland requested that Canada provide both operating and capital expenditures towards education for Eskimos 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. This agreement reached between the Premier of Newfoundland and Canada in 1954 provided for the re-assumption of federal constitutional responsibility over aboriginal persons in the new province of Newfoundland and Labrador.

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

36. 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."

37. As a result, by 1965, Canada had agreed to provide the same resources and programs to Indians, Inuit 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 – 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments.

38. Amongst other things, this "Contribution Agreement" was designed to provide services to the communities of Sheshatshit and Davis Inlet, including education. The Contribution Agreement identified the amount of funding available as (a) 90% from

Canada; and (b) 10% from Newfoundland. The Contribution Agreement also established a management committee composed of federal officials, provincial officials and representatives of the Davis Inlet and Sheshatshit communities.

39. At the same time, the then 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:

(a) 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);

(b) establishment of a federal-provincial committee to monitor provincial expenditures;

(c) continuation of federal funding for Inuit communities in Labrador; and

(d) 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.

40. 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..."

41. 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

(ii) Native People's of Labrador Agreement, valued at $38,831,00.00 federal payments/contributions.

42. The Labrador Agreement covered the following Indian and Inuit communities: Davis Inlet, Northwest Rivet, Nain, Hopedale, Makkovik, Rigolet and Postville. Pursuant to that Agreement, between 1981 and 1986, Canada contributed 90% of the costs of the programs and services in these Indian communities and 60% of the costs of those delivered in the Inuit communities. In total, Canada contributed $29,135,100.00 in this respect between 1981 and 1986.

43. In August 1985, Canada entered into a further contribution agreement with Newfoundland and Labrador, "for the benefit of native peoples in Labrador", recognizing Canada's "special interest in the social and economic development of Inuit and Indian People." The operation of education was the largest budget allocation item pursuant to this Agreement, for a total of $1,530,000.00 (1985/1986 fiscal year), 71% of which was Canada's responsibility.

44. Fiduciary obligations are and were owed by Canada to Aboriginal persons, peoples who, pursuant to section 35(2) of the *Constitution Act 1982* include the Indian, Inuit and Metis. This fiduciary relationship between Canada and Aboriginal persons was and is *sui generis* in nature. Accordingly, a fiduciary duty between Canada and Aboriginal persons in Newfoundland and Labrador arose at the moment of Confederation in 1949.

45. Canada has acknowledged its own sole singular responsibility over Indians and Inuit in Newfoundland by accepting its 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. Having undertaking discretionary control over a cognizable Indian interest, a fiduciary duty existed between Canada and the Class in these circumstances.

46. As the nature of Canada's relationship with Aboriginal persons gives rise to a non-delegable duty to preserve, protect and promote welfare and education of Aboriginal children, the responsibility for its execution rested solely with Canada.

47. In the alternative, if Canada failed to properly assume those common law and constitutional obligations, it breached its, fiduciary and common law duties owed to the class by failing to do so.

ii. Canada's Operation of the School in Newfoundland

48. The School was located in St. Anthony, Newfoundland. It was first established in the 1940's and ceased operation as a residential school for Aboriginal children in the 1950's.

49. The purpose of the School was to provide education to Aboriginal children between the ages of 6 and 16 years who attended the School from various First Nations bands and communities in Newfoundland. The School eventually became a vehicle for assimilating Aboriginal children through the eradication of their native languages, cultures and spiritual beliefs.

50. The School was initially founded and established by the International Grenfell Association. Once Confederation occurred in March 1949 and Newfoundland joined Canada, the International Grefnell Association began ceasing its involvement, funding and role in the School. ~~At all material times, the staff members at the School were employees, servants and/or agents of Canada.~~ The funding provided by Canada following Confederation was inadequate to meet the costs of operating and maintaining the School, and in particular, to meet the daily and educational needs of the students at the School. As a result, the care provided to the students and the conditions at the School were poor, the staff hired were unskilled and/or unsuitable for dealing with children and the conditions at the School were unsuitable and inappropriate for an educational facility for children.

~~51. In many cases, the Aboriginal children were forced to attend the School by representatives, agents or servants of Canada. The Aboriginal children who attended the School were separated from their families, uprooted and taken to the School, where they were placed within the control of Canada. For all intents and purposes, the children who attended the School, were wards of the School and Canada.~~

52. Canada participated in the funding, oversight ~~carried out that operation~~ and administration of the School until the late 1950's. These operative and administrative responsibilities, carried out on behalf of Canada or by its agents included:

(a) the operation and maintenance of the School during the Class Period;

(b) the care and supervision of all members of the Survivor Class, and for supplying all the necessaries of life to Survivor Class members *in loco parentis*;

(c) the provision of educational and recreational services to the Survivor Class while in attendance at the School and control over all persons allowed to enter the School premises at all material times;

(d) the selection, supply and supervision of teaching and non-teaching staff at the School and reasonable investigation into the character, background and psychological profile of all individuals employed to teach or supervise the Survivor Class;

(e) inspection and supervision of the School and all activities taking place therein, and for full and frank reporting to Canada respecting conditions in the School and all activities taking place therein;

(f) transportation of Survivor Class members to and from the School; and

(g) communication with and reporting to the Family Class respecting the activities and experiences of Survivor Class members while attending the School.

53. Attempts to provide educational opportunities to children confined in the School were ill-conceived and poorly executed by inadequately trained teaching staff. The result was to effectively deprive the Aboriginal children of any useful or appropriate education. Very few survivors of the School went on to any form of higher education.

54. The conditions and abuses in the School during the Class Period were well-known to Canada.

55. Any attempt by Canada to delegate its duties, responsibilities or obligations to the Class to the Province of Newfoundland is unlawful and in breach of its exclusive and non-delegable fiduciary duties owed to the class.

F. CANADA'S BREACHES OF DUTIES TO THE CLASS MEMBERS

56. Canada has a fiduciary relationship with Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled and regulated the School during the Class Period, either on its own or in conjunction with the Province.

57. Canada, and its respective servants and agents compelled members of the Survivor Class to leave their homes, families and communities, and forced members of the Survivor Class to attend (and sometimes live in) the School, all without lawful authority or the permission and consent of Survivor Class members or that of their parents. Such confinement was wrongful, arbitrary and for improper purposes.

58. Survivor Class members were systematically subjected to the institutional conditions, regime and discipline of the School without the permission and consent of Survivor Class members or that of their parents, and were also subjected to wrongful acts at the hands of Canada while confined therein.

59. In particular, Boasa experienced severe physical abuse and verbal abuse during their time at the School by teachers, "caregivers" and other students. Boasa also suffered from serious verbal abuse during her time at the School from both teachers and students. In particular, Boasa was prevented from speaking her native language Inuktitut. Many of

the children at the School also experienced sexual physical or verbal abuse, perpetrated against them by teachers, adults in positions of authority or from other students.

60. Holwell ~~Chido~~, as a member of the Family Class, has experienced emotional abuse and trauma due to ~~her brother's~~ his wife's inability to participate in normal family life as result of the physical harm ~~he~~ she suffered during ~~his~~ her attendance at the School.

61. All persons, including Boasa, who attended the School ~~did so as wards of Canada, with Canada as their guardian, and~~ were persons to whom Canada owed the highest non-delegable, fiduciary, ~~moral, statutory~~ and common law duties, which included, but were not limited to, the duty to ensure that reasonable care was taken of the Survivor Class while at the School, the duty to protect the Survivor Class while at the School and the duty to protect the Survivor Class from intentional torts perpetrated on them while at the School. These non-delegable ~~and~~ fiduciary duties were performed negligently and tortuously by Canada, in breach of its special responsibility to ensure the safety of the Survivor Class while at the School.

62. Canada was responsible for:

~~(h) the administration of the Act and its predecessor statutes as well as any other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;~~

(i) the promotion of the health, safety and well being of Aboriginal Persons in Newfoundland during the Class Period;

(j) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessor ministries and departments during the Class Period;

(k) decisions, procedures, regulations promulgated, operations and actions taken by the Department of Indian Affairs and Northern Development and,

its employees, servants, officers and agents in Canada during the Class Period;

(l) overseeing the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the School and for the creation, design and implementation of the program of education for Aboriginal Persons confined therein during the Class Period;

(m) the selection, control, training, supervision and regulation of the designated operators and their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons confined in the Residential School during the Class Period;

(n) the provision of all educational services and opportunities to the Survivor Class members, pursuant to the provisions of the Act and any other statutes relating to Aboriginal Persons during the Class Period;

~~(o) transportation of Survivor Class Members to and from the School and to and from their homes while attending the School during the Class Period;~~

~~(p) preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities;~~

(q) the care and supervision of all members of the Survivor Class while they were in attendance at the School during the Class Period and for the supply of all the necessities of life to Survivor Class Members, *in loco parentis*, during the Class Period;

(r) the provision of educational and recreational services to the Survivor Class while in attendance at the School during the Class Period;

(s) inspection and supervision of the School and all activities that took place therein during the Class Period and for full and frank reporting to Canada and to the Family Class Members with respect to conditions in the School and all activities that took place therein during the Class Period; and

~~(t) communication with and reporting to the Family Class with respect to the activities and experiences of Survivor Class Members while attending the School during the Class Period.~~

63. During the Class Period, male and female Aboriginal children, including Boasa, was subjected to gender specific, as well as non-gender specific, systematic child abuse, neglect and maltreatment. They were forcibly confined in the School and were

systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

64. At all material times, the children who attended the School were within the knowledge, contemplation, power or ~~and~~ control of Canada and were subject to the unilateral exercise of Canada's (or its delegates') power or discretion. By virtue of the relationship between the children and Canada, being one of trust, reliance and dependence, by the Aboriginal children, Canada owed a fiduciary obligation to ensure that the students who attended the School were treated fairly, respectfully, safely and in all other ways, consistent which the obligations of a parent or guardian to a child under his care and control.

65. At all material times, Canada owed a fiduciary obligation to the students who attended the School to act in the best interests of those students and to protect them from any abuse, be it mental, emotional, physical, sexual or otherwise. The children at the School relied upon Canada, to their detriment, to fulfill its fiduciary obligations.

66. Through its servants, officers, employees and agents, Canada was negligent and in breach of its non-delegable fiduciary, ~~moral, statutory,~~ and common law duties of care to the Survivor Class and the Family Class during the Class Period. Particulars of the negligence and breach of duty of Canada include the following:

(u) it systematically, negligently, unlawfully and wrongfully delegated its fiduciary and other responsibility and duties regarding the education of and care for Aboriginal children to others;

(v) it systematically, negligently, unlawfully and wrongfully admitted and confined Aboriginal children to the School;

~~(w) it acted without lawful authority and not in accordance with any statutory authority pursuant to or as contemplated by the provisions of the Act or any other statutes relating to Aboriginal Persons as:~~

~~(i) said provisions are and were *ultra vires* the Parliament of Canada and of no force and effect in law;~~

~~(ii) the conduct of Canada in placing the Aboriginal children in the School, confining them therein, and treating or permitting them to be treated there as set forth herein was in breach of Canada's fiduciary obligations to the Survivor Class and Family Class Members, which was not authorized or permitted by any applicable legislation and was, to the extent such legislation purported to authorize such fiduciary breach, of no force and effect and/or *ultra vires* the Parliament of Canada; and~~

~~(iii) Canada routinely and systematically failed to act in accordance with its own laws, regulations, policies and procedures with respect to the confinement of Aboriginal children in the School, which confinement was wrongful.~~

(x) it delegated to and contracted with the Churches and other Religious organizations and the Province to implement its program of forced integration, confinement and abuse;

(y) it failed to adequately screen and select the organizations and individuals to which it delegated the implementation of its Residential School program;

(z) it failed to adequately supervise and control the School and its agents operating same under its jurisdiction;

(aa) it deliberately and chronically deprived the Survivor Class Members of the education they were entitled to or were led to expect from the School or of any adequate education;

(bb) it designed, constructed, maintained and operated the School buildings which were sub-standard, inadequate to the purpose for which they were intended and detrimental to the emotional, psychological and physical health of the Survivor Class;

(cc) it failed to provide funding for the operation of the School that was sufficient or adequate to supply the necessities of life to Aboriginal children confined to them;

(dd) it failed to respond appropriately or at all to disclosure of abuses in the School during the Class Period;

~~(ee) it conspired with the operators of the schools to suppress information about abuses taking place in the School during the Class Period;~~

(ff) ~~it assaulted and battered the Survivor Class Members and~~ permitted them to be assaulted and battered during the Class Period;

(gg) it permitted an environment which permitted and allowed student-upon-student abuse;

(hh) ~~it forcibly confined the Survivor Class Members and~~ permitted them to be forcibly confined during the Class Period;

(ii) it was in breach of its fiduciary duty to its Wards the Survivor Class Members by reason of the misfeasances, malfeasances and omissions set out above;

(jj) it failed to inspect or audit the School adequately or at all;

(kk) it failed to implement an adequate system of evaluation, monitoring and control of teachers, administrators and non-teaching staff of the School during the Class Period;

(ll) it failed to periodically reassess its regulations, procedures and guidelines for the School when it knew or ought to have known of serious systemic failures in the School during the Class Period;

(mm) it failed to close the School and otherwise protect and care for those persons confined therein when it knew or ought to have known that it was appropriate and essential to do so in order to preserve the health, welfare and well being of the Survivor Class Members;

(nn) it delegated, attempted to delegate, continued to delegate and improperly delegated its non delegable duties and responsibility for the Survivor Class when it was incapable to do so and when it knew or ought to have known that these duties and responsibilities were not being met;

(oo) it failed to recognize and acknowledge harm once it occurred, to prevent additional harm from occurring and to, whenever and to the extent possible, provide appropriate treatment to those who were harmed;

~~(pp) it undertook a systematic program of forced integration and assimilation of the Aboriginal Persons through the institution of the School when it knew or ought to have known that doing so would cause profound and permanent cultural, psychological, emotional and physical injury to the members of the Survivor Class during and following the Class Period; and~~

~~(qq) it was in breach of its obligations to the Survivor Class Members and Family Class Members as set out in the Act and its Treaties with various~~

~~First Nations providing a right to education at a school to be established and maintained by Canada and which implicitly included the right to education in a safe environment free from abuse and the right to an education which would recognize Aboriginal beliefs, traditions, culture, language and way of life in a way that would not denigrate or eliminate these beliefs, traditions, culture, language and way of life.~~

67. Canada, through its employees, agents or representatives also breached its duty of care to protect the Survivor Class Members from sexual abuse by the student perpetrators while those particular Plaintiffs and the Survivor Class Members were attending and residing at the School with the result that the student perpetrators did in fact commit sexual abuse upon certain Plaintiffs and the Survivor Class Members.

68. Canada breached its fiduciary duties to the Plaintiffs and the Class and their families by failing to take any steps to protect the Survivor Class Members from sexual abuse.

68. In breach of its ongoing fiduciary duty to the Class, Canada failed and continues to fail, to adequately remediate the damage caused by its failures and omissions set out herein. In particular, Canada ~~has failed to take adequate measures to ameliorate the cultural, linguistic and social damage suffered by the class, and further~~ has failed to provide compensation for the physical, sexual and emotional abuse suffered by the Class.

~~69. The Plaintiffs plead that Canada was in breach of its various treaty obligations set out through the establishment and operation of the School and are liable for such breaches. In contravention of the Treaties between the Government and First Nations and in contravention of the *United Nations Genocide Convention*, particularly Article 2(e) thereof to which Canada is a signatory, the Plaintiffs and other Aboriginal children were to be systemically assimilated into white society. In pursuance of that plan, they were~~

~~forced to attend the School and contact with their families was restricted. Their cultures and languages were taken from them with sadistic punishment and practices.~~

~~70. The systemic child abuse, neglect and maltreatment sustained by the children at the School during the Class Period, the effect and impact of which is still being felt by Survivor Class Members and Family Class Members, was in violation of the rights of children, specifically, but not limited to, the following rights set out in the *United Nations Convention on the Rights of the Child*, adopted by the United Nations in 1989, and ratified by Canada in December of 1991.~~

G. DAMAGES SUFFERED BY CLASS MEMBERS

71. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Survivor Class Members, including Boasa, suffered injury and damages including:

(rr) isolation from family and community;

~~(ss) prohibition of the use of Aboriginal language and the practice of Aboriginal religion and culture and the consequential loss of facility and familiarity with Aboriginal language, religion and culture;~~

(tt) forced confinement;

(uu) assault and battery;

(vv) sexual abuse;

(ww) emotional abuse;

(xx) psychological abuse;

(yy) deprivation of the fundamental elements of an education;

(zz) an impairment of mental and emotional health amounting to a severe and permanent disability;

(aaa) a propensity to addiction;

(bbb) an impaired ability to participate in normal family life;

(ccc) alienation from family, spouses and children;

(ddd) an impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;

(eee) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the School experience;

(fff) depression, anxiety and emotional dysfunction;

(ggg) suicidal ideation;

(hhh) pain and suffering;

(iii) deprivation of the love and guidance of parents and siblings;

(jjj) loss of self-esteem and feelings of degradation;

(kkk) fear, humiliation and embarrassment as a child and adult, and sexual confusion and disorientation as a child and young adult;

(lll) loss of ability fulfill cultural duties;

(mmm) loss of ability to live in community; and

(nnn) constant and intense emotional, psychological pain and suffering.

72. The foregoing damages resulted from Canada's breach of fiduciary duty, and/or negligence, ~~assault, battery and/or breach of Aboriginal treaty rights.~~

73. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Family Class Members, including ~~Chido~~ Holwell, suffered injury and damages including:

(ooo) they were separated and alienated from Survivor Class Members for the duration of their confinement in the School;

(ppp) their relationships with Survivor Class Members were impaired, damaged and distorted as the result of the experiences of Survivor Class members in the School;

(qqq) they suffered abuse from Survivor Class members as a direct consequence of their School experience;

(rrr) they were unable to resume normal family life and experience with Survivor Class Members after their return from the Schools;

~~(sss) their culture and language was undermined and in some cases eradicated by, amongst other things, as pleaded herein, the forced assimilation of Survivor Class Members into non-aboriginal culture through the School.~~

74. Canada knew, or ought to have known, that as a consequence of its mistreatment of the children at the School, these Plaintiffs and class members would suffer significant mental, emotional, psychological and spiritual harm which would adversely affect their relationships with their families and their communities. ~~In fact, one of the purposes behind the operation of the School was to eliminate and damage relationships within families and communities with a view to promoting the assimilation of Aboriginal children into non-Aboriginal society.~~

H. PUNITIVE AND EXEMPLARY DAMAGES

75. The Plaintiffs plead that Canada, including its senior officers, directors, bureaucrats, ministers and executives, had specific and complete knowledge of the widespread physical, psychological, emotional, cultural and sexual abuses of Survivor Class Members which were occurring at the School during the Class Period. Despite this knowledge, Canada continued to operate the School and permit the perpetration of grievous harm to the Survivor Class Members.

~~76. In addition, Canada deliberately planned the eradication of the language, religion and culture of Survivor Class Members and Family Class Members. Their actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.~~

77. Full particulars respecting the daily care, operation and control of the School are within the Defendant's knowledge, control and possession.

78. The Plaintiffs plead and rely upon the following:

~~*Canadian Charter of Rights and Freedoms*, ss. 7, 15 and 24;~~

Class Actions Act, S.N.L. 2001, c. C-18.1.

Constitution Act, 1982, s. 35(1), being Schedule "B" to the *Canada Act, 1982* (U.K.), c. 11.

~~*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, ss. 3, 21, 22, and 23;~~

~~*The Indian Act*, S.C. 1951, c. 29, ss. 113-118;~~

~~*The Indian Act*, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122.~~

The Newfoundland Act, 1949 (U.K.), c. 22.

79. The Plaintiffs propose this action be tried in the City of St. John's, in the Province of Newfoundland.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of April, 2012.

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Leave granted
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IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

~~EMILY DICKMAN~~ EDGAR LUCY and DOMINIC DICKMAN

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

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

AMENDED STATEMENT OF CLAIM

A. RELIEF SOUGHT BY THE PLAINTIFFS AGAINST CANADA

48. The Representative Plaintiffs, on their own behalf, and on behalf of the members of the Survivor Class and Family Class claim:

(a) an Order certifying this proceeding as a Class Action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 and appointing ~~Emily Dickman~~ Edgar Lucy and Dominic Dickman as Representative Plaintiffs for the Survivor Class and any appropriate subgroup thereof;

(b) a Declaration that Canada owed ~~and was in breach of~~ exclusive non-delegable, fiduciary, and ~~statutory and common law~~ duties of care to the Plaintiffs and the other Survivor Class Members in relation to the ~~establishment~~, funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the Makkovik Boarding School in Makkovik, Newfoundland and Labrador (the "School");

(c) a Declaration that Canada was negligent in the ~~establishment~~, funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

Filed | Apr. 18/12 | MW

(d) a Declaration the Canada was or is in breach of its exclusive and non-delegable fiduciary obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its ~~establishment,~~ funding, operation, supervision, control, maintenance, oversight, ~~confinement in, transport of Survivor Class Members, to obligatory attendance at the School~~ of the School;

~~(e) a Declaration that Canada was or is in breach of its statutory duties pursuant to the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act") and its Treaty obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;~~

~~(f) a Declaration that the School caused cultural, linguistic and social damage and irreparable harm to the Survivor Class;~~

(g) a Declaration that Canada is liable to the Plaintiffs and other Survivor Class Members for the damages caused by its breach of exclusive non-delegable fiduciary and, ~~statutory and common law~~ duties of care and for negligence in relation to the ~~establishment,~~ funding, operation, supervision, control, maintenance, oversight, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

(h) non-pecuniary general damages for negligence, ~~loss of language and culture~~, breach of non-delegable exclusive fiduciary and duties of care, ~~statutory, treaty and common law duties~~ in the amount ~~of $500 million or such other sum as~~ this Honourable Court finds appropriate;

(i) pecuniary general damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, breach of non delegable exclusive fiduciary and, ~~statutory, treaty and common law~~ duties of care in the amount ~~$500 million or such other sum as~~ this Honourable Court ~~deems just~~ finds appropriate;

(j) exemplary and punitive damages in the amount ~~of $100 million or such other sum as~~ this Honourable Court deems just;

(k) damages in the amount ~~of $100 million or such other sum as~~ this Honourable Court deems just, pursuant to the *Family Law Act*, R.S.N., 1990, and its predecessors;

(l) prejudgment and postjudgment interest pursuant to the provisions of the *Judicature Act*, R.S.N. 1990, c. J-4 ; and

(m) the costs of this action on a substantial indemnity scale.

B. DEFINITIONS

49. The following definitions apply for the purposes of this Claim:

(a) "Aboriginal", "Aboriginal People(s)" or "Aboriginal Person(s)" means a person whose rights are recognized and affirmed by the *Constitution Act, 1982,* s. 35, being Schedule "B" to the *Canada Act, 1982* (U.K.), 1982. c. 11, specifically, members of the Metis and Inuit nations;

(b) "Aboriginal Right(s)" means rights recognized and affirmed by the *Constitution Act*, 1982, s. 35, being Schedule "B" to the *Canada Act, 1982* (U.K.), 1982. c. 11;

(c) "Agents" mean the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of the School;

(d) "Canada" means Her Majesty the Queen in Right of Canada, as represented in this proceeding by the Attorney General of Canada;

(e) "Class" or "Class Members" means all members of the Survivor Class and the Family Class;

(f) "Class Period" means March 31, 1949 to ~~December 31, 1996~~ and the date of closure of the Makkovik Boarding School;

(g) "Excluded Persons" means all persons who attended an Eligible Indian Residential School as defined by the Indian Residential Schools Settlement Agreement dated May 10, 2006 (the "Agreement") and all persons who are otherwise eligible, pursuant to the Agreement, to receive a Common Experience Payment or pursue a claim through the Individual Assessment Process, as defined by the Agreement;

(h) "Family Class" means:

(i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

~~(ii) the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;~~

(iii) a former spouse of a Survivor Class Member;

(iv) a child or other lineal descendent of a grandchild of a Survivor Class Member;

(v) a person of the same or opposite sex to a Survivor Class Member who cohabited for a period of at least one year with that Survivor Class Member immediately before his or her death;

(vi) a person of the same or opposite sex to a Survivor Class Member who was cohabiting with that Survivor Class Member at the date of his or her death and to whom that Survivor Class Member was providing support or was under a legal obligation to provide support on the date of his or her death;

(vii) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death;

(i) "School" means the Makkovik Boarding School, located in Makkovik, Newfoundland and Labrador;

(j) "Survivor Class" means:

All persons who attended the School between March 31, 1949 and ~~December 31, 1996~~ the date of closure of the Makkovik Boarding School.

C. THE PARTIES

i. Representative Plaintiffs

~~50. The Plaintiff, Emily Dickman ("Emily"), resides in Goose Bay, Newfoundland and Labrador ("Newfoundland"). Emily was born on March 26, 1942 and attended the School in Makkovik, Newfoundland for two (2) years between 1950 and 1952. Emily attended three (3) Residential Schools in Newfoundland, in total, between 1949 and 1957. Emily is a proposed representative plaintiff for the Survivor Class.~~

3. The Plaintiff, Edgar Lucy ("Edgar"), resides in Goose Bay, Newfoundland and Labrador ("Newfoundland"). Edgar was born on June 6, 1942 and attended the School in Makkovik, Newfoundland for five (5) years between 1949 and 1954. Edgar is a the representative plaintiff for the Survivor Class.

51. The Plaintiff, Dominic Dickman ("Dominic") resides in Goose Bay, Newfoundland. Dominic was born on January 20, 1968 and his mother, Emily Dickman, attended the School

in Newfoundland for two (2) years between 1950 and 1952. Dominic is a ~~proposed~~ the representative plaintiff for the Family Class.

52. The ~~proposed~~ Representative Plaintiffs do not purport to advance claims on behalf of any persons who are otherwise entitled to compensation pursuant to the terms of the Agreement.

53. Neither, the ~~proposed~~ Representative Plaintiffs' claim nor the classes they propose to represent overlap with the terms of the order issued by Regional Senior Justice Winkler of the Ontario Superior Court of Justice, dated March 8, 2007.

ii. The Defendant

54. The Defendant, Her Majesty the Queen in Right of Canada, is represented in this proceeding by the Attorney General of Canada ("Canada"). Canada represents the interests of the Minister of the Department of Indian Affairs Canada, who was, at all material times, responsible for the maintenance, funding, oversight or management ~~and operation~~ of the School, either on its own or in combination with other of its governmental agents or servants..

55. Once the Province of Newfoundland and Labrador entered Confederation in 1949, Canada assumed and possessed exclusive Legislative and executive responsibility over aboriginal persons, including the Classes. As aboriginal persons in the 'new' province in 1949 were legally "Indians" for the purposes of section 91(24) of the *British North America Act, 1867*, they were proper subjects of federal jurisdiction.

56. Canada's participation in the funding and operation of the School breached its exclusive duty of care owed to the Classes which was also in breach of its non-delegable fiduciary obligations and constitutional obligations owed to aboriginal persons.

57. Alternatively, even if Canada did not materially operate or manage the school, it nevertheless breached its fiduciary duties by failing to properly do so and protect the Class as it alone possessed singular and exclusive legal jurisdiction over aboriginal persons.

D. RESIDENTIAL SCHOOL SYSTEM – OPERATION OF THE SCHOOL

i. Background - Residential School History Generally

58. Residential Schools were established by Canada as early as 1874, for the education of Aboriginal children. These children were taken from their homes and their communities and transported to Residential Schools where they were confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them.

59. Commencing in 1911, Canada entered into formal agreements with various Churches and other philanthropic organizations (collectively the "Churches") for the operation of such schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of the Residential Schools. The Churches assumed the day-to-day operation of the Residential Schools under the control, supervision and direction of Canada, for which the Canada paid the Churches a per capita grant calculated to cover part of the cost of the Residential School operation.

60. As of 1920, the Residential School Policy included compulsory attendance at Residential Schools for all Aboriginal children aged 7 (seven) to 15 (fifteen). This approach to

the control and operation of the Residential Schools system continued until April 1, 1969, at which time Canada assumed the sole operation and administration of the Residential Schools from the Churches, excepting certain cases where Churches continued to act as agents of Canada.

61. Canada removed Aboriginal Persons, usually young children, from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. Canada controlled all aspects of the admission of Aboriginal Persons to the Residential Schools including arrangements for the care of such persons over holiday periods and the methods of transporting children to and from Residential Schools.

62. ~~The same~~ Similar Residential Schools ~~policy was implemented and effected in~~ existed in Newfoundland, which joined Canada on March 31, 1949. Accordingly, the claim against Canada is limited temporally to the time when the Canada became legally responsible for Aboriginal Persons residing in Newfoundland, or 1949, and beyond.

63. Aboriginal Persons were often taken from their families without the consent of their parents or guardians. While the stated purpose of the Residential Schools from their inception was the education of Aboriginal children, their true purpose was the complete integration and assimilation of Aboriginal children into mainstream Canadian society and the obliteration of their traditional language, culture and religion. Many children attending Residential Schools were also subject to repeated and extreme physical, sexual and emotional abuse, all of which continued until the year 1996, when the last Residential School operated by Canada was closed.

64. During the Class Period, children at the school were subjected to systemic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

65. The accommodation was crowded, cold, and sub-standard. Aboriginal children were underfed and ill nourished, forbidden to speak their native languages or to practice the customs and traditions of their culture. They were deprived of love and affection from their families and of the support that a child would normally expect to have from those in positions of trust and authority. Aboriginal children were also subjected to corporal punishment, assaults, including physical and sexual, and systematic child abuse.

E. CANADA'S ASSUMPTION OF DUTIES WHEN NEWFOUNDLAND JOINED CONFEDERATION IN 1949

66. Around the time of Confederation, two separate legal opinions commissioned by the Federal Department of Justice confirmed that the Federal Crown possessed exclusive legislative and executive responsibility in relation to Aboriginal persons, including the Inuit and Eskimo, living in Newfoundland and Labrador.

67. The records of the Federal departments, agencies, ministers and bureaucrats responsible for negotiating the *Terms of Union* 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.

68. As Canada's legal responsibility to Aboriginals was constitutional in nature, it was prohibited from attempting to cede or delegate such duties to any other entity, including the Province itself. Given the broad duties owed by Canada to Aboriginal persons, the welfare and education of Aboriginal children cannot be said to have resided with the Crown in right of the Province of Newfoundland after March 31, 1949.

69. The entry of Newfoundland and Labrador into Confederation brought its Aboriginal population fully within exclusive federal jurisdiction. At the time of Confederation, Canada was aware that any union with Newfoundland and Labrador would have had an Aboriginal component and legal responsibility associated with it.

70. 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 Aboriginal 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.

71. 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 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.

72. 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's Aboriginal people. Under Term 3 of the *Terms of Union*, for matters not specifically referred to, things were deemed to be as if Newfoundland had joined under the terms of the *Constitution Act, 1867.*

73. 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* it had exclusive jurisdiction in the area of Aboriginal peoples. By deleting the reference to native people in the proposed draft *Terms of Union* and writing in Federal responsibility, as outlined in the *British North America Act*, the Federal Government acknowledged *de facto* jurisdiction for the Indians, Inuit and Eskimos of Newfoundland and Labrador.

74. At the time of Confederation, the Premier, Joseph Smallwood, actually refused to sign an agreement with Canada which would have transferred federal responsibility for native persons to the Province. The Province maintained that the fiduciary obligations for Aboriginal persons remained, and belonged to the federal government.

75. 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."

76. This opinion provided by the Justice Department is consistent with the assumptions made during the pre-Confederation talks: Aboriginal persons, pursuant to the *British North America Act*, were Canada's responsibility. 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 populations in Newfoundland and Labrador. This demonstrates that the federal government believed it had a responsibility to fulfill in regard to the Eskimo and Inuit in Labrador and that it would be called upon to provide programs and assistance, funding, oversight and implementation of certain programs, including education.

77. In fact, the *Terms of Union* indirectly provided that the then Aboriginal population in Newfoundland fell under federal jurisdiction. Section three of the *Terms of Union* 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".

78. 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".

79. 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 Eskimo and Inuit in Labrador for which it expected payment. Throughout the

1950's and 1960's, programs for aboriginal education in Newfoundland and Labrador were paid for by Canada at the rate of 90% for Indian communities and 40% in Inuit communities.

80. 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 do not refer to Indians and Eskimos and since head 24 of section 91 of the *BNA Act* places 'Indians and lands reserved for Indians' exclusively under Federal jurisdiction, it seems clear that the Federal Government is responsible for the native population resident in Labrador."

81. By 1954, Newfoundland requested that Canada provide both operating and capital expenditures towards education for Eskimos 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. This agreement reached between the Premier of Newfoundland and Canada in 1954 provided for the re-assumption of federal constitutional responsibility over aboriginal persons in the new province of Newfoundland and Labrador.

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

83. 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."

84. As a result, by 1965, Canada had agreed to provide the same resources and programs to Indians, Inuit 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 – 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments.

85. Amongst other things, this "Contribution Agreement" was designed to provide services to the communities of Sheshatshit and Davis Inlet, including education. The Contribution Agreement identified the amount of funding available as (a) 90% from Canada; and (b) 10% from Newfoundland. The Contribution Agreement also established a management committee composed of federal officials, provincial officials and representatives of the Davis Inlet and Sheshatshit communities.

86. At the same time, the then 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:

(a) 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);

(b) establishment of a federal-provincial committee to monitor provincial expenditures;

(c) continuation of federal funding for Inuit communities in Labrador; and

(d) 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.

87. 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..."

88. 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

(ii) Native People's of Labrador Agreement, valued at $38,831,00.00 federal payments/contributions.

89. The Labrador Agreement covered the following Indian and Inuit communities: Davis Inlet, Northwest Rivet, Nain, Hopedale, Makkovik, Rigolet and Postville. Pursuant to that Agreement, between 1981 and 1986, Canada contributed 90% of the costs of the programs and services in these Indian communities and 60% of the costs of those delivered in the Inuit communities. In total, Canada contributed $29,135,100.00 in this respect between 1981 and 1986.

90. In August 1985, Canada entered into a further contribution agreement with Newfoundland and Labrador, "for the benefit of native peoples in Labrador", recognizing Canada's "special interest in the social and economic development of Inuit and Indian People." The operation of education was the largest budget allocation item pursuant to this Agreement, for a total of $1,530,000.00 (1985/1986 fiscal year), 71% of which was Canada's responsibility.

91. Fiduciary obligations are and were owed by Canada to Aboriginal persons, peoples who, pursuant to section 35(2) of the *Constitution Act 1982* include the Indian, Inuit and Metis. This fiduciary relationship between Canada and Aboriginal persons was and is *sui generis* in nature. Accordingly, a fiduciary duty between Canada and Aboriginal persons in Newfoundland and Labrador arose at the moment of Confederation in 1949.

92. Canada has acknowledged its own sole singular responsibility over Indians and Inuit in Newfoundland by accepting its 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. Having undertaking discretionary control over a cognizable Indian interest, a fiduciary duty existed between Canada and the Class in these circumstances.

93. As the nature of Canada's relationship with Aboriginal persons gives rise to a non-delegable duty to preserve, protect and promote welfare and education of Aboriginal children, the responsibility for its execution rested solely with Canada.

47. In the alternative, if Canada failed to properly assume those common law and constitutional obligations, it breached its, fiduciary and common law duties owed to the class by failing to do so.

ii. Canada's Operation of the School in Newfoundland

48. The School was located in Makkovik, Newfoundland. It was first established in the 1950's and ceased operation as a residential school for Aboriginal children in the 1970's.

49. The purpose of the School was to provide education to Aboriginal children between the ages of 6 and 16 years who attended the School from various First Nations bands and communities in Newfoundland. The School eventually became a vehicle for assimilating Aboriginal children through the eradication of their native languages, cultures and spiritual beliefs.

50. The School was initially founded and established by the Moravian Mission. Once Confederation occurred in March 1949 and Newfoundland joined Canada, the International Grefnell Association began ceasing its involvement, funding and role in the School. ~~At all material times, the staff members at the School were employees, servants and/or agents of~~

~~Canada.~~ The funding provided by Canada following Confederation was inadequate to meet the costs of operating and maintaining the School, and in particular, to meet the daily and educational needs of the students at the School. As a result, the care provided to the students and the conditions at the School were poor, the staff hired were unskilled and/or unsuitable for dealing with children and the conditions at the School were unsuitable and inappropriate for an educational facility for children.

51. ~~In many cases, the Aboriginal children were forced to attend the School by representatives, agents or servants of Canada. The Aboriginal children who attended the School were separated from their families, uprooted and taken to the School, where they were placed within the control of Canada. For all intents and purposes, the children who attended the School, were wards of the School and Canada.~~

52. Canada participated in the funding, oversight ~~carried out that operation~~ and administration of the School until the late 1970's. These operative and administrative responsibilities, carried out on behalf of Canada or by its agents included:

(a) the operation and maintenance of the School during the Class Period;

(b) the care and supervision of all members of the Survivor Class, and for supplying all the necessaries of life to Survivor Class members *in loco parentis*;

(c) the provision of educational and recreational services to the Survivor Class while in attendance at the School and control over all persons allowed to enter the School premises at all material times;

(d) the selection, supply and supervision of teaching and non-teaching staff at the School and reasonable investigation into the character, background and psychological profile of all individuals employed to teach or supervise the Survivor Class;

(e) inspection and supervision of the School and all activities taking place therein, and for full and frank reporting to Canada respecting conditions in the School and all activities taking place therein;

(f) transportation of Survivor Class members to and from the School; and

(g) communication with and reporting to the Family Class respecting the activities and experiences of Survivor Class members while attending the School.

53. Attempts to provide educational opportunities to children confined in the School were ill-conceived and poorly executed by inadequately trained teaching staff. The result was to effectively deprive the Aboriginal children of any useful or appropriate education. Very few survivors of the School went on to any form of higher education.

54. The conditions and abuses in the School during the Class Period were well-known to Canada.

55. Any attempt by Canada to delegate its duties, responsibilities or obligations to the Class to the Province of Newfoundland is unlawful and in breach of its exclusive and non-delegable fiduciary duties owed to the class.

F. CANADA'S BREACHES OF DUTIES TO THE CLASS MEMBERS

56. Canada has a fiduciary relationship with Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled and regulated the School during the Class Period, either on its own or in conjunction with the Province.

57. Canada, and its respective servants and agents compelled members of the Survivor Class to leave their homes, families and communities, and forced members of the Survivor Class to attend (and sometimes live in) the School, all without lawful authority or the

permission and consent of Survivor Class members or that of their parents. Such confinement was wrongful, arbitrary and for improper purposes.

58. Survivor Class members were systematically subjected to the institutional conditions, regime and discipline of the School without the permission and consent of Survivor Class members or that of their parents, and were also subjected to wrongful acts at the hands of Canada while confined therein.

59. In particular, ~~Emily~~ Edgar experienced emotional abuse during ~~her~~ his time at the School by teachers, "caregivers" and other students. Many of the children at the School experienced serious physical, mental and abuse during their time at the School from both teachers and students. Many of the children at the School also experienced sexual, physical and verbal abuse, perpetrated against them by teachers, adults in positions of authority or from other students.

60. Dominic, as a member of the Family Class, has experienced emotional abuse due to ~~his mother's~~ Emily Dickman's inability to participate in normal family life as result harm she suffered during her attendance at the School.

61. All persons, including ~~Emily~~ Edgar, who attended the School ~~did so as wards of Canada, with Canada as their guardian, and~~ were persons to whom Canada owed the highest non-delegable, fiduciary, ~~moral, statutory~~ and common law duties, which included, but were not limited to, the duty to ensure that reasonable care was taken of the Survivor Class while at the School, the duty to protect the Survivor Class while at the School and the duty to protect the Survivor Class from intentional torts perpetrated on them while at the School. These non-delegable and fiduciary duties were performed negligently and tortiously by Canada, in

breach of its special responsibility to ensure the safety of the Survivor Class while at the School.

62. Canada was responsible for:

~~(a) the administration of the Act and its predecessor statutes as well as any other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;~~

(b) the promotion of the health, safety and well being of Aboriginal Persons in Newfoundland during the Class Period;

(c) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessor ministries and departments during the Class Period;

(d) decisions, procedures, regulations promulgated, operations and actions taken by the Department of Indian Affairs and Northern Development and, its employees, servants, officers and agents in Canada during the Class Period;

(e) overseeing the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the School and for the creation, design and implementation of the program of education for Aboriginal Persons confined therein during the Class Period;

(f) the selection, control, training, supervision and regulation of the designated operators and their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons confined in the Residential School during the Class Period;

(g) the provision of all educational services and opportunities to the Survivor Class members, pursuant to the provisions of the Act and any other statutes relating to Aboriginal Persons during the Class Period;

~~(h) transportation of Survivor Class Members to and from the School and to and from their homes while attending the School during the Class Period;~~

~~(i) preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities;~~

(j) the care and supervision of all members of the Survivor Class while they were in attendance at the School during the Class Period and for the supply of all the necessities of life to Survivor Class Members, *in loco parentis*, during the Class Period;

(k) the provision of educational and recreational services to the Survivor Class while in attendance at the School during the Class Period;

(l) inspection and supervision of the School and all activities that took place therein during the Class Period and for full and frank reporting to Canada and to the Family Class Members with respect to conditions in the School and all activities that took place therein during the Class Period; and

(m) ~~communication with and reporting to the Family Class with respect to the activities and experiences of Survivor Class Members while attending the School during the Class Period~~.

63. During the Class Period, male and female Aboriginal children, including ~~Emily~~ Edgar, were subjected to gender specific, as well as non-gender specific, systematic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

64. At all material times, the children who attended the School were within the knowledge, contemplation, power or ~~and~~ control of Canada and were subject to the unilateral exercise of Canada's (or its delegates') power or discretion. By virtue of the relationship between the children and Canada, being one of trust, reliance and dependence, by the Aboriginal children, Canada owed a fiduciary obligation to ensure that the students who attended the School were treated fairly, respectfully, safely and in all other ways, consistent with the obligations of a parent or guardian to a child under its care and control.

65. At all material times, Canada owed a fiduciary obligation to the students who attended the School to act in the best interests of those students and to protect them from any abuse, be it mental, emotional, physical, sexual or otherwise. The children at the School relied upon Canada, to their detriment, to fulfill its fiduciary obligations.

66. Through its servants, officers, employees and agents, Canada was negligent and in breach of its non-delegable fiduciary, ~~moral, statutory,~~ and common law duties of care to the Survivor Class and the Family Class during the Class Period. Particulars of the negligence and breach of duty of Canada include the following:

(a) it systematically, negligently, unlawfully and wrongfully delegated its fiduciary and other responsibility and duties regarding the education of and care for Aboriginal children to others;

(b) it systematically, negligently, unlawfully and wrongfully admitted and confined Aboriginal children to the School;

~~(c) it acted without lawful authority and not in accordance with any statutory authority pursuant to or as contemplated by the provisions of the Act or any other statutes relating to Aboriginal Persons as:~~

~~(i) said provisions are and were *ultra vires* the Parliament of Canada and of no force and effect in law;~~

~~(ii) the conduct of Canada in placing the Aboriginal children in the School, confining them therein, and treating or permitting them to be treated there as set forth herein was in breach of Canada's fiduciary obligations to the Survivor Class and Family Class Members, which was not authorized or permitted by any applicable legislation and was, to the extent such legislation purported to authorize such fiduciary breach, of no force and effect and/or *ultra vires* the Parliament of Canada; and~~

~~(iii) Canada routinely and systematically failed to act in accordance with its own laws, regulations, policies and procedures with respect to the confinement of Aboriginal children in the School, which confinement was wrongful.~~

(d) it delegated to and contracted with the Churches and other Religious organizations and the Province to implement its program of forced integration, confinement and abuse;

(e) it failed to adequately screen and select the organizations and individuals to which it delegated the implementation of its Residential School program;

(f) it failed to adequately supervise and control the School and its agents operating same under its jurisdiction;

(g) it deliberately and chronically deprived the Survivor Class Members of the education they were entitled to or were led to expect from the School or of any adequate education;

(h) it designed, constructed, maintained and operated the School buildings which were sub-standard, inadequate to the purpose for which they were intended and detrimental to the emotional, psychological and physical health of the Survivor Class;

(i) it failed to provide funding for the operation of the School that was sufficient or adequate to supply the necessities of life to Aboriginal children confined to them;

(j) it failed to respond appropriately or at all to disclosure of abuses in the School during the Class Period;

~~(k) it conspired with the operators of the schools to suppress information about abuses taking place in the School during the Class Period;~~

(l) ~~it assaulted and battered the Survivor Class Members and~~ permitted them to be assaulted and battered during the Class Period;

(m) it permitted an environment which permitted and allowed student-upon-student abuse;

(n) ~~it forcibly confined the Survivor Class Members and~~ permitted them to be forcibly confined during the Class Period;

(o) it was in breach of its fiduciary duty to its Wards the Survivor Class Members by reason of the misfeasances, malfeasances and omissions set out above;

(p) it failed to inspect or audit the School adequately or at all;

(q) it failed to implement an adequate system of evaluation, monitoring and control of teachers, administrators and non-teaching staff of the School during the Class Period;

(r) it failed to periodically reassess its regulations, procedures and guidelines for the School when it knew or ought to have known of serious systemic failures in the School during the Class Period;

(s) it failed to close the School and otherwise protect and care for those persons confined therein when it knew or ought to have known that it was appropriate and essential to do so in order to preserve the health, welfare and well being of the Survivor Class Members;

(t) it delegated, attempted to delegate, continued to delegate and improperly delegated its non delegable duties and responsibility for the Survivor Class

when it was incapable to do so and when it knew or ought to have known that these duties and responsibilities were not being met;

(u) it failed to recognize and acknowledge harm once it occurred, to prevent additional harm from occurring and to, whenever and to the extent possible, provide appropriate treatment to those who were harmed;

~~(v) it undertook a systematic program of forced integration and assimilation of the Aboriginal Persons through the institution of the School when it knew or ought to have known that doing so would cause profound and permanent cultural, psychological, emotional and physical injury to the members of the Survivor Class during and following the Class Period; and~~

~~(w) it was in breach of its obligations to the Survivor Class Members and Family Class Members as set out in the Act and its Treaties with various First Nations providing a right to education at a school to be established and maintained by Canada and which implicitly included the right to education in a safe environment free from abuse and the right to an education which would recognize Aboriginal beliefs, traditions, culture, language and way of life in a way that would not denigrate or eliminate these beliefs, traditions, culture, language and way of life.~~

67. Canada, through its employees, agents or representatives also breached its duty of care to protect the Survivor Class Members from sexual abuse by the student perpetrators while those particular Plaintiffs and the Survivor Class Members were attending and residing at the School with the result that the student perpetrators did in fact commit sexual abuse upon certain Plaintiffs and the Survivor Class Members.

68. Canada breached its fiduciary duties to the Plaintiffs and the Class and their families by failing to take any steps to protect the Survivor Class Members from sexual abuse.

69. In breach of its ongoing fiduciary duty to the Class, Canada failed and continues to fail, to adequately remediate the damage caused by its failures and omissions set out herein. In particular, Canada ~~has failed to take adequate measures to ameliorate the cultural, linguistic and social damage suffered by the class, and further~~ has failed to provide compensation for the physical, sexual and emotional abuse suffered by the Class.

~~70. The Plaintiffs plead that Canada was in breach of its various treaty obligations set out through the establishment and operation of the School and are liable for such breaches. In contravention of the Treaties between the Government and First Nations and in contravention of the *United Nations Genocide Convention*, particularly Article 2(c) thereof to which Canada is a signatory, the Plaintiffs and other Aboriginal children were to be systemically assimilated into white society. In pursuance of that plan, they were forced to attend the School and contact with their families was restricted. Their cultures and languages were taken from them with sadistic punishment and practices.~~

71. ~~The systemic child abuse, neglect and maltreatment sustained by the children at the School during the Class Period, the effect and impact of which is still being felt by Survivor Class Members and Family Class Members, was in violation of the rights of children, specifically, but not limited to, the following rights set out in the *United Nations Convention on the Rights of the Child*, adopted by the United Nations in 1989, and ratified by Canada in December of 1991.~~

G. DAMAGES SUFFERED BY CLASS MEMBERS

72. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province for whom Canada is vicariously liable, the Survivor Class Members, including ~~Emily~~ Edgar, suffered injury and damages including:

(a) isolation from family and community;

~~(b) prohibition of the use of Aboriginal language and the practice of Aboriginal religion and culture and the consequential loss of facility and familiarity with Aboriginal language, religion and culture;~~

(c) forced confinement;

(d) assault and battery;

(e) sexual abuse;

(f) emotional abuse;

(g) psychological abuse;

(h) deprivation of the fundamental elements of an education;

(i) an impairment of mental and emotional health amounting to a severe and permanent disability;

(j) a propensity to addiction;

(k) an impaired ability to participate in normal family life;

(l) alienation from family, spouses and children;

(m) an impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;

(n) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the School experience;

(o) depression, anxiety and emotional dysfunction;

(p) suicidal ideation;

(q) pain and suffering;

(r) deprivation of the love and guidance of parents and siblings;

(s) loss of self-esteem and feelings of degradation;

(t) fear, humiliation and embarrassment as a child and adult, and sexual confusion and disorientation as a child and young adult;

(u) loss of ability fulfill cultural duties;

(v) loss of ability to live in community; and

(w) constant and intense emotional, psychological pain and suffering.

73. The foregoing damages resulted from Canada's breach of fiduciary duty, and/or negligence, ~~assault, battery and/or breach of Aboriginal treaty rights.~~

74. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Family Class Members, including Dominic, suffered injury and damages including:

(a) they were separated and alienated from Survivor Class Members for the duration of their confinement in the School;

(b) their relationships with Survivor Class Members were impaired, damaged and distorted as the result of the experiences of Survivor Class members in the School;

(c) they suffered abuse from Survivor Class members as a direct consequence of their School experience;

(d) they were unable to resume normal family life and experience with Survivor Class Members after their return from the Schools;

~~(e) their culture and language was undermined and in some cases eradicated by, amongst other things, as pleaded herein, the forced assimilation of Survivor Class Members into non-aboriginal culture through the School.~~

75. Canada knew, or ought to have known, that as a consequence of its mistreatment of the children at the School, these Plaintiffs and class members would suffer significant mental, emotional, psychological and spiritual harm which would adversely affect their relationships with their families and their communities. ~~In fact, one of the purposes behind the operation of the School was to eliminate and damage relationships within families and communities with a view to promoting the assimilation of Aboriginal children into non-Aboriginal society.~~

H. PUNITIVE AND EXEMPLARY DAMAGES

76. The Plaintiffs plead that Canada, including its senior officers, directors, bureaucrats, ministers and executives, had specific and complete knowledge of the widespread physical, psychological, emotional, cultural and sexual abuses of Survivor Class Members which were occurring at the School during the Class Period. Despite this knowledge, Canada continued to operate the School and permit the perpetration of grievous harm to the Survivor Class Members.

~~77. In addition, Canada deliberately planned the eradication of the language, religion and culture of Survivor Class Members and Family Class Members. Their actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.~~

78. Full particulars respecting the daily care, operation and control of the School are within the Defendant's knowledge, control and possession.

79. The Plaintiffs plead and rely upon the following:

~~*Canadian Charter of Rights and Freedoms*, ss. 7, 15 and 24;~~

Class Actions Act, S.N.L. 2001, c. C-18.1.

Constitution Act, 1982, s. 35(1), being Schedule "B" to the *Canada Act, 1982* (U.K.), c. 11.

~~*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, ss. 3, 21, 22, and 23;~~

~~*The Indian Act*, S.C. 1951, c. 29, ss. 113-118;~~

~~*The Indian Act*, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122.~~

The Newfoundland Act, 1949 (U.K.), c. 22.

80. The Plaintiffs propose this action be tried in the City of St. John's, in the Province of Newfoundland.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of April, 2012.

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Leave granted
R 7A 08.
Apr 12/12

2008 01T0845CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

SARAH ASIVAK and ~~DELANO FLOWERS~~
JAMES ASIVAK

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

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

AMENDED STATEMENT OF CLAIM

A. RELIEF SOUGHT BY THE PLAINTIFFS AGAINST CANADA

1. The Representative Plaintiffs, on their own behalf, and on behalf of the members of the Survivor Class and Family Class claim:

(a) an Order certifying this proceeding as a Class Action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 and appointing Sarah Asivak and ~~Delano Flowers~~ James Asivak as Representative Plaintiff for the Survivor Class and Family Class and any appropriate subgroup thereof;

(b) a Declaration that Canada owed ~~and was in breach of~~ exclusive non-delegable fiduciary and ~~statutory and common law~~ duties of care to the Plaintiffs and the other Survivor Class Members in relation to the ~~establishment~~, funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the Nain Boarding School in Nain, Labrador (the "School");

(c) a Declaration that Canada was negligent in the ~~establishment~~, funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

Filed | Apr 18/12 | mw

(d) a Declaration the Canada was or is in breach of its exclusive and non-delegable fiduciary obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its ~~establishment,~~ funding, operation, supervision, control, maintenance, oversight, ~~confinement in, transport of Survivor Class Members, to obligatory attendance at the School~~ of the school;

~~(e) a Declaration that Canada was or is in breach of its statutory duties pursuant to the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act") and its Treaty obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;~~

~~(f) a Declaration that the School caused cultural, linguistic and social damage and irreparable harm to the Survivor Class;~~

(g) a Declaration that Canada is liable to the Plaintiffs and other Survivor Class Members for the damages caused by its breach exclusive of non delegable, fiduciary and, ~~statutory and common law~~ duties of care and for negligence in relation to the ~~establishment,~~ funding, operation, supervision, control maintenance, oversight, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members~~ at and support of the School;

(h) non-pecuniary general damages for negligence, ~~loss of language and culture,~~ breach of non-delegable exclusive fiduciary and duties of care, ~~statutory, treaty and common law duties~~ in the amount ~~of $500 million or such other sum as~~ this Honourable Court finds appropriate;

(i) pecuniary general damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, breach of non delegable exclusive fiduciary and, ~~statutory, treaty and common law~~ duties of care in the amount ~~of $500 million or such other sum as~~ this Honourable Court ~~deems just~~ finds appropriate;

(j) exemplary and punitive damages in the amount ~~of $100 million or such other sum as~~ this Honourable Court ~~deems just~~ finds appropriate;

(k) damages in the amount ~~of $100 million or such other sum as~~ this Honourable Court deems just, pursuant to the *Family Law Act*, R.S.N., 1990, and its predecessors;

(l) prejudgment and postjudgment interest pursuant to the provisions of the *Judicature Act*, R.S.N. 1990, c. J-4 ; and

(m) the costs of this action on a substantial indemnity scale.

B. DEFINITIONS

2. The following definitions apply for the purposes of this Claim:

(a) "Aboriginal", "Aboriginal People(s)" or "Aboriginal Person(s)" means a person whose rights are recognized and affirmed by the *Constitution Act, 1982*, s. 35, being Schedule "B" to the *Canada Act, 1982* (U.K.), 1982. c. 11, specifically, members of the Metis and Inuit nations;

(b) "Aboriginal Right(s)" means rights recognized and affirmed by the *Constitution Act, 1982*, s. 35, being Schedule "B" to the *Canada Act, 1982* (U.K.), 1982. c. 11;

(c) "Agents" mean the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of the School;

(d) "Canada" means Her Majesty the Queen in Right of Canada, as represented in this proceeding by the Attorney General of Canada;

(e) "Class" or "Class Members" means all members of the Survivor Class and the Family Class;

(f) "Class Period" means March 31, 1949 to ~~December 31, 1996~~ and the date of closure of the Nain Boarding School;

(g) "Excluded Persons" means all persons who attended an Eligible Indian Residential School as defined by the Indian Residential Schools Settlement Agreement dated May 10, 2006 (the "Agreement") and all persons who are otherwise eligible, pursuant to the Agreement, to receive a Common Experience Payment or pursue a claim through the Individual Assessment Process, as defined by the Agreement;

(h) "Family Class" means:

(i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

~~(ii) the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;~~

(iii) a former spouse of a Survivor Class Member;

(iv) a child or other lineal descendent of a grandchild of a Survivor Class Member;

(v) a person of the same or opposite sex to a Survivor Class Member who cohabited for a period of at least one year with that Survivor Class Member immediately before his or her death;

(vi) a person of the same or opposite sex to a Survivor Class Member who was cohabiting with that Survivor Class Member at the date of his or her death and to whom that Survivor Class Member was providing support or was under a legal obligation to provide support on the date of his or her death;

(vii) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death;

(i) "School" means the Nain Boarding School, located in Nain, Newfoundland and Labrador;

(j) "Survivor Class" means:

All persons who attended the School between March 31, 1949 and ~~December 31, 1996~~ the date of closure of the Nain Boarding School.

C. THE PARTIES

i. Representative Plaintiffs

3. The Plaintiff, Sarah Asivak ("Asivak"), resides in Goose Bay, Newfoundland and Labrador ("Newfoundland") is an Inuit. Asivak attended the School in Nain, Newfoundland for one (1) year between 1958 and 1959. Asivak is ~~a proposed~~ the representative plaintiff for the Survivor Class.

4. The Plaintiff, ~~Delano Flowers~~ James Asivak ("~~Flowers~~ James") resides in Goose Bay, Newfoundland and is an Inuit. James ~~Flowers~~ was born on May ~~13~~ 15, ~~1962~~ 1943 and his ~~mother~~ wife, ~~Emily Dickman~~ Sarah Asivak, the other named plaintiff, attended the School in Nain, Newfoundland for one (1) year between ~~1949~~ 1958 and 1959~~0~~. ~~Flowers~~ James is ~~a proposed~~ the representative plaintiff for the Family Class.

5. The proposed Representative Plaintiffs do not purport to advance claims on behalf of any persons who are otherwise entitled to compensation pursuant to the terms of the Agreement.

6. Neither the proposed Representative Plaintiffs' claim nor the classes they propose to represent overlap with the terms of the order issued by Regional Senior Justice Winkler of the Ontario Superior Court of Justice, dated March 8, 2007.

ii. The Defendant

7. The Defendant, Her Majesty the Queen in Right of Canada, is represented in this proceeding by the Attorney General of Canada ("Canada"). Canada represents the interests of the Minister of the Department of Indian Affairs Canada, who was, at all material times, responsible for the maintenance, funding and oversight or management ~~and operation~~ of the School, either on its own or in combination with other of its governmental agents or servants.

8. Once the Province of Newfoundland and Labrador entered Confederation in 1949, Canada assumed and possessed exclusive Legislative and executive responsibility over aboriginal persons, including the Classes. As aboriginal persons in the 'new' province in 1949 were legally "Indians" for the purposes of section 91(24) of the *British North America Act, 1867*, they were proper subjects of federal jurisdiction.

9. Canada's participation in the funding and operation of the School breached its exclusive duty of care owed to the Classes which was also in breach of its non-delegable fiduciary obligations and constitutional obligations owed to aboriginal persons.

10. Alternatively, even if Canada did not materially operate or manage the school, it nevertheless breached its fiduciary duties by failing to properly do so and protect the Class as it alone possessed singular and exclusive legal jurisdiction over aboriginal persons.

D. RESIDENTIAL SCHOOL SYSTEM – OPERATION OF THE SCHOOL

i. Background - Residential School History Generally

11. Residential Schools were established by Canada as early as 1874, for the education of Aboriginal children. These children were taken from their homes and their communities and transported to Residential Schools where they were confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them.

12. Commencing in 1911, Canada entered into formal agreements with various Churches and other philanthropic organizations (collectively the "Churches") for the operation of such schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of the Residential Schools. The Churches assumed the day-to-day operation of the Residential Schools under the control, supervision and direction of Canada, for which the Canada paid the Churches a per capita grant calculated to cover part of the cost of the Residential School operation.

13. As of 1920, the Residential School Policy included compulsory attendance at Residential Schools for all Aboriginal children aged 7 (seven) to 15 (fifteen). This approach to the control and operation of the Residential Schools system continued until April 1, 1969, at which time Canada assumed the sole operation and administration of the

Residential Schools from the Churches, excepting certain cases where Churches continued to act as agents of Canada.

14. Canada removed Aboriginal Persons, usually young children, from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. Canada controlled all aspects of the admission of Aboriginal Persons to the Residential Schools including arrangements for the care of such persons over holiday periods and the methods of transporting children to and from Residential Schools.

15. ~~The same~~ Similar Residential Schools ~~policy was implemented and effected in~~ existed in Newfoundland, which joined Canada on March 31, 1949. Accordingly, the claim against Canada is limited temporally to the time when the Canada became legally responsible for Aboriginal Persons residing in Newfoundland, or 1949, and beyond.

16. Aboriginal Persons were often taken from their families without the consent of their parents or guardians. While the stated purpose of the Residential Schools from their inception was the education of Aboriginal children, their true purpose was the complete integration and assimilation of Aboriginal children into mainstream Canadian society and the obliteration of their traditional language, culture and religion. Many children attending Residential Schools were also subject to repeated and extreme physical, sexual and emotional abuse, all of which continued until the year 1996, when the last Residential School operated by Canada was closed.

17. During the Class Period, children at the school were subjected to systemic child abuse, neglect and maltreatment. They were forcibly confined in the School and were

systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

18. The accommodation was crowded, cold, and sub-standard. Aboriginal children were underfed and ill nourished, forbidden to speak their native languages or to practice the customs and traditions of their culture. They were deprived of love and affection from their families and of the support that a child would normally expect to have from those in positions of trust and authority. Aboriginal children were also subjected to corporal punishment, assaults, including physical and sexual, and systematic child abuse.

E. CANADA'S ASSUMPTION OF DUTIES WHEN NEWFOUNDLAND JOINED CONFEDERATION IN 1949

19. Around the time of Confederation, two separate legal opinions commissioned by the Federal Department of Justice confirmed that the Federal Crown possessed exclusive legislative and executive responsibility in relation to Aboriginal persons, including the Inuit and Eskimo, living in Newfoundland and Labrador.

20. The records of the Federal departments, agencies, ministers and bureaucrats responsible for negotiating the *Terms of Union* 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.

21. As Canada's legal responsibility to Aboriginals was constitutional in nature, it was prohibited from attempting to cede or delegate such duties to any other entity,

including the Province itself. Given the broad duties owed by Canada to Aboriginal persons, the welfare and education of Aboriginal children cannot be said to have resided with the Crown in right of the Province of Newfoundland after March 31, 1949.

22. The entry of Newfoundland and Labrador into Confederation brought its Aboriginal population fully within exclusive federal jurisdiction. At the time of Confederation, Canada was aware that any union with Newfoundland and Labrador would have had an Aboriginal component and legal responsibility associated with it.

23. 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 Aboriginal 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.

24. 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 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.

25. 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's Aboriginal people. Under Term 3 of the *Terms of Union*, for matters not

specifically referred to, things were deemed to be as if Newfoundland had joined under the terms of the *Constitution Act, 1867.*

26. 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* it had exclusive jurisdiction in the area of Aboriginal peoples. By deleting the reference to native people in the proposed draft *Terms of Union* and writing in Federal responsibility, as outlined in the *British North America Act*, the Federal Government acknowledged *de facto* jurisdiction for the Indians, Inuit and Eskimos of Newfoundland and Labrador.

27. At the time of Confederation, the Premier, Joseph Smallwood, actually refused to sign an agreement with Canada which would have transferred federal responsibility for native persons to the Province. The Province maintained that the fiduciary obligations for Aboriginal persons remained, and belonged to the federal government.

28. 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."

29. This opinion provided by the Justice Department is consistent with the assumptions made during the pre-Confederation talks: Aboriginal persons, pursuant to the *British North America Act*, were Canada's responsibility. 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 populations in Newfoundland and Labrador. This demonstrates that the federal government believed it had a responsibility to fulfill in regard to the Eskimo and Inuit in Labrador and that it would be called upon to provide programs and assistance, funding, oversight and implementation of certain programs, including education.

30. In fact, the *Terms of Union* indirectly provided that the then Aboriginal population in Newfoundland fell under federal jurisdiction. Section three of the *Terms of Union* 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".

31. 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".

32. 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 Eskimo and Inuit in Labrador for which it expected payment.

Throughout the 1950's and 1960's, programs for aboriginal education in Newfoundland and Labrador were paid for by Canada at the rate of 90% for Indian communities and 40% in Inuit communities.

33. 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 do not refer to Indians and Eskimos and since head 24 of section 91 of the *BNA Act* places 'Indians and lands reserved for Indians' exclusively under Federal jurisdiction, it seems clear that the Federal Government is responsible for the native population resident in Labrador."

34. By 1954, Newfoundland requested that Canada provide both operating and capital expenditures towards education for Eskimos 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. This agreement reached between the Premier of Newfoundland and Canada in 1954 provided for the re-assumption of federal constitutional responsibility over aboriginal persons in the new province of Newfoundland and Labrador.

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

36. 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."

37. As a result, by 1965, Canada had agreed to provide the same resources and programs to Indians, Inuit 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 – 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments.

38. Amongst other things, this "Contribution Agreement" was designed to provide services to the communities of Sheshatshit and Davis Inlet, including education. The Contribution Agreement identified the amount of funding available as (a) 90% from Canada; and (b) 10% from Newfoundland. The Contribution Agreement also established a management committee composed of federal officials, provincial officials and representatives of the Davis Inlet and Sheshatshit communities.

39. At the same time, the then 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:

(a) 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);

(b) establishment of a federal-provincial committee to monitor provincial expenditures;

(c) continuation of federal funding for Inuit communities in Labrador; and

(d) 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.

40. 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..."

41. 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

(ii) Native People's of Labrador Agreement, valued at $38,831,00.00 federal payments/contributions.

42. The Labrador Agreement covered the following Indian and Inuit communities: Davis Inlet, Northwest Rivet, Nain, Hopedale, Makkovik, Rigolet and Postville. Pursuant to that Agreement, between 1981 and 1986, Canada contributed 90% of the costs of the programs and services in these Indian communities and 60% of the costs of those delivered in the Inuit communities. In total, Canada contributed $29,135,100.00 in this respect between 1981 and 1986.

43. In August 1985, Canada entered into a further contribution agreement with Newfoundland and Labrador, "for the benefit of native peoples in Labrador", recognizing Canada's "special interest in the social and economic development of Inuit and Indian People." The operation of education was the largest budget allocation item pursuant to this Agreement, for a total of $1,530,000.00 (1985/1986 fiscal year), 71% of which was Canada's responsibility.

44. Fiduciary obligations are and were owed by Canada to Aboriginal persons, peoples who, pursuant to section 35(2) of the *Constitution Act 1982* include the Indian, Inuit and Metis. This fiduciary relationship between Canada and Aboriginal persons was and is *sui generis* in nature. Accordingly, a fiduciary duty between Canada and Aboriginal persons in Newfoundland and Labrador arose at the moment of Confederation in 1949.

45. Canada has acknowledged its own sole singular responsibility over Indians and Inuit in Newfoundland by accepting its 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. Having undertaking discretionary control over a cognizable Indian interest, a fiduciary duty existed between Canada and the Class in these circumstances.

46. As the nature of Canada's relationship with Aboriginal persons gives rise to a non-delegable duty to preserve, protect and promote welfare and education of Aboriginal children, the responsibility for its execution rested solely with Canada.

47. In the alternative, if Canada failed to properly assume those common law and constitutional obligations, it breached its, fiduciary and common law duties owed to the class by failing to do so.

ii. Canada's Operation of the School in Newfoundland

48. The School was located in Nain, Newfoundland. It was first established in the 1950's and ceased operation as a residential school for Aboriginal children in the 1970's.

49. The purpose of the School was to provide education to Aboriginal children between the ages of 6 and 16 years who attended the School from various First Nations bands and communities in Newfoundland. The School eventually became a vehicle for assimilating Aboriginal children through the eradication of their native languages, cultures and spiritual beliefs.

50. The School was initially founded and established by the Moravian Mission. Once Confdederation occurred in March 1949 and Newfoundland joined Canada, the International Grefnell Association began ceasing its involvement, funding the role in the School. ~~At all material times, the staff members at the School were employees, servants and/or agents of Canada.~~ The funding provided by Canada following Confederation was inadequate to meet the costs of operating and maintaining the School, and in particular, to meet the daily and educational needs of the students at the School. As a result, the care provided to the students and the conditions at the School were poor, the staff hired were unskilled and/or unsuitable for dealing with children and the conditions at the School were unsuitable and inappropriate for an educational facility for children.

~~51. In many cases, the Aboriginal children were forced to attend the School by representatives, agents or servants of Canada. The Aboriginal children who attended the School were separated from their families, uprooted and taken to the School, where they were placed within the control of Canada. For all intents and purposes, the children who attended the School, were wards of the School and Canada.~~

52. Canada participated in the funding, oversight ~~carried out that operation~~ and administration of the School until the late 1970's. These operative and administrative responsibilities, carried out on behalf of Canada or by its agents included:

(a) the operation and maintenance of the School during the Class Period;

(b) the care and supervision of all members of the Survivor Class, and for supplying all the necessaries of life to Survivor Class members *in loco parentis*;

(c) the provision of educational and recreational services to the Survivor Class while in attendance at the School and control over all persons allowed to enter the School premises at all material times;

(d) the selection, supply and supervision of teaching and non-teaching staff at the School and reasonable investigation into the character, background and psychological profile of all individuals employed to teach or supervise the Survivor Class;

(e) inspection and supervision of the School and all activities taking place therein, and for full and frank reporting to Canada respecting conditions in the School and all activities taking place therein;

(f) transportation of Survivor Class members to and from the School; and

(g) communication with and reporting to the Family Class respecting the activities and experiences of Survivor Class members while attending the School.

53. Attempts to provide educational opportunities to children confined in the School were ill-conceived and poorly executed by inadequately trained teaching staff. The result was to effectively deprive the Aboriginal children of any useful or appropriate education. Very few survivors of the School went on to any form of higher education.

54. The conditions and abuses in the School during the Class Period were well-known to Canada.

55. Any attempt by Canada to delegate its duties, responsibilities or obligations to the Class to the Province of Newfoundland is unlawful and in breach of its exclusive and non-delegable fiduciary duties owed to the class.

F. CANADA'S BREACHES OF DUTIES TO THE CLASS MEMBERS

56. Canada has a fiduciary relationship with Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled

and regulated the School during the Class Period, either on its own or in conjunction with the Province.

57. Canada, and its respective servants and agents compelled members of the Survivor Class to leave their homes, families and communities, and forced members of the Survivor Class to attend (and sometimes live in) the School, all without lawful authority or the permission and consent of Survivor Class members or that of their parents. Such confinement was wrongful, arbitrary and for improper purposes.

58. Survivor Class members were systematically subjected to the institutional conditions, regime and discipline of the School without the permission and consent of Survivor Class members or that of their parents, and were also subjected to wrongful acts at the hands of Canada while confined therein.

59. In particular, Asivak experienced abuse during her time at the School by teachers, "caregivers" and other students. Many of the children at the School also experienced sexual, physical and verbal abuse, perpetrated against them by teachers, adults in positions of authority or from other students.

60. ~~Flowers~~ James, as a member of the Family Class, has experienced emotional abuse due to his ~~mother's~~ wife's inability to participate in normal family life as result harm she suffered during her attendance at the School.

61. All persons, including Asivak, who attended the School ~~did so as wards of Canada, with Canada as their guardian, and~~ were persons to whom Canada owed the highest non-delegable, fiduciary, ~~moral, statutory~~ and common law duties, which

included, but were not limited to, the duty to ensure that reasonable care was taken of the Survivor Class while at the School, the duty to protect the Survivor Class while at the School and the duty to protect the Survivor Class from intentional torts perpetrated on them while at the School. These non-delegable and fiduciary duties were performed negligently and tortiously by Canada, in breach of its special responsibility to ensure the safety of the Survivor Class while at the School.

62. Canada was responsible for:

~~(a) the administration of the Act and its predecessor statutes as well as any other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;~~

(b) the promotion of the health, safety and well being of Aboriginal Persons in Newfoundland during the Class Period;

(c) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessor ministries and departments during the Class Period;

(d) decisions, procedures, regulations promulgated, operations and actions taken by the Department of Indian Affairs and Northern Development and, its employees, servants, officers and agents in Canada during the Class Period;

(e) oversee the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the School and for the creation, design and implementation of the program of education for Aboriginal Persons confined therein during the Class Period;

(f) the selection, control, training, supervision and regulation of the designated operators and their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons confined in the Residential School during the Class Period;

(g) the provision of all educational services and opportunities to the Survivor Class members, pursuant to the provisions of the Act and any other statutes relating to Aboriginal Persons during the Class Period;

~~(h) transportation of Survivor Class Members to and from the School and to and from their homes while attending the School during the Class Period;~~

~~(i) preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities;~~

(j) the care and supervision of all members of the Survivor Class while they were in attendance at the School during the Class Period and for the supply of all the necessities of life to Survivor Class Members, *in loco parentis*, during the Class Period;

(k) the provision of educational and recreational services to the Survivor Class while in attendance at the School during the Class Period;

(l) inspection and supervision of the School and all activities that took place therein during the Class Period and for full and frank reporting to Canada and to the Family Class Members with respect to conditions in the School and all activities that took place therein during the Class Period; and

~~(m) communication with and reporting to the Family Class with respect to the activities and experiences of Survivor Class Members while attending the School during the Class Period.~~

63. During the Class Period, male and female Aboriginal children, including Asivak, were subjected to gender specific, as well as non-gender specific, systematic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

64. At all material times, the children who attended the School were within the knowledge, contemplation, power or ~~and~~ control of Canada and were subject to the unilateral exercise of Canada's (or its delegates') power or discretion. By virtue of the relationship between the children and Canada, being one of trust, reliance and dependence, by the Aboriginal children, Canada owed a fiduciary obligation to ensure that the students who attended the School were treated fairly, respectfully, safely and in

all other ways, consistent with the obligations of a parent or guardian to a child under its care and control.

65. At all material times, Canada owed a fiduciary obligation to the students who attended the School to act in the best interests of those students and to protect them from any abuse, be it mental, emotional, physical, sexual or otherwise. The children at the School relied upon Canada, to their detriment, to fulfill its fiduciary obligations.

66. Through its servants, officers, employees and agents, Canada was negligent and in breach of its non-delegable fiduciary, ~~moral, statutory~~, and common law duties of care to the Survivor Class and the Family Class during the Class Period. Particulars of the negligence and breach of duty of Canada include the following:

(a) it systematically, negligently, unlawfully and wrongfully delegated its fiduciary and other responsibility and duties regarding the education of and care for Aboriginal children to others;

(b) it systematically, negligently, unlawfully and wrongfully admitted and confined Aboriginal children to the School;

~~(c) it acted without lawful authority and not in accordance with any statutory authority pursuant to or as contemplated by the provisions of the Act or any other statutes relating to Aboriginal Persons as:~~

~~(i) said provisions are and were *ultra vires* the Parliament of Canada and of no force and effect in law;~~

~~(ii) the conduct of Canada in placing the Aboriginal children in the School, confining them therein, and treating or permitting them to be treated there as set forth herein was in breach of Canada's fiduciary obligations to the Survivor Class and Family Class Members, which was not authorized or permitted by any applicable legislation and was, to the extent such legislation purported to authorize such fiduciary breach, of no force and effect and/or *ultra vires* the Parliament of Canada; and~~

~~(iii) Canada routinely and systematically failed to act in accordance with its own laws, regulations, policies and procedures with~~

~~respect to the confinement of Aboriginal children in the School, which confinement was wrongful.~~

(d) it delegated to and contracted with the Churches and other Religious organizations and the Province to implement its program of forced integration, confinement and abuse;

(e) it failed to adequately screen and select the organizations and individuals to which it delegated the implementation of its Residential School program;

(f) it failed to adequately supervise and control the School and its agents operating same under its jurisdiction;

(g) it deliberately and chronically deprived the Survivor Class Members of the education they were entitled to or were led to expect from the School or of any adequate education;

(h) it designed, constructed, maintained and operated the School buildings which were sub-standard, inadequate to the purpose for which they were intended and detrimental to the emotional, psychological and physical health of the Survivor Class;

(i) it failed to provide funding for the operation of the School that was sufficient or adequate to supply the necessities of life to Aboriginal children confined to them;

(j) it failed to respond appropriately or at all to disclosure of abuses in the School during the Class Period;

~~(k) it conspired with the operators of the schools to suppress information about abuses taking place in the School during the Class Period;~~

(l) ~~it assaulted and battered the Survivor Class Members and~~ permitted them to be assaulted and battered during the Class Period;

(m) it permitted an environment which permitted and allowed student-upon-student abuse;

(n) ~~it forcibly confined the Survivor Class Members and~~ permitted them to be forcibly confined during the Class Period;

(o) it was in breach of its fiduciary duty to ~~its Wards~~ the Survivor Class Members by reason of the misfeasances, malfeasances and omissions set out above;

(p) it failed to inspect or audit the School adequately or at all;

(q) it failed to implement an adequate system of evaluation, monitoring and control of teachers, administrators and non-teaching staff of the School during the Class Period;

(r) it failed to periodically reassess its regulations, procedures and guidelines for the School when it knew or ought to have known of serious systemic failures in the School during the Class Period;

(s) it failed to close the School and otherwise protect and care for those persons confined therein when it knew or ought to have known that it was appropriate and essential to do so in order to preserve the health, welfare and well being of the Survivor Class Members;

(t) it delegated, attempted to delegate, continued to delegate and improperly delegated its non delegable duties and responsibility for the Survivor Class when it was incapable to do so and when it knew or ought to have known that these duties and responsibilities were not being met;

(u) it failed to recognize and acknowledge harm once it occurred, to prevent additional harm from occurring and to, whenever and to the extent possible, provide appropriate treatment to those who were harmed;

~~(v) it undertook a systematic program of forced integration and assimilation of the Aboriginal Persons through the institution of the School when it knew or ought to have known that doing so would cause profound and permanent cultural, psychological, emotional and physical injury to the members of the Survivor Class during and following the Class Period; and~~

~~(w) it was in breach of its obligations to the Survivor Class Members and Family Class Members as set out in the Act and its Treaties with various First Nations providing a right to education at a school to be established and maintained by Canada and which implicitly included the right to education in a safe environment free from abuse and the right to an education which would recognize Aboriginal beliefs, traditions, culture, language and way of life in a way that would not denigrate or eliminate these beliefs, traditions, culture, language and way of life.~~

67. Canada, through its employees, agents or representatives also breached its duty of care to protect the Survivor Class Members from sexual abuse by the student perpetrators while those particular Plaintiffs and the Survivor Class Members were attending and residing at the School with the result that the student perpetrators did in fact commit sexual abuse upon certain Plaintiffs and the Survivor Class Members.

68. Canada breached its fiduciary duties to the Plaintiffs and the Class and their families by failing to take any steps to protect the Survivor Class Members from sexual abuse.

69. In breach of its ongoing fiduciary duty to the Class, Canada failed and continues to fail, to adequately remediate the damage caused by its failures and omissions set out herein. In particular, Canada ~~has failed to take adequate measures to ameliorate the cultural, linguistic and social damage suffered by the class, and further~~ has failed to provide compensation for the physical, sexual and emotional abuse suffered by the Class.

~~70. The Plaintiffs plead that Canada was in breach of its various treaty obligations set out through the establishment and operation of the School and are liable for such breaches. In contravention of the Treaties between the Government and First Nations and in contravention of the *United Nations Genocide Convention*, particularly Article 2(c) thereof to which Canada is a signatory, the Plaintiffs and other Aboriginal children were to be systemically assimilated into white society. In pursuance of that plan, they were forced to attend the School and contact with their families was restricted. Their cultures and languages were taken from them with sadistic punishment and practices.~~

71. ~~The systemic child abuse, neglect and maltreatment sustained by the children at the School during the Class Period, the effect and impact of which is still being felt by Survivor Class Members and Family Class Members, was in violation of the rights of children, specifically, but not limited to, the following rights set out in the *United Nations Convention on the Rights of the Child*, adopted by the United Nations in 1989, and ratified by Canada in December of 1991.~~

G. DAMAGES SUFFERED BY CLASS MEMBERS

72. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Survivor Class Members, including Asivak, suffered injury and damages including:

(a) isolation from family and community;

~~(b) prohibition of the use of Aboriginal language and the practice of Aboriginal religion and culture and the consequential loss of facility and familiarity with Aboriginal language, religion and culture;~~

(c) forced confinement;

(d) assault and battery;

(e) sexual abuse;

(f) emotional abuse;

(g) psychological abuse;

(h) deprivation of the fundamental elements of an education;

(i) an impairment of mental and emotional health amounting to a severe and permanent disability;

(j) a propensity to addiction;

(k) an impaired ability to participate in normal family life;

(l) alienation from family, spouses and children;

(m) an impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;

(n) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the School experience;

(o) depression, anxiety and emotional dysfunction;

(p) suicidal ideation;

(q) pain and suffering;

(r) deprivation of the love and guidance of parents and siblings;

(s) loss of self-esteem and feelings of degradation;

(t) fear, humiliation and embarrassment as a child and adult, and sexual confusion and disorientation as a child and young adult;

(u) loss of ability fulfill cultural duties;

(v) loss of ability to live in community; and

(w) constant and intense emotional, psychological pain and suffering.

73. The foregoing damages resulted from Canada's breach of fiduciary duty, and/or negligence ~~assault, battery and/or breach of Aboriginal treaty rights~~.

74. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Family Class Members, including ~~Flowers~~ James, suffered injury and damages including:

(a) they were separated and alienated from Survivor Class Members for the duration of their confinement in the School;

(b) their relationships with Survivor Class Members were impaired, damaged and distorted as the result of the experiences of Survivor Class members in the School;

(c) they suffered abuse from Survivor Class members as a direct consequence of their School experience;

(d) they were unable to resume normal family life and experience with Survivor Class Members after their return from the Schools;

~~(e) their culture and language was undermined and in some cases eradicated by, amongst other things, as pleaded herein, the forced assimilation of Survivor Class Members into non-aboriginal culture through the School.~~

75. Canada knew, or ought to have known, that as a consequence of its mistreatment of the children at the School, these Plaintiffs and class members would suffer significant mental, emotional, psychological and spiritual harm which would adversely affect their relationships with their families and their communities. ~~In fact, one of the purposes behind the operation of the School was to eliminate and damage relationships within families and communities with a view to promoting the assimilation of Aboriginal children into non-Aboriginal society.~~

G. PUNITIVE AND EXEMPLARY DAMAGES

76. The Plaintiffs plead that Canada, including its senior officers, directors, bureaucrats, ministers and executives, had specific and complete knowledge of the widespread physical, psychological, emotional, cultural and sexual abuses of Survivor Class Members which were occurring at the School during the Class Period. Despite this knowledge, Canada continued to operate the School and permit the perpetration of grievous harm to the Survivor Class Members.

~~77. In addition, Canada deliberately planned the eradication of the language, religion and culture of Survivor Class Members and Family Class Members. Their actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.~~

78. Full particulars respecting the daily care, operation and control of the School are within the Defendant's knowledge, control and possession.

79. The Plaintiffs plead and rely upon the following:

~~*Canadian Charter of Rights and Freedoms*, ss. 7, 15 and 24;~~

~~*Class Actions Act*, S.N.L. 2001, c. C-18.1.~~

Constitution Act, 1982, s. 35(1), being Schedule "B" to the *Canada Act, 1982* (U.K.), c. 11.

~~*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, ss. 3, 21, 22, and 23;~~

~~*The Indian Act*, S.C. 1951, c. 29, ss. 113-118;~~

~~*The Indian Act*, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122.~~

The Newfoundland Act, 1949 (U.K.), c. 22.

80. The Plaintiffs propose this action be tried in the City of St. John's, in the Province of Newfoundland.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of April, 2012.

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leave granted
K7A08
April 12/12
[illegible]

2007 5423CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

TOBY OBED, WILLIAM ADAMS and MARTHA BLAKE

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

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

AMENDED STATEMENT OF CLAIM

A. RELIEF SOUGHT BY THE PLAINTIFFS AGAINST CANADA

1. The Representative Plaintiffs, on their own behalf, and on behalf of the members of the Survivor Class and Family Class claim:

(a) an Order certifying this proceeding as a Class Action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 and appointing Toby Obed and William Adams as Representative Plaintiffs for the Survivor Class and any appropriate subgroup thereof;

(b) a Declaration that Canada owed ~~and was in breach of~~ exclusive non-delegable, fiduciary, and ~~statutory and common law~~ duties of care to the Plaintiffs and the other Survivor Class Members in relation to the ~~establishment~~, funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the Yale School in Northwest River, Newfoundland and Labrador (the "School");

(c) a Declaration that Canada was negligent in the ~~establishment~~, funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

Filed | Apr 18/12 | MW

(d) a Declaration the Canada was or is in breach of its exclusive and non-delegable fiduciary obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its ~~establishment~~, funding, operation, supervision, control, maintenance, oversight, ~~confinement in, transport of Survivor Class Members, to obligatory attendance at the School~~ of the School;

~~(e) a Declaration that Canada was or is in breach of its statutory duties pursuant to the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act") and its Treaty obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;~~

~~(f) a Declaration that the School caused cultural, linguistic and social damage and irreparable harm to the Survivor Class;~~

(g) a Declaration that Canada is liable to the Plaintiffs and other Survivor Class Members for the damages caused by its breach of exclusive non delegable, fiduciary and, ~~statutory and common law~~ duties of care and for negligence in relation to the ~~establishment,~~ funding, operation, supervision, control maintenance, oversight, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

(h) non-pecuniary general damages for negligence, ~~loss of language and culture,~~ breach of non-delegable, exclusive fiduciary, and duties of care, ~~statutory, treaty and common law duties~~ in the amount ~~of $500 million or such other sum as~~ this Honourable Court finds appropriate;

(i) pecuniary general damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, breach of non-delegable exclusive fiduciary and, ~~statutory, treaty and common law~~ duties of care in the amount ~~of $500 million or such other sum as~~ this Honourable Court ~~deems just~~ finds appropriate;

(j) exemplary and punitive damages in the amount ~~of $100 million or such other sum as~~ this Honourable Court ~~deems just~~ finds appropriate;

(k) damages in the amount of ~~$100 million or such other sum as~~ this Honourable Court finds appropriate, pursuant to the *Family Law Act*, R.S.N., 1990, and its predecessors;

(l) prejudgment and postjudgment interest pursuant to the provisions of the *Judicature Act*, R.S.N. 1990, c. J-4 ; and

(m) the costs of this action on a substantial indemnity scale.

B. DEFINITIONS

2. The following definitions apply for the purposes of this Claim:

(a) "Aboriginal", "Aboriginal People(s)" or "Aboriginal Person(s)" means a person whose rights are recognized and affirmed by the *Constitution Act*, 1982, s. 35, being Schedule "B" to the *Canada Act*, 1982 (U.K.), 1982. c. 11, specifically, members of the Metis and Inuit nations;

(b) "Aboriginal Right(s)" means rights recognized and affirmed by the *Constitution Act*, 1982, s. 35, being Schedule "B" to the *Canada Act*, 1982 (U.K.), 1982. c. 11;

(c) "Agents" mean the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of the School;

(d) "Canada" means Her Majesty the Queen in Right of Canada, as represented in this proceeding by the Attorney General of Canada;

(e) "Class" or "Class Members" means all members of the Survivor Class and the Family Class;

(f) "Class Period" means March 31, 1949 ~~to December 31, 1996~~ and the date of closure of the Yale School;

(g) "Excluded Persons" means all persons who attended an Eligible Indian Residential School as defined by the Indian Residential Schools Settlement Agreement dated May 10, 2006 (the "Agreement") and all persons who are otherwise eligible, pursuant to the Agreement, to receive a Common Experience Payment or pursue a claim through the Individual Assessment Process, as defined by the Agreement;

(h) "Family Class" means:

(i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

~~(ii) the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;~~

(iii) a former spouse of a Survivor Class Member;

(iv) a child or other lineal descendent of a grandchild of a Survivor Class Member;

(v) a person of the same or opposite sex to a Survivor Class Member who cohabited for a period of at least one year with that Survivor Class Member immediately before his or her death;

(vi) a person of the same or opposite sex to a Survivor Class Member who was cohabiting with that Survivor Class Member at the date of his or her death and to whom that Survivor Class Member was providing support or was under a legal obligation to provide support on the date of his or her death;

(vii) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death;

(i) "School" means the Yale School, located in Northwest River, Newfoundland;

(j) "Survivor Class" means:

All persons who attended the School between March 31, 1949 and ~~December 31, 1996~~ the date of closure of the Yale School.

C. THE PARTIES

i. Representative Plaintiffs

3. The Plaintiff, Toby Obed ("Obed"), resides in Goose Bay, Newfoundland and is an Inuk. Obed attended the School in Northwest River, Newfoundland and Labrador ("Newfoundland") for four (4) years between 1972 and 1976. Obed is a ~~proposed~~ the representative plaintiff for the Survivor Class.

4. The Plaintiff, William Adams ("Adams"), resides in Northwest River, Newfoundland and is an Inuk. Adams attended the School in Northwest River, Newfoundland for eight (8) years between 1969 and 1977. Adams is a ~~proposed~~ the representative plaintiff for the Survivor Class.

5. The Plaintiff, Martha Blake ("Blake") resides in Northwest River, Newfoundland and is an Inuk. Blake was born on March 25, 1958 and her common law husband,

Adams, attended the School in Northwest River, Newfoundland for eight (8) years between 1969 and 1977. Blake is ~~a proposed~~ the representative plaintiff for the Family Class.

6. The ~~proposed~~ Representative Plaintiffs do not purport to advance claims on behalf of any persons who are otherwise entitled to compensation pursuant to the terms of the Agreement.

7. Neither, the proposed Representative Plaintiffs' claim nor the classes they ~~propose to~~ represent overlap with the terms of the order issued by Regional Senior Justice Winkler of the Ontario Superior Court of Justice, dated March 8, 2007.

ii. The Defendant

8. The Defendant, Her Majesty the Queen in Right of Canada, is represented in this proceeding by the Attorney General of Canada ("Canada"). Canada represents the interests of the Minister of the Department of Indian Affairs Canada, who was, at all material times, responsible for the maintenance, funding, oversight or management ~~and operation~~ of the School, either on its own or in combination with other of its governmental agents or servants.

9. Once the Province of Newfoundland and Labrador entered Confederation in 1949, Canada assumed and possessed exclusive Legislative and executive responsibility over aboriginal persons, including the Classes. As aboriginal persons in the 'new' province in 1949 were legally "Indians" for the purposes of section 91(24) of the *British North America Act, 1867*, they were proper subjects of federal jurisdiction.

10. Canada's participation in the funding and operation of the School breached its exclusive duty of care owed to the Classes which was also in breach of its non-delegable fiduciary obligations and constitutional obligations owed to aboriginal persons.

11. Alternatively, even if Canada did not materially operate or manage the school, it nevertheless breached its fiduciary duties by failing to properly do so and protect the Class as it alone possessed singular and exclusive legal jurisdiction over aboriginal persons.

D. RESIDENTIAL SCHOOL SYSTEM – OPERATION OF THE SCHOOL

i. Background - Residential School History Generally

12. Residential Schools were established by Canada as early as 1874, for the education of Aboriginal children. These children were taken from their homes and their communities and transported to Residential Schools where they were confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them.

13. Commencing in 1911, Canada entered into formal agreements with various Churches and other philanthropic organizations (collectively the "Churches") for the operation of such schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of the Residential Schools. The Churches assumed the day-to-day operation of the Residential Schools under the control, supervision and direction of Canada, for which the Canada paid the Churches a per capita grant calculated to cover part of the cost of the Residential School operation.

14. As of 1920, the Residential School Policy included compulsory attendance at Residential Schools for all Aboriginal children aged 7 (seven) to 15 (fifteen). This approach to the control and operation of the Residential Schools system continued until April 1, 1969, at which time Canada assumed the sole operation and administration of the Residential Schools from the Churches, excepting certain cases where Churches continued to act as agents of Canada.

15. Canada removed Aboriginal Persons, usually young children, from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. Canada controlled all aspects of the admission of Aboriginal Persons to the Residential Schools including arrangements for the care of such persons over holiday periods and the methods of transporting children to and from Residential Schools.

16. ~~The same~~ Similar Residential School~~s policy was implemented and effected in~~ existed in Newfoundland, which joined Canada on March 31, 1949. Accordingly, the claim against Canada is limited temporally to the time when the Canada became legally responsible for Aboriginal Persons residing in Newfoundland, or 1949, and beyond.

17. Aboriginal Persons were often taken from their families without the consent of their parents or guardians. While the stated purpose of the Residential Schools from their inception was the education of Aboriginal children, their true purpose was the complete integration and assimilation of Aboriginal children into mainstream Canadian society and the obliteration of their traditional language, culture and religion. Many children attending Residential Schools were also subject to repeated and extreme physical, sexual

and emotional abuse, all of which continued until the year 1996, when the last Residential School operated by Canada was closed.

18. During the Class Period, children at the school were subjected to systemic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

19. The accommodation was crowded, cold, and sub-standard. Aboriginal children were underfed and ill nourished, forbidden to speak their native languages or to practice the customs and traditions of their culture. They were deprived of love and affection from their families and of the support that a child would normally expect to have from those in positions of trust and authority. Aboriginal children were also subjected to corporal punishment, assaults, including physical and sexual, and systematic child abuse.

E. CANADA'S ASSUMPTION OF DUTIES WHEN NEWFOUNDLAND JOINED CONFEDERATION IN 1949

20. Around the time of Confederation, two separate legal opinions commissioned by the Federal Department of Justice confirmed that the Federal Crown possessed exclusive legislative and executive responsibility in relation to Aboriginal persons, including the Inuit and Eskimo, living in Newfoundland and Labrador.

21. The records of the Federal departments, agencies, ministers and bureaucrats responsible for negotiating the *Terms of Union* 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.

22. As Canada's legal responsibility to Aboriginals was constitutional in nature, it was prohibited from attempting to cede or delegate such duties to any other entity, including the Province itself. Given the broad duties owed by Canada to Aboriginal persons, the welfare and education of Aboriginal children cannot be said to have resided with the Crown in right of the Province of Newfoundland after March 31, 1949.

23. The entry of Newfoundland and Labrador into Confederation brought its Aboriginal population fully within exclusive federal jurisdiction. At the time of Confederation, Canada was aware that any union with Newfoundland and Labrador would have had an Aboriginal component and legal responsibility associated with it.

24. 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 Aboriginal 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.

25. 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 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.

26. 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's Aboriginal people. Under Term 3 of the *Terms of Union*, for matters not specifically referred to, things were deemed to be as if Newfoundland had joined under the terms of the *Constitution Act, 1867*.

27. 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* it had exclusive jurisdiction in the area of Aboriginal peoples. By deleting the reference to native people in the proposed draft *Terms of Union* and writing in Federal responsibility, as outlined in the *British North America Act*, the Federal Government acknowledged *de facto* jurisdiction for the Indians, Inuit and Eskimos of Newfoundland and Labrador.

28. At the time of Confederation, the Premier, Joseph Smallwood, actually refused to sign an agreement with Canada which would have transferred federal responsibility for native persons to the Province. The Province maintained that the fiduciary obligations for Aboriginal persons remained, and belonged to the federal government.

29. 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."

30. This opinion provided by the Justice Department is consistent with the assumptions made during the pre-Confederation talks: Aboriginal persons, pursuant to the *British North America Act*, were Canada's responsibility. 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 populations in Newfoundland and Labrador. This demonstrates that the federal government believed it had a responsibility to fulfill in regard to the Eskimo and Inuit in Labrador and that it would be called upon to provide programs and assistance, funding, oversight and implementation of certain programs, including education.

31. In fact, the *Terms of Union* indirectly provided that the then Aboriginal population in Newfoundland fell under federal jurisdiction. Section three of the *Terms of Union* 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".

32. 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".

33. 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 Eskimo and Inuit in Labrador for which it expected payment. Throughout the 1950's and 1960's, programs for aboriginal education in Newfoundland and Labrador were paid for by Canada at the rate of 90% for Indian communities and 40% in Inuit communities.

34. 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 do not refer to Indians and Eskimos and since head 24 of section 91 of the *BNA Act* places 'Indians and lands reserved for Indians' exclusively under Federal jurisdiction, it seems clear that the Federal Government is responsible for the native population resident in Labrador."

35. By 1954, Newfoundland requested that Canada provide both operating and capital expenditures towards education for Eskimos 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. This agreement reached between the Premier of Newfoundland and Canada in 1954 provided for the re-assumption of federal constitutional responsibility over aboriginal persons in the new province of Newfoundland and Labrador.

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

37. 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."

38. As a result, by 1965, Canada had agreed to provide the same resources and programs to Indians, Inuit 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 – 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments.

39. Amongst other things, this "Contribution Agreement" was designed to provide services to the communities of Sheshatshit and Davis Inlet, including education. The Contribution Agreement identified the amount of funding available as (a) 90% from

Canada; and (b) 10% from Newfoundland. The Contribution Agreement also established a management committee composed of federal officials, provincial officials and representatives of the Davis Inlet and Sheshatshit communities.

40. At the same time, the then 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:

(a) 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);

(b) establishment of a federal-provincial committee to monitor provincial expenditures;

(c) continuation of federal funding for Inuit communities in Labrador; and

(d) 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.

41. 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..."

42. 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

(ii) Native People's of Labrador Agreement, valued at $38,831,00.00 federal payments/contributions.

43. The Labrador Agreement covered the following Indian and Inuit communities: Davis Inlet, Northwest Rivet, Nain, Hopedale, Makkovik, Rigolet and Postville. Pursuant to that Agreement, between 1981 and 1986, Canada contributed 90% of the costs of the programs and services in these Indian communities and 60% of the costs of those delivered in the Inuit communities. In total, Canada contributed $29,135,100.00 in this respect between 1981 and 1986.

44. In August 1985, Canada entered into a further contribution agreement with Newfoundland and Labrador, "for the benefit of native peoples in Labrador", recognizing Canada's "special interest in the social and economic development of Inuit and Indian People." The operation of education was the largest budget allocation item pursuant to this Agreement, for a total of $1,530,000.00 (1985/1986 fiscal year), 71% of which was Canada's responsibility.

45. Fiduciary obligations are and were owed by Canada to Aboriginal persons, peoples who, pursuant to section 35(2) of the *Constitution Act 1982* include the Indian, Inuit and Metis. This fiduciary relationship between Canada and Aboriginal persons was and is *sui generis* in nature. Accordingly, a fiduciary duty between Canada and Aboriginal persons in Newfoundland and Labrador arose at the moment of Confederation in 1949.

46. Canada has acknowledged its own sole singular responsibility over Indians and Inuit in Newfoundland by accepting its 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. Having undertaking discretionary control over a cognizable Indian interest, a fiduciary duty existed between Canada and the Class in these circumstances.

47. As the nature of Canada's relationship with Aboriginal persons gives rise to a non-delegable duty to preserve, protect and promote welfare and education of Aboriginal children, the responsibility for its execution rested solely with Canada.

48. In the alternative, if Canada failed to properly assume those common law and constitutional obligations, it breached its, fiduciary and common law duties owed to the class by failing to do so.

ii. Canada's Operation of the School in Newfoundland

49. The School was located in Northwest River, Newfoundland. It was first established in 1948 and ceased operation as a residential school for Aboriginal children in 1979.

50. The purpose of the School was to provide education to Aboriginal children between the ages of 6 and 16 years who attended the School from various First Nations bands and communities in Newfoundland and Labrador. The School eventually became a vehicle for assimilating Aboriginal children through the eradication of their native languages, cultures and spiritual beliefs.

51. The School was initially founded and established by the International Grenfell Association. Once Confederation occurred in March 1949 and Newfoundland joined Canada, the International Grefnell Association began ceasing its involvement, funding and role in the School. ~~At all material times, the staff members at the School were employees, servants and/or agents of Canada~~. The funding provided by Canada following Confederation was inadequate to meet the costs of operating and maintaining the School, and in particular, to meet the daily and educational needs of the students at the School. As a result, the care provided to the students and the conditions at the School were poor, the staff hired were unskilled and/or unsuitable for dealing with children and the conditions at the School were unsuitable and inappropriate for an educational facility for children.

~~52. In many cases, the Aboriginal children were forced to attend the School by representatives, agents or servants of Canada. The Aboriginal children who attended the School were separated from their families, uprooted and taken to the School, where they were placed within the control of Canada. For all intents and purposes, the children who attended the School, were wards of the School and Canada.~~

53. Canada participated in the funding, oversight ~~carried out that operation~~ and administration of the School until 1979. These operative and administrative responsibilities, carried out on behalf of Canada or by its agents included:

(a) the operation and maintenance of the School during the Class Period;

(b) the care and supervision of all members of the Survivor Class, and for supplying all the necessaries of life to Survivor Class members *in loco parentis*;

(c) the provision of educational and recreational services to the Survivor Class while in attendance at the School and control over all persons allowed to enter the School premises at all material times;

(d) the selection, supply and supervision of teaching and non-teaching staff at the School and reasonable investigation into the character, background and psychological profile of all individuals employed to teach or supervise the Survivor Class;

(e) inspection and supervision of the School and all activities taking place therein, and for full and frank reporting to Canada respecting conditions in the School and all activities taking place therein;

(f) transportation of Survivor Class members to and from the School; and

(g) communication with and reporting to the Family Class respecting the activities and experiences of Survivor Class members while attending the School.

54. Attempts to provide educational opportunities to children confined in the School were ill-conceived and poorly executed by inadequately trained teaching staff. The result was to effectively deprive the Aboriginal children of any useful or appropriate education. Very few survivors of the School went on to any form of higher education.

55. The conditions and abuses in the School during the Class Period were well-known to Canada.

56. Any attempt by Canada to delegate its duties, responsibilities or obligations to the Class to the Province of Newfoundland is unlawful and in breach of its exclusive and non-delegable fiduciary duties owed to the class.

F. CANADA'S BREACHES OF DUTIES TO THE CLASS MEMBERS

57. Canada has a fiduciary relationship with Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled and regulated the School during the Class Period, either on its own or in conjunction with the Province.

58. Canada, and its respective servants and agents compelled members of the Survivor Class to leave their homes, families and communities, and forced members of the Survivor Class to attend (and sometimes live in) the School, all without lawful authority or the permission and consent of Survivor Class members or that of their parents. Such confinement was wrongful, arbitrary and for improper purposes.

59. Survivor Class members were systematically subjected to the institutional conditions, regime and discipline of the School without the permission and consent of Survivor Class members or that of their parents, and were also subjected to wrongful acts at the hands of Canada while confined therein.

60. In particular, Obed and Adams experienced severe physical abuse and verbal abuse during their time at the School by teachers, "caregivers" and other students. Obed and Adams also suffered from serious physical, mental and abuse during their time at the School from both teachers and students. In particular, both Obed and Adams were repeatedly sexually abused by dorm supervisors, supposed caregivers and other students.

Many of the children at the School also experienced sexual abuse, perpetrated against them by teachers, adults in positions of authority or from other students.

61. Blake, as a member of the Family Class, has experienced both serious physical and emotional abuse due to Adams' inability to participate in normal family life as result harm he suffered during his attendance at the School.

62. All persons, including Obed and Adams, who attended the School ~~did so as wards of Canada, with Canada as their guardian, and~~ were persons to whom Canada owed the highest non-delegable, fiduciary, ~~moral, statutory~~ and common law duties, which included, but were not limited to, the duty to ensure that reasonable care was taken of the Survivor Class while at the School, the duty to protect the Survivor Class while at the School and the duty to protect the Survivor Class from intentional torts perpetrated on them while at the School. These non-delegable ~~and~~ fiduciary duties were performed negligently and tortuously by Canada, in breach of its special responsibility to ensure the safety of the Survivor Class while at the School.

63. Canada was responsible for:

~~(a) the administration of the Act and its predecessor statutes as well as any other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;~~

(b) the promotion of the health, safety and well being of Aboriginal Persons in Newfoundland during the Class Period;

(c) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessor ministries and departments during the Class Period;

(d) decisions, procedures, regulations promulgated, operations and actions taken by the Department of Indian Affairs and Northern Development and,

~~(e) it acted without lawful authority and not in accordance with any statutory authority pursuant to or as contemplated by the provisions of the Act or any other statutes relating to Aboriginal Persons as:~~

~~(i) said provisions are and were *ultra vires* the Parliament of Canada and of no force and effect in law;~~

~~(ii) the conduct of Canada in placing the Aboriginal children in the School, confining them therein, and treating or permitting them to be treated there as set forth herein was in breach of Canada's fiduciary obligations to the Survivor Class and Family Class Members, which was not authorized or permitted by any applicable legislation and was, to the extent such legislation purported to authorize such fiduciary breach, of no force and effect and/or *ultra vires* the Parliament of Canada; and~~

~~(iii) Canada routinely and systematically failed to act in accordance with its own laws, regulations, policies and procedures with respect to the confinement of Aboriginal children in the School, which confinement was wrongful.~~

(d) it delegated to and contracted with the Churches and other Religious organizations and the Province to implement its program of forced integration, confinement and abuse;

(e) it failed to adequately screen and select the organizations and individuals to which it delegated the implementation of its Residential School program;

(f) it failed to adequately supervise and control the School and its agents operating same under its jurisdiction;

(g) it deliberately and chronically deprived the Survivor Class Members of the education they were entitled to or were led to expect from the School or of any adequate education;

(h) it designed, constructed, maintained and operated the School buildings which were sub-standard, inadequate to the purpose for which they were intended and detrimental to the emotional, psychological and physical health of the Survivor Class;

(i) it failed to provide funding for the operation of the School that was sufficient or adequate to supply the necessities of life to Aboriginal children confined to them;

(j) it failed to respond appropriately or at all to disclosure of abuses in the School during the Class Period;

~~(k) it conspired with the operators of the schools to suppress information about abuses taking place in the School during the Class Period;~~

(l) ~~it assaulted and battered the Survivor Class Members and~~ permitted them to be assaulted and battered during the Class Period;

(m) it permitted an environment which permitted and allowed student-upon-student abuse;

(n) ~~it forcibly confined the Survivor Class Members and~~ permitted them to be forcibly confined during the Class Period;

(o) it was in breach of its fiduciary duty to ~~its Wards~~ the Survivor Class Members by reason of the misfeasances, malfeasances and omissions set out above;

(p) it failed to inspect or audit the School adequately or at all;

(q) it failed to implement an adequate system of evaluation, monitoring and control of teachers, administrators and non-teaching staff of the School during the Class Period;

(r) it failed to periodically reassess its regulations, procedures and guidelines for the School when it knew or ought to have known of serious systemic failures in the School during the Class Period;

(s) it failed to close the School and otherwise protect and care for those persons confined therein when it knew or ought to have known that it was appropriate and essential to do so in order to preserve the health, welfare and well being of the Survivor Class Members;

(t) it delegated, attempted to delegate, continued to delegate and improperly delegated its non delegable duties and responsibility for the Survivor Class when it was incapable to do so and when it knew or ought to have known that these duties and responsibilities were not being met;

(u) it failed to recognize and acknowledge harm once it occurred, to prevent additional harm from occurring and to, whenever and to the extent possible, provide appropriate treatment to those who were harmed;

~~(v) it undertook a systematic program of forced integration and assimilation of the Aboriginal Persons through the institution of the School when it knew or ought to have known that doing so would cause profound and permanent cultural, psychological, emotional and physical injury to the members of the Survivor Class during and following the Class Period; and~~

~~(w) it was in breach of its obligations to the Survivor Class Members and Family Class Members as set out in the Act and its Treaties with various~~

~~First Nations providing a right to education at a school to be established and maintained by Canada and which implicitly included the right to education in a safe environment free from abuse and the right to an education which would recognize Aboriginal beliefs, traditions, culture, language and way of life in a way that would not denigrate or eliminate these beliefs, traditions, culture, language and way of life.~~

68. Canada, through its employees, agents or representatives also breached its duty of care to protect the Survivor Class Members from sexual abuse by the student perpetrators while those particular Plaintiffs and the Survivor Class Members were attending and residing at the School with the result that the student perpetrators did in fact commit sexual abuse upon certain Plaintiffs and the Survivor Class Members.

69. Canada breached its fiduciary duties to the Plaintiffs and the Class and their families by failing to take any steps to protect the Survivor Class Members from sexual abuse.

70. In breach of its ongoing fiduciary duty to the Class, Canada failed and continues to fail, to adequately remediate the damage caused by its failures and omissions set out herein. In particular, Canada ~~has failed to take adequate measures to ameliorate the cultural, linguistic and social damage suffered by the class, and further~~ has failed to provide compensation for the physical, sexual and emotional abuse suffered by the Class.

~~71. The Plaintiffs plead that Canada was in breach of its various treaty obligations set out through the establishment and operation of the School and are liable for such breaches. In contravention of the Treaties between the Government and First Nations and in contravention of the *United Nations Genocide Convention*, particularly Article 2(e) thereof to which Canada is a signatory, the Plaintiffs and other Aboriginal children were to be systemically assimilated into white society. In pursuance of that plan, they were~~

~~forced to attend the School and contact with their families was restricted. Their cultures and languages were taken from them with sadistic punishment and practices.~~

~~72. The systemic child abuse, neglect and maltreatment sustained by the children at the School during the Class Period, the effect and impact of which is still being felt by Survivor Class Members and Family Class Members, was in violation of the rights of children, specifically, but not limited to, the following rights set out in the *United Nations Convention on the Rights of the Child*, adopted by the United Nations in 1989, and ratified by Canada in December of 1991.~~

G. DAMAGES SUFFERED BY CLASS MEMBERS

73. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Survivor Class Members, including Obed and Adams, suffered injury and damages including:

(a) isolation from family and community;

~~(b) prohibition of the use of Aboriginal language and the practice of Aboriginal religion and culture and the consequential loss of facility and familiarity with Aboriginal language, religion and culture;~~

(c) forced confinement;

(d) assault and battery;

(e) sexual abuse;

(f) emotional abuse;

(g) psychological abuse;

(h) deprivation of the fundamental elements of an education;

(i) an impairment of mental and emotional health amounting to a severe and permanent disability;

(j) a propensity to addiction;

(k) an impaired ability to participate in normal family life;

(l) alienation from family, spouses and children;

(m) an impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;

(n) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the School experience;

(o) depression, anxiety and emotional dysfunction;

(p) suicidal ideation;

(q) pain and suffering;

(r) deprivation of the love and guidance of parents and siblings;

(s) loss of self-esteem and feelings of degradation;

(t) fear, humiliation and embarrassment as a child and adult, and sexual confusion and disorientation as a child and young adult;

(u) loss of ability fulfill cultural duties;

(v) loss of ability to live in community; and

(w) constant and intense emotional, psychological pain and suffering.

74. The foregoing damages resulted from Canada's breach of fiduciary duty, and/or negligence, ~~assault, battery and/or breach of Aboriginal treaty rights~~.

75. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Family Class Members, including Blake, suffered injury and damages including:

(a) they were separated and alienated from Survivor Class Members for the duration of their confinement in the School;

(b) their relationships with Survivor Class Members were impaired, damaged and distorted as the result of the experiences of Survivor Class members in the School;

(c) they suffered abuse from Survivor Class members as a direct consequence of their School experience;

(d) they were unable to resume normal family life and experience with Survivor Class Members after their return from the Schools;

~~(e) their culture and language was undermined and in some cases eradicated by, amongst other things, as pleaded herein, the forced assimilation of Survivor Class Members into non-aboriginal culture through the School.~~

~~76.~~ Canada knew, or ought to have known, that as a consequence of its mistreatment of the children at the School, these Plaintiffs and class members would suffer significant mental, emotional, psychological and spiritual harm which would adversely affect their relationships with their families and their communities. ~~In fact, one of the purposes behind the operation of the School was to eliminate and damage relationships within families and communities with a view to promoting the assimilation of Aboriginal children into non-Aboriginal society.~~

H. PUNITIVE AND EXEMPLARY DAMAGES

77. The Plaintiffs plead that Canada, including its senior officers, directors, bureaucrats, ministers and executives, had specific and complete knowledge of the widespread physical, psychological, emotional, cultural and sexual abuses of Survivor Class Members which were occurring at the School during the Class Period. Despite this knowledge, Canada continued to operate the School and permit the perpetration of grievous harm to the Survivor Class Members.

~~78. In addition, Canada deliberately planned the eradication of the language, religion and culture of Survivor Class Members and Family Class Members. Their actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.~~

79. Full particulars respecting the daily care, operation and control of the School are within the Defendant's knowledge, control and possession.

80. The Plaintiffs plead and rely upon the following:

~~*Canadian Charter of Rights and Freedoms*, ss. 7, 15 and 24;~~

Class Actions Act, S.N.L. 2001, c. C-18.1.

Constitution Act, 1982, s. 35(1), being Schedule "B" to the *Canada Act, 1982* (U.K.), c. 11.

~~*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, ss. 3, 21, 22, and 23;~~

~~*The Indian Act*, S.C. 1951, c. 29, ss. 113-118;~~

~~*The Indian Act*, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122.~~

The Newfoundland Act, 1949 (U.K.), c. 22.

81. The Plaintiffs propose this action be tried in the City of St. John's, in the Province of Newfoundland.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of April, 2012.

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its employees, servants, officers and agents in Canada during the Class Period;

(e) overseeing the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the School and for the creation, design and implementation of the program of education for Aboriginal Persons confined therein during the Class Period;

(f) the selection, control, training, supervision and regulation of the designated operators and their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons confined in the Residential School during the Class Period;

(g) the provision of all educational services and opportunities to the Survivor Class members, pursuant to the provisions of the Act and any other statutes relating to Aboriginal Persons during the Class Period;

~~(h) transportation of Survivor Class Members to and from the School and to and from their homes while attending the School during the Class Period;~~

~~(i) preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities;~~

(j) the care and supervision of all members of the Survivor Class while they were in attendance at the School during the Class Period and for the supply of all the necessities of life to Survivor Class Members, *in loco parentis*, during the Class Period;

(k) the provision of educational and recreational services to the Survivor Class while in attendance at the School during the Class Period;

(l) inspection and supervision of the School and all activities that took place therein during the Class Period and for full and frank reporting to Canada and to the Family Class Members with respect to conditions in the School and all activities that took place therein during the Class Period; and

~~(m) communication with and reporting to the Family Class with respect to the activities and experiences of Survivor Class Members while attending the School during the Class Period.~~

64. During the Class Period, male and female Aboriginal children, including Obed and Adams, were subjected to gender specific, as well as non-gender specific, systematic child abuse, neglect and maltreatment. They were forcibly confined in the School and

were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

65. At all material times, the children who attended the School were within the knowledge, contemplation, power or ~~and~~ control of Canada and were subject to the unilateral exercise of Canada's (or its delegates') power or discretion. By virtue of the relationship between the children and Canada, being one of trust, reliance and dependence, by the Aboriginal children, Canada owed a fiduciary obligation to ensure that the students who attended the School were treated fairly, respectfully, safely and in all other ways, consistent which the obligations of a parent or guardian to a child under his care and control.

66. At all material times, Canada owed a fiduciary obligation to the students who attended the School to act in the best interests of those students and to protect them from any abuse, be it mental, emotional, physical, sexual or otherwise. The children at the School relied upon Canada, to their detriment, to fulfill its fiduciary obligations.

67. Through its servants, officers, employees and agents, Canada was negligent and in breach of its non-delegable fiduciary, ~~moral, statutory,~~ and common law duties of care to the Survivor Class and the Family Class during the Class Period. Particulars of the negligence and breach of duty of Canada include the following:

(a) it systematically, negligently, unlawfully and wrongfully delegated its fiduciary and other responsibility and duties regarding the education of and care for Aboriginal children to others;

(b) it systematically, negligently, unlawfully and wrongfully admitted and confined Aboriginal children to the School;

leave granted
R 7A 08, Apr 12/12

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

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

AMENDED STATEMENT OF CLAIM

A. RELIEF SOUGHT BY THE PLAINTIFF AGAINST CANADA

1. The Representative Plaintiffs, on their own behalf, and on behalf of the members of the Survivor Class and Family Class claim:

(a) an Order certifying this proceeding as a Class Proceeding pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 and appointing Carol Anderson and Allen Webber as Representative Plaintiffs for the Survivor Class and any appropriate subgroup thereof;

(b) a Declaration that Canada owed ~~and was in breach of~~ exclusive non-delegable fiduciary, and ~~statutory and common law~~ duties of care to the Plaintiffs and the other Survivor Class Members in relation to the ~~establishment~~, funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the Lockwood School in Cartwright, Labrador (the "School");

(c) a Declaration that Canada was negligent in the ~~establishment~~, funding, oversight, operation, supervision, control, maintenance, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

Filed Apr 18/12 mw

(d) a Declaration the Canada was or is in breach of its exclusive and non-delegable fiduciary obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its ~~establishment~~, funding, operation, supervision, control, maintenance, oversight, ~~confinement in, transport of Survivor Class Members, to obligatory attendance at the School~~ of the School;

~~(e) a Declaration that Canada was or is in breach of its statutory duties pursuant to the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act") and its Treaty obligations to the Plaintiffs and the other Survivor Class Members as a consequence of its establishment, funding, operation, supervision, control, maintenance, confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at and support of the School;~~

~~(f) a Declaration that the School caused cultural, linguistic and social damage and irreparable harm to the Survivor Class;~~

(g) a Declaration that Canada is liable to the Plaintiffs and other Survivor Class Members for the damages caused by its breach of exclusive non delegable~~,~~ fiduciary and~~, statutory and common law~~ duties of care and for negligence in relation to the ~~establishment~~, funding, operation, supervision, control, maintenance, oversight, ~~confinement in, transport of Survivor Class Members to, obligatory attendance of Survivor Class Members at~~ and support of the School;

(h) non-pecuniary general damages for negligence, ~~loss of language and culture~~, breach of non-delegable exclusive fiduciary and duties of care, ~~statutory, treaty and common law duties~~ in the amount ~~of $500 million or such other sum as~~ this Honourable Court finds appropriate;

(i) pecuniary general damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, breach of non-delegable exclusive fiduciary and~~, statutory, treaty and common law~~ duties of care in the amount ~~of $500 million or such other sum as~~ this Honourable Court finds appropriate;

(j) exemplary and punitive damages in the amount ~~of $100 million or such other sum as the~~ this Honourable Court finds appropriate;

(k) damages in the amount of ~~$100 million or such other sum as~~ this Honourable Court finds appropriate, pursuant to the *Family Law Act*, R.S.N., 1990, and its predecessors;

(l) prejudgment and post judgment interest pursuant to the provisions of the *Judicature Act*, R.S.N. 1990, c. J-4 ; and

(m) the costs of this action on a substantial indemnity scale.

B. DEFINITIONS

2. The following definitions apply for the purposes of this Claim:

(a) "Aboriginal", "Aboriginal People(s)" or "Aboriginal Person(s)" means a person whose rights are recognized and affirmed by the *Constitution Act*, 1982, s. 35, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982. c. 11, specifically, members of the Metis and Inuit nations;

(b) "Aboriginal Right(s)" means rights recognized and affirmed by the *Constitution Act*, 1982, s. 35, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982. c. 11;

(c) "Agents" mean the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of the School;

(d) "Canada" means the Defendant, the Government of Canada as represented in this proceeding by the Attorney General of Canada;

(e) "Class" or "Class Members" means all members of the Survivor Class and the Family Class;

(f) "Class Period" means March 31, 1949 ~~to December 31, 1996~~ and the date of closure of the Lockwood School;

(g) "Excluded Persons" means all persons who attended an Eligible Indian Residential School as defined by the Settlement Agreement dated May 10, 2006, executed between Canada, as represented by the Attorney General of Canada (the "Agreement") and all persons who are otherwise eligible, pursuant to the Agreement, to receive a Common Experience Payment or pursue a claim through the Individual Assessment Process, as defined by the Agreement;

(h) "Family Class" means:

(i) the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class Member;

~~(ii) the spouse of a child, grandchild, parent, grandparent or sibling of a Survivor Class Member;~~

(iii) a former spouse of a Survivor Class Member;

(iv) a child or other lineal descendent of a grandchild of a Survivor Class Member;

(v) a person of the same or opposite sex to a Survivor Class Member who cohabited for a period of at least one year with that Survivor Class Member immediately before his or her death;

(vi) a person of the same or opposite sex to a Survivor Class Member who was cohabiting with that Survivor Class Member at the date of his or her death and to whom that Survivor Class Member was providing support or was under a legal obligation to provide support on the date of his or her death;

(vii) any other person to whom a Survivor Class Member was providing support for a period of at least three years immediately prior to his or her death;

(i) "School" means the Lockwood School, located in Cartwright, Labrador;

(j) "Survivor Class" means:

All persons who attended the School between March 31, 1949 and ~~December 31, 1996~~ the date of closure of the Lockwood School.

C. THE PARTIES

i. Representative Plaintiffs

3. The Plaintiff, Carol Anderson ("Anderson"), resides in Goose Bay, Newfoundland and is a Metis First Nation. Anderson attended the School in Cartwright between 1958 and 1959. Anderson is ~~a proposed~~ the representative plaintiff for the Survivor Class.

4. The Plaintiff, Allen Webber ("Allen"), resides in Goose Bay, Newfoundland and is a Metis First Nation. Allen attended the School in Cartwright between 1958 and 1959 Allen is ~~a proposed~~ the representative plaintiff for the Survivor Class.

5. The Plaintiff, Joyce Webber ("Webber") resides in Goose Bay, Newfoundland and is a Metis First Nation. Joyce was born on June 2, 1954. Her husband Allen attended the School in Cartwright, Newfoundland between 1958 and 1959. Joyce is ~~a proposed~~ the representative plaintiff for the Family Class.

6. The ~~proposed~~ Representative Plaintiffs do not purport to advance claims on behalf of any persons who are otherwise entitled to compensation pursuant to the terms of the Agreement.

7. In particular, the proposed Representative Plaintiffs' claim and the class they ~~propose to~~ represent, do not overlap with the terms of the order granted by Justice Winkler of the Ontario Superior Court of Justice, dated March 8, 2007, attached hereto as Schedule "A".

ii. The Defendant

8. The Defendant, the Government of Canada, is being represented in this proceeding by the Attorney General of Canada. Canada represents the interests of the Minister of the Department of Indian Affairs Canada, who was, at all material times, responsible for the maintenance, funding, oversight or management ~~and operation~~ of the School, either on its own or in combination with other of its agents or servants.

9. Once the Province of Newfoundland and Labrador entered Confederation in 1949, Canada assumed and possessed exclusive Legislative and executive responsibility over aboriginal persons, including the Classes. As aboriginal persons in the 'new' province in 1949 were legally "Indians" for the purposes of section 91(24) of the *British North America Act, 1867*, they were proper subjects of federal jurisdiction.

10. Canada's participation in the funding and operation of the School breached its exclusive duty of care owed to the Classes which was also in breach of its non-delegable fiduciary obligations and constitutional obligations owed to aboriginal persons.

11. Alternatively, even if Canada did not materially operate or manage the school, it nevertheless breached its fiduciary duties by failing to properly do so and protect the Class as it alone possessed singular and exclusive legal jurisdiction over aboriginal persons.

D. RESIDENTIAL SCHOOL SYSTEM – OPERATION OF THE SCHOOL

i. Background - Residential School History Generally

12. Residential Schools were established by Canada as early as 1874, for the education of Aboriginal children. These children were taken from their homes and their communities and transported to Residential Schools where they were often confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them.

13. Commencing in 1911, Canada entered into formal agreements with the Churches for the operation of such schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of the Residential Schools. The Churches assumed the day-to-day operation of the Residential Schools under the control, supervision and direction of Canada, for which the Canada paid the Churches a per capita grant calculated to cover part of the cost of the Residential School operation.

14. As of 1920, the Residential School Policy included compulsory attendance at Residential Schools for all Aboriginal children aged 7 (seven) to 15 (fifteen). This approach to the control and operation of the Residential Schools system continued until April 1, 1969, at which time Canada assumed the sole operation and administration of the

Residential Schools from the Churches, excepting certain cases where Churches continued to act as agents of Canada.

15. Canada removed Aboriginal Persons, usually young children, from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. Canada controlled all aspects of the admission of Aboriginal Persons to the Residential Schools including arrangements for the care of such persons over holiday periods and the methods of transporting children to and from Residential Schools.

16. ~~The same~~ ~~A~~ Similar Residential School~~s~~ ~~policy was implemented and effected in~~ existed in Newfoundland and Labrador which joined Canada on March 31, 1949. Accordingly, the claim against Canada is limited temporally to the time when the Canada became legally responsible for Aboriginal Persons residing in that province, or 1949, and beyond.

17. Aboriginal Persons were often taken from their families without the consent of their parents or guardians. While the stated purpose of the Residential Schools from their inception was the education of Aboriginal children, their true purpose was the complete integration and assimilation of Aboriginal children into mainstream Canadian society and the obliteration of their traditional language, culture and religion. Many children attending Residential Schools were also subject to repeated and extreme physical, sexual and emotional abuse, all of which continued until the year 1996, when the last federally operated Residential School was closed.

18. During the Class Period, children at the school were subjected to systemic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

19. The accommodation was crowded, cold and sub-standard. Aboriginal children were underfed and ill nourished, forbidden to speak their native languages or to practice the customs and traditions of their culture. They were deprived of love and affection from their families and of the support that a child would normally expect to have from those in positions of trust and authority. Aboriginal children were also subjected to corporal punishment, assaults, including physical and sexual and systematic child abuse.

E. CANADA'S ASSUMPTION OF DUTIES WHEN NEWFOUNDLAND JOINED CONFEDERATION IN 1949

20. Around the time of Confederation, two separate legal opinions commissioned by the Federal Department of Justice confirmed that the Federal Crown possessed exclusive legislative and executive responsibility in relation to Aboriginal persons, including the Inuit and Eskimo, living in Newfoundland and Labrador.

21. The records of the Federal departments, agencies, ministers and bureaucrats responsible for negotiating the *Terms of Union* 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.

22. As Canada's legal responsibility to Aboriginals was constitutional in nature, it was prohibited from attempting to cede or delegate such duties to any other entity, including the Province itself. Given the broad duties owed by Canada to Aboriginal persons, the welfare and education of Aboriginal children cannot be said to have resided with the Crown in right of the Province of Newfoundland after March 31, 1949.

23. The entry of Newfoundland and Labrador into Confederation brought its Aboriginal population fully within exclusive federal jurisdiction. At the time of Confederation, Canada was aware that any union with Newfoundland and Labrador would have had an Aboriginal component and legal responsibility associated with it.

24. 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 Aboriginal 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.

25. 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 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.

26. 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's Aboriginal people. Under Term 3 of the *Terms of Union*, for matters not specifically referred to, things were deemed to be as if Newfoundland had joined under the terms of the *Constitution Act, 1867*.

27. 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* it had exclusive jurisdiction in the area of Aboriginal peoples. By deleting the reference to native people in the proposed draft *Terms of Union* and writing in Federal responsibility, as outlined in the *British North America Act*, the Federal Government acknowledged *de facto* jurisdiction for the Indians, Inuit and Eskimos of Newfoundland and Labrador.

28. At the time of Confederation, the Premier, Joseph Smallwood, actually refused to sign an agreement with Canada which would have transferred federal responsibility for native persons to the Province. The Province maintained that the fiduciary obligations for Aboriginal persons remained, and belonged to the federal government.

29. 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."

30. This opinion provided by the Justice Department is consistent with the assumptions made during the pre-Confederation talks: Aboriginal persons, pursuant to the *British North America Act*, were Canada's responsibility. 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 populations in Newfoundland and Labrador. This demonstrates that the federal government believed it had a responsibility to fulfill in regard to the Eskimo and Inuit in Labrador and that it would be called upon to provide programs and assistance, funding, oversight and implementation of certain programs, including education.

31. In fact, the *Terms of Union* indirectly provided that the then Aboriginal population in Newfoundland fell under federal jurisdiction. Section three of the *Terms of Union* 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".

32. 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".

33. 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 Eskimo and Inuit in Labrador for which it expected payment. Throughout the 1950's and 1960's, programs for aboriginal education in Newfoundland and Labrador were paid for by Canada at the rate of 90% for Indian communities and 40% in Inuit communities.

34. 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 do not refer to Indians and Eskimos and since head 24 of section 91 of the *BNA Act* places 'Indians and lands reserved for Indians' exclusively under Federal jurisdiction, it seems clear that the Federal Government is responsible for the native population resident in Labrador."

35. By 1954, Newfoundland requested that Canada provide both operating and capital expenditures towards education for Eskimos 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. This agreement reached between the Premier of Newfoundland and Canada in 1954 provided for the re-assumption of federal constitutional responsibility over aboriginal persons in the new province of Newfoundland and Labrador.

36. Just four years into this Agreement, Newfoundland requested further funds from Canada to provide education and housing for both Indians and Inuit. Shortly thereafter, in 1964, the Premier of Newfoundland asked Prime Minister Pearson, to either have Canada

assume sole and full responsibility for Indians and Inuit or to at least increase funding to the level of support being provided by Canada to other provinces in Canada.

37. 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."

38. As a result, by 1965, Canada had agreed to provide the same resources and programs to Indians, Inuit 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 – 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments.

39. Amongst other things, this "Contribution Agreement" was designed to provide services to the communities of Sheshatshit and Davis Inlet, including education. The Contribution Agreement identified the amount of funding available as (a) 90% from Canada; and (b) 10% from Newfoundland. The Contribution Agreement also established a management committee composed of federal officials, provincial officials and representatives of the Davis Inlet and Sheshatshit communities.

40. At the same time, the then 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:

(a) 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);

(b) establishment of a federal-provincial committee to monitor provincial expenditures;

(c) continuation of federal funding for Inuit communities in Labrador; and

(d) 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.

41. 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..."

42. 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

(ii) Native People's of Labrador Agreement, valued at $38,831,00.00 federal payments/contributions.

43. The Labrador Agreement covered the following Indian and Inuit communities: Davis Inlet, Northwest Rivet, Nain, Hopedale, Makkovik, Rigolet and Postville. Pursuant to that Agreement, between 1981 and 1986, Canada contributed 90% of the costs of the programs and services in these Indian communities and 60% of the costs of those delivered in the Inuit communities. In total, Canada contributed $29,135,100.00 in this respect between 1981 and 1986.

44. In August 1985, Canada entered into a further contribution agreement with Newfoundland and Labrador, "for the benefit of native peoples in Labrador", recognizing Canada's "special interest in the social and economic development of Inuit and Indian People." The operation of education was the largest budget allocation item pursuant to this Agreement, for a total of $1,530,000.00 (1985/1986 fiscal year), 71% of which was Canada's responsibility.

45. Fiduciary obligations are and were owed by Canada to Aboriginal persons, peoples who, pursuant to section 35(2) of the *Constitution Act 1982* include the Indian, Inuit and Metis. This fiduciary relationship between Canada and Aboriginal persons was and is *sui generis* in nature. Accordingly, a fiduciary duty between Canada and

Aboriginal persons in Newfoundland and Labrador arose at the moment of Confederation in 1949.

46. Canada has acknowledged its own sole singular responsibility over Indians and Inuit in Newfoundland by accepting its 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. Having undertaking discretionary control over a cognizable Indian interest, a fiduciary duty existed between Canada and the Class in these circumstances.

47. As the nature of Canada's relationship with Aboriginal persons gives rise to a non-delegable duty to preserve, protect and promote welfare and education of Aboriginal children, the responsibility for its execution rested solely with Canada.

48. In the alternative, if Canada failed to properly assume those common law and constitutional obligations, it breached its, fiduciary and common law duties owed to the class by failing to do so.

ii. Canada's Operation of the School in Labrador

49. The School was located in Cartwright, Labrador. It was first established in 1949 and ceased operation as a residential school for Aboriginal children in 1979.

50. The purpose of the School was to provide education to Aboriginal children between the ages of 6 and 16 years who attended the School from various First Nations bands and communities in Newfoundland and Labrador. The School eventually became a

vehicle for assimilating Aboriginal children through the eradication of their native languages, cultures and spiritual beliefs.

51. The School was initially founded and established by the International Grenfell Association. Once Confederation occurred in March 1949 and Newfoundland joined Canada, the International Grefnell Association began ceasing its involvement, funding and role in the School. ~~At all material times, the staff members at the School were employees, servants and/or agents of Canada~~. The funding provided by Canada following Confederation was inadequate to meet the costs of operating and maintaining the School, and in particular, to meet the daily and educational needs of the students at the School. As a result, the care provided to the students and the conditions at the School were poor, the staff hired were unskilled and/or unsuitable for dealing with children and the conditions at the School were unsuitable and inappropriate for an educational facility for children.

~~52. In many cases, the Aboriginal children were forced to attend the School by representatives, agents or servants of Canada. The Aboriginal children who attended the School were separated from their families, uprooted and taken to the School, where they were placed within the control of Canada. For all intents and purposes, the children who attended the School, were wards of the School and/or Canada.~~

53. Canada participated in the funding, oversight ~~carried out that operation~~ and administration of the School until 1979. These operative and administrative responsibilities, carried out on behalf of Canada or by its agents included:

(a) the operation and maintenance of the School during the Class Period;

(b) the care and supervision of all members of the Survivor Class, and for supplying all the necessaries of life to Survivor Class members *in loco parentis*;

(c) the provision of educational and recreational services to the Survivor Class while in attendance at the School and control over all persons allowed to enter the School premises at all material times;

(d) the selection, supply and supervision of teaching and non-teaching staff at the School and reasonable investigation into the character, background and psychological profile of all individuals employed to teach or supervise the Survivor Class;

(e) inspection and supervision of the School and all activities taking place therein, and for full and frank reporting to Canada respecting conditions in the School and all activities taking place therein;

(f) transportation of Survivor Class members to and from the School; and

(g) communication with and reporting to the Family Class respecting the activities and experiences of Survivor Class members while attending the School.

54. Attempts to provide educational opportunities to children confined in the School were ill-conceived and poorly executed by inadequately trained teaching staff. The result was to effectively deprive the Aboriginal children of any useful or appropriate education. Very few survivors of the School went on to any form of higher education.

55. The conditions and abuses in the School during the Class Period were well-known to Canada.

56. Any attempt by Canada to delegate its duties, responsibilities or obligations to the Class to the Province of Newfoundland is unlawful and in breach of its exclusive and non-delegable fiduciary duties owed to the class.

F. CANADA'S BREACHES OF DUTIES TO THE CLASS MEMBERS

57. The Defendant Canada, as represented by the Attorney General of Canada, has a fiduciary relationship with Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled and regulated the School during the Class Period, either on its own or in conjunction with the Province.

58. Canada, and its respective servants and agents compelled members of the Survivor Class to leave their homes, families and communities, and forced members of the Survivor Class to attend (and sometimes live in) the School, all without lawful authority or the permission and consent of Survivor Class members or that of their parents. Such confinement was wrongful, arbitrary and for improper purposes.

59. Survivor Class members were systematically subjected to the institutional conditions, regime and discipline of the School without the permission and consent of Survivor Class members or that of their parents, and were also subjected to wrongful acts at the hands of Canada while confined therein.

60. In particular, Anderson experienced severe physical abuse and verbal abuse during her time at the School by teachers, "caregivers" and other students. Anderson was hospitalized for a period of two weeks during her residence at the School due to her kidney ailments as a child, exacerbated by the substandard care, poor nutrition and abuse. Webber also suffered from serious physical and mental abuse during his time at the School from both teachers and students. Many of the children at the School also experienced sexual abuse, perpetrated against them by teachers, adults in positions of authority or from other students.

61. All persons, including Anderson and Webber, who attended the School ~~did so as wards of Canada, with Canada as their guardian, and~~ were persons to whom Canada owed the highest non-delegable~~,~~ fiduciary, ~~moral, statutory~~ and common law duties, which included, but were not limited to, the duty to ensure that reasonable care was taken of the Survivor Class while at the School, the duty to protect the Survivor Class while at the School and the duty to protect the Survivor Class from intentional torts perpetrated on them while at the School. These non-delegable ~~and~~ fiduciary duties were performed negligently and tortiously by Canada, in breach of its special responsibility to ensure the safety of the Survivor Class while at the School.

62. Canada was responsible for:

~~(a) the administration of the Act and its predecessor statutes as well as any other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;~~

(b) the promotion of the health, safety and well being of Aboriginal Persons in Newfoundland during the Class Period;

(c) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessor Ministries and Departments during the Class Period;

(d) decisions, procedures, regulations promulgated, operations and actions taken by the Department of Indian Affairs and Northern Development, its employees, servants, officers and Agents in Canada their predecessors during the Class Period;

(e) overseeing the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the School and for the creation, design and implementation of the program of education for Aboriginal Persons confined therein during the Class Period;

(f) the selection, control, training, supervision and regulation of the designated operators and their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons confined in the Residential School during the Class Period;

(g) the provision of all educational services and opportunities to the Survivor Class members, pursuant to the provisions of the Act and any other statutes relating to Aboriginal Persons during the Class Period;

~~(h) transportation of Survivor Class Members to and from the School and to and from their homes while attending the School during the Class Period;~~

~~(i) preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities;~~

(j) the care and supervision of all members of the Survivor Class while they were in attendance at the School during the Class Period and for the supply of all the necessities of life to Survivor Class Members, *in loco parentis*, during the Class Period;

(k) the provision of educational and recreational services to the Survivor Class while in attendance at the School during the Class Period;

(l) inspection and supervision of the School and all activities that took place therein during the Class Period and for full and frank reporting to Canada and to the Family Class Members with respect to conditions in the School and all activities that took place therein during the Class Period; and

~~(m) communication with and reporting to the Family Class with respect to the activities and experiences of Survivor Class Members while attending the School during the Class Period.~~

63. During the Class Period, male and female Aboriginal children, including Anderson, were subjected to gender specific, as well as non-gender specific, systematic child abuse, neglect and maltreatment. They were forcibly confined in the School and were systematically deprived of the essential components of a healthy childhood. They were subjected to physical, emotional, psychological, cultural, spiritual and sexual abuse by those who were responsible for their well being.

64. At all material times, the children who attended the School were within the knowledge, contemplation, power or ~~and~~ control of Canada and were subject to the unilateral exercise of Canada's (or its delegates') power or discretion. By virtue of the

relationship between the children and Canada, being one of trust, reliance and dependence, by the Aboriginal children, Canada owed a fiduciary obligation to ensure that the students who attended the School were treated fairly, respectfully, safely and in all other ways, consistent which the obligations of a parent or guardian to a child under his care and control.

65. At all material times, Canada owed a fiduciary obligation to the students who attended the School to act in the best interests of those students and to protect them from any abuse, be it mental, emotional, physical, sexual or otherwise. The children at the School relied upon Canada, to their detriment, to fulfill its fiduciary obligations.

66. Through its servants, officers, employees and agents, Canada was negligent and in breach of its non-delegable fiduciary, ~~moral, statutory,~~ and common law duties of care to the Survivor Class and the Family Class during the Class Period. Particulars of the negligence and breach of duty of Canada include the following:

(a) it systematically, negligently, unlawfully and wrongfully delegated its fiduciary and other responsibility and duties regarding the education of and care for Aboriginal children to others;

(b) it systematically, negligently, unlawfully and wrongfully admitted and confined Aboriginal children to the School;

~~(c) it acted without lawful authority and not in accordance with any statutory authority pursuant to or as contemplated by the provisions of the Act or any other statutes relating to Aboriginal Persons as:~~

~~(i) said provisions are and were *ultra vires* the Parliament of Canada and of no force and effect in law;~~

~~(ii) the conduct of Canada in placing the Aboriginal children in the School, confining them therein, and treating or permitting them to be treated there as set forth herein was in breach of Canada's fiduciary obligations to the Survivor Class and Family Class Members, which was not authorized or permitted by any applicable~~

~~legislation and was, to the extent such legislation purported to authorize such fiduciary breach, of no force and effect and/or *ultra vires* the Parliament of Canada; and~~

~~(iii) Canada routinely and systematically failed to act in accordance with its own laws, regulations, policies and procedures with respect to the confinement of Aboriginal children in the School, which confinement was wrongful.~~

(d) it delegated to and contracted with the Churches, ~~and~~ other Religious organizations and the Province to implement its program of forced integration, confinement and abuse;

(e) it failed to adequately screen and select the organizations and individuals to which it delegated the implementation of its Residential School program;

(f) it failed to adequately supervise and control the School and its agents operating same under its jurisdiction;

(g) it deliberately and chronically deprived the Survivor Class Members of the education they were entitled to or were led to expect from the School or of any adequate education;

(h) it designed, constructed, maintained and operated the School buildings which were sub-standard, inadequate to the purpose for which they were intended and detrimental to the emotional, psychological and physical health of the Survivor Class;

(i) it failed to provide funding for the operation of the School that was sufficient or adequate to supply the necessities of life to Aboriginal children confined to them;

(j) it failed to respond appropriately or at all to disclosure of abuses in the School during the Class Period;

~~(k) it conspired with the operators of the schools to suppress information about abuses taking place in the School during the Class Period;~~

(l) ~~it assaulted and battered the Survivor Class Members and~~ permitted them to be assaulted and battered during the Class Period;

(m) it permitted an environment to which permitted and allowed student-upon-student abuse;

(n) ~~it forcibly confined the Survivor Class Members and~~ permitted them to be forcibly confined during the Class Period;

(o) it was in breach of its fiduciary duty to ~~its Wards~~ the Survivor Class Members by reason of the misfeasances, malfeasances and omissions set out above;

(p) it failed to inspect or audit the School adequately or at all;

(q) it failed to implement an adequate system of evaluation, monitoring and control of teachers, administrators and non-teaching staff of the School during the Class Period;

(r) it failed to periodically reassess its regulations, procedures and guidelines for the School when it knew or ought to have known of serious systemic failures in the School during the Class Period;

(s) it failed to close the School and otherwise protect and care for those persons confined therein when it knew or ought to have known that it was appropriate and essential to do so in order to preserve the health, welfare and well being of the Survivor Class Members;

(t) it delegated, attempted to delegate, continued to delegate and improperly delegated its non delegable duties and responsibility for the Survivor Class when it was incapable to do so and when it knew or ought to have known that these duties and responsibilities were not being met;

(u) it failed to recognize and acknowledge harm once it occurred, to prevent additional harm from occurring and to, whenever and to the extent possible, provide appropriate treatment to those who were harmed;

~~(v) it undertook a systematic program of forced integration and assimilation of the Aboriginal Persons through the institution of the School when it knew or ought to have known that doing so would cause profound and permanent cultural, psychological, emotional and physical injury to the members of the Survivor Class during and following the Class Period; and~~

~~(w) it was in breach of its obligations to the Survivor Class Members and Family Class Members as set out in the Act and its Treaties with various First Nations providing a right to education at a school to be established and maintained by Canada and which implicitly included the right to education in a safe environment free from abuse and the right to an education which would recognize Aboriginal beliefs, traditions, culture, language and way of life in a way that would not denigrate or eliminate these beliefs, traditions, culture, language and way of life.~~

67. Canada, through its employees, agents or representatives also breached its duty of care to protect the Survivor Class Members from sexual abuse by the student perpetrators while those particular Plaintiffs and the Survivor Class Members were attending and

residing at the School with the result that the student perpetrators did in fact commit sexual abuse upon certain Plaintiffs and the Survivor Class Members.

68. Canada breached its fiduciary duties to the Plaintiffs and the Class and their families by failing to take any steps to protect the Survivor Class Members from sexual abuse.

69. In breach of its ongoing fiduciary duty to the Class, Canada failed and continues to fail, to adequately remediate the damage caused by its failures and omissions set out herein. In particular, Canada ~~has failed to take adequate measures to ameliorate the cultural, linguistic and social damage suffered by the class, and further~~ has failed to provide compensation for the physical, sexual and emotional abuse suffered by the Class.

~~70. The Plaintiffs plead that Canada was in breach of its various treaty obligations set out through the establishment and operation of the School and are liable for such breaches. In contravention of the Treaties between the Government and First Nations and in contravention of the *United Nations Genocide Convention*, particularly Article 2(e) thereof to which Canada is a signatory, the Plaintiffs and other Aboriginal children were to be systemically assimilated into white society. In pursuance of that plan, they were forced to attend the School and contact with their families was restricted. Their cultures and languages were taken from them with sadistic punishment and practices.~~

~~71. The systemic child abuse, neglect and maltreatment sustained by the children at the School during the Class Period, the effect and impact of which is still being felt by Survivor Class Members and Family Class Members, was in violation of the rights of children, specifically, but not limited to, the rights set out in the *United Nations*~~

~~*Convention on the Rights of the Child*, adopted by the United Nations in 1989, and ratified by Canada in December of 1991.~~

G. DAMAGES SUFFERED BY CLASS MEMBERS

72. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Survivor Class Members, including Anderson, Allen and Webber, suffered injury and damages including:

(a) isolation from family and community;

~~(b) prohibition of the use of Aboriginal language and the practice of Aboriginal religion and culture and the consequential loss of facility and familiarity with Aboriginal language, religion and culture;~~

(c) forced confinement;

(d) assault and battery;

(e) sexual abuse;

(f) emotional abuse;

(g) psychological abuse;

(h) deprivation of the fundamental elements of an education;

(i) an impairment of mental and emotional health amounting to a severe and permanent disability;

(j) a propensity to addiction;

(k) an impaired ability to participate in normal family life;

(l) alienation from family, spouses and children;

(m) an impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;

(n) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the School experience;

(o) depression, anxiety and emotional dysfunction;

(p) suicidal ideation;

(q) pain and suffering;

(r) deprivation of the love and guidance of parents and siblings;

(s) loss of self-esteem and feelings of degradation;

(t) fear, humiliation and embarrassment as a child and adult, and sexual confusion and disorientation as a child and young adult;

(u) loss of ability fulfill cultural duties;

(v) loss of ability to live in community; and

(w) constant and intense emotional, psychological pain and suffering.

73. The foregoing damages resulted from Canada's breach of fiduciary duty, and/or negligence. ~~assault, battery and/or breach of Aboriginal treaty rights.~~

74. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Family Class Members, including Webber, suffered injury and damages including:

(a) they were separated and alienated from Survivor Class Members for the duration of their confinement in the School;

(b) their relationships with Survivor Class Members were impaired, damaged and distorted as the result of the experiences of Survivor Class members in the School;

(c) they suffered abuse from Survivor Class members as a direct consequence of their School experience;

(d) they were unable to resume normal family life and experience with Survivor Class Members after their return from the Schools;

~~(e) their culture and language was undermined and in some cases eradicated by, amongst other things, as pleaded herein, the forced assimilation of Survivor Class Members into non-aboriginal culture through the School.~~

75. Canada knew, or ought to have known, that as a consequence of its mistreatment of the children at the School, these Plaintiffs and class members would suffer significant mental, emotional, psychological and spiritual harm which would adversely affect their relationships with their families and their communities. ~~In fact, one of the purposes behind the operation of the School was to eliminate and damage relationships within families and communities with a view to promoting the assimilation of Aboriginal children into non-Aboriginal society.~~

H. PUNITIVE AND EXEMPLARY DAMAGES

76. The Plaintiffs plead that Canada, including its senior officers, directors, bureaucrats, ministers and executives, had specific and complete knowledge of the widespread physical, psychological, emotional, cultural and sexual abuses of Survivor Class Members which were occurring at the School during the Class Period. Despite this knowledge, Canada continued to operate the School and permit the perpetration of grievous harm to the Survivor Class Members.

~~77. In addition, Canada deliberately planned the eradication of the language, religion and culture of Survivor Class Members and Family Class Members. Their actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.~~

78. The Plaintiffs plead and rely upon the following:

~~*Canadian Charter of Rights and Freedoms*, ss. 7, 15 and 24;~~

Class Actions Act, S.N.L. 2001, c. C-18.1.

Constitution Act, 1982, s. 35(1), being Schedule "B" to the *Canada Act, 1982* (U.K.), c. 11.

~~*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, ss. 3, 21, 22, and 23;~~

~~*The Indian Act*, S.C. 1951, c. 29, ss. 113-118;~~

~~*The Indian Act*, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122;~~

The Newfoundland Act, 1949 (U.K.), c. 22;

~~*United Nations Genocide Convention*; and~~

~~*United Nations Convention on the Rights of the Child*, adopted by the United Nations in 1989, and ratified by Canada in December of 1991.~~

79. The Plaintiffs propose this action be tried in the City of St. John's, in the Province of Newfoundland.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of April, 2012.

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Solicitors for the Defendant

2007 01T4955CP

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

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

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

SUPPLEMENTARY RESPONSE TO DEMAND FOR PARTICULARS
(On the Amended Statement of Claim, filed April 18, 2012)

2008 01T0845CP

BETWEEN:

SARAH ASIVAK and JAMES ASIVAK

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

2008 01T0844CP

BETWEEN:

SELMA BOASA and REX HOLWELL

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

2008 01T0846CP

BETWEEN:

EDGAR LUCY and DOMINIC DICKMAN

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

2007 01T5423CP

BETWEEN:

TOBY OBED, WILLIAM ADAMS and MARTHA BLAKE

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

The Plaintiffs provide the following answers to the Defendant's Demand for Particulars dated April 23, 2012. These answers constitute a supplement to, and are intended to be read with, the Amended Statement of Claim and the Plaintiffs' Response to the Demand for Particulars dated May 13, 2012, the material facts and allegations which the Plaintiffs expressly and impliedly repeat and adopt herein:

3. The Amended Statement of Claim at para. 2(c) lists "Agents" as a defined term. Please confirm whether the term "delegates" (see for example para. 64) used throughout the Claim can also be included under the defined term "Agents" for the purposes of the claim.

A: "Agents" can be used interchangeably with the term "delegates" throughout the claim.

4. Name any and all entities that the Plaintiffs allege are included under the defined term "Agents" for the purposes of this claim.

A: The Moravian Mission/Church, the International Grenfell Association ("IGA"), the Labrador School Board and the Western School Board (the "Boards") and the Province of Newfoundland and Labrador (the "Province"), including all of the servants and employees of these entities (collectively the "Delegates").

It is the Plaintiffs' position that for the purposes of Canada's fiduciary duty owed to the class (as enumerated with particulars in paragraphs 9, 10, 15 and 19 of the Response to Demand for Particulars, dated May 13, 2012), Canada was not permitted, as a matter of law, to delegate any portion of that duty. To the extent that Canada did attempt to delegate, or did delegate, any of its fiduciary obligations, the Plaintiffs plead that such duties were incapable of delegation and therefore, wrongful in law. Accordingly, the entities named above could not be "agents" *per se*, as that term is known to law, of Canada for the purposes of fulfilling any fiduciary duties, only *purported* "agents".

For the purposes of the tort claim, as a matter of law, Canada was responsible in tort for the operation of the schools and care of the children through its participation in funding and the federal-provincial committees expressly assumed such responsibility. The Plaintiffs plead that Canada had a positive duty to inform itself of the safety and welfare of its aboriginal charges (minors) residing at the Schools.

By the time Confederation occurred with Canada in 1949, institutions similar to the "Mainland's" recognized residential schools existed in several Newfoundland and Labrador communities. For the most part, they were operated by the Moravian Mission[1] and IGA[2] prior to Confederation. Since Confederation, and in particular, as early as 1950, both Canada and the Province recognized and acknowledged these institutions as "residential schools"[3] (hosting children from a variety of isolated communities as was the case with residential schools in

---

1 The Moravian Missions were responsible for the education of the Inuit along the northern coast of Labrador and operated four schools in Makkovik, Nain, Hopedale and Hebron.

2 The IGA operated three schools in Cartwright, North West River and St Anthony.

3 April 3, 1950, Memorandum from the Deputy Minister of the Newfoundland Department of Natural Resources to the Interdepartmental Committee on Indians and Eskimos, Appendix 4 and 7.

Western Canada). Canada expressly realized and acknowledged that these schools were "residential" in nature.

Given its involvement with such schools in Western Canada, Canada knew, or ought to have known, how such schools were maintained and operated. By actively participating in the funding, planning, review and approval of projects in these schools, Canada accepted its legal responsibility for the education of aboriginal persons in the Province. Given its joint funding of the schools and active participation in the planning committees, Canada accepted responsibility for the operation and administration of the schools and the welfare of the children who attended them. As a result, it was subject to the duty to use due care and take reasonable steps.

To the extent that it permitted individuals from either the Moravian Mission/Church, the IGA or the Province to carry out those daily operational duties, those persons were acting on behalf of Canada. Knowingly permitting either the IGA, the Moravian Mission/Church or the Province to implement a system of residential schools post-Confederation, while also financially contributing to such a system, yet failing to provide appropriate oversight, all the while acknowledging a sole Federal responsibility in the arena, was an attempt to improperly delegate Federal duties. Having assumed full responsibility for the welfare, including that of Indians, in the new Province, any entities or persons who were in daily operational control of the Schools were acting on behalf of Canada, as a matter of law.

Participation or involvement by the Moravian Mission/Church and the IGA in residential schools in Labrador followed the pattern of how such schools were operated across Canada. In all such schools, the religious organizations acted with the guidance and input of federal representatives in staffing the schools and in managing their daily operations. As in Labrador, Canada was involved in the policy decisions of the schools which were closely tied to its funding obligations. Moravian and IGA involvement was merely an exercise of carrying out federal obligations with the oversight (or lack thereof) of Canada.

While the schools may have been established and operated by the time Canada assumed a legal responsibility to become involved, Canada had a funding role which also gave it input into where and how such funds were to be allocated. These policy determinations affected the operations of the schools both directly and indirectly.

5. Does the Plaintiff allege the entities, collectively called "Agents", were in a principal/agent relationship with Canada for the purposes of this claim?

A See Answers to paragraphs 4 and 6 herein. The Plaintiffs plead that by operation of law and the legal duties imposed upon Canada once the Province entered into Confederation, any persons or entities who carried out the responsibilities of operating the Schools were acting on behalf of Canada, as a matter of law.

6. Provide the material facts that could show a relationship of principal/agent between Canada and each of the entities collectively referred to as "Agents" for the purposes of this claim.

A: From the moment of Confederation with Canada in April 1949, Canada, by operation of law, assumed a constitutional responsibility toward native persons in the new Province codified by section 91(24) of the *Constitution Act, 1867*. That legal responsibility extended to funding and oversight of such persons' education, health and welfare. Such federal constitutional

responsibility for the Inuit in Labrador was acknowledged by a Privy Counsel Memorandum in 1953, which stated:

> "From a purely constitutional point of view, it is difficult to see how the Federal Government can escape at least some responsibility for Indians and Eskimos in the new province as the *British North America Act* vests in the Parliament of Canada exclusive legislative authority in respect of this group."[4]

Therefore, entities such as the Moravian Mission/Church, the IGA, the Boards and the Province (the "Delegates") acted on behalf of Canada in their operation and oversight of the schools. Canada was the party with the legal responsibility towards the individuals at the schools. To the extent that it permitted the Delegates to assume that role, Canada wrongly forsaked its legal obligations and is responsible in law for the wrongs or omissions of those parties. To the extent that Canada provided the core funding and pursuant to its constitutional duties, it was obliged to supervise the administration of the schools, which it utterly failed to do.

Some of the material facts which bear out this relationship, include, but are not limited to:

(i) Canada required a report from the Committee to the Department of Natural Resources to supply information regarding Indian and Eskimo administration, education and welfare,[5] a report that never would have been requested by Canada if its involvement had been limited to the provision of funds;

(ii) a 1952 memorandum from the Chief of the Northern Administration Division of the Federal Department of Resources and Development references a request from the Secretary of the Committee studying financial arrangements between Canada and the Province, including information regarding the annual operating costs of education for Eskimos which "would include the cost of operating our own schools and the grants we pay to Eskimo mission schools";[6]

(iii) in 1956, the Deputy Minister of Education from the Federal Secretary of the Treasury Board requested detailed information on the Nain school in particular, "for the information of my government, something of the facilities there at present and the size and nature of the population to be served ... I would like to know what the sociological policies are that underlie the choice of Nain for this development";[7]

(iv) in 1965, Canada requested information of the proposed school and dormitory at North West River, and expressed concern about the location of two small schools

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4 Memorandum from Paul Pelletier, Privy Council Office (24 February 1953) at 5.

5 Memorandum for the Interdepartmental Committee on Indians and Eskimos by P. Pelletier of the Privy Council Office, April 3, 1950

6 Memorandum from the Chief, Northern Administration Division, of the Federal Department of Resources and Development dated June 23, 1952.

7 Correspondence to the Deputy Minister of Education from the Federal Secretary to the Treasury Board, May 28, 1956.

in the same area, resulting in approval for Canada's representatives to travel to Northern Labrador to visit the schools;[8]

(v) in 1966, Canadian representatives reported on their visit to Northern Labrador and discussed the integration of Indian children with white and Eskimo children pursuant to the Canadian government's general policy, including a Canadian expression of concern on the ability to recruit and retain suitable teaching staff and a Canadian request for copies of plans and estimates;[9]

(vi) in 1966, Canadian representatives questioned the proposed location of a dormitory in North West River, pointing out that "the Federal government is careful in its application of principles concerning Indians and Eskimos so that the financial support to each is comparable to the rest of the country";[10]

(vii) in 1967, the Province provided a detailed report on various aspects of Indian and Eskimo school services to the entire Federal-Provincial Committee,[11] evidencing Canada's interest, knowledge and involvements in such matters;

(viii) Canada and the Province entered into agreements commencing in 1965 which was renewed every five years, and ultimately by 1981 entitled "Canada-Newfoundland Native Peoples of Labrador Agreement" which establishes a Coordinating Committee of both federal and provincial representative and charges it with "designated programs" including "education programs";

(ix) a variety of native educational issues fell within the meaning of "education programs", demonstrating the long standing agreement and understanding between Canada and the Province respecting native education in Labrador and is an indicator of the degree of federal participation or legal duty.

In this respect, and in particular, the Plaintiffs further repeat and rely upon paragraphs 14, 15 and 18 of the Response to Demand dated May 13, 2012.

7. Name any and all entities that the Plaintiffs allege were in a principal/agent relationship with Canada for the purposes of this claim.

A: See Answers to paragraphs 4, 5 and 6 herein.

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8 Minutes of the Second Meeting of the Federal-Provincial Committee on Financial Assistance for Indians and Eskimos in Northern Labrador (November 30, 1965 – December 1, 1965) with capital expenditure attachments.

9 Minutes of the Third Meeting of the Federal-Provincial Committee on Financial Assistance for Indians and Eskimos in Northern Labrador (June 21, 1966) with capital expenditure attachments.

10 Minutes of the Fourth Meeting of the Federal-Provincial Committee on Financial Assistance for Indians and Eskimos in Northern Labrador (December 13 – 14, 1966), with capital expenditure attachments.

11 Minutes of the Sixth Meeting of the Federal-Provincial Committee on Financial Assistance for Indians and Eskimos in Northern Labrador (November 28, 1967), with capital expenditure attachments.

8. Provide the material facts that could show a relationship of principal/agent between Canada and any entities alleged to have been Canada's agents for the purposes of this claim.

A: This requested Particular is identical to item #6 above. See Answers to paragraphs 4, 5 and 6 herein.

27. In respect of paragraph 58: particulars of who and/or what are the alleged "servants" and "agents" of Canada.

A: See Answers to paragraphs 4, 5and 6 herein. In particular, individuals working for, on behalf of or employed by:

(i) Her Majesty the Queen in Right of Canada, irrespective of Ministry, Department or Agency;

(ii) the Moravian Mission/Church;

(iii) the IGA;

(iv) the Province; and

(v) the Boards.

33. In respect of paragraph 65: particulars of who and/or what are Canada's "delegates".

A: See Answers to paragraphs 4, 5, 6, 7, 8 and 27 herein.

34. In respect of paragraph 67: particulars of who and/or what are Canada's "servants, officers, employees or agents".

A: See Answers to paragraphs 4, 5, 6, 7, 8, 27 and 33 herein.

36. In respect of paragraph 67(d): particulars of the "Churches", "other Religious organizations" Canada is alleged to have delegated and/or contracted with; and particulars of all contracts and/or delegations Canada is alleged to have made with respect to the School.

A: The Moravian Mission/Church and the IGA.

37. In respect of paragraph 67(f): particulars of the "agents" operating the School.

A. Teachers, principal, schools staff, employees of the School, administrators and, any individuals in the employ of, or working on behalf of, one of the Delegates

40. In respect of paragraph 68: particulars of Canada's employees, agents and representatives, including (where possible) their names, positions/title and responsibilities.

A: Teachers, principals, school staff, employees of the School, administrators and, any individuals in the employ of, or working on behalf of, one of the Delegates.

41. In respect of paragraphs 73 and 75: particulars of the "agents" (apart from the Province) for whom Canada is vicariously liable.

A: See Answers to paragraphs 4, 5, 6, 7, 8, 27, 33, 34, 36, 37 and 40 herein.

Koskie Minsky LLP | 4/30/2012 3:28:38 PM PAGE 1/004 Fax Server

Jonathan Tarlton | COMPANY:Department of Justice

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April 30, 2012

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Dear Mr. Tarlton:

Re: Obed et al. v. The Attorney General
Our File No. 070584

We are in receipt of the defendant's Demand for Particulars dated April 23, 2012. To ensure compliance with the litigation timetable, the plaintiffs today provide the following response in connection with the Obed action's Demand for Particulars. The plaintiffs' position with respect to what they will and will not answer in response to the Obed Demand will be identical for the other four Demands for Particulars. If you wish, the plaintiffs can provide a separate response to each Demand for Particulars in due course but those responses will be the same as set out below.

The plaintiffs will make their best efforts to answer the following paragraphs of the Obed Demand for Particulars, if that information is in their possession, power or control:

1, 3, 9, 10, 12, 14, 15, 16, 17, 18, 19, 20, 21, 25, 26, 28, 32, 35 and 38

Even though it is the plaintiffs' position that:

i) paragraphs 9, 10, 14, 15, 19, 20, 21, 28 and 35 request answers to pure questions of law;

ii) paragraphs 12, 16, 17, 18 and 26 are within the power, control and knowledge of the defendant; and

iii) paragraphs 32 and 38 request answers to individual inquiries, not necessary for the purposes of pleading.

the plaintiffs will nevertheless make best efforts to answer these paragraphs from any information in their possession, power or control in an effort to move the litigation forward

KOSKIE MINSKY LLP

expeditiously and remove any need for a motion concerning the defendant's Demands for Particulars so that Canada may deliver its Statement of Defence in a timely fashion.

With respect the plaintiffs' refusals, we would remind counsel of the governing principles regarding pleadings and proper request for particulars which include:

i) the defendant has sought particulars of irrelevant information which is unnecessary for the purposes of pleading, as provided for by Rule 14 of the *Rules of the Supreme Court, 1986;*

ii) the defendant has sought particulars concerning the individual circumstances of class members which is not permitted pursuant to the current state of class proceedings jurisprudence or the wording of the governing legislation;

iii) much of the particulars sought by the defendant constitute evidence which is only properly gathered during the discovery process; and

iv) many of the defendant's requests are entirely within Canada's sole knowledge and control and therefore do not properly form part of a Demand for Particulars.

Accordingly, the plaintiffs refuse to answer the following paragraphs of the Obed Demand for Particulars and the basis for each such refusal is provided next to the correspondence paragraph number:

2 - seeks evidence and not material facts necessary to plead

4 - irrelevant for the purposes of pleading and within the sole knowledge and control of the defendant

5 - irrelevant for the purposes of pleading and any agency relationship is within defendant's knowledge

6 - irrelevant for the purposes of pleading

7 - irrelevant for the purposes of pleading

8 - irrelevant for the purposes of pleading

11 - seeks evidence and not material facts necessary to plead

13 - irrelevant and within the sole knowledge and control of the defendant

22 - irrelevant for the purposes of pleading and an individual issue in any event

23 - within the sole knowledge and possession of the defendant

24 - within the sole knowledge and possession of the defendant

27 - within the sole knowledge and possession of the defendant

29 - overbroad and within the defendant's exclusive knowledge, constitutes evidence

30 - overbroad and within the defendant's exclusive knowledge, constitutes evidence

31 - overbroad and within the defendant's exclusive knowledge

33 - within the sole knowledge and possession of the defendant

34 - within the sole knowledge and possession of the defendant

36 - within the sole knowledge and possession of the defendant

37 - within the sole knowledge and possession of the defendant

39 - within the sole knowledge and possession of the defendant

40 - within the sole knowledge and possession of the defendant

41 - within the sole knowledge and possession of the defendant

42 - individual issues not relevant for the purposes of pleading

As advised above, one of the main principles upon which we rely to base the plaintiffs' refusals is that it is well-settled law that particulars will not be ordered where the facts sought are within the defendant's knowledge: *John Doe v. Roman Catholic Episcopal Corp. of St. John's*, [2007] N.J. No. 84 at para. 10.

Please advise as soon as is possible as to whether Canada intends to move on the plaintiffs' refusals. If such a motion is necessary, the plaintiffs will ask Justice Butler to hear the motion on July 26, 2012, at the same time Canada's application to add any defendants or third parties is returnable.

Yours truly,

KOSKIE MINSKY LLP

Celeste Poltak
CP/ds

cc Kirk Baert – Koskie Minsky LLP
Mark Freeman - Department of Justice Canada
Steve Cooper – Ahlstrom Wright Oliver & Cooper LLP
Ches Chisbie

2007 5423CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

TOBY OBED, WILLIAM ADAMS and
MARTHA BLAKE

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

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

RESPONSE TO DEMAND FOR PARTICULARS
On the Amended Statement of Claim

The Plaintiffs provide the following answers to the Defendant's Demand for Particulars dated April 23, 2012, as follows; this Response is a supplement to, and intended to be read with, the Amended Statement of Claim the materials facts and allegations of which the Plaintiffs repeat and adopt herein:

1. **The June 24, 2010 certification order directs that "breach of fiduciary duty" and "negligence" will proceed to a common issues trial. Please confirm that any and all duties and causes of action alleged throughout the amended statement of claim are limited to "breach of fiduciary duty" and "breach of duty of care in negligence" for the purposes of this claim.**

A: Yes.

3. **The amended claim at para. 2(c) lists "Agents" as a defined term. Please confirm whether the term "delegates" (see for example para. 64) used throughout the claim can also be included under the defined term "Agents" for the purposes of the claim.**

A: No. Delegates are not necessarily also agents.

9. In respect of paragraph 10: particulars of Canada's exclusive duty of care, and fiduciary and constitutional obligations owed to aboriginal persons.

A:Since 1949, Canada has had a constitutional responsibility in accordance with section 91(24) of the *Constitution Act 1867* for the aboriginals in Newfoundland. This carries with it the fiduciary obligation to act in the best interests of the individuals to whom that obligation is owed. The fiduciary obligations of Canada involved an obligation to act for the benefit of aboriginal persons, including taking whatever measures were appropriate in light of the particular circumstances and actual needs of the time. Constitutionally, Canada was responsible for providing for the administration of aboriginal persons in the new province, including their education. The Federal Crown acknowledged this responsibility in and around the time of Confederation. By virtue of the *Constitution Act*, the implementation of residential school policy across the rest of Canada at the time and the historic presumptive fiduciary relationship between the federal Crown and aboriginals, Canada assumed a duty to act to act in a fiduciary capacity with respect to the education of aboriginal persons.

The affirmative obligation to provide for the welfare of aboriginal persons belongs solely to the Federal Crown. Pursuant to section 91(24), Canada has primary jurisdiction with respect to aboriginal persons which means the federal government cannot, consistent with its fiduciary obligations, deliberately decide not to exert itself when aboriginal persons are abused or their culture threatened. The implementation of the residential school policy in Canada, gave rise to a federal assumption of fiduciary duty with respect to the education of aboriginal persons. Once Newfoundland joined Canada, that same assumption of fiduciary and constitutional duty applied to aboriginals in the new province.

Knowing of the residential school policies and operations across Canada at the time of Newfoundland's Confederation, the Federal Crown had a responsibility to ensure that aboriginals in the new province were not similarly treated by the Province or any organization. Having internally acknowledged its responsibilities to aboriginals in Newfoundland, including their education, Canada funded many aboriginal programs and had the corollary responsibility to ensure those institutions were operated safely and in accordance with minimum standards.

Constitutional obligations include Canada's obligation to fully assume the role demanded of it by the Constitution. If Canada failed to fully exercise its exclusive jurisdiction over aboriginals in Newfoundland, that itself could constitute a breach of fiduciary duty. Where by statute or unilateral undertaking, one party has an obligation to act for the benefit of another – and the power carries with it discretionary power – that party is a fiduciary.

As the responsibility for "Indians" continued to be a federal constitutional responsibility following Confederation, if Canada failed to fulfil its direct and exclusive constitutional responsibilities, those failures themselves constitute breaches of duty. If Canada financially contributed to a provincial school system that had assimilation as one its

aims, or was woefully inadequate, Canada's improper delegation or oversight constituted a breach of fiduciary duty.

To the extent that Canada funded and thereby participated in the systemic practices, programs, policies and wrongs which occurred at the Schools, it thereby abdicated and breached its duty of care and fiduciary obligations as Canada knew, or should have reasonably known, that harm would enure to aboriginal children. Canada was under an obligation to ensure that the institutions it was funding were carried out safely and in accordance in basic minimum standards of education.

Direct federal administration could have, and should have, been exerted over the Inuit and metis in Newfoundland and Labrador in 1949 just as it was being done at the same time in Northern Quebec.

10. In respect of paragraph 16: particulars of Canada's legal responsibility for Aboriginal persons residing in Newfoundland in 1949 and beyond.

A: The Plaintiffs repeat and rely on the particulars provided in paragraph 9 above.

Additionally, by funding an improper educational system and failing to properly oversee and/or administer those educational institutions, Canada abdicated its federal duty to Indian persons pursuant to section 91(24) and its duty of care at common law. Canada's participation in these residential schools amounted to dishonest and disloyal conduct which violated its fiduciary duties to aboriginal persons.

Canada breached a fiduciary duty or was negligence by failing to take steps to prevent these children from being abused and losing the aboriginal identities as a by-product of the province's residential schools which were being supported by federal funds.

12. In respect of paragraph 20: particulars of the dates and authors of the two separate legal opinions commissioned by the Federal Department of Justice.

A: On July 2, 1947, the Newfoundland delegation, aware of the obligatory Federal role in Indian affairs, requested from Canada "amplification with regard to treatment of Indians and Eskimos and in particular the question of education, the method by which it is carried on, the role which provinces and religious denominations play in this connection".[1]

The response to this query was provided by the Department of Mines and Minerals (the department responsible for Indian Affairs) which stated that "the Dominion assumes full

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[1] NAC, RG 2, vol. 128, file N-18 Newfoundland and Labrador 1947 (July). Ottawa, July 3, 1847 J.R. Baldwin to Dr. H.L. Keenleyside, Deputy Minister of Mines and Resources.

responsibility for the welfare, including education, of Indians and Eskimos and has the control and management of their lands and property."[2]

In 1950, a legal opinion was sought from the Federal Department of Justice on the "precise legal extent of the federal government's responsibility insofar as Indians and Eskimos residing in Newfoundland and Labrador are concerned". Opinion regarding the legal position respecting Federal jurisdiction over and responsibility for Newfoundland Indians and Eskimos, was authored by F.P. Varcoe, Deputy Minister of Justice, April 14, 1950:

> "...for the purposes of the *British North America Act*, 'Indians' includes Eskimos. ... 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 of providing money to be devoted to the carrying out of policies in relation to the Indians."[3]

The 1947 and 1950 Federal opinions were a correct statement of the legal extent of the Federal Crown's responsibilities and obligations insofar as Indians, Eskimos and Inuit residing in Newfoundland were concerned.

14. In respect of paragraph 22: particulars of Canada's legal responsibility and duties owed to Aboriginal persons in Newfoundland after March 31, 1949.

A: See response to in paragraphs 9 and 10 above, repeated and relied upon here.

The lack of a specific provision pertaining to the new province's aboriginal persons in the *Terms of Union* is of no importance with respect to Canada's jurisdiction over aboriginal persons – the *Terms of Union* explicitly provide that the *Constitution Acts 1867 and 1940* shall apply to the Province of Newfoundland in the same way and to the like extent as they apply to the other provinces, confirming the application of section 91(24) to persons in Newfoundland. Similarly, at the time or entry or creation of other non-original provinces, there was no provision that aboriginals in those provinces fell within exclusive federal jurisdiction yet there has never been any suggestion that aboriginals in those provinces were not subject to section 91(24).[4]

Examples of Canada's acknowledgement and assumption of such duties lies in its very own legal opinions and include, but are not limited to the following contractual arrangements with the Province:

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[2] NAC, MG 32, B5, vol. 118, file Newfoundland References 1946 – 47 (file 2). "Questions Asked by Newfoundland Delegation and Answered by the Appropriate Departments", stamped July 14, 1947.
[3] 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.

[4] *Manitoba Act, 1870*, 33 Vict. c. 3(Canada); *Prince Edward Island Terms of Union* (1873); *The Alberta Act*, 4 – 5 Ed. VII, c. 3 (1905)(Canada); *Saskatchewan Act*, 4 – 5 Ed. VII, c. 42 (1905)(Canada).

- 1954 Canada-Newfoundland Agreement provided that Canada would assume 66 2/3% of costs in respect of Eskimos and 100% of the costs in respect of Indians relating to "capital expenditures...in the fields of welfare, health and education";[5]

- four years later, Newfoundland requested further funds from Canada to provide education and housing for both the Innu and Inuit. ;

- 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;

- 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;

- these 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 – 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments

- 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:

  a) 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);

  b) establishment of a federal-provincial committee to monitor provincial expenditures;

  c) continuation of federal funding for Inuit communities in Labrador; and

- 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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[5] J.W. Pickersgill to H.L. Pottle, April 12, 1954; Pottle to Pickersgill, April 26, 1954, to come into effect April 1, 1954.

15. **In respect of paragraph 23: particulars of how Newfoundland and Labrador's entry into Confederation brought its Aboriginal population fully within exclusive federal jurisdiction and particulars of Canada's legal responsibility.**

A:In June 1947, the first official meeting between the Newfoundland delegation and federal representatives to discuss a union with Canada. Prior the meeting, the federal Department of Mines and Resources requested information regarding the numbers, location, education facilities and policing for aboriginals in Newfoundland.[6]

During this meeting, a document was provided to the Newfoundland delegation by the Federal Government which outlined responsibilities that various Federal departments would have over the new province Newfoundland. "Indian Affairs" was listed under the jurisdiction of the Federal Department of Mines and Resources. The function of the Indian Affairs branch was to administer "the affairs of Indians of Canada ... [which] included the control of their education, the development of agriculture, the administration of their lands, their community funds and estate and the general supervision of their welfare".[7]

At a July 1947 meeting in Ottawa between the Newfoundland delegation and the Federal Crown, the Department of Mines and Resources explicitly stated to the Newfoundland delegation that "the Dominion assumes full responsibility for the welfare, including education, of Indians and Eskimos and has the control and management of their lands and property".[8] To that end, during these negotiations in July 1947, the Federal delegation advised that "the general federal practice has been to cooperate with both provincial authorities and religious groups in Indian education, using whichever seemed appropriate to local conditions"[9].

Following the initial plenary sessions between federal and provincial delegations, and Indian and Eskimo Sub-Committee was established. It is widely thought that the creation of this Sub-Committee was in response to queries about native education raised by the Newfoundland delegation. Ultimately, the Sub-Committee was tasked "to bring together and examine information on the numbers, economic conditions and general situation of

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[6] LAC, RG 21 Records of the Department of Energy, Mines and Resources, vol. 10, file: 171-2, pt. 1, R.A. Gibson to H.L. Keenleyside, 11 June 1947.

[7] National Archives of Canada (NAC), MG 32, B5, vol. 118, file Newfoundland Reference 1947 (file 1). "Some Notes on the Constitution and Government of Canada and the Canadian Federal System", June 1947.

[8] NAC, MG 32, B5, vol. 118, file Newfoundland Reference 1946-1947 (file 2). "Questions Asked by the Newfoundland Delegation and Answered by the Appropriate Departments", stamped July 14, 1947

[9] *Documents on Relations between Canada and Newfoundland*, vol. 2. doc. 362: "Minutes of a Meeting between Delegates from the National Convention of Newfoundland and Representatives of the Government of Canada" 2 July 1947.

the Indians and Eskimos of Labrador and how they would be provided for in the event of union"[10].

Minutes of the Sub-Committee on Indians and Eskimos shows that in September 1947, Canadian officials responsible for federal Indian affairs advised that if Newfoundland became a province of Canada, the province's Indians and Eskimos would be the sole responsibility of the federal government, including the provision of education.[11]

The Sub-Committee on Indians and Eskimos published its final report in October 1947, "A Preliminary Statement regarding the Position of Newfoundland's Indians and Eskimos in the Event of Union", which stated the following:

> "Under the *Indian Act*, Indians and Eskimos in Canada are regarded as one race for the purposes of administration. In the event of Newfoundland becoming a province of Canada, the Indians and Eskimos of Newfoundland and Labrador would be the sole responsibility of the federal government ..."[12] [emphasis added]

In the same document, under the section "Education of Indians and Eskimos", it stated that "the Dominion assumes full responsibility for the welfare, including education, of Indians and Eskimos".[13] [emphasis added]

By confirming in the Terms of Union that Federal responsibility in the new province was that as outlined in the *B.N.A. Act*, in the same way and to the same extent as applicable in the balance of Canada, "as if the Province of Newfoundland had been one of the Provinces originally united",[14] Canada acknowledged and accepted exclusive jurisdiction over Indians and Eskimos in Newfoundland and Labrador.

As early as May 1948, the federal Department of the Indian Affairs Branch contemplated a federal administrative take-over of aboriginal affairs in the new province:

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[10] LAC. MG 30 E 159, R.A. MacKay Papers, vol. 4, File: Nfld National Convention to Ottawa Reports, "Meetings Between Delegates from the National Convention of Newfoundland and Representatives of the Government of Canada".

[11] NAC, MG 30e, 159, vol. 4, file – "Indians and Eskimos of Newfoundland", submitted 1950, Minutes, 2 September 1947, Report of the Indian and Eskimo Sub-Committee.

[12] NAC, RG 2, vol. 128. "Meeting between Delegates from the National Convention of Newfoundland and Representatives of the Government of Canada". Appendix XI, "A Preliminary Statement regarding the Position of Newfoundland's Indians and Eskimos in the event of Union", typescript report, October 10, 1947.

[13] *ibid.*

[14] NAC, RG 2, vol. 128, file: N-18 Newfoundland (October). Ottawa, October 10, 1947, J.R. Baldwin, memorandum for Mr. St. Laurent.

> "So far as this Branch is concerned, it is not considered that any serious difficulties would arise as a result of a precipitated administrative change-over. As the Newfoundland government does not administer the welfare of its native peoples, as in the case of Canada, and as missionary societies are largely responsible for such work in Newfoundland territory, any change-over along this line could be a gradual process..."[15]

The Supreme Court of Canada decision in 1939 in *Re Eskimo* further confirmed federal jurisdiction and constitutional obligations over the Inuit. In that case, Canada had appealed to the Supreme Court of Canada, unsuccessfully, to avoid having to accept any responsibility for the Quebec Inuit. The Court in that case rejected Canada's arguments that Quebec bore provincial responsibility to administer the Inuit. Rather, the court ruled that the Inuit were "Indians" within the meaning of section 91(24) and therefore, a federal responsibility. Similarly, upon becoming part of the Dominion in 1949, aboriginals in Newfoundland automatically became the constitutional responsibility of Canada. Having acknowledged its legal obligations and accepted fiscal responsibility for the aboriginals in Newfoundland, Canada was also obliged to ensure the systems and institutions it was funding were operated in a safe and appropriate manner.

16. In respect of paragraph 26: particulars including the dates, authors and subject lines of the legal opinions.

A:Opinion regarding the legal position respecting Federal jurisdiction over and responsibility for Newfoundland Indians and Eskimos, authored by F.P. Varcoe, Deputy Minister of Justice, April 14, 1950:

> "...for the purposes of the *British North America Act*, 'Indians' includes Eskimos. ... 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 of providing money to be devoted to the carrying out of policies in relation to the Indians."[16]

In 1954, officials recognized federal responsibility in this field and went so far to say that if Newfoundland went to court to compel Canada to assume responsibility, the province would be successful:

> "The federal government's responsibility in this matter seems to be inescapable, legally and otherwise..."[17]

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[15] LAC, RG 10, vol. 6925, file: 121/29-1 vol. 1: Director to Deputy Minister (Mines and Resources), 20 May 1948.

[16] 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.

[17] P. Pelletier to J.W. Pickersgill, Secretary of State, 16 March 1954; N.A. Robertson to P. Martin, Minister of Health and Welfare, June 1954.

In October 1963, J. W. Pickersgill (Newfoundland MP and Minister of Transport) tried to persuade Prime Minister Pearson to place a reference before the Supreme Court of Canada to determine the extent of federal responsibility for aboriginals in Newfoundland but Prime Minister Pearson refused.[18]

In March 1964, Premier Smallwood wrote to Prime Minister Pearson asserting federal responsibility for Indians and Eskimos in the province. No objection was made to the letter by Prime Minister Pearson.[19]

In November 1964, a further legal opinion was requested from the Department of Justice. In that opinion, the 1950 Varcoe position was endorsed and confirmed that the constitutional position in respect of Indians applicable in the rest of Canada was equally applicable to Newfoundland:

> "Mr. Varcoe's 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".[20]

An April 1965 Federal Cabinet memorandum addresses the constitutional framework once more, stating that: "The conclusion to be drawn from the outline of the situation given above seems to support a substantial degree of federal obligation with respect to the formulation of policies and the voting of funds to provide for programs on their [Indians and Eskimos in Newfoundland] behalf".[21]

Despite acknowledgement of a "substantial degree of federal obligation", the same Cabinet memorandum went on to recommend "gradually relieving the Federal Government of direct responsibility, both financial and administrative, for this segment of the Indian and Eskimo population of Canada".[22]

17. In respect of paragraph 28: particulars of the agreement referred to therein, including the date, author and terms of said agreement.

A: At this time, the Plaintiffs cannot locate the specific agreement. The Plaintiffs will continue to search for the agreement and provide a copy if same can be located.

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[18] 21 October 1963, Correspondence, J.W. Pickersgill, to Prime Minister Pearson; 24 October 1963, Correspondence, Prime Minister Pearson to J.W. Pickersgill.

[19] Letter of Premier Smallwood to Lester Pearson, dated March 23, 1964.

[20] Letter of the Deputy Attorney General, dated November 23, 1964.

[21] 22 April 1965, Cabinet Memorandum, "Contributions to Newfoundland Respecting Indians and Eskimos".

[22] *ibid*, Recommendations #13 and #17.

18. In respect of paragraph 30: particulars of the federal departmental estimates prior to Confederation (1949), including the names of the said departments, the amounts that were submitted and the dates when those amounts were included in the estimates.

A: In 1946, the Federal Cabinet established the Cabinet Committee on Newfoundland Relations and an advisory interdepartmental committee to report to Cabinet. Cabinet requested a report to show the costs of the various items Canada would be responsible for upon Newfoundland's entry into Confederation.[23]

In 1947, when discussing the implications of Confederation with Newfoundland officials, federal official clearly indicated that the aboriginal peoples of Newfoundland would be subjected to federal jurisdiction and an allocation was made to the 1949-1950 budget estimates of the federal government in order to begin covering the costs of such persons for 1949. Minutes of a meeting of federal officials and Newfoundland delegates in September 1947 show that the federal government at the time contemplated the application of the *Indian Act* and establishment of land reserves.[24] To this end, approximately sixty-thousand dollars was put into the 1949-1950 budget estimates for these purposes:[25]

i. Indians (Federal Department of Citizenship & Immigration)

April 1, 1949 – March 31, 1950:	$20,906.10
April 1, 1950 – March 31, 1951:	$21,354.22
	$42,260.32

ii. Eskimos (Federal Department of Resources & Development)

April 1, 1949 – March 31, 1950:	$13,601.82
April 1, 1950 – March 31, 1951:	$12,302.90
	$25,904.72 [26]

[23] NAC, MG32, B5, vol. 114, file, Newfoundland: Cables between Canada and High Commissioner for Canada in Newfoundland 1945 – 47 (file 2); NAC, RG 85, vol. 2079, file 1006-5(1), "Natural Resources of Newfoundland"; Report by J.L. Robinson, Geographer, with appendix "Additional Responsibilities and Costs to the Department of Mines and Resources" (August 10, 1946).

[24] NAC, RG 2, 18 Vol. 128, file N-18 Newfoundland Delegation-Canadian government representatives meeting, June – September 1947.

[25] NAC, RG 2, 18, Vol. 172, File N-18-3 (1949-51), Major D.M. Mackay, Director of Indian Affairs Branch (Mines and Resources) to H.L. Keenleyside Deputy Minister of Mines and Resources.

[26] NAC, RG22, vol. 22, File 40-8-4. P. Pelletier, Privy Council Office. "Notes on the Indian and Eskimo Problem in Labrador", 31 October 1951.

19. In respect of paragraph 45: particulars of fiduciary obligations and duty between Canada and Aboriginal persons in Newfoundland and Labrador that arose at the instant of Confederation in 1949.

A: The Plaintiffs repeat and rely on the particulars provided above in paragraphs 9, 10, 14 and 15.

Additionally, the fiduciary relationship between Aboriginals in Newfoundland and Canada arises from the historical facts of these parties. Inuit and Eskimo existed and occupied Newfoundland and Labrador for hundreds of years prior to European contact. Canada ultimately assumed jurisdiction over all aboriginals in the country. One of the major responsibilities assumed by Canada in the *Constitution Act* was to reserve for itself exclusive jurisdiction over "Indians". Newfoundland joined Canada in 1949 with the agreement in the Terms of Union that the *Constitution Act* apply to the new province in the same way, and to the like extent, as in the rest of Canada. Accordingly, as of March 31, 1949, section 91(24) of the *Constitution Act* applied with full force to the aboriginal persons living in Newfoundland and Labrador.

By retaining for itself exclusive jurisdiction over Indians in the Constitution Act, which applied to persons in Newfoundland after March 31, 1949, Canada was under an obligation to act. This fiduciary duty, essentially codified by section 91(24) has always existed, from the moment that Canada assumed unto itself dominion over Indians. The federal power pursuant to section 91(24) must also be reconciled with federal duties and the requirement on the Crown to justify its conduct or steps that either infringe upon or deny aboriginal persons their rights. This is consistent with the well-entrenched principle of holding the Crown to a high standard of honourable dealing with respect to all of the aboriginal peoples in Canada. As a result, the Federal Crown was responsible for protecting the rights of aboriginals in Newfoundland following Confederation which arose from the special trust relationship between the parties created by history and legislation.

Moreover, the common law fiduciary relationship between the Crown and the Indians is also rooted in the historic reality of the parties. That duty extends to protect such persons from personal harm visited upon them by non-Indian forces.

20. In respect of paragraph 46: particulars of Canada's legal responsibility, discretionary control and cognizable Indian interest alleged to give rise to a fiduciary duty between Canada and the Class.

A: The Plaintiffs repeat and rely upon the particulars provided above in paragraphs 9, 10, 14 and 15 and in particular, the Federal opinions given in 1947, 1950 and 1964.

21. In respect of paragraph 48: particulars of the common law and constitutional obligations, and fiduciary and common law duties.

A. The Plaintiffs repeat and rely upon the particulars provided above in paragraphs 9, 10, 14 and 19.

25. In respect of paragraph 54: particulars of educational opportunities.

A: Refusal to provide particulars. The information sought by this particular paragraph constitutes evidence and not facts necessary to plead. Particulars regarding the denial and/or loss of educational opportunities is evidence that the Defendant may glean or explore during the discovery process.

26. In respect of paragraph 56: particulars of the duties, responsibilities or obligations Canada is alleged to have attempted to delegate to the Province of Newfoundland.

A: The Plaintiffs repeat and rely upon the particulars provided above in paragraphs 9, 10, 14, 15 and 19, including the 1947, 1950 and 1964 Federal opinions and the Supreme Court of Canada decision in *Re Eskimo*.

28. In respect of paragraph 62: particulars of Canada's "special responsibility".

A. The Plaintiffs repeat and rely upon the particulars provided and described above in paragraphs 9, 10, 14 and 19.

32. In respect of paragraph 64: particulars of the systemic child abuse, neglect and maltreatment and the systematic deprivation of the essential components of a healthy childhood at the School.

A: Tony Obed was physically beaten repeatedly for speaking his mother language Inuktitut and was sexually abused at the School on numerous occasions.

William Adams was prohibited from having any contact with his Inuk siblings at the School where the children were not permitted to speak their native language. Adams was physically beaten several times for speaking Inuktitut and physically and verbally abused by the School's supervisors. Given the physical labour required to Adams, he received little education. Adams was also sexually abused by a dorm supervisor and the principal of the School.

Other resident class members experienced similar mistreatment and abuse during their time at the School. The School was operated more like a reformatory or prison then a school for young children, with inadequate physical care of the children and a systemic pervasive atmosphere of both physical and sexual abuse. Former students of the School were subjected to an atmosphere targeted at their assimilation by removing their native culture, identity and language, which profoundly and adversely affected them.

35. In respect of paragraph 67(a): particulars of Canada's "other responsibilities and duties" and particulars of who and/or what are the "others" to which Canada is alleged to have wrongfully delegated said other responsibility and duties.

A: Knowingly permitting either the International Grefnell Association, Moravian Church or the province to continue a system of residential schools following Confederation,

while also financially contributing to such a system, yet providing no oversight to ensure the safety of the students, all the while acknowledging its sole responsibility in this arena, was an improper attempt to delegate exclusive Federal duties.

38. **In respect of paragraph 67(i): particulars of all disclosure of abuses in the School during the Class Period.**

A: Not in the Plaintiffs' possession. These would be documents solely within the Defendant's possession. Alternatively, the Plaintiffs allege that if the Defendant claims it was unaware of these abuses, it was thereby negligent for failing to administer any appropriate oversight of the School (or was otherwise wilfully blind) when, at the same time, it was providing educational funding and acknowledged that it owed an exclusive constitutional duty to the persons attending that school.

DATED at Toronto, Ontario, this 11th day of May, 2012.

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Court File No: 2007 01T5423CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at «place»

DEMAND FOR PARTICULARS

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SCHEDULE "B"
THIRD PARTY CLAIM

1. The Plaintiffs' Statement of Claim (the "Claim") is brought as five class actions. The Plaintiffs allege abuses and breaches of duties at five schools (the "Schools") in Newfoundland and Labrador. The Plaintiffs state they are either former students of the Schools or their family members.

2. The Plaintiffs have sued Canada seeking damages for the alleged abuse, loss of language and culture and other heads of damage arising from their alleged experience at the Schools.

3. The International Grenfell Association (the "IGA"), the Moravian Church (the "Moravians") the Labrador and Western School Boards (the "Boards") and the Government of Newfoundland and Labrador (the "Province"), by their purpose, operation and management, created and ran the Schools.

4. The Province, by its purpose, operation and/or management, created and ran the Schools. Upon entering Confederation in 1949, the Province continued to have exclusive legislative authority over education. The Province's exclusive legislative authority over education remains in effect today. Both before and after Confederation, the Schools existed and were run in accordance with Provincial legislation, regulations and policy. The Schools existed and were operated prior to 1949, the year of Confederation between Canada and Newfoundland. The Schools continued to operate for several decades post Confederation.

5. Canada admits it provided some funding to the Province for use in programs for Aboriginal Peoples. Canada did not administer any programs or services relating to education of Aboriginal Peoples in respect of the Schools.

6. Canada states that the provision of funding, whether by the federal or provincial government, in keeping with the policy decisions of the government of the day, does not constitute a cause of action at law. Specifically, Canada's provision of funding to the Province does not give rise to a cause of action or legal liability.

7. Alternatively, if the Court decides that the provision of funding (or otherwise) can give rise to liability on Canada, then Canada hereby seeks contribution and indemnity from the Province. The Province received money from Canada and directed its uses. Canada was provided with an accounting of funds. The Province, not Canada, dealt directly with the Boards, IGA and Moravians in accordance with the Province's jurisdiction over education.

8. Canada had no agreements regarding the operation of the Schools. Canada did enter into agreements with the Province regarding funding arrangements for capital expenditures. Canada did not mandate the implementation of federal policy or guidelines with respect to the operation of the Schools.

9. Over the years, Canada participated in various committees with the Province and, later, with Aboriginal Peoples. These committees discussed funding, but did not require mandatory reporting to Canada regarding the daily operations of the Schools. Canada was not responsible for and did not undertake the day-to-day operation and management of the Schools. At no time was Canada ever made aware of any allegations of abuse at the Schools.

10. Canada had no agreements, policies or guidelines regarding the daily operation of the Schools. Canada did not inspect or audit the Schools, and did not have the power or authority to do so. Canada reviewed the Province's expenditures in order to determine whether the money provided was spent in accordance with the terms of the applicable agreements. Canada was not responsible for and did not undertake the day-to-day purpose, operation or management of the Schools.

11. Canada did not take any of the following actions, undertaken by the Province, Boards, IGA and/or Moravians, such actions including, but not limited to:

    a. admission of children to the Schools;

    b. transportation of children to and from the Schools;

c. living conditions and food within the Schools;

d. selection, hiring, supervision, discipline and dismissal of staff;

e. academic, vocational, religious, and moral teaching of the students;

f. school curriculum and attendance;

g. medical treatment; and

h. supervision, day-to-day care, guidance and discipline of the students.

12. The Province, Boards, IGA and Moravians were the employers of any staff at the Schools. The Province and possibly others are vicariously liable for the actions of such staff at the Schools. Canada is not vicariously liable for the acts or omissions of such staff. Furthermore, Canada is not liable for the actions of anyone that was on School property, regardless of whether they had the express or implied consent of the Province, Boards, IGA and Moravians, who had operation, management and control of the Schools.

13. Canada repeats the foregoing and claims against the Province as follows:

a. A declaration that Canada is entitled to contribution and indemnity from the Province to the extent that Canada is found liable to pay damages to the Plaintiffs; including any award as to interest and costs made against Canada;

b. Judgment for contribution and/or indemnity in an amount equivalent to the amount of any judgment awarded against Canada in favour of the Plaintiffs, including any award as to interest and costs;

c. Costs of this Third Party Claim; and

d. Such further and other relief as the Court deems just.

14. Canada pleads and relies upon the *Contributory Negligence Act*, RSNL 1990, c. C-33; the *Crown Liability and Proceedings Act*, RSC 1985, c C-50; and the *Schools Act*, 1997, SNL 1997, c S-12.2, and its predecessor legislation.

DATED at Halifax, Nova Scotia, this 16th day of November, 2012.

Jonathan Tarlton
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Counsel for the Defendant/Plaintiff by 3rd Party Claim, The Attorney General of Canada

THIS IS EXHIBIT "L" REFERRED TO IN THE
AFFIDAVIT OF SEAN O'DONNELL
SWORN BEFORE ME, THIS 25TH DAY OF MARCH, 2013

A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

Jonathan Reuben Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

2007 01 T 4955 CP
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

BETWEEN:		
	Carol Anderson, Allen Webber and Joyce Webber	**PLAINTIFFS**
AND:		
	The Attorney General of Canada	**DEFENDANT**
AND:		
	Her Majesty In Right of Newfoundland and Labrador	**THIRD PARTY**

2008 01 T 0845 CP

BETWEEN:		
	Sarah Asviak and James Asivak	**PLAINTIFFS**
AND:		
	The Attorney General of Canada	**DEFENDANT**
AND:		
	Her Majesty In Right of Newfoundland and Labrador	**THIRD PARTY**

2008 01 T 0844 CP

BETWEEN:		
	Selma Boasa and Rex Holwell	**PLAINTIFFS**
AND:		
	The Attorney General of Canada	**DEFENDANT**
AND:		
	Her Majesty In Right of Newfoundland and Labrador	**THIRD PARTY**

2008 01 T 0846 CP

BETWEEN:		
	Edgar Lucy and Dominic Dickman	**PLAINTIFFS**
AND:		
	The Attorney General of Canada	**DEFENDANT**
AND:		
	Her Majesty In Right of Newfoundland and Labrador	**THIRD PARTY**

2007 01 T 5423 CP

BETWEEN:		
	Tony Obed, William Adams and Martha Blake	**PLAINTIFFS**
AND:		
	The Attorney General of Canada	**DEFENDANT**
AND:		
	Her Majesty in Right of Newfoundland and Labrador	**THIRD PARTY**

Brought under the ***Class Actions Act*** SNL 2001, c. C-18.1
Before the Honourable Madame Justice Butler, Case Management Judge

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DEFENCE
Of the Third Party,
Her Majesty in Right of Newfoundland and Labrador

---

01. The Third Party Defendant, (hereafter the Province), admits paragraphs 1 and 2 of the Third Party Statement of Claim, dated 16 November 2012, (hereafter the Statement of Claim).

02. As to paragraph 3 of the Statement of Claim, while it is correct to say that the International Grenfell Association, (the IGA), the Moravian Church and the Labrador and Western School Boards, (the Boards), *by their purpose operation and management created and ran schools*, this is not correct in respect of the Province and the Province denies this.

03. As to paragraph 4 of the Statement of Claim:

i) The Province denies the first sentence of paragraph 4 of the Statement of Claim and repeats paragraph 2 herein;

ii) As to the balance of paragraph 4 of the Statement of Claim the Province notes that the Federal Government also had jurisdiction by virtue of s. 91(24) of the ***Constitution***;

iii) Otherwise, the Province admits paragraph 4 of the Statement of Claim.

04. As to paragraph 5 and 6 of the Statement of Claim the Province admits that Canada from time to time provided funding for education in the Province, and that, dependent on the circumstances, the provision of funding may not give rise to a cause of action, but otherwise denies these paragraphs and repeats paragraph 03(ii) herein.

05 As to paragraphs 5 to 10 of the Statement of Claim:

i) the Province notes that the basis of the Plaintiffs' claim against Canada is the allegation that the Plaintiffs breached a non-delegable fiduciary duty towards the Plaintiffs in moving the Plaintiffs to, and maintaining their attendance at residential schools. The Plaintiffs alleges that their cause of action stems from

duties assumed by Canada at the time of Newfoundland and Labrador's entry into Confederation. The Plaintiffs further allege that the ***British North America Act,*** and the ***Terms of Union*** are the source of Canada's non-delegable fiduciary duty and therefore that Canada is exclusively liable;

ii) The nature of the claim as formulated by the Plaintiffs is not one which lends itself to a third party action by Canada against the Province as the liability alleged by the Plaintiffs is uniquely and solely Canada's as a result of Canada's duties, constitutional and otherwise;

iv) While the foundation for the Plaintiffs claim is not financial Canada submits in the alternative that if liable because of the provision of funding (or otherwise) then it is entitled to contribution and indemnification from the Province. The Province denies this, repeats paragraphs paragraph 5(ii) herein and states that the payment of money by Canada to the Province toward education does not, under the circumstances, give rise to a cause of action against the Province. The Province states that Canada should seek contribution and indemnification from the IGA, the Moravians and the Boards who managed the day to day operations of the subject schools.

06. The Province denies paragraph 11 of the Statement of Claim and states that with the exception of curriculum the activities listed relate to day to day running of the schools which was the responsibility of the Boards, the IGA, and the Moravians.

07. The Province denies paragraph 12 of the Statement of Claim and states that it was the Boards, the IGA and the Moravians who were the employers of staff at the schools and who must therefore be liable, vicariously or otherwise, for the acts and omissions of their employees.

08. The Province denies that Canada is entitled to the relief claimed in paragraph 13 of the Statement of Claim.

09. As to Statement of Claim as a whole:

i) The Province denies the allegations contained therein and puts Canada to the strict proof thereof;

ii) The Province further denies the allegations contained in the Statement of Claim as between the Class Action(s) and Canada;

iii) The nature of the claim as formulated by the Plaintiffs is not one which lends itself to a third party action by Canada against the Province as the liability alleged by the Plaintiffs is uniquely and solely Canada's as a result of Canada's duties, constitutional and otherwise;

iv) While the foundation for the Plaintiffs claim is not financial Canada submits in the alternative that if liable (solely) because of its financial contributions to education in the Province then it is entitled to contribution and indemnification from the Province. The Province denies this and states that the payment of money by Canada to the Province which then funded activities of IGA, the Moravians and the Boards does not, under the circumstances, give rise to a cause of action. The Province states that Canada should seek contribution and indemnification from the IGA, the Moravians and the Boards who managed the day to day operations of the subject schools.

v) The Boards, the IGA and the Moravians were the employers of staff at the schools and it's those entities who ultimately would be liable, vicariously or otherwise, for the acts and omissions of their employees.

vi) The Province's duties and responsibilities as defined by the Common Law and statute applicable during the relevant time were discharged in a non-negligent manner consistent with the common law and the applicable statutory law.

vii) The claims of the class members to the extent that they allege mental, physical and emotional abuse, as opposed to sexual abuse, are in any event statute barred.

10. The Province seeks the dismissal of this Statement of Claim.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this 31st day of January 2013.

Rolf Pritchard Q.C.
Solicitor for the Third Party
Department of Justice
Government of Newfoundland and Labrador
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To: The Registry
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And to:

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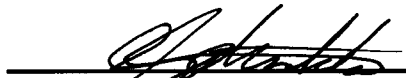
THIS IS EXHIBIT "M" REFERRED TO IN THE
AFFIDAVIT OF SEAN O'DONNELL
SWORN BEFORE ME, THIS 25TH DAY OF MARCH, 2013



A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

Jonathan Reuben Samuel Schachter, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 24, 2014.

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

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

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

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

Docket: 2007 01T 5423

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

Docket: 2008 01T 0844

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

Docket: 2008 01T 0845

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

Docket: 2008 01T 0846

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

Before: The Honourable Madam Justice Gillian D. Butler

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

Summary:

Counsel of Record:

Chesley F. Crosbie, Q.C. with Kirk M. Baert and Celeste Poltak	Counsel for the Plaintiffs
Jonathan D.N. Tarlton with Mark S. Freeman and Melissa A. Grant	Counsel for the Defendant
Rolf Pritchard, Q.C.	Counsel for the Third Party

Authorities Cited:

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

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

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

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

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

REASONS FOR JUDGMENT

BUTLER, J.:

INTRODUCTION

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

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

[3] I accept that:

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

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

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

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

[4] Rule 38.01 states:

> 38.01. (1) The Court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,
>
> (a) determine any relevant question or issue of law or fact, or both;
>
> (b) determine any question as to the admissibility of any evidence;
>
> (c) order discovery or inspection to be delayed until the determination of any question or issue;
>
> (d) give directions as to the procedure to govern the future course of any proceeding, which directions shall govern the proceeding notwithstanding the provision of any rule to the contrary;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NATURE OF THE ACTION

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

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

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

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

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

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

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

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

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

(b) Canada's involvement in aboriginal education

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

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

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

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

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

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

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

NATURE OF DUTIES CLAIMED

A) Non-Delegable Fiduciary Duty

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

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

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

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

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

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

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

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

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

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

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

B) Direct Negligence Claim

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

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

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

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

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

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

C) Summary of Duties of Care Alleged

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

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

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

ANALYSIS

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

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

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

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

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

A) Discernable Advantage

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B) Sufficient Evidentiary Record

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

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

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

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

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

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

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

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

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

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

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

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

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

C) Underlying Facts a Matter of Law and Public Record

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

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

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

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

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

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

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

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

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

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

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

D) Intermingled Issues and Credibility

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

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

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

E) Determination Would Dispose of Action or Substantially Simplify Trial

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

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

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

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

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

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

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

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

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

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

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

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

H) Application is Premature

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

GILLIAN D. BUTLER
Justice

CAROL ANDERSON et al	and	**THE ATTORNEY GENERAL OF CANADA**	Court File No: 2007 01T4955CP
Plaintiffs		Defendant	

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR TRIAL DIVISION (GENERAL)
Proceeding commenced at the City of St. John's

BROUGHT UNDER THE CLASS ACTIONS ACT, S.N.L. 2001, C. C-18.1, BEFORE THE HONOURABLE MADAM JUSTICE BUTLER, CASE MANAGEMENT JUDGE

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APPLICATION RECORD OF THE PLAINTIFFS (SEVER/STAY MOTION)

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