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

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; **Rumbly 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 Plaintiff's 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 fine residential schools that form this complete action since the same affidavit is included in each of the five motion records.

[5] The Plaintiff's 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 no bear the traditional indicia of an "Indian Residential School", (ad 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 a 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 Plaintiff's 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 resumed 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 that 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 Plaintiff's 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 fix 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 owned 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 owned 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 owned 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

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

to be left exclusively in the political area. Simply put, he argues there is no duty to 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 Norther 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 agreement can be made to support the Plaintiff's 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 Govern-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 owned 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. at paragraph 58 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 Plaintiff's 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 Plaintiff's 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

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

this action, since the material facts are dependent on whether or not Canada had a 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 **Rumbly 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 th is 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 Plaintiff's 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 Plaintiff's position. It is not for me at this stage to determine the strength of the Plaintiff's 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 dury

the period claimed and whose family members are themselves readily identifiable. Cameran, 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 these 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 possible 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 no 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

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

Goudge, J.A. at paragraph 85 in **Cloud** that "Because residential schools for native 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 387, 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 Plaintiff's 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.f 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 founds that "neither the parties nor the court is blessed with perfect foresight at this stage of the proceeding and the future courts of the litigation may depend upon the findings of fact and the decisions made at the trial of the common issues. For this reason, sections 12 and 13 of the Act confers wide discretion on the trial judge to decide how the individual issues ought to be dealt with.

[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.

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ROBERT A. FOWLER
Justice