201001H0088

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Defendant
(Intended Appellant)

AND:

CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER

Plaintiff
(Intended Respondents)

AND IN THE FOLLOWING 4 ACTIONS:

THE ATTORNEY GENERAL OF CANADA - and - **TOBY OBED, WILLIAM ADAMS and MARTHA BLAK**	201001H0089
THE ATTORNEY GENERAL OF CANADA - and - **SELMA BOASA and REX HOLWELL**	201001H0090
THE ATTORNEY GENERAL OF CANADA - and - **SARAH ASIVAK and JAMES ASIVAK**	201001H0091
THE ATTORNEY GENERAL OF CANADA - and - **EDGAR LUCY and DOMINIC DICKMAN**	201001H0092

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

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OVERVIEW

A. THE CERTIFICATION APPLICATIONS BELOW

1. Pursuant to this Honourable Court's direction made on September 22, 2010, these submissions are made on behalf of the Plaintiffs/Intended Respondents (the "Respondents") in response to the Defendant/Intended Appellant's ("Appellant") application for leave to appeal the order of Justice Fowler dated June 24, 2010, certifying these five (5) actions. By the court's direction, these submissions constitute the Respondents' argument on both (i) leave to appeal and, should leave be granted; (ii) the merits of the appeals themselves, to be heard on November 9 and 10, 2010.

2. Following a three (3) day hearing on the five (5) certification applications (being commonly case managed) on June 1, 2, and 3, 2009, by Reasons dated June 7, 2010, Justice Fowler certified each of the actions as a class action pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 (the "Act"). On the basis of extensive written and oral argument, voluminous materials and the benefit of presiding over cross-examinations of the Respondents, the learned applications judge properly considered the evidence and authorities before him in certifying these actions.

3. As described below, Justice Fowler committed no error of law in locating a reasonable cause of action and made no palpable or overriding error in the exercise of his judicial discretion with respect to the balance of the certification test. Accordingly, the Respondents respectfully request that leave to appeal Justice Fowler's orders be denied and in the alternative, that the appeals be dismissed in their entirety.

PART I - STATEMENT OF FACTS

A. THE RESPONDENTS' HISTORY, EXPERIENCES AND BASIS OF CLAIMS

4. Each plaintiff, on behalf of the both the Survivor[1] and Family Classes[2], swore and filed an affidavit in support of these applications below.[3] Many of these persons were also cross-examined by Canada in the presence of Justice Fowler, presenting the court with the best opportunity to assess their credibility.

5. Irrespective of the School attended, certain common threads and experiences presented themselves in the evidence filed and given *viva voce* before the applications judge. During their time at the Schools, the Survivor Class Members were prohibited from speaking their native languages[4] and beaten for speaking Inukitut[5] or any other language but English.[6] A number of former students were also sexually abused either at the hands of other students, dormitory supervisors or principals[7] and many experienced physical abuse on a daily basis.[8]

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

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

3 See Appellant's Record on Application for Leave to Appeal in all five action (*Anderson* at Tab 17-19, *Asivak* at Tabs 18-19, *Boasa* at Tab 18-19, *Lucy* at Tab 18-19, and *Obed* at Tab 166-18).

4 Affidavit of Sarah Asivak, sworn October 22, 2008, *Asivak* Record on Application for Leave to Appeal, Tab 18, para. 8.

5 Affidavit of Tony Obed, sworn October 21, 2008, *Obed* Record on Application for Leave to Appeal, Tab 16, para. 8. Affidavit of William Adams, sworn October 22, 2008, *Obed* Record on Application for Leave to Appeal, Tab 17, para. 8. Affidavit of Selma Boasa, sworn October 22, 2008, *Boasa* Record on Application for Leave to Appeal, Tab 18, para. 8.

6 Affidavit of Carol Anderson, sworn November 20, 2008, *Anderson* Record on Application for Leave to Appeal, Tab 17 para. 7. Affidavit of Allen Webber, sworn November 24, 2008, *Anderson* Record on Application for Leave to Appeal, Tab 18, para. 8

7 Affidavit of Tony Obed, sworn October 21, 2008, *Obed* Record on Application for Leave to Appeal, Tab 16, para. 12. Affidavit of William Adams, sworn October 22, 2008, *Obed* Record on Application for Leave to Appeal, tab 17, para. 10.

As a result of their attendance at the Schools, Survivor Class Members were deprived of a childhood and grew ashamed of their aboriginal identities,[9] the after-effects of which many Class Members continue to grapple with to this day.

6. Family Class Members gave 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.[10]

7. The impact of future generations of survivors of residential schools has been well-documented and recognized by Canadian courts and civil society, and typically manifests itself in an in 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.

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

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[8] Affidavit of Carol Anderson, sworn November 20, 2008, *Anderson* Record on Application for Leave to Appeal, Tab 17, para. 11. Affidavit of Allen Webber, sworn November 24, 2008, *Anderson* Record on Application for Leave to Appeal, Tab 18, para. 12.

[9] Affidavit of Selma Boasa, sworn October 22, 2008, *Boasa* Record on Application for Leave to Appeal, Tab 18, paras. 12 – 14. Affidavit of Allen Webber sworn November 24, 2008, *Anderson* Record on Application for Leave to Appeal, Tab 18, paras. 13–15. Affidavit of Carol Anderson sworn November 20, 2008, *Anderson* Record on Application for Leave to Appeal, Tab 17, paras. 12–14; Affidavit of William Adams sworn October 22, 2008, *Obed* Record on Application for Leave to Appeal, Tab 17, paras. 11–13, Affidavit of Tony Obed sworn October 21, 2008, *Obed* Record on Application for Leave to Appeal, Tab 16, paras. 13–15.

[10] Affidavit of Martha Blake, sworn October 22, 2008, *Obed* Record on Application for Leave to Appeal, Tab 18, para. 7.

9. The evidence tendered on behalf of the Respondents and considered by Justice Fowler describes the experiences suffered through at these Schools by these former students. The lasting effects of their time at these Schools and their respective damaging experiences were not cross-examined upon nor were they contradicted by the evidence of the Appellant. There is no basis upon which to reject their truth or significance.

10. The applications judge considered the pleadings before him which allege that the Appellant participated in the operation, care, control, funding or management of these institutions on the coast of Newfoundland and Labrador once the province entered Confederation in 1949. The Respondents allege that Canada's participation in the operation of these institutions breached the duty of care owed to the class members which was also in breach of its fiduciary obligations owed to aboriginal persons at common law. Even if the Appellant did not materially operate or manage these institutions, it nevertheless breached its fiduciary duties by failing to properly do so as it alone possessed singular and exclusive jurisdiction over aboriginal persons.

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

11. Around the time of Confederation, two separate legal opinions commissioned by the Federal Department of Justice confirm that the Federal Crown possessed exclusive legislative and executive responsibility in relation to aboriginal persons, including the Innu. Any other position can be characterized as an attempt by the Federal Crown to avoid its legal responsibility and improperly transfer its jurisdiction to Newfoundland. The records of the

Federal departments, agencies, ministers and bureaucrats responsible for negotiating the *Terms of Union* "clearly show that from 1946 the Federal Government recognized that under the terms of the *British North America Act*, section 91(24), it would have to assume full responsibility for the native people of the new province". It is plainly the case now that the entry of Newfoundland and Labrador into Confederation brought that province's aboriginal population fully within federal jurisdiction.

> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992, Respondents' Book of Authorities, Tab 1.
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> *"Pencilled Out": Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954,* A Report prepared for Jack Harris, M.P. on the impact of the exclusion of Newfoundland and Labrador's native people from the Terms of Union in 1949, March 31, 1988, at p. 3, Respondents' Book of Authorities, Tab 2.

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

13. The function of the Indian Affairs Branch was described as administering the "affairs of the Indians of Canada [which] included the control of their education". The Federal Department of Mines and Resources clearly stated, at that time, that "the Dominion assumes full responsibility for the welfare, *including education*, of Indians and Eskimos", a response which went on at length to describe the day and residential school system. [emphasis added]

> *"Pencilled Out": Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954,* A Report prepared for Jack Harris, M.P. on the impact of the exclusion of Newfoundland and Labrador's native people from the Terms of Union in 1949, March 31, 1988, at page 12–14, Respondents' Book of Authorities, Tab 2.

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

> *Aboriginal Peoples and Governance in Newfoundland and Labrador,* authored by Adrian Tanner, John C. Kennedy, Susan McCorquodale and Gordon Inglis, October 1994, at pg. 33, see also Tompkins, Respondents' Book of Authorities, Tab 3.

> *"Pencilled out": Newfoundland and Labrador's Native People and Canadian Confederation,* 1947-1954, A Report prepared for Jack Harris, M.P. on the Impact of the Exclusion of Newfoundland and Labrador's native people from the Terms of Union in 1949, March 31, 1988,, Report prepared for Jack Harris, M.P., 1988, Respondents' Book of Authorities, Tab 2.

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

> *"Pencilled Out": Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954,* A Report prepared for Jack Harris, M.P. on the Impact of the Exclusion of Newfoundland and Labrador's native people from the Terms of Union in 1949, March 31, 1988, at page 18, Respondents' Book of Authorities, Tab 2.

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

> ...the federal Parliament has exclusive legislative authority in relation to Indians ... which, of course, means that the provincial legislature has no authority to enact legislation directed at or dealing with [matters] in relation to Indians.... It is the responsibility of the federal government to formulate and carry out all policies that are directed at dealing with Indian or Indian problems. Such policy is to be formulated by Parliament and the executive. This responsibility carries with it the responsibility or providing money to be devoted to the carrying of our policies in relation to the Indians.
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> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992, Respondents' Book of Authorities, Tab 1.
>
> *"Pencilled out": Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954*, A Report prepared for Jack Harris, M.P. on the Impact of the Exclusion of Newfoundland and Labrador's native people from the Terms of Union in 1949, March 31, 1988, at p. 33, Respondents' Book of Authorities, Tab 2.

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

> *"Pencilled out": Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954*, A Report prepared for Jack Harris, M.P. on the impact of the exclusion of Newfoundland and Labrador's native people from the Terms of Union in 1949, March 31, 1988, pg. 33, Respondents' Book of Authorities, Tab 2.

18. Even before Newfoundland's entry into Confederation, various federal departments had included in their departmental estimates sizeable amounts towards relief, services and expenditures for the native population in Newfoundland and Labrador. This evidences that "the federal government believed it had a responsibility to fulfill in regard to the Innu and Inuit in Labrador and that they would be called upon to provide programs and assistance to them".

Canada-Newfoundland Agreements An Innu Perspective, Innu Nation Researcher: James Roche, July, 1992, p. 3, Respondents' Book of Authorities, Tab 1.

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

Terms of Union, 1949, Respondents' Book of Authorities, Tab 4.

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

Canada-Newfoundland Agreements An Innu Perspective, Innu Nation Researcher: James Roche, July, 1992, p. 2, Respondents' Book of Authorities, Tab 1.

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

> "Section 3 of the *Terms of Union* stipulates that the provisions of the *BNA Act* shall apply to Newfoundland except insofar as varied by the Terms. Since the Terms of Union do not refer to Indians and Eskimos and since head 24 of section 91 of the *BNA Act* places 'Indians and lands reserved for Indians' exclusively under Federal jurisdiction, it seems clear that the Federal Government is responsible for the native population resident in Labrador."

> *"Pencilled Out"* at pg. 34, relying on NAC, RG 22, vol. 254, file 40-8-4 part 1. January 16, 1951, Paul Pelletier, Privy Counsel Office: Memorandum re "Notes on Labrador Indians and Eskimos and possible measures which might be adopted to discharge federal responsibility in the field", Respondents' Book of Authorities, Tab 2.

22. By 1954, Newfoundland requested that Canada provide both operating and capital expenditures towards education for the Innu and Inuit. The 1954 Agreement between Newfoundland and Canada stipulated that Canada would assume 66% of capital expenditures on behalf of Eskimos in Newfoundland and 100% of capital expenditures on behalf of Indians in the fields of health, welfare and education.

> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher. James Roche, July, 1992, p.9, Respondents' Book of Authorities, Tab 1.

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

> *Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992, p.11, Respondents' Book of Authorities, Tab 1.

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

> "...there is no provision in the *Indian Act* excluding any portion of Canada from its application. Mr. Varcoe's opinion [the 1950 Justice Department opinion] as to the constitutional position is, in my opinion, correct. The fact that there is no mention of

> Eskimos or Indians in the *Terms of Union* means only that the constitutional position with respect thereto has not changed with regard to Newfoundland."
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> *Canada-Newfoundland Agreements An Innu Perspective,* Innu Nation Researcher: James Roche, July, 1992, Appendix 2, see also pg. 36, Respondents' Book of Authorities, Tab 1.

25. As a result, by 1965, Canada had agreed to provide the same resources and programs to Indians and Eskimos in Labrador as were provided to similar groups elsewhere in Canada. The proposed agreements were to be: (a) renegotiated and reviewed every five years; (b) a Federal-Provincial committee was to be established to monitor expenditures and propose budgets for approval by both governments; (c) Newfoundland would be reimbursed for 90% of the Provinces' capital expenditures for Indians and Eskimos for the period 1954 – 1964; and (d) the agreement was to be administered by an inter-governmental committee comprised of representatives of both governments.

> Summary of the Report of the Royal Commission on Labrador, 1974, at p. 96, Respondents' Book of Authorities, Tab 5.

26. Amongst other things, this "Contribution Agreement" was designed to provide services to the Innu communities of Sheshatshit and Davis Inlet, although these are identified as "supplementary programs and services". The Contribution Agreement identified the amount of funding available as (a) 90% from Canad; and (b) 10% from Newfoundland. The Contribution Agreement also established a management committee composed of federal officials, provincial officials and representatives of the Davis Inlet and Sheshatshit communities.

> Report on the Complaints of the Innu of Labrador to the Canadian Human Rights Commission Report, by Donald M. McRae, August 18, 1993, at p. 8, Respondents' Book of Authorities, Tab 6.

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

a) Canada to pay Newfoundland up to $1,000,000.00 per annum for 90% of the Province's Innu and Inuit expenditures (except where otherwise covered under other federal-provincial agreements);

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

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

d) agreements to be reviewed and renegotiated every five years to "ensure that they continued to meet the changing circumstances and needs of the Eskimo and Indian residents in Labrador".

Canada-Newfoundland Agreements An Innu Perspective, Innu Nation Researcher: James Roche, July, 1992, p. 17, Respondents' Book of Authorities, Tab 1.

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

"The Commission finds itself unable to determine a sound rationale for the practice under this Agreement of having the Province pay a percentage of cost for services to Indians and Eskimos. This is not the practice in other parts of Canada. In the view of the Commission, the Federal Government, as it does elsewhere, should be prepared to accept full fiscal responsibility unless the Province wishes to ensure its continued direct involvement in the program for Indians and Eskimos through sharing part of the cost..."

Canada-Newfoundland Agreements An Innu Perspective, Innu Nation Researcher: James Roche, July, 1992, p. 24, Respondents' Book of Authorities, Tab 1.

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

a) Canada-Newfoundland Community Development Subsidiary Agreement, valued at $38,996,000.00, payable by the Federal government; and

b) Native People's of Labrador Agreement, valued at $38,831.00.00 federal payments/contributions.

Canada-Newfoundland Agreements An Innu Perspective, Innu Nation Researcher: James Roche, July, 1992, p. 27, Respondents' Book of Authorities, Tab 1.

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

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

PART II - LIST OF THE ISSUES

A. APPLICATION FOR LEAVE TO APPEAL

32. Canada's applications for leave to appeal raise the following issues:

a) whether there is good reason to doubt the correctness of the certification orders;

b) whether these proposed appeals involve matters of such importance that leave to appeal should be granted;

c) whether the issues raised by the proposed appeals are such that any appeals following final judgment would be of no practical effect; and

d) whether it is in the interests of justice to grant leave to appeal.

Rule 57.02(4), Rules of the Supreme Court, 1986, Respondents' Memorandum of Fact and Law, Schedule B, Tab B.

33. The Applicant has failed to satisfy this test. Leave to appeal should be denied accordingly.

B. PROPOSED APPEALS OF THE CERTIFICATION APPLICATIONS

34. Canada's proposed appeals of the certification applications raise the following issues:

a) whether the applications judge erred in law by finding that it was not plain and obvious that the Respondents' claim was doomed to failure;

b) whether the applications judge's exercise of discretion was palpably unreasonable in finding that these class actions had identifiable classes, raised common issues and were the preferable means of adjudicating these claims.

35. No error of law has been established. Nor has the Applicant shown that Justice Fowler misapprehended the evidence. The appeals ought to be dismissed.

PART III - ARGUMENT

A. CANADA CANNOT SATISFY THE TEST FOR LEAVE TO APPEAL PRESCRIBED BY RULE 57.02(4)

36. Leave to appeal interlocutory orders dealing with procedural matters such as certification should be granted sparingly: "[t]hat has been the clear message of this Court [the Newfoundland and Labrador Court of Appeal] for some time". Moreover, as section 11 of the *Class Actions Act* permits the court to "amend a certification order, decertify an action or make another order it considers appropriate", the jurisprudence suggests that the threshold for leave to appeal a certification order "should be even higher".

> *Bayer Inc. v. Pardy* (2005), 246 Nfld. & P.E.I.R. 157 (C.A.) at paras. 9 – 10, leave to appeal to the Supreme Court of Canada dismissed, Respondents' Book of Authorities, Tab 7.

37. As well, a "distinction may be drawn between the circumstances when certification is granted and when it is refused. … when certification is granted, certain procedural protections are engaged which may, depending on all the circumstances, support refusal to grant leave to appeal." [emphasis added]

> *Davis v. Canada (Attorney General)* (2008), 279 Nfld. & P.E.I.R. 1 (C.A.) at para. 19, Respondents' Book of Authorities, Tab 8.

38. As certification orders are "not necessarily final and will be subject to variation, and even cancellation, if circumstances change", they are fundamentally matters of case management. Accordingly, absent an error of law or principle, the certification application judge has wide discretion and appellate intervention ought to be restricted to matters of general principle.

Bayer Inc. v. Pardy (2005), 246 Nfld. & P.E.I.R. 157 (C.A.) at paras. 9–10, Respondents' Book of Authorities, Tab 7.

J.L.G. v. A.W.W. (2003), 184 B.C.A.C. 367 (C.A.) at para. 22, Respondents' Book of Authorities, Tab 9.

39. In these cases, there are no conflicting decisions to resolve as the applications judge's decision to certify these actions was based on established class action jurisprudence. As noted by this court in *Bayer*, there is no good reason to doubt the correctness of the certification orders when section 11 (1) of the Act permits for variation of the order and even decertification if necessary.

40. Moreover, while any appeal of the certification orders following judgment would lack practical effect, Canada's interests will be protected throughout both by section 11 and its right to appeal any eventual judgment on its merits. Most importantly, the certification orders below are determinative only of that procedural issue and do not dispose of any substantive rights as between the parties. Any judicial disposition of Canada's substantive rights and obligations on their merits will be susceptible to appellate review at the appropriate time. Procedural questions such as class certification do not constitute matters of sufficient importance to warrant leave to appeal.

41. Lastly, in this case, the overarching interests of justice dictate that leave to appeal ought to be denied. Appellate review of the discretionary decision below, which contains no palpable error of law or principle, would only further delay the timely resolution of these actions, visiting prejudice on the class members. Given the advanced age of the vast majority of class members (and the reality of dying class members), additional delay in these circumstances constitutes non-compensable prejudice. In *Baxter v. Canada* (the Ontario class

proceeding commenced on behalf of residential school survivors), Justice Winkler (as he then was) stated:

> "The class period spans a period of over 75 years. At this point, a reasonable inference can be drawn that there are elderly potential class members for whom further delay represents significant prejudice. Those members of the potential class are entitled to have a determination whether this proceeding is certifiable as a class action in a timely manner." [emphasis added]
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> *Baxter v. Canada* (2005), 39 A.C.W.S. (3d) 627; [2005] O.J. No. 2165 (S.C.J.) at para. 13, Respondents' Book of Authorities, Tab 10.

42. Even if this Honourable Court grants leave to appeal the applications judge's decision, the prevailing jurisprudence suggests that significant defence ought nevertheless be applied.

B. STANDARD OF REVIEW – CERTIFICATION DECISIONS ENTITLED TO HIGH DEGREE OF DEFERENCE

43. Canada's proposed appeals challenge four (4) aspects of the statutory certification test: (a) sustainability of the pleadings; (b) whether an identifiable class exists; (c) whether the claims of the class raise common issues; and (d) whether proceeding by way of class action is preferable to other means.

44. Only one of these criteria is subject to review on a correctness standard: whether the pleadings disclose a reasonable cause of action. The applicable test with respect to this component of certification is that which is applied pursuant to Rule 14.24: whether the "plaintiff has pleaded any factual circumstances that could found the legal right asserted that would justify the granting of the remedy sought". The test this Honourable Court is to apply to the review of the applications judge's findings on the pleading is a stringent one. The court

below can only be considered to have erred in law if is plain and obvious that the Respondents cannot succeed.

> *Roberts v. Browning Ferris Industries Ltd.* (1998), 170 Nfld. & P.E.I.R. 228 (C.A.), at paras. 24-25, Respondents' Book of Authorities, Tab 11.
>
> *LeDrew v. Conception Bay South (Town)* (2003), 231 Nfld. & P.E.I.R. 61 (C.A.)at para. 20, Respondents' Book of Authorities, Tab 12.
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> *Brace v. Watchtower Bible and Tract Society of Pennsylvania et al.* (2009), 291 Nfld. & P.E.I.R. 270 (T.D.) at para. 15, Respondents' Book of Authorities, Tab 13.

45. The jurisprudence considered by this Court in *Walsh v. TRA Co.* clearly concluded that the Supreme Court of Canada's *Hunt v. Carey* test is consistent with the test appellate courts had earlier adopted and applied. The simple determination reflected in these decisions is that:

> "A claim will be struck out, not on the basis that it may not succeed, but only on the basis that it cannot succeed." [emphasis added]
>
> *Walsh v. TRA Co.* (2007), 268 Nfld. & P.E.I.R. 111 (C.A.) at para. 13, Respondents' Book of Authorities, Tab 14.

46. The balance of the application judge's determinations regarding the statutory certification test are subject to review on a reasonableness standard and ought to be afforded a high degree of deference – they ought to only be disturbed if the court below erred in principle. The certification of a class action involves the determination of whether the components of section 5 of the Act are met. These are questions of mixed fact and law which cannot be reversed unless the application judge made a palpable and overriding error. An appellate court should not interfere with such decisions so long as the applications judge had some valid grounds for the discretionary decision.

Ring. v. Canada (Attorney General) (2010), 297 Nfld. & P.E.I.R. 86 (C.A.) at paras. 7 – 8, leave to appeal to the Supreme Court of Canada dismissed, Respondents' Book of Authorities, Tab 17.

47. In any event, the appeals must be considered in the context of the following determinations surrounding class actions: "[c]lass certification is not a trial. It is not a summary judgment motion. Class certification is a procedural motion which concerns the form of an action, not its merits. Contentious factual and legal issues between the parties cannot be resolved on class certification motion."

Wheadon v. Bayer Inc. (2004), 237 Nfld. & P.E.I.R. 179 (S.C.T.D.) at para. 91, Respondents' Book of Authorities, Tab 18.

48. As this court has recently stated, certification is a matter of discretion:

> "...assessment of the criteria [for certification] involves judicial discretion, particularly in determining whether a class action is the preferable procedure to resolve the common issues. Further, authority to proceed by way of a class action is essentially a procedural matter, one which a judge of the Trial Division would be in an advantageous position to assess. In the circumstances, deference by this Court is properly accorded to the discretionary decisions of the applications judge." [emphasis added]

Davis v. Canada (Attorney General) (2008), 279 Nfld. & P.E.I.R. 1 (C.A.) at para. 23, Respondents' Book of Authorities, Tab 8.

49. This approach to appellate review and the deference that ought to be afforded to the applications judge is wholly consistent with well-settled law in both Newfoundland and the rest of Canada. The statutory certification test is decidedly intended to set a low threshold, given that the statute is only procedural in nature:

> "I agree with the Plaintiffs that this test establishes a 'low threshold' for class certification. This was confirmed in *Hollick* where the Chief Justice noted the evidentiary threshold is not an onerous one. Canadian courts have tended to give class proceedings legislation a large and liberal interpretation to ensure that its policy goals

> are realized. Courts must be mindful not to impose undue technical requirements on plaintiffs." [emphasis added]
>
> *Wheadon v. Bayer Inc.* (2004), 237 Nfld. & P.E.I.R. 179 (S.C.T.D.) at para. 91, Respondents' Book of Authorities, Tab 18.

50. Class actions allow for meritorious cases that could not otherwise be litigated to be aired fully at a common issues trial:

> "The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. ... [it] provides three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve a judicial economy by avoiding unnecessary duplication of fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class members would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public."
>
> *Pardy v. Bayer* (2003), 230 Nfld. & P.E.I.R. 325 (S.C.T.D.), at para. 12, Respondents' Book of Authorities, Tab 19.
>
> *Hollick v. Toronto*, [2001] 3 S.C.R. 158, at para. 25, Respondents' Book of Authorities, Tab 20

51. The Honourable Justice Fowler considered and applied these principles by acknowledging that at this stage of the proceeding: "the court 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... Whether or not the Plaintiffs will be successful at trial is not a concern at this time."

> Reasons for Decision of Justice Fowler, dated June 7, 2010 paras. 11 and 106, *Anderson* Record on Application for Leave to Appeal, Tab 3.

52. This is the correct approach. There is neither error of law reflected in the applications judge's findings nor an unprincipled exercise of discretion. As a result, this Honourable Court ought not disturb the determinations made below.

C. THE PLEADINGS DISCLOSE A REASONABLE CAUSE OF ACTION (Section 5(1)(a))

53. It is well-settled law that Justice Fowler was only permitted to dismiss the Respondents' claims if he found that there was no chance that the action could succeed. As stated by the Supreme Court of Canada:

> "if there is a *chance* that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat ... the proposition that *it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions,* has been affirmed repeatedly in the last century". [emphasis added]
>
> *Sparkes v. Imperial Tobacco Canada Ltd.* (2010), 295 Nfld. & P.E.I.R. 267 (C.A.) at para. 15, Respondents' Book of Authorities, Tab 21.
>
> *Hunt v. Carey*, [1990] 2 S.C.R. 959 at para. 33 & 18, Respondents' Book of Authorities, Tab 22.

54. This Honourable Court has also extensively considered the prevailing principles surrounding Rule 14.24 applications (or section 5(1)(a) in a class action context) and found that the applicable test is so stringent that:

> "I conclude, therefore, that if there is any possible basis whatsoever on which a plaintiff might successfully argue entitlement at law, it is inappropriate to anticipate any defence a defendant may plead, even though it may be a very strong one, and, on the basis of evaluating that defence, strike the Statement of Claim as having no chance of success. That issue can only be determined at trial after hearing all of the evidence relevant to the matters pleaded by all parties, and the legal arguments of the parties. On an application under rule 14.24, it is not appropriate to make a preliminary

> determination of the success of any defence the defendant might plead."[emphasis added]
>
> *Walsh v. TRA Co.* (2007), 268 Nfld. & P.E.I.R. 111 (C.A.) at para. 16, Respondents' Book of Authorities, Tab 14.

55. Justice Fowler determined 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*." On the basis of these pleadings, the applications judge found that "the nature of the relationship between the Plaintiffs and the federal Crown will be the driving force … and in that regard, I am unable to agree with counsel for Canada that no relationship at all exists between them." [emphasis added]

> Reasons for Decision of Justice Fowler, dated June 7, 2010 at paras. 88 and 100, *Anderson* Record on Application for Leave to Appeal , Tab 3.

56. The Appellant argues that merely because the Crown retains legislative authority over Aboriginal persons does not necessarily lead to the conclusion that Canada owes a fiduciary duty to all Indians. However, the applications judge made no such finding. Justice Fowler did not state that a fiduciary duty is necessarily owed, but only that it is not plain or obvious that one is *not* owed: "because the Crown retains legislative authority, a credible argument can be made that this duty is fiduciary in nature and applied to all Indians without exception".

> Reasons for Decision of Justice Fowler, dated June 7, 2010 at paras. 62, *Anderson* Record on Application for Leave to Appeal , Tab 3.

57. While the Appellant relies on the non-inclusion or failure to extend the provisions of the *Indian Act* to these class members as a seeming defence to any liability, (as that statute gives exclusive jurisdiction over Indians and Eskimos to Canada) as a matter of law, that does

not affect or otherwise obviate Canada's common law duties and obligations to these persons. The *Indian Act* is not the source of federal jurisdiction but rather an expression of it.

58. The lack of 'status' under the *Indian Act* in no way diminishes federal constitutional or equitable obligations. It is well-settled in Canadian jurisprudence that fiduciary obligations are owed by the Crown to "Aboriginal" persons, peoples which, pursuant to section 35(2) of the *Constitution Act 1982*, include Indian, Inuit and Metis individuals. The Royal Commission on Aboriginal Persons itself has acknowledged that Canadians courts have accepted and described this fiduciary relationship as *sui generis* in nature:

> "Non-status Indians are those who self-identify as Aboriginal but who are ineligible for registration under the [Indian] Act. Since the Crown's fiduciary duties are rooted in historical interaction between the groups that predate the current status/non-status regime, that may create a basis for arguing that the Crown owes collective duties to non-status Indians as well, ending the distinction between status and non-status in this respect."
>
> D. L. Rotman, *Fiduciary Law* (2005), p. 524 & 597; Also relying on *Royal Commission on Aboriginal Persons*, vol. 5, p. 162 (1996), Respondents' Book of Authorities, Tab 23,

59. Much academic and authoritative commentary has been undertaken with respect to the status of the relationship between Canada and Aboriginals in Newfoundland and Labrador at the time of Confederation. The key question is whether the Federal Crown assumed certain fiduciary obligations upon Confederation in 1949.

> "When the First Nations of Newfoundland and Labrador mount a challenge to the actions of the Federal and Newfoundland Governments the spotlight will be on the Newfoundland courts. Will the deliberate breaches of Federal fiduciary obligations be condoned or condemned? Will the *ultra vires* agreements be struck down or upheld? Will the abrogation and derogation of the Aboriginal and treaty rights of First Nations by the Federal and Newfoundland Governments be held to be a contravention of subsection 35(1) of the *Constitution Act, 1982*?...Will the courts be prepared to order vast amounts of compensation for the withholding of federal services that the Frist nations people in Newfoundland and Labrador should have been receiving since 1949"

Jerry Wetzel "Liberal Theory as a Tool of Colonialism and the Forced Assimilation of the First Nations of Newfoundland and Labrador" (1995) 4 *Dal. J. Leg. Studies* at pp. 151-152, Respondents' Book of Authorities, Tab 24.

W. McLean "Equal Citizens? The Legal and Constitutional Status of the aboriginal peoples of Labrador,", University of Ottawa, December 1997, Respondents' Book of Authorities, Tab 25.

60. These cases involve allegations of negligence and breach of fiduciary duty. The categories in which a duty of care is owed are never closed and the precise constitutional and fiduciary obligations and responsibilities at Confederation are uncertain. It is also evident that the law is, generally, in transition with respect to delineating the scope and content of duties owed by the Crown to aboriginal peoples. As courts in this province have determined: "when the areas of fiduciary obligations and aboriginal law intersect, as is claimed here, then clearly a defendant has a particularly heavy burden in seeking to strike a pleading." Moreover, when these areas of law are engaged, courts must be mindful that "claims which might have been considered outlandish or outrageous only a few years ago are now being accepted". [emphasis added]

Davis v. Canada (Attorney General) (2004), 240 Nfld. & P.E.I.R. 21 (S.C T.D.) at paras. 10-11, Respondents' Book of Authorities, Tab 26.

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

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

Shubenacadia Indian Band v. Canada (Minister of Fisheries and Oceans) (2001), 202 F.T.R. 30; F.C.J. No. 347 at paras. 5–6 (T.D.), affirmed (2002), 291 N.R. 393; F.C.J. No. 880 (C.A.), Respondents' Book of Authorities, Tab 27.

62. This is consistent with the admonition of the Supreme Court of Canada that neither the novelty of the cause of action nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with an action. In fact, in such circumstances, novelty may be a critical factor that warrants permitting the action to proceed to its merits, in order to delineate new claims or duties.

Hunt v. Carey, [1990] 2 S.C.R. 959 at para. 33, Respondents' Book of Authorities, Tab 22.

63. Contrary to this well established authority, Canada expressly acknowledges these claims may be novel but nevertheless erroneously suggests that this factor weighs in favour of striking the claims now.

Memorandum of Fact and Law of the Intended Appellant: Application for Leave to Appeal) (*Anderson*), dated September 3, 2010, at para. 116, pg. 33.

64. With these principles firmly in mind, the applications judge correctly:

(a) applied the *Hunt v. Carey* test;

(b) determined that the strength of the link between the federal government and the Inuit of Labrador is not to be decided on a certification application;

(c) held that contentious factual and legal issues cannot be resolved on a class certification application;

(d) found that one of the major responsibilities assumed by Canada in its Constitution was to reserve unto itself the exclusive jurisdiction over "Indians and Lands reserved for Indians";

(e) determined that, based on the language of the Supreme Court of Canada in relation to Indians (i.e. *Guerin; Sparrow; Re. Eskimo*), including the Inuit, 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;

(f) acknowledged that it is a credible argument to suggest that the Crown possessed a duty to recognize and protect the rights of aboriginal peoples as soon as these people were subsumed into the Canadian constitutional mosaic;

(g) held that the strength of the relationship between Canada and the plaintiffs, be it fiduciary or otherwise, must fall to be determined by the evidence ultimately presented at trial;

(h) stated that "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 clearly not out of the realm of being accepted that a duty of care was owed";

(h) found that an analysis of what rights or duties were create cannot simply be answered by saying 'there were none', but will have to be adjudicated upon a full evidentiary record. [emphasis added]

Reasons for Decision of Justice Fowler, June 7, 2010, at paras. 38, 43, 44, 48, 52, 68, 75 and 88, *Anderson* Record on Application for Leave to Appeal, Tab 3.

65. Any defences to the merits of the claims asserted at this stage by the Appellant cannot be taken into account. Without any Statement of Defence having been filed, such defences are purely speculative in nature. In any event, courts have consistently, and historically, held that it is impermissible to anticipate defences, even very strong ones, which defendants may be able to prove at trial:

"…the Court has a right to stop an action at this stage if it is wantonly brought without a shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed from under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of action because the judge in chambers does not think they will be successful in the end lies a wide region and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure." [Emphasis added]

Walsh v. TRA Co. (2007), 268 Nfld. & P.E.I.R. 111 (Nfld. C.A.) at paras. 14 and 26, Respondents' Book of Authorities Tab 14.

Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094 (C.A.), Respondents' Book of Authorities Tab 16.

Dyson v. Attorney General, [1911] 1 K.B. 410 (C.A.), Respondents' Book of Authorities Tab 15.

66. While the Appellant has attempted to confuse and mischaracterize the Respondents' claims as non-justiciable policy decisions or a failure to legislate, such arguments fundamentally misapprehend the classes' claims. The Appellant suggests that the Respondents' claims are based upon a failure to enact legislation to bring the Schools at issue under federal authority, thereby conflating federal authority to legislate with its direct federal constitutional obligations codified in section 91(24) of the *Constitution Act*. A review of the pleading demonstrates that no such allegations have been made in this case. Rather, the Respondents' claims are plainly advanced on the basis of (i) operational negligence and (ii) breach of fiduciary duty.

67. In any event, even in cases which do involve claims for a failure to proclaim legislation (for which a legal remedy would be the rare exception), claims involving the intersection of Aboriginal and fiduciary rights have not been struck. In *Davis*, both the applications judge (and this court) held that:

> "In the circumstances of this case, involving as it does the added consideration of the Terms of Union and Newfoundland's entry into Confederation, I am not prepared to conclude that it is plain and obvious that not proclaiming specific legislation to be in force, and then not declaring the Plaintiffs to be a band under the particular Act, could not be considered to be a breach of fiduciary duty. ... The Plaintiffs' arguments may be novel, and not easy to sustain, but in the context and circumstances of this case, I am not prepared to conclude that a decision by the Governor in Court not to proclaim legislation in force is of such a character that it could never be considered as engaging a fiduciary duty." [emphasis added]

Davis v. Canada (Attorney General) (2004), 240 Nfld. & P.E.I.R. 21 (S.C.T.D.) at paras. 27 and 43, Respondents' Book of Authorities, Tab 26.

Davis v. Canada (Attorney General) (2008), 279 Nfld. & P.E.I.R. 1 (C.A.), Respondents', Book of Authorities, Tab 8.

68. Moreover, Canada cannot argue that it somehow ceded its duties to the province at Confederation in order to suggest that the applications judge erred by not striking the pleadings at this stage. Such distinctions have been rejected as untenable at law by Canadian jurisprudence as the Federal Crown can only assert that it fulfilled its constitutional obligations with respect to Aboriginal persons by agreements with the Province if it can also show that it thereby properly executed its fiduciary obligations as the province has no constitutional nor fiduciary responsibility for aboriginal individuals.

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

Mitchell v. Peguis Indian Band (1990), 71 D.L.R. (4th) 193 (S.C.C.) at p. 209, Respondents' Book of Authorities, Tab 28.

70. Moreover, the content of any vicarious liability as between Canada and the Province is a question of fact, history and law, which can only be determined on a full evidentiary record.

71. The Appellant's arguments that non-operational decisions might be engaged by these claims or that proximity is not *prima facie* apparent, ought to also be rejected. Even if that were the case, Justice Fowler was nevertheless correct in permitting the claims to proceed to their merits. The Supreme Court of Canada has confirmed that if there is any doubt as to

whether the Crown's conduct is properly characterized as operational versus policy, as a matter of law, the action must proceed to trial.

> *Just v. British Columbia*, [1989] 2 S.C.R. 1228 at paras. 33 – 36, Respondents' Book of Authorities, Tab 29.

72. Where there is any doubt as to whether a decision or action at issue is properly characterized as "operational" or whether a duty existed at all, the applications judge must nevertheless permit the action to proceed. Where such distinctions cannot definitively be made at such a preliminary stage of the proceedings, they should properly be left to be determined on a full evidentiary record, at trial.

> *Rideout v. Health Labrador Corp.* (2005), 12 C.P.C. (6th) 91; N.J. No. 228 (T.D.) at paras. 42, 65, 69 and 70, Respondents' Book of Authorities, Tab 30.
>
> *Sauer v. Canada (Attorney General)* (2007), 225 O.A.C. 143; [2007] O.J. No. 2443 (C.A.) leave to appeal to the Supreme Court of Canada denied, at paras. 57, 62, 63, Respondents' Book of Authorities, Tab 31.

73. While the Appellant relies on the jurisprudence of *Cooper*, *Edwards* and *Syl Apps* to suggest that courts ought not hesitate striking claims at a preliminary stage, without a full record, none of those cases involve allegations of failures in operational control over persons within the defendant's jurisdiction and none engage matters of aboriginal law.

74. Rather, those cases each pertain to relationships that know no recognized category of proximity at law: (a) whether a Registrar owed private law duties of care to members of the investing public at large, (b) whether the Law Society had a positive duty to ensure a lawyer properly operated trust accounts to protect the public at large, and (c) whether a treatment

facility owes a duty to families at large for children apprehended into its custody. They bear no resemblance to the cases at bar.

> Memorandum of Fact and Law of the Intended Appellant. Application for Leave to Appeal (*Anderson*) dated September 3, 2010, at para. 112, p. 32

75. Lastly, the Appellant argues that funding alone is an insufficient basis upon which to locate Canada's liability to the class, as a matter of law. This is a mischaracterization of the Respondents' claims. While a historical review of Canada's relationship to aboriginal peoples in Newfoundland following Confederation is rife with examples of duties or obligations by way of funding arrangements, this is but one indicia of the legal relationship Canada knew it assumed, as a constitutional matter, at the time of Confederation.

76. In any event, while there is no doubt that the Crown is *prima facie* immune from suit on the basis of its funding decisions alone, such immunity is not absolute. As determined by the Supreme Court of Canada, it is open to a litigant to "attack the system as not having been adopted in a *bona fide* exercise of discretion and to demonstrate that in all the circumstances, including budgetary restraints, it is appropriate for a court to make a finding on the issue", once a complete evidentiary record is before the court:

> "it will always be open to a plaintiff to establish, on a balance of probabilities, that the policy decision was not *bona fide* or was so irrational or unreasonable as to constitute an improper exercise of governmental discretion. This is not a new concept. It has long been recognized that government decisions may be attacked in those relatively rare instances where the policy decision is shown to have been made in bad faith or in circumstances where it is so patently unreasonable that it exceeds governmental discretion." [emphasis added]

> *Just v. British Columbia*, [1989] 2 S.C.R. 1228 at para. 15, Respondents' Book of Authorities, Tab 29.

Brown v. B.C., [1994] 1 S.C.R. 420 at para. 28, Respondents' Book of Authorities, Tab 32.

77. Nevertheless, even if a pleading does not meet the test described above, before it strikes the claim, the court is required to "consider whether the deficiency can be cured by either a realistic amendment or by an order for particulars".

Montreal Trust Co. v. Hickman (2001), 204 Nfld. & P.E.I.R. 58 (C.A.), at para. 11 , Respondents' Book of Authorities, Tab 33.

78. Accordingly, if this court has any doubt that the applications judge erred in holding that the pleading discloses a reasonable cause of action, it ought not strike the current pleading without first granting leave to amend as any deficiency can likely be cured by a realistic amendment.

79. For all of the above reasons, the Crown's appeal under s. 5(1)(a) of the Act should be dismissed.

D. AN IDENTIFIABLE CLASS OF PERSONS EXISTS (Section 5(1)(b))

80. The court below approved and certified the following class:

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

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

81. The applications judge certified these class definitions because they; (a) identify members of the proposed class by objective criteria; and (b) are not dependent on the

outcome of the litigation. There is no statutory or judicial requirement that every class member be named or even known at this stage.

> *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534, at para. 38, Respondents' Book of Authorities, Tab 34.

82. The Appellant's primary objection to the applications judge's finding that an identifiable class of persons exists is intrinsically connected to its arguments regarding the sustainability of a reasonable cause of action. By so doing, it erroneously conflates the two (2) statutory components of the certification test as being necessarily interdependent, arguing that:

a) "If there is no cause of action common to the identified class members, then there is clearly no rational relationship between the membership criteria…";

b) "The mere declaration that systemic negligence or breach of fiduciary duty could be a cause of action does not mean that a meaningful issue is common to all members of the class, beyond mere attendance at a given school";

c) "As a starting point, there is no cause of action against Canada and therefore no class capable of definition in this matter"; and

d) "Given that the Intended Respondents have failed to identify a cause of action that is capable of proof against Canada, it is difficult to evaluate the requisite link between the alleged causes of action, the proposed common issues and the proposed class definition."

> Supplementary Memorandum of Fact and Law of the Intended Appellant: Application for Leave to Appeal *(Anderson)*, dated October 4, 2010, paras. 36, 46.
>
> Memorandum of Fact and Law of the Intended Appellant: Application for Leave to Appeal *(Anderson)*, dated September 3, 2010, p.27 paras. 88, 90.

83. Accordingly, if the Appellant is unsuccessful on its section 5(1)(a) assertions, its submissions on the presence of an identifiable class must also, necessarily, fail.

84. On the basis of the prevailing jurisprudence of *Wheadon v. Bayer, Rumley v. British Columbia* and *Hollick v. Toronto (City),* the applications judge properly held that, as in those cases, it was also possible to objectively identify the proposed class members in this case by reference to their attendance at one of the five schools, during a fixed time period.

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

> "Students at the Jericho Hill School between 1950 and 1992 who reside in British Columbia and claim to have suffered injury, loss or damages as a result of misconduct of a sexual native occurring at the school."
>
> *Wheadon v. Bayer Inc.* (2004), 237 Nfld. & P.E.I.R. 179, (S.C.T.D.) at paras. 104 – 105, Respondents' Book of Authorities, Tab 18.
>
> *Rumley v. British Columbia*, [2002] 3 S.C.R. 184 (S.C.C.) at para. 21, Respondents' Book of Authorities, Tab 35.

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

> a) all persons who attended the Mohawk Institute Residential School between 1922 and 1969;

b) all parents and siblings of all persons who attended the Mohawk Institute School between 1992 and 1969; and

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

Cloud v. Canada (Attorney General) (2004), 247 D.L.R. (4th) 667 (C.A.) at para. 47, leave to appeal to the Supreme Court of Canada dismissed, Respondents' Book of Authorities, Tab 36.

87. While the Appellant also asserts that the decision below in inconsistent with this Honourable Court's holding in *Ring*, by allegedly failing to properly link the class definition to the common issues, the contrary is actually the case – Justice Fowler's decision considers, applies and adopts the reasoning in *Ring*. As a result, the class definition certified below accords with the principles enunciated by this court and by the Ontario Court of Appeal in *Could*.

Memorandum of Fact and Law of the Intended Appellant: Application for Leave to Appeal *(Anderson)*, dated September 3, 2010, at p.27 para. 93.

88. The Court of Appeal's decision in *Ring* makes certain findings about the statutory criteria requiring an identifiable class, findings which are consistent with the Respondents' proposed class definitions in these actions:

a) "it is not intended that the class be limited to those who will be ultimately successful";

b) "as large as the numbers are in this case, that fact alone does not make the definition too broad"; and

c) "the general rule is that criteria should not depend on the outcome of the litigation".

Ring. v. Canada (Attorney General) (2010), 297 Nfld. & P.E.I.R. 86 (C.A.) at paras. 62, 64, 67, Respondents' Book of Authorities, Tab 17.

89. The class definitions certified by the applications judge do not fall afoul of these three general principles nor are they inconsistent with the analysis of the court in *Ring*. Firstly, the class is not defined by reference to any 'claims limiter', which the Court of Appeal criticized in *Ring*. Rather, the class definition in these actions is defined by reference to attendance at the Schools, during a fixed time, which is discernible by objective criteria.

90. In contrast, the class definition proposed in *Ring* lacked any rational connection to the causes of action or common issues as there was no objective criteria there to assess whether any one of approximately 400,000 persons were part of the class or whom in the class even had a claim given the pattern of spraying, its time frame and the size of the base. A class definition based on "exposure to dangerous levels of dioxin or HCB" was completely subjective criteria requiring an investigation into what level of exposure, how an individual was exposed, whether they were in fact exposed, coupled with an inquiry into the threshold of what 'dangerous' entails. For these reasons, the class in *Ring* was determined to be too broadly defined. The class definition in this case does not suffer from these defects.

> *Ring, v. Canada (Attorney General)* (2010), 297 Nfld. & P.E.I.R. 86 (C.A.) at para. 76, Respondents' Book of Authorities, Tab 16.

91. The class definitions in the case at bar are not defined by reference to the merits of the case or to those whom might ultimately be successful. Unlike in *Ring*, the class definition certified by the applications judges is circumscribed by its defining criteria and are rationally linked to the common issues as all class members claim breach of those duties.

92. As determined by Justice Fowler, the proposed class definitions were capable of clear definition as:

> "...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 appear 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 communities by people still able to remember that they in fact attended these residential schools..."
>
> Reasons for Decision of Justice Fowler, dated June 7, 2010 at para. 101, *Anderson* Record on Application for Leave to Appeal, Tab 3.

93. There is no principled reason to interfere with the applications judge's finding in this regard.

E. THE CLAIMS OF THE CLASS RAISE COMMON ISSUES (Section 5(1)(c))

94. Section 5(1)(c) of the Act requires that the class action raise common issues of either fact or law. These issues need not be wholly determinative of liability nor form the dominant issues of the litigation. Rather, the common issues criterion "focuses on what is rather than on what is left or what should be. Simply put, are there one or more common issues the resolution of which would be the same for each class members' claim?".

> *Davis v. Canada (Attorney General)* (2007), 263 Nfld. & P.E.I.R. 114 (S.C.T.D.) at para. 111, Respondents' Book of Authorities, Tab 37.

95. In this case, the applications judge certified common issues whose resolution would require a factual and legal inquiry that would not involve any class members but would, at the same, time, significantly advance their claims. If Canada owes no duty to the classes, this finding alone would dispose of the entire proceedings. On the basis of the evidence before him, Justice Fowler properly found that "there is some basis in fact to have these issues considered as common", primarily on the basis that at its core, the claims "beg the question as

to the status of the aboriginal people on the coast of Labrador at the time of Confederation in 1949." The resolution of this issue alone would either dispose of these proceedings or move them significantly far enough forward to be considered sufficiently 'common'.

> Certified Common Issues Order of Justice Fowler, June 7, 2010, Respondents' Memorandum of Fact and Law, Schedule C, Tab C.
>
> Reasons of Justice Fowler, dated June 7, 2010 at paras. 75 and 108, *Anderson* Record on Application for Leave to Appeal, Tab 3.

96. The only matters which might have to be determined on an individual basis would be individual causation and damages. All other issues, as encapsulated in the certified common issues are common to all class members and their resolution would significantly advance the litigation in a material way: (a) the presence of a duty of care; (b) the standard of care owed in the circumstances; (c) the breach of the duty of care; (d) the degree of care and control Canada enjoyed over the institutions; and (e) the purely legal issues surrounding the scope and content of Canada's duties to aboriginals in Newfoundland and Labrador following Confederation.

97. Even on Canada's view of the case alone, (a) the history and scope of Canada's legal responsibilities, if any, to aboriginal persons in Newfoundland and Labrador; (b) its involvement in education in the province; (c) its agreements and arrangements with the province; (d) the nature of any legal duties owed; and (e) whether those duties were breached, are all of primary import to the class action as certified all are common. No class member can recover any damages until they have succeeded in law on these issues. Canada cannot argue that it owes no duties to a certain class of persons, at a certain period of time, and then also assert that that same class of persons has no commonality in their claims.

98. A single trial of these issues would make it unnecessary to adduce evidence more than once of the Crown's conduct, duties and history in relation to these individuals:

> "[a]s in *Cloud*, the resolution of the debate about the essential legal duties on which the claim is founded and whether these duties were breached, would significantly advance the action to the point where, on my view of the case, only an assessment of damages would remain."
>
> *Sauer v. Canada (Attorney General)* (2008), 169 A.C.W.S. (3d) 27; [2008] O.J. No. 3419 (S.C.J.) at para. 57, Respondents' Book of Authorities, Tab 31.

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

> *Cloud et at. v. Canada (Attorney General)*, (2004) 247 D.L.R. (4th) 667 (C.A.) at para. 65, leave to appeal to the S.C.C. dismissed, Respondents' Book of Authorities, Tab 36.
>
> *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 at para. 27, Respondents' Book of Authorities, Tab 35.
>
> *Dolmage et al. v. Province of Ontario*, 2010 ONSC 1726 (S.C.J.), decision, Respondents' Book of Authorities, Tab 39.

100. As the scope of a duty owed and its concomitant breach can dispose of such significant points of liability and take the action a long way, to a point where only harm and causation remain, they have repeatedly been certified as common issues:

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

> claims. ... this approach is consistent with Canadian class action jurisprudence. Canadian courts have repeatedly certified breach of duty as a common issue, leaving issues of causation and damages to individualized hearings."
>
> *Wheadon v. Bayer Inc.* (2004), 237 Nfld. & P.E.I.R. 179 (S.C.T.D.) at paras. 132-133, Respondents' Book of Authorities, Tab 18.

101. As the claims of the classes raise substantial common ingredients to the resolution of their actions, the resolution of which would significantly move the action forward, the applications judge appropriately exercised his discretion in certifying these common issues.

F. A CLASS ACTION IS THE PREFERABLE PROCEDURE (Section 5(2))

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

> *Hollick v Toronto*, [2001] 3 S.C.R. 158, at paras. 27–28, Respondents' Book of Authorities, Tab 20.
>
> *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 (C.A.) at para. 73, leave to appeal to the Supreme Court of Canada dismissed, Respondents' Book of Authorities, Tab 36.
>
> *Ring. v. Canada (Attorney General)* (2010), 297 Nfld. & P.E I.R. 86 (C.A.) at para. 100, Respondents' Book of Authorities, Tab 17.

103. The applications judge considered and applied this prevailing jurisprudence and exercised his discretion appropriately, on the basis of all the evidence before him, in holding that:

> "Clearly, the National Settlement Program is closed to the Plaintiffs. ... The critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action. 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. 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 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."
>
> Reasons for Decision of Justice Fowler, dated June 7, 2010, paras. 112, 120–121, *Anderson* Record on Application for Leave to Appeal , Tab 3.

104. Justice Fowler correctly applied the proper legal principles on the basis of the evidence before him. There was no palpable error in the exercise of his Honour's discretion

105. In challenging the decision below with respect to preferability, the Appellant places heavy reliance on the fact that a national settlement agreement in 2006 subsumed the claims of many aboriginal persons in Canada for attendance at residential schools. While such a settlement was in fact reached, it by no means applied to any and all persons who attended residential schools in Canada, nor did apply to the institutions at question in these five (5) actions. Indeed, hundreds of similarly situated schools were excluded from that settlement agreement, and remain excluded today. Despite numerous requests for their addition, Canada has refused every such request.

Memorandum of Fact and Law of the Intended Appellant: Application for Leave to Appeal (*Anderson*), dated September 3, 2010, at p. 31, para. 107.

Supplementary Memorandum of Fact and Law of the Intended Appellant: Application for Leave to Appeal (*Anderson*), dated October 4, 2010, at p. 17-20, paras. 66–83.

106. Despite these exclusions, the Appellant nevertheless suggests that the decision to exclude these five (5) institutions may be appealed, as a meaningful preferable process. The Appellant characterizes this possibility as a preferable avenue for redress while at the same time wholly and unequivocally denying Canada's involvement in these schools and knowing that applications to include them as "Eligible Indian Residential Schools" in the national settlement have been consistently denied by the Appellant itself without any explanation whatsoever.

107. It cannot be said that repeated, further applications in this respect, ought to be regarded as preferable to a class proceeding. Canada has not asked that further information be provided about these Schools or stated that the applications were somehow incomplete, to be visited again upon the provision of additional documentation or research. Is it preferable that the class members continue to pursue continuous applications for inclusion which have no chance of success?

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

Respondents pursue civil litigation in class action form, as soon as is possible. Whether or not the schools at issue in these proceedings meet the negotiated definition of an "Eligible Indian Residential School" has no bearing on whether Canada may be civilly liable to these schools' attendees at common law.

109. On the basis of this evidence before him, Justice Fowler properly found that "Canada has determined that the Plaintiffs do not fit the criteria of the settlement agreement reached with other aboriginal residential school attendees and as a result that procedure was closed to the Plaintiffs." This was an appropriate exercise of his Honour's judicial discretion as was his finding that no other reasonably available means (such as test cases or joinder) "would accomplish the stated objectives of the Act". There is no meaningful reason to interfere with this exercise of discretion.

> Reasons for Decision of Justice Fowler, dated June 7, 2010, at paras. 111 and 123, *Anderson* Record on Application for Leave to Appeal, Tab 3.

110. Accordingly, it is not open to Canada to argue that Justice Fowler erred in finding that there are no other legitimate or meaningful avenues of redress other than litigation. Even where there existed an alternative dispute resolution procedure for which class members were in fact entitled and eligible to access, (unlike the in the National Settlement Agreement, as in this case), the Ontario Court of Appeal still found that a class proceeding was preferable. The reasoning in *Cloud* applies with even more force in this case as the alternative dispute resolution process upon which Canada relies to suggest the Class can access and seek redress, is also a process for which Canada has denied these individuals' eligibility.

Cloud v. Canada (Attorney General) (2004), 247 D.L.R. (4th) 667 (C.A.) at paras. 92–93, leave to appeal to the Supreme Court of Canada dismissed, Respondents' Book of Authorities, Tab 36.

111. As required by the Supreme Court of Canada's holding in *Hollick*, the applications judge's preferability analysis required him to "look at all reasonably available means of resolving the class members' claims". A careful review of the evidence tendered on the applications and the Reasons for Decision below demonstrate that Justice Fowler properly followed this direction and considered all of the economies and realities of resolving these claims in various fashions.

Hollick v. Toronto, [2001] 3 S.C.R. 158, at paras. 27, 31, Respondents' Book of Authorities, Tab 20.

112. The Appellant argues that if the Respondents continue to pursue redress through inclusion into the national settlement agreement and fail, "the parties and the courts have saved time and resources in reaching that outcome. The Intended Respondents can then decide whether they wish to bring an action against the parties that actually operated and managed the named schools".

Supplementary Memorandum of Fact and Law of the Intended Appellant: Application for Leave to Appeal (*Anderson*), dated October 4, 2010, at p.18, para. 78.

113. This argument wrongly assumes that such proposed appeals can actually answer the common issues advanced by these common issues, once and for all. Moreover, even if the Respondents appealed the failure to include them in the national settlement and failed, the avenue of a class action, in these current forms, would nevertheless remain available. Failure to be included in that settlement process is no bar whatsoever to the pursuit of a civil

proceeding. No time would be saved and it is likely that many more elderly class members would not survive waiting through that protracted and expensive route.

114. The merits of the appeal process relied upon by the Appellant are disingenuously optimistic. On any such appeal, Canada would submit the same materials to the court upon which it based its decision to exclude these class members from the settlement program. There would be little if any chance a court would arrive at a difference conclusion when considering whether these individuals are included within the purview of the settlement agreement.

115. As with the hundreds of other excluded institutions, the appeal process only obliges Canada to tender the same evidence which it considered on the original request to add these institutions – whether that negotiated settlement definition of an Eligible Indian Residential School is satisfied or not has no bearing on whether Canada may be civilly liable to the class. In contrast to the settlement appeal process, the discovery obligations under the Rules in a civil proceeding are broad, wide and require that all documents or materials that bear a semblance of relevance to the common issues be produced. Accordingly, Canada cannot produce only that which assists its case.

116. Lastly, the Appellant relies on this court`s decisions in *Ring* and *Davis* to assert that the applications judge improperly exercised his discretion in finding that a class action has a fair, efficient and manageable method of advancing these claims. Essentially, Canada likens the cases at bar to that of *Davis* and suggests that if these claims proceeded to trial they would "likely more resemble a commission of inquiry than a trial".

Memorandum of Fact and Law of the Intended Appellant: Application for Leave to Appeal (*Anderson*), dated September 3rd, 2010, at p. 29-30, paras. 101–105.

117. The comparison to *Davis* ought to be rejected with respect to the preferability test as the claims in that case are of an entirely different nature and kind than those asserted herein. There is no similarity between an action which seeks damages for negligence and breach of fiduciary duty (as is the case here) and the action in *Davis* which sought declaratory relief of entitlement to statutory Indian status and bands. In *Davis*, the courts properly found that a class action was not the preferable procedure because the remedy sought there was one outside the jurisdiction of the courts:

> "...the benefits which the plaintiffs claim to have lost – since 1949 – and to which they say they are now entitled – are purely statutory benefits which require as a precondition to entitlement registration under the *Indian Act*. ... The only way for the plaintiffs – or some of them – to be band members is for the Governor in Council to declare them to be a band for purposes of the *Indian Act*. ... A band for the purposes of the *Indian Act* cannot be created or ordered by the court. While a decision of the Governor in Council may indeed in certain circumstances be subject to judicial review, that is a far cry from the proposition that the court has the jurisdiction to order the Governor in Council – in the first instance – to make a particular discretionary decision. A decision to declare a band is a political one. Thus a court could not order one of the primary orders sought by the plaintiffs." [emphasis added]
>
> *Davis v. Canada (Attorney General)* (2004), 240 Nfld. & P.E.I.R. 21, at paras. 125–128, upheld on appeal (2008), 279 Nfld. & P.E.I.R. 1 (C.A.), Respondents' Book of Authorities, Tab 26.

118. The Appellant's reliance on *Ring* is also misplaced. In that case two fundamental considerations prevented the court from finding that a class action was the preferable procedure: (a) none of the proposed common issues were truly common to each member of the class; and (b) the applicable statutory schemes at issue, the *Pensions Act* and *Crown Liability and Proceedings Act*, both provided an alternative remedy to much of the class

which might have prevented the court from exercising jurisdiction over the proposed class in any event:

> "The provisions of the *Pensions Act* and the *Crown Liability and Proceedings Act* indicate that for three-fourths of the potential members of the class there is legislation which: (1) might provide an alternative remedy, under legislation which provides certain advantages to the applicant which would not be available in a legal action; (2) might require that a stay of any action be granted until the availability of the alternative remedy is determined; and (3) might prevent the court from exercising jurisdiction if the other remedy is granted in respect of the facts upon which the claim before the court is grounded. ... In this context, it is possible that the alternative procedure will be held to be the only one available to three-fourths of the members of the class. The impact of the legislation in this context is the complication caused by the inefficiency of having to have the determination made for such a large percentage of the class. Further, this is not an issue that could be determined on a class wide basis."
>
> *Ring. v Canada (Attorney General)* (2010), 297 Nfld. & P.E.I.R. 86 (C.A.) at para. 118, Respondents' Book of Authorities, Tab 17.

119. None of these factors are present in these proceedings. In any event, Justice Fowler considered these very matters and came to the proper conclusion.

120. Moreover, the evidence before the applications judge at certification plainly demonstrated that both access to justice and judicial economy concerns are paramount to these applications and can only be realized by way of a class proceeding.[11] Access to justice

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[11] Affidavit of Carol Anderson sworn November 20, 2008, *Anderson* Record on Application for Leave to Appeal, Tab 17, at paras. 28–29; Affidavit of Allen Webber sworn November 24, 2008, *Anderson* Record on Application for Leave to Appeal, Tab 18, at paras. 29–20; Affidavit of Joyce Webber sworn November 24, 2008, *Anderson* Record on Application for Leave to Appeal, Tab 19, at paras. 20–21; Affidavit of Selma Boasa sworn October 22, 2008, *Boasa* Record on Application for Leave to Appeal , Tab 18, at paras. 28–29; Affidavit of Rex Holwell sworn November 28, 2008, *Boasa* Record on Application for Leave to Appeal, Tab 19, at paras. 20–21; Affidavit of Dominic Dickman sworn December 3, 2008, *Lucy* Record on Application for Leave to Appeal, Tab 19, at paras. 19–20; Affidavit of Sarah Asivak sworn October 22, 2008, *Asivak* Record on Application for Leave to Appeal, Tab 18, at paras. 29–20; Affidavit of James Asivak sworn November 26, 2008, *Asivak* Record on Application for Leave to Appeal, Tab 19, at paras. 18–19; Affidavit of Tony Obed sworn October 21, 2008, *Obed* Record on Application for Leave to Appeal, Tab 16, at paras. 29–20; Affidavit of William Adams sworn October 22, 2008, *Obed* Record on Application for Leave to Appeal, Tab 17, at paras. 27–28; Affidavit of Martha Blake sworn October 22, 2008, *Obed* Record on Application for Leave to Appeal, Tab 18, at paras. 21-22; Affidavit of David Rosenfeld sworn December 10, 2008, *Anderson* Record on Application for Leave to Appeal, Tab 20, at paras. 19-20.

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

121. In this case, the evidence before the court showed that the failure to certify the actions as class proceedings would effectively deny access to the courts for hundreds of elderly claimants, largely due to their respective financial circumstances. The legal costs of proceeding individually, especially against an adversary as formidable as Canada, would exceed the class members' individual damages, making it financially impossible to bring separate individual actions. Each of the representative plaintiffs had tendered evidence on the applications that the costs and expenses associated with complex litigation, particularly against Canada, makes individual litigation an impossibility. None of this evidence was contradicted.

122. Accordingly, it was an appropriate exercise of judicial discretion for Justice Fowler to determine that the only avenue by which to have these claims adjudicated upon swiftly, fairly and for all, is by way of class action. This would ensure the Class has access to meaningful redress, in an arena where the inherent inequalities of bargaining powers of these parties may be equalized in an efficient, case-managed setting.

123. There is no legal or factual basis to interfere with Justice Fowler's decision.

PART IV - ORDER REQUESTED

124. The Respondents request that the applications for leave to appeal be dismissed and alternatively, that Canada's appeals of the certification applications be denied in their entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED .

DATED at Toronto, in the Province of Ontario, this 1st day of November, 2010.

Kirk M. Baert
Of counsel for the Plaintiffs

Celeste B. Poltak
Of counsel for the Plaintiffs

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

Steven Cooper
Of counsel for the Plaintiffs

SCHEDULE "A"

LIST OF AUTHORITIES

1.	*Canada-Newfoundland Agreements An Innu Perspective*, Innu Nation Researcher: James Roche, July, 1992
2.	*"Pencilled Out": Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954,* A Report prepared for Jack Harris, M.P. on the impact of the exclusion of Newfoundland and Labrador's native people from the Terms of Union in 1949, March 31, 1988
3.	*Aboriginal Peoples and Governance in Newfoundland and Labrador,* authored by Adrian Tanner, John C. Kennedy, Susan McCorquodale and Gordon Inglis, October 1994
4.	*Terms of Union*, 1949
5.	*Summary of the Report of the Royal Commission on Labrador*, 1974
6.	*Report on the Complaints of the Innu of Labrador to the Canadian Human Rights Commission Report*, by Donald M. McRae, August 18, 1993
7.	*Bayer Inc. v. Pardy* (2005), 246 Nfld. & P.E.I.R. 157; 2005 NLCA 20 (Nfld. C.A.)
8.	*Davis v Canada (Attorney General)* (2008), 279 Nfld. & P.E.I.R. 1; 2008 NLCA 49 (Nfld. C.A.)
9.	*J.L.G. v. A.W.W.* (2003), 184 B.C.A.C. 367; [2003] B.C.J. No. 1551 (Quicklaw) (B.C.C.A.)
10.	*Baxter v Canada* (2003), 39 A.C.W.S. (3d) 627; [2005] O.J. No. 2165 (Quicklaw) (S.C.J.)
11.	*Roberts v. Browning Ferris Industries Ltd.* (1998), 170 Nfld. & P.E.I.R. 228 (Nfld.C.A.)
12.	*LeDrew v. Conception Bay South (Town)* (2003), 231 Nfld. & P.E.I.R. 61; 2003 NLCA 56 (Nfld. C.A.)
13.	*Brace v. Watchtower Bible and Tract Society of Pennsylvania et al.* (2009), 291 Nfld. & P.E.I.R. 270; 2009 NLTD 171
14.	*Walsh v. TRA Co.* (2007), 268 Nfld. & P.E.I.R. 111; 2007 NLCA 50 (Nfld. C.A.)
15.	*Dyson v. Attorney General*,. [1911] 1 K.B. 410 (C.A.)
16.	*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094 (C.A.)
17.	*Ring. v. Canada (Attorney General)* (2010), 297 Nfld. & P.E.I.R. 86; 2010 NLCA 20 (Nfld. C.A.)
18.	*Wheadon v. Bayer Inc.* (2004), 237 Nfld. & P.E.I.R. 179; 2004 NLSCTD 72 (S.C.T.D.)
19.	*Pardy v. Bayer* (2003), 230 Nfld. & P.E.I.R. 325; 2003 NLSCTD 130 (S.C.T.D.)
20.	*Hollick v. Toronto*, [2001] 3 S.C.R. 158 (Supreme Court of Canada Website) (S.C.C.)
21.	*Sparkes v. Imperial Tobacco Canada Ltd.* (2010), 295 Nfld. & P.E.I.R. 267; 2010 NLCA 21 (C.A.)

22.	*Hunt v. Carey*, [1990] 2 S.C.R. 959 (Quicklaw)
23.	*Fiduciary Law*, Dr. L. Rotman (2005), p. 524 & 597
24.	Jerry Wetzel "Liberal Theory as a Tool of Colonialism and the Forced Assimilation of the First Nations of Newfoundland and Labrador" (1995) 4 Dal. J. Leg. Studies
25.	"Equal Citizens? The Legal and Constitutional Status of the aboriginal peoples of Labrador," W. McLean, University of Ottawa, December 1997
26.	*Davis v. Canada (Attorney General* (2004), 240 Nfld. & P.E.I.R. 21; 2004 NLSCTD 153 (S.C.T.D.)
27.	*Shubenacadia Indian Band v. Canada (Minister of Fisheries and Oceans)* (2001), 202 F.T.R. 30; 2001 FCT 181; F.C.J. No. 347 (T.D.), affirmed, (2002), 291 N.R. 393; 2002 FCA 249; F.C.J. No. 880 (C.A.) (Quicklaw)
28.	*Mitchell v. Peguis Indian Band* (1990), 71 D.L.R. (4th) 193 (Canada Law Book) (S.C.C) at p. 209
29.	*Just v. British Columbia,* [1989] 2 S.C.R. 1228 (Quicklaw)
30.	*Rideout v. Health Labrador Corp.* (2005), 12 C.P.C. (6th) 91; [2005] N.J. No. 228; 2005 NLTD 116 (Nfld. T.D.)
31.	*Sauer v. Canada (Attorney General)* (2007), 225 O.A.C. 143; [2007] O.J. No. 2443 (Quicklaw) (C.A.) leave to appeal to the S.C.C. denied
32.	*Brown v. British Columbia* [1994] 1 S.C R. 420 (Quicklaw)
33.	*Montreal Trust Co. of Canada v. Hickman*, (2001) 204 Nfld. & P.E.I.R. 58; 2001 NFCA 42 (C.A.)
34.	*Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 (Quicklaw)
35.	*Rumley v. British Columbia*, (2002), 205 D.L.R. (4th) 39 (Quicklaw) (S.C.C)
36.	*Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 (C.A.)
37.	*Davis v. Canada (Attorney General),*(2007) 263 Nfld. & P.E.I.R. 114; 2007 NLTD 25 (S.C.T.D.)
38.	*Sauer v. Canada (Attorney General)* (2008), 169 A.C.W.S. (3d) 27; [2008] O.J. No. 3419 (Quicklaw) (S.C.J.)
39.	*Dolmage et al. v. Province of Ontario*, 2010 ONSC 1726 (S.C.J)

SCHEDULE "B"
RELEVANT STATUTES

1.	*Rule 57.02(4), Rules of the Supreme Court, 1986*

SCHEDULE "C"

Common Issues Certified by the Honourable Justice Fowler, June 7, 2010

Anderson et al v HMQ

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

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

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

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

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

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