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

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

ATTORNEY GENERAL OF CANADA APPELLANT

AND:

CAROL ANDERSON, ALLEN WEBBER
AND JOYCE WEBBER RESPONDENTS

Docket: 10/89

BETWEEN:

ATTORNEY GENERAL OF CANADA APPELLANT

AND:

TOBY OBED, WILLIAM ADAMS
AND MARTHA BLAKE RESPONDENTS

Docket: 10/90

BETWEEN:

ATTORNEY GENERAL OF CANADA APPELLANT

AND:

SELMA BOASA AND REX HOLWELL RESPONDENTS

Docket: 10/91

BETWEEN:

ATTORNEY GENERAL OF CANADA APPELLANT

AND:

SARA ASIVAK AND JAMES ASIVAK RESPONDENTS

Docket: 10/92

BETWEEN:

ATTORNEY GENERAL OF CANADA APPELLANT

AND:

EDGAR LUCY AND DOMINIC
DICKMAN RESPONDENTS

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

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

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

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

Barry and Harrington, JJ.A.:

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

BACKGROUND FACTS

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

(a) Canada's funding of expenditures for aboriginals

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

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

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

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

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

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

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

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

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

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

(b) Canada's involvement in aboriginal education

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

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

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

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

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

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

THE PARTIES' POSITIONS

(a) The respondents' claim

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

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

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

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

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

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

(b) Canada’s position

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

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

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

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

THE TRIAL DIVISION

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

(a) Cause of action

> The respondents have made an arguable case that a fiduciary duty between the aboriginal people of Labrador and Canada arose at the instant of Confederation in 1949 and this duty extended to them as a people to protect their cultural identity and not just in relation to their lands.
>
> Whether the federal Crown had sufficient involvement in the running of the Schools to establish a breach of any fiduciary, constitutional or common law duty owed, is a matter to be established by evidence at trial and it is not plain and obvious that the respondents will be unable to prove this.

(b) Identifiable class

> In the circumstances, the following class definitions adopted by the respondents meet the requirements of the *Act*:
>
> (i) all persons who attended the Schools between 1949 and the date of its respective closure (the "Survivor Class"); and
>
> (ii) all persons who have a derivative claim on account of a family relationship with a person in the Survivor Class (the "Family Class").
>
> The circumstances involve only five isolated schools in a relatively remote part of Canada. The class as defined appears for the most part to be a closed set of about 500 individuals. They can be readily identified since the attendance of individuals would have been in a school record or known by people in the communities.

(c) Common issues

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

(d) Preferable procedure

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

(e) Representative plaintiffs

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

THE APPLICABLE STATUTORY AND CONSTITUTIONAL PROVISIONS

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

> **5.** (1) On an application made under section 3 or 4, the court shall certify an action as a class action where
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;

(d) a class action is the preferable procedure to resolve the common issues of the class; and

(e) there is a person who

(i) is able to fairly and adequately represent the interests of the class,

(ii) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

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

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

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

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

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

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

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

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

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

> Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —
>
> …
>
> 24. Indians, and Lands reserved for the Indians.

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

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

STANDARD OF PROOF

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

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

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

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

> … The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action …

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

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

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

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

> [23] Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.
>
> [24] This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities — as they sometimes do — the remedy is to amend the pleadings to plead new facts at that time.
>
> [25] Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding.

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

THE ISSUES

[33] Three issues arise:

a. Should leave to appeal be granted?
b. What is the standard of review on an appeal of a certification decision?
c. Was the applications judge correct in concluding it was not plain and obvious that no cause of action was disclosed in the statement of claim or did he commit a palpable and overriding error in concluding some basis in fact existed for the other criteria for certification?

LEAVE TO APPEAL

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

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

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

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

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

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

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

THE STANDARD OF REVIEW

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

LAW AND ANALYSIS

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

(i) The alleged causes of action

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) Breach of non-delegable fiduciary duty

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

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

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

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

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

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

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

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

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

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

Further, at p. 191 McCabe elaborates:

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

McCabe makes reference again to the *Bonaparte* decision and on the same page comments further:

> … The particular cognizable interest of the plaintiffs to be considered "with the benefit of an evidentiary record" was, it may be inferred, preservation of "their culture and identity, [and] … as and when they became adults, their ability "to pass on to succeeding generations the spiritual, cultural and behavioural bases of their people".

[54] The analysis by McCabe, though not relied on by the applications judge (or cited on this appeal), provides support for the finding by the judge of a certifiable cause of action residing in both the Survivor Class and the Family Class in these proceedings. The Supreme Court's reasons at para. 47 of *Elder Advocates*, which compares fiduciary duties owed by the Crown to

aboriginal peoples to traditional categories of fiduciary relationships such as "guardian-ward or parent-child", provides additional support.

[55] The respondents assert that the nature of Canada's relationship with aboriginal peoples gives rise to a non-delegable duty to preserve, protect and promote the health, welfare and education of aboriginal children. They submit that support for this position is found in the reasons of Cromwell J. in *Reference re Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360, at para. 54:

> As Professor Klar states in his text *Tort Law* (4th ed. 2008), at p. 663, "[t]he essential feature of a non-delegable duty is that responsibility for its execution always rests on the person upon whom the duty is imposed. Although it may be delegated to another, the breach, no matter how committed, by the delegatee, will be treated as a breach by the delegator." See also *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at paras. 30-32. A non-delegable duty may have its source in statute, as the appellants here allege. For example, in *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, the Court found that the relevant legislation imposed a non-delegable duty on the Ministry of Transportation and Highways to ensure that maintenance work on the highways was performed with reasonable care.

[56] The non-delegable duty alleged here does not arise from statute but rather, on the respondents' submissions, from the *sui generis* nature of the relationship between the Crown and aboriginal peoples.

[57] In *Elder Advocates* the class seeking certification relied upon provincial statutory obligations contained in health and welfare legislation to ground an assertion of a private duty of care which was allegedly breached by the Alberta government by its failure to properly audit, supervise and monitor the running of long term care homes. McLachlin C.J., at paragraph 69, wrote:

> Determining whether a duty of care lies on the government proceeds by "review of the relevant powers and duties of the [government body] under the Act": *Cooper*, at para. 45. See also *Broome*, at para. 20; *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 27.

[58] Here the respondents submit that at Confederation Canada reaffirmed its exclusive responsibility for the affairs of aboriginal peoples insofar as its responsibility related to native peoples of Labrador (and northern Newfoundland). These duties would not have been related solely to educational funding contributions to Newfoundland, which is separately alleged to have been woefully inadequate. The respondents claim that

Canada had a duty to manage, monitor, investigate, promote and protect the health and welfare of the Survivor Class, while subject to compulsory attendance at the Schools. It is alleged that Canada knew or ought to have known that they would be at risk of physical, verbal, mental and sexual abuse in an environment of involuntary cultural assimilation in the European tradition.

[59] In *Broome,* at para. 67 the Supreme Court compared the circumstances in the Prince Edward Island Children Aid Societies, where funding was the only role of the provincial government, with the circumstances in its decision in *Blackwater v. Plint*, "… where the Court assumed but did not decide there was a fiduciary duty, the federal government had a central role in running the residential school in which the abuse had taken place, and the children were taken from their families and placed there pursuant to a federal statute, the *Indian Act,* S.C. 1951, c-29."

[60] Canada suggests that the reasons of the Supreme Court in *Blackwater* do not apply here since the facts, assumed to be true, do not indicate a "central role" of the federal government in the operations of the Schools in question, the Schools being operated by charitable entities with financial support and oversight by the Department of Education of the Newfoundland government.

[61] However, the respondents argue that on a broad view of Canada's fiduciary duty the health, welfare and education of aboriginal peoples cannot be said to have resided solely in the Crown in right of Newfoundland after Confederation in 1949.

[62] The respondents support their position by reference to the Supreme Court decision in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193 at 209 where Dickson C.J. wrote:

> … it is true that, since 1867, the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples. <u>However, the Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations</u>. …

(Emphasis added.)

[63] Given that there is some basis in fact for the proposition that Canada had an over-arching responsibility for the health and welfare of aboriginal persons attending residential schools, Canada has failed to show at this early stage of the proceeding that a non-delegable fiduciary duty cannot be sustained because Canada's sole role respecting the operations of the Schools was only to make funding contributions under the auspices of Newfoundland's exclusive constitutional role in education regarding all persons within the Province. The respondents have pleaded a greater involvement by Canada and these pleadings must be accepted as true at this stage.

(iii) Direct negligence claim

[64] The duty of care alleged to exist in this case has not been "settled by existing authority" and must therefore meet the two stage test for determining whether a novel duty of care could be recognized in these circumstances: see *Broome* at para. 12. That test was described in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537. There, McLachlin C.J. and Major J. stated:

> [30] In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the <u>relationship</u> between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
>
> [31] On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by

> reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.

(Emphasis in original.)

[65] What is the nature of the relationship in this case? The respondents allege that Canada had a constitutional responsibility for the welfare of all aboriginal peoples including members of the Survivor Class from the date of Confederation in 1949. It is alleged that Canada failed not only to adequately fund the education of the class members but also more broadly failed to monitor, manage, investigate and protect the health and welfare interests of the aboriginal children who were compelled to attend the Schools when Canada knew or ought to have known that abuses and neglect of aboriginal children had occurred at other residential schools in other parts of Canada prior to and after Confederation in 1949.

[66] The respondents contend that the issue of proximity is met by the degree of interaction between Canada and the Newfoundland government pre and post Confederation, which is highlighted by repeated concerns of Government of Newfoundland officials that were expressed to Canada about the inadequacy of financial support for education of aboriginal children living in Labrador, particularly in light of the province's weak financial position at the date of and after Confederation.

[67] Canada contends that there is no duty of care recognizable in law with regard to its limited single purpose role with respect to the Schools after Confederation. Canada submits that funding of the Schools through the provincial government was its only involvement and asserts that this role is not sufficient to create a duty of care owing to the Survivor Class. Canada relies on the Supreme Court's decision in *Broome* in support of its position.

[68] The respondents cannot point to any specific legislation that would support the creation of a duty of care owed to them by Canada. Similarly, the provision of funding with no accountability requirements will not support the finding of a duty of care; see *Broome* at para. 45.

[69] The unique constitutional relationship existing here between Canada and the respondents, however, may give rise to different considerations. While the claim that Canada has a constitutional responsibility for the welfare of all aboriginal peoples including members of the Survivor Class, from the date of Confederation in 1949, might be a novel claim, it has some justification. This is particularly so in light of the respondents' allegations

against Canada set out in paragraph 48 of these reasons including the continuation of "a systematic program of forced integration of aboriginal persons through the institutions of the schools when it knew or ought to have known that doing so would cause profound and permanent cultural, emotional and physical injury to the members of the Survivor Class". Looking at this unilateral exercise of control over aboriginal children, it is at least arguable that an analogy may be drawn between the situation herein existing and one or more of the relationships in which duties of care have been recognized, such as that existing between guardians and wards cited by the Supreme Court in *Broome* and later in *Elder Advocates*.

[70] Considering the special constitutional relationship between the Crown and aboriginals, it is not plain and obvious that the respondents will not be able to establish a *prima facie* duty of care in this case.

[71] Even without a special constitutional relationship, a common law duty of care may arise in the circumstances.

[72] Establishing a breach of duty in the case of governmental malfeasance has been constrained by the threshold requirement that claimants identify a negligent act or omission in an operational context rather than in a policy making mode.

[73] In *Just v. British Columbia*, [1989] 2 S.C.R. 1228, the Supreme Court recognized a duty of care being owed to the motoring public by a government highways department to carry out highway maintenance, which duty could extend to the prevention of injury from falling rock onto the highway.

[74] Cory J. wrote for the majority at 1239:

> … Over the passage of time the increased government activities gave rise to incidents that would have led to tortious liability if they had occurred between private citizens. The early governmental immunity from tortious liability became intolerable. This led to the enactment of legislation which in general imposed liability on the Crown for its acts as though it were a person. However, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. …

[75] In setting out ground rules for the determination of policy-based versus operational decision making, Justice Cory wrote at 1244-1245:

> … a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.

> In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the *bona fide* exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.
>
> The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment.

(Emphasis added.)

[76] The respondents submit that Canada not only had constitutional and statutory obligations to the Survivor Class in a policy context but also had operational and administrative obligations, either separately or jointly with Newfoundland, to inspect and supervise the Schools attended by the Survivor Class to ensure that the residents were healthy and safe from various forms of abuse, after being involuntarily removed from the care of their families. (See paragraph 41 above.) Any inspection could only be meaningful if minimum standards of care were required by Canada and imposed on school authorities. The respondents allege that neither Canada nor the Newfoundland authorities discharged any of these obligations.

[77] Whether Canada moved from the policy stage to assume operational and administrative obligations is a matter for trial. At a preliminary stage of a class action proceeding it is difficult to make these determinations.

[78] Canada relies heavily upon *Hicks v. Saskatchewan Crop Insurance Corp.* (2008), 313 Sask.R. 238 (Q.B.), where the applications judge struck claims against one defendant allegedly involved in administering a weather-based crop insurance program because an affidavit filed established that other defendants in fact did the administration. Canada submits that, in the same way, the evidence before the applications judge in the present case establishes that Canada had involvement only in funding. That submission

ignores the allegations in the pleadings, supported by affidavits of the plaintiffs, asserting greater involvement by Canada in monitoring and supervising the Schools. In the present case, one cannot say that the facts pleaded are "manifestly incapable of being proven": see *Imperial Tobacco* at para. 22.

[79] Based on the facts alleged in the pleadings, it is not plain and obvious that the respondents will not be able to make out a duty of care owed by Canada to the respondents.

(b) Whether the class is identifiable for a class proceeding

[80] Canada submits that the certified class is unnecessarily broad and does not bear a rational relationship with the proposed common issues.

[81] Canada further submits that all the following factors must be considered when assessing whether or not there is an identifiable class:

(a) The class must be capable of clear definition. The purpose of the definition is to identify the individuals who are entitled to notice, entitled to relief if relief is awarded, and bound by the judgment.

(b) The class definition should state objective criteria for membership.

(c) The criteria for membership should bear a rational relationship to the asserted common issues.

(d) The proposed representative plaintiff must show that the class is not unnecessarily broad. When the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the class definition be amended.

[82] Canada also submits that, unless there is a cause of action common to the identified class members, there is no rational relationship between the membership criterion of being a residential school student for the stated period and the common issues. Canada relies on *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.), where Winkler J. (as he then was) rejected a class definition described as "all persons who attended the [s]chool between 1990 and May 1996" on the basis that a rational connection was not established between the class definition and the common issue. Justice Winkler, at paragraph 68, took the position that the mere fact

that a group of people is identifiable is not sufficient to render them a class for the purpose of the *Act.*

[83] Here, Canada points out that the intended class are not using aboriginal ancestry as a limiter but seek to include all children including non-aboriginals who attended the Schools. Canada submits that the pleaded claim is founded in claims of negligence and breach of fiduciary duty arising from section 91(24) of the *Constitution Act, 1867.* Canada says it follows that the definition lacks a "rational connection between the classes defined and the asserted common issues". Canada further asserts that the respondents appear to be espousing a class definition similar to one advanced in the Indian Residential School class action proceeding. However the difficulty here, says Canada, is that it had no direct involvement in the operations or management of the Schools.

[84] Canada further says that the class definition is not sufficiently akin to that certified in *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401 (C.A.), leave to appeal refused at [2005] 1 S.C.R. vi, or in *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184.

[85] The respondents reply that Canada's primary objection to the applications judge's finding that an identifiable class exists is closely connected to arguments regarding the sustainability of the cause of action. In doing so, the respondents suggest that the viability of the cause of action and of the class definition are necessarily interdependent and that if the appellants are unsuccessful with regard to the cause of action it follows that the assertion of no identifiable class must also fall.

[86] The applications judge found that it is possible to objectively identify the proposed class members by reference to their attendance at the Schools during the period described after 1949. For the most part, the class definition is similar to that certified in *Rumley*, although the nature of the misconduct there alleged related solely to sexual abuse affecting students attending a particular school between certain years. The respondents submit that in *Cloud*, the Ontario Court of Appeal approved a class definition of former residential school survivors which was defined by attendance at the school within a particular time frame. The Court of Appeal was satisfied with the proposed class as having been "circumscribed by defining criteria" and were rationally linked to the common issues because "all class members claimed breach of these duties and they all suffered at least some harm as a result" (para. 47). The approved class in that case was:

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

(b) All parents and siblings of all persons who attended the Mohawk Institute School between 1922 and 1969; and

(c) All spouses and children of all persons who attended the Mohawk Institute School between 1922-1969.

[87] This Court in *Ring* elaborated on the statutory criteria for the identification of the class, at paras. 62, 64 and 67:

(i) It is not intended that the class be limited to those who will be ultimately successful;

(ii) As large as the numbers are, that factor alone does not make the definition too broad; and

(iii) The general rule is that criteria should not depend on the outcome of the litigation.

[88] Canada submits that the class definition certified by the applications judge conflicts with the principles set forth in *Ring*. Counsel for the respondents submit that the class is not defined by any "claims limiter" as was criticized in *Ring*. The class here is defined by reference to attendance at the Schools during a fixed period of time, which is capable of being determined by objective criteria, the latter being a principal concern in *Ring*.

[89] The applications judge made no palpable and overriding error in concluding that the criteria for inclusion in the class have been reasonably defined at this stage and are objectively capable of determination. The applications judge correctly found, at paragraph 101, as follows:

> … the circumstances relate to only five small isolated schools in a relatively remote area of Canada. No doubt it will not be a simple task to identify every possible person touched by this litigation; however, this class of people is here for the most part to be a closed set of about 500 individuals. They are almost unique in their geographical location and their attendance would be expected and had been recorded as part of the school record at the time or at least known in their community by people still able to remember that they in fact attended these residential schools … .

[90] The class definition certified by the applications judge is consistent with those certified in *Cloud v. Canada (Attorney General)*, (2004), 247 D.L.R. (4th) 667 (Ont. C.A.), leave to appeal to S.C.C. refused [2005] SCCA 50 and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184. In *Rumley* the Court found that all students at a certain school between 1950 and 1992 shared an interest in the question of whether the government breached a duty of care by systemic negligence in failing to prevent sexual and physical abuse. In *Cloud* the Court followed *Rumley* and certified a class action for harm allegedly caused at an aboriginal residential school between certain years. In the present case, the applications judge did not err in determining that the class meets the identifiably criteria for certification. At a later stage in the proceedings an amendment to the class may be justified. However, as the Supreme Court pointed out in *Hollick*, that is part of the inevitable exercise that may result as a class action progresses.

[91] The applications judge also certified a Family Class allowing family members of claimants to bring derivative claims. A similar class had been certified in *Cloud*. However, Canada says that there is doubt as to whether family members can bring derivative claims in this Province where the family member directly affected by the tort has not died as a result of the tortious activity alleged.

[92] In Ontario, subsection 61(1) of the *Family Law Act*, RSO 1990, c. F-3, provides:

> 61(1) If a person is **injured or killed** by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

(Emphasis added.)

[93] The Newfoundland and Labrador *Family Law Act*, RSNL 1990, c. F-2, has no similar provision. The *Fatal Accidents Act*, RSNL 1990, c. F-6, subsection 3(1) provides:

> 3(1) Where the **death** of a person is caused by a wrongful act, neglect or default and the act, neglect or default would have entitled the party injured to maintain an action and recover damages, then the person who would have been liable if death

> had not ensued is liable to an action for damages, notwithstanding the death of the person injured.
>
> (Emphasis added.)

The subsection allows dependants to bring actions when the tortious activity has resulted in the death of the person directly affected by the tortious activity, but not when the individual was merely injured. Ontario has no *Fatal Accidents Act*. Instead, section 61(1) of the *Family Law Act* achieves the same result.

[94] The Ontario Superior Court of Justice discussed the impact of section 61 of the Ontario *Family Law Act* in *Lionti v. Toronto Star*, 2000 CarswellOnt 24. At paragraph 25 of that decision, Perkins, J. stated:

> The history referred to in *Munro* is the fact that s. 61, first enacted in 1978, is a direct descendant of the *Fatal Accidents Act*, R.S.O. 1970. That act provided for recovery of damages by family members only when the "injury" complained of caused the death of the person who suffered the injury. In the *Family Law Reform Act, 1978*, the Legislative Assembly of Ontario enacted the predecessor of s. 61 in substantially the same terms as the current provision. In doing so it gave effect to the recommendations of the Ontario Law Reform Commission (whose abolition is regretted) in its landmark Report on Family Law, volume 1, Torts (1969). That volume recounted the history of the various "family" torts such as loss of consortium and loss of services. It recommended the abolition of many of those torts, but when it came to the statutory cause of action created by the *Fatal Accidents Act* the report noted a gap in the law. It was anomalous that a fatal injury gave rise to an action by family members for both out of pocket expenses in caring for or burying the victim and damages for loss of care, guidance and companionship, whereas a nearly fatal injury that left the victim a quadriplegic or lingering in a coma gave rise to no action by the family (perhaps not even for out of pocket expenses). It recommended reforms of the statutory tort. The government responded positively with a discussion paper released in October, 1976 and a bill that was ultimately enacted in March, 1978.

[95] In *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, the Supreme Court of Canada extended the maritime common law to allow claims to be brought by dependants of a person injured but not killed in a boating accident. In that case, the defendants had argued that the *Family Law Act* of Ontario could not apply to maritime claims.

[96] Despite the fact that this Province’s legislature has not addressed the “gap” in the law as did the Ontario legislature, prior decisions in certification proceedings in this Province, have applied the reasoning in *Ordon* and have

refused to strike out claims of dependents on the basis that it is plain and obvious that they will fail.

[97] In *Rideout v. Health Labrador Corp*., 2005 NLTD 116, Russell J. considered a similar argument to the one proposed in *Ordon*, and stated:

> [90] The defendant points out that unlike some jurisdictions, Newfoundland and Labrador does not have legislation in place whereby family members can make this claim as a result of injuries to another family member.
>
> [91] The defendant also submits the spouses did not suffer any damages and, therefore, their claim will fail.
>
> [92] The plaintiff agrees that to date, in this jurisdiction, an award under this claim has only been given in fatal accident cases. However, the plaintiff submits that the decision in *Ordon Estate v. Grail* (1998), 166 D.L.R. (4th) 193 (S.C.C.) has fundamentally altered this area of the law by mandating non-pecuniary awards of damages, in both death cases and personal injury cases.
>
> [93] *Ordon* concerned five separate actions for personal injury and wrongful death arising out of boating accidents in inland waters. The Court was dealing with Federal Maritime law and concluded that no existing common law rule permitted either personal injury or fatal accident claims for damages for loss of guidance, care and companionship. The Court then stated at par. 100:
>
>> That said, the next question, in accordance with the framework established in *Bow Valley Husky*, *supra*, and in this case, is whether the common law rules barring recovery in both instances should be judicially reformed to allow claims for damages for loss of guidance, care and companionship (and, in the case of dependants of a person injured but not killed in a boating accident, to allow such claims to be brought by a broader class of plaintiffs than is currently permitted under *the actio per quod servitium amisit* and *actio per quod consortium amisit*). We agree with the Court of Appeal for Ontario that they should.
>
> [94] At para. 102, the Court stated:
>
>> It is unfair to deny compensation to the plaintiff dependants in these actions based solely upon an anachronistic and historically contingent understanding of the harm they may have suffered. This is true both for the fatal accident claimants and for the personal injury claimants. In this light, we are of the view that changing the definition of "damages" within the context of maritime accident claims is required to keep non-statutory maritime law in step with modern understandings of fairness and justice, as well as with the "dynamic and evolving fabric of our society"...

> [95] The plaintiff submits that based upon the pronouncements in *Ordon*, it has an arguable case that in this jurisdiction, where the legislature has not addressed derivative or relationship claims, that the common law has been reformed to allow for claims for loss of guidance, care, and companionship. At this early stage, I am unable to conclude that it is plain and obvious that this claim will fail.

[98] In *Doucette v. Eastern Regional Integrated Health Authority*, 2007 NLTD 138, Thompson J. stated:

> [36] I adopt the statements of Russell, J. of this Court in *Rideout*, *supra* at paragraphs 88-96 and in his consideration of *Ordon Estate v. Grail* (1998), 166 D.L.R. (4th) 193 (S.C.C.), I conclude that it is not plain and obvious that this claim would fail. I am satisfied that the plaintiff has established a basis in fact for this cause of action. I conclude the proposed cause of action meets the requirement of s. 5(1)(a) of the *Class Actions Act*. However, as the defence properly notes, these actions are derivative of the family members whose causes of action are being submitted for certification. The defendant acknowledges in argument that it accepts the approach taken in *Rideout* at this stage.

[99] In Klar, *Tort Law*, 4th ed. (Toronto: Carswell, 2008), at p. 273, the author notes:

> There are three areas where recovery for [economic loss consequent on personal injuries suffered by others] is permitted. First, there is the action for loss of consortium and services which may be brought by one spouse for losses caused as a result of personal injuries suffered by the other… Third, there is the action under provincial legislation which may be brought by dependents of those killed, and, in some provinces, injured, for loss of support, or for expenses incurred as a result of the death, or injury, of their relative.

[100] With respect to the loss of consortium, Klar, at page 274, notes:

> The action [for loss of consortium] was, at common law, an action brought by a husband for a wrong done to his wife which resulted in a loss of her services to him. It has a long history, and originates in a society whose approach to the relationship between husband and wife would clearly be repugnant to us today. Nevertheless, in some jurisdictions the action still survives, changed however by public policies and legislative enactments which have attempted to achieve sexual equality with respect to it. [Footnote: … It has been extended to wives by the application of the Charter of Rights and Freedoms in *Power v. Moss* (1986), 38 C.C.L.T. 31 (Nfld. T.D.)…] It also must be noted that provincial statutes now provide for a wide range of compensation to relatives of those injured or killed by the torts of others, which render the common law actions unnecessary. [Footnote: Compensation is now frequently provided, for example, for the loss of care, guidance and companionship, of relatives injured or killed in accidents. In the

> case of [*Ordon*], the Supreme Court of Canada extended the common law action for loss of consortium and services to provide for similar compensation to relatives of those injured or killed in boating accidents, which is not governed by the provincial statutes but by maritime common law…]

[101] At common law, a spouse may bring an action for loss of consortium and services. However, this head of damages has not yet been made available to other dependents, such as children. Other dependents have an arguable case that their claims for loss of care, guidance and companionship should be allowed on the basis that *Ordon* mandates an expansion of the types of situations in which such damages may be awarded. The comments in *Imperial Tobacco* regarding novel claims are relevant here. The applications judge made no palpable and overriding error in certifying the Family Class.

(c) Common Issues

[102] With respect to the existence of common issues, the applications judge concluded, at paragraph 104:

> As to the relationship between membership and the class on the asserted common issues, it is clear what the plaintiffs are stating is that because they were aboriginal children, that is, Inuit and Metis, they were literally rounded up, taken from their homes and families and forced to attend residential schools set up to accommodate them. Consequently, as a result of attending these schools they collectively allege that they suffered cultural, physical, and some cases sexual abuse, for which they want access to the courts to address these issues. While there are no guarantees as to the merits of the litigation, I find that there is a rational relationship between the class members and the common issues as framed in a fiduciary duty, or negligence...

[103] The applications judge referred to this Court's reasons in *Ring* at para. 62, which read as follows:

> Arriving at a class definition may be easier in some types of cases than in others. In **Hollick** it was said that in product liability cases the class might typically be "those who purchased the product" (para. 20). In environmental actions such as **Hollick** and this case, however, "the appropriate scope of the class is not so obvious" and "it falls to the putative representative to show that the class is defined sufficiently narrowly" (**Hollick**, para. 20). On the subject of finding the right balance in defining a class Chief Justice McLachlin said at para. 21 of **Hollick**:
>
>> … The representative need not show that <u>everyone</u> in the class shares the same interest in the resolution of the asserted common issue. There must

> be some showing, however, that the class is not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended … (Emphasis in original.)

> It is recognized, however, that it is not intended that the class be limited to those who will be ultimately successful. A purpose of class actions is to deal with all potential claims at the same time so that defendants proceed with the knowledge that "all potential claims are resolved and all potential claimants are bound by the result, including those that may fail." **Attis v. Canada (Minister of Health)** (2007), 46 C.P.C. (6th) 129, (Ont. S.C.J.) para. 53.

(Emphasis added.)

[104] The applications judge disagreed with Canada's position that the class is "unreasonably overbroad and therefore unmanageable". He was content that the class was a limited and closed set of aboriginal persons living in remote areas of Labrador and the tip of Newfoundland's Northern Peninsula. While acknowledging that there were a number of non-aboriginal children who had been attending the Schools at the periods claimed to be relevant after 1949, the applications judge was nevertheless satisfied that the claim is primarily an aboriginal based claim. He concluded that the issue could be addressed specifically as the class proceeding progressed, including by the granting of leave to amend at trial if the evolution of the proceeding and the evidence warranted such a step. He concluded, at paragraph 105, that "… the inclusion of non-aboriginal children is not a fatal flaw to the matter going forward". He further emphasized that he only needed to be satisfied that there is "some basis in fact" to accept the class as set out by the plaintiffs in this application. There was no error in making these determinations.

[105] We are satisfied that the essence of Canada's position with regard to the absence of common issues is rooted in its submission, at paras. 88-89 of its factum, which states:

> As a starting point, there is no cause of action against Canada and therefore no class capable of definition in this matter. A rational connection between the proposed class definition, the proposed common issues and the alleged causes of action cannot be proven where the common issues and causes of action themselves are incapable of proof.

> Given that the intended respondents have failed to identify a cause of action that is capable of proof against Canada, it is difficult to evaluate the requisite link between the allege cause of action, the proposed cause of common issues and the proposed class definition.

(Emphasis added.)

[106] Canada relies upon the principles for determination of a common issue set out in *Ring* at para. 80 where "an issue was said to be common 'only where its resolution is necessary to the resolution of each class members' claim': *Hollick* at para. 18. It is not common unless the issue is a substantial ingredient of each members' claim".

[107] The analysis continued in *Ring* as to whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis. Canada submits that the success for one class member must mean success for all and that determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. (See *Ring* at para. 81.)

[108] Ultimately Canada returns to the lack of sustainability of the cause of action as it affects the class definition as well as the common issues, when it makes the following submission:

> As with the proposed class definition, it is a matter of conjecture from the pleadings to isolate specific issues which might be claimed to be capable of common determination or how such a determination is proposed to proceed. That the pleadings do not reveal a cause of action with sufficient factual or legal foundation to proceed exacerbates this difficulty for a court or a party defending the claim. The causes of action pleaded are incapable of proof against Canada – as a result the proposed common issues are, by necessary extension deficient.

[109] The respondents say that Canada's position relies on the fact that an objective view of the pleadings demonstrates that a number of common issues, which are all justifiably part of the certified class action, include:

(i) The history and scope of Canada's legal responsibilities, if any, to aboriginal persons of Newfoundland and Labrador;

(ii) Canada's involvement in education in the Province;

(iii) Canada's agreements and arrangements with the Province;

(iv) The nature of any legal duties owed; and

(v) Whether those legal duties were breached.

[110] From the respondents' perspective the certified common issues affect all class members and include the presence of a duty of care; the standard of care owed; whether a breach of duty of care occurred; the degree of care and control that Canada enjoyed over the Schools; and legal issues surrounding the scope and content of Canada's duties to aboriginals of Newfoundland and Labrador following Confederation. The respondents believe that the only individual matters to be resolved would be those of causation and damages.

[111] The respondents rely on the reasoning of the Ontario Superior Court of Justice in *Sauer v. Canada (Attorney General)*, (2008), 169 A.C.W.S. (3d) 27 at para. 57:

> [A]s in *Cloud*, the resolution of the debate about the essential legal duties of which the claim is founded and whether those duties were breached, will significantly advance the claim to the point where, on my view of the case, only an assessment of damages would remain.

[112] Further support for the respondents' position is found in *Rumley*, at para. 27, where the Supreme Court affirmed the finding of the British Columbia Court of Appeal with regard to commonality of issues while applying the criteria that "all class members share an interest in the question of whether the appellant breached a duty of care, on claims of negligence and breach of fiduciary duty, no class member can prevail without showing duty and breach".

[113] Considering the above, the applications judge did not err in his determination that common issues exist in this proceeding.

(d) Preferred Procedure

[114] Canada contends that the applications judge erred in his determination that a class action is the preferable procedure as this proceeding will not achieve the goals of judicial economy, access to justice and behaviour modification. It submits that the proceeding will simply allow the respondents to bring claims that are not legally recognized against Canada.

[115] Canada says that the claims will require proof of aboriginal ancestry on an individual basis. This would negate the benefits of the class action process where discovery of class representatives should be sufficient. Canada says that the obvious necessity of individual discovery here militates against a finding of preferability.

[116] Canada also refers to an alternate procedure that was allegedly overlooked by the applications judge which involves a pursuit of an appeal under Article 12 of the *Indian Residential Schools Settlement Agreement* (IRSSA), where a settlement process is provided with regard to native residential schools in Canada. Canada has acknowledged the eligibility of attendees at various residential schools to seek compensation under that agreement does not include attendees at the five schools involved in this proceeding. However, Canada notes there is an appeal process to a judge of the Ontario Superior Court, who has the power to declare eligibility for inclusion in the IRSSA.

[117] The respondents say that Canada's submission is disingenuous on its face since Canada has not been willing to include residents of the Schools as eligible claimants under the IRSSA at the same time it suggests that an appeal should be made under the terms of the agreement. Meanwhile Canada has mounted a vigorous denial of any duties owed to any of the residents of the Schools in its submissions to this Court and the Court below.

[118] The existence of the IRSSA does not of itself establish that there is a legitimate and meaningful avenue of redress other than this litigation as it affects the class claimants in this proceeding. The respondents correctly point out that even if the class claimants had access to the IRSSA process, it would merely involve the threshold question of accessibility but would not resolve any of the common issues raised in this proceeding. They note that the Ontario Court of Appeal in *Cloud* found that a class action was still preferable notwithstanding Canada's submission that the claimants there should seek a determination of eligibility under IRSSA first.

[119] Though not specifically referring to the appeal procedure, the applications judge was satisfied that the national settlement program under the IRSSA was effectively closed to the respondents. He was satisfied that there was no other procedure more preferable than the present class action for what he described as a "small population of aboriginal people who are seeking access to justice as a single unit, all claiming identical issues to be addressed by the same legal methods open to them".

[120] Given the degree of commonality which he found, the applications judge saw no reason why the class action process should not be followed and was skeptical as to whether a test case would be preferable given that it could lead to a full civil trial, which would be time consuming and would create an enormous financial burden on the single claimant in such a process.

[121] The certification judge is owed deference on the issue of preferability. He was satisfied that "some basis in fact" existed for the assertion that a class action is the preferable procedure. There was no palpable and overriding error with respect to that finding.

(e) Whether there is an appropriate representative plaintiff

[122] The appellants provided no basis for concluding the applications judge committed a palpable and overriding error in finding the respondents are appropriate representative plaintiffs.

SUMMARY AND DISPOSITION

[123] In summary:

(a) Leave to appeal should be granted in the interests of justice.

(b) The standard of review is correctness regarding existence of a cause of action and palpable and overriding error regarding an identifiable class, presence of a common issue, the preferable procedure, and an appropriate representative plaintiff.

(c) The applications judge correctly concluded it was not plain and obvious that no cause of action is disclosed and made no palpable and overriding error in concluding some basis in fact was set out for the other certification criteria.

The appeal is dismissed with no order as to costs.

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L. D. Barry, J.A.

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M. F. Harrington, J.A.

I Concur: ______________________________
J. D. Green, C.J.N.L.