

**2024 01G CP 0064
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR,
GENERAL DIVISION**

BETWEEN:

**INNU NATION INC., GREGORY RICH,
MARIE MARTHA ANDREW, AND
MAGDALINE BENUEN**

PROPOSED REPRESENTATIVE PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA

FIRST DEFENDANT

AND:

**HIS MAJESTY THE KING IN RIGHT OF
THE PROVINCE OF NEWFOUNDLAND
AND LABRADOR**

SECOND DEFENDANT

Brought under the *Class Actions Act*, SNL 2001, c C-18.1

**BEFORE THE HONOURABLE JUSTICE BROWNE,
THE CASE MANAGEMENT JUDGE**

CERTIFICATION BRIEF OF THE SECOND DEFENDANT

Application Hearing Dates: March 17-20, 2026

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PART 1 - INTRODUCTION

1. The Plaintiffs expressly commenced this proposed class proceeding as a vehicle for Canada to reach a settlement similar to others elsewhere in the country. It bears mentioning that no province or territory participated in any such settlements; nevertheless, the Plaintiffs named Newfoundland and Labrador as well. The Province is committed to the pursuit of reconciliation with Indigenous peoples. But the history of Innu education in the Province differs radically from the experiences of other Indigenous peoples elsewhere, which cannot simply be transplanted to this jurisdiction.

2. Following the Province's entry into Confederation, the Innu were not disenfranchised under the *Indian Act*, which the Plaintiffs call a "colonial, assimilative, and harmful" statute.¹ Rather, the Innu were only recognized as Status Indians in 2002, at their own request. Nor were the Innu taught to a lesser standard in their community schools, despite general hardships in the early years of the Province. On the contrary, the Innu learned the provincial curriculum, with increasing modifications to incorporate Innu language and culture, as well as Innu teachers and teacher aides. This transition reflected the initial unavailability of qualified local personnel, as well as the fact that the written form of Innu-aimun, the language of the Innu, was still developing into the 2000s. Innu leadership accepted the need for external management of their schools, participated in that oversight, and ultimately assumed control of the schools in 2009.

3. Moreover, Innu communities never ceded responsibility for teaching their children traditional knowledge. Families took their children out on the land, or into the country, for weeks or months during the school year, often with the assistance of an outpost program funded by the Defendants. Because of this parallel pedagogy, attendance rates at the schools were exceedingly low. Far from forcing assimilation, however, children were welcomed back to school without punishment when they returned from the country. In the result, the Innu have maintained remarkable rates of fluency in Innu-aimun and familiarity with their traditional practices, even as their connections to broader society have expanded.

4. In view of these differences, the Defendants have been unable to accede to the Plaintiffs' demand that they pay compensation to every student who attended school in the Innu communities

¹ Plaintiffs' Certification Brief, at para. 60.

from 1949 to 2009. Nevertheless, the Province takes seriously its obligations to address claims by students who say they suffered abuse while attending school. To facilitate that process, the Province has recently waived the limitation period on such claims, which can stretch back to 1973, when legislation was first introduced to permit proceedings against the Crown. In the absence of a common policy that resulted in a failure of supervision, these are essentially an unknown quantity of claims in which the Defendants are said to be vicariously liable for an unknown number of assailants over a span of some six decades. These claims are best pursued in individual actions that can accommodate each claimant's idiosyncratic facts.

5. As the record discloses, members of the proposed class have been long able to commence individual actions in respect of abuse suffered at the schools, and Plaintiffs' counsel are expert at marshalling claims of this nature. Nothing except delay would be served by forcing the abuse claims into a class action to resolve superficial common issues that would leave the substantive issues to be resolved in individual proceedings.

6. The balance of the Plaintiffs' claims address an alleged injury to language and culture. These claims largely challenge the curriculum that Innu students were taught. The Plaintiffs describe regrettable individual experiences. However, there is no basis in fact to support the Plaintiffs' allegation that the Defendants pursued a consistent policy of assimilating the Innu throughout the proposed class period. On the contrary, significant efforts were made to promote Innu language and culture. But the Plaintiffs complain that these efforts were insufficient. They lament that the Innu were settled in permanent communities, that their children were taught English alongside Innu-aimun, that there were few printed materials in Innu-aimun before a written language developed, and that outsiders had a significant role in organizing the provincial curriculum.

7. It appears that the Plaintiffs are claiming a right to an ahistorical outcome in which they were instructed only in Innu-aimun, and taught their own curriculum by Innu teachers from 1949 onward. However, this vision sits uneasily with the aspirations of those Innu, like some of the Plaintiffs' affiants, who hoped to pursue opportunities outside their respective communities. Moreover, choices about what the Innu were taught in school, like the amount of funding allotted to those schools, are core policy decisions that engage a weighing of competing social priorities

that courts are ill-equipped to judge. These claims are not justiciable, they rely on rights plainly unavailable to the Innu, and in any event, they are so dated as to be statute-barred. Even if these claims were available to the Plaintiffs, Innu educational experiences varied so widely over time and across Innu communities that there are no meaningful common issues suitable for class action treatment.

8. The fact that this action has not settled is no reason to certify an entirely unworkable class proceeding in the hope that a settlement will later materialize. This action was not built to be litigated. Rather, the court should convert the Plaintiffs' abuse claims into individual actions with the prospect of common case management for those claims that name common assailants. This is by far the preferable means of resolving putative class members' only viable claims.

PART 2 - FACTS

A.) The Plaintiffs' Witnesses on this Application

9. The Plaintiffs led evidence from five Innu witnesses, each of whom attests to having attended one of the Innu Day Schools.²

10. Prote Poker is an advisor to the proposed representative plaintiff, Innu Nation Inc.,³ which is a not-for-profit corporation incorporated under the laws of Newfoundland and Labrador.⁴ He is also the former Chief of Mushuau Innu First Nation.⁵ Mr. Poker says he attended the Mushuau Innu School in Davis Inlet from 1967 or later until either 1976 or 1977.⁶ Mr. Poker was cross-examined on November 5, 2025.⁷

11. Gregory Rich is a proposed representative plaintiff. He previously served as Chief of Mushuau Innu First Nation and Grand Chief of Innu Nation.⁸ Gregory Rich's schooling experience

² For ease of reference only, the Province uses the term "Innu Day Schools" in the same manner as the Plaintiffs.

³ Affidavit #1 of Prote Poker, sworn June 27, 2024 [**"Poker Affidavit"**] at para. 1.

⁴ Poker Affidavit at para. 15.

⁵ Poker Affidavit at para. 5.

⁶ Poker Affidavit at paras. 3-4; Transcript of the Cross-Examination of Prote Poker, November 5, 2025 [**"Poker Cross-Examination"**] at p. 31, l. 24.

⁷ Poker Cross-Examination, as supplemented by the Prote Poker, Agreed Statement of Facts, January 20, 2026, Schedule A [**"Poker ASF"**].

⁸ Affidavit of Gregory Rich, sworn June 12, 2024 [**"Gregory Rich Affidavit"**] at paras. 6-7.

in Davis Inlet commenced in or around 1973-1974.⁹ The school that Mr. Rich initially attended burned down in 1977. Mr. Rich also attended the new school in Davis Inlet, which was called Nukum Mani Shan.¹⁰ He was cross-examined on November 4, 2025.¹¹

12. Marie Martha Andrew is a proposed representative plaintiff and a member of the Sheshatshiu First Nation.¹² She attended school in Sheshatshiu from about 1965 to 1975, including the Peenamin McKenzie School upon its completion in 1968.¹³ Ms. Andrew was not cross-examined.

13. Magdaline Benuen is a proposed representative plaintiff and a member of the Sheshatshiu First Nation.¹⁴ She was enrolled at Peenamin McKenzie School in Sheshatshiu from 1969 to about 1977.¹⁵ Ms. Benuen was not cross-examined.

14. George Rich is a land rights negotiator for Innu Nation Inc., and a former Chief of Mushuau Innu First Nation.¹⁶ George Rich began attending school in Davis Inlet in either 1967 or 1968.¹⁷ He was not cross-examined, and he is not proposed as a representative plaintiff.

B.) The Province's Evidence on this Application

15. In response to the Plaintiffs' application, the Province provided evidence from three witnesses.

16. Dr. Leonard Wade Locke is a Professor Emeritus of Economics at Memorial University of Newfoundland with a specialty in public finance.¹⁸ His expert opinion is that, throughout the class period, "the federal government has played an important role in funding education for the Innu of

⁹ Gregory Rich Affidavit at para. 9.

¹⁰ Gregory Rich Affidavit at paras. 11-12.

¹¹ Transcript of the Cross-Examination of Gregory Rich, November 4, 2025 [**"Rich Cross-Examination"**], as supplemented by the Gregory Rich, Agreed Statement of Facts, January 20, 2026, Schedule A [**"Rich ASF"**].

¹² Affidavit of Marie Martha Andrew, sworn July 2, 2024 [**"Andrew Affidavit"**] at paras. 1-3.

¹³ Andrew Affidavit at para. 4.

¹⁴ Affidavit of Magdaline Benuen, sworn June 24, 2024 [**"Benuen Affidavit"**] at paras. 1-3.

¹⁵ Benuen Affidavit at para. 5.

¹⁶ Affidavit of George Rich, sworn June 12, 2024 [**"George Rich Affidavit"**], at paras. 1-2, 6.

¹⁷ George Rich Affidavit at paras. 4-5.

¹⁸ Affidavit #1 of Dr. Leonard Wade Locke, sworn September 10, 2025 [**"Locke Affidavit"**], at para. 2.

Labrador. This role has continued in different forms since Newfoundland joined Confederation in 1949.”¹⁹ Dr. Locke was cross-examined on October 22, 2025.²⁰

17. Gary Hatcher is a retired employee of the Province’s Department of Education.²¹ He began as an Executive Secretary at the Department in the 1970s. He was appointed Assistant Director of School Services in 1981, Director of School Services in 1990, and Senior Director of School Services in 2000.²² Before coming to work at the Department, Mr. Hatcher was school teacher and administrator.²³ Mr. Hatcher was cross-examined on October 20, 2025.²⁴

18. Cynthia Fleet served a Principal of the Peenamin McKenzie School in Sheshatshiu for a four-month term in 1990,²⁵ and again from 1993-1995.²⁶ She then served as the Assistant Superintendent of Education for the Roman Catholic School Board of Labrador.²⁷ She remained in a series of managerial positions with the Labrador School Board through the transition to a nondenominational system in 1997.²⁸ At the Labrador School Board, she was an Assistant Director of Education (Programs) from 2001-2004, and later CEO/Director from 2004-2006.²⁹ Ms. Fleet was cross-examined on October 23, 2025.³⁰

C.) Canada’s Evidence on this Application

19. The first defendant, Canada, led evidence from two witnesses.

20. Kimberlee Ford is a Manager within the Litigation and Resolution Directorate for the Resolutions and Partnerships Sector of Crown-Indigenous Relations and Northern Affairs Canada

¹⁹ Dr. Leonard Wade Locke, *An expert opinion and report describing the various funding arrangements that were in place between the Government of Canada and Government of Newfoundland and Labrador between 1949 and 2009 in relation to the provision of education services to Innu students in Labrador*, September 6, 2025 [“**Locke Expert Opinion**”] at p. 10, Ex B to Locke Affidavit.

²⁰ Transcript of the Cross-Examination of Dr. Leonard Wade Locke, October 22, 2025 [“**Locke Cross-Examination**”].

²¹ Affidavit #1 of Gary Hatcher, sworn September 10, 2025 [“**Hatcher Affidavit**”], at para. 2.

²² Hatcher Affidavit at paras. 6-9.

²³ Hatcher Affidavit at paras. 4-5.

²⁴ Transcript of the Cross-Examination of Gary Hatcher, October 20, 2025 [“**Hatcher Cross-Examination**”].

²⁵ Affidavit #1 of Cynthia Fleet, sworn September 8, 2025 [“**Fleet Affidavit**”] at para. 8.

²⁶ Fleet Affidavit at para. 11.

²⁷ Fleet Affidavit at para. 15.

²⁸ Fleet Affidavit at paras. 16-17.

²⁹ Fleet Affidavit at paras. 20-21.

³⁰ Transcript of the Cross-Examination of Cynthia Fleet, October 23, 2025 [“**Fleet Cross-Examination**”].

(“CIRNAC”).³¹ Ms. Ford has responsibility for managing Canada’s involvement in Indigenous childhood claims, including federal day schools, boarding homes, and federal Indian hospitals.³² She was cross-examined on October 29, 2025.³³

21. Dr. Jean-Pierre Morin is the Departmental Historian with CIRNAC. His affidavit provides documentary evidence pertaining to Newfoundland and Labrador’s entrance into Confederation, the Federal-Provincial funding agreements in place until 1996, and the funding agreements in place between the Federal government and the Innu from 1997 until 2009.³⁴ Mr. Morin was cross-examined on October 29, 2025.³⁵

D.) The Innu of Labrador

22. When the Province entered Confederation, it brought its own unique history, culture, and relationship with Indigenous peoples. This relationship cannot be conflated with Canada’s historical treatment of Indigenous peoples elsewhere in the country. Under the Terms of Union, no Indigenous group, including the Innu, was considered an “Indian” within the meaning of the *Indian Act*; Indigenous people in the Province had full rights of citizenship.³⁶

23. There are two principal Innu communities in Labrador: the Sheshatshiu Innu and Mushuau Innu. Sheshatshiu is near the English-speaking community of Happy Valley-Goose Bay.³⁷ The more northern Mushuau Innu were located in Davis Inlet until they relocated to Natuashish in 2003.³⁸

24. These Innu communities had different levels of exposure to outside influences. As Ms. Fleet observed:

They – in particular, in Sheshatshiu, that community is in close proximity to the community of Happy Valley-Goose Bay. So there was a lot of exposure there to English communities and across the river at North West River. And whereas Davis Inlet, there was greater isolation. And my understanding was the Innu

³¹ Affidavit of Kimberlee Ford, sworn August 26, 2025 [“**Ford Affidavit**”] at para. 1.

³² Ford Affidavit at para. 2.

³³ Transcript of the Cross-Examination of Kimberlee Ford, October 29, 2025 [“**Ford Cross-Examination**”].

³⁴ Affidavit #1 of Jean-Pierre Morin, sworn September 4, 2025 [“**Morin Affidavit**”].

³⁵ Transcript of the Cross Examination of Jean-Pierre Morin, October 29, 2025 [“**Morin Cross-Examination**”].

³⁶ Locke Expert Opinion at p. 11, Ex B to Locke Affidavit.

³⁷ Fleet Cross-Examination at p. 38, ll. 12-22.

³⁸ Gregory Rich Affidavit at para. 4; Fleet Affidavit at para. 19.

language was really strong in that community, meaning there was very little English spoken.³⁹

25. Sheshatshiu Innu First Nation and Mushuau Innu First Nation were each formally declared as Bands under the *Indian Act* in 2002 at which point their members became eligible to apply for Indian Status. The proposed representative plaintiff, Innu Nation Inc., represents the two First Nations in some regards,⁴⁰ but is “not a band under the *Indian Act*” itself.⁴¹

26. Innu-aimun is the language of the Innu, and it is traditionally spoken, rather than written. A written form of Innu-aimun continued to be developed through the 1990s by Dr. Marguerite McKenzie, a linguistics professor at Memorial University of Newfoundland,⁴² and it was not prevalent during much of the proposed class period.⁴³ Additionally, Innu-aimun has material regional variations across Sheshatshiu, Davis Inlet/Natuashish, and Quebec.⁴⁴

27. During the proposed class period, Innu students generally spoke Innu-aimun. Ms. Fleet described her experiences in Sheshatshiu in the 1990s as follows:

But the Innu-aimun was very strong in the school. Every student in that school spoke Innu-aimun. At what level of fluency, I couldn't say. But to the point where we needed interpreters. That's why we had the teacher aides in the school, to ensure that what the children were saying in Innu-aimun could be translated and interpreted.⁴⁵

28. Today, there are an estimated 3,300 Innu people in the Province; roughly 1,200 in Natuashish and 2,200 in Sheshatshiu.⁴⁶ Both Mr. Poker and Mr. Gregory Rich estimated that there were roughly 2,000 people in the proposed class, but neither could provide a detailed explanation of this calculation.⁴⁷

³⁹ Fleet Cross-Examination at p. 38, ll. 12-22.

⁴⁰ Poker Affidavit at para. 17.

⁴¹ Poker Cross-Examination at p. 15, l. 21.

⁴² Fleet Affidavit at paras. 44 and 46.

⁴³ Fleet Affidavit at paras. 44 and 46. Ms. Fleet deposes that it was not prevalent in the 1990s: see Fleet Cross-Examination at p. 72, ll. 18-21. Mr. Rich said that he was taught only the “basics” of how to write in Innu-aimun: see Rich ASF at para. 86.

⁴⁴ Fleet Cross-Examination at p. 73, ll. 10-13; Rich Cross-Examination at p. 8, ll. 2-8.

⁴⁵ Fleet Cross-Examination at p. 34, ll. 13-20.

⁴⁶ Rich ASF at paras. 51-54.

⁴⁷ Rich ASF at paras. 136-152; Poker Cross-Examination at p. 20, ll. 5-8.

29. The Innu are noted for their success in maintaining their language. The 2016 census reported that more than 1500 people in the Province identified as Innu-aimun speakers, and 1200 reported that Innu-aimun was the language most often spoken at home.⁴⁸

E.) Shifting Management and Funding of the Innu Day Schools

i.) Education in the Province

30. As of 1950, educational policy in the Province was set by the Council of Education, which included the Minister of Education, the Deputy Minister of Education, and denominational Superintendents of Education.⁴⁹ Under the applicable legislation in 1952, the Superintendent of Education had the powers of a “Board of Education” in any jurisdiction without an existing board.⁵⁰

31. In 1960, denominational schools boards were introduced across the Province.⁵¹ There were 230 school boards in the Province, all of which were denominational.⁵² In the denominational education system, the churches had a “fairly major role.”⁵³ During this time:

School boards were mainly appointed by the churches and operated by the churches. There was no board office, no staff. And the board members, where there were some board members, were appointed by the churches.⁵⁴

32. The 1968 *Report of the Royal Commission on Education and Youth* recommended that churches be removed from control of education. Legislative changes in 1968 introduced Denominational Educational Committees/Councils to replace the Council of Education.⁵⁵ As Mr. Hatcher recalled, the removal of religious authorities:

didn’t take all that well, so the churches still maintained some control. But outside of the department, there was a separate group set up called Denominational Education Councils. And they exercised the churches’ rights...

⁴⁸ Celeste McKay and Professor Donald McRae, “Follow-up Report to the Canadian Human Rights Commission on the Human Rights of the Innu of Labrador” August 9, 2021 [“**McKay and McRae**”] at p. 70, Ex S to Affidavit of Dr. Adrian Tanner, sworn March 6, 2025 [“**Tanner Affidavit**”].

⁴⁹ *The Education (Departmental) (Amendment) Act*, 1950, S.N. 1950, No. 13, s. 5(1), Second Defendants’ Book of Authorities [“**SDBOA**”] Tab 77 and Plaintiffs’ Book of Authorities [“**PBOA**”] Tab 125.

⁵⁰ *The Education Act*, S.N. 1952, c. 101, s. 13, SDBOA Tab 78 and PBOA Tab 124.

⁵¹ *The Education Act, 1960*, S.N. 1960, No. 50, SDBOA Tab 79 and PBOA Tab 126.

⁵² Hatcher Cross-Examination at p. 7, ll. 12-17.

⁵³ Hatcher Cross-Examination at p. 6, ll. 18-20.

⁵⁴ Hatcher Cross-Examination at p. 7, l. 24 to p 8, l. 4.

⁵⁵ *The Department of Education Act*, 1968 R.S.N. 1968, No. 58, ss. 16-17, SDBOA Tab 76 and PBOA Tab 127.

At the same time, the number of school boards went from 230 down to 35. And they were organized, as well, somewhat along church lines. There was Roman Catholic school boards, Pentecostal Assembly school boards.⁵⁶

33. In the 1970s, provincial legislation was amended to create the position of a Regional Superintendent,⁵⁷ but in practice, there were no Regional Superintendents in the Province.⁵⁸

34. In 1997, the Province transitioned into a non-denominational system, which took full effect in the 1998-1997 school year.⁵⁹ This transition was accomplished through an amendment to the Terms of Union and the introduction of the provincial *Schools Act, 1997* (the “***Schools Act, 1997***”).⁶⁰ The Roman Catholic School Board of Labrador was subsequently dissolved and replaced by the Labrador School Board.⁶¹

35. School boards were the main actors in education across the Province. During the proposed class period, the *Schools Act*, and later the *Schools Act, 1997*, delegated “responsibility for the operation of schools” to the school boards, which included, for example, responsibility “for policy making related to their delivery of education”.⁶² School boards were also responsible for inspecting schools.⁶³

36. As a general matter, the provincial curriculum was designed by the Department of Education, but its delivery was the responsibility of “the school board staff and the principal of the school, and teachers”.⁶⁴ Similarly, the Department of Education was not responsible for training teachers, which was the responsibility of universities.⁶⁵

⁵⁶ Hatcher Cross-Examination, p. 9, ll. 15-24, p. 10, ll. 1-4.

⁵⁷ *The Schools Act*, R.S.N. 1970, c. 346, ss. 110-111, SDBOA Tab 82 and PBOA Tab 128.

⁵⁸ Hatcher Cross-Examination at p. 72, ll. 7-12.

⁵⁹ Fleet Affidavit at paras. 16-17.

⁶⁰ *Schools Act, 1997*, SN 1997, C S-12.2, SDBOA Tab 83.

⁶¹ Hatcher Cross-Examination at p. 18, ll. 10-11; Fleet Affidavit at paras. 15-18.

⁶² Hatcher Affidavit at para. 11.

⁶³ Hatcher Cross-Examination at p. 79, ll. 2-4.

⁶⁴ Hatcher Cross-Examination at p. 33, ll. 17-24.

⁶⁵ Hatcher Cross-Examination at p. 35, ll. 17-18.

ii.) **Innu Day Schools**

37. Education in Sheshatshiu and Old Davis Inlet was initially provided directly by the Roman Catholic Church.⁶⁶ Oblate priests arrived in Sheshatshiu in 1951, but they were not all provincially certified teachers, and no school was built until 1954.⁶⁷ The language of instruction was Innu-aimun during this time.⁶⁸

38. There is little evidence in the record as to how the Innu Day Schools were run in the early years of the class period. No witness was able to speak to the matter. The Plaintiffs allege that the priests acted as agents of the Province, but there is no evidence to support this claim.⁶⁹

39. In 1960, the Roman Catholic Church's role in administering the Innu schools was replaced by the newly formed Roman Catholic School Board for Labrador, which meant the standard Provincial curriculum and language of instruction, being English, were introduced.⁷⁰ The Sheshatshiu and Davis Inlet schools "were under the jurisdiction of the Labrador Roman Catholic School Board" until the Province moved to the non-denominational education system in 1997.⁷¹ Thereafter, these schools were the responsibility of the Labrador School Board.⁷²

40. The Labrador School Board was also responsible for the school in Natuashish, upon the Mushuau Innu's relocation from Davis Inlet in 2003.⁷³ In 2009 the Labrador School Board transferred responsibility for the schools in Sheshatshiu and Natuashish to the newly formed Innu Education Board, Mamu Tshishkutamashutau – Innu Education.⁷⁴

41. The school boards sought out representation from the Innu to inform and aid in their decision making. For example, in 1986, Mr. Poker, as Chief of Mushuau Innu First Nation, was a member of the Roman Catholic School Board of Labrador.⁷⁵ In 1991, it was agreed that a

⁶⁶ Hatcher Cross-Examination at p. 18, ll. 1-2.

⁶⁷ Brian William Vardy, *An Examination of English Language Teaching Practices in an Innu Setting from 1951 to 1982* (MEd Thesis, Memorial University of Newfoundland, 1983), chapter II ["Vardy"] at pp 11-12, Ex D to Tanner Affidavit.

⁶⁸ Vardy at p. 13, Ex D to Tanner Affidavit.

⁶⁹ Plaintiffs' Certification Brief at para. 90. See also Amended Statement of Claim at para. 19.

⁷⁰ Vardy at p. 16, Ex D to Tanner Affidavit.

⁷¹ Hatcher Cross-Examination at p. 18, ll. 1-9.

⁷² Hatcher Cross-Examination at p. 18, l. 11.

⁷³ Fleet Affidavit at para. 19.

⁷⁴ Morin Affidavit at para. 45.

⁷⁵ Ex 1 to Poker Cross-Examination at p. 5; Poker Cross-Examination at p. 57, l. 9 to p. 59, l. 11.

representative of the Roman Catholic School Board for Labrador would meet with a committee appointed by Mr. Poker and his Band Council to review and alter allocations.⁷⁶ The Innu's views of the schools were important to school staff,⁷⁷ who spoke with Innu staff and community leaders about the performance of the schools.⁷⁸ By the 1990s Peenamin McKenzie School in Sheshatshiu employed an Innu community-school liaison to facilitate communication between the Principal, school administration, and the Innu community.⁷⁹

iii.) Federal Funding for Innu Day Schools

42. Canada was responsible for funding the Innu Day Schools throughout the class period and participated in the allocation of that funding. Canada's funding was memorialized in series of arrangements and agreements between the Province and Canada from 1954 to 2010, which provided funds for the Innu, with increasing specificity and focus on education.⁸⁰ Dr. Locke identified twelve such arrangements.⁸¹

43. Canada's contribution to funding Innu education differed throughout the years,⁸² and in "the vast majority" of years, the proportion of funding was 75 per cent federal, and 25 per cent provincial.⁸³ By 1986, Canada provided 90% of the funds, with the Province contributing the remaining 10%.⁸⁴ In 1997, Canada passed an Order in Council recognizing the Innu of Labrador

⁷⁶ Ex A to Poker Cross-Examination. Gerry Butler was the Assistant Superintendent of the Roman Catholic School Board for Labrador: Fleet Affidavit at para. 10.

⁷⁷ Fleet Cross-Examination at p. 12, ll. 10-13.

⁷⁸ Fleet Cross-Examination at p. 26, ll. 4-17.

⁷⁹ Fleet Affidavit at para. 37(k).

⁸⁰ Locke Expert Opinion at pp. 11-18, Ex B to Locke Affidavit. Note that the Federal Government was funding the Innu of Labrador as early as of 1950, though less formally: Locke Expert Opinion at pp. 18-19.

⁸¹ Locke Expert Opinion at p. 19 (ten-year 1954 arrangement), p. 20 (1964 renewal of 1954 arrangement, extended in 1970 and 1976) (1981-1985 Canada-Newfoundland Native Peoples of Labrador Funding Agreement), p. 23 (1985-1986 Contribution Funding Agreement for the Benefit of Native Peoples of Labrador), p. 25 (1986-1988 Contribution Funding Agreement for Benefit of the Innu), p. 27 (1988-1989 Contribution Funding Agreement for Benefit of Innu Peoples of Labrador), p. 29 (1989-1991 Contribution Funding Agreement for Benefit of Innu Communities of Labrador), p. 32 (five-year 1991 Contribution Funding Agreement for Benefit of Innu Communities of Labrador), p. 35 (1996-1997 Contribution Funding Agreement for Benefit of Innu Communities of Labrador), p. 38 (1997-2003 Alternative Funding Arrangement Transfer Payment for Sheshatshiu Innu), p. 39 (2003-2004 Canada-Newfoundland Arrangement for Funding of Education in Davis Inlet/Natuashish), p. 41 (2004-2010 Canada-Newfoundland Arrangement for Funding of Education in Natuashish), Ex B to Locke Affidavit.

⁸² A full breakdown of relevant funding agreements from 1949 to 2010 is found in Locke Expert Opinion at pp. 18-47, Ex B to Locke Affidavit.

⁸³ Locke Expert Opinion at pp. 21 and 24, Ex B to Locke Affidavit; Locke Cross-Examination at p. 12, ll. 3-8.

⁸⁴ Locke Expert Opinion at p. 25 (regarding the Contribution Funding Agreement in place between Canada and the Province in 1986-1988), Ex B to Locke Affidavit.

as Status Indians for the purposes of providing programs and services,⁸⁵ and subsequently began entering direct funding agreements with the Sheshatshiu Innu, in which it provided 100% of the funding.⁸⁶ The “landscape of Innu schooling shifted significantly” after the Mushuau and Sheshatshiu Innu were recognized as Bands under the *Indian Act* in 2002.⁸⁷

44. After both communities received reserve status, Canada assumed full financial responsibility for programs and services.⁸⁸ With the benefit of federal funding, the Labrador Innu Comprehensive Healing Strategy began in the fall of 2000, which included initiatives between 2002 and 2009 to transition the control of education to the Innu.⁸⁹ In 2007, the Innu Education Joint Transition Authority was established to help achieve devolution of schools to the Innu communities by September 2009.⁹⁰

F.) Evolving Curriculum in Innu Day Schools

45. Over the proposed class period, the role of Innu-aimun in the classroom grew, as did the incorporation of Innu culture in the school environment. However, this progression was uneven between Sheshatshiu and Davis Inlet/Natuashish. In the result, students’ educational experiences varied widely over the proposed class period, and from one community to another.

i.) Innu Education in Davis Inlet

46. The experiences of the Plaintiffs’ affiants spoke to the rapid pace of change. Mr. Poker began attending the Mushuau Innu School in Davis Inlet beginning in or after 1967.⁹¹ He remembered that little Innu-aimun was taught in the classroom.⁹² His evidence was that the Mushuau Innu School did not teach primary school in Innu-aimun, nor was an Innu-aimun class offered in upper years.⁹³ Mr. Poker had a limited recollection of staff who spoke Innu-aimun. He remembered some instruction in Innu-aimun, including a priest who would come to the school and

⁸⁵ Ex 19 to Morin Affidavit.

⁸⁶ Locke Expert Opinion at pp. 14-15, Ex B to Locke Affidavit; Ex 20 to Morin Affidavit. Direct funding agreements in Natuashish were entered later in 2003: Locke Expert Opinion at pp. 38-39, Ex B to Locke Affidavit.

⁸⁷ Fleet Affidavit at para. 57.

⁸⁸ Morin Affidavit at para. 34.

⁸⁹ Morin Affidavit at paras. 36, 38.

⁹⁰ Morin Affidavit at para. 44.

⁹¹ Poker Affidavit at paras. 3-4; Poker Cross-Examination at p. 31, l. 24.

⁹² See Poker Cross-Examination at pp. 44-46.

⁹³ Poker Cross-Examination at p. 39, ll. 13-20.

speak about the Bible in Innu-aimun,⁹⁴ and a nun who “was able to speak some of the Innu language.”⁹⁵

47. Mr. Poker also recalled being taught basic writing skills in Innu-aimun:

A: No. There was some language – I don’t know when it started, that we were able to write some of the language. There was some language that was taught in the school [...]

Q: Tell me about that. How is it taught? Was it a specific class?

A: Yeah. There was – I think the priest comes in. The priest comes in at times, and they – he will be able to tell us the Innu language. There was some languages there that – I don’t know what they called – they called I, A, E, U – I, A, E, O. So we were able to learn some of those, we can write our language at times. There was some – we were taught some Innu language by the priest. He wasn’t really fluent, but he was able to teach us a reasonable – well, how to write it.

Q: I see. Was the priest teaching you an Innu-aimun alphabet, so you could write Innu-aimun?

A: Yeah. Um-hm.⁹⁶

48. Mushuau Innu School did not have Innu teachers or teacher aides during Mr. Poker’s time.⁹⁷ Nor did Mushuau Innu School have an Innu curriculum centre,⁹⁸ or assign classes based on age to accommodate students who fell behind.⁹⁹ Mr. Poker did not recall an Innu tent being used for cultural learning.¹⁰⁰ Nor could he remember books, booklets, or pamphlets in Innu-aimun.¹⁰¹

49. Mr. Gregory Rich, by contrast, began attending school in Davis Inlet around 1973 or 1974.¹⁰² He remembered that there were Innu teachers by that time,¹⁰³ and four or five Innu teaching aides.¹⁰⁴ These Innu staff referred to students by their Innu names.¹⁰⁵ He also remembered some Innu-aimun instruction from kindergarten through grade 8.¹⁰⁶ The school brought Mr. Rich

⁹⁴ Poker Cross-Examination at p. 38, ll. 3-5.

⁹⁵ Poker Cross-Examination at p. 44, ll. 15-19.

⁹⁶ Poker Cross-Examination at p. 39, l. 20 to p. 40, l. 17.

⁹⁷ Poker Cross-Examination at p. 44, ll. 6-8.

⁹⁸ Poker Cross-Examination at p. 44, ll. 20-23.

⁹⁹ Poker Cross-Examination at p. 44, l. 24 to p. 45, l. 4.

¹⁰⁰ Poker Cross-Examination at p. 45, ll. 19-22.

¹⁰¹ Poker Cross-Examination at p. 46, ll. 13-15.

¹⁰² Gregory Rich Affidavit at para. 9.

¹⁰³ Rich ASF at paras. 81, 90-96.

¹⁰⁴ Rich ASF at para. 91.

¹⁰⁵ Rich ASF at para. 116.

¹⁰⁶ Rich ASF at paras. 81-90.

to a tent to learn the importance of the Innu way of life from an Elder.¹⁰⁷ Mr. Rich remembered that a poster of Innu Elder Mary Jane Pastine, the namesake of Davis Inlet's new school, hung in main entrance.¹⁰⁸

ii.) Innu Education in Sheshatshiu

50. The experience in Sheshatshiu also changed over time, and in ways quite separate from Davis Inlet. In particular, the manner in which Innu-aimun was taught in the two communities "was definitely different".¹⁰⁹

51. Ms. Andrew reports that Peenamin McKenzie School started teaching some basic Innu language in just one class in 1975.¹¹⁰ With reference to the same school in the 1990s, by contrast, Ms. Fleet deposed that:

[O]ur aim at the school was to have the children who come into the school speaking their own language, coming into a very, I will call it a foreign structure and to keep their learning within Innu-aimun. And that's why we had – it's previous to when I went there, because it was set, that the teachers from kindergarten to grade 3 were the Innu teachers. And as they moved into grade 4, we introduced English that was accompanied with a continuation of core Innu.

Anyone who's been around a school that has core French or French immersion, you'll understand what I mean. And we had a core Innu teacher, Mani Katmin, who was involved from grade 4 to – through serious high school with trying to sustain the knowledge of the Innu, their language, and their culture.¹¹¹

52. Between 1993 and 1995, Ms. Fleet and her staff made the following efforts to incorporate Innu language and culture into the school environment in Peenamin McKenzie School:¹¹²

- a. Community Elders came to speak with students about Innu culture;
- b. Displays incorporated posters and art featuring Innu-aimun and Innu cultural imagery;
- c. The gymnasium's exterior was painted with Innu imagery;

¹⁰⁷ Rich ASF at paras. 106-109.

¹⁰⁸ Rich ASF at paras. 110-113.

¹⁰⁹ Fleet Cross-Examination at p. 104, ll. 21-23.

¹¹⁰ Andrew Affidavit at para. 10.

¹¹¹ Fleet Cross-Examination at p. 28, l. 14 to p. 29, l. 7.

¹¹² Fleet Affidavit at paras. 12 and 37.

- d. A large Innu tent was erected outside the school to create a cultural learning place, which a Core Innu teacher would use as a primary classroom for students;
- e. Students were encouraged to use and be proud of their own language and culture, and staff used Innu names for students;
- f. Students were taught exclusively in Innu-aimun from kindergarten through grade 3, and Innu language and history continued to be taught in grade 4 and onward;
- g. The school corresponded with parents in both Innu-aimun and English;
- h. Where possible, hallway and classroom displays used both Innu-aimun and English;
- i. Band Council members were involved in teacher hiring decisions; and
- j. Innu school liaison officers facilitated communication between the school and the community and worked with parents to support school attendance.¹¹³

53. Ms. Fleet and her staff at Peenamin McKenzie School made additional efforts to improve the quality of education by securing grants to train staff in teaching Innu-aimun.¹¹⁴ Peenamin McKenzie also had Innu teacher aides, who helped translate between Innu-aimun-speaking students and English-speaking teachers.¹¹⁵ The funding for these Innu teacher aides went back to the 1970s, and was representative of what Ms. Fleet described as “an effort to try to get to a goal at the end of the child’s education that would give us the graduate that the Innu people wanted.”¹¹⁶

54. Ms. Fleet deposed that the efforts to provide written materials in Innu-aimun predated her involvement at Peenamin McKenzie School:

I believe the work was started. Some of the little booklets I seem to remember seeing had the words. I was very interested in how they taught children to read their language.¹¹⁷

55. Francesca Snow was one of the first Innu teachers,¹¹⁸ and she had been operating a curriculum centre at Peenamin McKenzie School since 1984.¹¹⁹ The curriculum centre was to

¹¹³ Fleet Cross-Examination at p. 177, ll. 14-15, p. 190, ll. 20-23, and p. 191, l. 14 to p.193, l. 6.

¹¹⁴ Fleet Affidavit at para. 12.

¹¹⁵ Fleet Cross-Examination at p. 34, ll. 13-20.

¹¹⁶ Fleet Cross-Examination at p. 50, ll. 13-19.

¹¹⁷ Fleet Cross-Examination at p. 71, ll. 12-18.

¹¹⁸ Hatcher Cross-Examination at p. 24, ll. 18-22.

¹¹⁹ Fleet Affidavit at paras. 50-51.

“develop curriculum materials in Innu-aimun, and materials that were culturally relevant to Innu students.”¹²⁰ Where there were no Innu-aimun language materials available in primary grades at Peenamin McKenzie, Innu teachers “were able to adapt what they had seen in the English curriculum and adapt it where it was appropriate into Innu-aimun.”¹²¹

iii.) The Province’s Evolving Efforts to bring Innu Culture into Schools

56. The changes observed in the Innu Day Schools were reflective of a broader effort to train Innu teachers and teacher aides. This initiative was driven in part by the 1974 Royal Commission Report on Labrador, which criticized the lack of Innu-aimun in the Innu Day Schools, as well as the failure to teach the traditional skills of northern people. The Report made a variety of recommendations to remedy those shortcomings.¹²²

57. The Report recommended that the Province provide for the employment of local, bilingual teacher aides or interpreters in the Innu Day Schools, and that Innu-aimun courses be offered as a language elective for credit.¹²³ The Province followed these recommendations promptly.¹²⁴ As Mr. Gregory Rich attested, Innu staff had already been deployed in the schools by the mid-1970s.¹²⁵

58. Mr. Hatcher deposed that the Department of Education made “significant efforts” “to promote Innu culture and language at the schools”.¹²⁶ In addition to funding Innu teacher aides from the 1970s,¹²⁷ other efforts began in the 1980s and 1990s.¹²⁸ Mr. Hatcher described one of these efforts, in which the Department of Education allocated funding to provide additional teachers and teacher aides for Indigenous students:

Now, the number of teachers each board was to receive or be paid for was determined by a formula called allocation formula. And there were various components to that formula, so many principal units, so many guidance counsellor units, so many classroom teacher units. And in the case of Labrador

¹²⁰ Fleet Affidavit at para. 53.

¹²¹ Fleet Cross-Examination at p. 110, ll. 20-22.

¹²² Plaintiffs’ Certification Brief at paras. 128-129.

¹²³ Certification Brief at para. 129, citing *Report of the Royal Commission on Labrador*, vol 1 (February 1974) (Donald Snowden) “Education” (131–234) [“**Royal Commission on Labrador**”] at pp. 175-177, Ex C to Tanner Affidavit.

¹²⁴ Fleet Cross-Examination at p. 50, ll. 13-19.

¹²⁵ Rich ASF at paras. 82-97.

¹²⁶ Hatcher Affidavit at para. 12.

¹²⁷ Fleet Cross-Examination at p. 34, ll. 13-20.

¹²⁸ Hatcher Cross-Examination at p. 20, ll. 1-13.

and Labrador-owned Catholic school board and the Integrated board, there were additional units called Native teacher units.

So in the case of Sheshatshiu and in Davis Inlet, the school board would have been told, in addition to all the other units you get, you can have X number of units, which we've called Native teacher units. Now, they weren't Native teachers. They were teachers -- teacher units that were given to work in Native schools over and above what the same school would have gotten if it was a school -- non-native school. So these were extra efforts that were being made to improve education in those schools.

The Department of Education also paid for teacher aides or teacher assistants. These would have been generally local people who were familiar with the language and would work in the classrooms with the non-speaking Innu-aimun teachers to help them and help the children. So that -- these were direct efforts by the department to assist in the education in those schools.¹²⁹

59. Additionally, in 1978 the Province's Department of Education and Memorial University began the Teacher Education Program for Labrador ("TEPL") program.¹³⁰ The Province supported the TEPL program, which was funded by Canada as early as 1986.¹³¹ The TEPL was intended to provide Innu people with a teaching certificate:¹³²

And the TEPL program was designed to teach programs for usually local people in the Native communities and would lead them towards getting a teaching certificate. And this was done over time. The courses were offered in the summer. At some points -- sometimes they were offered -- some years, they were offered in the evenings. They were specific to Innu. And separate ones were specific to Inuit. The TEPL program would lead them to get a teaching certificate. In which case, they could be hired as a teacher, same as any other certified teacher.¹³³

60. As the Department of Education's representative, Mr. Hatcher sat on the TEPL advisory committee, along with representatives from the school board, the Faculty of Education at Memorial University, the TEPL students, and representatives from the Innu Band Councils.¹³⁴ Francesca

¹²⁹ Hatcher Cross-Examination at p. 20, l. 18 to p. 22, l. 16. Mr. Hatcher estimated these Native teacher units were introduced between 1981 and 1990: p. 28, ll. 3-7 [emphasis added]. See also Hatcher Cross-Examination at p. 26, ll. 8-12: these Native teacher units were available in addition to any other benefits for which the schools were eligible.

¹³⁰ Fleet Affidavit at para. 51.

¹³¹ Locke Expert Opinion at p. 26, Ex B to Locke Affidavit.

¹³² Hatcher Cross-Examination at p. 22, l. 21 to p. 23, l. 12; Fleet Affidavit at para. 51.

¹³³ Hatcher Cross-Examination at p. 22, l. 21 to p. 23, l. 11.

¹³⁴ Hatcher Cross-Examination at p. 23, l. 23 to p. 24, l. 8, and p. 30, ll. 22-23.

Snow, the first TEPL graduate, began teaching in Sheshatshiu in the 1980s,¹³⁵ and became the first Innu Principal of Peenamin McKenzie School in 1999.¹³⁶

61. The TEPL was a long-term investment in Innu education. The Innu Day Schools faced significant challenges attracting qualified teachers fluent in Innu-aimun, and it took a generation to train Innu students to teach in their own communities. This challenge persists even after devolution in 2009. The Innu continue to encounter difficulties in hiring qualified teaching staff who are fluent in Innu-aimun. To the present day, neither Sheshatshiu nor Natuashish is able to offer Innu-aimun as a language of instruction in their own schools.¹³⁷

iv.) Increasing Role for Innu Decision-Making in Education

62. Over the proposed class period, the participation of the Innu community became increasingly important. The Innu had direct involvement in the management of the school board and the allocation of funding. Additionally, school leadership turned to the community for hiring decisions and for guidance on the educational program.

63. By the 1980s, Innu leaders were being appointed as members of the Roman Catholic School Board for Labrador North. As described above, Mr. Poker held this role himself.¹³⁸ At one budget meeting for Davis Inlet in which Mr. Poker participated, the Roman Catholic School Board specifically allocated money to Innu language and salaries for Innu teacher aides.¹³⁹

64. Innu leaders were also appointed to the Management Committee for the Contribution Agreement, which allocated federal and provincial funding for the Innu.¹⁴⁰ Mr. Poker served on this committee in his capacity as Chief of the Mushuau Innu First Nation. At one meeting in 1992 he is recorded as having moved to increase the education budget in Davis Inlet by 3% for the coming year.¹⁴¹ Mr. Poker's motion carried, despite opposition from the Province's representative,

¹³⁵ Fleet Affidavit at para. 50.

¹³⁶ Colin Samson, "Teaching Lies: The Innu Experience of Schooling" (2000) 16 *London Journal of Canadian Studies* 89 ["**Samson**"] at pp. 105-106, Ex P to Tanner Affidavit.

¹³⁷ McKay and McRae at p. 68, Ex S to Tanner Affidavit.

¹³⁸ Poker Cross-Examination at p. 56, ll. 18-24.

¹³⁹ Ex A to Poker Cross-Examination.

¹⁴⁰ Ex 2 to Poker Cross-Examination at p. 1.

¹⁴¹ Poker ASF at paras. 31-35.

Mr. Hatcher, who noted that the request for increased funding “was from the community and was against the advice of the Department of Education.”¹⁴²

65. School officials also placed great importance on the views of the Innu communities. Ms. Fleet spoke to the central role of community input in her work as Principal of Peenamin McKenzie School:

Q: So it's fair to say that, when you were working with the Innu, you valued the views of the Innu community?

A: One hundred percent.

[...]

Q: I mean, how the Innu viewed the schools, that was an important consideration in the work that you conducted at the schools.

A: Yes.¹⁴³

66. Even British academic Colin Samson, an activist who once likened the Innu to “Canada’s Tibet,” acknowledged the progress that had been made by the time of his 2000 study:

Cynthia Fleet’s promise to make the school ‘more Innu’ is coming along through changes of personnel as well as by simulation. The persons who control it, however, the Labrador School Board, are still non-Innu, but there are moves to make the school Band Council-controlled through the government process of devolution.¹⁴⁴

67. Devolution of the schools to Innu management was an important goal during the latter part of the proposed class period. However, that effort required capacity building and it necessarily took time. In 1986, as Chief of the Mushuau Innu First Nation, Mr. Poker candidly told the Roman Catholic School Board for Labrador North that his Band Council did not feel ready to administer their own school. As the meeting minutes recorded, the Band Council declined the offer of assistance in seeking self-determination:

Mr. Poker also informed the Committee Members that the Innu Band Council had received the Board’s offer of assistance in their preparation of a self-determination brief to the Government. Mr. Poker told those present that the Innu Band Council of Davis Inlet did not feel that they were ready to administer their own school at this point in time.¹⁴⁵

¹⁴² Ex 2 to Poker Cross-Examination at p. 3.

¹⁴³ Fleet Cross-Examination at p. 12, ll. 2-13.

¹⁴⁴ Samson at pp. 105-106, Ex P to Tanner Affidavit.

¹⁴⁵ Ex 1 to Poker Cross-Examination at p. 5 [emphasis added].

68. In 1997, again as Chief, Mr. Poker joined Chief Paul Rich of the Sheshatshiu Innu Band Council in writing to the Minister of Labrador and Aboriginal Affairs, expressing their communities' agreement that the Labrador School Board would continue to be responsible for their children's education:

we are prepared to enter appropriate agreements to continue with the current arrangement with the Labrador School Board to provide Innu specific educational programs in the schools in our community until the end of the current school year. [...] Your cooperation in advising the School Board of our intentions would be appreciated. We will meet with them in early April 1997 to conclude an agreement with respect to these services when our funding agreements with Canada are in place.¹⁴⁶

69. Mr. Poker confirmed that Innu leadership agreed that the Labrador School Board's role would continue thereafter:

Q. ...We can agree that your Band Council did, ultimately agree to continue with the board providing Innu-specific educational programs of the schools in your community, right?

A. Yes. Yeah.¹⁴⁷

70. Senior administrators like Ms. Fleet candidly acknowledged that, as outsiders, their efforts to bring Innu language and culture into the schools was "not enough."¹⁴⁸ Ms. Fleet confirmed that devolution to Innu control was the ultimate goal, and one to which she and her colleagues had been working for years.¹⁴⁹ These efforts, together with significant federal funding, culminated in the devolution of the Innu Day Schools to a new Innu school board, Mamu Tshishkutamashutau – Innu Education in 2009.¹⁵⁰ Although many of the same challenges continued under the new leadership, the Plaintiffs propose that this transfer mark the end of the class period.

G.) Important Community-Based Cultural Learning

71. Throughout the class period, Innu communities maintained an important role in teaching their traditional way of life to the next generation. Taking children out on the land or into the

¹⁴⁶ Ex 3 to Poker Cross-Examination [emphasis added].

¹⁴⁷ Poker Cross-Examination at p. 60, l. 22 to p. 61, l. 2.

¹⁴⁸ Fleet Cross-Examination at p. 208, l. 2.

¹⁴⁹ Fleet Cross-Examination at p. 50, l. 21 to p. 52, l. 2. See also Fleet Affidavit at para. 42.

¹⁵⁰ McKay and McRae at p. 66, Ex S to Tanner Affidavit.

country took precedence over attendance at the Innu Day Schools, and children would regularly be absent for weeks or months of the school year.¹⁵¹ Children learned valuable skills by living on the land and connected with their cultural traditions. Rather than discourage the practice of going into the country, the defendants funded programs to facilitate excursions.

i.) Innu Cultural Learning on the Land

72. Mr. Poker deposed that community Elders and family members taught him “Innu practices, history, and traditions”.¹⁵² On trips to the country, his father taught him about Innu cultural life:

Q: And he taught you to hunt in the country, right?

A: Um-hm. Yes. Not only that. He'd tell us stories about our culture, our spirituality, and stuff like that. That's how I learned by being in the country. Those things, we learned by being on the land and doing things. By doing, we learned how...¹⁵³

73. Mr. Poker explained that the abandonment of a semi-nomadic lifestyle and settlement in Davis Inlet had reduced Innu participation in land-based cultural activities.¹⁵⁴ As a child, however, he went out into the country “more than once” a year,¹⁵⁵ roughly every “three to four months”,¹⁵⁶ which resulted in “missed school”.¹⁵⁷ Mr. Poker confirmed that his parents made the decision to take him out on the land.¹⁵⁸

74. Mr. Poker compared the lessons learned in the country with those learned in school as “two worlds in front of us,” both of which were important to achieving his dream of being a store manager:

... [W]hen I'm out in the country, I'm learning about my culture. I was able to learn. And I come again and try to learn. I got two worlds in front of us. We want to learn, so we can – like, one of the things I talk about – I wanted to be – I wanted to be a store manager in the store. That's why I wanted to be in school. That's one of my dreams to be able to learn and manage a store.¹⁵⁹

¹⁵¹ Rich Cross-Examination at p. 19, ll. 9-12.

¹⁵² Poker Affidavit at para. 9.

¹⁵³ Poker Cross-Examination at p. 52, l. 21 to p. 53, l. 3 [emphasis added].

¹⁵⁴ Poker Affidavit at para. 3.

¹⁵⁵ Poker Cross-Examination at p. 51, ll. 7-12.

¹⁵⁶ Poker Cross-Examination at p. 52, l. 15.

¹⁵⁷ Poker Cross-Examination at p. 52, l. 9.

¹⁵⁸ Poker Cross-Examination at p. 53, ll. 4-6.

¹⁵⁹ Poker Cross-Examination at p. 50, l. 17 to p. 51, l. 2.

75. Mr. Gregory Rich likewise regularly traveled to the country with his family.¹⁶⁰ They would go out for a month or two at a time, often with his classmates and their families.¹⁶¹ His father taught him how to make things, like snowshoes, sleds, and knives, and taught him hunting.¹⁶² On the land, Mr. Rich learned traditional laws, which are important aspects of his culture.¹⁶³

76. To support the Innu's preservation of cultural practices, the Province and Canada jointly funded the Outpost Program,¹⁶⁴ which provided transportation into remote parts of the country. This included funding for airlifts to reach distant hunting grounds, as well as ground transportation for more proximate circuits.¹⁶⁵ In this way, the Defendants contributed directly to the preservation of a traditional Innu way of life.

ii.) Low Attendance at Innu Day Schools

77. In part because Innu children were frequently on the land, attendance at the Innu Day Schools was often exceedingly low. Ms. Fleet saw these challenges firsthand.¹⁶⁶ Attendance rates were lower in Sheshatshiu than in Davis Inlet.¹⁶⁷ In general, however, "attendance was sporadic at best."¹⁶⁸ Ms. Fleet observed that there was seasonality in the attendance rates, and numbers would dwindle when the community went out on the land.¹⁶⁹ Ms. Fleet was adamant that the Innu Day Schools never discouraged students from going into the country, nor were they penalized upon their return:

Q: Did you discourage or penalize children for going to the country or going out on the land?

A: Absolutely never. Most people envied them.

[...]

A: It was wonderful to go out in the labrador country and hunt and fish and get caribou. It was almost celebratory in the community when you'd see them come back and see the caribou brought in as, you know, food for the winter.¹⁷⁰

¹⁶⁰ Rich ASF at paras. 57 and 69.

¹⁶¹ Rich ASF at paras. 58-62.

¹⁶² Rich ASF at para. 66.

¹⁶³ Rich ASF at para. 68.

¹⁶⁴ Poker Cross-Examination at p. 53, ll. 7-21; Rich Cross-Examination at p. 12, l. 21 to p. 13, l. 20; Locke Expert Opinion at p. 27, Ex B to Locke Affidavit.

¹⁶⁵ Poker Cross-Examination at p. 53, l. 10-20; Poker ASF at para. 38.

¹⁶⁶ Fleet Affidavit at paras. 23-24.

¹⁶⁷ Fleet Affidavit at para. 28.

¹⁶⁸ Fleet Affidavit at para. 24.

¹⁶⁹ Fleet Affidavit at para. 26.

¹⁷⁰ Fleet Cross-Examination at p. 201, l. 16 to p. 202, l. 1.

78. Ms. Fleet deposed that the school's "approach was to ensure that students who went to the country with their families were welcomed back and not treated differently or penalized because they had been away."¹⁷¹ In 1993, Peenamin McKenzie School implemented a system that grouped students by age rather than grade level in grades 4 through 9. This approach recognized that some students fell behind on their studies during long absences, and it encouraged older children to return to school without fear of being separated from their cohort.¹⁷²

79. In Davis Inlet during the 1970s, Mr. Poker confirmed that there was no punishment for missing school to be in the country:

Q: Okay. So you've described how you would go into the country during the school year. You'd come back to school. When you got back to school, were you punished for having been absent?

A: We weren't punished, no. But we would – we missed out a lot of the school.¹⁷³

80. Mr. Gregory Rich likewise deposed that there was no punishment for being away from school; he just had to catch up on the work he had missed.¹⁷⁴

81. Even when he was not in the country, Mr. Poker, like many Innu students, did not attend school regularly.¹⁷⁵ When Mr. Poker dropped out of school in grade 9, no one forced him to go back.¹⁷⁶ Mr. Poker's father dropped out of school after only one day, never to return.¹⁷⁷

H.) No Evidence of a Policy of Assimilation

82. Against this backdrop of encouraging traditional practices, there is no evidence in the record of any widespread or prolonged policy of assimilation. The Plaintiffs' descriptions of particular instances in which they were made to feel shame about their Innu identity are unfortunate. However, Mr. Hatcher affirmed that he "was aware of no initiative to discourage the use of Innu-aimun or encourage the substitution of English," nor "any initiative to undermine the promotion of Innu culture" in the Innu Day Schools.¹⁷⁸

¹⁷¹ Fleet Affidavit at para. 36.

¹⁷² Fleet Affidavit at paras. 32-33.

¹⁷³ Poker Cross-Examination at p. 54, ll. 18-23.

¹⁷⁴ Rich ASF at para. 75.

¹⁷⁵ Poker Cross-Examination at p. 42, l. 20 to p. 43, l. 1.

¹⁷⁶ Poker Cross-Examination at p. 48, ll. 15-17.

¹⁷⁷ Poker Cross-Examination at p. 4, ll. 1-10.

¹⁷⁸ Hatcher Affidavit at para. 10. See also Hatcher Cross-Examination at p. 57, ll. 6-11 and p. 58, ll. 1-5.

83. Similarly, Ms. Fleet “never saw any initiative to discourage the use of Innu-aimun or encourage the substitution of English,” and, rather, incorporating “Innu-aimun was required by the School Board and of a high priority.”¹⁷⁹ She describes the Peenamin McKenzie School’s goal as follows:

So the challenge in Sheshatshiu was, in all aspects of life, to secure the language and the culture, including in school, and still try to introduce English as a second language to the level where students could have another language they could use. English was an obvious one where we were. And to be able to go on and study in universities, be they Aboriginal – you know, universities that had Aboriginal content, as we saw a lot of them happening out west or wherever. But to give them what we want to give all of our children, choices in life.¹⁸⁰

84. The Plaintiffs have not identified any particular policy of assimilation and appear to draw principally on the troubling experience of earlier eras in Indian Residential Schools elsewhere in the country. Nor have the Plaintiffs engaged with the curriculum in the Innu Day Schools to substantiate their allegations of an underlying goal of assimilation.

I.) Abuse Allegations Were Taken Seriously and Properly Investigated

85. At the Departmental level, and at the school level, allegations of abuse by staff were taken very seriously.¹⁸¹ School staff would report a reasonable suspicion of teacher misconduct involving a student.¹⁸² Under the applicable legislation, the Director of Child Welfare was the proper recipient for credible complaints, and the police and social workers would investigate.¹⁸³ The school board could also investigate and suspend or terminate a teacher’s employment where misconduct had occurred.¹⁸⁴

86. Supervision and reporting practices changed over the proposed class period as the danger of abuse in child-serving institutions became better understood. Ms. Fleet explained that in her experience, meetings with a complainant would include an “Innu counsellor aide” to encourage

¹⁷⁹ Fleet Affidavit at para. 40. See also Fleet Cross-Examination at p. 84, ll. 19-24.

¹⁸⁰ Fleet Cross-Examination at p. 39, ll. 12-23.

¹⁸¹ Hatcher Affidavit at para. 13; Fleet Affidavit at para. 59.

¹⁸² Fleet Affidavit at para. 60.

¹⁸³ Hatcher Affidavit at para. 14.

¹⁸⁴ Fleet Affidavit at para. 61.

disclosure,¹⁸⁵ and “to ensure that the communication was correct.”¹⁸⁶ Dr. Locke found evidence that the position of Innu counsellor aide was funded in Sheshatshiu by 1990.¹⁸⁷

87. The record contains differing accounts of corporal punishment, which should, where appropriate, be distinguished from allegations of assault. Mr. Poker and Ms. Andrew recall a strap or ruler used to punish students.¹⁸⁸ However, Mr. Gregory Rich had never seen a strap,¹⁸⁹ and did not expect to witness or experience physical discipline; he “never thought” teachers could use physical discipline.¹⁹⁰

88. Societal attitudes toward corporal punishment in a school setting have changed significantly over the proposed class period. Generally speaking, teachers were statutorily authorized to use corporal punishment until 1996.¹⁹¹ For much of the proposed class period, the use of a strap or ruler to maintain discipline was lawful and commonplace in schools throughout the Province. However, changing norms require a careful analysis of each plaintiff’s abuse claim to understand the necessary social and factual context.

J.) Abuse Allegations Have Been Litigated in Individual Actions

89. Members of the proposed class have previously sought damages in individual actions for alleged abuse in the Innu Day Schools. Mr. Poker was one of several plaintiffs, including Mr. George Rich, who commenced individual actions against the Defendants and others in or around 2000.¹⁹² The proposed class action replicates the claims advanced in those earlier individual actions, including the alleged failure to provide culturally relevant supports.¹⁹³

¹⁸⁵ Fleet Cross-Examination at p. 129, ll. 9-11.

¹⁸⁶ Fleet Cross-Examination at p. 130, ll. 15-24.

¹⁸⁷ Locke Expert Opinion at p. 32, Ex B to Locke Affidavit.

¹⁸⁸ Poker Cross-Examination at p. 36, ll. 13-16; Andrew Affidavit at paras. 7-8.

¹⁸⁹ Rich ASF at para. 132.

¹⁹⁰ Rich ASF at para. 135.

¹⁹¹ *Schools Act*, [R.S.N.](#) 1990, C. s-12, s. 79, SDBOA Tab 84; *contra Schools Act*, 1996, [R.S.N.](#) 1996, C. s-12-1, s. 36, SDBOA Tab 85.

¹⁹² Poker ASF at paras. 52-59, and Schedule C to Poker ASF at paras. 5-18.

¹⁹³ Schedule C to Poker ASF at paras. 14-15.

PART 3 - ISSUES

90. The only issue before this Honourable Court is whether the Plaintiffs' action should be certified as a class proceeding pursuant to s. 5(1) of the *Class Actions Act*, SNL 2001, c C-18.1 (*Class Actions Act*). Specifically, this Court must determine whether there is a reasonable cause of action, and, if so, whether the plaintiffs shown some basis in fact for the remaining certification criteria. This issue should be determined in the negative for the reasons that follow.

PART 4 - LAW & ANALYSIS**A.) Certification Criteria**

91. The Court must certify an action as a class proceeding where the following five part test is met:

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.¹⁹⁴

92. The proposed representative plaintiffs “must show some basis in fact for each of the certification requirements set out in s. 5 of *Act*, other than the requirement that the pleadings disclose a cause of action”.¹⁹⁵

93. Section 5(1)(a) of the *Act* requires that the pleadings disclose a reasonable cause of action. The test for whether the pleadings disclose a reasonable cause of action is the same as applied on

¹⁹⁴ *Class Actions Act*, [SNL 2001](#), c C-18.1, [s. 5\(1\)](#), SDBOA Tab 75 and PBOA Tab 137.

¹⁹⁵ *Hollick v Toronto (City)*, [2001 SCC 68](#) at paras. [24-25](#) [*Hollick*], SDBOA Tab 34.

an application under Rule 14.24(1)(a) to strike pleadings for want of a cause of action.¹⁹⁶ A cause of action is a “factual situation that entitles a person to a *legal* remedy.”¹⁹⁷

94. While the novelty of a claim is not a reason to refuse certification, if a novel claim is doomed to fail, then it should not be certified merely because it is novel.¹⁹⁸ The Court should consider “whether the viability of the claims presented can be determined on the basis of the facts pleaded and the resolution of questions of law engaged by those facts”.¹⁹⁹

95. The Province accepts that the Plaintiffs have stated an objective definition of a class of two or more persons in accordance with s. 5(1)(b). As discussed below, however, this definition is not rationally connected to any articulable common issues.

96. There are two-steps to establishing commonality under s. 5(1)(c): the plaintiff must lead some evidence for both the *existence* and *commonality* of each of the proposed common issues.²⁰⁰ An issue is common “only where its resolution is necessary to the resolution of each class member’s claim”, and while it is not essential that all class members are identically situated, or that common issues predominate over non-common issues, “the class members’ claims must share a substantial common ingredient to justify a class action.”²⁰¹

97. To determine whether a class action is the preferable procedure under s. 5(1)(d), the *Class Actions Act* prescribes factors to consider:

5 (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

¹⁹⁶ *Koehler v. Newfoundland and Labrador*, [2021 NLSC 95](#) at para. [31](#) [*Koehler*], SDBOA Tab 42, citing *Dow Chemical Company v. Ring, Sr.*, [2010 NLCA 20](#), SDBOA Tab 24; *Thorne v. College of the North Atlantic*, [2018 NLCA 33](#) at para. [58](#), SDBOA Tab 67.

¹⁹⁷ *Crotty v. Aviva General Insurance Company*, [2025 NLCA 39](#) at para. [25](#) [*Crotty NLCA*], SDBOA Tab 23.

¹⁹⁸ *Koehler* at para. [32](#), SDBOA Tab 42.

¹⁹⁹ *Koehler* at para. [32](#), SDBOA Tab 42, citing *Atlantic Lottery Corporation Inc. v. Babstock*, [2020 SCC 19](#) at paras. [18-19](#), SDBOA Tab 5; *Newfoundland and Labrador v. Chiasson*, [2020 NLCA 28](#) at paras. [8-19](#), SDBOA Tab 47.

²⁰⁰ *Jensen v. Samsung Electronics Co. Ltd.*, [2023 FCA 89](#) at para. [81](#), SDBOA Tab 38, leave to appeal to SCC ref’d [2024 CanLII 543 \(SCC\)](#); *Simpson v. Facebook*, [2021 ONSC 968](#) at para. [43](#), SDBOA Tab 59, aff’d [2022 ONSC 1284 \(Div. Ct.\)](#), at paras. [26-27](#), SDBOA Tab 60; *Crotty v. Aviva General Insurance Company*, [2024 NLSC 54](#) at para. [138](#), SDBOA Tab 22, rev’d on other grounds *Crotty NLCA*, SDBOA Tab 23.

²⁰¹ *Western Canadian Shopping Centres Inc. v. Dutton*, [2001 SCC 46](#) at paras. [39-40](#), SDBOA Tab 73. *Crotty NLCA* at para. [134](#), SDBOA Tab 23.

- (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.²⁰²

98. Preferability calls for a two-part analysis: the plaintiffs must present some basis in fact “(1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members’ claims”.²⁰³ The second inquiry applies a lens of access to justice, behaviour modification, and judicial economy; “is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the CPA, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals”.²⁰⁴

99. It seems apparent that the Plaintiffs are effectively advancing two different class actions, jammed together in the interest of expediency and in the hope of reaching a global resolution. There are distinct claims for abuse, on the one hand, and for loss of language and culture, on the other. On the record before the Court, none of these claims is appropriate for certification.

B.) Cause of action

100. All of the Plaintiffs’ claims are subject to limitations that truncate the proposed class period. Some of these restrictions stem from the inability to advance claims against the Province for events that occurred before the adoption of enabling legislation in 1973. Other restrictions are

²⁰² *Class Actions Act*, s. 5(1), SDBOA Tab 75 and PBOA Tab 137.

²⁰³ *AIC Limited v. Fischer*, 2013 SCC 69 [*Fischer*] at para. 48, SDBOA Tab 1; *Crotty NLCA* at para. 139, SDBOA Tab 23.

²⁰⁴ *Fischer* at para. 23, SDBOA Tab 1; *Crotty NLCA* at para. 140, SDBOA Tab 23.

imposed by the Province's limitations statute. The Plaintiffs' overreach is apparent on the face of their pleadings and it is appropriately corrected at certification.²⁰⁵

101. On the substance of the Plaintiffs' allegations, only the negligence and vicarious liability claims for physical and sexual abuse give rise to reasonable causes of action, albeit ones that are restricted in the manner described above. It is plain and obvious that the balance of the Plaintiffs' claims must fail.

i.) No Claims Prior to 1973

102. As the Supreme Court of Canada explained in *Thouin*, it is "deeply entrenched in our law" that the Crown can be sued only with its permission, and this principle can only be overridden with "clear and unequivocal legislative language".²⁰⁶ The Province's *Proceedings Against the Crown Act*, R.S.N.L. 1990, c. P-26 ("*PACTA*") provides that clear language. However, the *PATCA* is not retroactive and, accordingly, the Crown is immune from tort claims arising from events that took place prior to *PATCA*'s enactment on May 1, 1973.²⁰⁷

103. There is no jurisprudence in the Province that suggests that the *PATCA*'s effect—barring claims before May 1, 1973—would not equally apply to the fiduciary duty claims made against the Province. The Courts of Newfoundland and Labrador have only grappled with the federal Crown liability legislation's application in the context of fiduciary duty claims made against Canada in *Anderson v. Canada (Attorney General)*, 2010 NLTD 106.²⁰⁸

104. The certification judge, applying *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (Ont. C.A.), determined that Crown liability legislation did not bar fiduciary duty claims before May 14, 1953, but only because Canada would have been subject to the Exchequer (now Federal) Court's jurisdiction for that type of claim before 1953.²⁰⁹ This point of law was not considered or settled on appeal.²¹⁰

²⁰⁵ See *Hoy v. Expedia Group Inc.*, 2022 ONSC 6650 [*Hoy SC*] at paras. 231-233, SDBOA Tab 35, aff'd *Hoy v. Expedia Group, Inc.*, 2024 ONSC 1462 [*Hoy Div Court*], SDBOA Tab 36.

²⁰⁶ *Canada (Attorney General) v. Thouin*, 2017 SCC 46 at para. 1, SDBOA Tab 12.

²⁰⁷ *George v. Newfoundland and Labrador*, 2016 NLCA 24 [*George*] at para. 63, SDBOA Tab 27.

²⁰⁸ *Anderson v. Canada (Attorney General)*, 2010 NLTD 106 [*Anderson*], SDBOA Tab 3.

²⁰⁹ *Anderson* at paras. 41-43, SDBOA Tab 3.

²¹⁰ *Canada (Attorney General) v. Anderson*, 2011 NLCA 82 [*Anderson NLCA*], SDBOA Tab 9.

105. The Province was never subject to the jurisdiction of the Exchequer Court. Given that critical difference, the reasoning in *Richard v. British Columbia*, 2009 BCCA 185 ought to be followed in respect of claims against the Province: “a claim for damages for breach of fiduciary duty is blocked by Crown immunity in the same way as an action for damages in tort, and it is as Madam Justice Satanove found, plain and obvious the claim cannot succeed.”²¹¹

ii.) Claims for loss of language and culture are statute-barred

106. The proposed class period ends in 2009, some fifteen years before this action was commenced in 2024. Even if the Plaintiffs were to rely on the doctrine of discoverability, the *Limitations Act* limits discoverability as a means of extending the limitation period for a cause of action beyond ten years of the date on which act or omission arose.²¹² The *Limitations Act* therefore imposes a functional ten-year limitation period on the invocation of discoverability, which would have ended for the latest proposed class members in 2019.

107. In any event, there is no evidence to support a claim of delayed discoverability. The Plaintiffs were themselves subject to the experiences that give rise to their present claims, and they would have been immediately aware of the material facts.²¹³ In his capacity as Grand Chief of the Innu Nation, Mr. Rich wrote to Canada in 2019 to complain that the Innu had been excluded from Canada’s national settlement in respect of Indian Day Schools.²¹⁴ By that time, and in fact much earlier, Mr. Rich understood that the Innu would have to commence their own action if they wanted to advance similar claims.²¹⁵ As noted above, Mr. Poker complained about the lack of cultural support in his 2000 statement of claim.²¹⁶

108. As discussed below, the Plaintiffs’ claims in respect of loss of language and culture do not disclose a reasonable cause of action. But even if they did, they would be subject to a two-year limitation period under the *Limitations Act*, or at most, a six-year limitation period,²¹⁷ That

²¹¹ *Richard v. British Columbia*, [2009 BCCA 185](#) at para. 64, SDBOA Tab 57.

²¹² *Limitations Act*, [S.N.L. 1995](#), c. L-16.1, s. [14\(3\)](#), SDBOA Tab 80.

²¹³ *Hoy SC* at paras. [239-243](#), SDBOA Tab 35.

²¹⁴ Ex F to Gregory Rich Affidavit.

²¹⁵ Rich ASF at paras. 167-174.

²¹⁶ Schedule C to Poker ASF at paras. 14-15.

²¹⁷ *Limitations Act*, [S.N.L. 1995](#), Ch. L-16.1, ss. [5](#) and [9](#), SDBOA Tab 80.

limitation period had expired long before the Plaintiffs commenced this action. The Court should refuse to certify claims that are clearly statute-barred.²¹⁸

109. The Province accepts that *Limitations Act* now provides that the Plaintiffs' claims for misconduct of a sexual nature and assault are not subject to a limitation period.²¹⁹

iii.) Section 5(1)(a): The pleadings do not disclose a reasonable cause of action

110. The Plaintiffs advance claims for the Province's direct liability and seek to hold the Province accountable for the actions of various school boards. There is a well-developed body of jurisprudence on individual claims for negligence or vicarious liability arising from physical and sexual abuse in institutional settings. The Province does not dispute that the Plaintiffs have pled claims that give rise to a reasonable cause of action in this regard.

111. However, it is plain and obvious that Plaintiffs' remaining claims must fail. With respect to the Province, these claims fall into three principal buckets: systemic negligence, fiduciary duties (be they *per se/ad hoc*, or *sui generis*), and Aboriginal rights. These causes of action fail as a matter of settled law, or are otherwise unsupported by pleaded material facts that are capable of being proven.²²⁰ None of these claims is viable.

a.) No Cause of Action in Systemic Negligence

112. Negligence is a well recognized cause of action. So is systemic negligence. The latter requires a system of policies, procedures, or practices that are said to have been improper or inadequate. Both negligence *simpliciter* and systemic negligence require a duty of care, a breach of the standard of care, damages, and causation in fact.²²¹ A duty of care arises *prima facie* from the relationship between the parties, but may be negated by residual policy concerns.²²² For government defendants, these policy concerns can include the need to preserve immunity for core policy decisions.²²³ Finally, the Crown is immune from direct claims in tort and can only be liable

²¹⁸ *Hoy SC* at paras. [231](#) and [249](#), SDBOA Tab 35.

²¹⁹ *Limitations Act*, [S.N.L. 1995](#), Ch. L-16.1, s. [8\(2\)](#), SDBOA Tab 80.

²²⁰ *Crotty NLCA* at para. [26](#), SDBOA Tab 23.

²²¹ *Saadati v. Moorhead*, [2017 SCC 28](#) at para. [13](#), SDBOA Tab 58; *Canada (Attorney General) v. Nasogaluak*, [2023 FCA 61](#), at para. [28](#), SDBOA Tab 11, leave to appeal ref'd, [2023 CanLII 118472 \(SCC\)](#).

²²² *Nelson (City) v. Marchi*, [2021 SCC 41](#) [*Nelson*] at paras. [16-19](#), SDBOA Tab 46.

²²³ *Nelson* at paras. [63-67](#), SDBOA Tab 46.

for the vicarious liability of its servants, such that there can be no cause of action for “institutional indifference”.²²⁴ None of this is controversial.

113. A school board can incur a duty of care to students. For example, the Supreme Court of Canada has described the standard of care exercised by school authorities as “that of the careful or prudent parent” in relation to “the supervision and protection of students for whom they are responsible”, the extent of which will vary, depending on a host of specific factors.²²⁵

114. The Plaintiffs’ claims for loss of language and culture invokes a different and largely unbounded duty of care. Indeed, the Plaintiffs’ brief complains of everything back to the decision to settle the Mushuau Innu in Old Davis Inlet.²²⁶ The Plaintiffs frame alleged duties at the highest level of generality, being “the promotion of the health, safety, and well-being of Innu in the Province” or “the provision of all educational services and opportunities to the Class Members”, for example.²²⁷

115. With specific reference to their claim for language and culture, the Plaintiffs allege that the Province owed a duty of care in respect of “preserving, promoting, maintaining, and not interfering with Aboriginal rights, including the rights of the Innu to learn, practice, exercise, develop, use, teach, transmit, and revitalize their culture and language (collectively “Innu Language and Culture Rights”) and the right of the Innu to control and govern the education and welfare of their children”.²²⁸

116. The Province is said to have breached a duty of care because “it deliberately and chronically deprived the Survivor Class Members of the education they were entitled to, or were led to, expect from Innu Day Schools or of any adequate education” and “it failed to take proper steps to ameliorate the harmful effects of the Innu Day Schools”.²²⁹

²²⁴ *Hinse v. Canada (Attorney General)*, [2015 SCC 35](#) at para. 92, SDBOA Tab 33.

²²⁵ *Myers v. Peel County Board of Education*, [1981 CanLII 27 \(SCC\)](#), [\[1981\] 2 S.C.R. 21](#) at p. 31, SDBOA Tab 44. See also *Hentze (Guardian of) v. Campbell River School District No. 72*, [1994 CanLII 173 \(BC CA\)](#), [\[1994\] B.C.J. No. 1876](#) at paras. [14-15](#), SDBOA Tab 32.

²²⁶ Plaintiffs’ Certification Brief at paras. 52, 65, 69.

²²⁷ Second Amended Statement of Claim at para. 44(a) and (f).

²²⁸ Second Amended Statement of Claim, at para. 44(j).

²²⁹ Second Amended Statement of Claim, at paras. 46(f) and (d).

117. The Plaintiffs' core allegation is that the Province "allowed a systemic program of forced integration of Innu children through the institution of Innu Day Schools when it knew or ought to have known that doing so would cause profound and permanent cultural, psychological, emotional, and physical injury to Class Members" and "conducted Innu education in a way that interfered with the rights of the Innu, including their Innu Language and Culture Rights and the right of the Innu to control and govern the education and welfare of their children".²³⁰

118. It is important to remember that proposed class members were not separated from their families or communities by virtue of attending the schools. These were not residential schools, much less the deeply troubling Indian Residential Schools found elsewhere in Canada. Nor is this case about children being taken into the care of child and family services agencies. The Plaintiffs did not become wards of the state by attending school. They returned home to their families every day. Moreover, the Plaintiffs acknowledge that those families played an important role in teaching traditional practices, and students would spend material portions of the school year out on the land with members of their communities.²³¹

119. At base, the Plaintiffs complain that the Province, or the relevant school boards or religious orders, fell short in formulating and teaching a curriculum. However, the provision of public education is a function of government and a public duty of general application. The Plaintiffs plead that the Province is liable for the acts of the school boards. They also plead, without material facts, that the Province is liable for the acts of the Oblate priests that provided education in the early years of the proposed class period. But the establishment of a school curriculum, where "the legislative provisions are comparable to the regulation, for the public good, of any number of activities" cannot give rise to a private law duty of care.²³² Rather, a private law duty must be founded in the statutory scheme where one exists.²³³ But there is no credible suggestion that any statute creates such an obligation in the case at bar. This is fatal to the claim.

²³⁰ Second Amended Statement of Claim, at paras. 46(a) and (o).

²³¹ Second Amended Statement of Claim, at para. 53.

²³² *Chiasson v Nalcor Energy*, [2021 NLCA 34](#) at paras. 35-36, SDBOA Tab 20. See also *Cooper v. Hobart*, [2001 SCC 79](#) at para. 49, SDBOA Tab 21; *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)*, [2006 CanLII 37121 \(ONCA\)](#) at para. 19, SDBOA Tab 26, leave to appeal ref'd [2006 CanLII 27476 \(SCC\)](#).

²³³ *Syl Apps Secure Treatment Centre v. B.D.*, [2007 SCC 38](#) at para. 27, SDBOA Tab 64.

120. Even if a *prima facie* duty of care is recognized, core policy decisions are protected from suit. There is no specific allegation against any Crown servant that could be generalized to the proposed class. Rather, “it is the policies themselves, and only the policies, that are the subject of the claim; wrongful conduct in the usual tort sense is not in issue”, and “[t]here can be no prospect of success in these claims as they do not allege actionable conduct”.²³⁴ This is a case like *George v. Newfoundland and Labrador*, in which the Court of Appeal found both a lack of proximity in the statutory framework and core policy immunity that negated any proximity that might exist.²³⁵

121. The Plaintiffs are complaining that they were given an education that failed to sufficiently respect their particular cultural and linguistic needs, for example by introducing English in the classroom or failing to provide sufficient instruction in traditional Innu practices. But in refusing to certify a proposed class action in respect of Indigenous child welfare in *BM v. Ontario*, Justice Morgan found that an allegation of this nature could not give rise to a cause of action in negligence: “[t]he very essence of the present claim is that the government has devised a system that treats Indigenous children and families living off reserve as members of the undifferentiated public, and nothing more. That allegation, separate from being part and parcel of an inactionable policy argument, creates no proximity between government actor and claimant on which to base a duty of care in tort”.²³⁶

122. The Plaintiffs seem to suggest that the Province had an obligation to ensure that from 1949 onward, all Innu children attended schools that were operated by their respective communities, where all of the instruction was in Innu-aimun, and taught by Innu teachers, with a curriculum that did not achieve provincial standards. This despite the fact that the written form of Innu-aimun was still developing through the 1990s,²³⁷ and there were no certified Innu teachers until the 1980s.²³⁸ To retrospectively assess the conduct of Innu education writ large is precisely the sort of “public inquiry” into core policy questions that Courts are ill-equipped to undertake.²³⁹

²³⁴ *BM v. Ontario*, [2025 ONSC 4575](#) [*BM*] at paras. 97-98, SDBOA Tab 6. Note that *BM* is being appealed: [2025 ONCA 791](#), SDBOA Tab 7.

²³⁵ *George* at [para. 153](#), SDBOA Tab 27.

²³⁶ *BM* at para. [111](#), SDBOA Tab 6.

²³⁷ Fleet Affidavit at paras. 44 and 46.

²³⁸ Fleet Affidavit at paras. 50-51; Hatcher Cross-Examination at p. 24, ll. 18-22.

²³⁹ *Tanudjaja v. Canada (Attorney General)*, [2014 ONCA 852](#) at para. [33](#), per Pardu J.A. (majority): “Issues of broad economic policy and priorities are unsuited to judicial review”, SDBOA Tab 66, leave to SCC ref’d [2015 CanLII 36780 \(SCC\)](#).

123. In *B.M.*, Justice Morgan refused to certify a class action in respect of Indigenous child welfare because it sought to “redirect the trajectory of Canadian social policy”: “Governments and legislatures have a role to play in steering the course of Canadian policy in respect of Indigenous children, parents, and other caregivers. The courts arguably do not – at least, not in the generalized policy sense in which this claim is presented”.²⁴⁰ That reasoning applies with equal force in the case at bar. This is particularly true because, as the Plaintiffs describe, the proposed class period was a time of enormous change for the Innu, in which they were exposed to outside influences as never before.²⁴¹ The social context was not limited to schooling.²⁴²

b.) No Cause of Action for Breach of Fiduciary Duties

124. The Plaintiffs’ reliance on fiduciary duties is misplaced. It is plain and obvious that neither the Province, nor any school board or religious order, owed the Plaintiffs *ad hoc* or *sui generis* fiduciary duties.

i. *Ad hoc* Fiduciary Duties

125. It is well-settled that a school board has no general fiduciary duty to act in the best interests of a student or to ensure that no employee harms a student.²⁴³ In turn the Plaintiffs would have to allege an “explicit Crown undertaking” to found an *ad hoc* fiduciary duty.²⁴⁴ An undertaking flowing from a statute “must be clearly supported by the language in the statute,” whereas an undertaking arising by implication “from the relationship between the parties is determined by focussing on analogous cases”.²⁴⁵ Instead, the Plaintiffs premise the existence of an *ad hoc* fiduciary duty on the fact that students attended the schools.²⁴⁶ This is insufficient.

126. *Ad hoc* fiduciary duties are rare because “[t]he party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the

²⁴⁰ *BM* at paras. 8-11, SDBOA Tab 6 [emphasis added].

²⁴¹ See Plaintiffs’ Certification Brief at paras. 52, 65, 69 (re settlement in coastal communities in the 1960s and associated social strain), para. 70 (regarding conditions in Innu communities generally), and para. 59 (re the Innu’s exclusion from federal statutes like the *Indian Act*).

²⁴² See e.g. Fleet Cross-Examination at p. 38, ll. 12-22 (re exposure to English communities), p. 195, ll. 7-19 (re exposure to English television), p. 32, l. 9 to p. 33, l. 21 (re lack of Innu-aimun equivalent for certain new words, like “computer”). See also Philpott 2004 at p. 18 (re exposure to English through television and at-home conversation), Ex A to Fleet Affidavit.

²⁴³ *E.D.G. v. Hammer*, 2003 SCC 52 at paras. 23-24, SDBOA Tab 25.

²⁴⁴ *Paddy-Cannon v. Canada (Attorney General)*, 2025 ONCA 394 [*Paddy-Cannon*] at para. 69, SDBOA Tab 51, citing Jack Woodward and Ethan Krindle, *Aboriginal law in Canada* (Toronto: Thomson Reuters, 2025), at § 3:58, SDBOA Tab 86.

²⁴⁵ *Paddy-Cannon* at para. 73, SDBOA Tab 51.

²⁴⁶ Plaintiffs’ Certification Brief at para. 242.

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beneficiary, in relation to the specific legal interest at stake”.²⁴⁷ It is particularly rare for government actors to incur fiduciary duties of this kind because they owe duties to the public at large, which “belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests”.²⁴⁸ Even a targeted initiative to benefit the Plaintiffs is insufficient because “it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns”.²⁴⁹

127. The Plaintiffs have failed to plead anything approaching the sort of explicit Crown undertaking that would be required to establish an *ad hoc* fiduciary duty.²⁵⁰ Providing education is a public law duty, “the performance of which requires the exercise of discretion,” and will “not typically give rise to a fiduciary relationship”.²⁵¹ The Plaintiffs have pled nothing to establish an undertaking to provide the sort of language and culture rights to which they say they are entitled.

128. The Plaintiffs rely on Justice Favel’s recent decision in *St. Theresa Point First Nation v. Canada*, but it does not support their argument.²⁵² The finding of an *ad hoc* fiduciary duty in that case was grounded in Canada’s express undertaking to act in the best interests of First Nations across a “complex web” of programs and policies governing housing on reserve.²⁵³ This undertaking was fundamental to Canada’s promise of a reserve as a residential homeland, and it finds no analogue in education.²⁵⁴ Nothing about the creation of a reserve necessarily implicates education, and in any event, Innu reserves were not created until the end of the proposed class period.

129. There is no reasonable cause of action for breach of an *ad hoc* fiduciary duty.

²⁴⁷ *Alberta v. Elder Advocates of Alberta Society*, [2011 SCC 24](#) [*Elder Advocates*] at para. [31](#), SDBOA Tab 2.

²⁴⁸ *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013 SCC 14](#) [*Manitoba Metis Federation*] at para. [62](#), SDBOA Tab 43; *BM* at para. [85](#), SDBOA Tab 6; *Elder Advocates* at para. [29](#), SDBOA Tab 2; *Sun Indalex Finance, LLC v. United Steelworkers*, [2013 SCC 6](#) at para. [272](#), SDBOA Tab 63; *Ontario (Attorney General) v. Restoule*, [2024 SCC 27](#) at paras. [232-234](#), SDBOA Tab 49; *Paddy-Cannon* at para. [72](#), SDBOA Tab 51.

²⁴⁹ *Manitoba Metis Federation* at para. [62](#), SDBOA Tab 43.

²⁵⁰ Plaintiffs’ Certification Brief at paras. 243 (b), (c), (f), and (h).

²⁵¹ *Guerin v. The Queen*, [1984 CanLII 25 \(SCC\)](#), [[1984](#)] 2 S.C.R. 335 [*Guerin*] at p. 385, SDBOA Tab 30.

²⁵² Plaintiffs’ Certification Brief at paras. 251-261; *St. Theresa Point First Nation et al. v. His Majesty the King*, [2025 FC 1926](#) [*St. Theresa Point First Nation*], SDBOA Tab 62.

²⁵³ *St. Theresa Point First Nation* at paras. [171](#) and [195-96](#), SDBOA Tab 62.

²⁵⁴ *St. Theresa Point First Nation* at paras. [140](#), [160](#) and [181](#), SDBOA Tab 62.

ii. *Sui generis* Fiduciary Duties

130. Claiming loss of Indigenous cultural identity is insufficient to ground a *sui generis* fiduciary duty.²⁵⁵ Rather, there must be a cognizable Aboriginal interest and a Crown undertaking of discretionary control over that interest.²⁵⁶ A cognizable aboriginal interest is distinctly Aboriginal, collective in character, and integral to the nature of the distinctive Aboriginal community. To date, *sui generis* fiduciary duties have been grounded in Aboriginal interests in land.²⁵⁷

131. The Plaintiffs say that the Province assumed discretionary control over two Aboriginal interests:

- a. a right to learn, exercise, develop use, teach, transmit, and revitalize their culture and language (“Innu Language and Culture Rights”); and
- b. a right to control and govern the education and welfare of their children (“Education Right”).²⁵⁸

132. However, the Statement of Claim lacks any pleaded facts to demonstrate these claimed interests are “communal” and “distinctly Aboriginal”. The Statement of Claim merely alleges:

Innu, including their Innu Language and Culture rights and the right of the Innu to control and govern the education and welfare of their children. These rights are central to the Innu as a people and their Indigenous difference, and constitute cognizable Aboriginal interests.²⁵⁹

133. This is a conclusion of law, not a pleaded material fact. In *B.M.* the plaintiffs relied on a similar assertion that “protecting Indigenous children and passing on and connecting children to Indigenous culture constitute the specific and recognizable Indigenous interest required for a fiduciary duty to exist”.²⁶⁰ Justice Morgan found that this pleading was insufficient to support a *sui generis* fiduciary duty:

²⁵⁵ *Paddy-Cannon* at para. 66, SDBOA Tab 51.

²⁵⁶ *Manitoba Metis Federation* at paras. 49-51, SDBOA Tab 43.

²⁵⁷ *Wewaykum Indian Band v. Canada*, 2002 SCC 79 [*Wewaykum*] at paras. 98-100, SDBOA Tab 74.

²⁵⁸ Plaintiffs’ Certification Brief at para. 269.

²⁵⁹ Second Amended Statement of Claim at para. 53.

²⁶⁰ *BM* at para. 79, SDBOA Tab 6.

[80] That statement on its own, however, does not satisfy the legal test of a recognizable Indigenous interest. In determining such an interest, more than just a bald and generic statement like ‘preserving culture’ is required. The Supreme Court has indicated that to make out a claim of fiduciary duty, the Plaintiffs must plead material facts that would allow the court to “[d]etermine whether the claimant has proven that a relevant pre-contact practice, tradition or custom existed and was integral to the distinctive culture of the pre-contact society...[and] [d]etermine whether the claimed modern right is “demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice”: *R. v. Desautel*, [2021 SCC 17 \(CanLII\)](#), at paras. [51\(b\)](#) and (c).

[81] To be clear, the pleading must contain facts that would establish an actual “practice, tradition or custom” that is distinct to the culture, not just a universal human activity or a generalized value for culture held by virtually every society. Thus, in *R. v. Van der Peet*, [1996 CanLII 216 \(SCC\)](#), at para. [17](#), the Supreme Court indicated that “the mere existence of an activity in a particular aboriginal community prior to contact with Europeans is not, in itself, sufficient foundation for the definition of aboriginal rights.”²⁶¹

134. The Plaintiffs have not pleaded any facts to establish a cognizable Aboriginal interest in a school curriculum, particularly when they acknowledge that traditional practices are taught separately on regular trips out on the land.²⁶² As in *B.M.*, “[w]hat the Plaintiffs put forward is really little more than a general, non-concretized statement of a value held by human society at large, and not a practice that can be delineated, acted upon, and, consequently, entrenched as a right and protected as a *sui generis* fiduciary duty”.²⁶³

135. Moreover, the Plaintiffs’ assertion that the Province took discretionary control of what they term Innu Language and Culture Rights is refuted by their underlying complaint that the schools did not teach Innu language or culture.²⁶⁴ The Plaintiffs’ further pleadings of discretionary control are more bald assertions rather than material facts:²⁶⁵

- a. The Province was responsible for “preserving, promoting, maintaining, and not interfering with Aboriginal rights” including the two identified above.²⁶⁶

²⁶¹ *BM* at paras. [80-81](#), SDBOA Tab 6 [emphasis added].

²⁶² Plaintiffs’ Certification Brief at para. 53. This stands in contrast to *Anderson NLCA*, SDBOA Tab 9, at paras. [11](#), and [53-54](#), where the plaintiffs alleged that residential schools were a ‘total institution’ that governed all aspects of students’ lives. See also *Anderson v. Canada (Attorney General)*, [2015 CanLII 81670 \(NL SC\)](#) at para. [20](#), SDBOA Tab 4.

²⁶³ *BM* at para. [83](#), SDBOA Tab 6.

²⁶⁴ See Second Amended Statement of Claim at para. 55; Plaintiffs’ Certification Brief at para. 302.

²⁶⁵ Plaintiffs’ Certification Brief at para. 269, n. 366.

²⁶⁶ Second Amended Statement of Claim at para. 44(j).

- b. The Province “conducted Innu education in a way that interfered with the rights of the Innu,” including the two rights identified above.²⁶⁷
- c. “The Province and Canada undertook to educate Innu children, and assumed discretionary control over the education of Innu children.”²⁶⁸

136. Again, these are conclusions of law and they cannot support the cause of action. The Plaintiffs conflate a fiduciary relationship with a fiduciary duty. As a general principle, the Government acts in a fiduciary capacity with respect to the Aboriginal peoples.²⁶⁹ However, the content of that fiduciary duty must be clearly articulated because fiduciary duties do not extend to all aspects of the fiduciary relationship.²⁷⁰ A breach of statute, or even negligence, is not enough to establish a breach of fiduciary duty;²⁷¹ the Plaintiffs must show the Crown acted “in an unconscionable or unreasonable way inconsistent with the interests of the Aboriginal claimant”.²⁷²

c.) No Cause of Action in Aboriginal Rights

137. It is plain and obvious that the Plaintiffs’ claims for an infringement of Aboriginal rights are doomed to fail. Section 35 of the *Constitution Act, 1982* only came into effect in 1982 and does not operate retroactively.²⁷³ Further, and in any event, the Plaintiffs have failed to articulate an Aboriginal right. While it may be true that culture, values and identity underpin the distinctiveness of the Innu,²⁷⁴ that does not mean that a particular school curriculum is an Aboriginal right within the contours of s. 35. The interest must be “distinctly Aboriginal”, held collectively rather than individually,²⁷⁵ and demonstrably connected to, and a continuation of, a pre-contact practice.²⁷⁶

²⁶⁷ Second Amended Statement of Claim at para. 46(o).

²⁶⁸ Second Amended Statement of Claim at para. 53.

²⁶⁹ *R. v. Sparrow*, [1990 CanLII 104 \(SCC\)](#), [1990] 1 S.C.R. 1075 [*Sparrow*] at para. 59, SDBOA Tab 56.

²⁷⁰ *Kelly v. Canada (Attorney General)*, [2013 ONSC 1220 \[Kelly\]](#) at para. 82, SDBOA Tab 41; *Varcoe v. Sterling*, (1992), [1992 CanLII 7478 \(ON SC\)](#), 7 O.R. (3d) 204 (Gen. Div.) at p. 229, SDBOA Tab 68, aff’d (1993), [1992 CanLII 7730 \(ON CA\)](#), [10 O.R. \(3d\) 574 \(C.A.\)](#), SDBOA Tab 69.

²⁷¹ *Papashchase Indian Band No. 136 v. Canada (Attorney General)*, [2004 ABQB 655](#) at para. 83, SDBOA Tab 52, rev’d in part *Papashchase Indian Band No 136 v. Canada (Attorney General)*, [2006 ABCA 392, 404 AR 349](#), SDBOA Tab 53, aff’d on other grounds *Canada (Attorney General) v. Lameman*, [2008 SCC 14](#), SDBOA Tab 10.

²⁷² *Kelly* at para. 86, SDBOA Tab 41, citing *Guerin* at pp. 349, 383, SDBOA Tab 30; *Wewaykum* at paras. 86, 100, SDBOA Tab 74.

²⁷³ *Sparrow* at para. 23, SDBOA Tab 56; *R. v. Marshall*, [1999 CanLII 665 \(SCC\)](#), [1999] 3 S.C.R. 456 at para. 48, SDBOA Tab 55.

²⁷⁴ Plaintiffs’ Certification Brief at para. 286.

²⁷⁵ *Paddy-Cannon* at para. 64, SDBOA Tab 51.

²⁷⁶ *R. v. Desautel*, [2021 SCC 17](#) at paras. 51(b) and (c), SDBOA Tab 54.

138. The Plaintiffs' pleadings must contain facts that would establish an "actual 'practice, tradition or custom' that is distinct to the culture, not just a universal human activity or a generalized value for culture held by virtually every society".²⁷⁷ As set out above, the Plaintiffs have not pled material facts to establish an Aboriginal right to a particular curriculum or form of day schooling.²⁷⁸

139. Even if there were an Aboriginal right in this case, these rights would be held by the First Nations, not individuals, and a class proceeding would be an inappropriate vehicle to assert communal Aboriginal rights.²⁷⁹

140. Finally, as the Plaintiffs admit,²⁸⁰ the Honour of the Crown is not a cause of action.²⁸¹

d.) Underfunding is not Actionable

141. The Plaintiffs complain of "chronic underfunding", despite the fact that they say the Province treated them no differently than other students.²⁸² To the extent that the Plaintiffs are advancing a claim for underfunding, it is not justiciable. It is settled law that underfunding and non-funding are not causes of action.²⁸³

142. As Justice Morgan explained in *B.M.*:

[38] To the extent that the Plaintiffs impugn not only the operation of the child welfare system in the province but its funding, it is noteworthy that funding decisions for child welfare services are made at Cabinet level. The funding decision for child welfare services is part and parcel of the division of tax dollars to the various Ontario ministries, and is thus an integral component of the annual budget process. It is, accordingly, directed by Cabinet and approved by Treasury Board along with the rest of the provincial budget. Budgetary allocations of this nature cannot be assessed on their own or on a stand-alone basis, but rather are part of the complex process of funding for all public services in the province.

[39] An adjudication of whether the funding for any aspect of child welfare system is "sufficient" would entail measuring that funding against the available

²⁷⁷ *BM* at para. [81](#), SDBOA Tab 6.

²⁷⁸ See above at paras. 130-136.

²⁷⁹ *Kelly* at para. [110](#), SDBOA Tab 41.

²⁸⁰ Plaintiffs' Certification Brief at para. 299.

²⁸¹ *Manitoba Metis Federation* at paras. [73](#), SDBOA Tab 43.

²⁸² Plaintiffs' Certification Brief at paras. 114 and 116.

²⁸³ *BM* at para. [131](#), SDBOA Tab 6; *Ontario v. Phaneuf* (2010), [2010 ONCA 901](#) at para. [13](#), SDBOA Tab 50.

funds in the province's treasury, and weighing the priorities to be given to health, education, transportation, infrastructure, policing, and other provincial responsibilities overall. Counsel for Ontario submit, accurately, that the level and allocation funding, as a budgetary matter for the province, is a policy decision that is and can only be made at the highest level of government.²⁸⁴

143. The Court of Appeal reached a similar conclusion in *George*:

[107] To those who would have this Court direct government to expend more money on moose fencing, it should be noted that money spent on further risk mitigation will be money not available for health care, education and other areas of governmental responsibility. The comments of the Ontario Court of Appeal, in *Smith v. Inco Ltd.*, 2011 ONCA 628 at para. 93, noted by the trial judge, are appropriate here:

93 There are no doubt strong arguments for imposing strict liability on certain inherently dangerous activities. In our view, however, that is fundamentally a policy decision that is best introduced by legislative action and not judicial fiat.²⁸⁵

iv.) Section 5(1)(c): No Basis in Fact to Support Common Issues

144. The Plaintiffs have articulated a maximalist class definition that captures even those students like Mr. Poker's father, who attended school for only a single day.²⁸⁶ While this definition may be objective, it lacks a rational connection to any articulable common issues. This problem is exacerbated by the Plaintiffs' failure to plead an attack on any specific policy or practice. As in *B.M.*, the purported common issues "are posed at such a broad level of generality that they add nothing that would not be accomplished by, and do not short-circuit in any way, a trial of each individual child's circumstance".²⁸⁷

145. The Plaintiffs' allegations of sexual misconduct and assault are essentially claims for vicarious liability, advanced on behalf of an unknown subset of the proposed class, and in respect of an unknown cadre of assailants. The circumstances in which a school board can owe a duty of care or incur vicarious liability are well-established in the jurisprudence, and they should not be controversial.²⁸⁸ But there is no unifying policy or procedure that could give rise to direct liability

²⁸⁴ *BM* at paras. 38-39 and 104, SDBOA Tab 6.

²⁸⁵ *George* at para. 107, SDBOA Tab 27.

²⁸⁶ Poker Cross-Examination at p. 4, ll. 1-10.

²⁸⁷ *BM* at para. 153, SDBOA Tab 6.

²⁸⁸ *Blackwater v. Plint*, 2005 SCC 58 [*Blackwater*], SDBOA Tab 8.

and tie the claims together, and standards of physical discipline changed dramatically over the proposed class period. In the result, there are no meaningful common issues and these claims will require a highly individualized analysis to make any material advance.

146. The claims for loss of language and culture likewise lack a thread that would give rise to common issues. There is a bald pleading that the Defendants pursued a policy of assimilation throughout the proposed class period. The Plaintiffs attack an “assimilative and deculturating agenda” without engaging with the curriculum or explaining how that purported agenda was given universal effect.²⁸⁹ Instead, the Plaintiffs then seek to rely on disturbing experiences in Indian Residential Schools in earlier eras and other parts of the country. This does not assist the court.

147. Moreover, the evidence before the Court on this application confirms that the integration of Innu language and culture into the school curriculum changed dramatically over the proposed class period, in keeping with broader social changes. Given the important roles of individual teachers and other staff, there is no basis in fact to suggest that common issues might arise even for students who attended school in the same era. This is particularly true when most students attended school only sporadically, and some, like Mr. Poker’s father, attended for as little as a day.²⁹⁰ This diversity of experience, combined with important traditional learning on the land, defeats any meaningful common issues.

148. The main pillars of the Plaintiffs appeal to commonality are thinly supported.²⁹¹

- a. The Plaintiffs say that the Innu Day Schools were administered under a common statutory regime.²⁹² The statutes applicable to these schools applied to all students in Newfoundland and Labrador.²⁹³ Unlike Indian Residential Schools elsewhere in Canada, there was no separate regime for Indigenous children. Moreover, the Province’s statutory regime changed significantly over the proposed class period, and the schools were operated first by priests, and later by a succession of school boards.

²⁸⁹ Plaintiffs’ Certification Brief at para. 213.

²⁹⁰ Poker Cross-Examination at p. 4, ll. 1-10.

²⁹¹ Plaintiffs’ Certification Brief, at paras. 85-88.

²⁹² Plaintiffs’ Certification Brief at para. 85.

²⁹³ Hatcher Affidavit at para. 11.

- b. The Plaintiffs say that the Innu Day Schools were created, funded, and administered by Canada and the Province in a series of agreements.²⁹⁴ There is no evidence that the schools were created by agreement between the federal and provincial governments. As detailed above, over the class period, there was significant variation in the agreements to fund these schools, and the schools themselves differed significantly both within the two First Nations and between them.²⁹⁵
- c. The Plaintiffs say that the Innu Day Schools shared a common assimilative purpose throughout the class period.²⁹⁶ As detailed above, there is no evidence of a “purpose” of assimilation, let alone one that could be generalized to the proposed class period.
- d. The Plaintiffs say that the Innu Day Schools inflicted the “same kind” of harms on students throughout the class period.²⁹⁷ However, the Plaintiffs led evidence from five former students who attended the schools between 1965 and roughly 1984.²⁹⁸ Even within these accounts, which cover only the middle third of the proposed class period, there is significant variation.

149. In the absence of a common factual foundation, the common issues proposed by the Plaintiffs are either so generic as to be useless, or not capable of being generalized to the proposed class.²⁹⁹ The Province reviews these proposed common issues in turn.

a.) Common Issues (1)-(6): Systemic Negligence Claims lack Commonality

150. The Plaintiffs have failed to adduce evidence showing a persistent, systemic wrongful conduct that fell below any evolving standard of care allegedly owed by the various actors involved in providing Innu education. The Plaintiffs have made no effort to identify or describe the policies and practices that applied to the supervision of staff or the reporting of abuse. Nor have the Plaintiffs made out any basis in fact that the Defendants pursued a general policy of assimilation. The curriculum in the schools changed significantly over the proposed class period, including with respect to teaching in Innu-aimun, the provision of cultural content, the involvement of Innu teachers and teacher assistants, and community direction of the schools.³⁰⁰

²⁹⁴ Plaintiffs’ Certification Brief at para. 86.

²⁹⁵ Locke Expert Opinion at pp. 19-41, Ex B to Locke Affidavit.

²⁹⁶ Plaintiffs’ Certification Brief at para. 87.

²⁹⁷ Plaintiffs’ Certification Brief at para. 88.

²⁹⁸ See Andrew Affidavit at para. 4, who started school at Peenamin McKenzie in 1965 and Gregory Rich Affidavit at para. 22, who attended school in Davis Inlet until roughly 1984.

²⁹⁹ Plaintiffs’ Certification Brief at para. 370.

³⁰⁰ See Fleet Affidavit at paras. 35-37 (culturally relevant education), paras. 38-46 (Innu-aimun language in schools and Innu teacher aides), and paras. 47-56 (Innu-specific curriculum development); Fleet Cross-Examination at p. 12, ll. 2-13; Poker Cross-Examination at p. 56, ll. 18-24; Exs A and 2 to Poker Cross-Examination.

151. At paragraphs 75 and 76 of the Plaintiffs' Certification Brief, the plaintiffs rely on comments in Division of Northern Labrador Affairs' memorandums from 1955 and 1959 as evidence that "they Innu Day Schools were to assimilate Innu children".³⁰¹ In particular, the 1955 "Memorandum on General Policy in Respect to Indians and Eskimos of Northern Labrador" says:

The Indian may be an excellent hunter, and more inclined when game resources permit to live off in the country, [but]...in view of the scarcity of game and the low prices for produce, these occupations alone can no longer provide even a bare existence...The needs of the Indian are the same as for the Eskimo, namely a vigorous Heath, Education, and Welfare programme to fit him for the society of the future.³⁰²

152. This snapshot does not evidence an assimilationist policy. It is a recognition that the Innu could not maintain their traditional lifestyle centred around hunting because of changes in the natural environment. The Innu therefore needed new skills to adapt.

153. The manner in which those skills were taught changed rapidly over the proposed class period, resulting in radically different educational experiences. As described above, one need only compare what Mr. Poker described with Mr. Gregory Rich recalled only a few years later. Or compare Ms. Andrew's account with that of Ms. Fleet. How is the Court to make common findings that bridge some sixty years of development?

154. Recall that by the time Ms. Fleet arrived in Sheshatshiu in 1990, there were already Innu teachers and aides who spoke and taught in Innu-aimun. Kindergarten through grade 3 were taught entirely in Innu-aimun, and then Innu-aimun and Innu culture and history courses continued in later years. Ms. Snow's curriculum centre, dedicated to developing curriculum materials in Innu-aimun, had been operating for six years, and the school employed an Innu counsellor aide to help the school guidance counsellor communicate with Innu students about personal and sensitive matters in Innu-aimun.³⁰³

³⁰¹ Plaintiffs Certification Brief at para. 75.

³⁰² W.G. Rockwood, as quoted in Andrea Procter, *A Long Journey: Residential Schools in Labrador and Newfoundland* (St. John's: ISER, 2020) chapter 13 ["Procter"] at 387, Ex R to Tanner Affidavit. Note that this is a secondary source material. The Plaintiffs do not quote from the Memorandum itself, and the edits within the quotation, including omissions marked by ellipses, appear in the secondary source. It is not clear what has been omitted.

³⁰³ Fleet Affidavit at paras. 41-43, 47, 50, 53; Fleet Cross-Examination at pp. 129-131.

155. The Plaintiffs also place great emphasis on school attendance being mandatory.³⁰⁴ However, all of the evidence suggests that attendance at the Innu Day Schools was in fact very low throughout the proposed class period.³⁰⁵ As Dr. David Philpott reported in 2004, “[t]he vast majority of those who do attend school do so sporadically. While a third of the full population do not attend school at all, another 17% do so less than 20% of the time.”³⁰⁶ The Plaintiffs cite Professor Samson’s work, which noted that, “many Innu” chose to “forsak[e] the school” and spend months at a time in hunting camps in *nutshimit* instead.³⁰⁷

156. Mr. Poker evidence was that he skipped school himself when he did not want to attend, despite being told to go.³⁰⁸ Mr. Poker decided to drop out of school in grade 9 without external pressure to return.³⁰⁹ As described above, Mr. Poker deposed that his own father attended school for only one day.³¹⁰ Students’ differing exposure to the schools would require an individual assessment of the impacts. The same would be true of students’ exposure to particular teachers and staff, Innu and non-Innu, who would have shaped the classroom experience.³¹¹

157. Moreover, as described above, there is no basis in fact to suggest that attendance at the Innu Day Schools constituted all or even most of students’ education. The Plaintiffs concede that “Innu families shared traditional knowledge, cultural practices and language with their children.”³¹² Mr. Gregory Rich and Mr. Poker described how their families would take them out on the land for weeks or even months at a time, several times a year.³¹³ They learned important traditional knowledge and skills on these excursions and came to understand their Innu identity.³¹⁴

³⁰⁴ Plaintiffs’ Certification Brief at para. 123.

³⁰⁵ See Fleet Affidavit at paras. 23-34 and Philpott 2004 at p. 12, Ex A to Fleet Affidavit. See also Constance Backhouse and Donald McRae, *Report to the Canadian Human Rights Commission on the Treatment of the Innu of Labrador by the Government of Canada* (26 March 2002) at p. 27, Ex Q to Tanner Affidavit.

³⁰⁶ Philpott 2004 at p. 12, Ex A to Fleet Affidavit.

³⁰⁷ Plaintiffs’ Certification Brief at para. 125, citing Samson at pp. 99, Ex P to Tanner Affidavit.

³⁰⁸ Poker Cross-Examination at p. 42, l. 23 to p. 43, l. 4.

³⁰⁹ Poker Cross-Examination at p. 48, ll. 15-17.

³¹⁰ Poker Cross-Examination at p. 4, ll. 1-10.

³¹¹ Some students had Innu teachers, whereas some had non-Innu teachers assisted by an Innu teacher aid: Fleet Affidavit at para. 41.

³¹² Plaintiffs’ Certification Brief at para. 53.

³¹³ See e.g. Poker Cross-Examination at pp. 52-53; Rich ASF at paras. 57-67.

³¹⁴ Rich ASF at paras. 65-67.

158. Far from discouraging these traditional practices, the Defendants funded an outpost program during the second half of the proposed class period to allow families to bring their children into the country.³¹⁵ Mr. Gregory Rich and Mr. Poker confirmed that they faced no punishment when they returned to school, other than having to catch up on work they had missed.³¹⁶ These individual experiences would have to be assessed when considering the impact of the schools on any particular member of the proposed class.

159. The Plaintiffs point to poor health and educational outcomes among the Innu, as if to suggest that they are entirely attributable to a failure of the Innu Day Schools during the proposed class period.³¹⁷ But this is simply emblematic of the Plaintiffs' overarching effort to conduct a public inquiry. As in *B.M.*, "there are multiple contributing factors that are responsible for the disparate outcomes...including geographic location and the specific conduct and attitudes of individual service providers. Again, there is no basis for concluding that answering the proposed common issues questions will advance the litigation or short-circuit the need for each and every claim to be tried on its own facts".³¹⁸

b.) Common Issues (7)-(17): Fiduciary Duties and Aboriginal Right

160. The Plaintiffs seek to replicate their negligence inquiry to address purported breaches of fiduciary duties and Aboriginal rights. As discussed above, these claims are not available to the Plaintiffs, and Question (9), regarding fiduciary duties owed by a school board, has already been decided in the negative by the Supreme Court of Canada. But even if these claims were available to the Plaintiffs, they would require the same individualized analysis as the negligence claims. The different causes of action do not short-circuit the inquiry into each student's experiences.

c.) Common Issue (18): Aggregate Damages

161. The Plaintiffs' claim for aggregate damages cannot be certified. Even if the Plaintiffs had pleaded a focused attack on some particular policy or procedure, there is no evidence of a common

³¹⁵ Poker Cross-Examination at p. 53, ll. 7-21, p. 56, ll. 7-17; Rich Cross-Examination at p. 12, l. 21 to p. 13, l. 20.

³¹⁶ Poker Cross-Examination at p. 54, ll. 18-23; Rich ASF at paras. 75-76.

³¹⁷ Plaintiffs' Certification Brief at paras. 69, 130, 136, 140-141.

³¹⁸ *BM* at para. [156](#), SDBOA Tab 6.

experience across both Innu communities and the proposed class period, or even within any given era.

162. The Plaintiffs rely on *Good v. Toronto (Police Services Board)*, which upheld the certification of aggregate damages at the common issues trial. The justification in *Good* was limited to claims for s. 24(2) *Charter* damages.³¹⁹ The Court of Appeal for British Columbia recently recognized the narrow application of *Good*, overturning a certification decision to certify aggregate damages with reliance on *Good* outside the *Charter* context.³²⁰ Rather, as in *B.M.*, “Since the liability issues are framed in a way that defies commonality, it stands to reason that the damages questions will be similarly lacking in commonality. The aggregate damages question is impossible to answer as there is nothing in the record to demonstrate a class-wide baseline of harms”.³²¹

d.) The Plaintiffs’ Reliance on Settlements

163. The Plaintiffs are disappointed that they were not included Canada’s prior settlements.³²² Compliance with the certification criteria is less stringently enforced when certifying a class action for settlement purposes because the case will not have to be litigated.³²³ In any event, the appeal to purported unfairness is not a reason to certify an unworkable class proceeding that fails to disclose any meaningful common issues.

v.) Section 5(1)(d): Preferable Procedure

164. In *Jane Doe #7 v. Newfoundland and Labrador*, Associate Chief Justice McGrath cautioned against trying to sandwich abuse allegations together with complaints about “denial of access to a proper education”.³²⁴ The Court noted that the plaintiffs had “quite properly limited the common issues to those relating to sexual battery and/or sexual misconduct”. By contrast, “[a]s noted by MacKenzie, J.A. in *Rumley*, any attempt to litigate that type of issue in the same

³¹⁹ See *Good v. Toronto (Police Services Board)*, [2016 ONCA 250](#) at para. 72, SDBOA Tab 29.

³²⁰ *Syngenta AG v. Van Wijngaarden*, [2025 BCCA 334](#) at para. 142, SDBOA Tab 65. The Plaintiffs cite the certification decision, *Gionet v. Syngenta*, [2024 BCSC 1440](#), SDBOA Tab 28, at Plaintiffs’ Certification Brief at n. 504, which was subsequently overturned. At Plaintiffs’ Certification Brief para. 383, the Plaintiffs also rely on *Neal v. Canada (Attorney General)*, [2025 BCSC 1498](#) [*Neal*], inaccurately describing it as a Federal Court case. *Neal* involved *Charter* claims and damages, unlike this case (see paras. 115-176).

³²¹ *BM* at para. 158, SDBOA Tab 6.

³²² Plaintiffs’ Certification Brief at paras. 391 and 392.

³²³ *Wein v. Rogers Cable Communications Inc.*, [2011 ONSC 7290](#) at para. 8, SDBOA Tab 72.

³²⁴ *Jane Doe (#7) v. Her Majesty in Right of Newfoundland and Labrador*, [2019 NLSC 170](#) [*Jane Doe* (#7)] at para. 13, SDBOA Tab 37.

class proceedings as sexual abuse claims could complicate the proceedings immensely”.³²⁵ Unfortunately, the Plaintiffs have not heeded the direction of the Associate Chief Justice and insist on advancing an omnibus claim. A class action is not the preferable procedure.

165. As discussed above, the claims for abuse lack a common foundation and are really claims for vicarious liability in a multitude of different contexts. At base, this case differs from *Jane Doe #7 v. Newfoundland and Labrador*, in which the Province consented to certification of a class proceeding for physical and sexual abuse in its training schools. In *Jane Doe #7*, the common issues focused narrowly on the Province’s policies and procedures for the supervision of staff and the reporting of abuse.³²⁶ The action addressed the Province’s direct liability for its policies and procedures, and it excluded claims for vicarious liability. The same was true of the earlier certification decision in *Anderson v. Canada* in respect of residential schools, where the Province was named in a third party claim after certification.³²⁷

166. With respect to its direct liability in the case at bar, the Province has led evidence that allegations of abuse in the Innu Day Schools were taken seriously, dealt with under the applicable child welfare legislation, and were reported to police and social workers as appropriate.³²⁸ There is no doubt that the manner in which child-serving organizations screen for abuse evolved dramatically over the proposed class period. Importantly, the class period in *Jane Doe #7* ended with the commencement of the Royal Commission of Inquiry into child abuse allegations at the Mount Cashel Orphanage on June 28, 1989. However, the Plaintiffs have made no effort to engage with any of the policies or procedures regarding abuse, let alone address them in a common issue. That choice necessarily shifts the focus of these claims to vicarious liability, with a corresponding effect on the preferable procedure.

167. The abuse alleged by the affiants on this application differ significantly.³²⁹ For example, Marie Martha Andrew complained that a strap and yardstick were used by teachers as punishment

³²⁵ *Jane Doe (#7)* at para. 13, SDBOA Tab 37.

³²⁶ *Jane Doe (#7)* at para. 22, SDBOA Tab 37.

³²⁷ *Anderson NLCA* at paras. 64-79, SDBOA Tab 9.

³²⁸ Fleet Affidavit at paras. 59-61; Hatcher Affidavit at paras. 13-16.

³²⁹ See Gregory Rich Affidavit at paras. 16-19; Poker Affidavit at paras. 6-8; Benuen Affidavit at paras. 7-12; Andrew Affidavit at paras. 5-8.

at Peenamin McKenzie School.³³⁰ As discussed above, teachers were statutorily authorized to use corporal punishment in the classroom until 1996.³³¹ By contrast, Mr. Rich described being punched in the face against a cement wall by a gym teacher.³³² These are allegations of different assaults by different assailants at different times and in different contexts. Each will turn on its facts.

168. The Province takes the Plaintiffs' complaints of abuse seriously, and it has amended the *Limitations Act* to waive the application of the usual limitation period for claims of this nature.³³³ However, the determination of vicarious liability requires a case-by-case assessment of whether the abuse occurred, the relationship between the assailant and Province or school board, and the circumstances in which the abuse occurred.³³⁴ There is no evidence as to how many putative class members claim to have been physically or sexually abused in the Innu Day Schools or by how many assailants. But whatever the number, these claimants would be better served by individual actions, which could be case managed together if common assailants were named as co-defendants.

169. As described above, Mr. Poker and several other members of the proposed class, including Mr. George Rich, brought individual actions against the Defendants in 2000.³³⁵ The claims advanced in these individual actions are repeated in the Plaintiffs' proposed class action.³³⁶ Unfortunately, the Plaintiffs' refused all questions when the Province sought to explore the outcome of Mr. Poker's action as an alternative to a class proceeding.³³⁷ As the Supreme Court of Canada explained in *Fischer*, the Plaintiffs have the burden of refuting the preferability of alternative procedures raised by the defendant.³³⁸ Because of their approach to cross-examination, however, they cannot discharge that onus.

³³⁰ Andrew Affidavit at paras. 7-8.

³³¹ *Schools Act*, [RSN](#) 1990, C s-12, s 79, SDBOA Tab 84.

³³² Gregory Rich Affidavit at para. 19.

³³³ *Limitations Act*, [S.N.L. 1995](#), c L-16.1, s. [8\(2\)](#), SDBOA Tab 80; *Limitations (Amendment) Act*, [S.N.L. 2024](#), c. 13, [s. 2](#), SDBOA Tab 81.

³³⁴ *Blackwater* at para. [20](#), SDBOA Tab 8.

³³⁵ Poker ASF at para. 55 and Schedule C.

³³⁶ Poker ASF at paras. 52-59 and Schedule C.

³³⁷ Poker ASF at para 59.

³³⁸ *Fischer* at para. [48](#), SDBOA Tab 1.

170. As Justice Saunders explained in *Sort v. British Columbia*, there is no economy to addressing generic common issues in a class proceeding:

But this is not simply a matter of the answers to the question, “Did the defendants owe a duty of care”, or “Did the defendants breach the standard of care” – or, for that matter, any of the other Proposed Common Issues – potentially being answered differently for each plaintiff, or each defendant. This is because there is no common substratum to the questions. The factual matrix engaged in answering those questions will necessarily vary both for each defendant, and for claimants whose circumstances materially differed. Asking a single, generalized question will not “avoid duplication of fact-finding or legal analysis”, per *Rumley*.³³⁹

171. Plaintiffs’ counsel are highly experienced in advancing and managing individual claims for abuse, as demonstrated by their success in respect of Mt. Cashell and the Christian Brothers.³⁴⁰ There is no reason why the Plaintiffs abuse claims should be plunged into a lengthy detour through a class action that will achieve little except delay. Justice Perell explained this risk in *Carcillo v. Canadian Hockey League*, 2023 ONSC 886:³⁴¹

[413] It also emerges from this deeper analysis that it may be preferable to sail directly to an individual issues negligence trial without sailing into the doldrums of a common issues trial. One of the ironies of institutional abuse class actions that are certified as the preferable procedure is that it is often the case that it would have been easier and quicker for the individual Class Member to prove his or her individual victimization and harm than waiting years for a determination that there was systemic negligence. *Cavanaugh v. Grenville Christian College* is an illustration of this ironical phenomena, which I believe would occur in the immediate case if I were to certify the proposed leviathan of a class action.

[414] *Grenville Christian College* is an ongoing institutional abuse class action against a private school about what took place at the school for 25 years from

³³⁹ *Sort v. British Columbia (Ministry of Children and Family Development)*, [2025 BCSC 247](#) at para. 99, and at paras. 97-110, SDBOA Tab 61.

³⁴⁰ *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John’s*, [2018 NLSC 60](#), SDBOA Tab 39, rev’d *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John’s*, [2020 NLCA 27](#), SDBOA Tab 40, leave to appeal to SCC ref’d: [2021 CanLII 1097 \(SCC\)](#).

³⁴¹ *Carcillo v. Canadian Hockey League*, [2023 ONSC 886](#) at paras. 413-415 (footnotes omitted), SDBOA Tab 13, aff’d *Carcillo v. Ontario Major Junior Hockey League*, [2025 ONCA 652](#), SDBOA Tab 14. Discussing *Cavanaugh v. Grenville Christian College*, [2012 ONSC 2995](#), SDBOA Tab 15; *Cavanaugh v. Grenville Christian College*, [2014 ONSC 290](#) (Div. Ct.), SDBOA Tab 16; *Cavanaugh v. Grenville Christian College*, [2020 ONSC 1133](#), SDBOA Tab 17; *Cavanaugh v. Grenville Christian College*, [2021 ONCA 755](#), SDBOA Tab 18; *Cavanaugh v. Grenville Christian College*, [2022 ONSC 5405](#), SDBOA Tab 19.

September 1973 to July 1997. The plaintiffs commenced their action in 2008. I was assigned to case manage the action. In 2012, the plaintiffs brought a certification motion, but I did not certify the action, because there was evidence that some students favoured the educational environment that they had experienced. With respect to the students who had genuine grievances and who had been mistreated and who had actually suffered psychological and physical abuse, I believed that it would be preferable for them to bring individual claims, rather than wait to see whether a systemic negligence claim had been proven at a common issues trial. However, in 2014, my decision was reversed by the Divisional Court, and the action proceeded to a common issues trial.

[415] Six years later, in 2020, after a five-week a common issues trial, Justice Leiper decided that school had breached its duty of care and breached its fiduciary duties to the students. There was no award of aggregate damages. Justice Leiper determined that there were potentially 1,360 claimants for individual issues assessments, and she remitted the case to me for case management. In 2021, Justice Leiper's decision was affirmed by the Court of Appeal. In 2022, until who knows how long, I am engaged in the exercise of settling a protocol for individual issues trials. I was advised that Class Counsel anticipates that approximately 600 of the 1,360 may pursue an individual claim. The trials will have to be determined by some other judge, because I and many of the students will be retired by the time the individual issues trials are resolved.

172. More recently, Justice Perell echoed this same reasoning to deny certification of a proposed class action against Jehovah's Witnesses for alleged sexual abuse:

[173] The proposed common issues would not be dispositive and to recover compensation, the Class Members would individually have to opt in to individual issues trials. The individual issues phase would be intensively case-specific and the proposed common issues would do little to advance the cases of the individual Class Members.³⁴²

173. Two decades of certifying abuse claims have taught that class proceedings can be an efficient means of administering global settlements, but a serious impediment to actually litigating claims that cannot be settled. This is particularly true where the abuse claims lack a foundation in a common policy of supervision or reporting. The abuse claims here cannot be efficiently, fairly,

³⁴² *Gutierrez v. The Watchtower Bible and Tract Society of Canada*, 2024 ONSC 3837 at para. 173. This same concern was the reasoning for denying certification in *V.L.M. v. Dominey Estate*, 2022 ABQB 299 [*Dominey*] at para. 114, SDBOA Tab 70, though rev'd in 2023 ABCA 261, SDBOA Tab 71. *Dominey* was a case about a single assailant who was alleged to have assaulted class members in the course of his employment over a four-year period, and the Court of Appeal accepted class members' evidence of the barriers they faced to commencing individual actions: 2023 ABCA 261 at para. 42. There is no comparable record in the case at bar.

or manageably advanced in the vehicle of a class proceeding. The preferable procedure for these claims is individual actions, which the prospect of joint case management.

174. As described above, the Plaintiffs have failed to plead a reasonable cause of action in respect of their claims for language and culture. Moreover, these claims do not give rise to any meaningful common issues. A class proceeding cannot be the preferable procedure for these claims, which are akin to a public inquiry.

C.) Section 5(1)(e): Proposed Representative Plaintiff

175. The Province does not challenge the appropriateness of the individual Plaintiffs, should the Court determine that the other certification criteria are met. However, Innu Nation Inc. is not a proper representative plaintiff of a First Nation or government sub-class.

176. Non-class members cannot be representative plaintiffs, except in the circumstances contemplated by s. 3(4) of the *Class Actions Act*, namely “a substantial injustice to the class”. As a corporate entity, Innu Nation Inc. is qualitatively different than Sheshatshiu Innu First Nation and Mushuau Innu First Nation, the proposed members of the Government Class. Innu Nation Inc. is unable to assert any cause of action in its own right, and there is no evidence that one or both of the Innu First Nations is unable to participate in this action to assert collective claims, if it wishes.

177. As Mr. Poker confirmed, neither First Nation has provided a Band Council Resolution to participate in these proceedings.³⁴³ There is therefore no evidence that the First Nations have exercised their powers under s. 2(3) of the *Indian Act*.³⁴⁴ No Canadian court has ever certified an opt-out class of First Nations, much less done so in the absence of any evidence of the wishes of those First Nations. As a practical matter, if an Innu First Nation wants to participate in this action, it should be added as a named plaintiff.

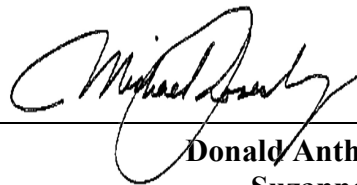
³⁴³ Poker Cross-Examination at pp. 21-22.

³⁴⁴ *Nootchtai v. Nahwegahbow Corbiere Genoodmagejig*, [2024 ONSC 6088](#) at para. [56](#), SDBOA Tab 48.

PART 5 - ORDER REQUESTED

178. The Plaintiffs' application for certification of a class proceeding should be dismissed. The Plaintiffs' claims for language and culture should be struck and their claims for abuse should be continued as individual actions pursuant to s. 10 of the *Class Actions Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of January, 2026.



Donald Anthony, K.C.
Suzanne Orsborn
Government of Newfoundland and Labrador

Michael Rosenberg
Emma Walsh
McCarthy Tétrault LLP

Solicitors for the Second Defendant

**SCHEDULE “A”
LIST OF AUTHORITIES**

TAB	JURISPRUDENCE
1.	<i>AIC Limited v. Fischer</i> , 2013 SCC 69
2.	<i>Alberta v. Elder Advocates of Alberta Society</i> , 2011 SCC 24
3.	<i>Anderson v. Canada (Attorney General)</i> , 2010 NLTD 106
4.	<i>Anderson v. Canada (Attorney General)</i> , 2015 CanLII 81670 (NL SC)
5.	<i>Atlantic Lottery Corporation Inc. v. Babstock</i> , 2020 SCC 19
6.	<i>BM v. Ontario</i> , 2025 ONSC 4575
7.	<i>B.M. v. Canada (Attorney General)</i> , 2025 ONCA 791
8.	<i>Blackwater v. Plint</i> , 2005 SCC 58 (CanLII), [2005] 3 SCR 3
9.	<i>Canada (Attorney General) v. Anderson</i> , 2011 NLCA 82
10.	<i>Canada (Attorney General) v. Lameman</i> , 2008 SCC 14
11.	<i>Canada (Attorney General) v. Nasogaluak</i> , 2023 FCA 61
12.	<i>Canada (Attorney General) v. Thouin</i> , 2017 SCC 46
13.	<i>Carcillo v. Canadian Hockey League</i> , 2023 ONSC 886
14.	<i>Carcillo v. Ontario Major Junior Hockey League</i> , 2025 ONCA 652
15.	<i>Cavanaugh v. Grenville Christian College</i> , 2012 ONSC 2995
16.	<i>Cavanaugh v. Grenville Christian College</i> , 2014 ONSC 290
17.	<i>Cavanaugh v. Grenville Christian College</i> , 2020 ONSC 1133
18.	<i>Cavanaugh v. Grenville Christian College</i> , 2021 ONCA 755
19.	<i>Cavanaugh v. Grenville Christian College</i> , 2022 ONSC 5405
20.	<i>Chiasson v. Nalcor Energy</i> , 2021 NLCA 34
21.	<i>Cooper v. Hobart</i> , 2001 SCC 79
22.	<i>Crotty v. Aviva General Insurance Company</i> , 2024 NLSC 54

23.	<i>Crotty v. Aviva General Insurance Company</i> , 2025 NLCA 39
24.	<i>Dow Chemical Company v. Ring, Sr.</i> , 2010 NLCA 20
25.	<i>E.D.G. v. Hammer</i> , 2003 SCC 52
26.	<i>Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)</i> , 2006 CanLII 37121 (ONCA)
27.	<i>George v. Newfoundland and Labrador</i> , 2016 NLCA 24
28.	<i>Gionet v. Syngenta</i> , 2024 BCSC 1440
29.	<i>Good v. Toronto (Police Services Board)</i> , 2016 ONCA 250
30.	<i>Guerin v. The Queen</i> , 1984 CanLII 25 (SCC) , [1984] 2 S.C.R. 335
31.	<i>Gutierrez v. The Watchtower Bible and Tract Society of Canada</i> , 2024 ONSC 3837
32.	<i>Hentze (Guardian of) v. School District No. 72</i> , 1994 CanLII 173 (BC CA) , [1994] B.C.J. No. 1876
33.	<i>Hinse v. Canada (Attorney General)</i> , 2015 SCC 35
34.	<i>Hollick v. Toronto (City)</i> , 2001 SCC 68
35.	<i>Hoy v. Expedia Group Inc.</i> , 2022 ONSC 6650
36.	<i>Hoy v. Expedia Group, Inc.</i> , 2024 ONSC 1462
37.	<i>Jane Doe (#7) v. Her Majesty in Right of Newfoundland and Labrador</i> , 2019 NLSC 170
38.	<i>Jensen v. Samsung Electronics Co. Ltd.</i> , 2023 FCA 89
39.	<i>John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's</i> , 2018 NLSC 60
40.	<i>John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's</i> , 2020 NLCA 27
41.	<i>Kelly v. Canada (Attorney General)</i> , 2013 ONSC 1220
42.	<i>Koehler v. Newfoundland and Labrador</i> , 2021 NLSC 95
43.	<i>Manitoba Metis Federation Inc. v. Canada (Attorney General)</i> , 2013 SCC 14
44.	<i>Myers v. Peel County Board of Education</i> , 1981 CanLII 27 (SCC) , [1981] 2 S.C.R. 21

45.	<i>Neal v. Canada (Attorney General)</i> , 2025 BCSC 1498
46.	<i>Nelson (City) v. Marchi</i> , 2021 SCC 41
47.	<i>Newfoundland and Labrador v. Chiasson</i> , 2020 NLCA 28
48.	<i>Nootchtai v. Nahwegahbow Corbiere Genoodmagejig</i> , 2024 ONSC 6088
49.	<i>Ontario (Attorney General) v. Restoule</i> , 2024 SCC 27
50.	<i>Ontario v. Phaneuf</i> (2010), 2010 ONCA 901 (CanLII) , 104 OR (3d) 392
51.	<i>Paddy-Cannon v. Canada (Attorney General)</i> , 2025 ONCA 394
52.	<i>Papaschase Indian Band No. 136 v. Canada (Attorney General)</i> , 2004 ABQB 655
53.	<i>Papaschase Indian Band No 136 v Canada (Attorney General)</i> , 2006 ABCA 392
54.	<i>R. v. Desautel</i> , 2021 SCC 17 (CanLII)
55.	<i>R. v. Marshall</i> , 1999 CanLII 665 (SCC) , [1999] 3 S.C.R. 456
56.	<i>R. v. Sparrow</i> , 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075
57.	<i>Richard v. British Columbia</i> , 2009 BCCA 185
58.	<i>Saadati v. Moorhead</i> , 2017 SCC 28
59.	<i>Simpson v. Facebook</i> , 2021 ONSC 968
60.	<i>Simpson v. Facebook</i> , 2022 ONSC 1284
61.	<i>Sort v. British Columbia (Ministry of Children and Family Development)</i> , 2025 BCSC 247
62.	<i>St. Theresa Point First Nation et al. v His Majesty the King</i> , 2025 FC 1926
63.	<i>Sun Indalex Finance, LLC v. United Steelworkers</i> , 2013 SCC 6
64.	<i>Syl Apps Secure Treatment Centre v. B.D.</i> , 2007 SCC 38
65.	<i>Syngenta AG v. Van Wijngaarden</i> , 2025 BCCA 334
66.	<i>Tanudjaja v. Canada (Attorney General)</i> , 2014 ONCA 852
67.	<i>Thorne v. College of the North Atlantic</i> , 2018 NLCA 33
68.	<i>Varcoe v. Sterling</i> , 1992 CanLII 7478 (ON SC)

69.	<i>Varcoe v. Sterling</i> , 1992 CanLII 7730 (ON CA)
70.	<i>V.L.M. v. Dominey Estate</i> , 2022 ABQB 299
71.	<i>V.L.M. v. Dominey Estate</i> , 2023 ABCA 261
72.	<i>Wein v. Rogers Cable Communications Inc.</i> , 2011 ONSC 7290
73.	<i>Western Canadian Shopping Centres Inc. v. Dutton</i> , 2001 SCC 46
74.	<i>Wewaykum Indian Band v. Canada</i> , 2002 SCC 79
TAB	LEGISLATION
75.	<i>Class Actions Act</i> , SNL 2001, c C-18.1 • s. 5 • s. 3(4)
76.	<i>The Department of Education Act</i> , 1968 R.S.N. 1968, No. 58
77.	<i>The Education (Departmental) (Amendment) Act</i> , 1950, S.N. 1950, No. 13, s. 5(1)
78.	<i>The Education Act</i> , S.N. 1952, c. 101, s. 13
79.	<i>The Education Act, 1960</i> , S.N. 1960, No. 50
80.	<i>Limitations Act</i> , SNL 1995, c L-16.1 • ss. 5 and 9 • s. 8(2) • s. 14(3)
81.	<i>Limitations (Amendment) Act</i> , SNL 2024, c 13 • s. 2
82.	<i>The Schools Act</i> , R.S.N. 1970, c. 346, ss. 110-111
83.	<i>Schools Act</i> , 1997, SN 1997, C S-12.2
84.	<i>Schools Act</i> , RSN 1990, C. s-12, s. 79
85.	<i>Schools Act, 1996</i> , RSN 1996, C. s-12-1, s. 36

TAB	SECONDARY SOURCES
86.	Jack Woodward and Ethan Krindle, Aboriginal law in Canada (Toronto: Thomson Reuters, 2025)