Court File No. 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

MEMORANDUM OF FACT AND LAW ON BEHALF OF THE FIRST DEFENDANT, ATTORNEY GENERAL OF CANADA

SUMMARY OF CURRENT DOCUMENT	
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William A. F. Hiscock
Budden & Associates
5 Hallett Crescent, Unit 4
St. John's, NL A1B 4C4

AND

Judith Rae and **Jaclyn McNamara**
Olthuis Kleer Townshend LLP
250 University Ave, 8th floor
Toronto, ON M5H 3E5

Counsel for the proposed representative Plaintiffs

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Atlantic Regional Office
Suite 1400, 5251 Duke Street
Halifax, NS B3J 1P3
Fax: 902-426-2329

Per: Gwen MacIsaac / Victor Ryan
Emily Crompton
Tel: 782-640-9008
Email: gwen.macisaac@justice.gc.ca
victor.ryan@justice.gc.ca
emily.crompton@justice.gc.ca

Counsel for the First Defendant, Attorney General of Canada

Michael Rosenberg/Don Anthony, K.C.
Department of Justice
PO Box 8700
4th Fl, East Block, Confederation Building
St. John's, NL A1B 4J6

Counsel for the Second Defendant, His Majesty in Right of Newfoundland and Labrador

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OVERVIEW

1. This proposed class action is brought on behalf of the Labrador Innu, individually and collectively, and seeks compensation from both Canada and Newfoundland and Labrador for the creation, administration, and operation of "Innu Day Schools" in Labrador over a 60-year period. The Plaintiffs acknowledge that Canada's was not responsible for administering the delivery of education the day schools, either directly or indirectly. Despite this acknowledgement, the Claim asserts broad and generic claims against the Attorney General of Canada (Canada), including that Canada failed to prevent harm to Innu students, including failing to prevent physical and sexual abuse and loss of language and culture. The Claim also challenges the decision to create the school system itself and the various decisions to operate and maintain the schools over decades.

2. The class action the Plaintiffs propose does not, and cannot, satisfy the certification test. The Plaintiffs' claim does not disclose a reasonable cause of action, nor does the Plaintiffs' evidentiary record disclose some basis in fact for the remaining certification criteria. The causes of action in negligence and breach of fiduciary duty are not adequately pleaded against Canada and have no reasonable prospect of success. The causes of action for breach of Aboriginal rights and breach of statutory obligation, which are proposed as common issues in the Certification Application, are not pleaded in the Claim, are not supported in law, and have no reasonable prospect of success.

3. The Plaintiffs attempt to situate their proposed action within a larger context of class proceedings involving Indigenous residential and non-residential schools. This comparison cannot obviate the Plaintiffs' onus to satisfy the certification criteria, nor can it ameliorate the inherent unworkability of the action the Plaintiffs propose or rewrite the unique factual and legal context surrounding the delivery of education services to Innu children in Labrador. Canada has been, and continues to be, committed to playing a role in funding the delivery of high quality, culturally relevant primary education to Innu children in Labrador. The Plaintiffs' efforts to distort Canada's role with respect to the delivery of education are not a basis to certify a class action against Canada.

PART I – FACTS

The Claim

4. The Plaintiffs' Second Amended Statement of Claim (the "Claim") seeks relief for the individual and collective harms it alleges were suffered by the Innu of Labrador through the creation and operation of non-residential primary schools (referred to in the Claim as "Innu Day Schools") in Innu communities from March 31, 1949 and ending on August 1, 2009 (the "Class Period").

5. The Claim alleges that Canada "…funded, allowed, or was otherwise involved in the Innu Day Schools".[1] Importantly, the Claim concedes that Canada "…was not responsible for the day-to-day operations of the Innu Day Schools".[2]

Canada's role in funding off-reserve education for Innu (1949-1997)

6. Throughout the proposed Class Period, Canada funded, in part or in whole, the provision of education capital and programming for the Innu of Labrador. However, the contours of that funding differed significantly throughout the proposed Class Period.

7. On March 31, 1949, the Dominion of Newfoundland entered into union with Canada to become the tenth Canadian province. The Terms of Union between Newfoundland and Canada, signed December 11, 1948, expressly rendered section 93[3] of the *Constitution Act, 1867* inoperable in the new Province of Newfoundland, substituting that provision for a clause which granted the Province's future Legislature the exclusive authority to make laws in relation to education except insofar as those laws could prejudicially affect any right or privilege with respect to denominational schools.[4]

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[1] Second Amended Statement of Claim at para. 10 ["Claim"].
[2] Claim at para. 27.
[3] Section 93 of the *Constitution Act, 1867* grants the Legislature of each Province the exclusive jurisdiction to make laws in relation to education.
[4] Affidavit of Jean-Pierre Morin at para. 10; Ex. 2 ["Morin Affidavit"] – Application Record of the First Defendant, p. 978 ["Canada's Record"].

8. On January 25, 1949, the Lieutenant Governor in Council determined that any decision respecting the care of "Indians and Eskimos"[5] in Newfoundland and Labrador following union be deferred until such time as a satisfactory arrangement could be made with the Provincial government after the election of a Provincial Legislature in Newfoundland.[6]

9. In 1954, an exchange of letters between the Governments of Canada and Newfoundland and Labrador demonstrated Canada's position that there was no legal requirement for the federal government to assume financial or administrative responsibility for the residents of northern Labrador. Canada nevertheless agreed to replace pre-existing *ad hoc* funding arrangements and fund 100% of certain capital expenditures for the Innu in the fields of welfare, health and education.[7] This arrangement came into effect April 1, 1954[8] and remained in effect until March 31, 1959.[9]

10. In 1965, Canada agreed to reimburse Newfoundland and Labrador (hereafter "the Province") for 90% of the Province's expenditures on Innu and Inuit commencing April 1 of that year. The funding was not limited to capital expenditures but was subject to provincial audit certification and potential federal audit. Canada and the Province further agreed to review and renegotiate the financial arrangement at five-year intervals, to continue to meet changing circumstances and the needs of Innu and Inuit residents in Labrador.[10]

11. The agreement between Canada and the Province was renewed in 1970 and 1975. The 1975 renewal amended the terms of the arrangement to permit federal funding to be provided to the Province in advance of expenditure, and to increase the maximum annual federal contribution to $4.5 million CAD.[11]

12. In 1981, Canada and the Province entered into a "Canada-Newfoundland-Native Peoples of Labrador Agreement". The new agreement recognized the need to encourage increased

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[5] The Attorney General of Canada will limit the use of the terms "Indians" and "Eskimos" in this brief to their necessary legal and historical contexts.
[6] Morin Affidavit at para. 11; Ex. 3 – Canada's Record, p. 1009.
[7] Morin Affidavit at para. 13; Ex. 4(a) – Canada's Record, p. 1021.
[8] Morin Affidavit at para. 13; Ex. 4(e) – Canada's Record, p. 1032.
[9] Morin Affidavit, Ex. 7(a) – Canada's Record, p. 1057.
[10] Morin Affidavit at para. 14; Ex. 5(a) – Canada's Record, pp. 1036-1038.
[11] Morin Affidavit at paras. 16, 18 – Canada's Record, p. 955-956.

participation by Indigenous people in the development, planning, and review of social and economic development programs, and the desire for Indigenous people in Labrador for full and on-going participation in the planning, development, delivery and review of programs designed to assist them in achieving their cultural, social and economic goals.[12]

13. The 1981 Agreement maintained a cost-sharing arrangement that saw Canada pay 90% of the costs of the administration, operation and delivery of "Designated Programs", which included the operation and maintenance of special education programs for Indigenous people (such as Native Teacher Aids), grants towards the construction of education facilities, and the maintenance for students, including secondary and post-secondary funding.[13]

14. The 1981 Agreement expired in 1986, and was replaced by separate interim agreements for the Innu and the Inuit, respectively. The 1986 Innu Agreement saw Canada contribute approx. $2.5M CAD per year for two fiscal years, to support the administration, operation and delivery of provincial programs, including education.[14] This agreement was amended in 1988, in part to provide funding for the Innu to participate in the planning and negotiation of a new, long-term agreement.[15]

15. In 1989, Canada and the Province entered into a Contribution Agreement for the benefit of the Innu communities of Labrador. Under the agreement, Canada was to contribute approximately $3M CAD a year to the Province to be spent, in part, on costs related to Innu language education, the training and retention of Innu teachers, and curriculum development for Innu.[16]

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[12] Morin Affidavit at para. 19; Ex. 9 – Canada's Record, p. 1118.
[13] Morin Affidavit at para. 19; Ex. 9 – Canada's Record, pp. 1127-1128, 1137.
[14] Morin Affidavit at paras. 22-23; Ex. 11 – Canada's Record, p. 956.
[15] Morin Affidavit at para. 25; Ex. 13 – Canada's Record, p. 957.
[16] Morin Affidavit at para. 26; Ex. 14 – Canada's Record, p. 957.

16. In 1991, Canada and the Province entered into a new Contribution Agreement. The 1991 Agreement provided $19.5M CAD over a five-year term, with 90% of the cost borne by Canada. A new agreement, on similar terms, was struck in 1996.[17]

Canada's role in funding on-reserve education for Innu (1997-2009)

17. On March 19, 1997, the Governor General in Council issued an Order in Council confirming Canada's view that the Innu of Labrador are Indians within the meaning of section 91(24) of the *Constitution Act*, *1867* and authorized Ministers of the Crown to consider the Innu of Sheshatshiu and Davis Inlet as if they were status Indians on reserve land, for the purpose of providing the Innu with programs and services.[18]

18. The 1996 Contribution Agreement expired on March 31, 1997, and was replaced with funding arrangements whereby Canada entered into separate agreements with the Sheshatshiu Innu and Mushuau Innu, for the communities of Sheshatshiu and Davis Inlet/Natuashish, respectively.[19]

19. Under this new funding arrangement, Canada agreed to provide approximately $5.1M CAD to the Sheshatshiu Innu for education funding, for a five-year period ending in 2003. Under a separate agreement, Canada agreed to reimburse the Province 100% of its incurred costs for the administration and delivery of education to the Mushuau Innu until the community's move from Davis Inlet to Natuashish was complete.

20. These types of funding arrangements continued through to the end of the proposed Class Period, when the Mamu Tshishkutamashutau – Innu Education ("MTIE") was established to delivery elementary, secondary and other education and education related services on behalf of the Sheshatshiu and Mushuau Innu First Nations.[20]

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[17] Morin Affidavit at paras. 28, 30; Ex. 15, 17 – Canada's Record, pp. 1233, 1266.
[18] Morin Affidavit at para. 31; Ex. 19 – Canada's Record, p. 1313.
[19] Affidavit of Leonard Locke, Ex. B – Application Record of the Second Defendant, pp. 81-82 ["Province's Record"].
[20] Morin Affidavit, Ex. 40, 41 – Canada's Record, pp. 1829, 1833.

Canada's lack of role in administering and operating Innu Day Schools

21. Throughout the proposed Class Period, Canada had no involvement in, and bore no responsibility for, the administration or operation of Innu Day Schools. Rather, Canada's role was limited to funding, which included entering into funding agreements and the administration of those agreements.

22. Canada's lack of financial and administrative responsibility was acknowledged in a March 28, 1953 letter from the federal Minister of Citizenship and Immigration to the provincial Minister of Public Welfare as an aspect of the negotiation which established federal capital funding for education in Labrador.[21]

23. The 1965 funding arrangement between Canada and the Province was likewise predicated on the Governor General in Council's desire, expressed in a May 25, 1965 letter to Premier Smallwood, to not "…disturb the established arrangements for provincial administration of Indian and Eskimo affairs in Newfoundland."[22]

24. When the 1965 funding arrangement was renewed in 1970, provision was made for the appointment of a Federal-Provincial Committee which would be responsible for recommending annual budgets to the Governments of Canada and Newfoundland and Labrador for approval. The Committee was subsequently enlarged to take into consideration the restructuring of government services and to include representatives of the Native Association of Newfoundland and Labrador and Naskapi-Montagnais Association of Labrador (precursor organizations to the Innu Nation).[23]

25. While the Federal-Provincial Committee discussed a wide range of matters, it was understood to be "…a financial committee with a purely financial function".[24] The Committee's deliberations with respect to education acknowledged work done outside the

[21] Morin Affidavit, Ex. 4 – Canada's Record, p. 1020.
[22] Morin Affidavit, Ex. 5 – Canada's Record, p. 1036.
[23] Morin Affidavit, Ex. 7(a) – Canada's Record, p. 1058.
[24] Morin Affidavit, Ex. 7(b) – Canada's Record, p. 1090.

Committee, but confirmed that its role did not extend to the administration or execution of education programming or services.

26. The "Canada-Newfoundland-Native Peoples of Labrador Agreement" likewise constituted a "Co-ordinating Committee" in 1981 to make recommendations as to the allocation of funds, encourage greater interaction between the federal and provincial governments and Indigenous people, and to study various plans and policies affecting the Innu and Inuit of Labrador.[25] The Committee did not play a role in the administration of operation of Innu Day Schools.

27. The 1991 and 1996 Contribution Agreements each provided for the establishment of a "Management Committee", which consisted of representatives from Canada, the Province, and the Sheshatshiu and Davis Inlet band councils.[26] As with prior committees, the Management Committee exercised no operational or administrative control over the delivery of education in Innu Day Schools.[27]

<u>Allegations of abuse at Innu Day Schools</u>

28. In support of their application for certification, the Plaintiffs filed five affidavits containing direct evidence recounting their experiences attending an Innu Day School.[28]

29. Collectively, the Plaintiffs' evidence concerns experiences in Sheshatshiu and Davis Inlet from the period 1965-1984.[29] There is no direct evidence regarding the experiences of Innu Day School attendees in Old Davis Inlet or Natuashish, nor is there direct evidence regarding the experience of Innu Day School attendees between 1949-1965 and 1986-2009.

[25] Morin Affidavit, Ex. 9 – Canada's Record, p. 1121.
[26] Morin Affidavit at paras. 29-30 – Canada's Record, p. 958.
[27] Morin Affidavit, Ex. 16, 18 – Canada's Record, pp. 1257, 1306.
[28] Affidavit of Gregory Rich ["Gregory Rich Affidavit"]; Affidavit of Marie Martha Andrew ["Andrew Affidavit"]; Affidavit of Magdaline Benuen ["Benuen Affidavit"]; Affidavit of George Rich ["George Rich Affidavit"]; Affidavit of Prote Poker ["Poker Affidavit"].
[29] Gregory Rich Affidavit at paras. 9, 22; Andrew Affidavit at para. 4; Benuen Affidavit at para. 5; George Rich Affidavit at para. 5; Poker Affidavit at para. 4.

30. The five affiants provide no direct evidence of sexual abuse. The direct evidence does demonstrate some incidents involving physical use of force, and speaks generally to the affiants' fear and discomfort in attending the Innu Day Schools. There are also hearsay accounts of physical assault. [30]

PART II – ISSUE

31. The sole issue for the Court's determination is whether certification should be granted.

PART III – LAW & ARGUMENT

A. <u>The certification test</u>

32. The circumstances under which a class action may be certified are set out in s. 5 of the *Class Actions Act*, RSNL 2001, c. C-18.1, which states:

> 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.

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[30] Gregory Rich Affidavit at paras. 15, 16, 19; Andrew Affidavit at paras. 6-8; Benuen Affidavit at paras. 6-12; George Rich Affidavit at paras. 7-8; Poker Affidavit at paras. 7-8.

33. The proposed representative Plaintiffs bear the onus to establish all five of the certification criteria.[31] If the Court determines that one or more of the five criteria has not been satisfied, certification must be denied.

34. The standard by which the Court assesses the first certification criterion is identical to the standard applied to a motion to strike – that is, whether it is plain and obvious that the claim has "no reasonable prospect of success".[32] The Court looks solely to the pleadings and does not consider the evidentiary record in assessing the first certification criterion.

35. For the balance of the certification criteria, the Court must assess whether there is "some basis in fact" to support certification. The "some basis in fact" standard requires the Plaintiffs to establish an evidentiary basis for certification; that is, that the evidence enables the court to assess the nature of those claims that exist and determine whether four of the five certification criteria are satisfied.[33]

36. The "some basis in fact" burden is a lower evidentiary standard than a balance of probabilities. Nonetheless, certification is intended to be a meaningful screening device. While conflicts in the evidence need not be resolved and the merits are not determined, certification does not "…involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny."[34]

37. Critically, a class action is a procedural vehicle whose use neither modifies nor creates substantive rights. It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so.[35]

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[31] *Dow Chemical Company v Ring, Sr.*, 2010 NLCA 20 at para. 10.
[32] *Hollick v Toronto (City)*, 2001 SCC 68 at para. 25; *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at para. 87 ["*Babstock*"].
[33] *Hollick* at para. 25, citing *Taub v Manufacturers Life Insurance Co.*, [1998] O.J. No. 2694.
[34] *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at paras. 99-103 ["*Pro-Sys*"].
[35] *Bisaillon v Concordia University*, 2006 SCC 19 at para. 17.

B. The Claim does not disclose a reasonable cause of action

38. In considering whether the claims advanced by the Plaintiffs disclose a reasonable prospect for success, the Court should consider the viability of claims measured against any applicable mandatory rules of pleading and the elements of causes of action recognized by statute or precedent.[36] Some claims can and should be dismissed early, based on pleaded facts and law alone.[37]

39. The facts as pleaded in the Claim must be assumed true for the purposes of this analysis unless they are "manifestly incapable of being proven".[38]

40. The Plaintiffs' Claim, generously read, seeks to establish causes of action in negligence, breach of fiduciary duty, and a "breach of Constitutional duties", comprised of infringement of Aboriginal rights and "breaches of duties flowing from the honour of the Crown".[39]

i. The Plaintiffs' negligence claim cannot succeed

41. The Plaintiffs advance a cause of action in systemic negligence against Canada, of which the central issue is the allegation that Canada enforced a program of integration on the Labrador Innu through the creation of Innu Day Schools.[40] However, the Claim does not plead the material facts necessary to disclose a duty of care owed by Canada to the Plaintiffs. The relationship between the proposed Class and Canada, as pleaded, is indirect and lacks the sufficient proximity to support such a duty.

42. The doctrine of Crown immunity further bars the Plaintiffs' negligence claim. The federal Crown can only be liable in tort in accordance with the provisions of the *Crown Liability and Proceedings Act*.[41] The Plaintiffs' negligence is offside the limited grant of Crown liability in tort in two ways: firstly, by pre-dating the coming into force of the *Crown*

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[36] *Koehler v Newfoundland and Labrador*, 2021 NLSC 95 at para. 32.
[37] *Babstock* at para. 14.
[38] *Babstock* at para. 87.
[39] Claim at paras. 51, 55.
[40] Certification Brief of the Proposed Representative Plaintiffs, para. 186 ["Plaintiffs' Brief"].
[41] *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s. 3 ["the *CLPA*"].

Liability Act and secondly, by not grounding the alleged liability in a tort committed by a Crown servant.

a. The Plaintiffs have not established a duty of care

43. The elements the Plaintiffs must establish are the same as in all negligence cases, regardless of whether they are pursued on a systemic basis.[42] The Claim must plead material facts to support the existence of a private law duty of care, a breach of an associated standard of care, causation and damages.[43]

44. The Plaintiffs have not properly pleaded a duty of care owed by Canada, as they cannot establish the sufficient proximity to ground such a duty. To the extent that the Court finds the Plaintiffs have established a *prima facie* duty of care, such a duty is negated because the nature of the impugned decisions—for the funding and delivery of education—are public policy decisions that are subject to immunity in tort.

45. The Plaintiffs overstate the notion that determinations of core policy immunity cannot be resolved at certification. Such determinations have been made in the context of certification decisions, both in the Newfoundland and Labrador Court of Appeal[44] as well as the Federal Court of Appeal.[45] It is clear that, where the Court has the ability to determine whether a *prima facie* duty of care is negated by policy considerations, it need not permit a doomed claim to proceed to trial. Such a limitation would be antithetical to the meaningful screening role certification is meant to play.[46]

46. The Plaintiffs appear to accept the duty of care they allege is novel, requiring the Court to apply the full *Anns/Cooper* test to determine whether a *prima facie* duty of care has been established on the pleadings.[47] However, they submit that, on an application for

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[42] *Attorney General of Canada v Nasogaluak*, 2023 FCA 61 at para. 28 ["*Nasogaluak*"].
[43] *Saadati v Moorhead*, 2017 SCC 28 at para. 13.
[44] *Chiasson v Nalcor Energy*, 2021 NLCA 34 at para. 37 ["*Nalcor*"].
[45] *Nasogaluak* at para. 41.
[46] *Pro-Sys* at para. 103.
[47] Plaintiffs' Brief at paras. 62-70.

certification, the Court cannot consider whether a *prima facie* duty of care is negated by core policy immunity, and must instead leave that analysis to the common issues trial.[48]

47. At the first prong of the *Anns/Cooper* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) is the relationship between the parties sufficiently close and direct that imposing a duty of care would be fair. If foreseeability and a relationship of proximity are established, a *prima facie* duty of care arises. At the second prong of the test, the Court must consider whether there are broad residual policy considerations outside the relationship of the parties that may negate the duty of care.[49]

48. Under the first prong, the Plaintiffs have not pleaded that there was sufficient proximity between the proposed Class and Canada to ground a duty of care. Proximity in a governmental context can be grounded either by statute or the direct interactions between the parties, or a combination of both.[50] Not every statute will create a duty of care: a private law duty of care will only arise explicitly or by implication from the governing legislation.[51]

49. Where a plaintiff relies on interactions between the parties, those specific interactions should support a sufficiently close and direct relationship of proximity between the parties.[52] Markers of a proximate relationship are physical and causal closeness, "…expectations, representations, reliance, and the property or other interests involved."[53] Importantly, knowledge of a general risk or harm is not enough to create proximity – rather, it is the specific interactions themselves which create a proximate relationship.[54]

50. The Plaintiffs do not identify legislation that would create a private law duty of care. The Plaintiffs broadly plead that a duty of care for the Plaintiffs' welfare and educational needs arises from Canada's legislative authority under s. 91(24) of the *Constitution Act, 1867* and

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48 Plaintiffs' Brief at para. 183.
49 *Nelson v Marchi* 2021 SCC 41 at paras. 17-18 ["*Marchi*"].
50 *Nalcor* at para. 17, citing *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 ["*Imperial Tobacco*"].
51 *Imperial Tobacco* at para. 44.
52 *Marchi* at para. 17.
53 *Cooper v Hobart,* 2001 SCC 79 at para. 34.
54 See e.g., *Edwards v Law Society of Upper Canada*, 2001 SCC 80.

under the *Indian Act*.[55] However, legislative authority alone does not create a duty to legislate, to create policy, or to act in any way.[56] Furthermore, the law-making process is largely beyond the reach of judicial interference, based on the foundational principles of the separation of powers and parliamentary sovereignty.[57]

51. It is settled law that subsection 91(24) of the *Constitution Act, 1867* does not impose a private law duty on the federal government to legislate. Parliament's exercise of its authority is a matter of policy,[58] and legislative authority is not enough to impose vicarious liability.[59]

52. With respect to the direct interactions between the proposed Class and Canada, there is no analogous, established duty of care on which the Court can rely. The Plaintiffs point to the *Anderson* decision as an example of a class action which was certified on the same two sources of proximity that are pleaded here – the "special constitutional relationship" between "the Crown and aboriginals", and the alleged "operational and administrative obligations…to inspect and supervise the [s]chools".[60]

53. However, the legal analysis in *Anderson* has been overtaken by subsequent jurisprudence. The factors relied on in *Anderson* to establish that proximity had been properly pleaded cannot hold the same jurisprudential weight in the face of subsequent decisions of the Supreme Court of Canada in *Daniels* and *Marchi,* and the Newfoundland and Labrador Court of Appeal in *Nalcor*.[61] These decisions clarify that legislative jurisdiction, constitutional responsibility, or an oversight mandate alone cannot satisfy the proximity requirement of the duty of care analysis.

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[55] *Indian Act*, RSC 1985, c. I-5 ["*Indian Act*"].
[56] *Canada v Stonechild*, 2025 FCA 105 at para. 39 ["*Stonechild*"], citing *Daniels v Canada (Indian Affairs and Northern Development),* 2016 SCC 12 at para. 15 ["*Daniels*"]; see also *Nalcor* at para. 35.
[57] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras. 2, 36-37.
[58] *Daniels* at para. 15.
[59] *Reference re Broome v Prince Edward Island*, 2010 SCC 11 at para. 62.
[60] Plaintiffs' Brief at paras. 194-195; see also *Canada (Attorney General) v Anderson*, 2011 NLCA 82 at paras. 70, 76 ["*Anderson*"].
[61] *Nalcor*.

54. The Plaintiffs have not pleaded any interactions that would support a proximate relationship with Canada. The Claim acknowledges that the schools were "administered indirectly with the support of Canada"[62] and that Canada was "not responsible for the day-to-day operations" of the schools.[63] Canada's involvement was limited to providing funding and requesting information on the use of funds. However, courts have consistently held that funding alone does not create a proximate relationship,[64] nor does a requirement to audit funding or the ability to establish standards.[65] Proximity requires a relationship based on specific and direct interactions beyond permissive powers or jurisdiction. The Claim fails to disclose any material facts that describes the interactions that would support a finding of proximity.

55. The federal Crown is not subject to direct tort liability and liability against Canada can only be vicarious.[66] The Plaintiffs reliance on *Rumley* is misplaced: unlike the federal *Crown Liability and Proceedings Act*, British Columbia's *Crown Proceeding Act*[67] expressly contemplates direct liability against the provincial crown. The proximity analysis is complicated by the Plaintiffs' failure to plead the identities of Crown servants for whom Canada is vicariously liable. The close and direct relationship required to support a proximity analysis requires specific interactions that are facilitated by Crown servants. Where the pleadings do attempt to identify Crown servants, the pleadings do not disclose material facts that establish a proximate relationship.[68] Public policy concerns negate a duty of care.

56. The Claim also fails at the second stage of the *Anns/Cooper* test given the strong policy reasons for negating a private law duty of care, if any, in the circumstances. The nature of

[62] Claim at para. 12.
[63] Claim at para. 27.
[64] *Rebello v Canada (Justice)*, 2023 FCA 67 at para. 22.
[65] *Conley v Chippewas of the Thames First Nation Chief*, 2015 ONSC 404 at paras. 60-62; *Nalcor* at para. 35.
[66] *CLPA* s. 3.
[67] *Crown Proceeding Act*, RSBC 1996, c 89, s 2.
[68] Claim at para. 42(d) and 12.

the decisions and the Claim challenges core policy decisions that are immune from negligence liability.[69]

57. Whether or not a particular decision is protected by core policy immunity turns on whether the decision is properly characterized as "true policy" instead of "operational implementation."[70] Core policy decisions, shielded from negligence liability, are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors.[71] These decisions are not based only on objective considerations but require value judgments.[72] Operational implementation concerns "the practical implementation of the formulated policies" or "the performance or carrying out of a policy."[73]

58. In *Marchi*, Karakatsanis and Martin JJ writing for the Court identified four factors to assist in determining the nature of a public authority's decision: "(1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria."[74] The rationale for protecting core legislative functions is rooted in the constitutional separation of powers,[75] whereby courts should not interfere with policy decisions, as this would represent second-guessing of the decisions of democratically elected government officials.[76]

59. Here, the Plaintiffs' claim is not that Canada was negligent in the way it implemented any policy or program, but rather that the government was negligent in funding education without establishing and implementing any policy. The Claim is not levied against any particular group of federal employees, organizational branch, or job position alleged to be tasked with the matter but instead takes aim at the highest-level decision-makers in the

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[69] *Marchi* at paras. 3, 49.
[70] See, for example, *Marchi* at para. 50.
[71] *Marchi* at paras. 44, 51; *Imperial Tobacco* at para. 90.
[72] *Marchi* at para. 44.
[73] *Marchi* at para. 52.
[74] *Marchi* at para. 56.
[75] *Ibid.*
[76] *Marchi* at para. 44.

federal (and provincial) government. This is evidenced by the nature of the decisions themselves, which include the Terms of the Union and the federal-provincial funding agreements that resulted from inter-governmental negotiations. These are decisions that bear the hallmarks of core policy decisions: they address Canada's allocation of funding to the Province and delineate the boundaries of Canada's undertaking to fund education services. [77]

60. The Plaintiffs cannot convert policy-immune decisions about government administration, such as funding allocation and policy development, into examples of "operational" activity merely by characterizing these functions as such.[78] The essence of the Plaintiffs' argument is that Canada should have developed legislation or policy to intervene or supervise the provision of education at the Innu Day Schools, as demonstrated by the reliance on *Rumley*.[79] An alleged duty cannot properly be said to be "operational" if the imposition of such a duty would necessarily interfere with core policy functions.

61. Where it is clear that a duty of care is barred by core policy immunity, the court can and should conclude that there is no reasonable cause of action disclosed. A claim that discloses no reasonable cause of action has no chance of success and should not be allowed to proceed to trial.[80] The principles underpinning a motion to strike are equally appropriate here: appropriate scrutiny of claims to ensure that they disclose a cause of action promotes both efficiency in the conduct of the litigation and correct results.[81] Here, the pleadings attack a core policy decision that negates any *prima facie* duty of care, resulting in a cause of action in negligence that discloses no reasonable chance of success.

b. Claims in tort prior to May 14, 1953 cannot be brought against the Crown

62. At common law, the Crown is completely immune from tort liability.[82] Such liability arises exclusively from legislation; the first enactment, the *Crown Liability Act* came into effect

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[77] *Marchi* at para. 54.
[78] Claim at para. 43.
[79] Plaintiffs' Brief at para. 179.
[80] *Babstock* at para. 14.
[81] *Imperial Tobacco* at para. 20.
[82] See e.g., *Rudolph Wolff & Co. v Canada*, [1990] 1 S.C.R. 695.

on May 14, 1953.[83] Any claims in tort that arose before this date cannot succeed because this Court has no jurisdiction to consider them.

63. The vicarious liability outlined in statute in the *Crown Liability Act* is not retroactive. Section 24 stated that no proceeding can be commenced under the statute for any act, omission, transaction, matter, or thing occurring or existing before the act was assented to.[84] Appeal Courts in both Ontario and British Columbia have concluded that this bars a claim for breach of duties brought against Canada.[85]

64. Consequently, the claim in systemic negligence arising before May 14, 1953 is barred by the doctrine of Crown immunity.

c. The Claim is barred by the Crown Liability and Proceedings Act

65. The federal government cannot be liable in tort for its own actions or inactions. It can only be vicariously liable, in respect of the fault of its servants.[86] This means that personal liability of a Crown servant is a precondition to Canada's liability. Here, the pleadings fail to identify the Crown servants and the facts underpinning their personal liability, for which the Crown would be vicariously liable.

66. To advance a claim in tort against Canada, the pleadings must disclose the material facts identifying the Crown servant as well as the particular action that is alleged. Where a name may prove impossible to identify, the pleading should still provide enough material facts for the Crown servant to be identified.[87] For claims in negligence, the identity of the Crown servant is essential to conducting the proximity analysis and determining if the actor was acting in a policy capacity, which could negate any *prima facie* duty of care.

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[83] *Crown Liability Act*, S.C. 1952-53, c. 30 ["*Crown Liability Act*"].
[84] *Crown Liability Act*, s. 24.
[85] *Cloud v Canada (Attorney General),* 2004 CanLII 45444 (ON CA) at para. 25; see also *Richard v British Columbia*, 2009 BCCA 185.
[86] *CLPA* at ss. 3 and 10; *Hinse v Canada (Attorney General)*, 2015 SCC 35 at paras. 91-92 ["*Hinse*"].
[87] *Merchant Law Group v Canada Revenue Agency,* 2010 FCA 184 at para. 38.

67. The Plaintiffs' pleading does not identify the person or persons they allege committed the alleged tortious acts, nor does the pleading provide material facts to allow the persons to be identified. The pleading generally relies on broad statements that allege that "Canada" acted in a certain manner. There is similarly no mention of any group of people, such as an organizational branch or employees, for which Canada would be vicariously liable.

68. The Claim does not allege that the employees of the Innu Day Schools were Crown servants. An assessment of the Crown-Crown servant relationship is the same as that of a principal-agent relationship.[88] It is determined by closely examining the relationship of the person and government.[89] A relationship where the government has greater management and control over the person is indicative of a principal-agent relationship.

69. The pleadings do not disclose material facts supporting a conclusion that the administrators, teachers, or staff were in a principal-agent relationship. In contrast, the material facts and statutes assert that the school staff were servants or agents of the superintendents and the school board, and that Canada was not involved in the administration of education. As such, allegations that rely on school administrators, teachers, and staff being agents of Canada have no chance of success.

ii. The Plaintiffs' fiduciary duty claim cannot succeed

70. It is plain and obvious that the Plaintiffs have not established a cause of action grounded in a breach of fiduciary duty as against Canada.

71. Canada acknowledges that the relationship between the federal Crown and Indigenous peoples of Canada is fiduciary in nature, and, in specific circumstances, may ground a fiduciary duty. However, the relationship itself does not create a generalized or overarching duty upon the federal Crown – not all dealings between parties in a fiduciary relationship are governed by fiduciary obligations.[90]

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88 *KLB v British Columbia*, 2003 SCC 51 at para. 23.
89 *KLB v British Columbia*, 2003 SCC 51 at para. 23.
90 *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 ["*MMF*"] at para. 48.

72. As noted by the Supreme Court of Canada, the "…concept of fiduciary duty is not an invitation to engage in 'results oriented' reasoning", but rather a principled analysis.[91] A fiduciary duty may arise in two ways: firstly, from a "cognizable aboriginal interest"[92] and secondly, an *ad hoc* fiduciary duty may arise where certain conditions are met. In *Elder Advocates*, the Supreme Court of Canada stated that the Crown's broad responsibility to act in the public interest means that only in rare situations will it owe a duty of "utmost loyalty" to a particular person or group.[93]

a. No sui generis fiduciary duty

73. The *sui generis* fiduciary duty, unique to the relationship between the Crown and Indigenous Peoples, arises where there is: (1) a specific or cognizable "Aboriginal"[94] interest, and (2) the Crown has assumed a sufficient amount of discretion over that interest, meaning the Crown's control must be such that it invokes responsibility "in the nature of a private law duty."[95]

74. The Claim does not assert Canada assumed discretionary control over a specific or cognizable Aboriginal interest, or that it undertook to exercise discretionary control in a way that invokes responsibility in a private law duty with respect to that interest.[96] It therefore does not sufficiently plead all the elements required to give rise to a *sui generis* fiduciary duty and a breach thereof.

75. Moreover, such an interest must be "communal" and "distinctly Aboriginal".[97] So far, courts have only found fiduciary duties based on the *sui generis* test in relation to land and land-

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[91] *Gladstone v Canada (Attorney General)*, 2005 SCC 21 ["*Gladstone*"] at para. 24.
[92] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para. 85 ["*Wewaykum*"].
[93] *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 ["*Elder Advocates*"] at paras. 22, 43-44.
[94] As that term is commonly used in the relevant jurisprudence.
[95] *Wewaykum* at para. 85; *MMF* at para. 61.
[96] Claim at para. 10.
[97] *Paddy-Cannon v Canada (Attorney General)* 2025 ONCA 394 at para. 64.

related interests.[98] The Supreme Court has also suggested that section 35 rights ("interests in reserve land" as a collective) can qualify as a specific or cognizable interest.[99]

76. The Claim asserts that Canada had at all material times, exclusive legislative authority for "Indians" under s. 91(24) of the *Constitution Act, 1867*.[100] However, as noted, section 91(24) does not create a duty to legislate, create policy or act in any way.[101] These general responsibilities do not amount to an undertaking necessary to give rise to a fiduciary duty.

77. While the Plaintiffs rely on the *Indian Act* to establish a fiduciary duty, following the 1949 Terms of Union, no consequential amendments were made to the 1952 *Indian Act* to extend its application to the Labrador Innu in Newfoundland and Labrador.[102] This only occurred in 2002, when Canada recognized the Sheshatshiu Innu First Nation and the Mushuau Innu First as 'bands' under the *Indian Act*.[103]

78. In any event, the relevant provisions of the *Indian Act* concerning education provide Ministerial discretion to make regulations, enter into agreements and apply moneys to pay for children's maintenance at a school.[104] The Supreme Court of Canada has said these provisions are not mandatory and do not create duties on the federal Crown.[105] They therefore cannot be relied on as an undertaking of discretionary control.

79. While the Plaintiffs rely on *St. Teresa Point First Nation* and *Shamattawa First Nation*, the factual and legal matrix applicable to the delivery of education to the Innu in Labrador is entirely distinguishable from the context before the Federal Court in those cases, where the

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[98] *Guerin v The Queen* [1984] 2 SCR 335; *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at para. 55,; *Wewaykum* at para. 81; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at paras. 53-56 ["*Williams Lake*"].
[99] *Williams Lake* at para. 53, *MMF* at para. 53.
[100] Claim at para. 10.
[101] *Daniels* at para. 15; *Stonechild* at para. 39.
[102] *British North America Act*, 1949-Enactment No. 21; *Indian Act*, SC 1951, c. 29, *Indian Act*, RSC 1952, c. 149.
[103] *Sheshatshiu Innu First Nation Band Order*, SOR/2002-414; *Mushuau Innu First Nation Band* Order, SOR/2002-415.
[104] *Indian Act*, RSC 1985 c I-5, ss 114-122. The provisions have not significantly changed since 1970.
[105] *Blackwater v Plint*, 2005 SCC 58 at para. 50.

reserves and real property on reserve, were held by Canada for the benefit of the First Nations pursuant to the *Indian Act* and Canada undertook to provide housing or drinking water on-reserve pursuant to its programs and policies.[106]

b. No ad hoc fiduciary duty

80. Under the *ad hoc* test, plaintiffs must plead material facts supporting that (i) Canada undertook to act in class members' best interests, forsaking all other interests; (ii) there is a defined class of persons vulnerable to Canada's control; and (iii) a legal or substantial practical interest of class members that stands to be adversely affected by Canada's exercise of discretion or control.[107] An *ad hoc* fiduciary relationship must be established on a case-by-case basis.

81. The Claim relies on a general and expansive fiduciary duty, stemming from the relationship between Canada and Indigenous peoples.[108] However, a 'relationship of trust and reliance' alone does not meet the high threshold of an undertaking in the fiduciary sense.[109] The Plaintiffs' bare assertions do not adequately set out the necessary components or factual basis on which a fiduciary duty could be found, and even less so any corresponding breach. Stating that a loss of language and culture claim is corollary to the claims in another class proceeding is not sufficient to establish a claim.[110]

82. As stated earlier, a fiduciary duty owed by the Crown will be rare. Claims against the government that fail to satisfy the legal requirements of a fiduciary duty should not be allowed to proceed in the speculative hope that they may ultimately succeed.[111] Accordingly, the claim in breach of fiduciary duty cannot be certified on the basis of an *ad hoc* fiduciary duty against Canada.

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[106] *Indian Act*, RSC 1985 c I-5, s. 18(1).
[107] *Elder Advocates* at para. 36; *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574, 1989 CanLII 34 (SCC) at 599; *Wewaykum* at para. 83; *Ontario (Attorney General) v Restoule*, 2024 SCC 27 at paras. 228, 231.
[108] Claim at para. 29
[109] *Ontario (Attorney General) v Restoule*, 2024 SCC 27 at para. 231.
[110] Claim at paras. 34-35
[111] *Elder Advocates* at para. 65.

83. The Plaintiffs say, in their written submissions, that Canada owed a fiduciary duty to students on the basis that the fiduciary relationship between them is like the relationship between parent and child or guardian and ward. The premise to this assertion is lacking a factual basis in the Claim.[112] The Claim fails to specify how, by whom, when, or where, or in what way Canada is asserted to have put its interests ahead of those of the Plaintiffs. Canada, and the Court, are left to speculate as to these material facts. In the absence of these material facts, the Claim fails to set out how Canada breached any asserted *ad hoc* duty, and therefore discloses no cause of action.

84. Funding the Province to deliver education to Innu students does not amount to an assumption of discretionary power over Innu students, and is not analogous to the relationship between parent and child or guardian and ward.[113] The nature of funding decisions is entirely at odds with a fiduciary duty.[114] Setting funding levels requires the Crown to make choices amongst many deserving interests where resources are scarce. It does not, in an of itself, create the type of relationship and duty to act in the best interest in respect of a 'interest' as has been found to give rise to a fiduciary duty in other contexts.

85. The Plaintiffs' apparent assertion that Canada had an obligation to prevent all harm to Innu children is not supported by the law. In *G. (E.D) v Hammer*, the case relied on by the Plaintiffs, the Supreme Court of Canada expressly rejected the claim that a school board has a fiduciary duty to ensure that no employee harms school children on school premises. The Supreme Court of Canada stressed that such a proposal 'extends fiduciary law beyond its natural boundaries' as 'fiduciary obligations are no obligations to guarantee a certain outcome for the vulnerable party, regardless of fault. They do not hold the fiduciary to a certain type of outcome, exposing the fiduciary to liability whenever the vulnerable party is harmed by one of the fiduciary's employees.'[115]

86. As noted, the facts of the Claim are distinguishable from *Anderson*, where the schools at issues included a residential component. In *Anderson*, the residential component ultimately

[112] *Norvena Breaker v HMTK*, 2025 FC 985 at paras. 75-76, 105; Claim at para. 37-38.
[113] *Varley v Canada (Attorney General)*, 2025 FC 753 at para. 198.
[114] *Elder Advocates* at para. 44.
[115] *EDG v Hammer*, 2003 SCC 52 at para. 23.

formed the basis for certification of the Claim against Canada. Similarly, the factual and legal matrix in *Neal*[116], upon which the Plaintiffs rely and is under appeal, are different. At issue in *Neal* was the placement of children into care, and the application of Jordan's Principle as it relates to child welfare programs in British Columbia. Canada has simply not engaged in discretionary control over the education of Innu children. The circumstances before this Court is one where Innu children returned to their families and caregivers at the end of the school day – not one where parents had no opportunity to transmit their language and culture to their children.

87. Moreover, it is plain and obvious that the Plaintiffs' claim for breach of fiduciary duty, as advanced by Innu Nation cannot succeed. For a claim in fiduciary duty to succeed, there must be material facts pleaded that Canada has undertaken to act only in the interests of Innu Nation and the Innu Governments Class and deliberately forsaken the interests of all others in their favour.[117] For a fiduciary relationship to exist between Canada and the class in this specific context, it would require Canada to forsake the interests of Innu children in favour of a non-profit entity which represents the Labrador Innu in its dealings with Canada and the Province.

iii. The Plaintiffs' infringement of Aboriginal rights claim cannot succeed

88. The Plaintiffs have not pleaded all the elements required to support a cause of action for breach of their asserted Aboriginal rights, nor have they pleaded the material facts necessary to establish either the nature and scope of the rights or a *prima facie* infringement by Canada.

89. A pleading asserting a claim to an existing right affirmed by s. 35(1) of the *Constitution Act, 1982* must identify the precise nature and scope of the claimed right.[118] In *Lax Kw'alaams Indian Band*, the Supreme Court of Canada called for greater precision in the pleading of Aboriginal rights claims:

> It would not be in the public interest to permit a civil trial to lapse into a sort of free-ranging general inquiry into the practices and customs of pre-contact Aboriginal peoples from which, at the end of the day, the trial judge

[116] *Neal v Canada (AG),* 2025 BCSC 1498.
[117] *Elder Advocates* at para. 49.
[118] *Lax Kw'alaams Indian Band v Canada (Attorney General),* 2011 SCC 56 at paras. 11 and 46.

> would be expected to put together a report on what Aboriginal rights might, if properly raised in the pleadings, have been established.[119]

90. In order to sustain a cause of action for damages for breach of an Aboriginal right under s. 35, a claimant must plead the following:

   a. that the claimant or others were acting pursuant to an existing Aboriginal right;
   b. that the right had not been extinguished prior to the enactment of s. 35(1);
   c. that the right has been infringed; and
   d. that the Crown has failed to show that the infringement was justified.[120]

91. In *Van der Peet*, the Supreme Court articulated the test for determining whether an individual was acting pursuant to an Aboriginal right (i.e., the first step above). A practice, custom, or tradition which is integral to the distinctive culture of the Indigenous group must be shown to have continuity with the practices, customs, or traditions which existed prior to European contact with the Indigenous peoples asserting their right.[121]

92. Courts considering a claim to the existence of an Aboriginal right must focus specifically on the practices, customs and traditions of the Indigenous group asserting the right. To satisfy the "integral to a distinctive culture" test,[122] the Indigenous claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the Indigenous society of which he or she is part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture and that it has a reasonable degree of continuity with the integral pre-contact practice.

93. The Claim contains only a general assertion as to the nature of the claim in a generic way, namely that they hold Innu language and culture rights, and the right to control and

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[119] *Lax Kw'alaams Indian Band* v *Canada (Attorney General)*, 2011 SCC 56 at para. 11, and also see paras. 40-43.
[120] *R. v Gladstone*, [1996] 2 S.C.R. 723 at para. 20.
[121] *R v Van der Peet*, [1996] 2 SCR 507, paras. 45-47 and 55-74 [*"Van der Peet"*].
[122] *Van der Peet* at para. 48; see also *Fisher River Cree Nation v Canada (Attorney General)*, 2025 FC 561 at paras. 52-56, 59, 67-75 [*"Fisher River"*].

govern education, and that those rights were infringed.[123] The Claim does not plead the "period prior to contact"[124] with Europeans, or provide specifics as to how the practices were "integral"[125] to each proposed class member's pre-contact "distinctive culture",[126] or the existence of "continuity in the practices, customs and traditions."[127] Such assertions, without material facts in support, are insufficient to ground a claim.[128]

94. It is also well settled that Aboriginal rights protected by section 35 are communal rights.[129] It follows that the proper party with the standing to assert an Aboriginal rights claim is the section 35 rights-holding collective rather than individual members,[130] and the courts have ruled that a class action is not an appropriate vehicle for asserting such rights.[131] Given the same, any claim advanced on behalf of the Survivor Class does not support a viable cause of for infringement of section 35 rights.

iv. No reasonable claim for alleged breach of the honour of the Crown

95. Although the honour of the Crown is always at stake in its dealings with Indigenous peoples[132], it is not itself a cause of action.[133] Since it is not an independent cause of action, it cannot be a "reasonable" cause of action advanced in a proposed class action. Further, the honour of the Crown is only engaged as a source of distinct legal duties in certain specific circumstances,[134] none of which are present in this case.

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[123] Claim at paras. 30-31
[124] *Van der Peet* at para. 60.
[125] *Van der Peet* at para. 55.
[126] *Ibid.*
[127] *Van der Peet* at para. 63.
[128] *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para. 17.
[129] *R v Desautel,* [2021] 1 SCR 533 at paras. 18-20, 23.
[130] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para. 112.
[131] *Kelly v Canada (Attorney General),* 2013 ONSC 1220, para. 110, aff'd 2014 ONCA 92; *Chief Derek Nepinak and Chief Bonny Lynn Acoose v Canada*, 2025 FC 925, paras. 50-51, 66.
[132] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 61.
[133] *MMF* at para. 73.
[134] *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 at para. 156.

D. <u>The proposed Class is overly broad and unmanageable</u>

96. To satisfy the second certification criterion, the Plaintiffs must demonstrate some basis in fact that an identifiable class of two or more persons exists. Membership in the proposed class must be determined by objective criteria without reference to the merits of the action. There must also be a rational connection between the proposed class and the proposed common issues.[135]

97. Proper definition of the class is critical "…because it identifies the individuals entitled to notice, entitled to relief (if awarded), and bound by the judgment."[136] The class must be defined narrowly enough to meet these requirements – where a class could be defined more narrowly, the courts should either refuse certification or see that the class definition is amended.[137]

98. The Plaintiffs must demonstrate, through evidence, that two or more persons fit within the proposed class definition, and that they have suffered compensatory harm.[138]

99. In this Claim, the proposed class is comprised of two distinct sub-classes:

> i. the "Survivor Class", defined as all Innu persons where they may reside or be domiciled, who attended an Innu Day School during the Class Period or such persons as the Court otherwise recognizes or directs; and
>
> ii. the "Innu Governments Class", defined as the Innu government organizations that formally represent the Innu of Labrador, this class being composed of the Innu Nation, Sheshatshiu Innu First Nation, and Mushuau Innu First Nation.

100. The Plaintiffs also propose a "Class Period", commencing on March 31, 1949 and ending on August 1, 2009, to temporally limit the proposed class.

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135 *Hollick*, paras. 9, 17-19.
136 *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at para. 38. ["*Dutton*"]
137 *Hollick*, para. 16.
138 *Lockhart v Attorney General of Canada*, 2024 ONSC 6573 at para. 172.

101. The Survivor Class is overly broad in three ways: firstly, there is no rational connection between the class and the proposed common issues because the class includes all Innu persons whether or not they experienced abuse; secondly, the class definition fails to identify the schools which constitute "Innu Day Schools; and thirdly because there is no basis in fact to certify a class beyond the period 1965-1984, because there is no evidence of a claim beyond that timeframe.

102. The proposed class definition includes all Innu persons who attended an Innu Day School between 1949-2009, irrespective of their individual experience at school. The current definition captures individuals who have no individual claim for which they allege the federal Crown is liable, and for whom the resolution of the proceeding will provide no benefit. The class definition is therefore overbroad, and cannot be certified in its current form.

103. The class definition also does not define which schools constitute an "Innu Day School" for the purposes of the claim, choosing instead to rely on the defined term in the Claim (which defines Innu Day Schools as "such schools in Sheshatshiu, Old Davis Inlet, Davis Inlet and Natuashish, that operated during the Class Period". This presents practical issues when applied to such a broad proposed Class Period, as Sheshatshiu was often not referred to separately from North West River, the community to the north, in the early years of the Class Period.[139] It also presents practical issues in identifying who attended an Innu Day School, as there were no formally named schools or schoolhouses during the early years of the Class Period.

104. The class definition is further overbroad because the evidence proffered by the Plaintiffs provides no basis in fact for a Class Period which spans 60 years. The direct evidence marshalled by the Plaintiffs covers the time period between 1965-1984, a period of 19 years for which there is evidence from attendees at an Innu Day School.

[139] Morin Affidavit, Ex. 7, 9 – Canada's Record, pp. 1059, 1091, 1119.

105. The experiences of the proposed representative Plaintiffs cannot be extrapolated to provide some basis in fact for the existence of claims decades before and decades after the individual Plaintiffs attended an Innu Day School.[140]

106. The Plaintiffs point to academic articles and "community hearing" transcripts from the Inquiry Respecting the Treatment, Experiences and Outcomes of Innu in the Child Protection System as "some basis in fact" for the 60-year proposed Class Period. However, these secondary sources are vague, of limited evidentiary value, and do not assist the Plaintiffs in expanding the proposed Class Period beyond the direct experience of the affiants.

107. Documents of this nature are admissible at certification not for the truth of their contents, but for the limited purpose of putting the facts as pleaded into context.[141] They are assessed by the Court, along with all the frailties they contain, to determine whether a plaintiff has met the "some basis in fact" burden to warrant certification.

108. The Plaintiffs' academic sources do not refer to specific allegations of physical, verbal, or sexual abuse. To the extent that the sources do make specific allegations, they are largely confined to the actions of Father Pirson, a Catholic priest who taught in Sheshatshiu from "the 1950's until the early 1970's".[142] These sources cannot be used by the Plaintiffs to expand the proposed Class beyond the years for which they have marshalled direct evidence.

109. The Plaintiffs' use of transcripts from an ongoing provincial public inquiry are of similarly limited value – the allegations contained in the transcripts from "community hearings" is unsworn, and not tested by cross-examination.[143] The collection of these accounts was not intended to support a cause of action related to Innu Day Schools and was not subject to any civil evidentiary standards. To the extent that the Court can accept accounts in this context,

[140] *Canada v Greenwood*, 2021 FCA 186 at para. 173 ["*Greenwood*"].
[141] See *Bigeagle v Canada*, 2023 FCA 128 at para. 44 ["*Bigeagle*"].
[142] Affidavit of Adrian Tanner, Ex. P, R – pp. 1179, 1276.
[143] Affidavit of Caitlin Urquhart, para. 2, Ex. A – see also *Bigeagle* at para. 46.

the information itself is vague and unclear with respect to the time period and communities referred to by speakers.[144]

110. The Innu Government Class is overbroad and not rationally connected to the proposed common issues. Firstly, Innu Nation Inc. is a non-profit corporation and a rights-negotiating body that has no cause of action distinct from those of Sheshatshiu Innu First Nation and Mushuau Innu First Nation. Its inclusion in this proposed class action is duplicative and therefore overbroad. Secondly, the claims of the Innu Government Class are subject to a two-year limitation period. The proposed Class Period is therefore overbroad with respect to the Innu Government Class.

111. Innu Nation Inc. is a provincially incorporated not-for-profit which represents the rights and interests of the Labrador Innu in negotiations with Canada and the Province.[145] The membership of Innu Nation completely overlaps with the membership of Sheshatshiu Innu First Nation and Mushuau Innu First Nation, each of which have equal representation on the Innu Nation's Board of Directors.[146]

112. The Plaintiffs have not articulated any basis in fact for the inclusion of Innu Nation in a class with its constituent First Nations – the Sheshatshiu Innu First Nation and the Mushuau Innu First Nation.

113. The Plaintiffs heavily rely on *Gottfriedson v Canada*, a Federal Court class proceeding filed on behalf of both individuals and First Nations, the first case where a Band class was certified in Canada in a contested hearing. However, the structure and pleadings in *Gottfriedson* are distinguishable from this case.

114. The class members in *Gottfriedson* did not claim damages to First Nations arising from claims that were duplicative of the survivor class, namely breach of a duty of care in

[144] Affidavit of Caitlin Urquhart, Ex. A.
[145] Poker Affidavit at para. 3; Transcript of Cross-Examination of Prote Poker at pp. 14-13, 17-20.
[146] Affidavit of Florence Milley, Ex. A.

negligence or *Charter* breaches.[147] Here, the claims asserted by the Survivor Class and the Government Class are entirely duplicative. The Government Class simply includes organizations representing the First Nations or is otherwise simply inclusive of the First Nations made up of individuals. As drafted, the Claim lacks logical support for potential outcomes and overbroad, as the benefit of any monetary award will be enjoyed by the individual.

i. The Innu Governments Class and Survivor Class are subject to a 2 year limitation period

115. The proposed class definition is unnecessarily broad as it includes alleged wrongdoing that is statute-barred by limitation periods. The claims brought by the proposed Innu Governments Class are statute barred and the claims brought by the Survivor Class for loss of language and culture are statute barred.

116. Provincial limitation periods are applicable to Canada pursuant to section 32 of the *Crown Liability and Proceedings Act*. That statute provides that the laws relating to the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province. [148] Proceedings by or against Canada in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.[149]

117. Section 5 of the *Limitations Act* mandates a two-year limitation period for actions for damages in respect of injury to a person based on negligence, tort or statutory duty. This limitation period applies to the Plaintiffs' Claim. [150]

118. Section 8(2) of the *Limitations Act* creates an exception for actions based on misconduct of a sexual nature, and battery against a person where, at the time of the assault, the person was a minor and under the care or authority of another person, organization or agency, or

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[147] *Gottfriedson v Canada*, 2015 FC 766 at para. 1c. The Band class claim was certified for breaches of fiduciary duty and cultural and/or linguistic rights (be they Aboriginal or otherwise).
[148] *CLPA* at s. 32; *Clement Estate* v *Canada (Attorney General),* [2004] NBJ No 198; [2004] 3 CNLR 95 (QB), 2004 CarswellNB 237 at para. 48; *Supra* note 26, *Wewaykum* at para. 126.
[149] *Ibid.*
[150] *Limitations Act*, SNL 1995, c. L-16.1, s. 8(2) [*"Limitations Act"*].

the beneficiary of a fiduciary relationship with another person, organization or agency. These provisions are based on trespass to the person and are not at issue with respect to the claims brought by the proposed Innu Governments Class.[151]

119. Section 14 of the *Limitations Act* provides for the postponement of running of time and mandates that an action shall not be taken by a person after the expiration of 10 years from the later of the date of (a) the act or omission on which that action is based; or (b) the last of a series of acts or omissions.[152] Section 15 also provides for the suspension of the right to bring an action if the plaintiff is less then 19 years of age.[153] Notwithstanding, no action may be brought after the expiration of the ultimate 30-year limitation period.[154]

120. Section 24 of the *Limitations Act* mandates a two-year limitation period in circumstances where the previous statute did not set out a limitation period. This encompasses actions based on a breach of fiduciary duty and Aboriginal rights claims which did not previously have a statutorily-defined limitation period.[155] Consequently, any claim based on "actionable harms" in relation to breach of a fiduciary duty and Aboriginal claims had to have been brought by April 1, 1998, being two years from the date the *Limitations Act* came into force (April 1, 1996).

121. It is apparent from the Claim that the cause of action arose outside the application limitation period.[156] The Claim is brought with respect to loss of language and culture, negligence and breach of fiduciary duty because of impugned conduct that covers a 60-year period. The earliest date that the Class Period can commence is two years prior to the filing of the Claim. Any cause of action, arising before that date is barred by operation of provincial limitation periods.[157] Excepting the Survivor Class's claim based on trespass to person, the causes of action alleged by the Innu Governments Class and the Survivor Class arose in 2009 at the

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[151] *Limitations Act*, s. 8(2).
[152] *Limitations Act*, s. 14; *Fitzpatrick v Hefferman*, 2019 NLCA 77 at paras. 11-12.
[153] *Limitations Act*, s. 15.
[154] *Limitations Act*, s. 22.
[155] *Rich v Canada et al.*, 1999 CanLII 19761 (NL SCTD).
[156] *David Brace v Watch Tower Bible and Tract Society of Pennsylvania et al*., 2009 NLTD 171 at paras. 24-25.
[157] *Jacques v Canada,* 2024 FC 851 at para. 76.

very latest, prior to the transfer of administration of primary education for Innu children to the MTIE.[158]

122. There are no issues as to the postponement of the running of the limitation period. Discoverability is generally not decided on a motion for certification due the factual assessment required.[159] However, no such factual inquiry is required in this instance. Section 14 of the *Limitations Act* precludes any factual inquiry related to postponement, and here, the Claim is brought more than ten years after the transfer of administration to the MTIE.[160]

123. With respect to the claim of the Survivor Class, the *Schools Act* sets compulsory attendance for children ages 6-years or older. All members of the Survivor Class have reached the age of majority.[161] To the extent that their claims alleged injury to the person based on a loss of language and culture, those claims are also subject to the 2-year limitation period and are similarly barred by operation of provincial limitation periods.

124. While the Plaintiffs may seek to assert that limitations periods are not running because of a continuing breach, this Court should be mindful of the caution from other courts that acceptance of such a position would defeat the legislative intent and purpose of limitation periods. There is no never-ending series of breaches.[162] Moreover, courts, including the Supreme Court of Canada, have all made it clear that Aboriginal claims are not exempt from limitations constraints.[163]

[158] Claim at paras. 1, 12; See also Plaintiffs Admissions, Schedule C
[159] *Amyotrophic Lateral Sclerosis Society of Essex v Windsor (City)*, 2015 ONCA 572 at para. 41.
[160] *Limitations Act,* s. 14.
[161] *Limitations Act*, s. 15.
[162] *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at paras. 89-90; *Wesley v Alberta*, 2024 ABCA 276 at para. 122; *Semiahmoo Indian Band v Canada,* [1998] 1 FC 3.
[163] *Wewaykum* at paras. 134-137; *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para. 13; *MMF* at para. 138; *Shot Both Sides v Canada*, 2024 SCC 12 at para. 60.

E. The proposed common issues cannot be resolved in common

125. The Plaintiffs, through their Interlocutory Application for Class Certification, seek to certify the following common issues as against Canada:

a. Did either Defendant owe a duty of care to the Survivor Class and/or the Innu Governments Class through their respective roles, as defined below, in relation to schools in Sheshatshiu, Old Davis Inlet, Davis Inlet and Natuashish throughout the Class Period?

For the purposes of this Order, the "respective roles" of the Defendants refers to:

1. For Canada, the inspection of, supervision of, and provision of resources (including funding and educational services) to schools in Sheshatshiu, Old Davis Inlet, Davis Inlet, and Natuashish; and

[omitted]

b. If the answer to (a) is "yes", did either Defendant breach the standard of care?

c. Did either Defendant owe a fiduciary duty to the Survivor Class and/or the Innu Governments Class through their respective roles in relation to schools in Sheshatshiu, Old Davis Inlet, Davis Inlet, and Natuashish throughout the Class Period?

d. If the answer to (c) is "yes", did either Defendant breach its fiduciary duty?

e. Did either Defendant infringe the Aboriginal rights of the Survivor Class and/or the Innu Governments Class through their respective roles in relation to schools in Sheshatshiu, Old Davis Inlet, Davis Inlet, and Natuashish throughout the Class Period?

f. If the answer to (e) is "yes", was the infringements of Aboriginal rights justified?

g. Did either Defendant breach duties flowing from the honour of the Crown, in a manner that impacted the Survivor Class and/or the Innu Governments Class through their respective roles in relation to schools in Sheshatshiu, Old Davis Inlet, Davis Inlet, and Natuashish throughout the Class Period?

h. If either or both Defendants are liable to the Class Members in either Class in any of the causes of action alleged:

   i. Can the Court make an aggregate assessment of the damages suffered by the Class as part of the common issues trial?
   ii. If the answer to (i) is "yes", in what amount?
   iii. Are the Defendants guilty of conduct that warrants the award of the remedies of aggravated and/or punitive damages available in the circumstances?
   iv. If the answer to (iii) is "yes", in what amount?
   v. Are the remedies of general damages, constitutional damages, special damages, and/or equitable compensation available in the circumstances, and should those remedies by awarded?
   vi. Should declaratory or other relief be granted in any manner?

126. The principles applying to the "commonality" question on an application for certification are well-established.[164] An issue can only be certified as a "common issue" where it is an essential element of each class members' claim; its resolution will avoid duplication of fact-finding or legal analysis; its resolution will meaningfully advance the claim, the issue is not dependent upon individual findings of fact with respect to each individual claimant; and the common issues are not common only when stated in the most general terms. Certification should be refused where the issues are intrinsically individual or overwhelm the common issues.

[164] *Greenwood* at para. 133.

127. The "some basis in fact" standard obliges the Plaintiffs to demonstrate that the proposed common issues (1) actually exist in fact, and (2) can be answered in common across the entire class.[165]

i. No basis in fact showing common issues exist as against Canada

128. The fact that Canada plays no role in the direct delivery of primary education to Innu children in Labrador is not in dispute. The evidence, and the pleadings, speak to Canada's lack of operational and procedural involvement or management based on high-level policy decisions and its respect for provincial responsibility to provide educational services to Innu children residing off-reserve.[166]

129. The Plaintiffs' bald argument that Canada was required to inspect and supervise the schools in Sheshatshiu, Old David Inlet, Davis Inlet, and Natuashish has no basis in fact. There are no duties imposed on the federal Crown under clause 17 of the Terms of Union.

130. Similarly, subsequent legislation concerning the education of children, including Innu children, placed the responsibility for education on the Province. Pursuant to the *Education Act* of 1952[167] the administration of general elementary education for various religious denominations was administered through a Board of Education under the authority of the Province. *The Schools Act* of 1970[168] had the establishment of public schools receiving public funds from the Province and operated by a School Board. *The Department of Education Act,* 1990[169] similarly listed the Minister of Education as responsible for the education of all children in Newfoundland and Labrador. Canada had no responsibility regarding the hiring of teachers, the standard curriculum, the hours and frequency a child was to attend school nor when a child could be excused from attendance.

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[165] *Jensen v Samsung Electronics Co. Ltd.*, 2023 FCA 89 at para. 27.
[166] Morin Affidavit at paras. 28, 30-31 – Canada's Record, pp. 957-958; Hatcher Affidavit at para. 11 – Province's Record at p. 51.
[167] *The Education Act*, SN 1952, c 101, s. 47 at ss. 3-4, 6, 8.
[168] *The Schools Act*, RSN 1970, c 346, at ss. 12-13, 19, 33 .
[169] *The Department of Education Act*, SN 1990, c. 26, ss.2 (c), 2 (h), 7.

ii. Issues cannot be answered in common across the entire class

131. Considering the varying experiences and individual circumstances at issue in the Claim, the purported common issues necessarily break down into individual issues. By proposing such broad common issues across a wide-ranging Class Period, the proposed common issues cannot be determined on a common or class-wide basis.

132. Importantly, the evidence tendered by the Plaintiffs does not show commonality across the classes. The Plaintiffs' submissions on this issue are vague and simply repeats general, unsupported statements made in the Claim. It does not address the wide range of circumstances undermining any viable commonality of the Survivor and Innu Governments Classes, including:

   a. variation across the 60-year Class Period relative to the involvement of the Oblates and the First Nations in the delivery of education services;[170]

   b. variations across the 60-year Class Period associated with the delivery of primary education in Innu-aimun;[171]

   c. variations across the 60-year Class Period due to changes in legislation and policies;[172]

   d. variations across the 60-year Class Period due to changes in the funding agreements between Canada and the Province or Canada and the Sheshatshiu Innu First Nation/Mushuau Innu First Nation;[173]

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[170] Morin Affidavit at paras. 17, 20, 21, 24-29, Ex. 9, 20-24 - Canada's Record at pp. 955-957, 1121, 1315, 1320, 1328, 1344, 1349, 1357, 1372, 1382, 1387, 1395-1396, 1426, 1439, 1456-1460, 1467, 1472.
[171] Morin Affidavit at para. 26, Ex. 14, 17, 24-26, 31 - Canada's Record at pp. 957, 1219, 1285, 1472, 1482, 1493, 1497, 1500, 1511, 1566, 1568; Fleet Affidavit at paras. 12, 37, 39-46 – Province's Record at pp. 6, 11-13.
[172] Morin Affidavit at para. 38, Ex. 7 - Canada's Record at pp. 959, 1063, 1071; Hatcher Affidavit at para. 11 – Province's Record at p. 51.
[173] Morin Affidavit at paras. 12, 26, 32, 34 - Canada's Record at pp. 955, 957-959.

e. variations across the proposed Class Period due to amendments to the *Indian Act* in 2002 and the subsequent creation of reserves for the benefit of Sheshatshiu Innu First in 2006 and Mushuau Innu First Nation in 2003;[174]

f. variations across the Innu Governments Class which includes both corporate entities and First Nations and does not distinguish between Indigenous collectives and their authorized representatives;[175]

g. variations in the individual experiences of the Survivor Class, including variations in parental choice about where and when their children would be educated.[176]

133. At the certification stage, the Court must grapple with whether and how common issues will advance the claim prior to granting certification. Two years after certification in *Rumley et al v HMTQ*, the common issues in negligence and fiduciary duty, including the claim in "operation and management", proved difficult to litigate.[177] After certification, the court questioned whether it was even possible to conduct a common issues trial that would "be of any benefit to the individual Plaintiffs."[178] Notably, the issues in *Rumley* were much more in "common" than those proposed in this proceeding.

iii. No basis to certify damages as a common issue

134. If this Court finds that the pleadings disclose a cause of action and that some common issues should be certified, it should decline to certify any common issues with respect to damages.[179] The Plaintiffs have provided no basis in fact supporting any assessment of damages as common issues.

[174] Morin Affidavit at para. 31 - Canada's Record at p 958.
[175] Morin Affidavit at para. 17, Ex. 17 - Canada's Record at pp 955, 1097, 1099.
[176] Morin Affidavit, Ex. 31 - Canada's Record at pp. 1552-1554.
[177] *Rumley et al v HMTQ*, 2003 BCSC 234 at paras. 30, 75 ["*Rumley*"].
[178] *Rumley* at para. 75. See also *Carcillo v Canadian Hockey League*, 2023 ONSC 886 at para. 410 [*"Carcillo"*] for further commentary on *Rumley* post-certification.
[179] *Fisher River* at paras. 98, 114.

135. For any class action where questions relating to causation or damages are proposed as common issues, the Plaintiffs must demonstrate, with supporting evidence, that there is a methodology for determining such issues on a class-wide basis,[180] as opposed to an individual basis for the class members.

136. In this case, the Plaintiffs have not tendered any evidence to propose a methodology for determining damages on an aggregate basis across the class. No such workable methodology exists given the breadth of and wide variation within the classes. The proposed common issues ignore causation and injury. Accordingly, there is no basis in fact for the certification of common questions related to an aggregate damages assessment.[181] Finally, there is no basis in fact, or on the pleadings, for constitutional and reconciliatory damages to be certified as a common issue.

F. Individual actions are a preferable procedure

137. The onus is on the Plaintiffs to show that a class proceeding is preferable to any other reasonable means of resolving the claim.[182] Saying that a class action is preferable does not make it so; there is some heavy lifting to be done. The need for a "clear explanation" serves as an important check in considering whether the Plaintiffs have met the preferable procedure criteria and whether the common questions predominate over questions affecting only individual members.[183]

138. The preferable procedure inquiry is directed at whether the class proceeding is a "fair, efficient and manageable method of advancing the claim", and whether it is preferable to other procedures.[184] Allowing this matter to proceed as a class action will not result in judicial economy or access to justice considering the disparate nature of the claims and the plethora of individual issues raised.

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[180] *Pro-Sys* at s. 113, 115-116, 134. See also e.g. *Greenwood* at para. 188; *Nasogaluak* at paras. 111–115, applying *Greenwood* to Charter damages.
[181] *Greenwood* at paras. 19–20, 188–189.
[182] *Hollick*, paras. 28-31; see also *Stonechild* at para. 9.
[183] *McCracken v Canadian National Railway Company*, 2012 ONCA 445 at para. 146.
[184] *Rumley v British Columbia,* 2001 SCC 69 at para. 35, citing *Hollick* at para. 28.

139. In considering preferable procedure, this Court must consider whether the common issues predominate over individual ones.[185] A class action is not appropriate where, like in this case, the litigation requires detailed individual assessments of circumstances surrounding liability, injury, causation and damages specific to each individual claimant.[186]

140. The plethora of individual issues and circumstances in this case weigh against judicial economy and overwhelm the resolution of the common issues.[187] The resolution of the common issues "will, in substance, mark just the beginning of the process leading to a final disposition of the claims of class members."[188]

141. The framing of various claims as negligence, breach of fiduciary duty, and infringement of Aboriginal rights belie the complexity of the issues. Answering the common question will require a granular assessment of varied historical contexts—such as the agreement in place between the Province and Canada, the allocation of funding processes, the organization(s) responsible for the schools, the standard of care owed by school administrators and staff, and the status of the Plaintiffs. The answer to the common issues may change depending on the moment in the Class Period. The evidence provided in preparation for this certification motion suggests that the provision and administration of funding and education changed throughout the Class Period.[189] A class action is not the proper procedure for providing a judicial opinion about rights and obligations in the absence of any assessment of causation and injury.

142. As an example, the Claim asserts that Innu students suffered physical assaults, perpetrated by teachers. While these teachers were not servants or agents of the federal Crown for which Canada is liable, vicariously or otherwise[190], any assessment of liability necessarily requires an individual assessment of the reasonable use of discipline by those involved in the

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[185] *Class Actions Act*, s. 5(2)(a).
[186] *Bayens v Kinross Gold Corporation*, 2014 ONCA 901 at paras. 128–29 ["*Kinross*"]; *Fantl v Transamerica Life Canada*, 2016 ONCA 633 at paras. 1-3, 11-12; *Keatley* at para. 246.
[187] *Kinross* at paras. 128–29.
[188] *Dutton* at para. 39; See also *Carcillo* at para. 389.
[189] Morin Affidavit at paras. 12-30 – Canada's Record at pp 955-958; Fleet Affidavit, describing educational changes, Province's Record at pp. 11-16.
[190] *CLPA*, s. 3.

education of minors and whether the disciplinary activities associated with the individual allegations were reasonable in light of the standards of the day for discipline.[191]

143. To the extent that the action is based on the Aboriginal rights protected by s. 35 of the *Constitution Act*, *1982* held by the collective, representative actions brought by individual First Nations are preferrable. Findings made as to the existence, scope, and nature of s. 35 rights will not be restricted to those members of the proposed class who participate in the litigation. Rather, any such findings will necessarily be binding on all the collectives which have rights under s. 35 in question.[192] To the extent that the Survivor Class claim based on loss of language and culture is rooted in fiduciary law, the determination of the breach and any damages based on loss of language and culture will be specific to the individual. The record before the Court on certification is replete with factual examples for individuals who continue to speak Innu-aimun as their first language and continue their traditional cultural practices.[193]

144. Finally, the Plaintiffs raise broad and diffuse claims related to funding and policy that cannot be properly adjudicated.[194] The Ontario Superior Court in *BM v Ontario*, noted that general assertions about "broad social issues and core policy decisions" over many years are unsuitable for a class action proceeding.[195] This Claim similarly amount to a far-reaching public inquiry about the policy of Innu education generally and is ill-suited a judicial proceeding.[196] The result is a Claim that is unmanageable and fundamentally not justiciable.

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[191] See e.g., *The Education Act*, SN 1952, c 101, s. 47; *The Education Act*, 1960, SN 1960, No. 50, s. 68; *The Schools Act,* RSN 1970, c 346, s. 84; *The Schools Act*, 1997, SNL 1997 c S-12.2, ss. 33, 42; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General),* 2004 SCC 4 (CanLII), [2004] 1 SCR 76 at para. 40; and common-law defences.
[192] *Soldier v Canada*, 2009 MBCA 12 at para. 78; *Chief Derek Nepinak and Chief Bonny Lynn Acoose v Canada*, 2025 FC 925 at para. 41.
[193] Fleet Affidavit at paras. 39-46 – Province's Record at pp. 11-13; Affidavit of Gregory Rich at para. 24; Transcript of Cross Examination of Gregory Rich at pp 3-4, 7, 13, 18-19; Morin Affidavit, Ex. 31 - Canada's Record at pp. 1536-1537, 1566.
[194] *Tanudjaja v Canada (Attorney General),* 2014 ONCA 852 at paras. 32-33 ["*Tanudjaja*"].
[195] *BM v Ontario,* 2025 ONSC 4575 at paras. 135–36.
[196] *Tanudjaja* at para. 33.

G. The proposed representative Plaintiffs are inappropriate

145. The proposed representative Plaintiffs for the Survivor Class each appear suited to the role as representative Plaintiff on a personal level.

146. However, there is nevertheless an issue with respect to their suitability to represent a proposed class in an action that names the federal Crown as a defendant. Chiefly, the pleading does not allege material facts on which either of Mr. Rich, Ms. Andrew or Ms. Benuen has a cause of action as against Canada. The paragraphs in the Claim that alleges wrongful conduct suffered by these individuals does not ascribe the conduct to Canada, or a servant of the federal Crown.

147. As stated earlier, a class action is a procedural vehicle that does not grant substantive rights to the proposed Class, nor does it weaken any standards of pleadings or evidence to which a plaintiff is held. The representative Plaintiffs must be "anchored in the proceeding"[197] and each have a claim of his or her own. Absent a viable individual claim, the three proposed representative Plaintiffs for the Survivor Class are not anchored in the proceeding and cannot be suitable representatives of the Class.

148. With respect to the Innu Governments Class, there is likewise no basis in fact to demonstrate Innu Nation Inc. is anchored in the proceeding such that it could suitably represent a sub-class consisting of itself, Mushuau Innu First Nation and Sheshatshiu Innu First Nation. There is nothing in the record to show that the Innu Nation Inc. is the authorized representative of the collectives for the purposes of advancing the claim based on s. 35 rights.[198]

149. In addition, the evidentiary record exposes an apparent conflict between Innu Nation Inc. and the members of the proposed Survivor Class, rendering Innu Nation ill-suited to the role of representative Plaintiff. Since at least the 1981 Canada-Newfoundland-Native Peoples of Labrador Agreement, Innu Nation and the other members of the proposed Innu

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[197] *McMillan v Canada*, 2023 FC 1752 at para. 110.
[198] *Behn v Moulton Contracting Ltd*. 2013 SCC 26 at paras. 30-31; Transcript of Cross-Examination of Prote Poker at p. 21.

Governments Class have participated in various management committees set up pursuant to that Agreement, and similar agreements.[199]

150. To the extent that Canada's participation in these committees is a source of Canada's alleged liability in this action, the proposed Innu Governments Class are likewise exposed as alleged tortfeasors. The Innu Governments Class will inevitably find itself in a conflict with the Survivor Class with respect to the role Innu Nation, Sheshatshiu Innu First Nation, and Mushuau Innu First Nation played in the administration and delivery of Innu education during the proposed Class Period.

H. <u>Other legal proceedings are not determinative</u>

151. It is incumbent on the Court to evaluate this proposed class action on its own merits, the record before the Court, and the distinguishing facts involved in this case.

152. The Plaintiffs make sweeping statements that Indigenous plaintiffs routinely used class proceedings as a means of resolving school-related claims against Canada to justify certification of this action. It is not sufficient to rely on other proceedings, which each turn on their own facts and context, to justify certification of this action.[200] The context of the *Indian Residential School Settlement Agreement* and *McLean* are entirely distinguishable from the facts of this Claim as those proceedings involved the delivery of education to students who lived on reserve pursuant to the *Indian Act*. The question of whether certification should be granted is answered based upon the application of the relevant legal framework and is not a political question.[201]

153. Therefore, for all of the reasons submitted herein, the Plaintiffs have not satisfied the criteria under section 5 of *The Class Actions Act.*

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[199] Morin Affidavit, Ex. 9, 11, 13, 14, 20-22; Canada's Record at pp. 1120-1141, 1166-1191, 1198-1202, 1204-1232, 1315, 1320, 1328, 1344, 1349, 1357, 1372, 1382
[200] *Pro-Sys* at paras. 103, 104.
[201] *Highwood Congregation of Jehovah's Witness (Judicial Committee) v Wall*, 2018 SCC 26 at paras. 32-34.

PART IV – REMEDY

154. For the foregoing reasons, the Plaintiffs' application for certification must be dismissed.

DATED at Halifax, Nova Scotia this 20th day of January, 2026.

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Atlantic Regional Office
Suite 1400, 5251 Duke Street
Halifax, NS B3J 1P3
Fax: 902-426-2329

Per: Gwen MacIsaac / Victor Ryan/ Emily Crompton
Tel: 782-640-9008
Email: gwen.macisaac@justice.gc.ca
victor.ryan@justice.gc.ca
emily.crompton@justice.gc.ca

Solicitor for the Respondent / First Defendant, Attorney General of Canada

Schedule A: Previous settlements by Canada to resolve Indigenous childhood claims

Indigenous Class Action	Key Provisions	Settlement
Indian Residential School Settlement Agreement (IRSSA), dated May 8, 2006 (available online: *Fontaine et al v Canada (Attorney General) et al* (15 December 2006), Court File No. 00-CV-192059CP (ONSC), Settlement Approval Order)	"**Eligible CEP Recipient**" means any former Indian Residential School student who resided at any Indian Residential School prior to December 31, 1997 and who was alive on May 30, 2005. Article 12 allowed for a requestor to add an Indian Residential School to the list of school at Schedule "F" of the agreement if: (a) the child was placed in a residence away from the family home by or under authority of Canada for the purposes of education; (b) and Canada was jointly or solely responsible for the operation of the residence and care of the children there.[202]	• **$1.9 billion** Common Experience Payment ("CEP") fund for former students who resided in an Indian Residential School; Individual compensation **starting at $10,000** for every Eligible CEP Recipient. • **$125 million** for the Aboriginal Healing Foundation to address the legacy of harms suffered at Indian Residential Schools including its intergenerational effects, and to support local community-driven healing initiatives. • **$20 million** fund for a number of commemorative initiatives both at a national and community level to promote "Aboriginal languages, cultures and traditional and spiritual values". • **$60 million** fund for a five-year Truth and Reconciliation Commission that would provide opportunities for individuals, families and communities to share their experiences
Federal Indian Day Schools Settlement	a. "**Survivor Class**" means all persons…who attended an Indian Day School.	• **$200 million** for community-based legacy projects to support "Legacy Projects for

[202] Ford Affidavit, Ex. 1, Canada's Record at pp. 76-77.

Indigenous Class Action	Key Provisions	Settlement
Agreement (available online: *McLean v Canada*, 2019 FC 1074)	b. "**Family Class**" means all persons who are a spouse, former spouse, child, grandchild or sibling of a Survivor Class member. c. "**Federal Indian Day School**" or "**Federal Day School**" means a day school established, operated, maintained and controlled by Canada after 1920 as specified in Schedule K to the Settlement Agreement. d. "**Indian Day School**" means both a Federal Indian Day School and a Federal Day School	commemoration, wellness/healing, and the restoration and preservation of Indigenous languages and culture". • Individual compensation **ranging from $10,000 to $200,000**.
Day Scholars Survivor and Descendant Class Settlement Agreement (available online: *Gottfriedson v Canada*, 2021 FC 988)	a. "**Survivor Class**" means all Aboriginal Persons who attended as a student or for educational purposes for any period at an Indian Residential School from and including January 1, 1920, and ending on December 31, 1997. b. "**Day Scholar**" means a Survivor Class Member who attended but did not simultaneously reside at an Indian Residential School that is listed in Schedule E. e. "**Descendant Class**" means the first generation of persons descended from Survivor Class Members or persons who were legally or traditionally adopted by a Survivor Class Member or their spouse.	• **$50 million** for the creation of the Day Scholars Revitalization Fund, to support healing, wellness, education, language, culture, heritage and commemoration activities for survivor and descendant class members. • Individual compensation of **$10,000**.
Residential School Band Class Settlement Agreement (available online: *Gottfriedson v*	"**Band Class**" means 326 First Nations listed on Schedule C, on an opt-in basis.	• **$2.8 billion** for the creation of a trust fund to revive and protect indigenous languages and cultures, protect and promote heritage, and promote wellness for indigenous communities and their members.

Indigenous Class Action	Key Provisions	Settlement
Canada, 2023 FC 327)		
Newfoundland and Labrador Residential School Settlement Agreement Settlement Agreement[203]	"Schools" is defined as the facilities located at Catwright, Makkovik, Nain, North West River, and St. Anthony schools and dormitories.[204]	• **$50 million** lump sum; • Additional funding for healing and commemoration initiatives identified by former students and funding to the Innu Nation, Nunatsiavut Government and NunatuKavut Community Counsel.[205]

[203] Ford Affidavit at Ex. 2 - Canada's Record pp 115-181.
[204] Ford Affidavit at Ex. 2 - Canada's Record p 124.
[205] Ford Affidavit at paras. 9-10 - Canada's Record pp 9-10.

LIST OF AUTHORITIES

Legislation

1. *British North America Act*, 1949-Enactment No. 21
2. *Class Actions Act*, SNL 2001, c C-18.1, s. 5
3. *Constitution Act*, 1867, 30 & 31 Vict, c 3, ss. 91(24), 93
4. *Constitution Act*, *1982*, Part II, s. 35
5. *Crown Liability Act*, SC 1952-53, c 30, s. 24
6. *Crown Liability and Proceedings Act,* RSC 1985, c C-50, ss. 3, 10 and 32
7. *Crown Proceeding Act*, RSBC 1996, c 89, s 2
8. *Indian Act*, RSC 1952, c. 149
9. *Indian Act*, RSC 1985, c. I-5, s 18(1), 114-122
10. *Indian Act*, SC 1951, c. 29
11. *Limitations Act*, SNL 1995 Chapter L-16.1, ss. 5, 8(2), 14, 15, 22, 24
12. *Mushuau Innu First Nation Band Order,* SOR/2002-415
13. *Sheshatshiu Innu First Nation Band Order,* SOR/2002-414
14. *The Department of Education Act*, SN 1990, c. 26, ss. 2, 7
15. *The Education Act*, SN 1952, c 101, ss. 3-4, 6, 8, 47
16. *The Education Act*, SN 1960, No. 50, s. 68
17. *The Schools Act*, SNL 1997 c S-12.2, ss. 33, 42
18. *The Schools Act*, RSN 1970, c 346, s. 12-13, 19, 33, 84

Case Law

19. *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24
20. *Amyotrophic Lateral Sclerosis Society of Essex v Windsor (City)*, 2015 ONCA 572

21. *Atlantic Lottery Corp. Inc. v Babstock,* 2020 SCC 19

22. *Attorney General of Canada v Nasogaluak*, 2023 FCA 61

23. *Bayens v Kinross Gold Corporation*, 2014 ONCA 901

24. *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53

25. *Behn v Moulton Contracting Ltd*. 2013 SCC 26

26. *Bigeagle v Canada*, 2023 FCA 128

27. *Bisaillon v Concordia University,* 2006 SCC 19

28. *Blackwater v Plint*, 2005 SCC 58

29. *BM v Ontario,* 2025 ONSC 4575

30. *Canada (Attorney General) v Anderson*, 2011 NLCA 82

31. *Canada v Greenwood*, 2021 FCA 186

32. *Canada (Attorney General) v Lameman*, 2008 SCC 14

33. *Canada v Stonechild*, 2025 FCA 105

34. *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General),* 2004 SCC 4 (CanLII), [2004] 1 SCR 76

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