JOINT BOOK OF AUTHORITIES OF THE PLAINTIFFS
VOLUME III

Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CHARLES BAXTER, SR. AND ELIJAH BAXTER

Plaintiffs

- and –

THE ATTORNEY GENERAL OF CANADA

Defendant

- and –

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF CARIBOO, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE DIOCESE OF MOOSONEE, THE SYNOD OF THE DIOCESE OF WESTMINISTER, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE DIOCESE OF SASKATCHEWAN, THE SYNOD OF THE DIOCESE OF YUKON, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE PRESBYTERIAN CHURCH IN CANADA, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA), THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF

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Third Parties

Proceeding under the *Class Proceedings Act, 1992*

JOINT BOOK OF AUTHORITIES OF THE PLAINTIFFS
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Court File No. 00-CV-192059CP

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Third Parties

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49. Indian & Northern Affairs Canada, file E6757-18, volume 13, *A New Justice for Indian Children*, Child Advocacy Project, Children's Hospital, Winnipeg, 1987

Case Name:

T.L. v. Alberta (Director of Child Welfare)

Between
T.L., plaintiff, and
Her Majesty the Queen in Right of Alberta as
Represented by the Director of Child Welfare,
defendant

[2006] A.J. No. 163
2006 ABQB 104
Docket No. 0403 12898

Alberta Court of Queen's Bench
Judicial District of Edmonton
Slatter J.

Heard: October 26, 2005.
Judgment: February 8, 2006.
(152 paras.)

Civil procedure — Parties — Class or representative actions — Certification — Members of class — Common interests — Representative plaintiff — Application to certify these proceedings as a class action — Application allowed in part — The proposed class members (the members) claimed that, while they were minors and in the care of the defendant, Director, they suffered personal injury at the hands of a third party tortfeasors — The members alleged that the Director failed to sue the primary tortfeasors and as a result, the members lost certain rights — Since the proposed representative was not very strong, two or three others were to be added as representatives — There were some common issues — The members were to be divided into subclasses in order to better assess their claims.

Application to certify these proceedings as a class action — The proposed class members (the members) claimed that, while they were minors and in the care of the defendant, Director, they suffered personal injury at the hands of third party tortfeasors — There were possibly 200 members — The members alleged that the Director failed to sue the primary tortfeasor and as a result, the members lost certain rights — The members sought to recover punitive damages — The members had differing levels of involvement with the Director, including temporary guardianship, permanent guardianship, and supervision — The members varied in age, meaning that different limitation periods applied to the members — HELD: Application allowed in part — The members were to be divided into subclasses depending on their level of involvement with the Director — The class only included those who were injured as a result of a tort — There was a separate subclass for those who were now non-residents of the province — The class was limited to those members who were under the Director's care pursuant to the 1966 or 1984 Child Welfare Acts — There were common issues, including whether the Director owed the members a duty to protect their legal rights — The issue of whether there was a systemic breach of duty was not a common issue since each member's situation was too divergent — There was a common issue of whether the Director had systems, policies and practices in place between 1966 and 2004 relating to the prosecution of claims on behalf of children in their care — There was also an issue of whether punitive damages could be claimed in relation to these policies, systems or practices — Since the proposed representative plaintiff was not particularly strong, there were to be two or three

representative plaintiffs added — It was necessary to add necessary parties, including the agencies to whom the Director delegated powers — The class proceeding was preferable although its advantages were marginal.

Statutes, Regulations and Rules Cited:

Act to Amend the Child Welfare Act, S.A. 1961, c. 11, s. 10

Alberta Rules of Court, Rule 38(3), Rule 209

Children's Protection Act of Alberta, S.A. 1909, Chapter 12,

Child Welfare Act, S.A. 1925, Chapter 4,

Child Welfare Act, S.A. 1944, Chapter 8,

Child Welfare Act, S.A. 1966, Chapter 13, s. 17(9)(a), s. 35

Child Welfare Act, S.A. 1984, Chapter C-8.1, s. 7, s. 8, s. 29(2), s. 32(3)

Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12, s. 2, s. 21, s. 31(2), s. 34(4)

Class Proceedings Act, R.S.A. 2000, c. C-16.5, s. 2(1), s. 2(4), s. 5, s. 5(1), s. 5(1)(c), s. 5(1)(d), s. 5(1)(e), s. 5(2), s. 6(2), s. 7, s. 7(1), s. 7(1)(b), s. 7(3), s. 7(4), s. 9, s. 13, s. 17, s. 18(2), s. 20, s. 20(6)(a)

Criminal Injuries Compensation Act, R.S.A. 1980, c. C-33, s. 2(3)(a), s. 9(1), s. 12

Dependent Adults Act, R.S.A. 2000, c. D-11,

Family Services Authorities Act,

Limitation of Actions Act, R.S.A. 1980, c. L-15, s. 51(b), s. 57, s. 59, s. 59(2)(a)

Limitations Act, R.S.A. 2000, c. L-12, s. 4, s. 5, s. 5.1(2)

Victims of Crime Act, R.S.A. 2000, c. V-3,

Victims of Crime Regulation, A.R. 63/2004, s. 8(4)

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REASONS FOR JUDGMENT

¶ 1 **SLATTER J.**:— This is an application to certify these proceedings as a class action. The premise

of the action is that the class members, who were minors at the time and under the care of the Defendant, suffered a personal injury (the "primary tort") at the hands of a third party tortfeasor (the "primary tortfeasor"). It is alleged that the Defendant Director of Child Welfare had a duty to sue the primary tortfeasor on behalf of the minor, but did not do so. As a result, it is alleged that the class members lost certain rights, and they now seek to recover damages from the Defendant Director.

¶ 2 This is therefore not an action about any failure of the Defendant to react properly to the abuse itself. This is a lawsuit about lawsuits. The thrust of the Plaintiff's claim is that she and other members of the class suffered personal injuries that would have entitled them to damages, or would have entitled them to make claims under the Victims of Crime legislation. The allegation is that the Defendant should have pursued those claims on behalf of the plaintiff class, and did not do so.

Facts

¶ 3 A certification application is not a determination of the merits, and none of the allegations in the pleadings have at present been proven. In this particular action, the circumstances of the various potential class members will vary widely, distinguishing this action from some others that have been certified. The circumstances of some of the individual potential class members are useful in providing some context for the application. The record discloses the circumstances of three potential class members.

The LaBonte Claim

¶ 4 Ms. T.L., the proposed representative plaintiff, deposes that she was abused by her step-father between the ages of 7 and 14. The first involvement of the Defendant with the family actually occurred when Ms. T.L. was nine years old, and involved a report of mental abuse by her step-father. Both Ms. T.L. and her mother denied the abuse, and the file was closed.

¶ 5 In about September of 1986, Ms. T.L. and her mother and sister went to a facility for battered women. At that time Ms. T.L. reported physical abuse by her step-father to the Defendant. Ms. T.L. was 14 years old. Ms. T.L. deposes that she was made the subject of a Permanent Guardianship Order at this time, but the Defendant's records do not confirm that. The Defendant and the Plaintiff's mother did enter into a "Support or Custody Agreement with Guardian" for a three-month period from September 11, 1986 to December 18, 1986. The Support Agreement is a standard form one-page document, which recites that it was made pursuant to the provisions of the Child Welfare Act. The agreement has a place to check off "Support Agreement", or "Custody Agreement", and the former was checked. The agreement states that "the guardian(s) and the Director agree:", and the only operative clause is clause 5 which reads as follows:

> 5. The guardian(s) delegate(s) to the director the authority to make the following decisions:
>
> __ Day to day child care
> __ Consent to emergency treatment or surgical procedures
> __ Social activities
> __ School enrollment, vocational training,and employment
> __ Not applicable
> __ Other
> __ Acquisition of recreational licenses and permits
> (excluding firearms and driver's license)

__ Consent to ordinary medical/dental care

The only box checked off was the one marked "Not applicable". It therefore appears that a fairly low level of involvement by the Defendant was anticipated. The purpose of the Support Agreement was apparently to allow the Defendant to provide the Plaintiff with a youth worker and counselling services.

¶ 6 In December of 1986, Ms. T.L.'s counsellor reported that she was doing well. There was a restraining order in place against her step-father, the Department workers concluded that the family was doing well, and the file was closed on January 26, 1987.

¶ 7 In May of 1987, Ms. T.L. disclosed prior sexual abuse to her mother, who contacted the Department. A further Support Agreement was entered into between July 7, 1987 and January 6, 1988. It was similar in form to the previous Support Agreement. Further counselling was arranged, but Ms. T.L. apparently did not attend.

¶ 8 The second Support Agreement was terminated early on September 2, 1987 when Ms. T.L.'s mother arranged for her to move and reside with an aunt. On September 29, 1987 the aunt reported some difficulties with Ms. T.L. In October of 1987, Ms. T.L. overdosed and was admitted to hospital. On October 29, 1987, Ms. T.L. was "apprehended into the custody of a director" under s. 17(9)(a) of the Act, on the basis that Ms. T.L. was lost or abandoned or had no guardian, as neither her mother nor her aunt were willing to take responsibility for her.

¶ 9 On November 10, 1987, the Provincial Court issued a Temporary Guardianship Order with respect to Ms. T.L. The order was made permanent on October 20, 1988. That order stayed in effect until her 18th birthday on July 19, 1990. At that point, Ms. T.L. left the Child Welfare system, and prima facie the limitation periods on her claims would have started to run again (see infra, para. 77). During this time the Department arranged counselling for Ms. T.L. and her mother, and she resided in various foster homes (from which she sometimes ran away).

¶ 10 In 1988, Ms. T.L.'s step-father was charged with criminal offences relating to the abuse, and in 1990 he was convicted and sentenced to a term in prison.

¶ 11 A summarized chronology of the T.L. claim is as follows:

T.L. Chronology

July 19, 1972	Date of Birth
1979	Abuse starts (age 7)
August, 1981	First Involvement of Children's Services (emotional abuse)
August, 1986	Abuse ends (age 14)
Sept. 11-Dec. 18, 1986	Physical abuse reported; Support Agreement and counselling
May, 1987	Sexual abuse reported to mother and Department
July 7-Sept. 2, 1987	Support Agreement; moves to aunt
October 29, 1987	Apprehended (age 15)
November 10, 1987	Temporary Guardianship Order

1988	Step-father charged
October 20, 1988	Permanent Guardianship Order (age 16)
July 19, 1990	Turns 18; leaves Child Welfare system; limitations start to run?
1990	Step-father convicted
July 19, 1992	Turns 20; two years from re-start of limitations
August, 1996	Ten years after abuse ends
May, 1997	Ten years after disclosure
March 1, 1999	New Limitations Act in effect
July 19, 2000	Turns 28; ten years after re-start of limitations
March 1, 2001	Two years after new Limitations Act; transitional period over
June 29, 2004	Action commenced

¶ 12 It is unclear whether Ms. T.L.'s history represents a typical pattern of the proposed class. It can be seen that on two occasions she was under "Support Agreements" for short periods of time. She was the subject of a Temporary Guardianship and then a Permanent Guardianship Order for approximately 31 months. Since her step-father was convicted, it is clear that she was the victim of a tort. It also seems likely that she might have had a claim under the Criminal Injuries Compensation Act. She was not however under the care of the Defendant at the time of the tort, and she was not apprehended directly as a result of the tort. Her eventual apprehension was as a result of her aunt having problems with her, and because of her overdose. However, the Defendant was aware of the tort at the time of the apprehension in October of 1987.

S.J. Claim

¶ 13 It was originally proposed that S.J. would be the representative plaintiff, but Ms. T.L. was substituted in her place. S.J. was born in 1961. She deposes that she was sexually and physically assaulted by a number of relatives and friends of the family. When she was 14 years old she became pregnant as a result of a sexual assault by a relative. That relative was subsequently convicted of the crime. S.J. lived a very unstable life, and in her later teens she was abused or exploited by other persons, and had three other children.

¶ 14 S.J.'s involvement with the Defendant was somewhat limited. Between 1965 and 1968 the family was involved with the City of Calgary's Children's Aid Department, not the Defendant. The Defendant assumed supervision of the family in December of 1968, when S.J. was about seven years old. At one point, S.J.'s sister was the subject of a Temporary Guardianship Order. In addition to the Defendant's monitoring of the home, S.J. was the subject of a Temporary Custody Agreement under s. 35 of the Act, dated May 31, 1977. The agreement provided that "the Director agrees to take the child into care". It gave the Director authority to provide medical care for S.J., and allowed the Director to collect the Family Allowance payments. It was anticipated that the agreement would be in force for six months, but it was terminated after two months on August 1, 1977. On that date S.J. was moved from a foster home back to her parents.

¶ 15 S.J. was apparently never the subject of a Temporary Guardianship Order or a Permanent Guardianship Order. Apart from the Temporary Custody Agreement that was in place for about two months, the involvement of the Defendant with S.J. amounted to "monitoring" of the family. The involvement of the Department with S.J. was therefore qualitatively different than its involvement with Ms. T.L. While S.J. was assaulted many times, the primary assault occurred in 1975, which would

suggest that the presumptive limitation period would have expired in 1977. The record is somewhat unclear, but the limitation might have expired during the term of the Temporary Custody Agreement. This raises the issue of the responsibility of her guardians to commence the action either before, or during the currency of the Temporary Custody Agreement. If the Defendant had a duty to sue on her behalf, and did not do so, the limitation period on S.J.'s cause of action against the Defendant might well have expired in 1983. At the time that this action was commenced, S.J. was over 28 years of age, which suggests that the ultimate limitation period might have expired (see infra, paras. 55(a) and 77).

Claim of J.J.S.

¶ 16 J.J.S. is put forward as another person who might be a member of the class. J.J.S. was born on May 28, 1988. He was accordingly 16 years old when this action was commenced, and he is 17 today. A Next Friend commenced an action on his behalf in 2004, but it is suggested that this claim would be absorbed into the class action.

¶ 17 J.J.S. was apparently made the subject of a Temporary Guardianship Order in November of 1993, when he was five years old. J.J.S. was placed in a foster home, where he was assaulted by another foster child in late 1993 or early 1994. The other foster child was convicted as a result of these assaults.

¶ 18 The claim of J.J.S. therefore differs significantly from the claim of S.J. and Ms. T.L. The primary tort against him occurred while he was under the joint guardianship of the Defendant. The limitation period against the primary tortfeasor would have arisen under the old Limitation of Actions Act. By the time the new Limitations Act came into place in 1999, it is likely that the limitation period had already run, subject to the question of whether he was under the "actual custody" of a parent or guardian (see infra, para. 50). If the tort had occurred after 1999, the limitation period would still be suspended in favour of J.J.S. under the new Limitations Act, because he is a minor (see infra, para. 52).

¶ 19 This brief summary of the allegations of Ms. T.L., S.J., and J.J.S., shows the wide variety of circumstances in which the claims of class members might arise. This factual context must be kept in mind in determining whether this action should proceed as a class action.

The Statute

¶ 20 This application is brought under the Class Proceedings Act, R.S.A. 2000, c. C-16.5. The most relevant provisions of the Act are as follows:

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of 2 or more persons;
> (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
> (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
>
> (i) will fairly and adequately represent the interests of the class,

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

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

Evidentiary Issues

¶ 21 The Plaintiff and Defendant tendered evidence in this application. A good deal of that evidence was inadmissible.

Evidence on Legal Issues

¶ 22 An affidavit was filed by S.J., who was originally put forward as the representative plaintiff. She deposed in part "I have reviewed the proposed litigation plan attached as Exhibit A and believe it would provide a proper framework for dealing with the claims." Whether the litigation plan is appropriate is a matter for argument by counsel, and a decision by the certifying judge. It is not an appropriate topic for expert evidence, much less evidence of a lay litigant.

¶ 23 The Plaintiff also filed an affidavit of Deborah Stewart, a barrister with a large personal injury practice in Edmonton. Ms. Stewart deposed that she once represented a client known as MS. J. MS. J. had been sexually abused by her step-father, and was so traumatized by the experience that she was unable to participate in any litigation to protect her rights. She could not even participate in examinations for discovery or independent medical examinations. Ms. Stewart deposed that plaintiffs like MS.J. would benefit from a class proceeding, because they would not have to participate directly in the proceedings. To this extent Ms. Stewart's affidavit was unobjectionable, even if of slight materiality, as the circumstances of MS.J. were so extreme and unusual that they are unlikely to be representative of the majority of class members. The affidavit also did not explain how a plaintiff like MS.J. would handle the individual phase of this litigation: see infra, para. 58.

¶ 24 Ms. Stewart's affidavit, however, went on to depose that "based on my experience and observations as Next Friend for MS.J., I believe that there are many advantages to prosecuting S.J.'s lawsuit as a representative action." Again, whether a class proceeding is "the preferable procedure for the fair and efficient resolution of the common issues" is a matter for argument and decision. It is not an appropriate topic for expert evidence: Furthermore, Ms. Stewart's affidavit was full of hearsay. It recounted things that third parties had disclosed to Mr. Lee, and that Mr. Lee had then passed on to Ms. Stewart, who then swore that she verily believed them to be true. This sort of double hearsay is of so little probative value as to be of no use to the Court: Dudziak v. Boots Drug Stores Canada Ltd. (1983), 40 C.P.C. 140 at para. 6; Edwards v. Law Society of Upper Canada (1995), 40 C.P.C. (3d) 316 (Ont. Gen. Div.) at para. 15. If there are third parties with factual information of assistance in the certification hearing, those third parties should themselves swear the affidavits.

Statements of Counsel

¶ 25 The Plaintiff also attempted to rely on statements made in court by counsel retained by the Defendant in other similar litigation. These statements were made during argument in those cases, sometimes in response to questions from the presiding judge. What counsel says in court about issues of fact is not evidence: Cairns v. Cairns, [1931] 3 W.W.R. 335, 26 Alta. L.R. 69 (C.A.); Ravoy v. Ravoy,

2000 ABCA 114, 255 A.R. 293 at para. 18; Mitran v. Guarantee RV Centre Inc. (1999), 251 A.R. 77, at para. 17; Principal Savings and Trust Co. v. Amo Pecuniam Holdings, [1984] A.J. No. 578 at para. 36. Counsel of course has implied authority to make binding admissions of fact in an action. But such admissions are regarded as mere waivers of the need to prove the fact in that case, and are not binding in subsequent actions: Phipson on Evidence (16th ed., 2005) at para. 4-19. Any purported "admissions" on matters of law are not binding on the court, even in the action in which they are made: Avco Delta Corp. Canada Ltd. v. MacKay (1977), 4 A.R. 565, [1977] 5 W.W.R. 4 (App. Div.); V. W. v. D.S., [1996] 2 S.C.R. 108, at para. 17.

¶ 26 Statements made by counsel to the court during argument are rarely admissions at all. They often are no more than examples offered by counsel to show the consequences of the arguments of that counsel, or his or her opponent. Sometimes they are merely responses to probing questions or "kite flying" by the judge. Statements made by counsel in argument in other cases are not relevant. For example, in British Thomson-Houston Company, Limited v. British Insulated and Helsby Cables, Limited, [1924] 1 Ch. 203, the plaintiff argued that it was impossible to draw a tungsten filament by following a particular patent. In a previous action it had argued the opposite. The case (i.e. the factum) filed by the plaintiff in the House of Lords in the earlier action was held not to be admissible in the present action. In Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage), [2002] F.C.J. No. 371, 2002 FCA 106, the Court refused to include in the appeal books the arguments of counsel in a previous related action. Even the reasons for judgment in a previous action involving the same parties have no probative value: Marthaller v. Lansdowne Equity Venture Ltd. (1997), 52 Alta. L.R. (3d) 329, 200 A.R. 226 (C.A.) at para. 46; Edwards v. Law Society of Upper Canada, supra, at para. 9.

¶ 27 Related to the rule that the arguments of counsel are irrelevant in subsequent cases is the rule that the comments of the judge during argument are not official pronouncements. As Viscount Simon said in a Practice Note, [1942] W.N. 89:

> During the hearing of an appeal Viscount Simon L.C., referring to reports which might be made of the case, said that it was well understood that interlocutory observations of members of the Board or of a Court were not judicial pronouncements. They did not decide anything, even provisionally. They were made to elucidate the argument, to point the question, or to indicate what were the matters which the judicial spokesman thought needed to be investigated, and that was all. It would be a very great pity, and a profound error, if anybody, foreigner or fellow-subject, supposed that interlocutory observations were anything more.

See also R. v. Hodson, 2001 ABCA 111, 281 A.R. 76, at para. 33; Alberta Union of Provincial Employees v. Continuing Care Employees' Bargaining Association, 2002 ABCA 148, 4 Alta. L.R. (4th) 206, 303 A.R. 137. Any rule that the client is forever bound by statements made by its counsel in argument could only impede the frank dialogues between counsel and the Court that are often used as a part of the adversarial process of problem solving. The transcripts of argument in other cases relied on by the Plaintiff are of no probative value, and are vexatious.

Evidence of Other Actions

¶ 28 The Defendant also attempted to produce evidence on whether the class proceeding is the "preferable procedure for the fair and efficient resolution of the common issues". The evidence was an affidavit deposing that 33 individual actions had been commenced against the Defendant that overlapped with the claims that would be included in the class action. This, the Defendant argued, showed that these claims can be efficiently resolved in individual actions.

¶ 29 Not surprisingly, the Plaintiff attempted to cross-examine on this affidavit. She wanted the Defendant to identify each of the 33 actions, and then to give the status of the actions. The Plaintiff proposed to show that some of the 33 actions had been abandoned, discontinued, struck out, or summarily dismissed. This it was said would show that a class proceeding was the preferable procedure.

¶ 30 An application to compel the Defendants to provide further information about the 33 actions was dismissed, on the basis that the evidence was not relevant and material. The reasons can be summarized as follows:

(a) Whether a procedure is "preferable" is largely a question of law. It is determined by the certification judge based on his or her knowledge of how court procedures work. Evidence on questions or conclusions of law is not appropriate: Canada Post Corp. v. Smith (1994), 20 O.R. (3d) 173, 118 D.L.R. (4th) 454 (Div. Ct.); R. v. S. (G.) (1988), 67 O.R. (2d) 198, 31 O.A.C. 161, 46 C.C.C. (3d) 332 (C.A.), aff'd [1990] 2 S.C.R. 294; R. v. Oliver (1997), 48 Alta. L.R. (3d) 180, 193 A.R. 241 (C.A.); Ontario (Ministry of Natural Resources) v. Ontario Federation of Anglers and Hunters (2001), 143 O.A.C. 103, 32 Admin. L.R. (3d) 282 (Div. Ct.); Marquis of Camden v. Inland Revenue Commissioners, [1914] 1 K.B. 641 at pg. 650. For example, evidence of this type was rejected in Bramalea Inc. (Trustee of) v. KPMG [2000] S.C.C.A. No. 278, 143 O.A.C. 399 (whether issue important enough to justify leave to appeal); Alberta Human Rights Commission v. Blue Cross, [1983] 6 W.W.R. 758, 28 Alta. L.R. (2d) 1, 48 A.R. 192 at para. 8 (whether procedural steps unreasonable); Chevron Canada Resources v. Canada (Executive Director of Indian Oil and Gas Canada), 1998 ABQB 910, [1999] 7 W.W.R. 47, 239 A.R. 138 (whether proceeding an abuse of process); Hovsepian v. Westfair Foods Ltd., 2003 ABQB 641, [2004] 5 W.W.R. 519, 22 Alta. L.R. (4th) 241, 341 A.R. 1 at para. 54 (whether matter res judicata).

(b) Some of the proposed evidence did not appear to be relevant. For example, if an action was dismissed or abandoned because of the expiry of a limitation period, that would have nothing to do with whether a class proceeding was preferable or not. Either way the action would be statute barred.

(c) The evidence is not material, because at the end of the day it is not probative. As I pointed out in Robertson v. Edmonton (City) Police Service (#9), 2004 ABQB 243, 39 Alta. L.R. (4th) 239, 355 A.R. 281 at paras. 12-20 attempting to draw generalized conclusions from individual examples is rarely helpful.

(d) This evidence is also not admissible because it would cause the Court to have to inquire into 33 separate collateral issues. One could only conclude that the 33 actions were or were not being successfully prosecuted individually by examining the circumstances of each one. Where the actions had been abandoned, discontinued, or struck out, one would have to examine them individually to see whether they would have been more successful as a class proceeding. The system simply cannot devote the resources needed for this kind of collateral inquiry: Robertson v. Edmonton, supra, at para. 20. In any event, even if the inquiry was conducted it is unlikely that any probative evidence would result.

(e) Further, it should be noted that the issue in the Act is whether the common issues can be more efficiently decided in the class action. Because individual issues and individual actions have been resolved does not necessarily speak to the preferable way of resolving the common issues.

In determining whether a class proceeding is the preferable procedure to follow, I have accordingly disregarded any evidence of the results of particular individual actions.

Publication Ban

¶ 31 The proposed representative Plaintiff brought an application to prosecute this action using a pseudonym, and for an order that information that would disclose her identity not be published. In accordance with Practice Note No. 11, notice was given to the media of this application. The Defendant took no position on the application.

¶ 32 The Supreme Court has, on many occasions, made it clear that justice should be administered in public. As the Court recently held in Toronto Star Newspapers Ltd. v. Ontario, [2005] 2 S.C.R. 188, 2005 SCC 41, 253 D.L.R. (4th) 577 at paras. 1-4:

> [1] In any constitutional climate, the administration of justice thrives on exposure to light -- and withers under a cloud of secrecy.
> [2] That lesson of history is enshrined in the Canadian Charter of Rights and Freedoms. Section 2 of the Charter guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
> [3] The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
> [4] Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration.

An open judicial system is one of the hallmarks of our democratic constitution. As such, publication bans should be exceptional.

¶ 33 There are some cases where the victims of sexual assaults have been permitted to sue using pseudonyms: Nickason v. Alberta, [2006] A.J. No. 165, 2006 ABQB 115 at para. 10. Many of these cases were decided before the leading decisions on the constitutional importance of keeping the courts open. Most of them were not decided on notice to the media, and many do not discuss the Charter implications of a publication ban.

¶ 34 When considering a publication ban, there are special considerations that apply to a class action. When a person comes forward and purports to be a representative plaintiff, there is much to be said for the argument that the other members of the class are entitled to know who it is that purports to represent them: see B.B. v. Quebec (Procurer General), [1998] R.J.Q. 317. Section 20 of the Act requires that notice of certification be given to the class. Section 20(6)(a) requires that the name and address of the representative plaintiff be disclosed. It would be somewhat artificial to provide for a publication ban, or the use of a pseudonym, when the name and address of the representative plaintiff must be publicized to the class. In all of the circumstances, it is inappropriate to allow the representative Plaintiff to sue by use

of a pseudonym, and the application is accordingly dismissed.

The Merits

¶ 35 Section 6(2) of the Act provides that a certification application is not a determination of the merits: see also Hollick v. Toronto (City), [2001] 3 S.C.R. 158, 2001 SCC 68 at para. 16. Section 5(1)(a) requires only that the pleadings disclose a cause of action. A certification application is therefore not in the nature of a summary judgment application, although sometimes the defendant will bring a cross-application for summary judgment at the time of certification: Pauli v. ACE INA Insurance Co., 2004 ABCA 253, 32 Alta. L.R. (4th) 205, at para. 7; Papaschase Indian Band v. Canada (A.G.), 2004 ABQB 655, 43 Alta. L.R. (4th) 41, at para. 1.

¶ 36 Nevertheless, the merits of the action are relevant to determining whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. It is necessary to explore the merits to identify the common issues and to define the class: Cloud v. Canada (A.G.) (2004), 73 O.R. (3d) 401, 247 D.L.R. (4th) 667 (C.A.) at para. 48. Further, while the certification motion is not the appropriate place for deciding difficult questions of fact or law, if it appears on the face of the proceeding that the action is doomed to fail, there is little point in certifying the class proceeding. The following issues relating to the merits are relevant to the certification motion.

Social Welfare Legislation

¶ 37 Since Alberta became a province in 1905, there have been five statutes relating to the protection of children:

> The Children's Protection Act of Alberta, S.A. 1909, Chapter 12; in force February 15, 1909 (the "1909 Act");
> The Child Welfare Act, S.A. 1925, Chapter 4; in force November 1, 1931 (the "1925 Act");
> The Child Welfare Act, S.A. 1944, Chapter 8; in force May 1, 1944 (the "1944 Act");
> The Child Welfare Act, 1966, S.A. 1966, Chapter 13; in force July 1, 1966 (the "1966 Act");
> Child Welfare Act, S.A. 1984, Chapter C-8.1; in force July 1, 1985 (the "1984 Act").

The 1984 Act was substantially amended, and renamed the Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12 ("C.Y.F.E. Act") as of November 1, 2004. The 1984 Act having been in force for the last 20 years, as a practical matter most of the class members were probably involved with the Defendant pursuant to its provisions.

¶ 38 Not surprisingly the legislation has changed over time. It is not necessary to explore all of the differences in the legislation over the last century, but a few comments about the concept of guardianship are appropriate.

¶ 39 The 1909 Act did not deal with guardianship. The 1925 Act provided that the Director, or a private children's aid society would be the legal guardian of a child who became a permanent ward. Under the 1944 Act, the Superintendent became the legal guardian "of the person of the child" when a child was made a permanent ward.

¶ 40 By s. 10 of An Act to Amend the Child Welfare Act, S.A. 1961, c. 11, the Superintendent became the "sole legal guardian of the person and estate of the child" (emphasis added). The statute

provided that the rights of the Public Trustee with respect to any property held by him for the child were not affected by the guardianship of the Superintendent.

¶ 41 The 1984 Act expanded the options available to the Department. Section 7 of the 1984 Act authorized support agreements "with respect to the provisions of support services to the family or the child", if the welfare of the child would be adequately protected if he or she stayed with his or her guardian. Section 8 of the 1984 Act allowed for custody agreements under which a Director would be given custody of a child for a period not exceeding six months. Custody agreements could be renewed, but the total duration of the custody could not be more than two years. Under s. 9, a custody agreement had to deal with a number of issues, including "the extent of the delegation of the authority of the guardian to the Director".

¶ 42 The 1984 Act also allowed for Supervision Orders, Temporary Guardianship Orders, and Permanent Guardianship Orders. A Supervision Order could be made for a period not exceeding six months where a child was in need of protective services, and the child's needs could adequately be dealt with by the child's guardian, subject to the supervision of the Director.

¶ 43 If the needs of the child could not be met by the child's guardian, then the Director could apply for a Temporary Guardianship Order. A Temporary Guardianship Order could be in place for no more than one year, at which time the Temporary Guardianship Order could be renewed for one more year, or a Permanent Guardianship Order could be granted.

¶ 44 The 1984 Act did not appear to contemplate any change in guardianship as a result of a Supervision Order. When a Temporary Guardianship Order was made, s. 29(2) provided that the Children's Guardian would become a joint guardian with any other guardian of the child. When a Permanent Guardianship Order was granted, s. 32(3) provided:

> 32(3) If the court makes a permanent guardianship order, the Children's Guardian is the sole guardian of the person of the child and the Public Trustee is the sole trustee of the estate of the child. (emphasis added)

In 1988 the Children's Guardian was replaced by the Director, but otherwise the provisions of the 1984 Act were unchanged: see C.Y.F.E. Act, ss. 31(2) and 34(4). Thus, from 1961 to 1985 the Superintendent was the "guardian of the estate" of the child. From July 1, 1985, the Public Trustee has been the trustee of the estates of children subject to permanent guardianship orders. See Blood v. Alberta (Minister of Children's Services), 2004 ABQB 788, 365 A.R. 179, 7 C.P.C. (6th) 174.

Victims of Crime Legislation

¶ 45 One branch of the claim asserts that the class members have lost claims to compensation under the statutes in place to assist victims of crime. There have been two such statutes in force in Alberta: The Criminal Injuries Compensation Act, R.S.A. 1980, c. C-33 ("C.I.C.A.") which was in force from October 1, 1969 to November 1, 1997, and the Victims of Crime Act, R.S.A. 2000, c. V-3 ("V.C.A."), which has been in force from November 1, 1997 to the present. The benefits available under the statutes vary.

¶ 46 The C.I.C.A. (s. 2(3)(a)) required that the claim be made within one year of the injury, although the Board had a discretion to extend the time. Claims under the V.C.A. must (since it was amended in 2001) be made within two years of discovery of the injuries (s. 12). The discretion to extend the time remains, but ignorance of the existence of the V.C.A. is apparently not considered a sufficient reason.

¶ 47 The C.I.C.A. (s. 9(1)) allowed for out-of-pocket expenses and pecuniary damage including wage loss. The V.C.A. (under the Victims of Crime Regulation, A.R. 63/2004) contains a detailed list of injuries, and rates them by severity. Compensation is provided by a formula based on the assessed severity, to a maximum of $110,000.00 (Reg. 8(4)). In some cases the applicant might potentially receive more, and in other cases less, under the V.C.A. than the C.I.C.A.

Government Policy on Legal Rights of Children

¶ 48 The Defendant has for some time had written policies in place to provide for legal representation (when appropriate) for children respecting a child's own involvement in the Child Welfare system, and for children in care who become involved in the youth criminal justice system. Written policies respecting the legal representation of children in care who might have civil claims are more recent. Recognizing that this is not a determination of the merits, they appear to be as follows:

The 1989 Policy

N. LEGAL AID FOR CHILDREN IN CARE There may be a situation in which a child has the right to initiate civil legal action and will require legal counsel. The child welfare worker shall refer these to the Regional Manager of Children's Services to determine the appropriate action to take to protect the rights of the child.

The 1991 Policy

CRIMINAL OR CIVIL

If a child with status is a party to a criminal or civil action, even if proceedings continue past the 18th birthday:

1. Determine whether the child should have a lawyer.
2. If the child needs a lawyer, advise the regional manager, child welfare services.
3. Arrange for a lawyer.

If a child in care has the right to initiate civil action, refer the matter to the regional manager, child welfare services. The regional manager, child welfare services determines what action to take to protect the child's rights.

The 1992 Policy

CRIMINAL OR CIVIL

If a child under guardianship is a party to a criminal or civil action, even if proceedings continue past the 18th birthday:

1. Determine whether the child should have a lawyer.
2. If the child needs a lawyer, inform the district manager.
3. Arrange for a lawyer.

If a child under guardianship has the right to initiate civil action, refer the matter to the district manager who decides what action to take to protect the child's rights. (changes from 1991 Policy highlighted)

The 2005 Policy

Purpose To inform Ministry staff of the interim process for protecting the

legal interests of children under permanent guardianship.

Background

A recent ruling from the Court of Queen's Bench suggests that the Public Trustee (Alberta Justice) has the authority and the responsibility to pursue civil claims on behalf of children under permanent guardianship. This does not mean that the Public Trustee must pursue all claims that come to his attention. Rather, the Public Trustee is entitled to assess potential claims to determine if they are of sufficient merit to justify the expense and risk of legal action, and to consider, in consultation with the Director of Child, Youth, and Family Enhancement, whether litigation is in the best interests of the child.

In order to carry out this responsibility, the Public Trustee will be relying on Children's Services to identify cases involving harm to children under permanent guardianship and refer those cases to the Public Trustee for assessment and appropriate action.
Pending further clarification concerning the role of the Public Trustee, CFSAs and DFNAs are requested to implement the following process, effective immediately.

Process

Advise the Legal Services branch of Children's Services of all cases that meet any one of the following criteria:

* A child under permanent guardianship has been sexually assaulted.
* A child under permanent guardianship has sustained serious physical injury requiring significant medical attention, or resulting in residual medical problems.
* A lawyer or insurance company has contacted a child under permanent guardianship, or the child's worker, with respect to settlement of an injury or accident.
* A child under permanent guardianship has indicated that he or she wishes to commence a civil action.

Legal Services will subsequently refer these cases to the Public Trustee for assessment and appropriate action.

The "recent ruling" referred to in the 2005 Policy is my prior decision in Blood v. Alberta (Minister of Children's Services), supra, para. 44, which held that a natural parent has no standing to sue on behalf of a child who is the subject of a Permanent Guardianship order. The decision held that the Public Trustee should commence such actions, and that the natural parent has a moral (and possibly legal) duty to report all possible actions to the Public Trustee or the Director.

Limitations

¶ 49 The statutes of limitation will be a major issue in this litigation. They will operate at two levels:

(a) when and how the limitation period expired against the primary tortfeasors, which is said to trigger the liability of the Defendant, and
(b) when and how the limitation period expires on this claim by the class members

against the Defendant.

The issue is further complicated by the fact that two different statutory regimes relating to limitations have been in place in Alberta during the relevant period.

¶ 50 Up to March 1, 1999, limitations were governed by the Limitation of Actions Act, R.S.A. 1980, c. L-15. Section 51(b) of that Act provided a general two-year limitation (triggered by discoverability of the injury) in cases of personal injury. Of importance were the provisions relating to minors:

> 59(1) When a person entitled to bring an action to which this Part applies is under disability at the time the cause of action arises, he may commence the action at any time within 2 years from the date he ceases to be under disability.
>
> (2) Subsection (1) does not apply
>
> (a) if the person under disability is a minor in the actual custody of a parent or guardian, ...

(emphasis added)

Thus, if the class member was under the "actual custody" of the Defendant in its capacity as guardian, time would run against the class member. But if the class member was not in the "actual custody" of his or her guardian, time would not start to run until the class member turned 18 years of age. Under s. 57 of the old Limitation of Actions Act, fraudulent concealment of the cause of action might also stop time from running.

¶ 51 The old Limitation of Actions Act would apply to any tort that occurred before March 1, 1999. It would also apply to some of the claims by class members against the present Defendant, where the alleged negligence of the Defendant was discoverable prior to March 1, 1999, although the length of the limitation period on those claims is a live issue.

¶ 52 After March 1, 1999, limitations in Alberta have been governed by the new Limitations Act, R.S.A. 2000, c. L-12. That Act has a transitional provision that applied up to March 1, 2001, but which is unlikely to have effect on most of the class claims. The new Limitations Act provides for a general two-year limitation period on all claims, calculated from discoverability. Significantly, it also has a ten-year "ultimate" limitation on all claims, calculated from the date the conduct complained of occurred. Time under the new Limitations Act does not run against minors (s. 5.1(2)), persons under a disability (s. 5), and where there has been fraudulent concealment (s. 4). Persons are defined as being disabled if they are subject to an order under the Dependent Adults Act, R.S.A. 2000, c. D-11, or they meet the criteria of the Dependent Adults Act even if no order is in place: see Alberta Law Reform Institute, Limitations, Report No. 55, pg. 51.

¶ 53 Since this action was commenced on June 29, 2004, it is governed by the new Limitations Act. It is likely that some of the primary torts are also governed by the new Limitations Act, for example if they occurred after March 1, 1999. The ultimate ten-year limitation period also applies to this action, prima facie barring any claims that arose prior to June 29, 1994.

¶ 54 There are therefore several "layers" to the limitations issue:

(a) The limitation on the primary tort

i) where the tort was discoverable before March 1,1999 (old Limitation of

Actions Act).

ii) where the tort was discoverable after March 1,1999 (new Limitations Act).

(b) The limitation against the present Defendant under the old Limitation of Actions Act, where the limitation arguably expired before March 1, 1999 (or the end of the transitional period under the new Limitations Act, March 1, 2001), and so the action was barred under the old limitations regime.
(c) The limitation against the present Defendant under the new Limitations Act, since this action is prima facie governed by the new Limitations Act.
(d) The ultimate limitation period of ten years.

These layers must all be kept in mind when defining the class and the common issues.

¶ 55 I repeat again that a certification motion is not an adjudication on the merits. It does appear however that

(a) Any class member who was over the age of 28 on the date the Statement of Claim was issued will have to prove disability or fraudulent concealment to avoid the ultimate limitation period, because when he or she turned 18 the ten-year period started to run.
(b) Where the primary tort was discoverable more than two years before the class member came under the care of the Defendant, there will likely be an argument that the damage had already been done.
(c) Since time under the new Limitations Act is unconditionally suspended for minors, any class member who is still a minor (or possibly was a minor when the claim was issued on June 29, 2004) may still have a claim against the primary tortfeasor, at least where the tort occurred after March 1, 1999.

Again, these factors must be kept in mind in setting the common issues, and in defining the class.

Conditions for Certification

¶ 56 Section 5(1) of the Act (supra, para. 20) sets out the five requirements for certification:

(a) a cause of action
(b) an identifiable class
(c) common issues
(d) a suitable representative plaintiff, and
(e) that the class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.

Each of these requirements are discussed in the following sections of these reasons.

A Cause of Action

¶ 57 The statute requires that the claim disclose a cause of action. The premise of the claim is that:

(a) Each class member was injured in a tort, which might also have been a crime.
(b) If the class member had sued the primary tortfeasor, the class member would

have been awarded, and would have actually recovered damages, or the class member could have made a claim under the Victims of Crime statutes.

(c) At a relevant point in time the class member came under the care of the Director of Child Welfare in some way, sometimes as a result of the very tort in issue.

(d) The Director owed a duty to the class member to protect his or her legal rights.

(e) In all the circumstances, it was prudent and in the best interests of the child that an action be commenced, or a Victim of Crime claim be made.

(f) The Director negligently failed to take appropriate steps to advance the claim against the primary tortfeasor, or under the Victims of Crime statutes.

(g) As a result of the omission of the Director, the class member has lost his or her claim against the primary tortfeasor, usually because a limitation has run, but possibly just because pursuit of the claim has been made more difficult by the passage of time.

The Defendant concedes that this pleading does disclose a cause of action.

¶ 58 It will be apparent that, apart from any common issues, each individual claim will involve a "trial within a trial", much like a lawyer's negligence action. As the Court noted in Kelly v. Lundgard, 2001 ABCA 185, 202 D.L.R. (4th) 385, [2001] 9 W.W.R. 399, 95 Alta. L.R. (3d) 11, 286 A.R. 1, 7 C.C.L.T. (3d) 1 at para. 328:

> The prevailing practice in Alberta to ascertain damages in a [legal] professional malpractice action is to conduct a "trial within a trial" on the substantive action from which the negligence arose: Alberta (Worker's Compensation Board) v. Riggins (1992), 5 Alta. L.R. (3d) 66 (C.A.); Fisher v. Knibbe (1992), 3 Alta L.R. (3d) 97 (C.A.). A "trial within a trial" requires a trial judge to try the hypothetical action that a plaintiff would have against the original defendant had the cause of action not been missed. The issues to be dealt with include liability, causation and damages.

In order to determine damages for each class member, it will be necessary to try the potential action he or she would have had against the primary tortfeasor. This will include issues of liability, limitations against the primary tortfeasor, causation, quantum, and whether the primary tortfeasor had any assets to satisfy a judgment.

Identifiable Class

¶ 59 The statute requires an identifiable class of two or more persons. The Plaintiff proposes to define the class as follows:

> All persons who claim that:
>
> a) they were assaulted, sexually assaulted or injured while under the age of majority, and
> b) they were under the care and control of, or guardianship of Child Welfare at the time of or subsequent to the assault or injury, and
> c) Child Welfare failed to take steps to obtain compensation on their behalf.

While the proposed definition of the class has evolved over time, the Defendant argues that this definition is still inappropriate for several reasons.

¶ 60 The Defendant argues that the class is too wide and varied. The factual context suggests there might be several subgroups of class members. Different statutory regimes were in place from time to time, and different class members may have been in care under different regimes. Different limitations may apply depending on when the underlying tort occurred, when the class member was in care, which statute was in force, and whether the class member is still a minor. Without providing a definitive list, the Defendant also argues that different subclasses exist, depending on the following levels of involvement by the Defendant:

a) Screening
b) Investigation
c) Assessment
d) Support Agreement with Guardian
e) Support Agreement with Child
f) Custody Agreement with Guardian or Child
g) Apprehension Order
h) Supervision Order
i) Interim Custody Order
j) Temporary Guardianship Order
k) Permanent Guardianship Agreement
l) Permanent Guardianship Order
m) Extended Care and Maintenance

The Defendant argues that the circumstances of the various subgroups are so varied, and the legal implications of each different form of involvement are so different, that it is unlikely that there is one answer to the question "did the Defendant owe a duty of care to this class member?" The Defendant raised several specific objections to the proposed class definition, which are discussed in the following sections.

¶ 61 The Plaintiff acknowledges the breadth of the class, without conceding that all the possible categories identified by the Defendant would amount to "care and control", but argues that it is not necessary for all class members to be similarly situated. Differences between the class members are not a bar if there are common issues. The Plaintiff cites Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 54.

> The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess rescissionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

See also Rumley v. British Columbia, 2001 SCC 69, [2001] 3 S.C.R. 184 at paras. 32-3. The Plaintiff argues that the differences that exist do not negate the common features of the class. If a duty is found for those class members in the "care and control" of the Defendant, it will be a question of fact at the individual phase of the proceedings whether each class member was in "care and control".

"Claims to Be" Definition

¶ 62 The preface of the proposed class definition is "All persons who claim that". The Defendant argues that a class should not be defined based on a subjective "claim" of a potential class member. The Defendant argues that a class definition must be objective and presently ascertainable, citing the following passage from the Manual for Complex Litigation, Third (1995, West Publishing) at p. 217, quoted with approval in Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 at para. 10:

> Class definition is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled to notice in a class action. It is therefore necessary to arrive at a definition that is precise, objective, and presently ascertainable. ... Definitions should avoid criteria that are subjective (eg. a plaintiff's state of mind) or that depend on the merits (eg., persons who were discriminated against). Such definitions frustrate efforts to identify class members, contravene the policy against considering the merits of a claim in deciding whether to certify a class, and create potential problems of manageability.

The importance of a clear class definition was also discussed in Western Canadian Shopping Centres Inc. v. Dutton, supra, at para. 38:

> First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known.

The Defendant argues that defining the class as those who "claim" something incorporates a subjective state of mind into the definition.

¶ 63 The Plaintiff points out that claims-based classes have been certified in other actions. Rumley v. British Columbia, 1999 BCCA 689, 72 B.C.L.R. (3d) 1, aff'd 2001 SCC 69, [2001] 3 S.C.R. 184 was an action by former students of a residential school for the deaf, concerning allegations that the students had been abused for many years. The British Columbia Court of Appeal certified the action, and varied the class definition to cover all students who "claim to have suffered injury". The Supreme Court of Canada dismissed an appeal from this decision. While Rumley did approve this form of definition of the class, counsel for the Plaintiff fairly pointed out that neither court actually discussed this aspect of the definition: see Rumley at para. 26.

¶ 64 Pardy (Wheadon) v. Bayer Inc. (2004), 237 Nfld. & P.E.I.R. 179 aff'd 2005 NLCA 20, 246 Nfld. & P.E.I.R. 157 was a pharmaceutical products liability class action. A class described as those "who claim personal injury" was found to be acceptable. While the defendant argued that the class definition was based on a subjective consideration, the Court concluded that "whether or not one makes a claim can be objectively determined." Walls v. Bayer Inc., 2005 MBQB 3, 189 Man.R. (2d) 262, leave to appeal denied 2005 MBCA 93, 15 C.P.C. (6th) 377 was a parallel pharmaceutical products liability class action. It also approved a class of those "who claim personal injury".

¶ 65 In my view, claims-based class definitions are based on a subjective consideration, and are prima facie problematic. As the Court held in Western Canadian Shopping Centres, it is important to

know from the beginning who will be bound by the decision in the class action, win, lose or draw. It is not an acceptable situation for a class member to potentially argue in the future that they are not bound by the result of the class proceedings, or a settlement, because they never "claimed" anything, or that they never claimed anything at a relevant point in time.

¶ 66 Furthermore, a claims-based definition is not necessary. In the Bayer cases it would have been just as easy and effective to define the class as all those who consumed the drug in question and suffered personal injury as a result. Likewise, in Rumley, the definition would have been just the same if it had covered all students who were in fact assaulted at the school. If a situation arose where the class could not be defined except based on those who advanced a claim, a "claims-based" definition of the class might be appropriate, but that will not generally be the case.

¶ 67 The source of the "claims based" class definitions appears to be an attempt to avoid a merits based class definition. A merits based definition defines the class as those who have a valid cause of action, and so results in a circular definition. Those class members who lose were never part of the class to start with. Thus a definition of all those "who have suffered loss or damage as a result of the defendants'" conduct was found to be merits based in Chadha v. Bayer Inc. (2001), 54 O.R. (3d) 520 (Div. Ct.) at paras. 47-50, aff'd (2003), 63 O.R. (3d) 22 (C.A.) at para. 69. This problem is supposedly avoided by defining the class as those who "claim" injury, but this introduces a subjective element to the definition. There is however a difference between "damage" and "damages". "Damage" is an injury to person or property. "Damages" is a legal remedy, consisting of a sum of money paid to someone who has suffered compensable damage". It is merit based to define the class as "all those who are entitled to damages" from the defendant, because the entitlement to damages depends on a finding of liability. It is not merit based to define the class as all those who suffered "damage" or "personal injury". Damage is an essential element of a tort: without damage there is no tort. The suffering of damage does not always result in compensation (i.e. damages), or does not always result in compensation from the named defendant. In my view the resort to "claims based" class definitions is an attempt to avoid an artificial problem, and there is nothing wrong with requiring that the members of the class be only those who have suffered injury. Those without injury have no cause of action against anyone: Chadha, supra, at para. 19 (Div. Ct.).

¶ 68 In this action the essential characteristic of the class is the suffering of personal injury as a result of a tort while under the care of the Defendant. There is no need to resort to a claims-based definition of the class.

"Care and Control"

¶ 69 A second key part of the proposed definition of the class is that the class members were "under the care and control of, or guardianship" of the Defendant. The concept of "care and control" is taken from the decisions in Kocur v. Meunier, 2003 ABQB 539, 15 Alta. L.R. (4th) 370, 345 A.R. 383, and Thomas v. Radvak (1997), 51 Alta. L.R. (3d) 327 (C.A.) at paras. 19-21. Those decisions held that a child was under the "actual custody of a parent or guardian" within the meaning of s. 59(2)(a) of the Limitation of Actions Act (reproduced supra, para. 50) where the Director had "effective care and control" of the child. The issue in Kocur was whether the limitation period had run against the plaintiff during the time that he was the subject of a Permanent Guardianship Order. The proposed incorporation of "care and control" into the definition of the class therefore relies on a judicial gloss on the exact words of the statute, which are "the actual custody of a parent or guardian".

¶ 70 The incorporation of "guardianship" into the proposed definition of the class also finds its source partly in s. 59(2)(a) of the Limitation of Actions Act. However, it is more directly related to those provisions of the Child Welfare Act that relate to permanent guardianship, temporary guardianship, and

the like. The concept of "guardianship" would cover only a limited number of the potential levels of involvement, listed supra, at para. 60. The concept of "care and control" is less precise, and might apply to many of the different categories of involvement.

¶ 71 In my view, the concept of "care and control" is too imprecise a basis for a definition of the class. Whatever the merits of the Kocur and Thomas decisions, it is unlikely that the courts intended the expression "care and control" to be a universal substitute for the exact wording of the statute. It is inappropriate to build the entire definition of the class on that foundation. Further, since s. 59(2)(a) only relates to "parents or guardians", it will only be engaged in this action where the Defendant was a "guardian". Care and control through some other relationship will not be enough. The definition must therefore encompass care and control "and" guardianship, not "or" guardianship.

¶ 72 The fundamental relationship between the class members and the Defendant arises from the Child Welfare Act. While the wording of the Limitation of Actions Act will be important in the claims of many class members, it is the Child Welfare Act that is the foundation of the relationship. The class definition should therefore be tied back to the Child Welfare Act.

¶ 73 The argument of the Defendant that the present class definition on its face encompasses too many different levels of involvement in the care of children is valid. If the class definition was to encompass all of the different levels of involvement set out, supra, para. 60, the action would become unmanageable. In my view, the class should be limited to specific subgroups: "permanent wards" under the 1966 Act, and those subject to Temporary Guardianship Orders, those subject to Permanent Guardianship Orders, and those subject to Permanent Guardianship Agreements under the 1984 Act. Those are the situations where the Defendant had "guardianship" and the greatest involvement with the children and their estates, and they are the categories the Plaintiff indicated might amount to "care and control".

¶ 74 It is true that this definition of the class might well exclude some persons who are similarly situated to the class, such as S.J. However, it is important that the class action remain manageable. If too many of the different subcategories of children in care are included, the action will become unwieldy. The decision in the class action will likely provide some guidance even for those persons who are excluded from the class. While the decision will not have the advantage of binding the Defendant and the non-class members, it may nevertheless prove to be of some practical utility. In order to maintain the manageability of this class action, it is appropriate to limit the class as specified.

Torts Only

¶ 75 The Defendant notes that the proposed definition covers all persons who were "injured". On the face of it, this would include children who simply fell off their bicycles, or tripped at the playground, and would not have a civil claim against anybody. Since the premise of the claim is that the class members had legal rights against a tortfeasor that were not protected by the Defendant, it is obvious that the class is only intended to include persons who were injured as a result of a tort. The class should be defined accordingly.

Minors

¶ 76 Under s. 5.1(2) of the new Limitations Act, time does not run against minors. The new Act does not make the suspension of the limitation period dependent on whether the minor is in the actual custody of a guardian. Since the premise of this action is that the class members have claims against primary tortfeasors that have been barred by statute, the Defendant argues that any class member who was still a

minor when the Statement of Claim was issued would have no claim, and should be excluded from the class. Such persons could sue on their own once they turn 18, and would have a duty to mitigate. There is some merit to this argument, and it seems unlikely that many persons who were still minors on the date the Statement of Claim was issued would have a claim in this action. If the present Limitations Act had been in force throughout the relevant time period, the argument would have much merit. However, there is the possibility that there are some potential class members who were under 18 when the Statement of Claim was issued, but had claims against primary tortfeasors that became barred by time before 1999 when the new Limitations Act came into force. Inclusion of the minors in the class will not unduly complicate the litigation, and the proposed definition of the class is not objectionable because it includes them.

Persons Over 28

¶ 77 The Defendant also argues that no person over the age of 28 can have a claim against the Defendant, because when that class member turned 18, the ultimate limitation period will have started to run. The Plaintiff essentially concedes that persons, like herself, who are over the age of 28 will either have to prove a disability under s. 5, or fraudulent concealment under s. 4 of the Limitations Act in order to succeed. Again, while the claims of this category of the class may be more difficult, including them in the class will not unduly complicate the litigation. Whatever the status of their individual claims, there is merit in having them bound by the decision on the common issues.

"Delay Claims"

¶ 78 The proposed class action envisages three ways that a class member might have suffered loss. The first is that the limitation period against the primary tortfeasor has passed. The second is that a claim under the Victims of Crime statutes can no longer be advanced because of the passage of time. The third is that while a claim could still be advanced, the passage of time has made the prosecution of the claim more difficult because of the fading of memories, the disappearance of witnesses and documents, and other matters of that sort. The Defendant argues that the third category of loss is qualitatively different from the first two.

¶ 79 It is true that the third type of loss will involve different questions of proof than the first two. It will, if nothing else, be difficult to prove what a witness would have been able to remember if only he or she had not forgotten it. Nevertheless, considerations of that sort are more likely to arise during the individual phase of the class proceeding, and not during the determination of the common issues. As a result, the inclusion of all three types of loss within the class definition is not inappropriate.

Merits

¶ 80 It is clear that a class definition should not be merits based, in the sense that inclusion in the class should not depend on success in the class action. That creates a circular definition. The Defendant argues that this class definition is merit based, because it depends on each class member showing that they had a valid claim against the primary tortfeasor. The circularity only arises, however, if the definition is based on the merits of this action, that is on the class action respecting the failure of the Defendant to sue on the original cause of action. The merits of the original cause of action on the primary tort raise an issue of quantum, but do not create circularity in the class definition.

Non-Residents

¶ 81 Section 7(3) of the Act requires that a separate class be created for non-residents of the

province. The Defendant noted that the Plaintiff has not proposed such a subclass, nor has the Plaintiff put forward a proposed representative plaintiff to represent the non-resident subclass.

¶ 82 The Act was based on Report No. 85 of the Alberta Law Reform Institute entitled Class Actions (December 2000). The Report contemplated (at para. 227) that the non-resident subclass would have its own representative plaintiff. The Act appears to require a separate subclass for non-residents partly at least for constitutional reasons. Some class actions may encompass causes of action that arose in many different jurisdictions. Further, under the Act resident class members must opt out of the class action, while non-resident class members must opt in.

¶ 83 The Defendant pointed to a British Columbia decision that appears to suggest that there must always be a separate representative plaintiff for each subclass, particularly the non-resident subclass: Endean v. Canadian Red Cross Society (1997), 36 B.C.L.R. (3d) 350, at para. 32. Compare Pearson v. Boliden (2001), 94 B.C.L.R. (3d) 133, at paras. 75-6.

¶ 84 Section 7(1) of the Act merely provides that the Court "may" appoint a representative plaintiff for the subclass. While it is contemplated that the representative plaintiff will be a member of the subclass, s. 7(4) does provide for a non-member to be the representative plaintiff "to avoid a substantial injustice to the subclass". In my view, s. 7(1) is permissive, and it is not always necessary to appoint a representative for a subclass, even where a subclass is created: Anderson v. Wilson (1999), 44 O.R. (3d) 673 (C.A.).

¶ 85 In this case the creation of a separate subclass for non-residents is something of a formality. Because the operations of the Defendant have always been limited to the Province of Alberta, any cause of action against the Defendant will have arisen in the Province of Alberta. All of the class members must have been subject to the Alberta Child Welfare Act at one time or another. If there are non-resident subclass members, it is because they have since emigrated from Alberta. There is no conflict of interest between the representative Plaintiff and the non-resident subclass. Since the statute requires it, there will have to be a subclass for non-resident members. However, there is no need at this time to have a separate representative plaintiff for that subclass.

Temporal Limitations

¶ 86 The Defendant pointed out that the subclass is defined broadly enough to encompass all persons who were under care since the Children's Protection Act of Alberta was passed in 1909. Not only have the provisions of the statute varied significantly over time, the very structure of the child protection system has changed. The Defendant argues that when these factors are combined with the many different levels of care that are possible (see supra, para. 60), the entire action becomes completely unmanageable.

¶ 87 The Plaintiff notes that class actions have been certified even though they cover lengthy periods of time. For example, the Rumley case, supra, covered a period of 42 years. The Woodlands case (W.J.R. v. British Columbia, [2005] B.C.J. No. 561, 2005 BCSC 372) covered a period of 118 years. These class actions arose, however, out of abuse at single institutions, and largely related to abuse by the same type of tortfeasor (i.e. employees of the institution). While there were undoubtedly differences in the way the institutions were operated over the years, there was still the unifying factor of the institution throughout. Further, all the class members had the same relationship to the institution (ie. they were residents), whereas the class members in this case had varied relationships to the Defendant.

¶ 88 The Defendant raises a valid point on this issue. At the end of the day the class action must be

manageable at a practical level. The class should not be unduly broad: Hollick, supra, at para. 21; Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172, at para. 10. To attempt to cover every combination of care and statutory provision that has existed since 1909 is unworkable. It is also likely that any older claims will in practical terms be unsustainable at this point. In order to maintain the viability of the class action, the class should be limited to those class members who were in care under the 1966 Act or the 1984 Act, which covers the period after July 1, 1966. That will essentially cover the last 40 years, and should capture most of the viable claims.

¶ 89 Subject to the submissions of counsel on the exact wording, the appropriate class is defined, infra, at para. 151(b).

Common Issues

¶ 90 The statute requires that the action raise common issues, which can be common issues of fact, or common issues of law arising out of similar facts. An issue is "common" where its resolution is needed for the determination of the claim of each class member: Western Canadian Shopping Centres v. Dutton, supra at para. 39. An issue is "common" if deciding it will avoid duplication of fact-finding or legal analysis, and if the issue is a "substantial ingredient" of each individual claim: Hollick, supra, at para. 18. A class proceeding will always consist of some common issues that are decided once, followed by a number of individual issues that are decided by some suitable procedure: Metera v. Financial Planning Group, 2003 ABQB 326, 12 Alta. L.R. (4th) 120 at para. 69.

¶ 91 For an issue to be "common", it is not necessary that it will dispose of the entire cause of action: Cloud v. Canada, (2004), 73 O.R. (3d) 401 (C.A.), at para. 53. As I previously stated in Metera, supra, at para. 71:

> Given that there are common issues, the proper question is "how best can the common issues be decided?" This question must be answered in the overall context of the litigation, recognizing that the individual issues must also be decided at some point, and searching for the procedure that is most efficient globally. Regard must also be had to the other primary objective of class actions: access to justice.

To this should be added the point made in s. 5(1)(d), Western Canadian Shopping Centres, supra, at para. 51, and Chadha v. Bayer Inc., supra, at para. 18 that the structure of the common issues must be fair to all parties.

¶ 92 It is also clear that the certification of a common issue is no guarantee that the trial judge will be able to answer it. If it is too general it may have to be amended, or it may not be capable of an answer: Cloud v. Canada, supra, at para. 72.

¶ 93 The Plaintiff proposes the following common issues:

(a) Did the Defendant owe a duty to class members to protect their legal rights by taking appropriate steps to obtain compensation on their behalf?
(b) If the answer to common issue no. 1 is yes, did the Defendant breach its duty or duties by failing to take reasonable measures in its operations or management to ensure that appropriate steps would be taken to obtain compensation on behalf of class members?
(c) If the answer to question 2 is yes, was the Defendant guilty of conduct that justifies an award of punitive damages?

(d) If the answer to question 3 is yes, what amount of punitive damages should be awarded?

The Defendant argues that these questions are not appropriate.

The Duty

¶ 94 The proposed class would include children who were the victims of torts, and subsequently were under the care of the Defendant. In some cases the abuse will have been one, and perhaps the primary, reason for the apprehension of the child. The action therefore goes to the heart of the nature of a Child Welfare apprehension. Is the apprehension merely to ensure that the child receives "protective services", or does the apprehension go further and require the Defendant to protect the civil legal rights of the apprehended child? In other words, does the Defendant discharge its duty by simply ensuring that the child is placed in a safe environment, or must the Defendant also then pursue the legal rights of the child for the abuse that resulted in the apprehension? What is the effect of the statutory provisions making the Defendant the guardian of the children? Would the social workers employed by the Defendant be distracted from the protection of the children if they had to attend to their legal rights as well? These are issues that are central to this litigation, and common to the class.

¶ 95 The Defendant argues that the "duty" issue is incapable of an answer because of the many levels of care involved (see supra, para. 60), the different statutory regimes in place, the long time period covered, and similar issues. The duty may also vary depending on whether the tort occurred before or while the class member was in care. The Plaintiff replies that she just wants a simple answer to a simple question about the duty owed to all those in the "care and control" of the Defendant. In my view the Plaintiff's position does not answer the objection. A common issue should not be framed so as to only accommodate the theory of the plaintiff, but rather must be open to responding to the theories of all parties. It is not open to either party to say they want a "yes or no" answer, and that they are not seeking a "nuanced response" if that seems to be the only response possible. On the other hand, the differences identified by the Defendant can be dealt with by limiting the class, or by giving different answers (if necessary) for the different categories of class members. There may obviously be different answers to the question, depending on the statutory regime in force from time to time, and depending on the degree of involvement by the Defendant. The fundamental question is however the same.

¶ 96 I therefore conclude that the issue of the duty of the Defendant to the class is a common issue. Deciding this issue once will prevent duplication of fact-finding and legal analysis. The resolution of the duty issue is necessary for the resolution of the claim of each class member. The first common issue proposed by the Plaintiff is appropriate in this form:

> Did the Defendant owe, between 1966 and 2004, a duty to some or all of the various types of class members to protect their legal rights by taking steps to obtain compensation on their behalf, and if so, what was the nature of that duty?

Systemic Negligence and Policies

¶ 97 The second proposed common issue is whether the Defendant breached any duty that it might have owed to some or all of the class. The Plaintiff does not propose as a common issue whether the Defendant might have breached its duty with respect to any individual class member. Rather, the Plaintiff proposes as a common issue whether the Defendant's operations and management themselves were a breach of duty. In other words, the Plaintiff proposes to argue that there was a "systemic breach" of duty by the Defendant.

¶ 98 The Defendant argues that any issue of systemic breach is inappropriate in this case. The Defendants notes that some of the features of the Child Welfare system may have arisen as a result of policy decisions, whereas decisions with respect to individual children were likely operational. The liability of the Defendant may vary depending on the nature of the decision: Just v. British Columbia, [1989] 2 S.C.R. 1228. The Defendant argues that this prevents any meaningful analysis of the alleged systemic breach of duty in a way that would apply to all class members. The Defendant argues that the Plaintiff has drafted the common issues with a high level of abstraction, giving an artificial appearance of commonality.

¶ 99 The Defendant also argues that the situation of the various class members is too divergent to permit any systemic analysis of the breach of duty. In this case the class members were under various types of care, at different points in time, under different statutory regimes, and while differing policies of the Defendant were in place. Some were injured while in care, others before they were in care in events unrelated to their apprehension, and some before they were in care in events resulting in apprehension. The Defendant distinguishes cases like Rumley v. British Columbia, 2001 SCC 69, [2001] 3 S.C.R. 184, where systemic breach was certified as a common issue, on this basis. The Defendant notes that in Rumley sexual abuse of the plaintiff class was admitted, the plaintiff class all attended one institution, all the abuse happened there, and there was a much higher level of commonality between them.

¶ 100 The Plaintiff relies on decisions like Rumley, and argues that systemic breach is an appropriate common issue. The Plaintiff acknowledges that the issue of systemic breach has been intentionally structured in a manner that makes the case more amenable to certification, and argues that she is entitled to do so. The Plaintiff cites Rumley, at para. 30, as follows:

> As Mackenzie J.A. noted, the respondents' argument is based on an allegation of "systemic" negligence - "the failure to have in place management and operations procedures that would reasonably have prevented the abuse" (pp. 8-9). The respondents asserts, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9). [Emphasis in original]

The Plaintiff argues that if a systemic breach of duty is found, it would still be open to the Defendant to prove in the case of each individual class member that the systemic breach was not operative in causing any damage with respect to that individual class member.

¶ 101 Rumley was a class action proceeding arising out of sexual abuse of students at a school for the deaf. Over the years there had been numerous reports of abuse at the school that had not been responded to appropriately. The government directed that an inquiry be conducted, and the resulting report concluded that there had been abuse, and that the response had been inadequate. The government then set up a compensation scheme for the former students, but some of them elected to proceed by class

action instead. The representative plaintiff proposed a common issue of systemic negligence, much like the one proposed in this case. The trial judge rejected this common issue, holding that it was too generalized to be of any practical utility. The British Columbia Court of Appeal and the Supreme Court of Canada disagreed, holding that such questions of "systemic negligence" were appropriate for certification. The Court held that, within reason, the plaintiffs were entitled to narrow their claim if they chose, and that if the issue was too generalized that would simply make it more difficult for individual class members to prove their claims. That was however a choice that the class members were entitled to make.

¶ 102 The representative plaintiff may well be entitled to "restrict the grounds of negligence she wishes to advance to make the case more amenable to class proceedings". There are however limits on the ability of the representative plaintiff to define the issues: Rumley, at para. 28. Rumley states that the plaintiffs are entitled to "limit the grounds of negligence" they rely on to make certification possible, not that they are entitled to define the common issues as they choose. Class proceeding statutes are largely procedural in nature. They are designed to deal more efficiently and effectively with mass litigation. Class proceedings are not intended to create new substantive rights, to vary the substantive law relating to the issues, or to reverse the burden of proof: Chadha v. Bayer Inc., supra, at paras. 18-19. The common issues must not only be capable of resolution at a practical level, they must also be fair, and that means they must be fair to both the class and the defendant: s. 5(1)(d); Caputo v. Imperial Tobacco Ltd. (2004), 236 D.L.R. (4th) 348, 44 C.P.C. (5th) 350 (Ont. S.C.) at para. 50; Chadha v. Bayer Inc., supra, at para. 18. I do not read Rumley as holding that the class is always entitled as a matter of right to have "systemic breach" as a common issue. Because the courts had the advantage of the public inquiry into conditions at the school, Rumley may be at the extreme edge of the type of case that can be certified.

¶ 103 Systemic breach issues should not be stated so generally that the answer to the systemic breach issue is unlikely to be of much practical assistance in resolving the claims of individual class members. The Plaintiff presumably wishes to demonstrate that the policies that the Defendant had in place, and the way the Child Welfare system as whole was managed, was negligent. Even if this could be shown, the answer will be so abstract as to be of little practical utility. Take, for example, the situation of two large grocery stores. Both grocery stores realize that there is a risk that customers could slip on produce that finds it way onto the floors in the produce department. The one grocery store has in place a rigid policy requiring regular sweeping of the produce department, and the recording of the sweeping in a detailed log. The second grocery store has no such policy in place. If systemic breach of duty was set as a common issue in this case, one might well conclude that the second grocery store was in breach of its systemic duty. Suppose however that it was revealed that the first grocery store simply did not follow its policies and procedures, despite their supposed universal applicability. On the other hand, suppose it was shown that the second grocery store had particularly diligent management and staff, who meticulously cleaned the produce department despite the fact that there was no policy requiring them to do so. In evaluating the claim of any member of the class of customers who slipped on produce, the finding of systemic breach of duty would be practically meaningless. Even if the finding of systemic negligence was of some general validity, one would still have to examine the situation that prevailed on the particular day that any class member slipped on produce. Apart from perhaps reversing the burden of proof, the finding of systemic negligence would be of little assistance. The presence of, absence of, or content of policies will not equate to a systemic breach of duty, and neither will any assessment of the generic "operation" or "training" of the Child Welfare system. The "operation" of the system can only be tested at the individual level, by seeing how the rights of individual children were handled.

¶ 104 In this case the class consists of thousands of persons who were under the care of hundreds of different social workers, in many different situations. At the end of the day, whether an action should have been commenced on behalf of any particular child is going to depend on individualistic issues such

as the quality of the evidence available, the identity of the defendant, whether that defendant had any resources to satisfy the judgment, whether the primary tort was the reason for the apprehension, and matters of that sort: see para. 58, supra. Overriding the entire decision to commence proceedings would be the question of whether it was in the best interests of the child to commence those proceedings: s. 2 of the C.Y.F.E. Act makes the interests of the child the overriding factor in all child welfare decisions. In this climate the system of policies and operations that the defendant had in place will be relatively unimportant. The standard of care may be little more than "consider each case individually". This can be compared with a case like Rumley (see B.C.C.A. at para. 18) where the duty to prevent sexual abuse had no individualistic character to it. It is significant that in Rumley only the sexual abuse claim was considered to be sufficiently discrete to allow certification, and the other claims were not certified. The allegation of "systemic negligence" in this case is more analogous to the allegation of "educational malpractice" than the court refused to certify in Rumley. Andersen v. Wilson (1999), 44 O.R. (3d) 673, and Endean v. Canadian Red Cross Society (1997), 36 B.C.L.R. (3d) 350, rev'd other grounds (1998), 48 B.C.L.R. (3d) 90 (C.A.), other cases relied on by the Plaintiff, can also be distinguished because the "systemic negligence" focussed respectively on very discrete issues about the sterilization of medical instruments, and the screening of blood donors, not the general operation of the defendants' systems. The present action is the type of case where determining a breach of duty "would ultimately break down into individual proceedings": Nieberg (Litigation Guardian of) v. Simcoe County District School Board (2004), 48 C.P.C. (5th) 164 (Ont. S.C.), at paras. 40-42; Fehringer v. Sun Media Corp. (2002), 39 C.P.C. (5th) 151 (Ont. S.C.J.) at paras. 17, 19 and 24, aff'd 39 C.P.C. (5th) 151 (Div. Ct.); Sutherland v. Canadian Red Cross Society (1994), 17 O.R. (3d) 645. At the end of the day, this is not an appropriate case in which to attempt to decide if there has been a "systemic breach of duty".

¶ 105 The Plaintiff did not outline how she proposes to prove systemic negligence. If the intention is to prove systemic negligence by proving individual acts of negligence, the class proceeding is unlikely to be the "preferred procedure". Given the individualistic nature of the inquiry (discussed supra, paras. 104-5) this type of proof is to be expected. Any issue to be proved in this way is presumptively an "individual issue", not a common issue. Proving a general proposition by proving individual examples involves a type of similar fact analysis, and is an inefficient and usually inappropriate method of proof: Robertson v. Edmonton (City) Police Service (#9), 2004 ABQB 243, 355 A.R. 281 at paras. 12-20. Notwithstanding the superficial attractiveness of a common issue, the Court must have regard to the practicalities of having a trial with respect to the common issue. General and theoretical questions, that would not be sufficiently particular to place in a pleading, are not appropriate.

¶ 106 Here the Plaintiff argues that it would still be open to the Defendant to prove in any particular case that any systemic breach of duty did not cause any loss to any particular class member. This would effectively reverse the burden of proof, and if an accurate statement it would be one reason not to certify the systemic breach issue. However the burden of proof would not shift. It would still be up to each class member to prove causation: Rumley at para. 30.

¶ 107 The Plaintiff pointed to other cases where systemic breach had been certified as a common issue: Cloud v. Canada (A.G.), supra; White v. Canada (Attorney General), 2004 BCSC 99, 24 B.C.L.R. (4th) 347; Griffiths v. Winter, 2002 BCSC 1219, 23 C.P.C. (5th) 336, affirmed 2003 BCCA 367; 15 B.C.L.R. (4th) 390, 34 C.P.C. (5th) 216; Richard (W.J.R.) v. Canada, 2005 BCSC 372; and Larcade v. Ontario (Ministry of Community and Social Services) (2005), 197 O.A.C. 287, 16 R.F.L. (6th) 156 (Div. Ct.). The decision in Larcade related to the provision of medical services to disabled children. Larcade certified specific questions of statutory interpretation, and did not certify systemic negligence as a common issue. In Griffiths v. Winter, the "systemic negligence" related to the proper hiring and supervision of one specific foster parent, and did not raise truly "systemic" issues. The other cases related to sexual and physical abuse of children in institutional settings. The prevention of physical or sexual abuse is always imperative, and is not subject to the "best interests of the child". In these cases

any systemic negligence arising from the way that the residential facilities were operated was found to be a common issue. However, the circumstance of the class members in these cases were more uniform than in this one. The requirements of a policy would have been more rigid than is likely to be the case here. In the end there is unlikely to be much saving of legal or factual analysis by determining systemic breach as a common issue in this case, and a significant risk of unfairness to the Defendant. I note that in none of these cases was it expressly considered whether the allegation of systemic negligence was one that could be fairly responded to by the defendants, and the decisions proceeded on the assumption that there was no such unfairness. All of these cases assumed that the issue of systemic negligence could be decided without exploring in detail individual claims. If it is actually proposed to prove systemic negligence by proving acts of negligence in individual cases, the identification of systemic negligence as a "common" issue will be illusory.

¶ 108 It is instructive to note that the experience in the Rumley action was not entirely happy. An application was subsequently brought to decertify the action: Rumley v. British Columbia (#2), 2003 BCSC 234, 12 B.C.L.R. (4th) 121. As the case progressed, it became apparent that the attempt to determine negligence at a systemic level was actually turning into a trial of many different individual instances of abuse: see paras. 64 to 69. As the Court stated at para. 60:

> The question then remains whether any general finding that can be made in such a class proceeding can be of any assistance to the members of the plaintiff class who must then prove on an individual basis that they suffered damage and that the systemic breach was an effective cause of their injury.

The chambers judge went on to conclude that "the difficulty is that all of this must have been known by the Court of Appeal when they decided it was possible to certify a common issue", but I would note that the Act specifically provides for decertification just because it is impossible for the court to predict exactly how a class action will unfold. Rumley shows that an attempt to prove systemic negligence by proving many individual examples of negligence is unworkable. A careful reading of Rumley (#2) is instructive, because it is clear that if the chambers judge was deciding the matter afresh, she would not have certified systemic negligence as a common issue. While the case management judge felt that the class action could continue through "aggressive case management", and some refinement of the common issues, she did conclude at para. 91 that the action had "reached a precarious balance between a potentially workable class proceeding and unmanageable confusion".

¶ 109 As noted (supra, para. 61) a significant amount of divergence is possible within the class. In some cases it will be possible to certify systemic negligence as a common issue. But the more divergent the class, and the more varied the circumstances giving rise to the alleged breach of duty, the less likely it will be that a workable systemic breach common issue will be possible. In this case the class is very divergent. The individual breaches of duty alleged raise polycentric and individual considerations that go far beyond the generalized "policies and operations" of the Defendant. In this case "breach of the standard of care" is essentially an individual issue that must be decided in the second phase of the proceedings, and attempting to frame it as an issue of "systemic negligence" is really an attempt to bootleg individual issues as a common issue. The appearance of commonality is an artificial result of the generality of the question. The proposed systemic breach common issue is not fair or workable in this case.

¶ 110 There is however one common issue of fact that would be usefully determined as a common issue. It can be stated as follows:

> What policies, practices and systems did the Defendant have in place between 1966 and 2004 relating to the prosecution of civil claims on behalf of children in care?

Deciding this issue of fact once will eliminate the need for repetitive factual inquiries, and it is accordingly an appropriate common issue. Whether, in all the circumstances, the Defendant breached any duty it might owe is not a suitable common issue.

Punitive Damages

¶ 111 The third and fourth common issues proposed by the Plaintiff relate to the liability of the Defendant for punitive damages. The Plaintiff points to cases that have certified punitive damages as an appropriate common issue: Rumley, supra, at para. 34.

¶ 112 The Plaintiff has identified, in the very structure of the third proposed common issue, that it is not possible to decide if the systemic operation of the Child Welfare system justifies an award of punitive damages, without deciding if there has been some systemic breach of duty. Having concluded that the systemic breach issue is not an appropriate one for common determination, it follows that the determination of punitive damages is not appropriate as a common issue. Whether any class member has been dealt with in such a way that he or she is entitled to punitive damages will have to be dealt with as part of the assessment of individual claims.

¶ 113 There is however one aspect of the Defendant's conduct that could possibly be examined globally to determine if it itself justifies punitive damages. As previously indicated, one appropriate common issue is the determination of the policies that the Defendant had in place from time to time. The following common issues may therefore also be appropriate:

(a) Was the existence of, absence of, or content of the policies of the Defendant relating to the protection of the civil rights of children in care at any time between 1966 and 2004 so egregious or highhanded as to justify an award of punitive damages?
(b) If so, what quantum of punitive damages should be paid, and to whom?

Assessing the policies in this way at one time will possibly avoid duplication of factual and legal analysis, and this is also an appropriate common issue. If it turns out that this issue cannot be efficiently addressed in isolation, the question can be amended or withdrawn.

Limitations

¶ 114 The Plaintiff has not proposed any common issue with respect to limitations. As previously noted (supra, paras. 49-55) limitations will play a large part in this litigation. Since the limitations applicable to each class member, and when the applicable limitation started to run, will vary widely, it is impossible to state any common issue with respect to limitations generally.

¶ 115 There is however one aspect of the limitations argument that is amenable to common determination. As previously noted (supra, para. 77), there is an argument that the claim of any class member over the age of 28 is barred. Such a class member will have to demonstrate either fraudulent concealment of the cause of action, or disability. Disability is an individual issue that is not amenable to common determination. The same would apply to any fraudulent concealment of the claim of an individual class member. However, the argument that there was systemic fraudulent concealment is amenable to common determination, and the following common issue is appropriate:

Did the Defendant operate the Child Welfare system at any time between 1966 and 2004 in such a way as to fraudulently conceal any breach of duty by it to the class

members?

The determination of this common issue will avoid repetitive factual finding and legal analysis. Again, if the question turns out to be unworkable, it can be withdrawn.

A Suitable Representative Plaintiff

¶ 116 Section 5(1)(e) of the Act requires that there be a suitable representative plaintiff. S.J. was originally proposed as the representative plaintiff. The Defendant objected to her suitability, and Ms. T.L. was substituted as the proposed representative plaintiff. The Defendant argues that Ms. T.L. is also not a suitable representative Plaintiff.

¶ 117 The Defendant argues that the proposed representative Plaintiff is not a suitable member of the class, because her claim is statute barred. Subsection 2(4) creates a presumption in favour of the representative plaintiff being a member of the class, and states that a non-member may only be the representative plaintiff if "to do so will avoid a substantial injustice to the class". The requirement that the representative plaintiff be a member of the class is not the same thing as requiring that the representative plaintiff prove, at the certification stage, that he or she has a valid cause of action. In other words, being a member of the class is not the same thing as being able to succeed on an immediate summary judgment application on the entire cause of action. The Defendant undoubtedly has an arguable defence against the specific claim of the named representative Plaintiff, but that does not mean that she is not a member of the class.

¶ 118 Ms. T.L. asserts in the claim that she made disclosure to the Defendant's officials in 1987 or 1988. It is possible that if Ms. T.L. did have a cause of action against the Defendant, it may have become barred on her 28th birthday on July 19, 2000, at which time the ten-year ultimate limitation period in the Limitations Act would have expired. If the expiry of the limitation was conceded, then Ms. T.L. might not be a suitable representative. However, her counsel indicated she will reply to any limitation defence with a plea of "fraudulent concealment" or possibly "disability". Her claim is therefore sufficiently viable to allow her to represent the class.

¶ 119 As previously indicated (supra, para. 73), there are actually a number of subcategories of persons covered by the proposed class. Ms. T.L. is a representative of those who were subject to a Permanent Guardianship Order after the abuse in question had ceased. The fact that Ms. T.L. is not identically situated with all possible class members does not preclude her from being a proper representative plaintiff: see s. 7, which makes the certification of subclasses discretionary, and Western Canadian Shopping Centres, supra, at para. 41. However, the Court must still examine whether, all things considered, she is a suitable representative Plaintiff.

¶ 120 Ms. T.L. had undoubtedly had a very difficult life, and has not been afforded many of the advantages we hope children receive. She herself deposes that she has lived "a horrible life of poverty and sadness". She is not employed and has no financial resources. She has not deposed to her educational achievements, but it is unlikely that she has any skills, training, or education that will assist her in discharging the responsibilities of a representative plaintiff.

¶ 121 One could argue that with all of her challenges, Ms. T.L. is not suitable to represent the class. However, the circumstances are that many children who were abused would face similar impediments. The more resilient members of the class who have gone on to pursue successful lives despite the challenges they faced may not be easily identified, or may not wish to pursue their claims. Those who do wish to pursue their claims are more likely to be in the same position as Ms. T.L. In the

circumstances, Ms. T.L. is a suitable representative plaintiff despite the challenges she faces.

¶ 122 The Defendant argues that Ms. T.L. would be unable to satisfy any costs award against her, because she is admittedly impecunious. The ability of the representative Plaintiff to answer a costs award is a relevant factor, but not an absolute bar: see Pearson v. Inco Ltd., [2005] O.J. No. 4918 (C.A.) at paras. 95-6. If it appeared that a representative plaintiff had been selected deliberately because he or she was judgment proof, or if it appeared that there were suitable representative plaintiffs of means who were being held back, the Court might be disinclined to approve the proposed representative plaintiff. However, one of the purposes of the Class Proceedings Act is to ensure access to justice. Where it appears that the class as a whole is disadvantaged, and it seems unlikely that a member of the class of substantial means could be identified to pursue the action, it would be contrary to the very purposes of the Act to deny certification based on impecuniosity. This factor is therefore not an impediment in this case.

¶ 123 Section 2(1) of the Act provides that "one member" of a class may commence a proceeding. While the Act clearly authorizes a single representative plaintiff, that does not mean that a single representative plaintiff will always be appropriate. Since the representative plaintiff purports to represent the interests of a large group, there is much to be said for having a manageable group of class members running the litigation. Counsel for the Plaintiff advised that a single representative plaintiff was being proposed, as it is easier to take instructions from a single plaintiff, and therefore the administration of the action is easier. That may be so, but the convenience of counsel is not a primary consideration. Class proceedings are often criticized as being "lawyer-driven", and that argument is only strengthened if it appears that the class itself does not have control of the litigation. There are good reasons for requiring the self-appointed representative plaintiff to consult with other members of the class.

¶ 124 Further, s. 18(2) of the Act provides that the defendants can only examine the representative plaintiff as of right. Where there is significant diversity between the members of the class, it is appropriate to permit a wider examination than a single representative plaintiff can permit. Furthermore, when the matter goes to trial it is helpful if the trial judge has a wider range of factual circumstances to give context to the common issues. Ms. T.L.'s claim may turn out to be an extreme one, because her tortfeasor was criminally convicted, and the trial judge may find other cases of assistance.

¶ 125 As previously indicated (supra, para. 77) Ms. T.L.'s claim will be met with a limitation defence of some arguable merit. Where the claim of the proposed representative plaintiff is possibly vulnerable, it is appropriate to have multiple plaintiffs to ensure the continuity of the action.

¶ 126 Where the proposed representative plaintiff is a particularly strong representative, a single representative plaintiff might be appropriate. In this case however, Ms. T.L. has acknowledged her own limitations and challenges. In some cases there may be difficulty in identifying more than one representative plaintiff. I note however that the record discloses that over 200 persons have approached counsel for the Plaintiff, indicating that they are potential members of the class and wish to be included. In the circumstances, there is no reason to believe that there are not other appropriate representative plaintiffs available, and accordingly there is no reason to appoint a single representative. Therefore, while Ms. T.L. is a suitable representative plaintiff, the action should only proceed as a class action if two or three other suitable representative plaintiffs are also added.

The Litigation Plan

¶ 127 Section 7(1)(b) of the Act requires that the representative plaintiff present a proposed litigation plan. Section 9 does not make the approval of the plan one of the mandatory provisions of a certification

order. Section 13 of the Act contemplates continual case management of the action, and variations of the litigation plan as required. Neither party discussed the litigation plan in great detail during argument on the certification motion, and the exact contents of the litigation plan will have to be dealt with at a suitable time in the future if the other hurdles to certification can be overcome.

¶ 128 This factor overlaps however with the absence of necessary parties (see infra, paras. 138 ff.). The Plaintiff has a plan to try the common issues, and the "trials within trials" needed to resolve individual claims could be managed in some way (see supra, para. 58), but there is at present no viable plan presented to deal with the rights, duties and interests of third parties.

The Preferred Procedure

¶ 129 The statute requires that a class action be the "preferable procedure" for the "fair and efficient" resolution of the common issues. The class proceeding regime is a tool of civil procedure. It is intended to be a practical, working device. As I summarized the situation in Metera, supra, at para. 88:

> In Western Canadian Shopping Centres the Court at paras. 44-46 and 51 emphasized the need for a "liberal and flexible" approach to certification, and the need to balance "efficiency and fairness". In Elms, [2001] B.C.J. No. 1284 the Court noted at paras. 46-52 that trial judges must be given the flexibility to "make the proceedings work" and to achieve the objectives of class proceeding statutes. Class proceedings were said to require a "cost/benefit analysis", not to provide "perfect justice" but to enable the "fair and efficient resolution" of common issues. Hollick at para. 28 and Rumley at para. 35 speak of the need for class proceedings to be "fair, efficient and manageable". These cases also make the point that a class action can be decertified if it turns out to be an unsuitable procedure: W.C.S.C. at paras. 55-6; Elms at para. 48.

This pragmatic approach must be used to determining if the class action is the "preferable procedure", or if the action will turn out to be a "monster of complexity and cost": Tiemstra v. Insurance Corp. of British Columbia (1997), 95 B.C.A.C. 144, 38 B.C.L.R. (3d) 377 (C.A.) at para. 13.

¶ 130 The Court may consider any relevant matter in deciding if the class action is the "preferable procedure", but the Act sets out some mandatory factors:

> 5(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:
>
> (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;
> (b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> (d) whether other means of resolving the claims are less practical or less efficient;

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

Each of these factors is considered below. Another relevant factor in this case is the rights of third parties.

Whether Common Issues Predominate

¶ 131 A factor commonly considered in deciding whether or not to certify a proceeding is whether the common issues predominate over the individual issues. The statute requires that the class proceeding be the preferable, efficient and fair approach to deciding the "common issues". Section 5(1)(c) of the Act allows certification even if the common issues do not "predominate". Again, as I noted in Metera, supra, at para. 69, it would be extremely rare for a class proceeding to contain only common issues, with no individual issues to be determined. The question is always whether a class proceeding is the preferable way to resolve what common issues there are. Of course, using the pragmatic approach to certification, the presence and scope of the individual issues must also be considered. The ultimate goal is to resolve all of the individual claims, and the Court must determine that a class proceeding will ultimately be of some practical utility in doing that: see Hollick, supra, at para. 29; Chadha v. Bayer Inc., supra, at paras. 13-17 (Div. Ct.) and paras. 53-4 (C.A.).

¶ 132 The Defendant argues that this litigation is "inverted". The Defendant argues that it cannot be known whether any class member should pursue this claim until it is known that they suffered an actionable wrong that would have resulted in a damage recovery which is now barred by the passage of time. Since virtually all class actions deal with common issues, followed up by an assessment of individual claims, this argument could be made with respect to any class action. It is really an argument that the individual issues predominate over the common issues. The statute however provides that the common issues need not dominate the individual issues, so long as the class proceeding is the preferable, efficient and fair method of deciding the common issues. Of course, while the Plaintiff is entitled to "limit the grounds of negligence she relies on" (see supra, para. 100), the more limited the common issues, the more the individual issues will predominate, and the less efficient will be the class proceeding.

¶ 133 It is clear that in this case, while there are common issues, the individual issues will substantially predominate over the common issues. Even after the common issues are decided, there will be a lot of work to be done before it can be determined if any individual class member has a valid claim. Each individual claim will require a "trial within a trial": see para. 58, supra. While the overall benefits will be slight, there is still some practical utility in deciding the common issues once.

Separate Proceedings

¶ 134 The second and third factors to be considered are whether the prospective class members might have an interest in individually controlling their own actions, and whether the class claims are already the subject of other proceedings. On the first factor, each class member will still retain a significant element of control over his or her own claim, simply because the individual issues predominate over the common issues. Even after the common issues are decided, the class members will have a significant amount of control over the adjudication of the individual claims. There is nothing about the common issues that would suggest that the class members have any interest in maintaining control through separate prosecutions: see Rumley at para. 37.

¶ 135 The record does disclose a number of other proceedings that might be overtaken by the class proceeding. There is however some evidence that at least some of the plaintiffs in those individual proceedings would prefer to have their claims absorbed by the class action. For those that do not, there is always the option of "opting out" of the class proceeding pursuant to the terms of s. 17. On balance, the presence or likelihood of parallel private claims is not an impediment to certification in this case.

Practicality of Other Procedures

¶ 136 The fourth factor in s. 5(2) is whether other means of resolving the claims are less practical or less efficient. In this case there is not a sharp demarcation between the efficiency of the class proceeding, and the efficiency of hypothetical individual actions. This is again because the individual issues predominate over the common issues. In this particular situation, a great deal of the work in resolving the claims is going to have to happen at the individual level, and considered overall the practicality of the competing procedures is not significantly different. Certainly it is more efficient and practical to decide the common issues once and for all, and this factor is also not an impediment to certification, although again the benefits are marginal.

Difficulty in Administration

¶ 137 The final mandatory consideration under s. 5(2) is whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. In this case it is likely that the class members might well be among the more vulnerable and less advantaged members of society: see, supra, paras. 120-21. As the Court stated in Rumley at para. 39: "Allowing the suit to proceed as a class action may well go some way towards mitigating the difficulties that will be faced by the class members" if they attempted to pursue their claims individually. This is accordingly a factor that speaks in favour of certification.

Third Parties

¶ 138 The Defendant argues that this action is not the preferable way to determine the common issues because there are numerous third parties who are necessary parties. The Defendant identifies the following categories of potential parties:

(a) the primacy tortfeasors who committed the torts or crimes.
(b) First Nations to whom child welfare responsibilities were delegated (there are about 18 possible third parties).
(c) Regional Authorities created under the Child and Family Services Authorities Act to administer child protection services (there were 18, and are now 10 authorities).
(d) Charitable and for-profit service providers who were given responsibility over child protection from time to time.
(e) The Public Trustee, who is the trustee by statute of many class members.

The Defendant argues that the common issues cannot, or should not, be decided in the absence of these parties.

¶ 139 Section 21 of the C.Y.F.E. Act permits the delegation of the powers under the Act to a child and family services authority or to any other person. The Defendant placed on the record delegations of authority to First Nations child welfare agencies. These documents delegate to the agency all the powers of a director under the Act, and many of the Ministerial powers. The accompanying child welfare

agreements appear to grant the authority wide-ranging powers relating to the provision of child welfare services. The delegation of authority created by these documents might well have a significant impact on the existence and scope of any duty of care the Defendant might owe to the plaintiff class.

¶ 140 The representative plaintiff argues that she is entitled to pick her defendants, and there is no obligation on the class to sue all persons who might potentially be liable. The representative plaintiff has chosen to sue the Defendant government only, and has not engaged the liability of other defendants. The representative plaintiff undoubtedly has significant flexibility in choosing defendants, if only because of the common law rule that any joint tortfeasor is responsible for 100% of the damage caused to the plaintiff. However, if necessary parties are not joined in the litigation, that might be a factor which precludes certification of the class action. If the proper parties are not joined, the class action may no longer be the "preferable procedure".

¶ 141 First of all, it is useful to draw a distinction between true "third parties" and "necessary parties". In some cases the defendant may claim a right to be indemnified by another person who is not a party to the litigation, and the defendant may propose to add that other person as a third party. In those situations of a pure indemnity claim, it may be quite possible to proceed with the class action without adding the third parties: for example Attis v. Canada (Minister of Health) (2005), 75 O.R. (3d) 302. However, the more common situation is where the "third parties" are persons who are potentially jointly liable with the named defendant. For example, in Baxter v. Canada (Attorney General), [2005] O.T.C. 391 the representative plaintiffs sued over abuse at Indian residential schools. The plaintiff initially sued both the federal government and a number of different religious groups that actually operated the schools. The presence of this many parties was a hurdle to the certification of the class action, or at least prevented the certification of the class action without all of the third parties being given an opportunity to speak to the issue of certification. In response to this problem, the plaintiffs apparently proposed to limit their claim to the several liability of the federal government only, thereby supposedly enabling the exclusion of the defendant religious groups from the action. With respect, the suggestion that the interests of the other defendants could be severed in this way is illusory. How could the court fairly decide that the federal government was, say, severally liable for 25% of the damages without affording the third parties a reasonable opportunity to be heard? What if it was the third parties' position that the federal government was liable for 50% of the damages, or 75%? It would be fundamentally unfair to the other potential tortfeasors to purport to decide the several liability of one party without the others being part of the litigation. On this point I respectfully disagree with the premise of Baxter and with the similar conclusions in Endean v. Canadian Red Cross Society, supra, at paras. 56-9. Deciding the proportional liability of one defendant in the absence of other necessary parties creates a real risk of inconsistent judicial decisions, and violates the principle of natural justice that the rights of persons should not be decided unless they are extended a right to be heard in the proceedings: Sutherland v. Canadian Red Cross Society (1994), 17 O.R. (3d) 645 at pg. 652. In my respectful view the other defendants in Baxter were "necessary parties", not "third parties", and they had to be a part of the action before the issues of duty and proportional liability could possibly be decided. Similar issues arise in this action.

¶ 142 Further, while the Plaintiff relies on the Baxter decision as authority for the proposition that the presence of third parties is not a bar to certification, the Baxter decision only decided whether the certification motion should proceed before or after certain motions proposed by the third parties. It is not authority for the proposition that the presence of third parties is irrelevant to certification. Baxter also did not draw any distinction between true third parties and necessary parties.

¶ 143 In Attis v. Canada (Minister of Health), supra, it was held at paragraph 14 that "until such time as the action is certified, the nature of the proceeding is not yet crystallized so as to require the third party's participation. In consequence, the third party would have no standing to participate in the certification motion in any event." I am unable to accept that there is any such general rule. If the only

claim against the third party is a claim for indemnity, as was the case in Attis, severance of the third party claim may be possible. However, in most cases it is essential that all necessary and proper defendants be a part of the action. The deliberate decision of the plaintiff not to name proper defendants in an attempt to make the proceeding more amenable to certification will in fact often backfire, and the absence of those necessary defendants will often mean that the action cannot be certified: Bittner v. Louisiana-Pacific Corp. (1997), 43 B.C.L.R. (3d) 324; Charette v. Minerve Canada Compagnie de Transport Aériens Inc., unrep. Que. S.C., May 3rd, 1988, No. 500-06-000002-887; Dumoulin v. Société de transport de la Communauté Urbaine de Montreal, [1999] J.Q. No. 4899. I repeat that the Act is a tool of civil procedure, and is not intended to override other substantive and procedural rules, such as Rule 38(3) which requires the presence of all necessary parties: Edwards v. Law Society of Upper Canada (1995), 40 C.P.C. (3d) 316 (Ont. Gen. Div.) at para. 22. While s. 41(2) provides that the Act prevails over inconsistent Rules, there is nothing in the Act dispensing with the need to join all necessary parties.

¶ 144 One potential defendant is noticeably absent: the Public Trustee. In Blood v. H.M.Q., supra, para. 44, it was determined that the Public Trustee is the one who has the primary responsibility for enforcing the legal rights of children. Whatever the merits of that decision, it would appear that the Public Trustee is a necessary party to this litigation, if for no other reason than the Public Trustee is specifically mentioned in the C.Y.F.E. Act. It is at least theoretically possible that the trial judge in this proceeding might determine that the Defendant does not have any duty as alleged, because that duty falls on the Public Trustee. It would be inappropriate for the trial judge to make such a determination without hearing submissions from the Public Trustee, and without having the Public Trustee being bound to that conclusion. If such a determination was made, and the Public Trustee subsequently challenged it, there would be the risk of inconsistent decisions of the Court. Furthermore, if that was the conclusion of the trial judge, the resolution of the common issue would be of no practical utility. It is accordingly inappropriate to certify this class proceeding for any class member who was in care after 1985, unless the Public Trustee can be made a defendant.

¶ 145 Similar concerns exist with respect to the other potential third parties identified by the Defendant. While the Defendant has not yet filed a defence, it seems likely that the Defendant might argue that whatever duty it had to pursue the civil remedies of the class fell in whole or in part on the third parties, and not on the Defendant. The Plaintiff might argue in response that the Defendant had a non-delegable duty to the class and remains liable notwithstanding the involvement of the third parties. The Defendant might argue that whatever duty it has was discharged by putting the class members in the care of responsible third parties. I express no opinions on the correct answers to these difficult issues. It is obvious however that whatever decisions are made should only be made after the potential third parties have been given a fair opportunity to make submissions. Further, any decisions made on these issues should be binding on all those third parties.

¶ 146 Another group of potential necessary parties is absent: the other guardians of the class members. It appears that the involvement of the Defendant short of Temporary Guardianship did not result in a change of guardianship, and that Temporary Guardianship itself resulted in shared guardianship (see supra, para. 44). Even those class members who were subject to Permanent Guardianship Orders would have had other guardians before, and possibly after, the Permanent Guardianship Order. In some cases the primary tort, or the expiration of the limitation period may have occurred under that other guardianship. The interaction of any duty of the Defendant to pursue the civil claims of the class members, and the corresponding duty of these other guardians, is not something that could easily be decided in the absence of those other guardians.

¶ 147 On the other hand, I am not satisfied that it is necessary to join the original primary tortfeasors to this action. The premise of the litigation is that the limitation period has expired against the primary tortfeasors, and on that assumption it is unlikely that the rights of the primary tortfeasors will be affected

by this litigation. They are not necessary parties. For the same reason, the various agencies that were under contract to provide child welfare services are not necessary parties simply because they might have been vicariously liable for the acts of the primary tortfeasor, because the claim of vicarious liability is presumably subject to the same limitation period.

¶ 148 The Defendant argues that the other child welfare agencies are also necessary parties to this action because most of the documentation with respect to the class members is with those agencies. In my view this itself is not an impediment to certification. Rule 209 provides for the production of relevant documents by third parties. Furthermore, the production of documentation with respect to individual class members will only become critical when the individual claims are assessed in the second phase of the class proceedings.

¶ 149 To summarize, while the representative plaintiff may have a right to pick the defendants that are to be sued, the representative plaintiff must ensure that all necessary parties are joined to the litigation. The Class Proceedings Act does not override the general principles of civil litigation and R. 38(3) requires the joining of all necessary parties. The representative plaintiff has to take the Child Welfare system as it existed, and it appears that the system was, to a considerable extent, operated through third party agencies. It is not the "preferable procedure" to try and determine these difficult issues in the absence of those key third parties. It is therefore inappropriate for this class proceeding to be certified unless the necessary and appropriate third parties are joined.

¶ 150 As indicated, the Defendant has identified a number of possible third parties. Without hearing from each of them, and without hearing from the Plaintiff, it would be inappropriate to determine which of them are truly necessary to this proceeding. Some of them may become necessary, or may be excluded as being not necessary, depending on the final definition of the class. In other words, if the time period covered by the action is changed, the number of necessary third parties may be reduced. Furthermore, it might be possible to eliminate some third parties by narrowing the class. For example, if the class was defined to exclude class members under the care of particular categories of third parties, that might solve the problem. Alternatively, it might be possible to limit the class to only those children who were under the direct care of the Defendant, and were not thereafter placed under the care of third parties. No final decision on this issue should be made without giving the Plaintiff and the Defendant the opportunity to make further representations if they are so advised. However, as the action is presently structured, it would be inappropriate to certify it as a class action.

Summary

¶ 151 In summary, and subject to the submissions of counsel on the specific wording:

(a) the proceeding discloses a cause of action.
(b) the following class can be identified as an appropriate class of plaintiffs:

> All persons who suffered personal injury while a minor as a result of a tort by a third party, and between July 1, 1966 and June 29, 2004 were in the actual custody of the Defendant:
>
> i) as a permanent ward,
> ii) under a Permanent or Temporary Guardianship Order, or
> iii) under a Permanent Guardianship Agreement,
>
> and the Defendant did not commence a civil action or make a Victims of Crime application to obtain compensation on their behalf.

(c) there must be a subclass for non-resident members of the class who are not residents of Alberta on the date of certification.

(d) the following common issues can be identified:

(i) Did the Defendant, between 1966 and 2004, owe a duty to some or all of the various types of class members to protect their legal rights by taking steps to obtain compensation on their behalf, and if so, what was the nature of that duty?

(ii) What policies, practices and systems did the Defendant have in place between 1966 and 2004 relating to the prosecution of civil claims on behalf of children in care?

(iii) Was the existence of, absence of, or content of the policies of the Defendant relating to the protection of the civil rights of children in care at any time between 1966 and 2004 so egregious or highhanded as to justify an award of punitive damages?

(iv) If the answer to question (iii) is affirmative, what quantum of punitive damages should be paid, and to whom?

(v) Did the Defendant operate the Child Welfare system at any time between 1966 and 2004 in such a way as to fraudulently conceal any breach of duty by it to the class members?

(e) the proposed representative plaintiff is suitable, but the proceedings should not be certified unless approximately two or three other suitable representative plaintiffs are proposed as well.

(f) while the advantages in this case will be marginal, a class proceeding would be the preferable procedure for deciding the common issue, excepting only that there are certain other parties who must necessarily be joined to the action before it can be certified.

(g) the application to sue by pseudonym is dismissed.

¶ 152 The parties may speak to costs, and may seek other advice and directions as they are advised.

SLATTER J.

QL UPDATE: 20060221
cp/ci/e/qw/qlpha/qljxl

Case Name:

Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.

PROCEEDING UNDER the Class Proceedings Act, 1992
(Biotin) (Bulk Vitamins) (Choline Chloride)
(Methionine) (Niacin) (Supplemental Choline Chloride)
(Suppplemental Ontario Methionine)

Between
Glen Ford, Vitapharm Canada Ltd., Fleming Feed Mill
Ltd. and Marcy David, plaintiffs, and
F. Hoffmann-La Roche Ltd., Hoffmann-La Roche Ltd.,
Merck KGaA, Lonza AG, Alusuisse-Lonza Canada Inc.,
Sumitomo Chemical Co. Ltd., Sumitomo Canada
Limited/Limitée and Tanabe Seiyaku Co. Ltd.,
defendants
And between
Glen Ford, Vitapharm Canada Ltd., Fleming
Feed Mill Ltd., Aliments Breton Inc., Oger Awad and
Mary Helen Awad, plaintiffs, and
F. Hoffmann-La Roche Ltd., Hoffmann-La Roche
Limited/Limitée, Rhône-Poulenc S.A., Aventis Animal
Nutrition S.A., Rhône-Poulenc Canada Inc.,
Rhône-Poulenc Animal Nutrition Inc., Rhône-Poulenc
Inc., BASF Aktiengesellschaft, BASF Corporation, BASF
Canada Inc., Eisai Co. Ltd., Takeda Chemical
Industries Ltd., Takeda Canada Vitamin and Food Inc.,
Merck KGaA, Daiichi Pharmaceutical Company, Ltd.,
Reinhard Steinmetz, Dieter Suter, Hugo Strotmann,
Andreas Hauri, Kuno Sommer and Roland Brönnimann,
defendants
And between
Fleming Feed Mill Ltd., Aliments Breton
Inc., Len Ford and Marcy David, plaintiffs, and
BASF Aktiengesellschaft, BASF Corporation, BASF Canada
Inc., Chinook Group Ltd., Chinook Group, Inc., DCV
Inc., Ducoa L.P., Akzo Nobel NV, Akzo Nobel Chemicals
BV, Bioproducts Inc., Russell Cosburn, John Kennedy,
Robert Samuelson, Lindell Hilling, John L. ("Pete")
Fischer and Antonio Felix, defendants
And between
Glen Ford, Fleming Feed Mill Ltd., Aliments
Breton Inc. and Kristi Cappa, plaintiff, and
Rhône-Poulenc S.A., Rhône-Poulenc Canada Inc.,
Degussa-Hüls AG, Degussa Corporation, Degussa Canada

Inc., Novus International Inc. and Aventis Animal
Nutrition S.A., defendants
And between
Vitapharm Canada Ltd., Fleming Feed Mill
Ltd., Aliments Breton Inc., and Kristi Cappa,
plaintiffs, and
Degussa-Hüls AG, Degussa Corporation, Degussa Canada
Inc., Reilly Industries Inc., Reilly Chemicals S.A.,
Vitachem Company, Alusuisse-Lonza Canada Inc., Lonza
AG, Nepera Incorporated, Roger Noack and David Purpi,
defendants
And between
Fleming Feed Mill Ltd., Aliments Breton
Inc., Glen Ford and Marcy David, plaintiffs, and
UCB S.A. and UCB Chemicals Corporation, defendants
And between
Glen Ford, plaintiff, and
Novus International (Canada) Inc., defendant

[2005] O.J. No. 1117
Court File Nos. 00-CV-202080CP, 00-CV-200045CP,
00-CV-198647CP, 00-CV-201723CP, 00-CV-200044CP,
40610, and 42267CP

Ontario Superior Court of Justice
P.A. Cumming J.

Heard: March 8 and 9, 2005.
Judgment: March 23, 2005.
(115 paras.)

Civil procedure — Parties — Class or representative actions — Legal profession — Barristers and solicitors — Compensation — Measure of compensation — Reasonable charges, reasonably performed.

Application for the approval of class counsel fees. In 1999 multiple putative class actions were commenced in Ontario, British Columbia and Quebec that alleged a complex price-fixing and market-sharing conspiracy related to the sale of vitamins in Canada. Ultimately, five class actions were reconstituted and pursued in Ontario and dealt with discrete vitamins and separate representative plaintiffs. Two additional actions were pursued. Some of the defendants entered into a proposed settlement with some of the plaintiffs in the Ontario class actions. The agreement was lengthy and complex. It was approved in separate reasons and sought to compensate all class members across Canada. The settlement compared favourable to the results achieved in American litigation even though there was a higher scale of damages available in the United States. Class counsel agreed with the representative plaintiffs to be paid counsel fees equal to 15 per cent of the settlement funds. It was anticipated that the class counsel fee would be $14,732,906. The agreement allocated a maximum of $18 million for the payment of administration expenses and class counsel fees. The base fee for class counsel's time was $5.3 million. The anticipated class counsel fee was based on a multiplier of 2.78 on

the base fee. It also represented a 14.73 per cent fee on a recovery of $100 million after settlement credits. The settlement was based on a total value of $140 million and a total payable to the administrator of $100 million after settlement credits. The damages suffered by the class members was in the range of $103 to $138 million.

HELD: Application allowed. The legal issues were complicated and challenging. The litigation approach was designed to maximize recovery for the classes. Class counsel faced many risks. There was a multiplicity of actions throughout Canada against many defendants in different jurisdictions. There was a possibility that certification could be denied and that some or all of the actions could be dismissed. Price fixing civil litigation was novel in Canada when the actions were commenced. There was also the possibility that the actual recovery could be much smaller than the settlement amount. There was a chance that the value of counsels' time could be disproportionate to the amount involved. A further risk was that the settlement would not be approved. The amount of $15 million for fees was fair and reasonable if the actual recovery was $100 million. If the recovery was higher counsel would receive slightly more than this amount.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, S.O. 1992, c. 6, s. 32, s. 33, s. 33(2), s. 33(7)(b), s. 33(7)(c), s. 33(9).

Counsel:

Harvey T. Strosberg, Q.C., C. Scott Ritchie, Q.C., J.J. Camp Q.C., and Joe Fiorante for the Plaintiffs in all actions

Glenn M. Zakaib, for the Defendant Merck KGaA

John Callaghan, for Sumitomo Chemical Co. Ltd.

William Vanveen and François Baril, for the Defendants Hoffmann-La Roche Limited, F. Hoffmann-La Roche Ltd.

Ariane Farrell, for Sumitomo Canada Ltd.

Donald Houston, for Lonza AG

Katherine L. Kay and Eliot N. Kolers, for the Defendant Eisai Co. Ltd.

Evangelia Kriaris, for Takeda Pharmaceutical Company Limited (formerly Takeda Chemical Industries Ltd.); Takeda Canada Vitamin and Food Inc.

Sandra A. Forbes, for Aventis Animal Nutrition S.A., the Rhône-Poulenc defendants and Daiichi Pharmaceutical Company, Ltd.

David W. Kent, for BASF Aktiengesellschaft, BASF Corporation and BASF Canada Inc.

Andrew J. Roman, for Akzo Nobel N.V. and Akzo Nobel Chemicals B.V.

George D. Hunter, for DCV Inc. and Ducoa L.P.

James Doris, for Bioproducts, Inc.

Tycho Manson, for Chinook Group, Ltd.

F. Paul Morrison and J.P. Brown, for Degussa Corporation, Degussa Canada Inc. and Degussa-Huls A.G.

S.A. Dawson, for Novus International, Inc.

Donald Houston, for Lonza AG (acting previously discontinued agent) for Alusuisse-Lonza Canada Inc.

Jennifer Badley (per D. Kent) for Reilly Industries Inc. and Reilly Chemicals S.A.

S. Vlahakis, for Nepera Inc., Roger Noack and David Purpi

Donald Houston, for Wippon Soda Co. Ltd.

Pauline W. Wong for Defendant, Mitsui & Co., Ltd.

S.A. Dawson, for Novus International (Canada) Inc.

Donald Houston, for UCB S.A. and UCB Chemicals Corporation

[Editor's note: A corrected copy was released by the Court April 5, 2005; the corrections have been made to the text and the corrigendum is appended to this document.]

CLASS PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992
REASONS FOR DECISION

P.A. CUMMING J.:—

The Motion

¶ 1 This is a motion for approval of class counsel fees in respect of a group of class actions under sections 32 and 33 of the Class Proceedings Act, S.O. 1992, c. 6 ("CPA").

¶ 2 In 1999, multiple putative class actions were commenced in Ontario, British Columbia, and Quebec alleging a complex, global, multi-party, price-fixing and market-sharing conspiracy relating to the sale of vitamins in Canada. Ultimately, five separate class actions were reconstituted and pursued in Ontario, dealing with discrete Vitamins and with separate representative plaintiffs. Two additional, so-called "supplemental", class actions have also been initiated. Certain "Settling Defendants" have now entered into a proposed settlement with certain "Settling Plaintiffs" in these class actions in Ontario, culminating in what is called the "Amended Canadian Vitamins Class Actions National Settlement Agreement" ("Agreement") made as of November 1, 2004 and amended as of January 6, 2005. The proposed settlement is for the national classes contemplated in the class actions at hand, together with separate class proceedings in British Columbia and Quebec. Separate settlement approval hearings will take place before the Courts in those provinces. (The status of the several class actions, following upon the successful motions for certification and settlement approval, is set forth in paragraph 106 of the

separate Reasons for Decision in respect of the certification motions and for settlement approval released contemporaneously with these Reasons for Decision.)

¶ 3 The Agreement is lengthy and complex with several schedules and can be found (together with additional information), online: <http://www.vitaminsclassaction.com>. (See Exhibit D to Affidavit of Charles M. Wright in Volume 1 of 9 of Motion Record). There are also very recent, trailing, additional, separate Settlement Agreements for three Defendants (Akso Nobel Chemicals BV ("Akso"), UCB S.A. ("UCB"), and Reilly Industries Inc. ("Reilly")) which, for the purposes of the motion at hand, can be notionally treated as though they are part of a single overall settlement.

¶ 4 The alleged conspiracies remain simply that, i.e. "alleged" conspiracies, although it is to be noted that many of the Settling Defendants have pleaded guilty to charges of conspiracy in separate criminal proceedings with consequential fines.

¶ 5 The motion for certification and Court approval of the proposed settlement was heard on March 8, 2005 with the motion for the approval of "Class Counsel Fees" being heard separately March 9, 2005. Reasons for Decision in respect of certification and settlement approval have been given separately. The Reasons for Decision at hand deal with the discrete issue of fees for class counsel.

¶ 6 Capitalized terms used herein are as defined in the Agreement. However, the term "Class Counsel" means the law firms known as Siskinds, Cromarty, Ivey & Dowler ("Siskinds"), Sutts Strosberg ("Strosberg"), Camp Fiorante Matthews ("Camp"), Desmeules, and Allen Cooper. This definition of "Class Counsel" is different from the definition of "Class Counsel" found in the Agreement. The term "Quebec Counsel" means the two Montreal firms, Sylvestre, Charbonneau, Fafard and Unterberg, Labelle, Lebeau.

¶ 7 As well, "Class Counsel Fees", as this term is used herein, means the total fees payable to both Class Counsel and Quebec Counsel.

¶ 8 Class Counsel decided at an early stage that the litigation would be pursued in Ontario ahead of the actions in British Columbia and Quebec. Lawyers J.J. Camp and Joe Fiorante of the British Columbia bar both obtained a special call in Ontario to assist in the Ontario litigation.

¶ 9 Alleging distinct conspiracies, Class Counsel devised a theory which had not previously been postulated. Simply put, in separate actions (collectively called the "Vitamins class actions"), they alleged damage on behalf of all persons in Canada injured as a result of each alleged conspiracy. The class members have been divided into three groups, namely, Direct Purchasers, Intermediate Purchasers and Consumers. Class Counsel have sought to assess damages for them on a global basis. This theory has been pleaded in subsequent price-fixing actions and, indeed, approved by this Court in Alfresh Beverages Canada Corp. v. Hoechst AG, [2002] O.J. No. 79.

¶ 10 Several pre-certification motions have been heard. Class Counsel brought a carriage motion to defeat a challenge by other counsel in Ontario seeking to prosecute class actions on behalf of only Consumers (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2000] O.J. No. 4594). Then, some Defendants unsuccessfully challenged the Ontario Court's jurisdiction (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2002] O.J. No. 298). Some Defendants challenged the plaintiffs' right to obtain evidence in the U.S. (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2001] O.J. No. 237). This issue was argued in the District of Columbia and, ultimately, in the Ontario Court of Appeal where the plaintiffs prevailed ([2003] O.J. No. 868 (C.A.)).

¶ 11 The settlement Agreement, now approved by this Court (and if approved by the British Columbia and Quebec Courts), seeks to compensate all class members across Canada. As discussed in the Reasons for Decision relating to the settlement approval, the cy-près mechanism is employed to some extent in giving effect to the distribution of the settlement funds.

¶ 12 The settlement compares favourably to the results achieved in U.S. litigation even though in the U.S. there is a regime of statutory treble damages and a jury culture. As well, the settlement falls within the range of damages estimated by the plaintiffs' expert economist, Dr. Thomas Ross.

¶ 13 The proposed overall class action settlement totals by far the largest amount recovered in class actions relating to price-fixing in Canada. The settlement is based on a total damage assessment in excess of $140,000,000 including interest, expenses and costs and results in an expected payment by the Settling Defendants to the Administrator of about $100,000,000 after the deduction of "Settlement Credits" (being credits against the overall Canadian assessment of damages by excluded customers, that is, Direct Purchasers or Distributors who have already settled their individual claims with Settling Defendants separate and apart from the Agreement at hand).

¶ 14 Class Counsel in Ontario agreed with the representative plaintiffs to be paid counsel fees equal to 15% of the settlement funds or monetary award plus applicable taxes plus recovered costs, plus their unrecovered disbursements and applicable taxes.

¶ 15 Section 18.1 of the Agreement deals with "Class Counsel Fees and Disbursements and Administration Expenses." Paragraph 13 of the factum of Class Counsel sets forth the expected calculations under that provision:

Amount for Administration Expenses and Class Counsel Fees		$ 18,000,000
Plus Fees on Additional Settlements		$ 75,000
Plus estimated Costs and Interest recovery from Mr. Borden and/or his clients		$ 70,000
Subtotal		$ 18,145,000
Less Administration Expenses (actual and estimated)		($ 1,390,709)
Less Quebec Counsel's Disbursements and GST (estimated)		($ 40,000)
Less Class Counsel Disbursements (paid and payable)		($ 1,552,392)
Less interest authorized by CPA s. 33(7)(c)	Not calculated	
Less GST on Class Counsel Disbursements where applicable		($ 94,667)

Subtotal	$ 15,067,232
Less GST on Class Counsel Fees and Quebec Counsel Fees	($ 985,707)
Maximum amount available for Class Counsel Fees and Quebec Counsel Fees	$ 14,081,525
Percentage for Class Counsel Fees and Quebec Counsel Fees based on $100,000,000 recovery	14.08%
Less Quebec Counsel Fees (estimated) net of GST and disbursements	($ 2,000,000)
Maximum amount available for Class Counsel Fees	$ 12,081,525
Multiplier inherent in Class Counsel Fees	2.28

¶ 16 An "Expense Fund" of $10,000,000 was negotiated by Class Counsel as part of the Agreement. This is often seen in the practice in Ontario in class action and general litigation. For example, in a personal injury action involving a minor or a person under a disability, plaintiff's counsel will negotiate a fixed amount for "costs" as part of a settlement which is tendered to the court for approval.

¶ 17 There are problematic aspects to a discrete amount being labeled in a settlement agreement as being a contribution for class counsel fees. On the one hand, as the class is going to be required in all events to pay class counsel their fees, this factor is a necessary consideration in looking to the overall quantum of the funds being sought by the class in negotiating a settlement.

¶ 18 On the other hand, the structure for any sum isolated and labeled in any settlement agreement as going toward counsel fees requires careful scrutiny to ensure that the determination of class counsel fees is ultimately fair and reasonable.

¶ 19 A Court must be cognizant that any amount so labeled in a class action as being "on account of Class Counsel Fees" does not imply the minimum starting point in a determination of the quantum of fair and reasonable legal fees. The isolated amount, if such there is, should properly be seen as simply an indistinguishable part of the total global recovery for the class with fair and reasonable fees then being determined by looking to the global recovery along with all other appropriate factors.

¶ 20 I turn now to the Agreement at hand. Section 6.1(1) of the Agreement "notionally" allocates the "Settlement Amount" (defined in s. 1.1(65) as being "$132.45 million, including an amount of $10 million on account of Class Counsel Fees and Administration Expenses," plus interest) into five funds, including an "Expense Fund of $10 million."

¶ 21 Section 18.1(1) then proceeds to state, "The $10 million allocated to the Expense Fund is a payment by the Settling Defendants on account of Class Counsel Fees and Administration Expenses." Section 18.1(2) then provides that "The maximum amount the Courts shall allocate for Class Counsel Fees and Administration Expenses is $18 million." Section 18.1(10) states that as a result of this $18 million cap the Settling Defendants agree not to oppose the approval of Class Counsel Fees and Administrative Expenses.

¶ 22 Further elaboration on the regime for Class Counsel Fees and Administration Expenses is set forth in the remaining subsections of s. 18.1.

¶ 23 Class Counsel in their Factum emphasize that they "agreed to an $18,000,000 cap on Administration Expenses and Class Counsel Fees during the negotiations of the Amended Settlement Agreement knowing that this could result in a payment to them of less than Class Counsel agreed to and expected as a result of their fee agreements with each plaintiff." Presumably this was because the calculation as shown in the above chart would result in Class Counsel Fees of only 14.08% whereas the contingency fee agreements provide for a 15% fee of the recovered amount.

¶ 24 The written agreement between each plaintiff in the Ontario Actions and Strosberg or Siskinds states:

> Solicitor's Fees
>
> 4. Whether or not Success is achieved in the Action, the CLIENTS agree that the SOLICITOR shall be paid and shall receive all recovered party and party costs in the Action irrespective of the scale upon which the party and party costs are awarded, applicable taxes and any interest accruing on account of party and party costs.
> 5. In addition to any fees recovered as party and party costs paid to the SOLICITOR pursuant to the provisions of paragraph 4 above, in the event of Success in the Action the CLIENTS agree that the SOLICITOR shall be paid and shall receive the aggregate of the following:
>
> (a) to the extent that any disbursements are not received and recovered as party and party costs, an amount equivalent to the cost of the unrecovered disbursements plus applicable taxes; and
> (b) 15% of the settlement funds or monetary award plus applicable taxes.
>
> Disbursements
>
> 6. The CLIENTS agree that disbursements to be paid to the SOLICITOR shall include all amounts incurred or which may be incurred by the SOLICITOR and his firm and the Associate Counsel in connection with the representation of the CLIENTS and the Class in relation to the trial of the Common Issues and/or settlement, including but not limited to expenses incurred for investigation, court fees, duplication, travel, lodging, long distance telephone calls, the cost of a toll-free telephone line, the cost of specialized computer equipment and management systems software, the cost of a website, courier, postage, telecopier, imaging, and all services provided to the SOLICITOR by consultants, experts and agents. [Emphasis added]

¶ 25 Class Counsel take the position that the written agreement between each plaintiff in the B.C. Actions and Camp provides for Camp to be compensated on the same basis except that there is no provision for costs because no costs may be awarded in favour of or against a plaintiff in a B.C. class action. (It is noted the B.C. action retainer agreements apparently provide for legal fees that vary, depending on the stage of litigation, from 15% to 25% of all benefits obtained for class members, plus disbursements and applicable taxes.)

¶ 26 The representative plaintiffs each signed the Settlement Agreement and thereby agreed to $18,000,000 for Administration Expenses and Class Counsel Fees. However, it is noted that the

expectations of the Ontario class action representative plaintiffs in doing so are that there is about $100 million in actual settlement benefits and that the legal fees being requested are consistent with the retainer agreements' stipulation of legal fees being in the amount of 15% of all benefits obtained for class members, plus disbursements and applicable taxes. See for example the affidavit of Ms. Kristi Cappa, a representative plaintiff in the Ontario Methionine Action and the Ontario Niacin Action. Indeed, the affidavit of Ms. Heather Rumble Peterson of the lead plaintiff counsel firm, Strosberg, reiterates this intent and expectation.

¶ 27 Section 18.1(3) limits the maximum amount of fees for Quebec Counsel at $2.18 million, inclusive of taxes and disbursements.

¶ 28 Section 18.1(4) states that Class Counsel Fees and Administration Expenses "shall first be paid from the Expense Fund." Section 18.1(5) goes on to state that if there is Court approval to greater fees and expenses that the excess shall be paid from the four funds in given percentages (Direct Purchaser Fund - 80%, Methionine Fund - 4%, Intermediate Purchaser Fund - 8%, and Consumer Fund - 8%).

¶ 29 Section 18.1(6) provides that, "Class Counsel Fees and Administration Expenses shall constitute a first charge upon and shall be paid as the first payments from each fund."

¶ 30 In my view, there are some required adjustments to the calculations as shown in the chart above. First, some of the claimed disbursements in reality are notionally properly considered as fees for legal services implicit to the services provided by Class Counsel.

¶ 31 The factum of class counsel in the first instance sought to treat a payment to another Canadian law firm of some $200,000 as a simple disbursement. This payment arose because of an agreement resulting from a commitment by the other law firm to drop out of the contest in respect of the carriage motion back in 2001. There was nothing improper about this arrangement and it was made known to the Court at the point of the agreement. However, the payment should properly come out of the quantum determined as Class Counsel Fees and not be treated as a disbursement before determination of the quantum of Class Counsel Fees.

¶ 32 As well, the factum sought in the first instance to treat the $451,381 to be paid to American law firm advisors as a simple disbursement outside the determination of the quantum of Class Counsel Fees. This amount is notionally for legal services as a part of the overall legal services being provided by Class Counsel. Such amount is properly payable by Class Counsel out of the Class Counsel Fees after the determination of the quantum of Class Counsel Fees. Such amount is not properly treated as a disbursement by Class Counsel outside of the determined quantum of Class Counsel Fees. (It is noted incidentally as well that payment to the Canadian law firm of the $200,000 and to the American law firms of the $451,381 was agreed to by Class Counsel to be contingent upon success in the class actions at hand.)

¶ 33 Class Counsel were first alerted to the alleged conspiracies by several groups of U.S. counsel with experience in prosecuting antitrust cases, some of whom were involved in the prosecution of vitamins anti-trust litigation in the U.S. Federal court. U.S. counsel provided advice and guidance that assisted in a preliminary manner in shaping the general strategy and in developing expert evidence. They provided information about the alleged Vitamin conspiracies that was not readily available, even though not subject to U.S. protective orders. They introduced Class Counsel to some of the representative plaintiffs and to their expert economist, Dr. Beyer. They also assisted in the motion seeking access to evidence in the District of Columbia. The U.S. firms are: Much Shelist Freed Denenberg Ament & Rubenstein P.C.; Freed and Weiss LLC; Gallagher, Shrap, Fulton & Norman; Cohen, Milstein, Hausfeld

& Toll P.L.L.C.; Levin, Fishbein, Sedran & Berman; and The Cuneo Law Group. Class Counsel negotiated with some of the U.S. counsel in an attempt to formalize a working relationship with them; however, no agreement was ever finalized and signed.

¶ 34 Thus, in my view, there should be added into the quantum of Class Counsel Fees actually being received the two sums of $200,000 and $451,381 or a total add-in of $651,381. (There is a corresponding deduction to Class Counsel disbursements of this amount of $651,381, resulting in the adjusted anticipated expenses of Class Counsel being only $901,011 (rather than $1,552,392, as shown on the above chart)).

¶ 35 Thus, the chart, as properly adjusted in my view, would be as follows:

Amount for Administration Expenses and Class Counsel Fees	$ 18,000,000
Plus fees on additional settlements	$ 75,000
Plus estimated costs and interest recovery from Borden and/or his clients Plus potential costs and interest recovery on jurisdiction motions	
Subtotal	$ 18,075,000
Less Administration Expenses (actual and estimated)	($ 1,390,709)
Less Quebec Counsel's disbursements and GST (estimated)	($ 40,000)
Less Class Counsel disbursements (paid and payable)	($ 901,011)
Less interest authorized by CPA s. 33(7)(c)	Not calculated
Less GST on Class Counsel disbursements where applicable	($ 63,071)
Subtotal	$ 15,680,209
Less GST on Class Counsel Fees	($ 1,025,808)
Maximum amount available for Class Counsel Fees	$ 14,654,401
Percentage for Class Counsel Fees based on $100,000,000 recovery	14.654%
Less fees of Quebec Counsel (estimated) net of GST and disbursements	($ 2,000,000)
Estimated amount available for fees of	$ 12,654,401

Class Counsel	
Less $651,381 payable to other counsel excluded from the multiplier	($ 651,381)
Estimated amount available for Class Counsel	$ 12,003,020
Multiplier inherent in fees of Class Counsel on base fee of $5,306,189	2.26

¶ 36 The s. 18.1 regime as illustrated in the above charts makes Class Counsel Fees the residual amount after the payment of Administration Expenses. Class Counsel know with certainty the specific amounts for disbursements, taxes and administration expenses (having negotiated with the intended Administrator a capped fixed fee - see s. 17 of the Agreement). The adjusted chart shows anticipated total Class Counsel Fees of $14,654,401. In my view, it is quite possible that the Administration Expenses will be less than anticipated, which would mean some further increase to the residual calculation of Class Counsel Fees.

¶ 37 Class Counsel estimate that they will expend further time valued at approximately $350,000 and approximately $40,000 in disbursements. These future activities of Class Counsel (excluding the Methionine Actions) will include: preparation for and attendance at the motions for the approval of the settlement agreements and fees in the three jurisdictions; responding to questions from class members and their lawyers regarding the settlement and questions from, and interacting with, industry and consumer organizations; and bringing motions to declare the settlements operative.

¶ 38 Class Counsel will not be paid any additional fees or disbursements (except in relation to the Methionine Actions) for these further services. Therefore, the estimated value of these future services has been included by Class Counsel in the calculation of the base fee and factored into the calculation of the multiplier, as are their estimated future disbursements.

¶ 39 The result is that the regime set forth in the Agreement for the suggested overall Class Counsel Fees amounts to a reasonable certainty of expectation to Class Counsel of approximately $14,654,401 to $15,000,000.

¶ 40 Subject to the Court's approval, the Agreement allocates a maximum of $18,000,000 for the payment of Administration Expenses and Class Counsel Fees. The chart prepared by Class Counsel assumes the recovery and distribution of about $100 million in settlement funds. A recovery of $100 million is the premise underlying the estimate that Class Counsel Fees will be less than 15% of the recovered amount.

¶ 41 But the s. 18.1 regime is not dependent upon a recovery of $100 million. As drafted, the calculation of Class Counsel Fees does not change if the recovery in fact falls below $100 million due to opt outs. If the total Purchase Price of Vitamins by Direct Purchasers and Distributors who opt out of the Settling Proceedings exceeds the "Opt Out Threshold" the Settling Defendants may elect to terminate the Agreement (s. 15 of the Agreement). However, if there is no termination the s. 18.1 regime provides in effect that the Class Counsel Fees will always be calculated as set forth in the chart which should result in at least $14,654,401. (The "Opt Out Threshold" has been fixed by the agreement of counsel but will remain unknown to others (the set amount has been placed in a sealed envelope deposited with the Court) until the Opt Out date has passed.)

¶ 42 Suppose hypothetically that there is an opt out by Direct Purchasers such that recovery is only $90 million. In such event, Class Counsel Fees of $14,654,401 would be 16.28% of the actual settlement recovery.

¶ 43 In the course of submissions, given concerns expressed by the Court, various possibilities were mooted as alternatives to the proposal of Class Counsel as to a regime to determine the quantum of fees. One alternative considered as a possibility was that of a 'hard cap' in respect of Class Counsel fees, being determined as the least amount resulting from two calculations: first, 15% of the actual recovered amount for the classes and second, $15 million (inclusive of payment to Quebec counsel of $2,180,00.00) (plus any recovery of costs in the Borden court proceedings and the Methionine motion). The concept of a so-called 'hard cap' is based upon the underlying contingency fee agreement of 15% of any recovery of damages (plus any recovery in respect of the so-called "Borden court proceedings," discussed hereafter).

¶ 44 Quebec Counsel would be paid $2,180,000 out of the total fees allowed for counsel or such lesser amount as the Quebec Court directs.

¶ 45 If the British Columbia Court also gives its approval to the proposed settlement and the Quebec Court approves a payment of $2,180,000 to Quebec Counsel for fees, disbursements and taxes, then it is estimated Class Counsel (i.e. counsel for the plaintiff classes apart from Quebec Counsel) would receive under the hypothetical hard cap maximum:

(a) the balance of the $18,000,000 available after payment of Administration Expenses and Quebec Counsel to a maximum of $12,820,000.00 (i.e. the cap of $15 million less Quebec counsel fees of $2,180,000,00); plus
(b) any recovery of the costs and interest in respect of the Borden court proceedings.

¶ 46 The base fee representing the value of Class Counsel's time expended to about February 23, 2005 and their estimated time to completion is $5,306,189. (However, this amount excluded any inclusion for the unknown figure for the time of Quebec counsel.) With a base fee of about $5,306,189, the maximum of $12,003,020 (after deduction of $651,381 payable to non-class counsel, as their time has not been included in the base fee calculation of $5,306.189) for Counsel Fees would imply a multiplier of 2.26 on the base fee.

¶ 47 A court may fix as a fee a lump sum or a base fee increased by a multiplier or a percentage of the recovery. In the case of a lump sum, the court should test the reasonableness of the result by considering it as a multiplier and as a percentage of the amount recovered. Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386 at 393 (Ont. Gen. Div.); Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417 at 425 (C.A.).

¶ 48 The adjusted chart shows that, in total, it is estimated Class Counsel and Quebec Counsel would actually receive an amount of about $14,654,401 for fees or a percentage fee of about 14.654% based on a recovery of $100,000,000 after Settlement Credits. To the extent the recovery may be greater than $100 million and/or the estimated charges against the recovery in the above chart are less than the estimates, the fees would increase but could not exceed $15 million if there was a 'hard cap' of that amount.

¶ 49 If there are greater amounts for expenses, disbursements or taxes than as contemplated in the above calculations, such debits will reduce the amount of Class Counsel Fees as they are calculated as

the residual after the various deductions as seen in the chart. However, as discussed above, the estimation as to the quantum of expenses, disbursements and taxes seems to have a fair degree of certainty.

¶ 50 Class Counsel express concerns as to a possible hard cap of 15% of the actual recovery. They suggest that if this approach were to be favoured by the Court then a protective proviso would be appropriate. They suggest that to the extent there are opt outs up to $6,000,000 of the settlement's Direct Purchasers Fund (the figure of $6,000,00 being calculated from $50 million in sales, i.e. 12% of sales) the 15% limiting factor for Class Counsel Fees would not apply. That is, if there were to be a reduction in recovery monies within the range of $100 million to $94,000,000 due to opt outs, the possible 15% hard cap limiting factor would not apply. At $94 million, total Counsel Fees of $14,654,401 would then represent a 15.59% return to Class Counsel and Quebec Class Counsel.

¶ 51 Under this possible regime for Class Counsel Fees, if the opt outs were to exceed $6,000,000 (i.e., the recovery for the classes fell below $94 million) it was mooted in the exchanges with the Court during submissions that an adjusted limiting factor might then apply. The Class Counsel fees would be reduced by a percentage, say perhaps 10% hypothetically, times the amount of the shortfall in recovery below $94 million.

¶ 52 For example, suppose only $90 million were to be recovered after the impact of opt outs. Then under this hypothetical regime the Class Counsel Fees of $12,654,401 (after payment to Quebec Counsel of $2,000,000) would be decreased by $4,000,000 ($94,000,000 minus $90,000,000), times 10% = $400,000, leaving an amount of $12,254,401 as Class Counsel Fees. In the example, the total Class Counsel Fees of $14,254,401 would then be 15.84% of the amount recovered, $90 million. However, Class Counsel would also propose that their fees should never be allowed to fall below a given figure, say, $13,500,000.

¶ 53 As I have said, s. 18.1 of the Agreement serves the function of calculating Class Counsel Fees, subject to Court approval. There is an explicit cap in the formula of about $15 million for Class Counsel Fees given the overall ceiling of $18 million for Administration Expenses and Class Counsel Fees. This is arguably appropriate, fair and reasonable. But it is based upon the underlying premise of an actual recovery of $100 million.

¶ 54 There is, however, also an implicit floor in respect of Class Counsel Fees through the s. 18.1 regime. That is, the Class Counsel Fees would always amount to about $15 million, no matter what the actual recovery is through the settlement after possible opt outs, so long as a settlement survives (i.e. the Agreement is not terminated because the Opt Out Threshold is exceeded and the Settling Defendants elect for termination).

The Law

¶ 55 A solicitor and a representative party may enter into a written agreement providing for the payment of fees and disbursements only in the event of success in the class proceeding, that is, on a contingency basis.

¶ 56 Subsection 33(2) of the CPA defines success in a class proceeding to include a settlement that benefits one or more class members.

¶ 57 The contingency agreement between each plaintiff in the Ontario Actions and Strosberg or Siskinds is set forth above. Each contingency agreement states that counsel fees shall be "15% of the

settlement funds[.]" Class Counsel state that the contingency agreements with B.C. counsel are to be read the same way.

¶ 58 The CPA has the following three principal goals:

(a) judicial economy, or the efficient handling of potentially complex cases of mass wrongs;
(b) improved access to the courts for those whose actions might not otherwise be asserted (put otherwise, potentially meritorious claims might have legal costs implications so disproportionate to the amount of each claim that plaintiffs would not be able to pursue their legal remedies without the assistance afforded by the statute); and
(c) modification of the behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore legal obligations.

(a)

See generally Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 at paras. 27-29.

¶ 59 The realization of the foregoing objectives is achieved by providing appropriate rewards to counsel prepared to assume the manifold risks of the litigation. Professor Garry Watson of Osgoode Hall Law School of York University has expressed the need for adequate compensation for class counsel in the context of the CPA:

> This [issue of compensation] is a vitally important subject, not just because it determines what will go into class counsel's pocket but because it will determine whether or not the legislation is successful. In the final analysis whether or not the Class Proceedings Act will achieve its noble objectives will largely depend upon whether or not there are plaintiff class lawyers who are prepared to act for the class and hence bring the actions. This in turn depends on two factors [:] (a) the level of monetary reward given to class counsel, and (b) the predictability and reliability of the award. In the final analysis, both of these aspects are crucial. Class actions will simply not be brought if class counsel are not adequately remunerated for the time, effort and skill put into the litigation and the risk they assume (under contingency fee arrangements) of receiving nothing. Equally important is that such remuneration be reasonably predictable i.e., that class counsel can take on class actions with a reasonable expectation that in the event of success they will receive reasonable remuneration. It is vital to the viability of class actions that class counsel not be met on "judgment day" with judicial pronouncements (issued with the "benefit" of hindsight) that class counsel "spent too much time, had hourly rates that were too high and in any event were conducting a case which was not really risky at all" and awarded a low base fee and a niggardly multiplier - except in very clear cases. Garry D. Watson, Q.C., "Class Actions: Uncharted Procedural Issues" (Address to the Canadian Institute Seminar in Class Actions, 4 October 1996) at 3-4.

¶ 60 A frequently quoted passage supporting the introduction of contingency fee arrangements in class proceedings is found in the Report of the Ontario Law Reform Commission on the then-proposed legislation:

> Under the kind of fee arrangement permitted by the Act, the class lawyer will receive a

> fee only in the event of success. If he agrees to act on this basis, the class lawyer will be assuming a risk that, after the expenditure of time and effort, no remuneration may be received. It is essential that the successful lawyer be compensated for accepting the risk of non-payment. Otherwise, lawyers very likely will refuse to act for classes on this basis and will insist on the usual solicitor and client cost arrangements, in which case potential representatives may be unable or unwilling to retain them. Ontario Law Reform Commission, Report on Class Actions, vol. 3 (Toronto: Ministry of the Attorney General, 1982) at 737.

¶ 61 If individuals are to have access to capable and effective legal representation, an incentive must be provided for counsel to act for plaintiffs and class members who would not otherwise have the means to retain counsel. In support of this incentive, the CPA and the courts have provided the rationale and the means for premium fees to be paid to counsel who are willing to act for class members and who seek payment only in the event of success. Winkler J. has observed:

> In furtherance of the intent of the legislation -- that counsel be encouraged to accept the risk associated with litigation of this type, and encouraged to pursue it diligently in circumstances where they may never be remunerated for their efforts -- it is necessary to reward the successful resolution with a reasonable multiplier of the base fee. Serwaczek, supra, at 399. See also Gagne, supra, at 422-423 and Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83 at 88 (Gen. Div.).

¶ 62 Courts must be cognizant of many problematic factors, including: whether legal fees are based on the benefits actually received by class members and are not illusory; whether fees awarded to class counsel are proportionate to what class counsel actually accomplish for the benefit of the class members; whether the proposed settlement is reversionary with repayment to the defendant of unclaimed monies such as to potentially reduce the claimed settlement; whether the defendant agrees to pay class counsel's fees or purports to set their fees; and the expectations of class counsel and the representative plaintiffs as reflected in any fee agreement.

¶ 63 I turn now to a further consideration of the structure of the proposed settlement before the Court.

¶ 64 There is explicit expert economic evidence from Dr. Thomas Ross that the damage suffered by the class members is in the range of $103,000,000 to $138,000,000. The settlement is based on a total value of $140,676,928 (including interest) and a total payable to the Administrator of about $100,000,000 after Settlement Credits.

¶ 65 Significantly, the settlements have no reversionary aspect for unclaimed monies. That is, no unclaimed money will be repaid to the Settling Defendants. Any monies not paid out of the Direct Purchaser Fund will trickle down to the Consumer Fund. The Intermediate Purchaser Fund and Consumer Fund will be fully distributed cy-près.

¶ 66 The negotiations underlying the settlement of the class actions at hand were long and adversarial and involved mediation.

¶ 67 Factors relevant in assessing the reasonableness of the fees of any class counsel include the following:

(a) the factual and legal complexities of the matters dealt with;

(b) the risk undertaken, including the risk that the matter might not be certified;
(c) the degree of responsibility assumed by class counsel;
(d) the monetary value of the matters in issue;
(e) the importance of the matter to the class;
(f) the degree of skill and competence demonstrated by class counsel;
(g) the results achieved;
(h) the ability of the class to pay;
(i) the expectations of the class as to the amount of the fees; and
(j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

See generally Serwaczek, supra, at 393; Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369 at 376 (Gen. Div.); Endean v. Canadian Red Cross Society, [2000] B.C.J. No. 1254 at paras. 44-89 (S.C.).

¶ 68 The classes in the class actions at hand are comprised of three groups: Direct Purchasers numbering in the thousands, Intermediate Purchasers numbering in the tens of thousands and Consumers numbering in the millions.

¶ 69 The legal issues have proven to be complicated and challenging. The litigation approach was designed to maximize recovery for the classes by first quantifying the overcharges on all Canadian Vitamin sales and, thereafter, to distributing the amount recovered under court supervision.

¶ 70 Factual complexities arose because of the global nature of the alleged conspiracies among major corporations and some individuals. The carriage action involved a novel situation at the time for a Canadian court. The challenges to the jurisdiction of the Ontario Court and the need to attend outside of Canada for cross-examinations added cost and expenses, as did the attempts of some of the Defendants to block the plaintiffs' from gathering evidence in the United States.

¶ 71 When fixing class counsel fees after a settlement is reached, the Court should look at the matter not only from the present perspective of the conclusion but should also be mindful of the challenges and risks that confronted class counsel at the outset and over the course of the action. The risks involved in prosecuting the class action should be assessed as they existed when the litigation commenced and as it continued. Risk ought not to be assessed with the benefit of hindsight. See Gagne, supra, at 423, Goudge J.A.; Maxwell v. MLG Ventures Ltd. (1996), 30 O.R. (3d) 304 at 311 (Gen. Div.).

¶ 72 In addition to the traditional analysis which addresses litigation risk, the Court has considered "certification risk" and "resolution strategy risk" as substantial factors to consider in assessing whether the proposed fees in a class proceeding are fair and reasonable. Parsons v. Canadian Red Cross Society (2000), 49 O.R. (3d) 281 at 293, 295 (S.C.J.).

¶ 73 Some of the risks affecting Class Counsel in respect of the class actions at hand included:

(a) the fact of the multiplicity of actions in Ontario (seven), British Columbia (seven) and Quebec (two);
(b) the fact of the multitude of Defendants in different jurisdictions;
(c) the possibility that certification might be denied generally, a national class might not be certified or certification might be denied in Quebec or British Columbia or Ontario (in particular, that certification for a class of consumers seemed problematical, given the decision in Chadha v. Bayer Inc. (2003), 63 O.R. (3d)

22 (C.A.), aff'g (2001), 54 O.R. (3d) 520 (Div. Ct.) (certification denied), rev'g (1999), 45 O.R. (3d) 29 (Gen. Div.) (certification granted), leave to appeal to S.C.C. denied, [2003] S.C.C.A. No. 106, and if certification was denied in one of the provinces, the Canada-wide approach to damages would have been problematical;

(d) the possibility the actions, or some of them, might be dismissed at a trial of the common issues;

(e) the possibility that actual recovery might be much smaller than that seen through the settlement;

(f) the chance that the value of counsels' time expended might be disproportionate to the amount involved;

(g) the possibility the litigation might be delayed, resulting in any recovery being postponed for a significant period of time.;

(h) the possibility of liability for wasted significant out-of-pocket disbursements (including for expert reports);

(i) the possibility that some of the Non-Settling Defendants could object to the settlement because of the form of the proposed bar order;

(j) the possibility that objectors might persuade the court not to approve the settlement;

(k) the possibility the settlement may not be approved in British Columbia and Quebec giving some of the Settling Defendants the right to terminate the Amended Settlement Agreement; and

(l) the possibility the Opt Out Threshold may be exceeded and the settlement thereby declared null and void.

¶ 74 Class Counsel assumed significant risk in undertaking the class actions at hand. At the time the actions were commenced, price fixing civil litigation was novel in Canada (although the American experience served as a beacon of possibility for Canadian class action counsel). During the course of this litigation, other price-fixing actions have been defended in Ontario. There has been a refusal to certify an action brought on behalf of consumers that alleged the defendant sought to maintain prices of various audio-visual products in breach of Canadian competition laws. Price v. Panasonic Canada Inc., [2002] O.J. No. 2362 (S.C.J.). The Ontario Court of Appeal declined to certify an action brought on behalf of a group of consumers who alleged that manufacturers conspired to fix the price of iron oxide. Chadha v. Bayer Inc., supra.

¶ 75 Risks continue even if the settlements are approved in all three Courts. The "blow out" provision in s. 14.4 of the Agreement puts the settlements at risk if the Opt Out Threshold is exceeded.

¶ 76 Although the expert economic evidence applied in respect of all of the class actions, it was necessary to draw separate motion material seeking certification in each of the actions because the factual underpinnings for each were different.

¶ 77 There are about 21 firms defending in Ontario and 15 firms in British Columbia. In the context of settlement negotiations, it was necessary to deal with many of these firms.

¶ 78 The interests of each of the Defendants differed depending upon the Vitamin involved. For example, the "Degussa" Defendants settled the Niacin Actions but refused to settle the Methionine Actions.

¶ 79 The definition of class in Ontario includes Quebec corporations but not individuals. The considered view is that the class action legislation in Quebec in 1999 only allowed class actions for the

benefit of individuals: Book IX, C.C.P. That is, corporations could not then be members of any Quebec class action. Consequently, the definition of the class in Ontario includes Quebec corporations. For this reason, and also because of the need to deal with Quebec Counsel, Class Counsel was expanded to include Desmeules.

¶ 80 Moreover, it was necessary to have negotiations that were really on two planes: first, with some of the Defendants and concurrently with Quebec Counsel and, then, with other Defendants.

¶ 81 When the carriage motion was decided in December, 2000, it was the first carriage motion in Ontario. Six separate groups initially sought carriage of the Vitamins class actions. Ultimately, the Court gave carriage to Strosberg and Siskinds.

¶ 82 In Quebec, similar jockeying went on. Initially, there was a dispute between Desmeules and the other Quebec law firms about who would have carriage of which Vitamin action in Quebec. Ultimately, all plaintiffs' counsel agreed to cooperate, but this took substantial time and effort on Class Counsel's part.

¶ 83 Mr. Perry Borden Q.C. was one of the counsel in Ontario seeking carriage of the Vitamins class actions on behalf of retail purchasers or individual consumers. The affidavit of Ms. Patricia A. Speight of the Strosberg law firm, dated February 28, 2005, sets forth the history of the Borden court proceedings. Although other potential plaintiffs ceased their involvement after this Court's decision in respect of the carriage motion in favour of the present Class Counsel and consequential order dated December 4, 2000 (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2000] O.J. No. 4594, supra), Mr. Borden's clients did not.

¶ 84 Mr. Borden has represented a series of persons seeking to commence a class action on behalf of retail purchasers. The putative representative plaintiff Horvath, represented by Mr. Borden, initially appealed the carriage order to the Court of Appeal. She abandoned her appeal on a without costs basis and Class Counsel state they anticipated that there would be no further proceedings.

¶ 85 However, Mr. Borden then subsequently appeared on behalf of other individuals, being Messrs. Curran, Webster, Nightingale and Soderstrom, seeking to commence a new class action relating to retail purchasers. The motion for leave to commence a new action was dismissed by this Court September 14, 2001 (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche, [2001] O.J. No. 3682) and the appeal of this order was quashed by the Court of Appeal May 14, 2002 (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2002] O.J. No. 2010).

¶ 86 Leave to appeal was also sought by Mr. Borden in Divisional Court with several appearances in the fall of 2002, and a lengthy saga involving a multitude of proceedings, as set forth in Ms. Speight's affidavit, ensued, which proceedings are as yet incomplete.

¶ 87 Class Counsel say that they have expended in excess of $250,000 in the value of their time in dealing with Mr. Borden's attempts to seek leave on behalf of his clients to commence actions on behalf of retail purchasers. I agree with the submission of Class Counsel that they could not reasonably have foreseen these continuing collateral attacks on their authority to prosecute the class actions following upon this Court's decision in respect of the carriage motion December 4, 2000.

¶ 88 The following are reportedly the outstanding costs orders in favour of the plaintiffs relating to the interventions of Mr. Borden's clients:

(a) $10,000, inclusive of GST and disbursements, plus interest payable at the rate of 6% per annum, as a result of the dismissal of the leave application on September 14, 2001;
(b) $10,000 as a result of the Court of Appeal quashing the appeal of the September 14, 2001 order on May 14, 2002;
(c) $3,500 as a result of the November 4, 2002 order dismissing the motion for leave to appeal the September 14, 2001 order to the Divisional Court;
(d) $17,500 plus disbursements of $1,637.01, plus GST as a result of the November 7, 2003 decision of Madam Justice McFarland; and
(e) an amount, estimated by Class Counsel to be about $25,000, to be determined at a hearing scheduled for April 8, 2005, as a result of the August 21, 2003 order by the Divisional Court dismissing the motion for an order setting aside the November 4, 2002 order.

¶ 89 On August 18, 2003, Mr. Curran paid $20,000 into court in partial satisfaction of the costs awarded against him. These monies have not yet been paid out.

¶ 90 On April 8, 2005, the Divisional Court is scheduled to hear and determine the issue of costs as a result of its August 21, 2003 order. That is, the court will decide whether or not Mr. Borden's client and/or Mr. Borden must pay the costs of the appeal. Class Counsel estimate that the Divisional Court will fix costs in an amount of about $25,000.

¶ 91 Mr. Borden commenced yet another new, pending application February 23, 2005 on behalf of Mr. Lars Soderstrom seeking to advance a claim on the basis of an alleged infringement of the Canadian Charter of Rights and Freedoms.

¶ 92 The above proceedings relating to Mr. Borden's clients have been collectively referred to herein as "the Borden court proceedings." In my view, given the very exceptional circumstances of these continuing proceedings, it is reasonable that any recovery of costs in respect of the Borden court proceedings by Class Counsel should fairly go to Class Counsel, as requested, without reduction to the quantum of fees otherwise awarded to Class Counsel by the motion at hand in achieving a settlement.

¶ 93 Class Counsel and The Cuneo Law Group obtained an order from Hogan J. granting the plaintiffs leave to intervene in the Niacin litigation pending in the District of Columbia (In re Vitamins Antitrust Litigation, 2001 WL 34088808). However, Hogan J. deferred his ruling on whether to allow Class Counsel to participate in the deposition and have access to documentary productions until authorized by the Ontario Court.

¶ 94 Some Defendants then sought an order preventing or enjoining plaintiffs' access to the Niacin productions and depositions in the U.S. No such order had ever before been argued. By reasons released on January 26, 2001, this Court dismissed the motion, stating that there was "no consequential unfairness to the defendants" if the plaintiffs were given the access they sought to documents and depositions (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2001] O.J. No. 237).

¶ 95 Some of the Defendants challenged the jurisdiction of the Ontario Court in some of the Ontario Actions. Counsel from Siskinds and Camp attended in the United States and Europe for the purposes of cross-examinations. On January 28, 2002, this Court dismissed the jurisdiction motions (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2002] O.J. No. 298). This Court held that it had jurisdiction over the Ontario Actions and that Ontario was the forum conveniens.

¶ 96 The degree of success achieved is a relevant consideration in assessing whether the fees sought by counsel are fair and reasonable. Total recovery or the nature of payment is not the only criterion on which to judge the settlement. A court should also give weight to the relative ease or difficulty of access to the benefits achieved through the settlement for class members. Parsons, supra, at 289; Gagne, supra, at 424; Roberts v. Morana (1998), 37 O.R. (3d) 333 (Gen. Div.) at 343, aff'd (2000), 49 O.R. (3d) 157 (C.A.).

¶ 97 Class Counsel estimate that it would cost another $3,000,000 to prosecute the class actions to trial if the settlements were not approved. In such event, it is estimated it would take another three to five years before the class members might gain any compensation through a favourable result at trial.

¶ 98 The overall settlement is based upon total damages of $140,676,928 (inclusive of interest). It is estimated the Administrator will have about $100,000,000 (after deduction for Settlement Credits) in its hands by the time of distribution.

¶ 99 The amount of this settlement is the largest in Canadian legal history for price-fixing. It provides an expeditious claims process for a large number of Direct Purchasers who will receive the amount the Administrator calculates as due, unless a Direct Purchaser specifically disagrees.

¶ 100 Class Counsel proposes a plan of distribution which fairly deals with all members of the classes. The constituent Funds achieve this result. The cy-près distribution protocols and governing rules developed are precise and detailed. The precise formulation of this settlement "demonstrated ingenuity and imagination" in the face of "real and substantial risk." Roberts, supra, at 343.

¶ 101 The cost of prosecuting an individual action would be beyond the financial capability of most class members except for substantial Direct Purchasers. The disposition of these class actions through the overall settlement achieved represents an exemplary example of the public policy objective underlying the CPA of deterring wrongful conduct and achieving behaviour modification in the public interest. Put otherwise, public regulation by government authorities is often ineffectual. By encouraging the private sector of class action attorneys to police such behaviour through civil class actions (with the inducement of sizeable legal fees when successful) the realization of the public policy objectives of the regulators is enhanced. Wrongful anti-competitive behaviour through price-fixing in the marketplace is discouraged. Meritorious claims that would otherwise go uncompensated are effectively dealt with.

¶ 102 IDRC, now known as Micronutrient Initiative, is a Crown corporation. It was the only Intermediate Purchaser which commenced an individual court action. IDRC contracted with Accucaps, a Direct Purchaser, to put vitamins into capsules. IDRC then distributed these vitamin capsules, without charge, through UNICEF to persons in Third World countries. IDRC was not a typical Intermediate Purchaser because it was involved in a unique, non-profit situation.

¶ 103 The recovery of at least $11,400,000 for each of the Intermediate Purchaser Fund (see Schedule F to the Agreement) and the Consumer Fund (Schedule G to the Agreement) compensates these class members by means of a cy-près distribution.

¶ 104 There are two factors specifically enumerated in the CPA to determine a multiplier. The first factor, specified under clause 33(7)(b), is the risk which class counsel "incurred in undertaking and continuing the proceeding." The second factor, set out under subsection 33(9), is "the manner in which the solicitor conducted the proceeding." Also to be considered is the degree of success achieved by counsel, either at trial or through settlement of the proceeding.

¶ 105 In Gagne at 422 to 424, Goudge J.A. reasoned that a multiplier is a necessary ingredient if the CPA is to successfully achieve its goal of providing access to justice for claimants otherwise excluded.

¶ 106 In Gagne, the Court concluded that the determination of a multiplier is an art, not a science. All relevant factors must be weighed in order to determine an appropriate multiplier. Goudge J.A. said at 425:

> In the end, three considerations must yield a multiplier that, in the words of s. 33(7)(b), results in fair and reasonable compensation to the solicitors. One yardstick by which this can be tested is the percentage of gross recovery that would be represented by the multiplied base fee. If the base fee as multiplied constitutes an excessive proportion of the total recovery, the multiplier might well be too high. A second way of testing whether the ultimate compensation is fair and reasonable is to see whether the multiplier is appropriately placed in a range that might run from slightly greater than one to three or four in the most deserving case. Thirdly, regard can be had to the retainer agreement in determining what is fair and reasonable. Finally, fair and reasonable compensation must be sufficient to provide a real economic incentive to solicitors in the future to take on this sort of case and to do it well.

¶ 107 Using a percentage calculation in determining class counsel fees properly places the emphasis on the quality of representation, and the benefit conferred to the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours." In Re Warner Communications Securities Litigation, 618 F. Supp. 735 at 747 (D.C.N.Y. 198); see also Endean, supra, at para. 74.

¶ 108 Class Counsel intend to continue to prosecute the Methionine Actions in respect of "Non-Settling Defendants." The existing Methionine Fund of $6,000,000 created as the result of a Settling Defendant is to be held for the benefit of the Settlement Class Members who are Direct Purchasers or Distributors of Methionine and shall be paid as the Court directs on later motions brought by Class Counsel.

¶ 109 Class Counsel have advised that they may, at some future time, ask this Court to approve an amendment to the fee agreement with the plaintiffs in the Methionine Actions to provide, among other things, that if the plaintiffs in the continuing Methionine Actions become liable for costs, that the costs will be paid out of the Methionine Fund.

¶ 110 As I have discussed above, I agree that Class Counsel have achieved remarkable results and a successful overall settlement. They are experienced, imaginative, thorough and diligent counsel. However, they embarked upon this venture on the basis of contingency agreements providing for, inter alia, 15% of the recovery. Class Counsel throughout the submissions and in their factum have emphasized that their claim to fees is justified in large part on the basis of the significant risk as to whether they might be successful ultimately and what might be recovered. With respect, in my view, that risk must properly continue in the determination of their ultimate fees. The risk of a shortfall in the anticipated recovery having an adverse impact upon fees (because of the 15% contingency fee arrangement) should not be shifted to class members in the event there are opt outs from the Settling Plaintiff classes.

¶ 111 Class Counsel calculate their requested fees in the chart they prepared as part of their factum by emphasizing that they would receive not more than what they agreed upon with their clients through the contingency agreements, i.e. 15% of the recovery. Yet the regime in s. 18.1 is drafted to guarantee

them about $15 million in Class Counsel Fees so long as the Agreement is not terminated due to the Opt Out Threshold being exceeded and Settling Defendants then making the election to terminate the Agreement. In effect, the s. 18.1 regime transfers the risk of opt outs reducing the recovery below $100 million (but not being sufficient to trigger the termination) to the class members and means that Class Counsel Fees might rise beyond 15% of the actual recovery.

¶ 112 It was argued in the course of submissions that the implicit multiplier of about 2.26 upon the base fee is modest and a higher multiple would be supportable. In my view, the implicit multiplier applied to the base fee is one standard to measure whether the fees sought are fair and reasonable. The $15 million sought for fees is reasonable if the actual recovery is $100 million. In my view, the agreed-upon standard for fees of 15% of actual recovery as set forth in the bargained-for contingency agreements governing the Ontario actions must properly set a ceiling. Moreover, it is an appropriate ceiling. The results achieved, i.e. the actual recovery, is a seminal factor in determining fair and reasonable fees in any class action settlement.

¶ 113 In my view, the Class Counsel Fees should be limited to being not greater than 15% of the actual recovery through the overall settlement. If the actual recovery is more than $100 million, counsel may receive slightly more than $15 million in Class Counsel Fees (but subject to the agreed-upon cap with the Settling Defendants in s. 18.1(2) of $18 million (plus $75,000 in respect of the trailing, additional settlement agreements), less Administration Expenses, disbursements and applicable taxes). If their estimate of a recovery of $100 million proves accurate they will receive about $15 million. If there are opt outs such that the actual recovery falls below $100 million then they will receive less than $15 million in fees. Moreover, there should not be payment of fees until the actual recovery is known with certainty and precision.

¶ 114 Taking all factors into consideration, in my view, and I so find, Class Counsel Fees to a ceiling of 15% of the actual recovered amount for the class members (i.e. after the impact of any opt outs) is fair and reasonable. For the reasons given, it is stipulated that the s. 18.1 regime is to operate to accord with these Reasons for Decision. Considering all relevant factors, in my view, and I so find, the quantum of fair and reasonable Class Counsel Fees through the overall settlement at hand is fixed with a ceiling of 15% of the settlement funds or monetary award actually recovered.

DISPOSITION

¶ 115 For the reasons given, subject to the Agreement not being terminated in accordance with its provisions, but rather coming into full force and effect, an order shall issue that accords with these Reasons for Decision:

(1) declaring that an amount up to a ceiling of $18,075,000, calculated in accordance with subparagraph (2), for Class Counsel Fees (plus qualifying disbursements and applicable taxes) and Administration Expenses relating to the overall settlement of the subject class actions is fair and reasonable;

(2) declaring that Class Counsel Fees shall be calculated and paid, after deduction for the payment of qualifying disbursements, applicable taxes and Administration Expenses, on the basis of being limited to 15% of the actual recovery of monies for class members through the overall settlement; and

(3) declaring that it is fair and reasonable that Class Counsel are entitled to all costs and interest, if any, recovered in the Borden court proceedings and the methionine jurisdiction motion, in addition to the amount received under subparagraph (1) as calculated under subparagraph (2).

P.A. CUMMING J.

* * * * *

Corrigendum
Released: April 5, 2005

Minor changes have been made to the chart in para. 35 to achieve greater clarity and accuracy, with follow-on consequential minor changes in some amounts and percentages seen in paragraphs 36, 39, 41, 42, 46, (also with the added explanatory note therein in brackets), 48, 50 and 52. The words "and the Methionine jurisdiction motion" have been added in paragraphs 43 and 115 for greater certainty. Also, in paragraph 112, 1st line, the multiplier reference has been changed to 2.26.

QL UPDATE: 20050401
cp/e/qlalc/qlhcs

Case Name:

Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.

PROCEEDING UNDER the Class Proceedings Act, 1992
(Biotin) (Bulk Vitamins) (Choline Chloride
(Methionine) (Niacin) (Supplemental Choline Chloride)
(Supplemental Ontario Methionine)

Between
Glen Ford, Vitapharm Canada Ltd., Fleming Feed Mill
Ltd., and Marcy David, plaintiffs, and
F. Hoffmann-La Roche Ltd., Hoffmann-La Roche Ltd.,
Merck KGaA, Lonza AG, Alusuisse-Lonza Canada Inc.,
Sumitomo Chemical Co. Ltd., Sumitomo Canada
Limited/Limitée and Tanabe Seiyaku Co. Ltd.,
defendants
And between
Glen Ford, Vitapharm Canada Ltd., Fleming
Feed Mill Ltd., Aliments Breton Inc., Oger Awad and
Mary Helen Awad, plaintiffs, and
F. Hoffmann-La Roche Ltd., Hoffmann-La Roche
Limited/Limitée, Rhône-Poulenc S.A., Aventis Animal
Nutrition S.A., Rhône-Poulenc Canada Inc.,
Rhône-Poulenc Animal Nutrition Inc., Rhône-Poulenc
Inc., BASF Aktiengesellschaft, BASF Corporation, BASF
Canada Inc., Eisai Co. Ltd., Takeda Chemical
Industries Ltd., Takeda Canada Vitamin and Food Inc.,
Merck KGaA, Daiichi Pharmaceutical Company Ltd.,
Reinhard Steinmetz, Dieter Suter, Hugo Strotmann,
Andreas Hauri, Kuno Sommer and Roland Brönnimann,
defendants
And between
Fleming Feed Mill Ltd., Aliments Breton
Inc., Len Ford and Marcy David, plaintiffs, and
BASF Aktiengesellschaft, BASF Corporation, BASF Canada
Inc., Chinook Group Ltd., Chinook Group Inc., DCV,
Inc., Ducoa L.P. Akzo Nobel NV, Akzo Nobel Chemicals
BV, Bioproducts Inc., Russell Cosburn, John Kennedy,
Robert Samuelson, Lindell Hilling, John L. ("PETE")
Fischer and Antonio Felix, defendants
And between
Glen Ford, Fleming Feed Mill Ltd., Aliments
Breton Inc., and Kristi Cappa, plaintiffs, and
Rhône-Poulenc S.A., Rhône-Poulenc Canada Inc.,
Degussa-Hüls AG, Degussa Corporation, Degussa Canada

Inc., Novus International Inc. and Aventis Animal
Nutrition S.A., defendants
And between
Vitapharm Canada Ltd., Fleming Feed Mill
Ltd., Aliments Breton Inc., and Kristi Cappa,
plaintiffs, and
Degussa-Hüls AG, Degussa Corporation, Degussa Canada
Inc., Reilly Industries Inc., Reilly Chemicals S.A.,
Vitachem Company, Alusuisse-Lonza Canada Inc., Lonza
AG, Nepera Incorporated, Roger Noack and David Purpi,
defendants
And between
Fleming Feed Mill Ltd., Aliments Breton
Inc., Glen Ford and Marcy David, plaintiffs, and
UCB S.A. and UCB Chemicals Corporation, defendants
And between
Glen Ford, plaintiff, and
Novus International (Canada) Inc., defendant

[2005] O.J. No. 1118
Court File Nos. 00-CV-202080CP, 00-CV-200045CP,
00-CV-198647CP, 00-CV-201723CP, 00-CV-200044CP,
40610 and 42267CP

Ontario Superior Court of Justice
P.A. Cumming J.

Heard: March 8 and 9, 2005.
Judgment: March 23, 2005.
(190 paras.)

Civil procedure — Parties — Class or representative actions — Certification — Common interests — Settlements — Approval.

Application by the plaintiffs for certification of their claim actions and for the approval of settlements. In 1999 multiple putative class actions were commenced in Ontario, British Columbia and Quebec that alleged a complex price-fixing and market-sharing conspiracy related to the sale of vitamins in Canada. Ultimately, five class actions were reconstituted and pursued in Ontario and dealt with discrete vitamins and separate representative plaintiffs. Two additional actions were pursued. Some of the defendants entered into a proposed settlement with some of the plaintiffs in the Ontario class actions. Some of the defendants pleaded guilty in the United States and in Canada to price-fixing charges. The class actions were based on the impact of the global conspiracies on Canadian residents. The settlements were based on a total damage assessment of $140 million, including interest, costs and expenses. This would result in anticipated net recovery of $100 million. The settlement amount was $140,676,000. This included a contemplated damages amount of $132,982,000.

HELD: Applications allowed. The proposed class encompassed all levels of purchasers. A national

class action which included class members in all provinces and territories except Quebec and British Columbia was appropriate. The actions also raised a common issue which was whether the defendants agreed to fix vitamin prices. The class actions were the preferable procedure because they represented a fair and manageable process. There were no alternative avenues of redress except for individual actions, which would be less practical and efficient. The actions also provided a fair, efficient and manageable means of determin-ing the common issue. They also achieved the aims of judicial economy, access to justice and behaviour modification. The settlement was fair, reasonable and in the best interests of the class. The settlement damages amount compared with the estimate of damages, which was between $103 and $138 million. The settlement included a request for an order that barred future claims for contribution or indemnity against the defendants. This request was fair and reasonable. The proposed settlement achieved the legislative goals of the Class Proceedings Act and afforded significant judicial efficiency and economy. Class members would receive fair and reasonable benefits in return of the compromise of their litigation rights.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, S.O. 1992, c. 6, s. 1, s. 5, s. 5(1), s. 5(1)(a), s. 5(1)(d), s. 12, s. 13, s. 24, s. 26, s. 29(2), s. 32, s. 33.

Clayton Act, 38 Stat. 731, 15 U.S.C. ss. 15.

Competition Act, R.S.C. 1985, c. C-34 s. 36(1), s. 45(1).

Sherman Act, 26 Stat. 209, 15 U.S.C. ss. 1.

Counsel:

Harvey T. Strosberg, Q.C., C. Scott Ritchie, Q.C., J.J. Camp Q.C., and Joe Fiorante for the Plaintiffs in all actions

Glenn M. Zakaib, for the Defendant Merck KGaA

John Callaghan, for Sumitomo Chemical Co. Ltd.

William Vanveen and François Baril, for the Defendants Hoffmann-La Roche Limited, F. Hoffmann-La Roche Ltd.

Ariane Farrell, for Sumitomo Canada Ltd.

Donald Houston, for Lonza AG

Katherine L. Kay and Eliot N. Kolers, for the Defendant Eisai Co. Ltd.

Evangelia Kriaris, for Takeda Pharmaceutical Company Limited (formerly Takeda Chemical Industries Ltd.); Takeda Canada Vitamin and Food Inc.

Sandra A. Forbes, for Aventis Animal Nutrition SA, the Rhone-Poulenc defendants and Daiichi Pharmaceutical Company Ltd.

David W. Kent, for BASF Aktiengesellschaft, BASF Corporation and BASF Canada Inc.

Andrew J. Roman, for Akzo Nobel N.V. and Akzo Nobel Chemicals B.V.

George D. Hunter, for DCV Inc. and Ducoa L.P.

James Doris, for Bioproducts, Inc.

Tycho Manson, for Chinook Group Ltd.

Sandra A. Forbes, for Aventis Animal Nutrition S.A. and the Rhone-Poulenc defendants

F. Paul Morrison and J.P. Brown, for Degussa Corporation, Degussa Canada Inc. and Degussa-Huls AG

S.A. Dawson, for Novus International, Inc.

Donald Houston, for Lonza AG and Alusuisse-Lonza Canada Inc.

Jennifer Badley (per D. Kent) for Reilly Industries Inc. and Reilly Chemicals S.A.

S. Vlahakis, for Nepera Inc., Roger Noack and David Purpi

Donald Houston, for UCB S.A. and UCB Chemicals Corporation

Donald Houston, for Wippon Soda Co. Ltd.

Pauline W. Wong for Defendant, Mitsui & Co. Ltd.

S.A. Dawson, for Novus International (Canada) Inc.

CLASS PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992
REASONS FOR DECISION

P.A. CUMMING J.:—

The Motions

¶ 1 These are motions for certification, and for approval of the settlements, of a group of class actions in respect of certain defendants in the proceedings under sections 32 and 33 of the Class Proceedings Act, S.O. 1992, c. 6 ("CPA").

¶ 2 In 1999, multiple putative class actions were commenced in Ontario, British Columbia, and Quebec alleging a complex, global, multi-party, price-fixing and market-sharing conspiracy relating to the sale of vitamins in Canada. Ultimately, five separate class actions were reconstituted and pursued in Ontario, dealing with discrete Vitamins and with separate representative plaintiffs. Two additional, so-called "supplemental", class actions have also been initiated. Certain "Settling Defendants" have now entered into a proposed settlement with certain "Settling Plaintiffs" in these class actions in Ontario, culminating in what is called the "Amended Canadian Vitamins Class Actions National Settlement Agreement" ("Agreement") made as of November 1, 2004 and amended as of January 6, 2005. The proposed settlement is for the national classes contemplated in the class actions at hand, together with separate class proceedings in British Columbia and Quebec. Separate settlement approval hearings will

take place before the Courts in those provinces. (The status of the several class actions, upon successful motions for certification and settlement approval, is set forth in paragraph 106 of these Reasons.)

¶ 3 The materials filed in support of the motion at hand are voluminous, filling three bankers' boxes. The Agreement is lengthy and complex with several schedules (See Exhibit D to Affidavit of Charles M. Wright in Volume 1 of 9 of the Motion Record). These materials can be found (together with additional information) online <http://www.vitaminsclassaction.com>.

¶ 4 There are also very recent, trailing, additional, separate Settlement Agreements for three Defendants (Akso Nobel Chemicals BV ("Akso"), UCB S.A. ("UCB"), and Reilly Industries Inc. ("Reilly")) which, for the purposes of the motion at hand, can be notionally treated as though they are part of a single overall settlement.

¶ 5 Capitalized terms used herein are as defined in the Agreement. However, the term "Class Counsel" means the law firms known as Siskinds, Cromarty, Ivey & Dowler ("Siskinds"), Sutts Strosberg ("Strosberg"), Camp Fiorante Matthews ("Camp"), Desmeules, and Allen Cooper. This definition of "Class Counsel" is different from the definition of "Class Counsel" found in the Agreement. The term "Quebec Counsel" means the two Montreal firms, Sylvestre, Charbonneau, Fafard and Unterberg, Labelle, Lebeau.

¶ 6 As well, "Class Counsel Fees", as this term is used herein, means the total fees payable to both Class Counsel and Quebec Counsel.

¶ 7 The motion for certification and Court approval of the proposed settlement was heard on March 8, 2005 with the motion for the approval of "Class Counsel Fees" being heard separately March 9, 2005. Reasons for Decision in respect of certification and settlement approval have been given separately. The Reasons for Decision at hand deal with the discrete issue of certification and the approval of the settlement Agreement.

¶ 8 The plaintiffs assert that:

(a) the Defendants entered into conspiracies to fix prices with respect to the distribution and sale of Vitamins and related products in the period January 1, 1986 to February 28, 1999; and
(b) the worldwide vitamin industry was dominated by certain groupings of the Defendants who controlled a significant percentage of the world Vitamin market for many of the main types of vitamins.

¶ 9 Some of the Defendants pled guilty in the United States and Canada to price-fixing charges concerning Vitamins. The class actions at hand are based upon the impact of the alleged global conspiracies upon residents of Canada.

¶ 10 Generally, Vitamins are manufactured and marketed for four primary uses: animal and fish feed supplements; direct human consumption; food and beverage additive for human consumption; and cosmetics, as more fully particularized in the chart below:

Product	Uses
Biotin (Vitamin B8, Vitamin H)	Human consumption Animal and fish feed

	supplement
Bulk Vitamins (Vitamin A, Vitamin B1, Vitamin B2, Vitamin B5, Vitamin B6, Vitamin B9, Vitamin B12, Vitamin C, Vitamin E, Beta Carotene, Canthaxanthin, Premix)	Human consumption Food and beverage additive for human consumption Cosmetics Animal and fish feed supplement
Choline Chloride (Vitamin B4)	Food and beverage additive for human consumption Animal and fish feed supplement
Methionine	Human consumption Animal and fish feed supplement
Niacin, Niacinamide (Vitamin B3)	Human consumption Food and beverage additive for human consumption Animal and fish feed supplement

¶ 11 There is a broad spectrum of plaintiffs because of the different users, namely, Direct Purchasers, Intermediate Purchasers and Consumers.

¶ 12 The plaintiffs pursued this litigation, using a two-stage model. At stage one, on behalf of all purchasers of Vitamins, the plaintiffs sought to hold the alleged conspirators accountable for the aggregate overcharge on all sales of Vitamins in Canada by recovering aggregate damages. Then, at stage two, Class Counsel developed a distribution model for the aggregate damages to be paid to or for the benefit of Direct Purchasers, Intermediate Purchasers and Consumers, all of whom comprise the distribution chain.

¶ 13 Class Counsel submits this two-stage approach is novel in that it avoids the fragmented approach in the United States to price-fixing conspiracy claims. Under U.S. Federal anti-trust laws, only direct purchasers are entitled to claim damages, notwithstanding that some of the overcharge may have been passed through the distribution chain: Sherman Act, 26 Stat. 209, 15 U.S.C. ss. 1. Over 20 states have responded to this Federal law by passing state laws that permit indirect purchasers, harmed by a conspiracy, to claim damages in state courts.

The Motions for Certification

¶ 14 The CPA is a procedural statute. Section 5 of the CPA sets out the test for certification. The word "shall" in s. 5(1) is mandatory: the court must certify an action as a class proceeding if all of the five criteria of s. 5(1) of the CPA are met and if there is no other reason to refuse to make the order. Bendall v. McGhan Medical Corp. (1993), 14 O.R. (3d) 734 at 744 (Gen. Div.); Caputo v. Imperial Tobacco Ltd., [2004] O.J. No. 299 at para. 13.

¶ 15 To certify an action as a class proceeding under s. 5, the plaintiff requires a "minimum evidentia [ry] basis for a certification order." It is necessary that the plaintiff "show some basis in fact for each of the certification requirements," other than the requirement in s. 5(1)(a). The "adequacy of the record will vary in the circumstances of each case." Hollick v. The City of Toronto, [2001] 3 S.C.R. 158, [2001] S.C.J. 67 at para. 25.

¶ 16 On these certification motions, there is before the court a substantial evidentiary base touching on all the requirements of s. 5(1). While the motions for certification vary in terms of the parties and Vitamins involved, the motions can conveniently be discussed as a single motion.

¶ 17 The following principles apply to the issue as to whether the pleadings disclose a cause of action under s. 5(1)(a) of the CPA:

(a) no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion;
(b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
(c) the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;
(d) the novelty of the cause of action will not militate against the plaintiff;
(e) matters of law not fully settled in the jurisprudence must be permitted to proceed; and
(f) the statement of claim must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information. Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at 990-991; Anderson v. Wilson (1999), 44 O.R. (3d) 673 (C.A.) at 679; Hollick, supra, at para. 25; M.C.C. v. Canada (A.G.), [2004] O.J. No. 4924 (C.A.) at para. 41.

¶ 18 The plaintiffs allege the following causes of action:

(a) the Defendants contravened s. 45(1) of Part VI of the Competition Act, R.S.C. 1985 c. C-34, giving rise to a right of damages under ss. 36(1) and 45(1);
(b) the Defendants are liable for tortious conspiracy and intentional interference with economic interests; and
(c) the Defendants are liable for punitive damages.

¶ 19 The plaintiffs submit that it is not "plain and obvious" and beyond doubt that they could not succeed in the causes of action pleaded.

¶ 20 Class definition is critical because it identifies the persons who are entitled to notice, entitled to relief, if relief is awarded, and bound by the judgment. A class definition must be "defined ... by reference to objective criteria." A class definition dependent upon a determination of an issue in the action is unacceptable because the merits are not to be decided at the certification stage. Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, at para. 38.

¶ 21 A class definition must bear a rational relationship to the common issues. Canadian Shopping Centres, supra, at para. 38; Hollick, supra, at para. 17; M.C.C. v. Canada, supra, at para. 45.

¶ 22 The proposed class definition for each of the Ontario Actions can be stated as follows:

> All persons in Canada who purchased the relevant Class Vitamin(s) in Canada in the relevant Purchase Period(s) except the Excluded Persons and persons who are included in the corresponding British Columbia and Quebec Actions.

¶ 23 The proposed class definitions embody all levels of purchasers, including those who purchased Vitamins in raw form and those who purchased a product of which Vitamins were a component part. As the court recognized in Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977) at paras. 737-38, in the absence of a bar respecting the use of the passing-on defence, the class necessarily has to include all levels of plaintiffs, from direct purchasers to intermediate purchasers to ultimate consumers. All groups of class members must be present to ensure that the wrongdoers do not retain any of the fruits of their wrongdoing and to protect the rights of the class members to make a claim against a common fund to address their losses.

¶ 24 The case of Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968) serves as a starting point for the background of American price-fixing case law. Heard by the U.S. Supreme court in 1968, Hanover Shoe involved allegations by the plaintiffs that the defendants had monopolized the shoe machinery industry in violation of the Sherman Act, supra, resulting in an overcharge. The defendants argued that the plaintiff class had passed on some or all of the overcharge and therefore, was not entitled to recover such damages. The court rejected this defence, holding that the passing-on defence was not available to the defendants. In making its decision, the court determined that if the passing-on defence was permitted treble-damages actions would become too complicated, and the alleged co-conspirators "would retain the fruits of their illegality" because indirect purchasers, having only modest claims, would be unlikely to sue.

¶ 25 The above decision was affirmed in 1977 in Illinois Brick, supra, another U.S. Supreme Court decision. The State of Illinois brought an action against manufacturers and distributors of concrete block in the Greater Chicago area. The State alleged that the defendants' illegal overcharges had been passed on through various levels of contractors to the plaintiff consumers, or indirect purchasers, causing them to suffer a loss. The court held that the passing-on theory must be applied uniformly for plaintiffs and defendants alike. Therefore, the plaintiffs could not use the passing-on theory offensively in light of the court's prior ruling that it could not be used defensively. The court further stated that only overcharged direct purchasers, and not others in the chain of manufacture or distributors, are considered parties "injured in his business or property" within the meaning of the Clayton Act, 38 Stat. 731, 15 U.S.C. ss. 15: Illinois Brick.

¶ 26 The result of Illinois Brick is arguably to create a windfall for a direct purchaser that passes on an overcharge in whole or in part to an indirect purchaser. The indirect purchaser, who suffers a loss as a result of the conspiracy, would be barred from any recovery.

¶ 27 The decision of the U.S. Supreme Court in Illinois Brick was criticized in many quarters. The reasoning of its critics is largely contained within the dissent written by Mr. Justice Brennan at 749, joined by Mr. Justice Marshall and Mr. Justice Blackmun:

> Today's decision flouts Congress' purpose and undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the Court's decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal

overcharges to the ultimate consumers.

¶ 28 Since the Supreme Court's decision in Illinois Brick, more than twenty states have enacted statutes which authorize indirect purchaser lawsuits. These statutes serve to ensure that the Illinois Brick decision does not bar state residents from potential recoveries against alleged conspirators. The United States Supreme Court has ruled that such statutes are not pre-empted by the court's decision in Illinois Brick. See California v. ARC America Corp., 109 S. Ct. 1661 (1989) at 1665.

¶ 29 A national class which includes class members in all provinces and territories except Quebec (Consumers only) and British Columbia is appropriate. The subject matter of the class actions has a real and substantial connection to the province of Ontario. As stated by this Court in its decision dismissing the Defendants jurisdictional challenge:

> [i]n my view, if the alleged conspiracy in each of the class actions is proven, there is a real and substantial connection with Ontario in respect of the subject matter of the actions in tort.

¶ 30 I continued on to say:

> [t]he centre of gravity for each of the class actions, initially on behalf of putative plaintiff 'national classes', is Ontario. Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd., [2002] O.J. No. 298 (S.C.J.) at paras. 100-101.

¶ 31 National classes have been certified by the Ontario court in many class actions. Wilson v. Servier Canada Inc., (2000), 50 O.R. (3d) 219 at 228 (Sup. Ct.), leave to appeal denied (2000), 52 O.R. (3d) 20, leave to appeal to S.C.C. denied September 6, 2001, [2001] S.C.C.A. No. 88. Recently, Sharpe J.A. said that "there are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation." Currie v. McDonald's Restaurants of Canada Ltd., [2005] O.J. No. 506 (C.A.) at para. 15; Alfresh Beverages Canada Corp. v. Hoechst AG, [2002] O.J. No. 79 (S.C.J.) at para. 2.

¶ 32 The plaintiffs propose the following common issue for each of the Ontario Actions:

> Did the Settling Defendant(s) and its/their Affiliated Defendants(s) in the relevant Ontario Action agree to fix, raise, maintain or stabilize the prices of, or allocate markets and customers for, the relevant Vitamins(s) in Canada in the relevant Purchase Period?

¶ 33 The definition of "common issues" in section 1 of the CPA "represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high." The common issues need only to "advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of a particular legal claim ... is not required." This requirement has been described by the Court of Appeal "as a low bar." The Supreme Court of Canada has held that in framing the common issues, the guiding question should be "whether allowing the suit to proceed as a representative one would avoid duplication of fact finding or legal analysis." The common issues question should be approached purposively. Carom v. Bre-X Minerals Ltd. (2000), 51 O.R. (3d) 236 (C.A.) at 248-249; M.C.C. v. Canada, supra, at para. 52; Western Canadian Shopping Centres, supra, at para. 39; Rumley v. British Columbia, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 29.

¶ 34 Price-fixing conspiracy cases by their nature, deal with common legal and factual questions about the existence, scope and effect of an alleged conspiracy. Putative class members have a common

interest in any proof of a concerted action, conspiracy and of agreement with the aim and result of restricting trade. In Re Sugar Industry Antitrust Litigation 73 F.R.D. 322 (E.D. Pa. 1976) at 335.

¶ 35 In the United States, it is widely accepted that:

> [An] allegation of price-fixing ... will be viewed as a central or single overriding issue or a common nucleus of operative fact and will establish a common question. Herbert B. Newberg & Alba Conte, Newberg on Class Actions, 3d. ed. (Colorado: Sheppards/McGraw-Hill, 1992) at 18-15 to 18-21.

¶ 36 If each class member in the subject class actions proceeded individually against the Defendants, each would have to prove the existence and impact of the identical conspiracy to fix prices and allocate markets. Therefore, in each of these actions the common issue satisfies the test of advancing the proceeding and avoiding duplication of the fact-finding and legal analysis. Rumley, supra, at para. 29.

¶ 37 "[T]he preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members." The only litigation alternatives to these class actions are a plethora of individual actions or no individual actions. These are not realistic alternatives to a class action. M.C.C. v. Canada, supra, at para. 73.

¶ 38 One goal of the CPA is "litigation efficiency" or "judicial economy ... to enable the court system to deal efficiently with a large number of claims [arising] from the same event." Another goal is to encourage access by victims to the court system. Thus, it is said, the CPA is "anchored in the principles of access to justice and judicial economy." The assessment of the s. 5(1)(d) requirement of the CPA "should be conducted through the lens of the three principles of advantages of class actions - judicial economy, access to justice, and behavioural modification." Carom, supra, at 238-239; Hollick, supra, at para. 27.

¶ 39 It is necessary "to assess the litigation as a whole" and "to adopt a practical cost-benefit approach to" the s. 5(1)(d) requirement. It is "essential to assess the importance of the common issues in relation to the claim as a whole." Hollick, supra, at para. 29; M.C.C. v. Canada, supra, at para. 76.

¶ 40 These class actions are the preferable procedure because they present a fair and manageable process. Moreover, for class members there are no "alternative avenues of redress apart from individual actions." Further, "individual actions would be less practical and less efficient than a class proceeding." Thus, certification would increase access to justice. Hollick, supra, at para. 31; Rumley, supra, at paras. 37-38.

¶ 41 A class proceeding is the preferable procedure because it provides a fair, efficient and manageable method of determining the common issues and because it will advance the actions in accordance with the goals of judicial economy, access to justice and behaviour modification. In the absence of these class actions, it is unlikely that the majority of claims would be advanced at all. This accords with the preferability test as enunciated by the Supreme Court of Canada in Rumley and in Hollick, namely, whether or not the class proceeding would be a fair, efficient and manageable method of advancing the claim, and whether a class proceeding is preferable, in the sense of preferable to other procedures. Rumley, supra, at para. 35; Hollick, supra, at paras. 28-31.

¶ 42 Any notion of judicial economy would be destroyed if each class member was required to

proceed individually against the Defendants and to prove the existence and impact of the identical conspiracy to fix prices. Re Catfish Antitrust Litigation, 826 F. Supp. 1019 (N.D. Miss. 1993) at 1034.

¶ 43 Each of the proposed representative plaintiffs is a Direct Purchaser, Intermediate Purchaser, or Consumer, and each is a class member within the proposed relevant Settlement Class definition. Each of the plaintiffs would fairly and adequately represent the interests of the Settlement Classes.

¶ 44 The plaintiffs do not have on the common issue any interest in conflict with the interests of other class members. In conspiracy claims, every buyer and seller in the class has a common interest in proving the existence of the conspiracy and in maximizing the aggregate amount of class-wide damages. Re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493 (S.D.N.Y. 1996) at 513.

¶ 45 The plaintiffs have produced a plan through the Agreement which sets out a workable method of resolving the litigation on behalf of the Settlement Classes and of notifying class members.

¶ 46 The motion for certification is, of course, a necessary prerequisite to obtaining approval of the proposed settlement. The Settling Defendants will only settle if the plaintiff class members are to be bound by the settlement, subject to the right to opt out. The consent of the Settling Defendants is only for the purpose of giving effect to the settlement and is conditional upon the Court's approval of the settlement.

¶ 47 In my view, and I so find, the prerequisite criteria required by the CPA for certification are met. Subject to the issue of the motions for settlement approval being determined favourably, orders shall issue certifying the Ontario class actions under consideration as requested in the motion records in respect of the Settling Defendants. (See paragraph 106 of these Reasons for a summary.) I turn now to a consideration of the proposed settlements.

The Proposed Settlements

¶ 48 The proposed class action settlements at hand total, by far, the largest amount recovered in a class action relating to price-fixing in Canada. The settlements are based on a total damage assessment of about $140 million, including interest, expenses and costs and would result in an anticipated recovery of about $100 million after the deduction of Settlement Credits.

¶ 49 Direct Purchasers will receive up to 12% of the value of their Vitamin purchases. The benefits available to Intermediate Purchasers and Consumers will be paid cy-près to carefully selected and well-recognized consumer and industry organizations. Each cy-près recipient has prepared a detailed proposal for the expenditure of its share of the settlement monies. Each recipient will be held accountable for the monies it receives through compliance with strict governing rules.

¶ 50 During the settlement negotiations, Class Counsel sought damages for the class as a whole. As a result of these negotiations, the Settlement Amount reflected in the Agreement was $132,450,000 plus Pre-Deposit Interest. Since then:

(a) Akzo, a defendant in the Ontario Choline Chloride Action, has agreed to pay $250,000 to settle the claims against it. (Akzo did not sell choline chloride in Canada);
(b) UCB, a defendant in the Supplemental Ontario Choline Chloride Action, has agreed to pay $250,000 to settle the claims against it. (UCB did not sell choline chloride in Canada); and

(c) Reilly, a defendant in the Ontario Niacin Action, has agreed to settle the claims against it for $32,728.80, based on 16.5% of its sales of $184,154.50, plus interest of $2,323.30 from March 1, 2003.

¶ 51 In April 2002, the plaintiffs reached an agreement in principle with three of the Settling Defendants to resolve all of the actions for the amount of $144,000,000 plus post-agreement interest, assuming that all other Defendants agreed to participate.

¶ 52 In November 2002, after the first mediation before Mr. Justice Winkler, a memorandum of understanding was signed with some of the Defendants reflecting a Settlement Amount of $148,500,000, being $144,000,000 plus capitalized interest of $4,500,000.

¶ 53 By February 2003, some of the Defendants who sold methionine advised that they would not participate in the proposed settlement. Thus, an adjustment was required. After negotiations and as a result of a second mediation, the amount of $148,500,000 was reduced to $133,200,000.

¶ 54 In the fall of 2004 and January, 2005, there ware further adjustments to the Settlement Amount to bring it to $132,450,000.

¶ 55 The $132,450,000 includes some capitalized interest (in an amount less than $4,500,000) and is treated as damages.

¶ 56 The proposed settlements are based on a total of $140,676,928, as of the Deposit Date, calculated as follows:

Item	Amount
Aggregate damages per Amended Settlement Agreement (Settlement Amount $132,450,000 less expenses of $10,000,000)	$ 122,450,000
Plus: Akzo, UCB, Reilly settlement amounts totaling	$ 532,728
Subtotal of aggregate damages	$ 122,982,728
Plus: expenses per Amended Settlement Agreement	$ 10,000,000
Subtotal including expenses	$ 132,982,728
Plus: Pre-Deposit Interest per Amended Settlement Agreement	$ 7,694,200
Total	$ 140,676,928

¶ 57 Sales of Vitamins in Canada which were subject to the alleged conspiracies totaled about $950,000,000. This amount includes about $43,000,000 of methionine sales by a Settling Defendant and estimated methionine sales of about $80,000,000 by the Defendants who have not settled. Therefore, the

settlements are based upon Vitamins sales in Canada totaling about $870,000,000 ($950,000,000 minus $80,000,000).

¶ 58 Dr. Thomas Ross, the plaintiffs' expert, concludes in his affidavit that the "best 'point' estimate corresponds to overcharges on the order of 16%." He also states, "absent the conspiracy, the quantity of vitamins purchased would have cost buyers only $749 million rather than $870 million, implying an aggregate damage number (overcharge) of $121 million."

¶ 59 Dr. Ross also states:

> In summary, I suggest that a range of $103 million to $138 million provides a very good estimate of the damage arising from the price-fixing conspiracy considered in this affidavit. The "best estimate" or "point estimate" is approximately $121 million and the associated price overcharge is 16.2%. This percentage price overcharge is similar to that estimated by Beyer for the United States.

¶ 60 The settlements contemplate aggregate damages of $122,982,728 which compares favourably with Dr. Ross' "estimate of the damage arising" in the "range of $103 million to $138 million."

¶ 61 In his affidavit on settlement approval in the U.S. direct purchaser vitamins class action, economist Dr. John Beyer opined that the weighted average overcharge based on his regression analysis (using U.S. data) was 13.5%. This estimate can be compared to Dr. Ross' regression analysis of a 16.2% overcharge (using Canadian data). The settlement in the U.S. Federal Court was in the range of 18% to 20% of gross sales in an environment of treble damages and large jury verdicts.

Direct Purchasers

¶ 62 The aggregate damages of $122,982,728 includes the sales to the Direct Purchasers who commenced actions or made claims against some Settling Defendants and who have settled their claims directly with them.

¶ 63 Prior to the first mediation on October 7, 2002, and in the context of claims and/or ongoing litigation and at arm's length, three Settling Defendants paid, in total, $24,100,000 to settle individual claims of Direct Purchasers who had purchased a total of $200,500,000 of Vitamins from them. This equates to an average overcharge of 12% of sales.

¶ 64 Each Direct Purchaser who settled with a Settling Defendant is excluded from the settlements as an "Excluded Customer" because it has already been paid and no longer has a claim. The Settling Defendants are entitled to a deduction from the aggregate damages, reflecting the payments they made to such Excluded Customers who are not class members because they no longer have a claim.

¶ 65 Each Settling Defendant who settled with a Direct Purchaser is entitled to a Settlement Credit calculated as 12% of the Purchase Price. The Settlement Credits particularized in the Agreement total $42,436,670. These Settlement Credits represent settlements made by the Settling Defendants with Direct Purchasers who purchased approximately $353,639,000 of Vitamins, calculated as:

$$\frac{\$42,436,670 \times 100\%}{12\%}$$

¶ 66 By the time of the signing of the Agreement, the aforementioned three Settling Defendants had paid, on average, 11.5% of the Purchase Price to the Direct Purchasers with whom they settled.

¶ 67 After taking into account Settlement Credits, the Settling Defendants have agreed to pay to the Administrator approximately $98,240,258 as calculated in the following chart:

Item	Amount
Aggregate damages as per Amended Settlement Agreement	$ 122,450,000
Plus: Akzo Settlement Amount	250,000
Plus: UCB Settlement Amount	250,000
Plus: Reilly Settlement Amount	32,728
Subtotal of aggregate damages	122,982,728
Plus: expenses as per Amended Settlement Agreement	10,000,000
Subtotal of aggregate damages plus expenses	132,982,728
Plus: Pre-Deposit Interest as per Amended Settlement Agreement	7,694,200
Subtotal of aggregate damages, expenses and Pre-Deposit Interest	140,676,928
Less: Settlement Credits per the Amended Settlement Agreement	(42,436,670)
Total payable to Administrator	$ 98,240,258

¶ 68 The monies paid to the Administrator will earn interest in the Administrator's hands before being paid out. The additional interest to be earned will total about $2,000,000. Thus, the total recovered through the settlement of the class actions is estimated to be in excess of $100,000,000 ($98,240,258 + $2,000,000).

¶ 69 Five Funds are established by s. 6.1(1) of the Agreement. The estimated amount allocated to each Fund is set forth in the following chart: [Editor's note: The chart could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@quicklaw.com and request the following document: 05oj1118.doc.]

¶ 70 The recognition of Settlement Credits at 12% and the entitlement of each Direct Purchaser to receive up to 12% of the Purchase Price are inter-related and flow from the same relevant statistical information obtained by Class Counsel from some of the Defendants during the course of settlement negotiations.

¶ 71 As a result of the first mediation, Class Counsel agreed that it was reasonable for each Direct

Purchaser to be paid up to 12% of its Purchase Price.

¶ 72 Together, the Direct Purchaser Fund and the Methionine Fund are allocated $105,662,758 with Pre-Deposit Interest (but before Settlement Credits), calculated as follows:

Item	Amount
Direct Purchaser Fund: Amended Settlement Agreement	94,450,000
Methionine Fund: Amended Settlement Agreement	6,000,000
Subtotal	100,450,000
Pre-Deposit Interest on Direct Purchaser Fund	4,447,247
Pre-Deposit Interest on Methionine Fund	515,511
Akzo Settlement Agreement contribution to the Direct Purchaser Fund	250,000
Total	$ 105,662,758

¶ 73 The allocation of $105,662,758 to the Direct Purchaser Fund and the Methionine Fund was made in contemplation of payments to Direct Purchasers of $104,400,000, being 12% of the total Vitamin sales of $870,000,000. Class counsel submits that this allocation to the Direct Purchaser Fund gives Direct Purchasers added assurance that they will be paid 12% of the Purchase Price and will motivate them to participate in the settlements rather than opt out.

¶ 74 Direct Purchasers must decide whether or not to participate before the precise percentage payout of the Purchase Price to each Direct Purchaser is known. It is critical to the implementation of the settlements that Direct Purchasers do not opt out of the settlements. If Direct Purchasers with sales in excess of the Opt Out Threshold opt out, then the Settling Defendants, at their option, may declare the Agreement null and void pursuant to s. 14.4 thereof.

¶ 75 The Methionine Fund will not be distributed to Direct Purchasers of methionine at this time. It will be held pending a further order of the Court.

¶ 76 However, if the requested $18,075,000 for Administration Expenses and Class Counsel Fees were to become payable, approximately $300,000 would be paid out of the Methionine Fund towards these costs.

¶ 77 The proposed method of payments by the Administrator is user friendly for Direct Purchasers. The Administrator will write to virtually all Direct Purchasers to advise of their right to claim and, for many, will provide the precise amount due to the Direct Purchaser based on 12% of their Purchase Price as disclosed by the Settling Defendants to the Administrator.

¶ 78 If the Direct Purchaser agrees with the amount calculated by the Administrator, the Direct Purchaser need not produce any Purchase Price information. If the Direct Purchaser disagrees with the Administrator's calculation or the Administrator has no Purchase Price data for a particular Direct Purchaser, then the Direct Purchaser must prove the Purchase Price to the satisfaction of the Administrator by producing invoices or other records.

¶ 79 There are tens of thousands of Intermediate Purchasers and millions of Consumers in the classes.

¶ 80 There are substantial difficulties associated with the determination of the actual damage (taking into account pass through) suffered by each Intermediate Purchaser and Consumer. Moreover, the complexity and administrative costs associated with any direct distribution to each Intermediate Purchaser and Consumer would be prohibitive. Thus, the settlements contemplate cy-près distributions to these two groups of class members.

¶ 81 After the allocation to Direct Purchasers and to expenses, the balance of the settlement monies is to be divided equally between the Intermediate Purchasers and Consumers so that each Fund initially would receive $11,000,000 plus Pre-Deposit Interest. Class Counsel submit this to be reasonable given the complexities associated with a precise calculation of the damages of these class members.

Intermediate Purchasers

¶ 82 The Intermediate Purchaser Fund will be distributed cy-près to industry organizations for the benefit of Intermediate Purchasers.

¶ 83 Intermediate Purchasers can generally be classified into one of three categories: agricultural producers, grocer/wholesalers, and drugstores/pharmacies. The Intermediate Purchaser Fund Distribution Protocol, a negotiated term of the Agreement, is found at Schedule F. It allocates 70% percent of the fund to agricultural producers, 15% to grocer/wholesalers and 15% to drugstores/pharmacies.

¶ 84 The Intermediate Purchaser Fund Distribution Protocol is intended to provide benefits to Intermediate Purchasers by funding industry organizations. Class Counsel identified potential recipient organizations by internet research and discussions with various industry organizations. Each potential recipient was evaluated against the following criteria:

(a) the organization's membership base;
(b) whether the organization was national in scope;
(c) the organization's ability to deliver benefits to a particular group of Intermediate Purchasers; and
(d) the organization's financial stability.

¶ 85 Proposed recipients have agreed to comply with the rules governing cy-près distributions which were developed with the assistance of the Administrator, Deloitte & Touche LLP, and are found at s. 1.3 of Schedule F. These rules seek to ensure that all recipient organizations account to the Courts for the settlement funds they receive.

¶ 86 Each proposed recipient:

(a) prepared a detailed proposal which is before the Court;

(b) delivered a resolution from its Board of Directors or governing body authorizing the submission of a proposal for funding and confirmed it would comply with the procedures governing distribution; and
(c) has agreed to use the funds in a manner that will deliver an identifiable benefit to its respective membership.

¶ 87 The Canadian Cervid Council was to receive 0.112% of the money available to Intermediate Purchasers. However, it is now defunct. Thus, funds otherwise to have been allocated to the Canadian Cervid Counsel will be distributed to the remaining participating organizations as provided in Schedule F.

¶ 88 The Canadian Goat Society is to receive 0.098% of the Intermediate Purchaser Fund. The Canadian Goat Society seeks approval to share its portion of the settlement funds with the Canadian Boer Goat Association, a group that also represents Canadian goat producers. This is accepted as a request. Therefore, upon Court approval, each of these two organizations will receive 50% of the funds earmarked for the Canadian Goat Society.

¶ 89 Schedule F provides that two industry organizations representing grocers and grocer/wholesalers in Canada, the Federation of Independent Grocers and the Canadian Council of Grocery Distributors, are to receive 4.5% and 10.5% respectively of the available monies. Combined, the membership in these two organizations accounts for virtually all grocer/wholesalers in Canada.

¶ 90 Schedule F also provides that the Canadian Association of Chain Drugstores, an industry organization that represents the interests of over 70% of all retail drugstores and pharmacies in Canada, is to receive 15% of the available monies on behalf of drugstore/pharmacies.

¶ 91 Assuming a distribution of $11,400,000, the following chart lists the proposed cy-près recipients on behalf of Intermediate Purchasers, the initial percentage they were to receive, their percentage taking into account the adjustment because of the demise of the Canadian Cervid Council, and the amount each is actually to receive:

Proposed Recipients	Initial %	Adjusted %	Adjusted Allocation
Agricultural Producers - 70%			
Canadian Pork Council	22.12	22.12	32,522,022
Canadian Cattlemen's Association	18.795	18.79	92,143,086
Dairy Farmers of Canada	10.927	10.93	41,246,476
Chicken Farmers of Canada	7.469	7.476	852,264
Canadian Egg	3.22	3.227	367,878

Marketing Agency			
Canadian Aquaculture Industry Alliance	2.884	2.891	329,574
Canadian Turkey Marketing Agency	1.463	1.471	67,580
Equine Canada	1.162	1.169	133,266
Poultry Research Council	0.784	0.791	90,174
Canadian Broiler Hatching Egg Marketing Agency	0.525	0.532	60,648
Canadian Sheep Federation	0.266	0.273	31,122
Canadian Bison Association	0.175	0.182	20,748
Canadian Cervid Council (now defunct)	0.112	0	0
Canadian Goat Society	0.098	0.056	6,384
Canadian Boer Goat Association	0	0.056	6,384
Grocer Wholesalers - 15%			
Canadian Council of Grocery Distributors	10.5	10.507	1,197,798
Canadian Federation of Independent Grocers	4.5	4.507	513,798
Drugstores/Pharmacies - 15%			
Canadian	15.0	15.007	1,710,798

Association of Chain Drugstores			
Total	100.0	100.0	11,400,000

Consumers

¶ 92 The initial corpus of the Consumer Fund will be distributed to consumer organizations for activities related to Vitamin Products, such as food and nutritional research, education and food programs, consumer services, or consumer protection activities for the indirect benefit of Consumers of all ages.

¶ 93 The Consumer Fund Distribution Protocol, a negotiated term of the Agreement, is found at Schedule G. It allocates 30% of the initial monies in the Consumer Fund to research/advocacy groups for the benefit of all Consumers across Canada. The remaining 70% will be divided, based on population, between Quebec (16.5%) and the rest of Canada (53.5%) and allocated to service delivery groups. (Quebec Counsel independently have assumed responsibility for allocating the portion of the Consumer Fund earmarked for Quebec Consumers. This distribution is set out in s. 1.2(4) of Schedule G.) (The Quebec Court is to receive full particulars of these organizations and their plans.)

¶ 94 Proposed recipients were identified through internet research, discussions with various consumer organizations and through consultation among Class Counsel. Additionally, Class Counsel consulted with Mr. Gordon Wolfe, a person employed in the non-profit sector with knowledge of charitable and non-profit organizations.

¶ 95 Class Counsel recognized that selecting regional or provincial organizations would make equal treatment across Canada difficult, so they concentrated on selecting Canadian-wide organizations that had a presence in most, if not all, provinces and territories.

¶ 96 Each potential recipient was evaluated against the following criteria:

(a) the organization's ability to deliver benefits in each province and territory;
(b) the organization's ability to reach one or more of the target age groups, being children, youth, adults, or the elderly;
(c) whether the organization was non-denominational;
(d) whether the organization had a charitable or non-profit designation;
(e) the organization's financial stability and budget; and
(f) the organization's history of advocacy, service delivery, research, or education relevant to Vitamin Products.

¶ 97 Financial information was obtained from each potential recipient. The size of an organization's budget was a consideration in determining what proportion of the Consumer Fund, if any, a particular organization should receive.

¶ 98 Each proposed recipient prepared a detailed proposal which is before the Court. Each proposed recipient also delivered a resolution from its Board of Directors or governing body authorizing the submission of a proposal for funding and confirming that it will comply with the rules governing cy-près distributions found at Schedule G. Class Counsel have reviewed all of the proposals and state their belief that, if the distribution is made as proposed, the funds will provide a tangible benefit to Consumers.

¶ 99 Assuming an initial distribution of $11,400,000, the following chart lists the proposed cy-près recipients on behalf of Consumers and the amount each is to receive:

Proposed Recipients	%	Allocation
Allocation to National Organizations - 30%		
Food Safety Network	29.0	991,800
Option Consommateurs (Canada)	29.0	991,800
Canadian Foundation for Dietetic Research	12.5	427,500
The Centre for Research in Women's Health	10.5	359,100
The Centre for Science in the Public Interest	10.5	359,100
Canadian Institute of Food and Nutrition	8.5	290,700
Allocation to all provinces and territories except Québec - 53.5%		
Victoria Order of Nurses	35.0	2,134,650
Canadian Association of Food Banks	25.0	1,524,750
Boys and Girls Clubs of Canada	20.0	1,219,800
Breakfast for Learning	15.0	914,850
Canadian Feed the Children	5.0	304,950
Allocation to Québec - 16.5%		
Centraide pour tout le Québec	46.0	865,260
Fonds d'aide au recours collectif	19.0	357,390
Campagne de prévention à l'endettement des 40 associations de consommateurs du Québec	10.0	188,100

Projet Petits prêts (en collaboration avec la Fiducie Desjardins et la Coalition des associations des consommateurs du Québec)	9.0	169,290
Fondation Claude Masse	8.0	150,480
Option Consommateurs	8.0	150,480
Total		$ 11,400,000

¶ 100 The Agreement also provides in s. 6.2(7) that any remaining "balance in the Direct Purchaser Fund ... shall be transferred to and become part of the Consumer Fund." Based on experience and the statistics from other price-fixing class actions, class counsel are of the view that it is probable that the "take-up rate" by Direct Purchasers will be less than 100% and that substantial monies will trickle down to the Consumer Fund.

¶ 101 Section 1.3 of the Consumer Fund Distribution Protocol creates an alternative method to distribute monies which are subsequently allocated to the Consumer Fund as a result of trickle down from the Direct Purchaser Fund.

¶ 102 Although within the Consumer Fund Distribution Protocol, the intent of this alternative method of distribution is to benefit both Consumers and Intermediate Purchasers. This is accomplished by paying the vast majority of the trickle down monies to universities and colleges.

¶ 103 For example, the allocation to the Ontario Veterinary College at the University of Guelph seeks in part to benefit Intermediate Purchasers, many of whom are in the agricultural business.

¶ 104 The following chart lists the proposed recipients of the monies which could subsequently be allocated to the Consumer Fund and the amounts each would receive, assuming an amount of $10,000,000 trickles down:

	%	Allocation
Northwestern Region - 30.3%		
University of British Columbia	45	1,363,500
University of Alberta	33	999,900
University of Manitoba	12	363,600
Western College of Veterinary Medicine, University of Saskatchewan	10	303,000
Eastern Region - 7.6%		

Memorial University	50	380,000
Dalhousie University	50	380,000
Ontario - 38.4%		
University of Toronto	25	960,000
University of Guelph	25	960,000
Ontario Veterinary College, University of Guelph	25	960,000
Ontario Agri-Food Education	25	960,000
Québec - 23.7%		
Université Laval	27	639,900
McGill University	26	616,200
Faculté de médecine vétérinaire, Université of Montréal	27	639,900
Option Consommateurs [to a maximum of $1 million]	20	474,000
Total	100	$ 10,000,000

¶ 105 Option Consommateurs is to receive $1,142,280 of the initial Consumer cy-près distribution and 20%, to a maximum of $1,000,000, of the trickle down distribution. Option Consommateurs is not only a cy-près recipient but also a representative plaintiff in Quebec. In Quebec, Option Consommateurs has a unique status and has the capacity to sue on behalf of Consumers. As representative plaintiff, Option Consommateurs has been the recipient on behalf of Quebec Consumers of a portion of settlement funds in eight settled actions.

The status of the Ontario class actions upon settlement approval

¶ 106 The following chart lists the outstanding class actions in Ontario and the status of each action if the Court approves the proposed settlements and they become effective.

Proceeding	Settling Defendants	Non-Settling Defendants
Ontario Biotin Action Glen Ford v. F. Hoffmann-La Roche Ltd.	F. Hoffmann-La Roche Ltd., Merck KGaA, Lonza AG, Sumitomo Chemical Co., Ltd., Tanabe Seiyaku Co., Ltd.	none
Ontario Bulk	F. Hoffmann-La Roche Ltd.,	none

Vitamins Action Glen Ford v. F. Hoffmann-La Roche Ltd.	Aventis Animal Nutrition S.A., Eisai Co., Ltd., Takeda Pharmaceutical Company Limited (formerly Takeda Chemical Industries, Ltd.), Merck KGaA, Daiichi Pharmaceutical Company, Ltd.	
Ontario Choline Chloride Action Fleming Feed Mill Ltd. v. BASF Atkiengesell-schaft Ltd.)	Chinook Group Limited (incorrectly named Chinook Group, BASF Aktiengesellschaft Bioproducts, Incorporated (incorrectly named Bioproducts,Inc.) Akzo Nobel Chemicals BV	DCV, Inc. DuCoa, L.P.
Supplemental Ontario Choline Chloride Action Fleming Feed Mill Ltd. v. UCB S.A.	UCB S.A. UCB Chemicals Corporation UCB, Inc.	none
Ontario Niacin Action VitaPharm Canada Ltd. v. Degussa-Hüls AG	Degussa Canada Inc. Lonza AG Nepera, Inc. (incorrectly named Nepera, Incorporated) Reilly Industries Inc.	none
Ontario Methionine Action Glen Ford v. Rhône-Poulenc S.A.	Aventis Animal Nutrition S.A.	Degussa-Hüls AG Degussa Corporation Degussa Canada Inc. Novus Internationa l, Inc.
Supplemental Ontario Methionine Action Glen Ford v. Novus International (Canada) Inc.	none	Novus Internationa l (Canada) Inc. Nippon Soda Co. Ltd. Mitsui & Co.

Ltd.

¶ 107 If the proposed settlements are approved, Class Counsel will continue to prosecute the Ontario Methionine Action and the Supplemental Ontario Methionine Action.

¶ 108 The only other outstanding action will be the Ontario Choline Chloride Action against DCV Inc. and DuCoa L.P. These companies represent that they are insolvent. Class Counsel will seek the Court's direction about whether or not to continue this action against these Defendants.

¶ 109 The following chart sets out an estimate of the timeline for the implementation of the settlement if the Courts in the three provinces give their approval:

Ontario approval hearing	March 8, 9, 2005
Decision - Ontario	By March 24, 2005
British Columbia and Quebec approval hearings	April 6 and 21, 2005
Ontario judgment final	By April 24, 2005
British Columbia and Quebec judgments final	By May 6, 2005
Implementation of Notice Program	By June 5, 2005
Opt-Out period expires and claim period for Direct Purchasers begins	By August 5, 2005
Assume Opt Out Threshold is not exceeded, Administrator will report to the Courts and the Courts declare that settlements are operative and binding (s. 16.1 Amended Settlement Agreement)	By September 9, 2005
Payout of Intermediate cy-près and initial Consumer cy-près no earlier than	September 9, 2005
Claim period expires	By November 5, 2005
Payout to Direct Purchasers no earlier than	December 1, 2005
Calculation of trickle down and payout no earlier than	January 6, 2006
Final reports to Courts no earlier than	February 1, 2006

The Law

¶ 110 A settlement of a class proceeding is not binding unless approved by the Court. To approve a settlement, the Court must find that it is fair, reasonable, and in the best interests of the class. CPA s. 29 (2); Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429 at 444 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372.

¶ 111 The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy. As observed in Amoco Canada Petroleum Co. v. Propak Systems Ltd. (2000), 200 D.L.R. (4th) 667 at 677 (Alta. C.A.):

> In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice.

¶ 112 Similar sentiments have been expressed by Cronk J.A., in J.M. v. W.B., [2004] O.J. No. 2312 at para. 65 (C.A.): Finally, there is an additional, and powerful, reason to support the implementation of the Agreements in this case: the overriding public interest in encouraging the pre-trial settlement of civil cases. This laudatory objective has long been recognized by Canadian courts as fundamental to the proper administration of civil justice ... Furthermore, the promotion of settlement is especially salutary in complex, costly, multi-party litigation.

¶ 113 There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval. Manual for Complex Litigation, Third ss. 30.42 (1995). See Cotton v. Hinton, 559 F. 2d 1326 (5th Cir. 1977) at 1330; Dabbs (Gen. Div.), supra, at 440.

¶ 114 To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes. Dabbs (Gen. Div.), supra, at 440.

¶ 115 In general terms, a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a "zone or range of reasonableness":

> ... all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation. Dabbs (Gen. Div.), supra, 440; Newberg, supra, at 11-104.

¶ 116 A similar standard has been applied in non-class action proceedings in Ontario. The courts recognize that settlements are by their very nature compromises, which need not, and usually do not, satisfy every single concern of every stakeholder. Acceptable settlements may fall within a broad range of upper and lower limits:

> In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply

rubber-stamp the proposal. Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225 at 230 (H.C.J.).

¶ 117 In determining whether to approve a settlement, a court takes into account factors such as:

(a) the likelihood of recovery or likelihood of success;
(b) the amount and nature of discovery, evidence or investigation;
(c) the proposed settlement terms and conditions;
(d) the recommendation and experience of counsel;
(e) the future expense and likely duration of litigation;
(f) the recommendation of neutral parties, if any;

(g) the number of objectors and nature of objections;
(h) the presence of arms-length bargaining and the absence of collusion;
(i) the information conveying to the court the dynamics of, and the positions taken by
(j) the parties during the negotiations; and
(k) the degree and nature of communications by counsel and the representative
(l) plaintiff with class members during the litigation.

Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 at para. 13 (Gen. Div.); Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 at paras. 71-72 (S.C.J.).

¶ 118 These factors constitute a guide in the process. It is not necessary that all factors receive the same consideration. In any particular case, certain of the listed factors will have greater significance than others, and weight should be attributed accordingly. Parsons, supra, at para. 73.

¶ 119 When the subject class actions were commenced, this type of litigation was novel in Canada and the approach taken by Class Counsel was significantly different from that which had been seen in the United States Federal Court. Class Counsel advanced the actions on the theory that:

(1) the Defendants should pay the total overcharge for Vitamins sold in Canada; and
(2) the actions would be pursued in a two-phased approach: first, damages for the entire Canadian Vitamins marketplace would be measured by the total overcharge for Vitamins sold in Canada during the Purchase Periods; and second, an appropriate distribution protocol would be determined or negotiated.

¶ 120 The plaintiffs faced litigation risks. The novel nature of the actions and the theory pursued by Class Counsel created the risk that the actions, or some of them, would not be certified, and the risk that if certified, the Court would not assess damages in the aggregate. Quite probably, the Defendants would have argued that the decision of the Ontario Court of Appeal in Chadha v. Bayer Inc. (2003), 63 O.R. (3d) 22 (C.A.), aff'g (2001), 54 O.R. (3d) 520 (Div. Ct.) (certification denied), rev'g (1999), 45 O.R. (3d) 29 (Gen. Div.) (certification granted), leave to appeal to S.C.C. denied, [2003] S.C.C.A. No. 106, ought as precedent to preclude certification in the actions at hand.

¶ 121 The plaintiffs also faced risks specific to some of the Defendants and actions. For example, until October 2002, there were no guilty pleas relating to Niacin. Certain Bulk Vitamins were not the subject of criminal convictions. Moreover, certain pleas refer to conspiracy periods which are considerably shorter than those pleaded in the actions. Therefore, Class Counsel faced the significant

hurdle of having much less information to work with to prove overcharge rates for these Bulk Vitamins.

¶ 122 If the Defendants, or some of them, were successful in establishing any of the general defences, such as pass through, or the product specific defences, such as no sales in Canada or no conspiracy, then the plaintiffs would not succeed, at least in the entirety, at a trial of the common issues and there would be limited recovery. While these defences were arguably problematical, at the very least their number and complexity would lengthen a trial of the common issues.

¶ 123 A court "need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation. At minimum, a court must possess sufficient information to raise its decision above mere conjecture." The parties proposing the settlement have an obligation to provide sufficient information to permit the court to exercise its function of independent approval. Newberg, supra, at 11-100 & 11-101; Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598, at para. 15.

¶ 124 While the court requires sufficient evidence to be able to exercise an objective, impartial and independent assessment of the fairness of the settlement in all of the circumstances, it is not necessary that formal discovery have occurred at the time of settlement. It is clear that settlements reached at an early stage of proceedings are appropriate. Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598 at paras. 15 and 24.

¶ 125 Class Counsel had significant information about the case and a good understanding of liability and damages issues before embarking on the negotiation process. Class Counsel's grasp of these issues continued to increase throughout the negotiation process as a result of, among other things:

(a) interaction with U.S. counsel who had been litigating extensively against these Defendants and were able to assist in devising strategy and highlighting some of the strengths and weaknesses of the case;

(b) independent analysis of class member records including transaction data from Agro-Pacific, Statistics Canada data, and industry data;
(c) affidavit evidence and cross-examinations on affidavits conducted in the context of the motions by some Defendants challenging the jurisdiction of the Ontario Court;
(d) information obtained through, and as the result of, settlements with Lindel Hilling and Merck KGaA;
(e) the Agreed Statements of Fact that supported the guilty pleas; and
(f) the input from expert economists, Dr. Thomas Ross and Dr. John Beyer.

¶ 126 There is sufficient evidence before the court to allow it to exercise an objective and independent assessment of the fairness of the proposed settlement agreements.

¶ 127 The function of a court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of possibly improving the terms of the settlement. It is within the power of the court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. However, the court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598 at para. 10; Manual for Complex Litigation, supra, at ss. 30.42.

¶ 128 In reviewing the terms of a settlement, a court must be assured that the settlement secures an

adequate advantage for the class in return for the compromise of litigation rights; Newberg, supra, at 11-46.

¶ 129 The proposed settlement under consideration contemplates aggregate damages of $122,982,728, or $132,982,728 including expenses and costs of $10,000,000, or a total of $140,676,928 with Pre-Deposit Interest. The $122,982,728 compares favourably with Dr. Ross' estimate of the actual damages being in the "range of $103 million to $138 million."

¶ 130 The settlement reasonably allocates $56,710,577 of the settlement monies to the Direct Purchaser Fund. Any unclaimed portion will flow down to the Consumer Fund to be predominately used by universities for the benefit of Intermediate Purchasers and Consumers. Class Counsel expect that substantial amounts will flow down because the take-up rate by Direct Purchasers will not be 100%.

¶ 131 The distribution to Intermediate Purchasers and Consumers is through two cy-près distribution plans, the Intermediate Purchaser Fund Distribution Protocol and the Consumer Fund Distribution Protocol to recognized industry and consumer organizations and universities. Class Counsel identified the recipient organizations through diligent research and consultation. All recipient organizations will be accountable for settlement monies received by them.

¶ 132 Section 24 of the CPA permits damages to be assessed in the aggregate. Section 26 permits the court to direct the distribution of settlement monies by any means it considers appropriate whether or not such a distribution would benefit persons who are not class members or persons who otherwise might receive monetary compensation as a result of the proceeding. In other words, the CPA permits cy-près distributions of the type contemplated in Schedules F and G of the Agreement.

¶ 133 Cy-près distributions of the type outlined in Schedules F and G have been accepted by the Ontario Court. In Hoechst, supra, at paras. 15-16, a price-fixing case involving food additives, this Court held:

> There are significant problems in identifying possible claimants below the manufacturer level. Hence, the monies allocated to intermediaries such as wholesalers and consumers are to be paid by a cy-près distribution to specified not-for-profit entities, in effect as surrogates for these categories of claimants, for the general, indirect benefit of such class members. The CPA provides flexibility for this approach: see ss. 24 and 26.
> Such a settlement and payments largely serve the important policy objective of general and specific deterrence of wrongful conduct through price-fixing. That is, the private class action litigation bar functions as a regulator in the public interest for public policy objectives.

¶ 134 This reasoning was adopted by the Court in Sutherland v. Boots Pharmaceutical PLC, [2002] O.J. No. 1361 (S.C.J.). The Court approved a settlement which distributed all of the settlement benefits cy-près to various consumer groups for the indirect benefit of class members. The Court held:

> [w]here in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members the court will approve a cy-près distribution to recognized organizations or institutions which will benefit class members.

¶ 135 Class Counsel are seeking an order barring any future claim for contribution or indemnity against the Settling Defendants (and UCB in the additional, trailer settlement achieved with it). Once it

became clear in the course of negotiations some Defendants would not participate in a global settlement, a bar order was critical in the negotiation of the Agreement. Class Counsel submits that the form of the bar order is fair and properly balances the competing interests of the classes, the Settling Defendants, UCB and the Non-Settling Defendants. No bar order is sought by Akzo or Reilly.

¶ 136 Bar orders have their origin in the United States and are frequently used to achieve settlement in complex tort and securities litigation, including class proceedings. In the California case of Nelson v. Bennett, 662 F. Supp. 1324 (E.D. Cal. 1987) at 1335, District Court Judge Ramirez traced the history of the development of such orders and commented that they arose to counteract the inhibiting effect of claims for contribution on settlement. From a policy perspective, Ramirez J. concluded that ruling in favour of a bar order would "accommodate both the interests of settlement and of fairness and deterrence". He further stated that a "no bar" rule would give "exclusive weight to fairness and deterrence at the complete expense of settlement."

¶ 137 In the case Re Nucorp Energy Securities Litigation, 661 F. Supp. 1403 (S.D. Cal. 1987) at 1408, District Court Judge Irving went so far as to say that without some sort of settlement bar, partial settlement of any federal securities case before trial is, "as a practical matter, impossible". Any single defendant who refuses to settle, would force all other defendants to trial.

¶ 138 Ontario courts favour settlement wherever possible and have found that the underlying principles of American bar orders may be applied in Canada. For example, in Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130 at 141, a settlement agreement preventing non-settling defendants from making claims for contribution or indemnity was approved. Winkler J. considered many American authorities in support of the proposed bar order and concluded that while the U.S. cases were not dispositive of the issue, the underlying principles were applicable and, in the Ontario context, sections 12 and 13 of the CPA provided a mechanism for supporting these principles:

> I do, however, find that the underlying principles on which "bar orders" are granted in the American cases have some application to these proceedings. Moreover, the Class Proceedings Act provides a specific mechanism through which these objectives can be achieved in class proceedings in Ontario. Under s. 13 a court may "stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate". This broad discretion is buttressed by s. 12 which permits the court, on a motion by a party or class member, to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding.

¶ 139 Following the Ontario New Home Warranty decision, bar orders have been approved in the class actions context in order to facilitate partial settlements in mass tort claims that benefit the plaintiffs and achieve the goals of the class proceeding legislation. See Millard v. North George Capital Management Ltd., [2000] O.J. No. 1535 (S.C.J.); Sawatzky v. Societe Chirurgicale Instrumentarium Inc., [1999] B.C.J. No. 1814 (S.C.); Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 1481 (S.C.); McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474 (S.C.J.); and Gariepy v. Shell Oil Company (16 April 2004), Toronto 30781/99 (Ont. Sup. Ct.) at para. 16. Most recently, in a price-fixing case, the court approved a bar order. Bona Foods Ltd. v. Ajinomoto U.S.A,. Inc., [2004] O.J. No. 908.

¶ 140 In my view, the requested bar order is fair and reasonable.

¶ 141 The burden of proving that a settlement ought to be approved rests with the proponents,

however, the recommendation of capable counsel is significant. The recommendation of class counsel is clearly not dispositive as class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputations for integrity and diligent effort on behalf of their clients is also at stake. Dabbs (Gen. Div.), supra, at 440.

¶ 142 In the absence of evidence to the contrary, the recommendation of experienced counsel should be accorded considerable weight, as stated in Manual for Complex Litigation, supra, at ss. 30.42:

> [T]he judge should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms length negotiations between experienced, capable counsel after meaningful discovery.

¶ 143 In the normal course, once a court is satisfied that a settlement is the product of arm's length bargaining by experienced counsel, the settlement will be approved:

> As a practical matter, the overwhelming majority of proposed settlements are approved when the Court is satisfied that arms-length bargaining took place during settlement negotiations and experienced class counsel has recommended approval of the settlement. Newberg, supra, at 11-42.

¶ 144 Class Counsel and defence counsel have a unique ability to assess the potential risks and rewards of litigation. Class Counsel recommend approval of the proposed settlement. They have extensive experience in class action litigation and price-fixing litigation. In the absence of evidence to the contrary, the recommendation of these experienced counsel should be given considerable weight.

¶ 145 The proposed settlement achieves the legislative goals of the CPA and affords significant judicial efficiency and economy, while allowing access to justice through an efficient and cost effective distribution mechanism. To the extent that civil damages are paid to or for the benefit of the class over and above the criminal fines and penalties which have been paid by some Settling Defendants, there will be an incentive for these Settling Defendants, and others, to refrain from engaging in the type of behaviour complained of in the future.

¶ 146 Class members will receive fair and reasonable benefits in return for the compromise of their litigation rights against the Settling Defendants, and Akzo, UCB and Reilly.

¶ 147 If there were to be a trial of the common issues, the litigation process to determine liability would be complicated and protracted, and no class member would be paid until the litigation process ended. The practical value of an expedited recovery is a significant factor for consideration. In addition to the legal and factual risks, a practical concern favouring settlement includes the potential that a case such as this one would take considerable expense and many more years to reach trial and exhaust all appeals. Dabbs (Gen. Div.), supra, at 441.

¶ 148 The Court acknowledges a range of acceptable settlements, thereby recognizing, "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598 at para. 12 (Gen. Div.).

¶ 149 The settlements at hand were, in part, as a result of two mediations conducted by Winkler J.

Also, the Children's Lawyer and the Public Trustee were aware of the ongoing negotiations and having been given notice of this approval hearing have indicated they do not wish to make submissions.

¶ 150 In appropriate circumstances, objectors to a class action settlement may be granted leave to participate in the settlement approval hearing. Objectors who are granted leave are not parties to the proceeding, and accordingly do not have the rights of a party. Dabbs (C.A.), supra, at 100.

¶ 151 Even in the presence of objectors, the settlement approval process is non-adversarial in nature:

> It is important that the Court itself remain firmly in control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the objectors on the other. Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598 at para. 21.

¶ 152 An objector who suggests that Class Counsel ought to have structured the settlement differently essentially seeks to substitute the personal judgment of such objector for the judgment of Class Counsel.

¶ 153 It is not within the jurisdiction of the Court to consider an objection based upon extra-legal concerns. The approval process does not include an assessment of the proposed settlement from a social or political context:

> The parties have chosen to settle the issue on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the class as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra legal and outside the ambit of the court's review of the settlement. Parsons, supra, at para. 77.

¶ 154 The test for approval is whether the settlement is fair and reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member. Further, when a settlement is reached prior to the expiry of the opt out period, class members have a further element of control:

> The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The CPA mandates that class members retain for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgment that is tailored more to the individual's circumstances. In this case, there is the added advantage in that a class member will have the choice to opt out while in full knowledge of the compensation otherwise available by remaining a member of the class. Parsons, supra, at para. 79; Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598 at para. 11.

The Objections

¶ 155 As of February 15, 2005, the original deadline for written objections, Mr. William Dermody, the appointed friend of the Ontario Court in this settlement approval process, had received only three written objections in respect of the proposed settlement.

¶ 156 These were on behalf of two organizations, the International Society for Orthomolecular Medicine and the Health Action Network Society.

¶ 157 The third objection is by Dr. A. Hoffer, a retired psychiatrist and former Director of Psychiatric Research, Department of Public Health, for the province of Saskatchewan and a founder of the developing branch of medicine known as "orthomolecular medicine and psychiatry." His letter seeks consideration for patients who receive treatment of "optimum doses of vitamins for ... forms of mental and physical illness." Dr. Hoffer could not appear so that he did not make an oral submission.

¶ 158 It is necessary and appropriate that only well-recognized entities be the recipients of the cy-près distributions. Such entities have an established record of providing not-for-profit services, with transparency in respect of their activities and accounting. They provide the greatest level of confidence and assurance to the general consuming public that the monies distributed will be responsibly used. There are a multitude of charitable organizations in Canada who can use the limited monies available through the contemplated cy-près distribution. It is readily apparent that the organizations listed in Schedule G of the Agreement meet this criteria. It is also clear that there are other organizations who could arguably meet the criteria.

¶ 159 The process to determine recipients, and the reasons for the choices made, in respect of the listed organizations which are to receive the distributions in accordance with the Consumer Fund Distribution Protocol (Schedule G to the Agreement), including the proposals received from the successful intended recipients, are set forth in the Affidavit of Ms. Andrea DeKay dated February 16, 2005 (Vols. 3 and 4 of the Motion Record).

¶ 160 The first step in creating the Consumer Fund Distribution Protocol was to identify the primary objective, being the delivery of Vitamin related benefits to Canadian Consumers of all ages and across Canada. The second step was to identify potential recipient organizations which would meet the primary objective.

¶ 161 Class Counsel took into consideration the extent to which a proposed organization could deliver benefits in each province and territory, could reach one or more of the target age groups, whether the organization was non-denominational, whether there was a registered charitable designation, the organization's financial stability and budget and the organization's history of advocacy, service delivery, research or education relevant to Vitamin Products. Consultation was also made with an expert in the non-profit sector as to the tentative list of possible recipients for review and comment.

¶ 162 The third step in the process was to develop a draft plan of distribution and the allocation of the limited resources. Ultimately, money was not allocated simply on a provincial or regional population basis but also on the basis of research/advocacy or service delivery. For example, 30% of the Fund is allocated to research/advocacy focused organizations.

¶ 163 Finally, stringent guidelines were developed and reviewed by the accounting firm Deloitte & Touche LLP (the proposed Administrator) to ensure accountability. A binding commitment was obtained from each organization to use the monies solely for activities related to Vitamin Products, to maintain a separate account for the monies received, to provide reports, and to consent to an independent audit and to reimburse monies in the event a court should so order.

¶ 164 For example, The Food Safety Network is to receive 29%, The Centre for Research in Women's Health 10.5%, Breakfast for Learning 15% and Canadian Feed the Children 5%.

¶ 165 The distribution of any monies subsequently allocated to the Consumer Fund because of a less than 100% take-up in respect of the Direct Purchasers Fund (anticipated by Class Counsel) will go to listed universities.

¶ 166 Each objection was in respect of the list of proposed recipients of the Consumer Fund cy-près distribution. The objectors are persons or supporters of organizations or groups who wish to be recipients of the cy-près distribution.

¶ 167 A further objection was received by fax from the Consumer Health Organization of Canada March 4, 2005. A fifth objection was received by fax from Mr. Lars Soderstrom March 6, 2005.

¶ 168 The written submissions received were filed as part of the record of this proceeding. Each of the individual objectors who appeared at the hearing March 8, 2005 was allowed to make an oral submission and to file such further materials as desired.

¶ 169 Mr. Soderstrom's submission is unique in that he seems to argue against the merits of the proposed settlement on the basis that it does not result in payments directly to consumers. Mr. Borden has recently commenced an application on behalf of Mr. Soderstrom on the asserted basis that Mr. Stroderstrom's rights under the Canadian Charter of Rights and Freedoms are violated by the proposed settlement. The short answer to Mr. Soderstrom's objection is that he can, of course, opt out of the settlement and pursue his individual application, as he apparently intends to do. As I have stated above, in my view, a cy-près mechanism for the distribution of benefits through the recovery in respect of the damages to Consumers is the only viable, cost efficient and fair approach.

¶ 170 I turn now to the other four objections. Class Counsel properly objected to any organization or corporate entity which filed an objection being heard itself as an objector for the reason that it is not a class member. Hence, individuals, each being within the Consumer class in respect of the class actions at hand, made submissions, arguing that some parts of the monies available should go to certain organizations.

¶ 171 The only objector without an individual present who could speak in its interest was the International Society for Orthomolecular Medicine. Dr. Hoffer's letter objecting, discussed above, was also addressed to a like interest and concern as expressed by this organization. The responding affidavit of Ms. Andrea Dekay suggests that this organization represents a group of orthomolecular societies throughout the world, with its president being in the Netherlands.

¶ 172 Mr. Milt Bowling, Mr.Trueman Tuck, "a legal and political rights advocate", Dr. David Rowland and Mr. Paul Anderson, each made oral submissions. Mr. Tuck filed an extensive written submission.

¶ 173 Mr. Bowling argues for the inclusion of the Health Action Network Society ("HANS") as a recipient of funds. This organization is an educational, non-profit and charitable organization which has reportedly worked for some 22 years in educating consumers on the benefits of nutritional therapies, including the use of vitamins and minerals.

¶ 174 Mr. Anderson argued for the inclusion of the Consumer Health Organization of Canada in the list of recipients from the Consumer Fund.

¶ 175 Mr. Tuck proposes that funds from the settlement be given to the Live Longer Foundation. However, this entity was incorporated only in November, 2004. Mr. Tuck is also active on behalf of

"Friends of Freedom," not a registered charity, which reportedly actively supports several court actions by alternative health organizations against Health Canada. This group also supports HANS. Mr. Tuck is an advocate on behalf of a number of organizations which promote food based medicines as a health measure. Mr. Tuck is a passionate advocate in favour of vitamins for health purposes. He states he is opposed to doctors and prescription drugs.

¶ 176 Ms. DeKay states in her responding affidavit of March 3, 2005, to the objections, after completing her research into the organizations favoured by the objectors, that Class Counsel "are satisfied that none of the organizations which objected to the settlement satisfy the criteria" determined by the process employed for the selection of recipient organizations, as outlined in her affidavit of February 16, 2005 (and discussed above). She concludes that she "would not have recommended that any of these organizations receive settlement monies from the Consumer Fund."

¶ 177 The Court concurs with the view of Class Counsel that the organizations favoured by the objections do not meet the selection criteria. This is not to imply any condemnation or criticism of these organizations. It is simply to say that none are sufficiently substantial to meet the extensive, demanding criteria for selection. As discussed above, the selection criteria is quite reasonable and responsible in all the circumstances. To repeat, there is a very limited supply of monies for distribution, with potentially many worthy claimant organizations. Not nearly all can be selected. The stringent criteria for selection is both appropriate and necessary for selection and maximizes the confidence of the broad, vitamin consuming public that the objectives of the settlement are being realized, and will be easily seen to be realized, by the proposed recipient organizations.

¶ 178 Given the substantial size of the class (millions in this case) and the relatively small number of objections, the Court must also take account of the relative paucity of objections and conclude that the vast majority of the class is supportive of the settlement. Finally, the selection put forward by Class Counsel is certainly reasonable, worthy and appropriate from every objective viewpoint.

¶ 179 "While approval of a proposed class settlement is not a matter to be determined by a plebiscite, the views of putative class members are certainly relevant and entitled to great weight": Re Silicone Gel Breast Implant Products Liability Litigation, 1994 WL 578353 at 5 (N.D. Ala.).

Disposition

¶ 180 All of the negotiations in this case, including those with Lindel Hilling, Merck KGaA, Nepera, Inc., Lonza, Akzo, UCB and Reilly were at arms' length and adversarial in nature. Each clause of each settlement agreement was achieved through extensive, adversarial and protracted negotiations.

¶ 181 The drafting and negotiation of the Agreement was adversarial and hard fought over eighteen months. Reportedly, over 60 drafts of the agreements were circulated.

¶ 182 During the litigation process, before the announcement of the proposed settlement, Class Counsel did not attempt to directly communicate with or register individual class members because the large number (in the millions) made it impractical to do so. However, Class Counsel did maintain Vitamins websites and received numerous telephone and electronic contacts initiated by class members.

¶ 183 The proposed representative plaintiffs support and recommend approval of the settlement.

¶ 184 The inclusive model adopted by Class Counsel assesses aggregate damages for the entire marketplace, and provides benefits, directly and indirectly, to all purchasers in an efficient and

manageable way.

¶ 185 Numerous price-fixing class actions have been commenced in Ontario. Two of these cases, Chadha v. Bayer, supra, and Price v. Panasonic Canada Inc., [2002] O.J. No. 2362, were commenced on behalf of consumers only. In each of these consumer-only cases, the court refused to grant certification. Conversely, seven price-fixing class actions have been certified in Ontario in the context of negotiated settlements. In each of the settled cases, all purchasers of the price-fixed product, including Direct Purchasers, Intermediate Purchasers and Consumers, were included in the class. See Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co., [2001] O.J. No. 6028; Hoechst, supra; Bona Foods Ltd. v. Pfizer Inc., [2002] O.J. No. 5553; Newly Weds Foods Co. v. Pfizer Inc. (7 April 2003) Toronto 39495; Minnema v. Archer Daniels Midland Co. (28 February 2003), Barrie G23495-99CP (Ont. Sup. Ct.); A & M Sod Supply Ltd. v. Akzo Nobel Chemicals B.V. (22 December 2003) Toronto 02-CT-40300CP; Bona Foods Ltd. v. Ajinomoto U.S.A., Inc., supra.

¶ 186 In approving the settlement in Hoechst, this Court recognized that such settlements and payments "serve the important policy objective of general and specific deterrence of wrongful conduct through price-fixing." Hoechst, supra, at para. 16.

¶ 187 The CPA is remedial and is to be given a generous, broad, liberal and purposive interpretation. The three goals of a class action regime, as recognized by the 1982 Ontario Law Reform Commission's Report on Class Actions (vol. 1 (Toronto: Ministry of the Attorney General, 1982)), by the Attorney General's Advisory Committee on Class Action Reform and by the Supreme Court of Canada, are judicial efficiency, improved access to the courts and behaviour modification. Interpretation Act, R.S.O. 1990, c. I-11, s. 10; Hollick, supra, at para. 15; Western Canadian Shopping Centres, supra, at paras. 27-29.

¶ 188 The settlements are the product of lengthy, adversarial negotiations which understandably have involved compromise. Given the number of parties, the complexities of the issues and the litigation risks involved in proceeding to trial, in my view, and I so find, the settlements are fair and reasonable and in the best interests of the classes as a whole and should be approved.

¶ 189 For the reasons given, the overall settlement of the subject class actions is found to be fair and reasonable and in the best interests of all class members. Approval is given to the proposed settlement as set forth in the Agreement, subject to a determination and findings in respect of the regime set forth in s. 18.1 thereof, to be dealt with in separate Reasons for Decision, relating to the motion for approval of Class Counsel Fees.

¶ 190 Counsel can prepare the necessary implementing orders and judgments for my signature consistent with these Reasons for Decision and the separate Reasons for Decision relating to Class Counsel Fees.

P.A. CUMMING J.

QL UPDATE: 20050404
cp/e/qlalc/qlkjg

Case Name:

Walls v. Bayer Inc.

Between
Marilyn Walls and Ethel Nick, plaintiffs, and
Bayer Inc., defendant

[2005] M.J. No. 4
2005 MBQB 3
Docket: CI 03-01-31598

Manitoba Court of Queen's Bench
Winnipeg Centre
MacInnes J.

January 7, 2005.
(89 paras.)

Civil procedure — Parties — Class or representative actions — Certification — Common interests — Representative plaintiff.

Motion by Walls for certification of a class action. Walls and another plaintiff commenced an action against Bayer alleging they suffered injuries after consuming a drug produced by Bayer. Walls consumed the drug from the time it was released until it was withdrawn from the market due to concerns over side effects. Bayer denied it was negligent. Walls's lawyer claimed that despite a lack of advertising, many people contacted his office wishing to participate in a potential class action against Bayer. Bayer argued that Walls failed to present a genuine issue for trial. Settlements of other class actions against Bayer in respect of the same drug had been approved in other Canadian provinces.

HELD: Motion allowed. The question of whether there was sufficient evidence to establish a genuine issue for trial was not a question to be determined at the certification proceeding. Bayer acknowledged that Walls's statement of claim disclosed a cause of action. There was an identifiable class, composed of persons who had purchased the drug and claimed personal injury as a result of consuming the drug. The prescription and ingestion of the drug, and the resulting personal injuries were easily and objectively determinable criteria. The proposed class raised common issues. The questions of whether the drug caused side effects, was suitable for its intended use, whether Bayer was negligent and whether Bayer owed a duty of care were common to all members of the class and could be determined on a common issues hearing. A class action was preferable to any other form of proceeding. There were many common issues to be decided. A class proceeding encouraged efficient fact-finding, judicial economy and access to justice. Walls was an appropriate representative plaintiff. She had a colourable claim, had no conflicts of interest and could adequately represent the interests of the other class members. Walls's litigation plan was workable and suitable for the advancement of the action.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court Rule 42

Class Proceedings Act, 1992, S.O. 1992, c. 6 s. 5(1)

The Class Proceedings Act, C.C.S.M. c. 130 s. 1, s. 1, s. 1, s. 2, s. 4, s. 5(2), s. 7(a), s. 7(d)

Counsel:

For the Plaintiffs: Wayne P. Forbes and David A. Klein

For the Defendant: E. William Olson, Q.C., Peter J. Cavanagh and Susan E. Paul

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¶ 1 **MacINNES J.**:— The plaintiffs have sued the defendant for damages alleging they have suffered injury as a result of their consumption of Baycol, a cholesterol-lowering prescription drug promoted and distributed by the defendant.

¶ 2 The plaintiffs now move for certification of their action as a class proceeding under The Class Proceedings Act, C.C.S.M. c. C130 (the "Act").

¶ 3 Health Canada approved Baycol for distribution and sale in Canada on February 18, 1998. Initial approval was for dosage levels of 0.2 and 0.3 milligrams. On December 22, 1999, Health Canada approved the distribution and sale of Baycol at the increased dosage level of 0.4 milligrams, and on December 28, 2000, at the further increased dosage level of 0.8 milligrams.

¶ 4 On July 16, 2001, the defendant sent a letter to health care professionals in Canada advising that between March 1998 and June 30, 2001, 31 cases of suspected rhabdomyolysis had been reported in Canada, including 8 cases resulting in renal failure and 1 death. On August 8, 2001, the defendant withdrew Baycol from the Canadian market. On August 10, 2001, Health Canada published a "warning" reporting that the withdrawal was because of reports of rhabdomyolysis associated with the drug. Health Canada went on to report that between March 1998 and August 8, 2001, 45 cases of rhabdomyolysis including 14 cases of acute renal failure and 1 death had been reported in Canada.

¶ 5 Following the withdrawal of Baycol from the Canadian market, the Canadian Adverse Drug Reaction Monitoring Program of Health Canada released the Summary of Reported Adverse Drug Reactions pertaining to Baycol as at August 31, 2001. The Summary was a compilation of adverse drug reaction complaints reported to Health Canada pertaining to Baycol. The Summary stated that, as of that date, Health Canada had received 94 reports of Canadians who had reported suffering rhabdomyolysis, myalgia, myositis, muscle pain, renal failure, elevated CPK levels and other adverse reactions after taking Baycol.

¶ 6 The plaintiffs, both retired persons resident in Manitoba, allege they were prescribed Baycol by their respective medical doctors. Each filled her prescription at a pharmacy of her choice, followed instructions for consumption and ingested Baycol. Each did so from the time Baycol was first prescribed for her until its recall and removal from the Canadian market.

¶ 7 The plaintiffs assert that each experienced and continues to suffer weakness, pain, muscle loss and damage to her muscle tissue, which have impaired and interfered with her enjoyment of life and regular daily activities.

¶ 8 No statement of defence has yet been filed by the defendant. But based upon the evidence presented on the certification hearing, the defendant, while acknowledging the possible occurrence of rhabdomyolysis when Baycol was taken at its highest dosage, denies that it was negligent in any respect.

The defendant asserts that Baycol was efficacious. It also asserts that the product monograph was accurate and was amended in a timely fashion when new information concerning the drug or its side effects was discovered. As well, it says that many of the conditions or symptoms complained of by or on behalf of patients were not the result of Baycol or if they were, they related to normal side effects of statin medications (of which Baycol was one) for which adequate warnings of those side effects had been given.

¶ 9 One of the plaintiffs' counsel, Douglas Lennox, swore in an affidavit on June 25, 2003, that notwithstanding the absence of any formal notice of this action, 52 individuals from Manitoba and a total of 507 individuals from across Canada had already contacted his firm with respect to it.

¶ 10 Prior to commencement of this action, class proceedings had already been commenced in respect of Baycol in British Columbia, Saskatchewan, Ontario, Quebec, and Newfoundland and Labrador. In British Columbia, the plaintiffs obtained a certification order. That order is under appeal, but the appeal has not been heard. In the meantime a settlement was negotiated with respect to those members of the class who contracted rhabdomyolysis (as defined in the settlement agreement) from the ingestion of Baycol. The settlement has been approved.

¶ 11 In both the Ontario and Quebec proceedings, settlement agreements were reached settling the claims of those who contracted rhabdomyolysis (as defined in the settlement agreements). In Ontario, the settlement was approved. I am not aware of the present status of the Quebec proceeding. In neither Ontario nor Quebec has there been a certification motion as is now before me.

¶ 12 I am not aware of the status of the Saskatchewan proceeding.

¶ 13 In Wheadon v. Bayer Inc. (2004), 46 C.P.C. (5th) 155, a decision of the Newfoundland and Labrador Supreme Court, Trial Division, Barry J. heard a certification application and concluded that the plaintiffs had satisfied the certification criteria. His decision is under appeal. Counsel on the motion before me advised that the facts, evidence and issues in this case are virtually identical to the facts, evidence and issues in Wheadon, supra.

¶ 14 Class proceedings are not new. They have, however, become more prevalent in Canada in recent years and as a result many provinces have enacted legislation to provide and establish a regime or rules of process for class proceedings. Manitoba did so by passing the Act, which received royal assent July 25, 2002 and was proclaimed in force January 1, 2003. The following are certain provisions of the Act relevant to the motion before me:

PART 1

INTRODUCTORY PROVISIONS

Definitions
1 In this Act,

> "certification order" means an order certifying a proceeding as a class proceeding;
> "class proceeding" means a proceeding certified as a class proceeding under Part 2;
> "common issues" means

(a) common but not necessarily identical issues of fact, or
(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

. . .

PART 2

CERTIFICATION

Member of class may commence proceeding 2(1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of that class.
Motion for certification by plaintiff 2(2) A person who commences a proceeding under subsection (1) must make a motion to the court for an order

(a) certifying the proceeding as a class proceeding; and
(b) appointing a representative plaintiff.

. . .

Certification of class proceeding 4 The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if

(a) the pleadings disclose a cause of action;
(b) there is an identifiable class of two or more persons;
(c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
(e) there is a person who is prepared to act as the representative plaintiff who

(i) would fairly and adequately represent the interests of the class,
(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
(iii) does not have, on the common issues, an interest that conflicts with the interests of other class members.

. . .

Meaning of certification
5(2) An order certifying a proceeding as a class proceeding is not a determination of the merits.

. . .

Certain matters not bar to certification 7 The court must not refuse to certify a proceeding as a class proceeding by reason only of one or more of the following:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

. . .

(d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable;

¶ 15 In addition to this legislation, a body of case law has built up particularly in recent years providing direction as to the purpose of class proceedings, and the procedure before and the role of the court in the certification process. The following are some passages and/or principles which I have drawn from certain of the cases and which I have found helpful in deciding this certification motion:

* Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, was a case which had originated in Alberta and which was brought under Rule 42 of the Alberta Rules of Court, Alta. Reg. 390/68, as no class proceeding legislation existed. The unanimous judgment of the Supreme Court of Canada was delivered by McLachlin C.J. After commenting upon various circumstances that might in today's world give rise to a class action, she wrote, at pp. 549-50:

> ... Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.
>
> Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. ...
>
> Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied ....
>
> Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation ....

And at pp. 554-56, she wrote:

> ... [F]our conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the

> outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria ....
>
> Second, there must be issues of fact or law common to all class members. ... The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. ...
>
> Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.
>
> Fourth, the class representative must adequately represent the class. ... [T]he court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). ... The court should be satisfied ... that the proposed representative will vigorously and capably prosecute the interests of the class ....
>
> While the four factors outlined must be met for a class action to proceed, their satisfaction does not mean that the court must allow the action to proceed. Other factors may weigh against allowing the action to proceed in representative form. ... [T]he court has discretion to decide whether the class action should be permitted to proceed, notwithstanding that the essential conditions for the maintenance of a class action have been satisfied.

I pause here to note that s. 4 of the Act provides that the court must certify a class proceeding if the statutory criteria contained in the section are met. Three of those criteria were included and commented upon in the four conditions that McLachlin C.J. described as necessary to a class action. But the discretionary aspect of the court's decision continues under the Act in deciding whether the statutory criteria have been met, and particularly in respect of the criterion set forth in s. 4(d), that is, whether a class proceeding would be the preferable procedure.
Returning to Western Canadian, supra, McLachlin C.J. wrote, at pp. 556 and 557:

> ... The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.

. . . . .

> The need to strike a balance between efficiency and fairness also belies the suggestion that class actions should be approached restrictively.

And at pp. 560-61, she wrote:

> The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. ... The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.
> ... A class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance, the court may then consider whether the class action should continue.
> The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

* Hollick v. Toronto (City), [2001] 3 S.C.R. 158, was a class action brought under the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "Ontario Act"). The certification criteria are found in s. 5(1) of the Ontario Act and are very similar to those set forth in s. 4 of the Act. In Hollick, supra, the Supreme Court of Canada dealt with the appellant's application for a certification order. The court's judgment was delivered by McLachlin C.J. At p. 169, she wrote, "... the Act should be construed generously."

As well, she wrote, "The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool."
She then reiterated some of her comments made in Western Canadian and went on to write, at p. 170:

> ... [I]t is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
> It is particularly important to keep this principle in mind at the certification stage.

At pp. 170-71, she commented upon the nature of the certification stage:

> ... Thus the certification stage is decidedly not meant to be a test of the merits of the action .... Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action ....

[underlining in original text]

At pp. 171-73, McLachlin C.J. discussed whether the claims of the class members raise common issues:

> ... [A]n issue will be common "only where its resolution is necessary to the resolution of each class member's claim" .... Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.
> ... [T]he issue is whether there is a rational connection between the class as defined and the asserted common issues ....
> ... It falls to the putative representative to show that the class is defined sufficiently narrowly.

The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad - that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue.

[underlining in original text]

She then addressed the question of evidence in support of a certification motion and the role of the court in respect of such evidence. At p. 174, she wrote:

> The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion.

She referred to the Report of the Attorney General's Advisory Committee on Class Action Reform (Toronto: The Committee, 1990) and expressed the view that it ...

> ... appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.

And at p. 175, she wrote:

> ... [T]he representative of the asserted class must show some basis in fact to support the certification order. ... [T]hat is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, ... the class representative will have to establish an evidentiary basis for certification .... In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action.

McLachlin C.J. then discussed the preferability issue, that is, whether a class proceeding would be the preferable procedure for the fair and efficient resolution of common issues. In that regard she wrote, at p. 176:

> ... [T]he preferability inquiry should be conducted through the lens of the three principal advantages of class actions - judicial economy, access to justice, and behaviour modification ....

And at pp. 177-79, she wrote:

> ... "[P]referable" was meant to be construed broadly. The term was meant to capture two ideas: first ... "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, ... whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on" .... In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.
>
> The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues" ... and not that a class action be the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes:
>
>> The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy". The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinctio[n] can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.
>
> ... I would endorse that approach.
>
> The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. ... [T]he Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. ... [T]he drafters rejected a requirement ... that the common issues "predominate" over the individual issues .... I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. ... [T]he preferability requirement asks that the class representative "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings"....
>
> ... In my view, the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.
>
> [underlining in original text]

Lastly, McLachlin C.J., at pp. 182-83, wrote:

> ... The question of whether an action should be permitted to be prosecuted as a class action is necessarily one that turns on the facts of the case.

* Rumley v. British Columbia, [2001] 3 S.C.R. 184, was a class proceeding commenced under the British Columbia legislation which is similar to the Act. The judgment of the court was again delivered by McLachlin C.J. At p. 200, she cautioned against over breadth of the putative class. She wrote:

> There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. ... [T]he guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

She also commented as to the flexibility provided to the court under the Class Proceedings Act, R.S.B.C. 1996, c. 50 (the "British Columbia Act"). At p. 202, she wrote:

> ... In my view the Class Proceedings Act provides the court with ample flexibility to deal with limited differentiation amongst the class members as and if such differentiation becomes evident.

I note that the British Columbia Act is very similar to the Act, and the certification criteria found in s. 4(1) are substantially identical to those set forth in s. 4 of the Act.

* In Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219, Cumming J. of the Superior Court of Justice of Ontario certified a class proceeding wherein the plaintiff was alleging defectiveness in and damages suffered as a result of ingestion of a prescription medication. This is the essence of the plaintiffs' claim in the present action. In his reasons he commented upon what he described as "[t]he crux of the defendants' response to the motion for certification" being the individuality of many of the issues. At p. 248, he wrote:

> Undoubtedly, a large number of individual issues will arise for each member of the class who claims that a disease has resulted from the consumption of the diet pills. Indeed, there will probably have to be individual discovery of these class members. The CPA contemplates a bifurcated process as necessary and appropriate to accomplish this.

And he continued, at p. 249:

> The CPA provides for a bifurcated procedure whereby common issues can be resolved on a class-wide basis and follow-up individual issues dealt with on an individual basis. The CPA has several provisions to accommodate the necessary flexibility required ....

Cumming J. was, of course, referring to the Ontario Act. The Act, however, is substantially similar in provision and, in my view, in intention.
As regards preferability, he wrote, at pp. 249-50, that that criterion required a two-fold analysis:

> ... First, is a class proceeding the preferable procedure because it constitutes a fair, efficient and manageable way of determining the common issues presented by the claims of the proposed class members?
>
> Second, will such determination of the common issues advance the proceeding in accordance with the policy objectives underlying the CPA - objectives such as access to justice, judicial economy and the modification of the behaviour of those who might otherwise be wrongdoers?
>
> A court must consider the following factors:
> whether the class is such that a class proceeding will be unmanageable or impractical; whether common issues of fact or law are significant as compared with questions affecting only individual members; whether many of the members of the class have a valid interest in individually controlling the prosecution of separate actions; whether the administration of the class proceeding will create significantly more difficulties than those likely to be experienced if a remedy were to be sought by other means; ...
> ... Even though there may be common issues, the individual issues may overwhelm the common issues such that a class proceeding would not facilitate achievement of the underlying policy objectives of the CPA ....
>
> That individual issues will remain after the common issues are tried is not an obstacle to certification.

¶ 16 Let me turn then to consider this motion in light of the criteria set forth in s. 4 of the Act.

¶ 17 On the motion before me, the plaintiffs rely upon their amended statement of claim, the affidavit evidence of Marilyn Walls, Douglas Lennox and Dr. Keith Borden, and as well, the cross-examination of Marilyn Walls on her affidavit. The defendant filed affidavits of Dr. Lawrence A. Leiter, Douglas Grant, Manoj Saxena and Susan Paul. I received written briefs from the parties and heard oral submissions September 8, 9 and 10, 2004.

¶ 18 The defendant's position is that this action does not qualify for certification under the Act for a number of reasons:

(1) The proposed representative plaintiff does not, on the evidence, have a claim against the defendant that raises a genuine issue for trial. Accordingly, she cannot be a member of a class in an action against the defendant in respect of Baycol and she cannot fairly and adequately represent the interests of members of any properly defined class.
(2) Claims upon which common issues may arise must, for purposes of class certification, be limited to those that, on the evidence presented, raise a genuine issue for trial. The bald pleading that Baycol was defective or unfit is contradicted by unchallenged evidence and, accordingly, is not a colourable claim from which common issues may arise.
(3) The only claims in respect of which there may be a genuine issue for trial relate to the quality and timeliness of warnings of risks of rhabdomyolysis associated with Baycol. In respect of such claims, numerous individual issues of fact in relation to both liability and damages are inextricably interwoven with any

issues common to class members and, therefore, there are no issues that are a substantial ingredient of the claim of each class member, the resolution of which would materially advance the interests of each member of the putative class. Specifically, injury claims of persons with varying medical histories, who took different doses of Baycol at different times when the defendant had different knowledge about the medicine, in combination with gemfibrozil and in monotherapy, and under various product labels, cannot be adjudicated through a single proceeding.

(4) Class adjudication of the claims advanced in this action is not, on the facts of this case, the preferable procedure for the resolution of the claims of the putative class members. A class action would inevitably break down into a series of individual adjudications with the result that the policy objectives underlying the Act would not be achieved.

¶ 19 The evidentiary threshold for meeting the statutory criteria is low. Or, as McLachlin C.J. wrote in Hollick, "The requirement is not an onerous one."

¶ 20 Still, the law requires that the representative plaintiff must provide sufficient evidence to show some basis in fact for each of the certification criteria, other than that the pleadings disclose a cause of action. And the opposing party is entitled to provide evidence in response.

¶ 21 But the case law and s. 5(2) of the Act make clear that the certification hearing is not a merits based hearing.

¶ 22 In my view, the court must fill something of a gatekeeper function. It must consider the evidence adduced from both the party propounding certification and the party opposing, in light of the statutory criteria. But its consideration is from the perspective of form or procedure, not substance or merits. That is, does the evidence adduced on the certification hearing establish that a class proceeding is appropriate and preferable for the advancement of the intended action, consistent with the principal advantages of class actions, namely, judicial economy, access to justice, and behaviour modification. The question whether the evidence is sufficient to establish a genuine issue for trial is in my view, contrary to the submissions of the defendant, not a question for determination on the certification motion but one for later determination and one which requires a merits based assessment.

Section 4(a) - Cause of Action

¶ 23 Section 4(a) of the Act requires that the pleadings disclose a cause of action. No evidence need be provided. The defendant acknowledges that the plaintiffs' amended statement of claim discloses a cause of action.

Section 4(b) - Identifiable Class

¶ 24 Section 4(b) of the Act requires that there is an identifiable class of two or more persons. The plaintiffs have proposed the following class for certification:

(a) all persons resident in Manitoba and elsewhere in Canada who were prescribed and ingested Baycol which was purchased in Canada and who claim personal injury as a result ("Injury Class");

(b) all persons who have a derivative claim on account of a family relationship with a person described in paragraph (a) ("Family Class"); and

(c) such other persons as the court recognizes or directs.

Excluded from the Injury Class are persons resident in Quebec, persons resident in a province other than Manitoba who are members of an already certified class action in that other province, and as well, persons who are entitled to participate in a settlement approved by the Ontario and British Columbia courts (and the Quebec courts as and when approval is given).

¶ 25 Here, the essential criteria for class membership are prescription and ingestion of Baycol purchased in Canada, and a claim for personal injury as a result.

¶ 26 Prescription and ingestion of Baycol purchased in Canada are easily and objectively determinable.

¶ 27 While it may be true that one's determination of personal injury may be subjective, the fact of a claim to personal injury is not. That is, it will be easy to determine objectively whether and which prospective plaintiff claims not only to have been prescribed and to have ingested Baycol purchased in Canada, but also to have suffered injury as a result.

¶ 28 The proposed class definition is silent as to the merits of the claims, but as the criteria should not depend on the outcome of the litigation, it is not necessary that prospective class members be able to successfully establish that they have suffered injury. The criterion is simply that they claim to have suffered injury.

¶ 29 As well, the criteria for class membership here bear a rational relationship to the proposed common issues and are not dependent on the outcome of the litigation. Moreover, the criteria are such as to ensure that the proposed class is not overly inclusive.

¶ 30 In this case, two persons are named as plaintiffs in the statement of claim. Each asserts as material facts that she was prescribed Baycol by her doctor, that her prescription was filled at the pharmacy of her choice, that she followed instructions for consumption and ingested Baycol, and that she continued so taking Baycol until its recall and removal from the Canadian market.

¶ 31 Each plaintiff also alleges that she experienced and continues to suffer weakness, pain, muscle loss and damage to her muscle tissue, which have impaired and interfered with her enjoyment of life and regular daily activities.

¶ 32 Neither claims to have suffered rhabdomyolysis.

¶ 33 The plaintiff Marilyn Walls has sworn an affidavit confirming the allegations that she has made in the statement of claim. She briefly supplemented her affidavit evidence by answers given on her cross-examination on affidavit.

¶ 34 The plaintiff Ethel Nick has not sworn an affidavit confirming her allegations nor has any such evidence been provided from any other source on this motion, specifically related to her.

¶ 35 It would clearly have been preferable to have been provided with an affidavit from Ethel Nick. But, in the circumstances here, I conclude that her failure to do so is not fatal to establishment of this criterion.

¶ 36 There is other evidence before me that is available for consideration.

¶ 37 Exhibit "D" to the affidavit of Douglas Lennox sworn June 25, 2003 is a Summary of Reported Adverse Drug Reactions to Baycol as at August 31, 2001 from the Canadian Adverse Drug Reaction Monitoring Program of Health Canada. It shows that as of that date, Health Canada had received 94 reports of Canadians who had reported suffering rhabdomyolysis, myalgia, myositis, muscle pain, renal failure, elevated CPK levels and other adverse reactions after taking Baycol.

¶ 38 As well, Douglas Lennox swore that despite the absence of notice, 52 individuals from Manitoba and 507 individuals from across Canada had already contacted the plaintiffs' counsel's firm with respect to this action.

¶ 39 Moreover, Douglas Grant, in his affidavit on behalf of the defendant sworn October 8, 2003, stated that in the case of Baycol as of September 15, 2003, the defendant's Drug Safety and Medical Information Department had received directly and through Health Canada 179 spontaneous reports which the defendant, after investigation, classified as "serious" cases. He also stated that a "serious" event is defined as ...

> ... one that results in death or is life-threatening, requires inpatient hospitalization or prolongation of existing hospitalization, results in persistent or significant disability or incapacity, results in a congenital abnormality or birth defect or which is an important medical event.

This definition is one that is standardized across regulatory bodies and pharmaceutical companies.

¶ 40 Dr. Keith Borden in his affidavit swore as to the practice and procedure for the reporting of adverse drug reactions. He provided his expert opinion as to whether the number of adverse drug reactions reported to monitoring agencies for a given drug and event can be equated to the actual number of people who suffered the adverse drug reaction in question. He swore, "The brief answer is no and this position is universally accepted among experts in the ADR [adverse drug reaction] monitoring community."

¶ 41 He referred to an American text, Pharmacoepidemiology, 3rd edition, 2000, in which the statement is made that such reports "generally represent only a small proportion of the events that have actually occurred."

¶ 42 I am satisfied therefore, on the evidence before me, that the proposed class definition is objectively and clearly defined, that it is not overly inclusive, and that there is an identifiable class of two or more persons.

¶ 43 I conclude that the criterion set forth in s. 4(b) of the Act has been met.

Section 4(c) - Common Issues

¶ 44 Section 4(c) of the Act requires that the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members.

¶ 45 Section 4(c) requires that the action raise common issues of fact or law. They need not be determinative of liability nor dominant issues in the litigation. But they must be issues common to all members of the class in the sense that their decision at a common issues trial will advance the litigation in some meaningful way. Are the common issues ones that will have to be decided in respect of the claim of every member of the class, and will their being decided in a representative action avoid

duplication of fact-finding or legal analysis?

¶ 46 The plaintiffs here propose the following common issues:

(1) Does Baycol cause serious side effects and, if so, what are the nature and extent of those side effects?
(2) Was Baycol defective and/or unfit for its intended use?
(3) Was the defendant negligent and, if so, when and how?
(4) Did the defendant owe a duty of care to the class members?
(5) Did the defendant breach the standard of care expected of it and, if so, when and how?
(6) Should the defendant pay punitive damages, and, if so, to whom should they be paid, and in what amount?

Common Issue No. 1: Does Baycol cause serious side effects and, if so, what are the nature and extent of those side effects?

¶ 47 The plaintiffs assert that common issue no. 1 is a common issue of fact. What problems did Baycol actually cause? How serious were its effects? They assert that these questions forming the proposed common issue are issues of fact common to all class members and are contentious between them and the defendant. The defendant asserts that Baycol was simply a typical statin with the typical potential side effects associated with all statins in respect of which warnings were given and that there is no evidence before the court to suggest that Baycol was defective.

¶ 48 I disagree. One fact untypical of Baycol as compared with other statins is that its manufacturer withdrew Baycol from the market. Additionally, as I have already written, Douglas Grant swore:

> In the case of Baycol, as of September 15, 2003, Bayer Inc.'s Drug Safety and Medical Information Department has received directly and through Health Canada 179 spontaneous reports which Bayer Inc. has, after investigation, classified as "serious" cases.

¶ 49 Furthermore, he swore that as of September 15, 2003, the defendant had received 393 spontaneous reports which are described as "non serious" cases, directly and through Health Canada.

¶ 50 The certification stage is not a merits based determination. It may be that in due course, a determination will be made that none of the plaintiffs suffered any serious or provable effects from Baycol but there is evidence including that from the defendant of complaints which it has investigated and classified as serious cases.

¶ 51 A factual inquiry as to the nature of the problems caused by an allegedly defective drug is an appropriate common issue. Cumming J. so found in Wilson, supra and in my view the same applies in this case. This issue is one which can be determined at a common issues hearing and which will turn essentially on the evidence of expert witnesses. It will not require the evidence of plaintiffs who are members of the class. As well, a determination of this issue will advance the litigation.

Common Issue No. 2: Was Baycol defective and/or unfit for its intended use?

¶ 52 A number of cases have determined that a products liability case alleging defectiveness or unfitness for purpose is one ideally suited for class determination. In Harrington v. Dow Corning Corp.

(2000), 82 B.C.L.R. (3d) 1, a decision of the British Columbia Court of Appeal, the court, at pp. 21-22, wrote:

> At the risk of oversimplifying a complex decision-path, I venture to suggest the first step in every products liability case alleging negligent design, manufacture, or marketing is the determination of whether the product is defective under ordinary use or, although non-defective, has a propensity to injure. Some American authorities refer to this step as "general causation", whether a product is capable of causing the harm alleged in its ordinary use.
>
> The second step is the assessment of the state of the manufacturer's knowledge of the dangerousness of its product to determine whether the manufacturer's duty was not to manufacture and distribute, or to distribute only with an appropriate warning. It may be prudent to refer to this as an assessment of the state of the art; it may be that a manufacturer did not but should have known of its product's propensity for harm.

¶ 53 This common issue will raise a factual and legal inquiry into whether Baycol was defective and/or unfit for its intended purpose. It will entail a risk-based assessment of Baycol comparing it to other statins and, in particular, will provide an opportunity for assessment of the state of the defendant's knowledge as to the dangerousness and/or unfitness of its product.

¶ 54 This issue is one common to all proposed class members and its determination will advance the litigation.

¶ 55 Again, this is not a merits based determination.

¶ 56 But there is evidence before me to which I have already referred, specifically the Summary of Reported Adverse Drug Reactions from Health Canada and the affidavit of Douglas Grant, which is sufficient to meet the necessary evidentiary burden required on a certification motion.

> Common Issue No. 3: Was the defendant negligent and, if so, when and how?
> Common Issue No. 4: Did the defendant owe a duty of care to the class members?
> Common Issue No. 5: Did the defendant breach the standard of care expected of it and, if so, when and how?

¶ 57 In Bouchanskaia v. Bayer Inc., [2003] B.C.J. No. 1969, Gray J. of the British Columbia Supreme Court, in the certification application of the Baycol class proceeding commenced in British Columbia, did not certify the issue whether the defendant owed a duty to the class members but rather combined that issue with the issue of whether a duty of care was breached. In Wheadon, Barry J. exercised his discretion to combine common issues nos. 3, 4 and 5 into one common issue, namely, "Did the Defendant breach a duty of care owed to class members and if so, when and how?" In Wheadon, the plaintiffs advised that they were amenable to this approach and they have similarly advised me of that position here. Moreover, counsel advised that the case before me was identical in all material respects to Wheadon. In the circumstances, I choose to exercise my discretion, as did Barry J. in Wheadon, to combine common issues nos. 3, 4 and 5 into one common issue as he did, namely, "Did the Defendant breach a duty of care owed to class members and if so, when and how?"

¶ 58 The defendant admits that it owed a duty of care to patients prescribed Baycol but seems to assert that that duty was to provide adequate warnings concerning its potential side effects. It asserts that this proposed common issue is one which cannot be determined on a basis that is common to all class members and that its resolution would not materially advance the interests of each and every member of

the putative class. It says instead that this is an issue that will be dependent upon the individual circumstances of each claimant tied to the state of the defendant's knowledge from time to time, as well as the state of knowledge of the individual class members and/or their advisers at the time the medication was ingested.

¶ 59 In addition, the defendant asserts that it would still be necessary to determine whether the failure to meet the duty of care was the proximate cause of the harm suffered by any claimant which issue of legal causation will depend on numerous individual factors, including the role of the prescribing physician, and can only be resolved on an individual basis.

¶ 60 Even assuming proof of a breach of the duty of care as a common issue, there is no doubt that each class member will have to prove causation and damages and that this will require individualized hearings. But it is clear that the need for individualized hearings does not preclude a class proceeding.

¶ 61 The issue of breach of duty of care is one that has been frequently certified in products liability class actions and, from the perspective of a common issue, focuses upon the defendant's knowledge and conduct from time to time. It is an issue which will advance the litigation. If this common issue were determined in favour of the defendant, the litigation would end. If it is not, the issue would have been proved once and for all and would assist in moving the litigation forward to individualized hearings with respect to causation and presumably other individualized issues as well. Again, this common issue can be resolved without participation of class members.

Common Issue No. 6: Should the defendant pay punitive damages, and, if so, to whom should they be paid, and in what amount?

¶ 62 The defendant asserted before me, as it did before Barry J. in Wheadon, that before a court should certify as a common issue whether punitive damages would be awarded, there must first be a finding that there is at least one common issue relating to claims for compensatory damages that would materially advance the interests of all class members. It asserted as well that there are no colourable claims for compensatory damages that give rise to common issues in this case which would advance the interests of all class members and accordingly, a claim for punitive damages should not be certified as a common issue.

¶ 63 Barry J., at p. 194 of Wheadon, wrote:

> As I have decided above that there are colourable claims for compensatory damages that give rise to certifiable common issues, these objections of Bayer no longer apply. ... Whether the plaintiffs are entitled to punitive damages and the quantum thereof is entirely dependant on the conduct of the defendant. It is a common issue which can be decided without the involvement of class members.

¶ 64 I agree with his comments and inasmuch as I, too, have decided that there are colourable claims for compensatory damages that give rise to certifiable common issues, the defendant's objections no longer apply in the case before me. I am prepared to certify this as a common issue.

Section 4(d) - Preferable Procedure for Fairness and Efficiency

¶ 65 In Hollick, McLachlin C.J. wrote, at p. 176:

> ... [T]he preferability inquiry should be conducted through the lens of the three

> principal advantages of class actions - judicial economy, access to justice, and behaviour modification ....

And, at pp. 177-78, she wrote:

> ... "[P]referable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on" .... In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.
>
> The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues" (emphasis added) ....
>
> The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole.

¶ 66 She went on to write that the Ontario Act contemplates that class actions would be allowable even where there are substantial individual issues, that it was not necessary that the common issues "predominate" over the individual issues, and that in the preferability analysis the court should look to all reasonably available means of resolving the class members' claims and not simply the possibility of individual actions.

¶ 67 In this case, the defendant has argued that there exists a very large number of individual issues which would have to be determined in order to finally dispose of the litigation. Indeed, in its brief, it listed them, as seen by the defendant. The list is long and the issues are significant.

¶ 68 The defendant argues that any common issue, or the common issues as a whole, would be overwhelmed by the individual issues that would need to be decided to resolve the litigation. It argues as well that given the substantial number and importance of the individual issues, judicial economy would not be enhanced nor would duplication of fact-finding or legal analysis be avoided by the certification of the proceeding.

¶ 69 I do not agree. While it is undoubtedly true that there will be many, and many important, individual issues which may have to be decided before this case is finally resolved, there clearly are common issues of importance which can be decided once only, thus avoiding possible inconsistency in fact-finding and enhancing judicial economy and the advancement of the litigation.

¶ 70 As well, certification of the proceeding will clearly promote access to justice. This case, as with so many products liability cases, is one where the cost of litigating a claim on an individual basis will, if it does not exceed the amount of the likely recovery, be wholly disproportionate to it. In the result a requirement for individual claims as distinct from class proceedings would substantially inhibit, if not wholly prohibit, the ability of individuals to advance what they consider to be a justifiable claim.

¶ 71 As regards behaviour modification, the defendant asserts that Baycol was withdrawn voluntarily, that it was not required to do so by Health Canada, and that the drug has not been sold in Canada since August 8, 2001. While the plaintiffs dispute this to some degree, there is certainly evidence that the defendant did act voluntarily and responsibly at the time of the withdrawal of Baycol and in the steps it instituted thereafter with respect to refunding patients for their purchase of the drug.

¶ 72 As well, it has embarked upon a program of attempting to resolve claims for anyone who has experienced serious side effects and in particular rhabdomyolysis as a result of taking Baycol, notwithstanding that it does not admit liability and has defended claims advanced.

¶ 73 But that is only one aspect of the issue of behaviour modification. Another was succinctly stated by McLachlin C.J. in Western Canadian where she wrote, at p. 550:

> ... [C]lass actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery.

¶ 74 And in Wilson, Cumming J. wrote, at p. 250:

> Finally, the policy objective of behaviour modification is fostered through a class proceeding. If a drug is defective and liability attaches to a manufacturer or seller, a significant incidental result is that the pharmaceutical industry is more likely to take greater care in the development and testing of new products to ensure their safety before marketing them. ... The CPA's goal has been described as inhibiting "misconduct by those who might ignore their obligations to the public" .... The CPA serves to assist in regulating the pharmaceutical industry for an important public policy objective through class proceedings commenced in the private sector.

¶ 75 Consistent with the foregoing comments, I conclude that requiring the proposed class members to proceed on an individual claim basis would not be the appropriate procedure here. Nor in my view would joinder of individual claims or a test case for purposes of resolving the common issues. As well, a class proceeding under the Act permits both the resolution on a one-time basis of the common issues and the determination of individual issues.

¶ 76 I conclude that a class proceeding would be the preferable procedure for this case.

Section 4(e) - Representative Plaintiff

¶ 77 Section 4(e) of the Act states there must be a person who is prepared to act as the representative plaintiff who would fairly and adequately represent the interests of the class, who has produced a workable litigation plan for the class proceeding, and who is not in a conflict of interest on the common issues with the interests of other class members.

¶ 78 In this case, Marilyn Walls is proposed as the representative plaintiff. The defendant argues that she does not qualify as a representative plaintiff, as on the evidence she does not have a colourable claim. I have already decided otherwise. I am satisfied on the evidence that she is one who would fairly and adequately represent the interests of the class. She does not have a conflict of interest on the common issues with the interests of the other class members.

¶ 79 As well, I am satisfied that the litigation plan put forward by the plaintiffs' counsel on her behalf is a workable and suitable litigation plan for advancement of this action as a class proceeding on behalf of all class members. The litigation plan can of course be amended as the action progresses.

¶ 80 In the circumstances, I have no hesitation in deciding that the criterion set forth in s. 4(e) has

been satisfied.

¶ 81 In conclusion, I am satisfied that all of the statutory criteria set forth in s. 4 of the Act have been satisfied by the plaintiffs.

¶ 82 I, therefore, allow the plaintiffs' motion for certification of the proceeding as proposed and in respect of the common issues as proposed.

¶ 83 Counsel should proceed immediately to settle the terms of the certification order.

¶ 84 Both judicial authority and s. 5(2) of the Act make clear that a certification hearing is not a merits based hearing. I have stated that on several occasions in the course of these reasons. I did so because almost invariably, in my view, the arguments advanced by the defendant were arguments that invited a merits determination based upon evidence submitted by the defendant. As is clear, the Act contemplates and provides for a bifurcated process. In due course, the defendant will have the opportunity to proceed in a fashion that will necessitate a merits based determination.

¶ 85 The defendant's motion brief was filed December 16, 2003. In its brief, it argued that the action should be stayed and/or the motion adjourned pending the hearing of a certification motion in the proceeding commenced in Ontario. In early January 2004, I allowed the defendant's application for adjournment. Thereafter, as referred to in these reasons, a settlement agreement was negotiated in respect of the Ontario proceeding (as has also occurred in British Columbia and in Quebec). When the plaintiffs' certification motion was argued before me on September 8, 9 and 10, 2004, the application for stay of this action was not renewed.

¶ 86 Notwithstanding that, I would be prepared to entertain such a motion at this time should either party wish to apply. There is clearly a tension between the interests of the plaintiffs and of the defendant. But the jurisprudence tells us that two of the advantages of a class action proceeding are judicial economy and the avoidance of unnecessary duplication of fact-finding or legal analysis. In my view, this applies to a possible multiplicity of proceedings not simply within a province, but throughout the country.

¶ 87 In this case, as I have already written, the plaintiffs' counsel acknowledged that the Newfoundland and Labrador proceeding (Wheadon) was virtually identical in terms of facts, evidence and issues to this action. What is the judicial economy of having proceedings go forward in two provinces and with the accompanying risk of inconsistent findings?

¶ 88 On the other hand, I understand that the plaintiffs who are residents of Manitoba have an entitlement to their day in court with reasonable dispatch. Again, however, the jurisprudence tells us that the court should attempt to strike a balance between efficiency and fairness. While recognizing the interests of the plaintiffs, is it fair that the defendant should have to defend essentially the same action in more than one province?

¶ 89 Regrettably, there is no legislation that would take control of a class proceeding for all of Canada. I am told by counsel that there is often informal accommodation achieved between counsel for the various parties. In my view, that is something that ought certainly to be done here. A stay of this action for a period of time to permit such attempts to be concluded is something that may be considered by the parties or may be sought by the defendant.

MacINNES J.

QL UPDATE: 20050118
cp/e/qlemo

Case Name:

Walls v. Bayer Inc.

Between
Marilyn Walls and Ethel Nick, (plaintiffs)
respondents, and
Bayer Inc., (defendant) applicant

[2005] M.J. No. 286
2005 MBCA 93
Docket No. AI05-30-06063

Manitoba Court of Appeal
Kroft J.A.
(In Chambers)

Heard: April 14, 2005.
Oral judgment: August 10, 2005.
(36 paras.)

$* <QL:MLBKWDS/>Ž$*

Civil procedure — Parties — Class or representative actions — Certification.

Civil procedure — Appeals — Leave to appeal — Application for leave to appeal a decision certifying the plaintiffs' action as a class proceeding dismissed — The Class Proceedings Act, ss. 36.

Application by the defendant, Bayer, for leave to appeal from an order certifying the within proceeding as a class action. Walls and Nick commenced the within product liability action under The Class Proceedings Act. They claimed that they suffered injuries as a result of their use of a cholesterol lowering prescription drug named Baycol which was dispensed by Bayer. Walls and Nick sued on their own behalf and on behalf of persons resident in Manitoba and elsewhere who used Baycol and who claimed personal injuries as a result.

HELD: Application dismissed. At the time of the application there were six actions, which were underway or pending. All involved Bayer, the product Baycol and the illness Rhabdomyolysis. Based in part on the commonality of facts and issues, the certification as a class action was appropriate. The proceedings raised issues of public importance and it could be safely said that the plaintiffs had a reasonable prospect of success as regarded the issues determined by the certifying judge.

Counsel:

E.W. Olson, Q.C., P.J. Cavanagh and S. Mattheos for the Applicant

D.A. Klein and W.P. Forbes for the Respondents

[Editor's note: A Corrigendum was released by the Court August 16th, 2005. The correction has been made and the Corrigendum is appended to this document.]

KROFT J.A.:—

Introduction

¶ 1 The applicant, the defendant in this action, has moved for leave to appeal from the order certifying the proceeding as a class action. I would deny leave but, because the class action is a novel proceeding in Manitoba, my reasons will be somewhat longer than is usually the case in a routine leave application.

¶ 2 This is a product liability action commenced under The Class Proceedings Act, C.C.S.M., c. C130 (the CPA), proclaimed to be in force in Manitoba as of January 1, 2003. In the past in this province and most others, there was a single rule of court to govern what was referred to as the "joinder of causes of action." It was frequently expressed in the same language as Rule 58 of Manitoba King's Bench Rules of 1939, that is:

> Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorized by the court to defend on behalf of or for the benefit of, all.

¶ 3 The old joinder rule offered little help to multiple parties in defining the class, establishing the necessary degree of commonality of fact, describing cause of action or remedy sought, determining the representative of the class, or dealing with additions to or deletions from the class.

¶ 4 In modern times and a shrinking world, given the kind of complex litigation arising out of disputes about manufacturers' liability, public health services, environmental issues, public trading in mutual funds and other activity with significant commonality, it became obvious that a consistent and detailed code of procedure was required to define, create and manage class actions on behalf of litigants with common claims and to assist courts in the discharge of their responsibility for fair, expeditious and efficient conduct of class proceedings.

Relevant Statutory Language

¶ 5 The Queen's Bench Rules themselves do not meet the need which the CPA was intended by legislators to serve. A reading of the CPA makes clear that it is designed to be a separate and special code of civil procedure for use in class actions. I will not quote any particular section of the statute but the certifying judge did cite numerous provisions which illustrate the point I have made.

¶ 6 Legislation of this kind has long been in effect in American jurisdictions, but it was not until 1978 in Quebec and until 1993 in Ontario that the first collective proceedings legislation was introduced in Canada. Most of the country has now followed this lead and, as I pointed out, the CPA in Manitoba was proclaimed just over two years ago. It is similar in form to class legislation elsewhere.

¶ 7 The action before us, which was commenced on February 3, 2003, is one of the first to receive detailed scrutiny by this court. In particular, I do not believe that there have been any actions that have called upon our Court of Appeal to perform an extensive examination of what must be considered when certifying a class action. That process determines if there should be a class action at all; who will be or may become parties to the action; who will be the representative for the class; and what issues (for example. the alleged negligence and causation of damages) will be addressed. The application for

certification is the first step in a specific and detailed procedure that imposes upon the certifying judge a specific and ongoing case management responsibility. Within that responsibility lays the adding and deleting of parties, the redefining of issues and the guiding of settlement negotiations.

General Review of Facts and Inferences

¶ 8 The situation now before us involves the prescribing to and ingestion by the plaintiffs (two retired citizens living in Manitoba) of a cholesterol-lowering prescription drug named Baycol which was dispensed by the applicant. The plaintiffs commenced their action against the applicant alleging that they have suffered injury as a result of their use of that product. They have sued on their own behalf and on behalf of persons resident in Manitoba and elsewhere who used Baycol and who claimed personal injuries as a result.

¶ 9 Baycol is a prescription medicine in the class of drugs known as "statins." It was marketed in Canada by the applicant from March 1998 to August 2001, with the approval of Health Canada. Statins generally are employed in the treatment of coronary heart disease and arterial sclerosis. The defendant, however, removed Baycol from the other statins being dispensed in August 2001, due to increased reports of serious painful side effects, including Rhabdomyolysis, an acute medical condition that results from the breakdown of muscle cells and can be fatal. There is nothing in this brief summary which is disputed by the applicant, except of course any suggestion that it is legally liable.

¶ 10 It is for themselves and others like them that the plaintiffs seek to have the action certified and Mrs. Walls designated as the representative plaintiff.

¶ 11 The certification judge was obviously aware that he was breaking new ground in Manitoba, which included defining the meaning of "leave to appeal" in the context of the CPA. His 38-page judgment carefully sets forth the particular facts of this case and analyzes the initial and ongoing reasons for the requirements stipulated by the legislation.

¶ 12 In his order, he concluded that this action ought to be certified and, amongst other things, ordered that:

> 1. The class in respect of which this Order is made (the "Class") is described as:
> (i) All persons resident in Canada, excluding residents of Saskatchewan, Quebec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador, who were prescribed and ingested Baycol which was purchased in Canada and who claim personal injury as a result; and
> (ii) All persons who have a derivative claim on account of a family relationship with such a person described in sub-paragraph 1(i),
>
> provided that, notwithstanding the foregoing, every person who qualifies as a member of a class in an action pending in the Ontario Superior Court of Justice as Court File No. 01-CV-216773 CP (the "Coleman Action") or in an action pending in the Supreme Court of British Columbia as Court File No. S014776 Vancouver Registry (the "Bouchanskaia Action") in which orders were made certifying each of such actions as a class proceeding for the purpose of giving effect to a settlement and which approved the settlements in each action providing, among other things, for compensatory payments to persons who ingested Baycol and contemporaneously therewith suffered from Rhabdomyolysis, as defined in such settlements, and to persons who, on account of a family relationship to any one or more of such persons, assert a derivative claim for

compensation, shall be excluded from the Class in this proceeding

¶ 13 As required by the statute, he also designated the representative plaintiff, named the class counsel, described the nature of the claims asserted, named the forms of relief sought, and described the common issues. In so doing, he accepted that the CPA contains many procedures that are different from, or in addition to, the Queen's Bench Rules. He showed that for purposes of the CPA an order of certification is a procedure quite separate from the determination of liability and remedy.

¶ 14 Counsel for the applicant, in both their written brief and their oral arguments, forcefully submitted that this action should not have been certified. They asserted that the judge had erred in either law or principle, thereby leading him to misinterpret or misconstrue the evidentiary burden which is required for certification. Another assertion by the applicant's counsel was that the class and commonality issues had been defined in overly broad terms thereby leading to unwarranted linkages of issues by the judge.

¶ 15 Whether one agrees that all of the findings of the judge have been proved is not the key question. As long as he made no conspicuous errors of fact or law, he was bound only to exercise his discretion in a fair and reasonable way. The task of an appellate court in a situation like this is to determine from the CPA and the case law whether there is an identifiable issue of sufficient importance and complexity to dismiss certification and to leave it to the individual plaintiffs and others to pursue their claims on their own.

¶ 16 That is to say, the purpose of a certification application is not to establish a prima facie case or such a degree of certainty that it can be said that the action will likely meet with success after trial. Rather, it is to establish at least some factual basis for each of the certification requirements. Without success in that regard, the gate to a class action will not open.

¶ 17 The CPA does not create new substantive law or causes of action. As already noted, it is fundamentally a code of civil procedure to regulate the conduct of proceedings. It provides the rules for defining, certifying, adding or removing parties, settling issues and appealing orders in a class action.

General Principles

¶ 18 In addressing the certification application, the certifying judge referred in detail to those provisions of the CPA which have already been mentioned in these reasons, and which provide a useful and consistent guide for the determination of any certification application. I will also cite, without much elaboration, three Supreme Court judgments which identify a number of important general principles pertaining to class actions. They were all released in 2001. Later, I will address some pending and relevant actions in Canada which actually involve the applicant and the product Baycol.

¶ 19 The Supreme Court cases to which I alluded are Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46, Hollick v. Toronto (City), [2001] 3 S.C.R. 158, 2001 SCC 68, and Rumley v. British Columbia, [2001] 3 S.C.R. 184, 2001 SCC 69.

¶ 20 Dutton was an Alberta case commenced prior to the introduction of that province's class action legislation. Although it took the form of an action for summary judgment and a motion to strike out pleadings, Chief Justice McLachlin made it quite clear that she was addressing the case as if it were a class action proceeding. Hollick and Rumley emanated from Ontario and British Columbia where the legislation is very similar to that in Manitoba. In both of those cases the judgments of the Supreme Court were also written by McLachlin C.J.C.

¶ 21 I will not repeat all of the important statements quoted by the Manitoba certification judge from these judgments. I am, however, persuaded that he was correct in applying the principles which were so effectively articulated by the Chief Justice.

¶ 22 Further support for the certifying judge's approach can be found in the recent Ontario judgment of M.C.C. v. Canada (Attorney General), [2004] O.J. No. 4924, a native residential school case. Writing for the court, Goudge J.A. said (at para. 37):

> Speaking for the Court at paras. 14-16, McLachlin C.J.C. made clear that in light of its legislative history, the CPA should be construed generously and that an overly restrictive approach must be avoided in order to realize the benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause harm. She underlined the particular importance of keeping this principle in mind at the certification stage.

Standard for Granting Leave to Appeal

¶ 23 Against this background of legislation and precedent, the court is obliged to answer the question of whether it can and should grant leave to appeal from the order that the action be certified as a class action under the CPA. It is evident from the words of the statute that appeals from routine interlocutory orders were contemplated by the drafters. What is also obvious, however, is that special and separate attention is given in the CPA to orders granting or refusing certification. Appeals regarding judgment on identified common issues may be taken without leave (s. 36(1)). With leave, there may be an appeal from any order determining an individual claim or dismissing an individual claim for monetary relief (s. 36(3)). Finally, under a separate subsection, there is a provision stipulating that with leave, any plaintiff or defendant may appeal an order certifying or refusing to certify a proceeding as a class proceeding (s. 36(4)).

¶ 24 I trust that I have made clear my opinion that orders for certification or decertification are a question unto themselves and are not to be treated as if they were ordinary Queen's Bench Rules. I should qualify that statement somewhat by pointing out that the provisions of the CPA have a similarity of purpose to Queen's Bench Rule 20A. As with Rule 20A, the CPA was designed to provide tools for pre-trial conferences and settlement negotiation.

¶ 25 A fair and generous interpretation of the language of the CPA itself and the approach of the Supreme Court, leave me convinced that a certification order is not necessarily to be taken as confirmation that the claim is likely to succeed. It is only a reasonable opinion on the part of the certification judge that the suit is appropriately brought as a class action; that is, in a form that offers a means of efficiently and economically resolving the disputes in a manner that is fair to all parties.

¶ 26 Even under the Queen's Bench Rules, there are different standards required to succeed on an application for leave to appeal, depending on the circumstances. In the case of orders by statutory boards and tribunals, the specific legislation in issue usually requires a demonstration of an error in law or the commission of a jurisdictional excess. With judicial review we are concerned about issues of reasonableness and correctness. Over and above these matters, it may be said that where leave to appeal an order is required, an appellant must show that the contemplated application (a) raises issues of sufficient public importance to merit appellate consideration and (b) has a reasonable prospect of success. See, for example, Fillion v. Manitoba Public Insurance Corp. (2004), 10 C.C.L.I. (4th) 182, 2004 MBCA 61, Lejins v. Manitoba Public Insurance Corp. (2003), 50 C.C.L.I. (3d) 1, 2003 MBCA 95, and West-Man Culvert & Metal Co. v. Manitoba (Provincial Municipal Assessor) (1992), 81 Man.R.

(2d) 112 (C.A.).

Current Actions Involving Baycol

¶ 27 The matter before me now offers an opportunity to examine how courts in similar situations are approaching this question of certification in Canada. There are presently six actions which are or were underway. All involve the applicant, the product Baycol and the illness Rhabdomyolysis.

¶ 28 The jurisdictions where these proceedings have been launched are British Columbia: see Bouchanskaia v. Bayer Inc., [2003] B.C.J. No. 1969, 2003 BCSC 1306; Saskatchewan, Manitoba, Ontario: see: Coleman v. Bayer Inc., [2004] O.J. No. 1974 (S.C.J.), supplementary reasons [2004] O.J. No. 2775 (S.C.J.), Quebec and Newfoundland. All are relevant but the Newfoundland proceeding is the most germane to us.

¶ 29 I have mentioned that to us the most relevant of the Bayer proceedings is taking place in Newfoundland. In Wheadon v. Bayer Inc. (2004), 46 C.P.C. (5th) 155, 2004 NLSCTD 72, a certification application was heard and an order granted after Barry J., of the trial division, concluded that the plaintiffs had satisfied the necessary certification standards. The facts in that case were as similar as they could be to ours and the legislation is without material difference.

¶ 30 When the application hearing took place in Manitoba, the certification judge was told that "the facts, evidence and issues in this case are virtually identical to those in Wheadon" (at para. 13). He was also informed that the Newfoundland certification order was under appeal. Nonetheless, the reasoning of the Newfoundland judge was adopted here in Manitoba, without waiting for a result.

¶ 31 I was able to proceed with more certainty than the certification judge because on April 14, 2005, the Newfoundland court dismissed the application for leave (sub nom. Bayer Inc. v. Pardy, [2005] N.J. No. 122, 2005 NLCA 20), and the reasons became available during the course of our hearing.

¶ 32 Under the Newfoundland rules of court, an application for leave to appeal the certification by the trial judge was heard by three appellate court judges, rather than by a single chambers judge. Roberts J.A., writing for a unanimous panel, directed that the application for leave to appeal should be dismissed with costs.

¶ 33 Because I have attached significance to the reasons of Justice Roberts, I will offer several quotations from what he lists under the heading "considerations" (at paras. 9, 11, 12, 14):

> Regarding leave to appeal from interlocutory orders dealing with procedural matters, the default position is that leave should be granted sparingly. That has been the clear message of this Court for some time and was given confirmation in an earlier application for leave to appeal in this same proceeding. ...
> Simply put, a certification order is not necessarily final and will be subject to variation, and even to cancellation, if circumstances change. It is fundamentally a matter of case management. ...
> A similar reticence to interfere has been expressed by the Ontario Court of Appeal. Carthy J.A. in Anderson v. Wilson (1999), 175 D.L.R. (4th) 409, at para. 12 wrote:
>
> > I am mindful of the deference which is due to the Superior Court judges who have developed expertise in this very sophisticated area of practice. The Act provides for flexibility and adjustment at all stages of the proceeding and any

> intervention by this court at the certification level should be restricted to matters of general principle.
>
> ... There is no reason to doubt the correctness of the certification order, particularly having regard to s. 11(1) of the Act which allows for variation of the order, and even decertification, as the action progresses. The court does not consider that the appeal involves a matter of such importance that leave should be granted, and while it is correct to say that any appeal of the certification order following judgment will lack practical effect, the intended appellant's interest will be protected throughout, both by s. 11 of the Act and its right to appeal the eventual judgment on the merits. Lastly, there is no overarching interest of justice dictating that leave to appeal should be granted. [See Note 1 below]

Note 1: Section 11 of the Newfoundland and Labrador Class Actions Act corresponds to s. 10 of the CPA in Manitoba, although the language is not identical

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¶ 34 While that judgment is not one that necessarily binds this court, it is one which has considerable persuasive significance. The same approach was used by the Manitoba Queen's Bench judge in the proper use of his discretion.

Conclusion

¶ 35 I believe from the principles that I have reviewed and from the commonality of facts and issues, that the certification of a class action is appropriate. There can be little doubt that these proceedings raise issues of public importance and it can safely be said that both on the facts and the history to which I have referred, the plaintiffs have a reasonable prospect of success as regards the issues defined by the certifying judge. It is based on the foregoing comments that I came quite confidently to the conclusion which I presented at the beginning of these reasons.

¶ 36 It is ordered that the applicant's application for leave to appeal the certification order is dismissed without costs to any party.

KROFT J.A.

* * * * *

CORRIGENDUM

Released: August 16, 2005.

1) By virtue of s. 37(1) of The Class Proceedings Act, C.C.S.M., c. C130, no costs may be awarded again any party with respect to this proceeding. Accordingly, para. 36 is amended to provide that: "It is ordered that the applicant's application for leave to appeal the certification order is dismissed without costs to any party.

KROFT J.A.

QL UPDATE: 20050812

cp/e/qw/qlscw

Case Name:

Walton v. Mytravel Canada Holdings Inc.

Between
Thomas Walton, Dr. Vance Chow and Megan Engedahl,
suing by her litigation guardian, Wendy Engedahl,
plaintiffs, and
Mytravel Canada Holdings Inc., Skyservice Airlines
Inc., Signature Vacations Ltd., Ian Rampersaud and
Maria Sousa, defendants

[2006] S.J. No. 373
2006 SKQB 231
Q.B.G. No. 1055/2004

Saskatchewan Court of Queen's Bench
Judicial Centre of Saskatoon
Dovell J.

Judgment: May 16, 2006.
(86 paras.)

Civil procedure — Parties — Class or representative actions — Certification — Common interests — Members of class — Representative plaintiff — Application by the plaintiff to certify his action against an airline and other defendants for damages suffered from a flight delay dismissed — Statement of claim did not disclose a cause of action against the defendants — There was no identifiable class of passengers who had a common cause of action against anyone — Class action was not the preferable procedure — Proposed representative plaintiff was not appropriate.

Transportation law — Aeronautics — Regulation — Airlines — Liability — Application by the plaintiff to certify his action against an airline and other defendants for damages suffered from a flight delay dismissed — Statement of claim did not disclose a cause of action against the defendants — There was no identifiable class of passengers who had a common cause of action against anyone — Class action was not the preferable procedure — Proposed representative plaintiff was not appropriate.

Transportation law-- Carriers — Liability — Application by the plaintiff to certify his action against an airline and other defendants for damages suffered from a flight delay dismissed — Statement of claim did not disclose a cause of action against the defendants — There was no identifiable class of passengers who had a common cause of action against anyone — Class action was not the preferable procedure — Proposed representative plaintiff was not appropriate.

Application by Walton for certification of his action as a class proceeding — Walton brought the action in connection with an international flight he was on that departed from Punta Cana in the Dominican Republic to Regina and Saskatoon on January 21, 2004 — Flight was delayed in Punta Cana for an hour and a half because of mechanical difficulties — Delay resulted in uncomfortable conditions for the passengers — Walton sought to certify the action on behalf of the 215 passengers on the flight — Statement of claim alleged negligence, unlawful confinement and breach of contract — ***HELD:*** *Application dismissed — Potential claims against the defendants were governed by the Convention for*

the Unification of Certain Rules for International Carriage by Air — Convention was incorporated into the laws of Canada — It provided that the carrier was liable for death or bodily injury only if the accident that caused the death or injury occurred on board the aircraft or during any of the operations of embarking or disembarking — It also provided that any claim for damages of a passenger against a carrier could only be brought within the ambit of the Convention — Statement of claim did not disclose a cause of action against the defendants because Walton failed to prove that any of the passengers suffered a bodily injury, as required by the Convention — Since there was no evidence of bodily injury there was no identifiable class of passengers who had a cause of action against anyone — There were also too many variable in the various claims that were advanced — Due to the impossibility to identify an identifiable class it would be unrealistic to find that there were common issues between all of the passengers and the defendants — There were numerous scenarios that depended on the unique and specific circumstances of each passenger — There was less likelihood that there were any common issues that could be applied straight across the board — Class action was not the preferable procedure — It would be completely unmanageable — Certification would result in a multitude of individual trials which would completely override any advantage that might be derived from a trial of a few potential common issues — Court also had concerns about the deficiency of the proposed litigation plan — There was no detail in Walton's plan that allowed the court to assess the ability of the action to proceed in a class context — If any of the passengers were to pursue individual claims such claims would be straightforward pursuant to the provisions of the Convention — Walton was not the appropriate person who could fairly and adequately represent the interests of the class.

Statutes, Regulations and Rules Cited:

Carriage by Air Act, R.S.C. 1985, c. C-26, s. 2(2.1), Schedule VI, Schedule VI, Chapter I, Article 1, Schedule VI, Chapter I, Article 4, Schedule VI, Chapter III, Article 17(1), Schedule VI, Chapter III, Article 29

Class Actions Act, S.S. 2001, c. C-12.01, s. 2, s. 2, s. 4(2) (a), s. 4(2)(b), s. 6, s. 6(a), s. 6(b), s. 6(c), s. 6 (d), s. 6(e), s. 7, s. 7(1), s. 9

Convention for the Unification of Certain Rules for International Carriage by Air, Article 17, Article 17 (1), Article 17.1, Article 29, Article 30, Article 30(1), Article 43, Chapter V, Chapter V, Article 39

Saskatchewan Queen's Bench Rules, Rule 82

Counsel:

Ronald P. Piché for the plaintiffs

Bruce W. Wirth for the defendants

JUDGMENT

¶ 1 **DOVELL J.**:— The plaintiff, Thomas Walton, the representative plaintiff, applies for certification of this action pursuant to *The Class Actions Act*, S.S. 2001, c. C-12.01, on behalf of himself and the other passengers of an international flight being Flight 361 from Punta Cana, Dominican Republic, to Regina and Saskatoon, Saskatchewan, Canada, on January 21, 2004. The flight was delayed for about an hour and a half at the Punta Cana airport as a result of several evolving mechanical difficulties referred to by the pilot as a "creeping delay" resulting in uncomfortable conditions on the

airplane for the passengers.

A. Background

¶ 2 On June 21, 2004, a statement of claim was issued with regard to this case and on October 20, 2004, an amended statement of claim brought under *The Class Actions Act*. In response, on November 29, 2004, a statement of defence was entered on behalf of all of the defendants. Subsequently there has been with the consent of counsel for the plaintiff an amended statement of defence made on February 3, 2005, and an amended amended statement of defence made on February 24, 2006.

¶ 3 On February 21, 2005, an order was made pursuant to s. 4(2)(a) of *The Class Actions Act* appointing myself as a Justice of this Court to hear the certification application pursuant to s. 4(2)(b) of the Act.

¶ 4 Prior to the actual certification hearing counsel for the defendants objected to the form of the notice of motion in that it was not in strict compliance with Form 5D which resulted in the plaintiff redrafting the notice of motion for certification brought under *The Class Actions Act*.

¶ 5 Argument of the certification application was actually made on February 24, 2006; however, counsel for the plaintiff was given until March 3, 2006, to file case law with regard to the narrow issue of the meaning of "bodily injury" within Article 17 of the Montreal Convention of 1999 and counsel for the defendants was given until March 10, 2006, to file any material in reply. Three cases were provided to the Court by plaintiff's counsel who requested the opportunity of presenting further oral argument to the Court which the Court heard on April 28, 2006.

¶ 6 In support of the certification application the applicant filed two affidavits of the proposed representative plaintiff, Thomas Walton, and an affidavit of Randy Slusar, the son-in-law of Thomas Walton, who both were passengers on Flight 361.

¶ 7 The defendants filed five affidavits of flight attendants, including those of Brenda Martin, Louanne Mountain, Sheila Johnstone, Nancy McEwen and Alejandra Rosenberg; the affidavit of Maria Xavier (Sousa), the customer service manager of Flight 361; the affidavit of the pilot of Flight 361, Ian Rampersaud; the affidavit of Joel Birnbaum, the director of claims and facilities of MyTravel Canada Holidays Inc.; the affidavit of Marylou Lavalle, supervisor with customer relations at Skyservice Airlines Inc.; and the affidavit of Christina Groth, vice president of aviation and operations of Signature Vacations.

B. Nature of The Claim

¶ 8 The statement of claim seeks to bring the action on behalf of 215 passengers who boarded a Skyservice Boeing 757 200 aircraft, Flight 361, at approximately 4:10 p.m. on January 21, 2004, in Punta Cana with destination to Regina and Saskatoon. The plaintiff claims damages on his behalf and on behalf of all members of the class of plaintiffs which he seeks to represent in this class action for negligence for which he alleged all of the defendants are liable; unlawful confinement on the part of the defendant, Rampersaud and breach of contract with regard to the defendants, MyTravel and Signature.

¶ 9 Specifically, the following pleadings are contained in the amended statement of claim:

> 15. This action is brought on behalf of the Plaintiffs in their own right and ... as representatives of all passengers of the aforementioned Flight 361 and all

passengers who have suffered personal injury, economic loss or damage as a result of the events described in Paragraph 10 herein.

...

17. The Plaintiffs state that each Defendant was negligent in its dealing with the Plaintiffs and each Defendant owed a duty of care to them. The Plaintiffs state that each defendant, *inter alia*:

    (a) Owed each Plaintiff a duty of care to ensure that their health and well-being were maintained during the flight;
    (b) Knew that a breach of its duty would cause serious and severe damages to the Plaintiffs;
    (c) Knew or ought to have known of the potential for extreme heat in Puna [*sic*] Cana and should have taken all reasonable precautions to ensure that there were no excessive delays after the Plaintiffs boarded the aircraft. The Plaintiffs state that the Defendants were negligent in not taking such precautions;
    (d) Knew or ought to have known of mechanical difficulties which could arise with the operation of the aircraft and failed to properly maintain and repair it. The Plaintiffs state that the defendants were negligent in not properly maintaining and repairing the aircraft;
    (e) Knew or ought to have known that the Puna [*sic*] Cana airport did not have a properly functioning air conditioning cart and should have made alternate arrangements as a result or, alternatively, taken additional precautions to ensure that there were not excessive delays after the Plaintiffs boarded the aircraft. The Plaintiffs state that the Defendants were negligent in not making proper arrangements or taking such precautions;
    (f) Knew or ought to have known that Puna [*sic*] Cana airport would require satisfactory advance payment for the use of the air conditioning cart or alternatively, would require approved credit for use [of] the air conditioning cart. The Plaintiffs state that the Defendants were negligent in not having available funds to utilize the cart or for failing to have proper financing in place;
    (g) Knew or ought to have known that proper financing for the use of the Puna [*sic*] Cana airport, its equipments, and facilities was required in order to utilize its airport services. The Plaintiffs state that the Defendants were negligent in not having financing in place at Puna [*sic*] Cana;
    (h) Such further and other acts not now known to the Plaintiffs.

18. The Plaintiffs state that the Defendants SkyService, Rampersaud, and Sousa were also negligent in that they, *inter alia*:

    (a) Failed to provide water and other necessaries in order to sustain and/or comfort the Plaintiffs during their ordeal;
    (b) Failed to properly stock the aircraft with water and other necessaries in order to sustain and/or comfort the Plaintiffs during their ordeal;
    (c) Failed generally to attend to the needs of the Plaintiffs during their ordeal;
    (d) Such further and other acts not now known to the Plaintiffs.

19. The Plaintiffs state that the Defendant, Rampersaud, is liable for the tort of unlawful confinement by refusing to permit the passengers to disembark from the aircraft during the period in question after several passengers had requested that they be allowed to leave. The Plaintiffs further plead and rely upon the Airline Pilots Association Code of Ethics in support of their claim.
20. The Plaintiffs state that the defendant, SkyService, is vicariously liable for the acts of the Defendants Rampersaud and Sousa, as Rampersaud and Sousa were acting throughout in their capacity as employees of SkyService and/or as agents and or designates of SkyService.
21. The Plaintiffs state that the Defendants My Travel and Signature have breached their contract with them, a term of which either expressly or impliedly was, *inter alia*, that:

    (a) The air transportation-certified carrier hired would provide safe, comfortable, trouble-free and secure air travel;
    (b) The air transportation-certified carrier hired would be properly financed and/or have a proper line of credit in order to utilize the equipment and facilities at the airports frequented by the air transportation-certified carrier;
    (c) The reasonable efforts had been made in selecting the air transportation-certified carrier utilized;
    (d) such further and other breached not now ascertained by the Plaintiffs.

22. The Plaintiffs hereby plead the provisions of the *Warsaw Convention* as they may apply to this action and in particular rely on Articles 1, 19 and 20.
23. The Plaintiffs state that a purported disclaimer regarding liability as a result of the actions or inactions of the air transportation-carrier is of no force and effect as it was not part of the terms of the contract and was communicated after consideration had been paid to the Defendants.
24. The Plaintiffs state that the conduct and actions of the Defendants, SkyService, MyTravel, Signature, Ian Rampersaud and Maria Sousa, were high-handed, callous and arrogant, warranting exemplary and/or punitive damages. The Plaintiffs state the utter disregard shown for their welfare and the Defendant's attempts to profiteer from the Plaintiff's thirst warrant increased damages.

¶ 10 The amended amended statement of defence of February 24, 2006, raises numerous defences including the following as plead:

10. In response to the entire Amended Statement of Claim and in response to all of the causes of action alleged against the various defendants, the defendants state that the three named plaintiffs, and all other passengers on Flight 361, were travelling on a journey of international carriage by air, departing from Canada and returning to Canada, with an agreed stopping place in Punta Cana of the Dominican Republic. Accordingly, the rights and obligations of the parties are governed exclusively by the Convention for the Unification of Certain Rules for International Carriage by Air (the "Montreal Convention, 1999"), which is incorporated into the laws of Canada by the *Carriage by Air Act*, as amended, R.S.C. 1985, c. C-26 (hereinafter referred to as the "Convention").
11. The defendants state that the claims of the named plaintiffs and of any other passengers on Flight 361 are governed by the Convention, which provides the sole cause of action and only remedy for all claims arising in relation to Flight

361, including all claims for damages for bodily injury suffered by passengers. Article 17, paragraph 1 and Article 29 of the Convention read as follows:

> "17.1 The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.
>
> ...
>
> 29. In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable."

12. The defendants state that the plaintiffs have no cause of action against any of the defendants by reason of the following:

    (a) none of the plaintiffs suffered a bodily injury within the meaning of Article 17, paragraph 1 of the Convention; and
    (b) if any of the plaintiffs did suffer a bodily injury, which is not admitted but denied, the bodily injury was not caused by an accident within the meaning of Article 17, paragraph 1 of the Convention.

...

13. In the alternative, the defendants deny any negligence, breach of contract or unlawful confinement on their part. The defendants further deny that the doctrine of res ipsa loquitor has any application to the facts of this case.

C. *The Class Actions Act* and *The Queen's Bench Rules*

¶ 11 The following provisions of the Act have application to the certification application before the Court:

Interpretation
2 In this Act:
...

> "class" means two or more persons with common issues respecting a cause of action or a potential cause of action; ... "common issues" means:
>
> (a) common but not necessarily identical issues of fact; or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;
...

Class Certification
6 The court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:

(a) the pleadings disclose a cause of action;
(b) there is an identifiable class;
(c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
(d) a class action would be the preferable procedure for the resolution of the common issues; and
(e) there is a person willing to be appointed as a representative plaintiff who:

(i) would fairly and adequately represent the interests of the class;
(ii) has produced a plan for the class 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 other class members.

Certification application 7(1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced.

(2) An order certifying an action as a class action is not a determination of the merits of the action. ... **Certain materials no bar to certification 9** The court shall not refuse to certify an action as a class action by reason only of one or more of the following:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
(b) the relief claimed relates to separate contracts involving different class members;
(c) different remedies are sought for different class members;
(d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable;
(e) the class includes a subclass whose members have claims that raise common issues not shared by all the class members.

¶ 12 In respect of *The Queen's Bench Rules* applicable upon a certification application, Rule 82 provides:

Application for Certification
82(1) A Notice of Motion for Certification pursuant to clause 4(2)(b) or section 5 of the Act shall be in Form 5D.

(2) An application for a certification order pursuant to section 4 of the Act must be supported by an affidavit of the proposed representative plaintiff:

(a) deposing to the proposed representative plaintiff's willingness to be

appointed;

(b) setting out the basis of the proposed representative plaintiff's personal claim, where applicable, and the reason the proposed representative plaintiff believes that common issues exist for the rest of the members of the class;

(c) setting out objective criteria for determining membership in the proposed class, and providing the proposed representative plaintiff's best information on the number of members in the proposed class;

(d) setting out sufficient information to establish that the proposed representative plaintiff would fairly and adequately represent the interests of the class and is aware of the responsibilities to be undertaken;

(e) exhibiting a plan for the class action that sets out a workable method of:

  (i) advancing the action on behalf of the class; and
  (ii) notifying class members of the action; and

(f) setting out sufficient information to establish that the proposed representative plaintiff does not have, on the common issues, an interest that is in conflict with the interests of other class members.

D. Analysis

¶ 13 Although the applicant argued that if ever there was a case that should be certified, this case was it as it involved a defined group of passengers in a confined space, being an airplane, over a small period of time, the defendants opposed the certification application on the basis that none of the five criteria as set out in s. 6 of the Act had been met by the applicant.

¶ 14 The Court agrees. Although the Court would have dismissed the certification application on the sole basis of not meeting the criteria as set out in s. 6(a) of the Act, for reasons that will be thoroughly canvassed in this judgment, it would have also dismissed the certification application on the basis of the other criteria as outlined in s. 6 of the Act not being met for reasons which will be briefly outlined in this judgment.

(1) Section 6(a) - cause of action

¶ 15 The amended statement of claim alleges negligence on the part of all of the defendants, unlawful confinement on the part of the pilot, Rampersaud, and breach of contract as against the defendants MyTravel and Signature Vacations.

¶ 16 As stated by McLellan, J. in *Daniels v. Canada (Attorney General)*, 2003 SKQB 58, 230 Sask.R. 120 at paras. 13-14:

> [13] Suffice it for me to say that although the onus is on the plaintiffs, on a certification application, to satisfy the Court that the pleadings disclose a cause of action, it is not a very high onus.
> [14] The test to be applied in certification applications is similar to those used in applications to strike a statement of claim as disclosing no cause of action. Firstly, all allegations of fact pleaded are to be accepted as true and secondly, pleadings will only be struck if it is plain and obvious that the plaintiffs cannot succeed. In my view a court should be reluctant to deny a plaintiff his or her day in court.

And at paragraph 18:

> [18] The generous approach to be adopted on this application is specifically spelled out in s. 7 of the CAA which provides:
>
> "7(1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced.
>
> "(2) An order certifying an action as a class action is not a determination of the merits of the action."

¶ 17 Accordingly, this Court in determining this certification application has assumed that all of the specific allegations as contained in the amended statement of claim are true.

¶ 18 The question to be determined is whether or not it is plain and obvious that the applicant's claim does not disclose a cause of action.

¶ 19 The defendants argue that the statement of claim does not disclose a cause of action as against any of the defendants as any potential claim that any of the passengers of Flight 361 might possibly have against any of the defendants is governed solely by the provisions of the Montreal Convention of 1999 and that the requirement of Article 17(1), that namely, bodily injury must be established by the applicant has not been met. The Court agrees.

¶ 20 Although the applicant pleaded in his amended statement of claim the provisions of the Warsaw Convention, the applicable convention for consideration of this Court with regard to the passengers aboard Flight 361, being an international flight, is the Montreal Convention of 1999.

¶ 21 The Montreal Convention of 1999 is incorporated into the laws of Canada by the *Carriage by Air Act*, as amended, R.S.C. 1985, c. C-26, and is set out as Schedule VI of the Act. The Montreal Convention of 1999 modernized the Warsaw Convention and became effective on November 4, 2003.

¶ 22 The purpose of the *Carriage by Air Act* as outlined in the preamble of the Statute is as follows:

> An Act to give effect to certain conventions for the unification of certain rules relating to international carriage by air.

¶ 23 There is no question that Flight 361 from Punta Cana, Dominican Republic to Regina and Saskatoon, Saskatchewan, was an international flight and thus the provisions of the *Carriage by Air Act* are applicable.

¶ 24 Section 2(2.1) of the *Carriage by Air Act* states:

> (2.1) Subject to this section, the provisions of the Convention set out in Schedule VI, in so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons, have the force of law in Canada in relation to any carriage by air to which the provisions apply, irrespective of the nationality of the aircraft performing that carriage.

¶ 25 The general relevant provisions of the Montreal Convention of 1999 as contained in Schedule

VI of the *Carriage by Air Act* to this certification application include the following:

Schedule VI

...

Chapter I

General Provisions

Article 1 - Scope of Application

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. ...

...

4. This Convention applies also to carriage as set out in Chapter V [Carriage By Air Performed by a Person Other Than Contracting Carrier], subject to the terms contained therein.

¶ 26 The specific governing sections of the Montreal Convention of 1999 with regard to the defendant, Skyservice, being the carrier, are Articles 17(1) and 29. Those provisions read as follows:

Chapter III

Liability of the Carrier and Extent of Compensation for Damage

Article 17 - Death and Injury of Passengers - ...

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. [Emphasis of the Court.]

... Article 29 - Basis of Claims

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable. [Emphasis of the Court.]

¶ 27 The specific governing provision of the Montreal Convention of 1999 with regard to the defendants, Ian Rampersaud and Maria Sousa, being the servants and/or agents of the carrier, Skyservice, is Article 30(1). It provides:

Article 30 - Servants, Agents - Aggregation of Claims

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is

entitled to invoke under this Convention.

¶ 28 Chapter V of the Montreal Convention of 1999 provides for situations in which the carriage of air was performed by a person other than the contracting carrier. In this case those entities to which Chapter V would be applicable include the defendants, MyTravel and Signature. These operators sold packages to passengers including airfare and then made arrangements with the carrier being Skyservice to include the international flight. Chapter V thus has expanded the applicability of the Convention to entities previously not covered by the Warsaw Convention.

¶ 29 In particular, Article 39 provides:

Chapter V Carriage by Air Performed by a Person Other Than the Contracting Carrier Article 39 - Contracting Carrier - Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

¶ 30 As well, Article 43, like Article 30, provides any servant or agent of a carrier or of the contracting carrier shall, if they prove that they acted within the scope of their employment, be entitled to avail themselves of the conditions and limits of liability which are applicable under the Convention to the carrier whose servant or agent they are.

¶ 31 As previously stated, the Court accepts and agrees totally with the defendants' argument that all of the defendants as named in the lawsuit are governed by the provisions of the Montreal Convention of 1999. That includes the defendant carrier, Skyservice, the contracting carriers, being MyTravel and Signature, and the agents and/or servants of the carrier, being Sousa and Rampersaud. The Montreal Convention of 1999 serves as the exclusive remedy for all passengers in Flight 361 as against all of the defendants.

¶ 32 The wording of Article 29 is clear and obvious. Any claim for damages of a passenger of an international flight against a carrier, contracting carrier or employee of either carrier can only be brought within the ambit of the Montreal Convention of 1999.

¶ 33 The applicant provided to the Court the case of *Ruth Ann Reed, et al. v. Forwood Cloud Wiser, Jr., et al*, 414 F.Supp. 863 (S.D. N.Y. 1976), wherein the issue before the United States District Court for the Southern District of New York was whether the Warsaw Convention's limitation of liability provisions were applicable to employees of TWA. The legislation at the time being the Warsaw Convention had no definition of "carrier" and as such the court found that the Warsaw Convention did not limit the liability of employees or agents of a carrier.

¶ 34 That loophole, so to speak, has been filled by the inclusion in the Montreal Convention of 1999 of the expanded limitation of liability provisions as contained in Article 30(1) to include the servants and/or agents of the carrier in this case being the defendants Sousa and Rampersaud and Article 39 with regard to the contracting carriers in this case being MyTravel and Signature.

¶ 35 The applicant also provided the Court with the decision of *Akehurst and Others v. Thomson Holidays Ltd. and Britannia Airways Ltd.*, a decision from Wales which involved a claim against a commercial passenger airline (Britannia) and a package tour operator (Thomson) arising from a crash landing. Although the court found that the claimants had no right of recovery against Britannia in relation to purely psychological injuries, in view of Article 17, liability was established against the tour operator for psychological injuries not because the tour operator was not covered by the Convention but because of the express terms of a contract as between the tour operator and the plaintiff which allowed for the recovery of such damages. The court in that case was also dealing with the Warsaw Convention of 1929 as opposed to the provisions of the Montreal Convention of 1999, including Chapter V, which now recognizes the existence of both a contracting carrier and actual carrier, and thus was of little assistance to the Court.

¶ 36 Although no specific case law was provided to the Court with regard to the Montreal Convention of 1999, there is ample case law with regard to its predecessor, the Warsaw Convention, as to its exclusive remedy for passengers. Those cases include *Connaught Laboratories Ltd. v. British Airways* (2002), 217 D.L.R. (4th) 717 (Ont. S.C.J.), aff'd (2005), 253 D.L.R. (4th) 601 (Ont. C.A.), at paragraph 26:

> 26 Further, as a question of law, the Warsaw Convention would not be ousted in this situation. The goods were damaged in the course of transit between countries. There is a remedy for that damage provided for in the Warsaw Convention. That being the case, the Warsaw Convention applies regardless of whether there might be other remedies available as a matter of domestic law. ... The Warsaw Convention is meant to be an exhaustive source of remedies for damage sustained as a result of international carriage by air. ...

¶ 37 As well, in *McDonald v. Korean Air* (2002), 26 C.C.L.T. (3d) 271 (Ont. S.C.J.), aff'd (2003), 26 C.C.L.T. (3d) 275 (Ont. C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 160, Hermiston J. concluded Article 17 of the Warsaw Convention was "exclusive and exhaustive" in respect of what the plaintiff could argue in terms of liability allegations.

¶ 38 Another case of note is *Gal v. Northern Mountain Helicopters Inc.* (1998), 54 B.C.L.R. (3d) 87 (B.C.S.C.), aff'd 1999 BCCA 486, 177 D.L.R. (4th) 249, in which the Court accepted that any remedies sought for personal injury suffered on an international flight were confined to the Warsaw Convention. At paragraphs 31 and 32 the court stated:

> [31] As well, I have concluded that the plaintiff has no cause of action in negligence in light of this international carriage by air which brings it within the jurisdiction of the Warsaw Convention. The Warsaw Convention remedy pursuant to Article 17 is exclusive, that is, it extends to all claims made by a passenger against a carrier arising out of international carriage by air. See Article 24(1) and (2).
> [32] If the flight is one to which the Warsaw Convention applies, and I am satisfied that it is, the plaintiff has no claim except for that permitted under the Warsaw Convention. See *Sidhu v. British Airways PLC*, [1997] 1 All E.R. 193 (H.L.).

¶ 39 Accordingly, since Flight 361 was an international flight to which the Montreal Convention of 1999 applied with respect to all of the defendants, it is clear and obvious to this Court that the sole and exclusive claims that can be advanced by the plaintiffs are claims that must be launched pursuant to Article 17, Paragraph 1, of the Montreal Convention of 1999. In light of that, the plaintiffs' claims outside the ambit of the Montreal Convention of 1999 in negligence, breach of contract, unlawful confinement and the request for punitive damages as outlined in the statement of claim do not disclose a

cause of action.

¶ 40 Nor has the applicant established that a cause of action exists within the meaning of Article 17 (1) of the Montreal Convention of 1999.

¶ 41 Article 17(1) of the Montreal Convention of 1999 provides a remedy for passengers who have been injured on international flights. If a passenger sustains a "bodily injury" as a result of an accident which took place on board the aircraft or in the course of embarking or disembarking, the carrier is liable without proof of fault on the part of the carrier. A strict liability regime has been set up with a cap of damages established within the Convention if the passenger fits the criteria as set out in Article 17(1). That would be the sole and exclusive remedy available to the passenger.

¶ 42 It must be established that a passenger sustained a "bodily injury." In this case there is absolutely no evidence of "bodily injury" in any of the materials filed by the applicant, including the amended statement of claim and affidavit material. There is no evidence that any bodily injury was sustained by either the proposed representative plaintiff or any of the other passengers in the aircraft during the international flight.

¶ 43 It is settled law that for a passenger to have access to Article 17(1), the individual must have suffered a bodily injury as opposed to mere mental anguish. The case law, as established, interpreting Article 17 of the Warsaw Convention (almost identical to Article 17 of the Montreal Convention of 1999) is entirely consistent that an individual must have suffered from a bodily injury being a palpable, conspicuous or physical injury (*Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385 (1974)) as opposed to mere anguish or psychological injury.

¶ 44 "Bodily injury" pursuant to Article 17 has been described as "direct, concrete bodily injury as opposed to mere manifestation of fear and anxiety in *Carey v. United Airlines*, 255 F.3d 1044 (9th Cir. 2001).

¶ 45 There is some limited acceptance for psychological injury causally connected to a recognizable bodily injury in very specific circumstances as was determined in *Ehrlich v. Am. Airlines, Inc.,* 360 F.3d 366 (2nd Cir. 2004), as stated by the United States Court of Appeals for the Second Circuit:

> ... Our exhaustive examination of these sources leads us to conclude that a carrier may be held liable under Article 17 for mental injuries only if they are caused by bodily injuries.

¶ 46 Also *Terrafranca v. Virgin Atlantic Airways*, 151 F.3d 108 (3rd Cir. 1998), provided that the only situation in which a psychological injury is compensatory is when the psychological injury flows directly from a bodily injury.

¶ 47 As previously pointed out, the court recently in Wales in *Akehurst and Others v. Thomson Holidays Ltd.* held that the tour operator was not liable for psychological injuries suffered by the claimants as a result of the application of the Warsaw Convention but liable contractually independent of the Warsaw Convention.

¶ 48 Having accepted the allegations as true as contained in the statement of claim, the only facts the Court has before it is that the environmental conditions on the aircraft threatened the health and lives of the passengers. As well, in addition to the prolonged physical pain and duress, the on-going discomfort triggered psychological and/or emotional trauma which increased as the ordeal persisted.

¶ 49 Even if the Court were to consider in addition to the facts pleaded in the statement of claim the evidence as contained in the affidavits of Thomas Walton in determining whether it had "any evidence" of bodily injury, the most that Mr. Walton swore to was that the passengers he could see were sweat-soaked, disrobing and red faced. Babies were crying and even shallow breaths had become difficult for him and his wife.

¶ 50 At best, what has been pleaded is physical discomfort as opposed to bodily injury as contemplated by Article 17(1).

¶ 51 The Court has carefully considered the deficient information as disclosed by the proposed representative plaintiff regarding any "bodily injury" as well as the affidavit material filed by the defendants and, in particular, the five flight attendants and Maria Xavia. All of the flight attendants have sworn that while it was somewhat uncomfortable on the plane before the air conditioning was able to be started, at no time were any medical forms completed by any flight attendant which would have been required if any medical treatment had been sought by any passenger and provided by the flight crew.

¶ 52 Having determined that it has not been established by the applicant that any bodily injury had been sustained by any of the passengers on Flight 361 or that any psychological injury had been sustained as a result of any bodily injury as required within the meaning of Article 17(1) of the Montreal Convention of 1999, as a matter of law it is plain and obvious that the claim does not raise a reasonable cause of action as within Article 17(1) of the Montreal Convention.

¶ 53 The applicant's counsel argued that in the event that the Court was to determine that the Montreal Convention of 1999 was applicable and was to determine that the Applicants had not sustained a "bodily injury", that the Court should allow the applicant to amend its amended statement of claim to bring the claim within the ambit of the Montreal Convention of 1999. That, according to the applicant, was clearly available to the Court pursuant to Section 7(1) of the Act.

¶ 54 The Court is not prepared to grant the applicant leave to amend their claim as, under the circumstances of this case, it would not be appropriate. The Court accepts that the applicant has candidly put forth his best evidence as to what transpired to he and the other passengers before Flight 361 took off for Canada from Punta Cana, Dominican Republic. It would not be feasible to the Court that the applicant would now put forth affidavit material that the passengers all suffered from something other than discomfort or anxiety. On the chance that an individual passenger did sustain a bodily injury, certainly he or she could pursue litigation against the appropriate defendants independent of this application for a class action. But as a class, to allow the applicant the opportunity of amending his materials would serve no useful purpose. If Mr. Walton or any of the passengers had sustained any bodily injury, the Court would have expected that fact to have been pleaded. The Court assumes that it was not pleaded because no passenger on that plane sustained anything more than short term discomfort. While certainly the Court acknowledges that the situation that arose was understandably irritating, at the end of the day, in the year 2004, is to be regrettably expected as part of today's perils of air travel.

¶ 55 For all the reasons as outlined herein the applicant has failed to establish the first criteria as set out in s. 6(a) of the Act, and the application for certification shall be dismissed on that basis alone.

¶ 56 However, in the event the Court is in error in that regard, the Court wishes to briefly outline its reasons why it would have dismissed this application for certification on each of the other four criteria as outlined in s. 6 of the Act.

(2) Section 6(b) - identifiable class

¶ 57 At first blush it would appear that "215 passengers of Flight 361" would certainly be an identifiable class; however, it is not quite that simple.

¶ 58 The applicant bears the onus of establishing that a group of people have the same causes of action against the defendants about common issues. The Court has concern that very few, if any, of the other passengers on the flight other than Mr. Walton and his son-in-law, Mr. Slusar, wish to take action as against the defendants. At most, Mr. Walton in paragraph 19 of his affidavit sworn February 2, 2005, states:

> 19. ... That I have had contact with many of the individuals who were on board this aircraft and attached to this my Affidavit and marked as Exhibit "A" is a list of those people together with their place of residence and phone numbers.

¶ 59 And at paragraph 20(d):

> 20 ...
>
> (d) I have the support of at least 165 passengers, either individually or through a group representative, out of the approximately 215 passengers. These individuals have contacted me and entrusted me to act on their behalf. I believe I would have nearly 100% support of the passengers if I had a way to contact all of them;

¶ 60 The Court has difficulty in accepting that all of these people Mr. Walton is referring to wish to commence an actual action as against the defendants as opposed to just standing behind Mr. Walton. Of significance to the Court is the material filed by the applicant, including statements from several other passengers whose concerns can be categorized as general venting against the airline as opposed to filing a specific complaint, as well as the large amount of evidence as filed by the flight attendants who all consistently have sworn that while the cabin of the aircraft was somewhat uncomfortable for a period of time, at no time was any airline personnel required to complete a medical report for any passenger on Flight 361 which would have been required if any form of medical attention or treatment had been provided on the aircraft. In other words the suggested identifiable class is very overstated and over-inclusive.

¶ 61 An identifiable group is not just a group of people. As stated by our Court of Appeal in *Jameson Livestock Ltd. v. Toms Grain & Cattle Co. Ltd.*, 2006 SKCA 20, [2006] S.J. No. 93, at paragraph 28:

> [paragraph] 28 However, the mere fact that a group of people is identifiable is not sufficient to render them a class for the purpose of a class action. In addition, there must be a rational connection between the proposed class definition, the proposed causes of action and the proposed common issues. In effect, the class description must describe persons who in fact have a claim asserted in the statement of claim. This has often been interpreted to mean that all members of the proposed class must have at least a colourable claim and that the class definition should not be over-inclusive or under-inclusive, sweeping in those who do not have a claim against the proposed defendants or arbitrarily excluding others who share the same cause of action. ...

¶ 62 The individual circumstances of each passenger would have to be analyzed in depth both as to how they booked his or her vacation, their reaction to the unfortunate situation as well as what transpired after the flight, e.g., whether or not they accepted the settlement and cashed in his or her settlement

cheque.

¶ 63 In this case, assuming the passengers exclusive remedies are as contained in the Montreal Convention of 1999, it would have to be established they had sustained a "bodily injury" or a psychological injury resulting from a bodily injury. At this time there is no evidence that the proposed representative or any of the other passengers suffered from any bodily injury as opposed to anxiety. There is no identifiable class of passengers who have a cause of action against anyone and thus there is no identifiable class.

¶ 64 Even in the event any of the passengers were entitled to pursue a claim, there is no properly identifiable class. As stated earlier, there are too many variables in the claims for negligence, unlawful confinement and breach of contract.

¶ 65 With regard to the unlawful confinement as against the pilot, there is only the evidence of Mr. Slusar that he was not allowed to leave the aircraft; no one else. One person, namely, Mr. Slusar, does not constitute a class.

¶ 66 With regard to the claim in negligence, consideration in each case would have to be given to the defendants' duty, particular breach of that duty, the cause of any damage and the particular damages to each passenger in light of the specific circumstances of each individual passenger. If individual circumstances have to be looked at, that is not an identifiable class.

¶ 67 Also the claims of breach of contract as against the defendants, MyTravel and Signature, would need individual analyses into the circumstances of each passenger. Extensive analysis would be needed. Some passengers booked packages through MyTravel, some passengers booked packages through Signature and some passengers booked their trip themselves through the internet or other means. There would be different terms and conditions attached to these different modes of contracts that would have to be analyzed.

¶ 68 As well, there is the matter of 149 of the passengers having signed releases and cashed in the settlement cheques sent to them. What would be required is the individual circumstances of each passenger being analyzed, precluding there being a true identifiable class.

(3) Section 6(c) - common issues

¶ 69 For all the reasons that it would be impossible to identify an identifiable class, it would be unrealistic and almost impossible to find that there were common issues as between all of the passengers and all of the defendants. There are numerous scenarios that would arise depending upon the unique and specific circumstances of each passenger.

¶ 70 It is impossible at this stage to state with any certainty the different situations of the passengers other than to say that there are many different situations and thus there is less likelihood that there are any common issues that can be applied straight across the board.

(4) Section 6(d) - Preferability

¶ 71 The preferability analysis is based on and guided by the three principal advantages of class actions identified by the Supreme Court of Canada in the trilogy: judicial economy, access to justice and behaviour modification.

¶ 72 The number, complexity and significance of the individual issues and common issues are each key components in determining whether a class proceeding is preferable.

¶ 73 While the five factors as outlined in s. 9 of the Act individually are not a basis to refuse certification, it is also quite clear that their presence can be looked at in examining the preferability of a class proceeding.

¶ 74 It is extremely clear that a court is not to simply assume that a class action is a preferable procedure because of its theoretical advantages. There are several U.S. decisions that have denied certification in aircraft accident cases, including *Marchesi v. Eastern Airlines*, 68 F.R.D. 500 (E. N.Y. 1975), and *Sioux City v. United Airlines, Inc.*, 1990 U.S. Dist. LEXIS 181 (N.D. (E. Div.) Ill. 1990).

¶ 75 As stated in numerous cases, such as the case here, a class action is not a preferable procedure where the causes of action, the damages alleged and the issues proposed by the plaintiff as being common were dependent upon the class members individually establishing their claims against the defendant.

¶ 76 Considering the facts of this case, as a whole, a class action would be completely unmanageable, and certification would result in a multitude of individual trials which would completely override any advantage that might be derived from a trial of a few potential common issues.

¶ 77 The prospect would be large in this case for third party claims in the breach of contract cause of action as against numerous travel agencies. That alone would be reason enough to render class proceedings unduly complicated and unmanageable as was found in *Sutherland v. Canadian Red Cross* (1994), 17 O.R. (3d) 645 (Ont. Ct. Gen. Div.).

¶ 78 In addition, the issue of the releases signed by some of the passengers also is of great concern to the Court and would be a large factor in not proceeding by way of class action.

¶ 79 Although, as it turns out, not of great importance considering the decision of the Court in this certification application, the Court has grave concerns as to the deficiency of the proposed litigation plan. There is absolutely no detail in the applicant's plan to allow the Court to assess the ability of the action to proceed in a class context if it had decided otherwise and would have required substantial amendments.

¶ 80 Lastly, if any of the passengers were to pursue a claim against the defendants, the individual claim would be straightforward pursuant to the provisions of the Montreal Convention of 1999. The Convention assumes strict liability against all of the defendants in this case. The only issue to be determined would be if the individual passenger sustained a "bodily injury" and, if so, what the appropriate damage would be. There would be no need for complicated scientific expert evidence; a simple calculation of damages.

Section 6(e) - the representative plaintiff

¶ 81 In the event the Court had determined that there was an identifiable class, Thomas Walton would not have been the appropriate person to fairly and adequately represent the interests of the class for numerous reasons, including the fact he had booked his vacation through Signature as opposed to other passengers booking through MyTravel. He could not fairly and accurately represent those persons who booked their vacation through MyTravel or by themselves through the internet or other means.

¶ 82 As well, he was not one of the 149 persons who cashed in the settlement cheques and thus could not fairly or adequately represent those passengers who did. Again, there are just too many variables for any one passenger to fairly and adequately represent all of the interests of all of the passengers. That is not to say that his intentions were not sincere - they were - but impossible to accomplish in the circumstances of this case.

¶ 83 As stated before, his plan for the class action certainly lacked detail, and the Court, if it had granted the certification application, would have required a much more detailed plan be put forward with regard to advancing the class action.

E. Conclusion

¶ 84 For all the reasons as outlined in this judgment, the certification application is dismissed. Most importantly, the pleadings do not disclose a cause of action. The negligence, unlawful confinement and breach of contract claims cannot be made outside the provisions of the Montreal Convention of 1999 as the claims being made were by passengers on an international flight. The Montreal Convention of 1999 clearly applies to any claim being pursued by any of the passengers against the defendants in this case.

¶ 85 Nor is there any cause of action as against any of the defendants within the ambit of the Montreal Convention of 1999 on the evidence presently before the Court as there is no evidence that any of the passengers in Flight 361 suffered from anything other than mental distress or anxiety. It is necessary to establish that the passenger sustained bodily injury. That is fatal to any claim they may have had against any of the defendants pursuant to the Montreal Convention of 1999, resulting in no cause of action.

¶ 86 As well, none of the other criteria as outlined in s. 6 of the Act have been met by the applicants. There is a need for any potential claims of the passengers in Flight 361 to be individually assessed both as to liability and damages. Thus, the application for certification is denied.

DOVELL J.

QL UPDATE: 20060622
cp/e/qw/qlrds

Indexed as:

Western Canadian Shopping Centres Inc. v. Dutton

Bennett Jones Verchere, Garnet Schulhauser, Arthur Andersen & Co., Ernst & Young, Alan Lundell, The Royal Trust Company, William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, Peter K. Gummer, James G. Engdahl, Jon R. MacNeill, appellants/respondents on cross-appeal;

v.

Western Canadian Shopping Centres Inc. and Muh-Min Lin and Hoi-Wah Wu, representatives of all holders of Class "A", Class "E" and Class "F" Debentures issued by Western Canadian Shopping Centres Inc., respondents/appellants on cross-appeal.

[2001] 2 S.C.R. 534
[2000] S.C.J. No. 63
2001 SCC 46
File No.: 27138.

Supreme Court of Canada

Hearing and judgment: December 13, 2000.
Reasons delivered: July 13, 2001.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA
(62 paras.)

Practice — Class actions — Plaintiffs suing defendants for breach of fiduciary duties and mismanagement of funds — Defendants applying for order to strike plaintiffs' claim to sue in representative capacity — Whether requirements for class action met — If so, whether class action should be allowed — Whether defendants entitled to examination and discovery of each class member — Alberta Rules of Court, Alta. Reg. 390/68, Rule 42.

L and W, together with 229 other investors, became participants in the federal government's Business Immigration Program by purchasing debentures in WCSC, [page535] which was incorporated by D, its sole shareholder, for the purpose of helping investor-class immigrants qualify as permanent residents in Canada. WCSC solicited funds through two offerings to invest in income-producing properties. After the investors' funds were deposited, WCSC purchased from CRI, for $5,550,000, the rights to a Crown surface lease and also agreed to commit a further $16.5 million for surface improvements. To finance WCSC's obligations to CRI, D directed that the Series A debentures be issued in an aggregate principal amount of $22,050,000 to some of the investors. D advanced more funds to CRI and corresponding debentures were issued, in particular the Series E and F

debentures. Eventually, the debentures were pooled. When CRI announced that it could not pay the interest due on the debentures, L and W, the representative plaintiffs, commenced a class action complaining that D and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging their funds. The defendants applied to the Court of Queen's Bench for a declaration and order striking that portion of the claim in which the individual plaintiffs purport, pursuant to Rule 42 of the Alberta Rules of Court, to represent a class of 231 investors. The chambers judge denied the application. The majority of the Court of Appeal upheld that decision but granted the defendants the right to discovery from each of the 231 plaintiffs. The defendants appealed to this Court, and the plaintiffs cross-appealed taking issue with the Court of Appeal's allowance of individualized discovery from each class member.

Held: The appeal should be dismissed and the cross-appeal allowed.

In Alberta, class-action practice is governed by Rule 42 of the Alberta Rules of Court but, in the absence of comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them. Class actions should be allowed to proceed under Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of law or fact common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh [page536] the benefits of allowing the class action to proceed. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness. The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious". On procedural matters, all potential class members should be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out. This should be done before any decision is made that purports to prejudice or otherwise affect the interests of class members. The court also retains discretion to determine how the individual issues should be addressed, once common issues have been resolved. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis in a flexible and liberal manner, seeking a balance between efficiency and fairness.

In this case, the basic conditions for a class action are met and efficiency and fairness favour permitting it to proceed. The defendants' contentions against the suit were unpersuasive. While differences exist among investors, the fact remains that the investors raise essentially the same claims requiring resolution of the same facts. If material differences emerge, the court can deal with them when the time comes. Further, a class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance to establish breach of fiduciary duty, the court may then consider whether the class action should continue. The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

Finally, to allow individualized discovery at this stage of the proceedings would be premature. The defendants should be allowed to examine the representative plaintiffs as of right but examination of other class members [page537] should be available only by order of the court, upon the defendants showing reasonable necessity.

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Distinguished: General Motors of Canada Ltd. v. Naken, [1983] 1 S.C.R. 72; *referred to*: 353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd., [1989] A.J. No. 652 (QL); Shaw v. Real Estate Board of Greater Vancouver (1972), 29 D.L.R. (3d) 774; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959; Korte v. Deloitte, Haskins & Sells (1993), 8 Alta. L.R. (3d) 337; Oregon Jack Creek Indian Band v. Canadian National Railway Co., [1989] 2 S.C.R. 1069; Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574; Hodgkinson v. Simms, [1994] 3 S.C.R. 377; Chancey v. May (1722), Prec. Ch. 592, 24 E.R. 265; City of London v. Richmond (1701), 2 Vern. 421, 23 E.R. 870; Wallworth v. Holt (1841), 4 My. & Cr. 619, 41 E.R. 238; Duke of Bedford v. Ellis, [1901] A.C. 1; Taff Vale Railway Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426; Markt & Co. v. Knight Steamship Co., [1910] 2 K.B. 1021; Bell v. Wood, [1927] 1 W.W.R. 580; Langley v. North West Water Authority, [1991] 3 All E.R. 610, leave denied [1991] 1 W.L.R. 711n; Newfoundland Association of Public Employees v. Newfoundland (1995), 132 Nfld. & P.E.I.R. 205; Ranjoy Sales and Leasing Ltd. v. Deloitte, Haskins and Sells, [1984] 4 W.W.R. 706; International Capital Corp. v. Schafer (1995), 130 Sask. R. 23; Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée (1988), 86 N.B.R. (2d) 342; Lee v. OCCO Developments Ltd. (1994), 148 N.B.R. (2d) 321; Van Audenhove v. Nova Scotia (Attorney General) (1994), 134 N.S.R. (2d) 294; Horne v. Canada (Attorney General) (1995), 129 Nfld. & P.E.I.R. 109; Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172; Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094.

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Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5(1), 6, 25.

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APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (1998), 73 Alta. L.R. (3d) 227, 228 A.R. 188, 188 W.A.C. 188, 30 C.P.C. (4th) 1, [1998] A.J. No. 1364 (QL), 1998 ABCA 392, dismissing an appeal from a decision of the Court of Queen's Bench (1996), 41 Alta. L.R. (3d) 412, 191 A.R. 265, 3 C.P.C. (4th) 329, [1996] A.J. No. 1165 (QL). Appeal dismissed and cross-appeal allowed.

Barry R. Crump, Brian Beck and David C. Bishop, for the appellants/respondents on cross-appeal.
Hervé H. Durocher and Eugene J. Erler, for the respondents/appellants on cross-appeal.
[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of the Court was delivered by

¶ 1 **McLACHLIN C.J.**— This appeal requires us to decide when a class action may be brought. While the class action has existed in one form or another for hundreds of years, its importance has increased of late. Particularly in complicated cases implicating the interests of many people, the class action may provide the best means of fair and efficient resolution. Yet absent legislative direction, there remains considerable uncertainty as to the conditions under which a court should permit a class action to be maintained.

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¶ 2 The claimants wanted to immigrate to Canada. To qualify, they invested money in Western Canadian Shopping Centres Inc. ("WCSC"), under the Canadian government's Business Immigration Program. They lost money and brought a class action. The defendants (appellants) claim the class action is inappropriate and ask the Court to strike it out. For the following reasons, I conclude that the claimants may proceed as a class.

I. Facts

¶ 3 The representative plaintiffs Muh-Min Lin and Hoi-Wah Wu, together with 229 other investors, became participants in the government's Business Immigration Program of Employment and Immigration Canada by purchasing debentures in WCSC. WCSC was incorporated by Joseph Dutton, its sole shareholder, for the purpose of "facilitat[ing] the qualification of the Investors, their spouses, and their never-married children as Canadian permanent residents."

¶ 4 WCSC solicited funds through two offerings "to invest in land located in the Province of Saskatchewan for the purpose of developing commercial, non-residential, income-producing properties". The offering memoranda provided that the subscription proceeds would be deposited with an escrow agent, later designated as The Royal Trust Company ("Royal Trust"), and would be released to WCSC upon conditions, subsequently amended.

¶ 5 The dispute arises from events after the investors' funds had been deposited with Royal Trust. In May 1990, WCSC entered into a Purchase and Development Agreement ("PDA") with Claude Resources Inc. ("Claude") under which WCSC purchased from Claude, for $5,550,000, the rights to a Crown surface lease adjacent to Claude's "Seabee" gold deposits in northern Saskatchewan. WCSC also agreed to commit a further $16.5 million for surface improvements and for the construction of a gold mill, which would be owned by WCSC. A lease agreement executed in tandem with the PDA leased the not-yet-constructed gold [page541] mill and related facilities, together with the surface lands, back to Claude. The payments required of Claude under that lease agreement matched the semi-annual interest payments required of WCSC with respect to the investors.

¶ 6 To finance WCSC's obligations under the PDA with Claude, Dutton directed Royal Trust to issue debentures in an aggregate principal amount of $22,050,000 to a subset of the investors who had subscribed by that point. Royal Trust did so by issuing "Series A" debentures to 142 investors. After the debentures were issued, WCSC distributed an update letter to its investors, describing the investment in Claude.

¶ 7 In a separate series of transactions executed around the same time, Dutton and Claude entered into an agreement by which (1) Dutton effectively conveyed to Claude 49 percent of his shares in WCSC; (2) Claude paid Dutton $1.6 million in cash; (3) Claude advanced Dutton a $1.6 million non-recourse loan; (4) Dutton entered into an employment contract with Claude for a salary of $50,000 per year; and (5) Claude and Dutton's management company, J.M.D. Management Ltd., entered into a management contract for $200,000 per year. It appears that WCSC did not distribute an update letter to its investors describing this series of transactions.

¶ 8 Over the next months, Dutton advanced more funds to Claude and directed Royal Trust to issue corresponding debentures. Of particular relevance to the instant dispute are the Series E debentures issued in December 1990 (aggregate principal of $2.56 million), and the Series F debentures issued in May 1991 (aggregate principal of $9.45 million). When the Series E debentures were issued, the Series A and E debentures were pooled, so that investors in those series became entitled to a pro rata claim on

the total security pledged with respect to the two series. When the Series F debentures were issued, the security for that series was [page542] pooled with the security that had been pledged with respect to the Series A and E debentures. WCSC apparently distributed investor update letters after the issuance of the Series E and F debentures, just as it had done after the issuance of the Series A debentures.

¶ 9 In December 1991, Claude announced that it could not pay the interest due on the Series A, E, and F debentures and Muh-Min Lin and Hoi-Wah Wu commenced this action. The gravamen of the complaint is that Dutton and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging or misdirecting their funds.

II. Statutory Provisions

¶ 10 Alberta Rules of Court, Alta. Reg. 390/68

> 42 Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.
>
> 129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
> (b) it is scandalous, frivolous or vexatious, or
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
> (d) it is otherwise an abuse of the process of the court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) No evidence shall be admissible on an application under clause (a) of subrule (1).
> (3) This Rule, so far as applicable, applies to an originating notice and a petition.
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> [page543]
>
> 187 A person for whose benefit an action is prosecuted or defended or the assignor of a chose in action upon which the action is brought, shall be regarded as a party thereto for the purposes of discovery of documents.
> 201 A member of a firm which is a party and a person for whose benefit an action is prosecuted or defended shall be regarded as a party for the purposes of examination.

III. Decisions

¶ 11 The appellants applied to the Court of Queen's Bench of Alberta (1996), 41 Alta. L.R. (3d) 412 for a declaration and order striking that portion of the Amended Statement of Claim in which the individual plaintiffs purport, pursuant to Rule 42 of the Alberta Rules of Court, to represent a class of 231 investors. The chambers judge identified four issues: (1) whether the court had the power under Rule 42 to strike the investors' claim to sue in a representative capacity; (2) whether the court was restricted to considering only the Amended Statement of Claim filed; (3) the standard of proof required to compel the court to exercise its discretion to strike the representative claim; and (4) whether, in this case, this standard was met.

¶ 12 On the first issue, the chambers judge relied on the decision of Master Funduk in 353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd., [1989] A.J. No. 652 (QL), to conclude that the court has the power, under Rule 42, to strike a claim made by plaintiffs to sue in a representative capacity.

¶ 13 On the second issue, the chambers judge held that the court need not limit its inquiry to the pleadings, relying on 353850 Alberta, supra, and on the decision of the British Columbia Supreme Court in Shaw v. Real Estate Board of Greater Vancouver (1972), 29 D.L.R. (3d) 774. He concluded, however, that resolution of the case before him did not require resort to the affidavit evidence.

¶ 14 On the third issue, the chambers judge concluded that the court should strike a representative claim under Rule 42 only if it is "entirely clear" or [page544] "beyond doubt" or "plain and obvious" that the claim is deficient -- the standard applied to applications to strike pleadings for disclosing no reasonable claim: Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959.

¶ 15 On the final issue, the chambers judge, applying the "plain and obvious" rule, concluded that the Amended Statement of Claim was not deficient under Rule 42 and met the requirements set out in Korte v. Deloitte, Haskins & Sells (1993), 8 Alta. L.R. (3d) 337 (C.A.): (1) that the class be capable of clear and definite definition; (2) that the principal issues of law and fact be the same; (3) that one plaintiff's success would necessarily mean success for all members of the plaintiff class; and (4) that the resolution of the dispute not require any individual assessment of the claims of individual class members. However, he left the matter open to review by the trial judge.

¶ 16 The Alberta Court of Appeal, per Russell J.A. (for the majority), dismissed the appeal, Picard J.A., dissenting: (1998), 73 Alta. L.R. (3d) 227. The majority rejected the argument that the chambers judge should have conclusively resolved the Rule 42 issue rather than left it open to the trial judge, citing Oregon Jack Creek Indian Band v. Canadian National Railway Co., [1989] 2 S.C.R. 1069, in which this Court left to the trial judge the issue of whether the plaintiffs were authorized to sue on behalf of a broader class. The majority also rejected the argument that the investors must show individual reliance to succeed. However, it granted the defendants the right to discovery from each of the 231 plaintiffs on the grounds that Rule 201, read with Rule 187, allows discovery from any person for whose benefit an action is prosecuted or defended and that the defendants should not be barred from developing an argument based on actual reliance merely because it was speculative.

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¶ 17 Picard J.A., would have allowed the appeal. In her view, the Chambers judge erred in deferring the matter to the trial judge because, unlike Oregon Jack Creek, the case was narrow and "a great deal of relevant evidence was available to the court to allow it to make a decision" (p. 235). The need to show individual reliance was only one of many problems that the investors would face if allowed to proceed as a class. Citing this Court's decisions in Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, and Hodgkinson v. Simms, [1994] 3 S.C.R. 377, she concluded that "[t]he extent of fiduciary duties in a particular case requires a meticulous examination of the facts, particularly of any contract between the parties" (p. 237). She concluded that "[t]his responsibility of proof by the [investors] cannot possibly be met by a representative action nor by giving a right of discovery of the 229 other parties to the action" (p. 237).

IV. Issues

¶ 18 1. Did the courts below apply the proper standard in determining whether the investors had satisfied the requirements for a class action under Rule 42?

2. Did the courts below err in denying defendants' motion to strike under Rule 42?
3. If the class action is allowed, should the defendants have the right to full oral and documentary discovery of all class members?

V. Analysis

A. The History and Functions of Class Actions

¶ 19 The class action originated in the English courts of equity in the late seventeenth and early eighteenth centuries. The courts of law focussed on individual questions between the plaintiff and the defendant. The courts of equity, by contrast, applied a rule of compulsory joinder, requiring all those interested in the subject matter of the dispute [page546] to be made parties. The aim of the courts of equity was to render "complete justice" -- that is, to "arrang[e] all the rights, which the decision immediately affects": F. Calvert, A Treatise Upon the Law Respecting Parties to Suits in Equity (2nd ed. 1847), at p. 3; see also C. A. Wright, A. R. Miller and M. K. Kane, Federal Practice and Procedure (2nd ed. 1986), at s. 1751; J. Story, Equity Pleadings (10th ed. 1892), at s. 76a. The compulsory-joinder rule "allowed the Court to examine every facet of the dispute and thereby ensure that no one was adversely affected by its decision without first having had an opportunity to be heard": J. A. Kazanjian, "Class Actions in Canada" (1973), 11 Osgoode Hall L.J. 397, at p. 400. The rule possessed the additional advantage of preventing a multiplicity of duplicative proceedings.

¶ 20 The compulsory-joinder rule eventually proved inadequate. Applied to conflicts between tenants and manorial lords or between parsons and parishioners, it closed the door to the courts where interested parties in such cases were too numerous to be joined. The courts of equity responded by relaxing the compulsory-joinder rule where strict adherence would work injustice. The result was the representative action. For example, in Chancey v. May (1722), Prec. Ch. 592, 24 E.R. 265, members of a partnership were permitted to sue on behalf of themselves and some 800 other partners for misapplication and embezzlement of funds by the partnership's former treasurer and manager. The court allowed the action because "it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, and so all the rest were in effect parties," and because "it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be made parties" (p. 265); see also Kazanjian, supra, at p. 401; G. T. Bispham, The Principles of Equity (9th ed. 1916), at para. 415; S. C. Yeazell, "Group Litigation and Social Context: Toward a History of the Class Action" (1977), 77 Colum. L. Rev. 866, at pp. 867 and 872; J. K. Bankier, "Class Actions for Monetary [page547] Relief in Canada: Formalism or Function?" (1984), 4 Windsor Y.B. Access Just. 229, at p. 236.

¶ 21 The representative or class action proved useful in pre-industrial English commercial litigation. The modern limited-liability company had yet to develop, and collectives of business people had no independent legal existence. Satisfying the compulsory-joinder rule would have required a complainant to bring before the court each member of the collective. The representative action provided the solution to this difficulty: see Kazanjian, supra, at p. 401; Yeazell, supra, at p. 867; City of London v. Richmond (1701), 2 Vern. 421, 23 E.R. 870 (allowing the plaintiff to sue trustees for rent owed, though the beneficiaries of the trust were not joined).

¶ 22 The class action required a common interest between the class members. Many of the early representative actions were brought in the form of "bills of peace", which could be maintained where the interested individuals were numerous, all members of the group possessed a common interest in the question to be adjudicated, and the representatives could be expected fairly to advocate the interests of all members of the group: see Wright, Miller and Kane, supra, at para. 1751; Z. Chafee, Some Problems of Equity (1950), at p. 201, T. A. Roberts, The Principles of Equity (3rd ed. 1877), at pp. 389-92;

Bispham, supra, at para. 417.

¶ 23 The courts of equity applied a liberal and flexible approach to whether a class action could proceed. They "continually sought a proper balance between the interests of fairness and efficiency": Kazanjian, supra, at p. 411. As stated in Wallworth v. Holt (1841), 4 My. & Cr. 619, 41 E.R. 238, at p. 244, "it [is] the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, [page548] to decline to administer justice, and to enforce rights for which there is no other remedy".

¶ 24 This flexible and generous approach to class actions prevailed until the fusion of law and equity under the Supreme Court of Judicature Act, 1873 (U.K.), 36 & 37 Vict., c. 66, and the adoption of Rule 10 of the Rules of Procedure:

> 10. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested.

While early cases under the new rules maintained a liberal approach to class actions (see, e.g., Duke of Bedford v. Ellis, [1901] A.C. 1 (H.L.); Taff Vale Railway Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426 (H.L.)), later cases sometimes took a restrictive approach (see, e.g., Markt & Co. v. Knight Steamship Co., [1910] 2 K.B. 1021 (C.A.)). This, combined with the widespread use of limited-liability companies, resulted in fewer class actions being brought.

¶ 25 The class action did not forever languish, however. Conditions emerged in the latter part of the twentieth century that once again invoked its utility. Mass production and consumption revived the problem that had motivated the development of the class action in the eighteenth century -- the problem of many suitors with the same grievance. As in the eighteenth century, insistence on individual representation would often have precluded effective litigation. And, as in the eighteenth century, the class action provided the solution.

¶ 26 The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its [page549] growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.

¶ 27 Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): see W. K. Branch, Class Actions in Canada (1998), at para. 3.30; M. A. Eizenga, M. J. Peerless and C. M. Wright, Class Actions Law and Practice (1999), at para. 1.6; Bankier, supra, at pp. 230-31; Ontario Law Reform Commission, Report on Class Actions (1982), at pp. 118-19.

¶ 28 Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, supra, at para. 3.40; Eizenga, Peerless and Wright, supra, at para. 1.7; [page550] Bankier, supra, at pp. 231-32; Ontario Law Reform Commission, supra, at pp. 119-22.

¶ 29 Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law -- The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), 113 Harv. L. Rev. 1806, at pp. 1809-10; see Branch, supra, at para. 3.50; Eizenga, Peerless and Wright, supra, at para. 1.8; Bankier, supra, at p. 232; Ontario Law Reform Commission, supra, at pp. 11 and 140-46.

B. The Test for Class Actions

¶ 30 In recognition of the modern importance of representative litigation, many jurisdictions have enacted comprehensive class action legislation. In the United States, Federal Rules of Civil Procedure, 28 U.S.C.A. para. 23 (introduced in 1938 and substantially amended in 1966) addressed aspects of class action practice, including certification of litigant classes, notice, and settlement. The English procedural rules of 1999 include detailed provisions governing "Group Litigation": United Kingdom, Civil Procedure Rules 1998, SI 1998/3132, rr. 19.10-19.15. And in Canada, the provinces of British Columbia, Ontario, and Quebec have enacted comprehensive statutory schemes to govern class action practice: see British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50; Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6; Quebec Code of Civil Procedure, R.S.Q., c. C-25, Book IX. Yet other Canadian provinces, including Alberta and Manitoba, are considering enacting [page551] such legislation: see Manitoba Law Reform Commission, Report #100, Class Proceedings (January 1999); Alberta Law Reform Institute, Final Report No. 85, Class Actions (December 2000); see also R. Rogers, "A Uniform Class Actions Statute", Appendix O to the Proceedings of the 1995 Meeting of The Uniform Law Conference of Canada.

¶ 31 Absent comprehensive codes of class action procedure, provincial rules based on Rule 10, Schedule, of the English Supreme Court of Judicature Act, 1873 govern. This is the case in Alberta, where class action practice is governed by Rule 42 of the Alberta Rules of Court:

> 42 Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

The intention of the Alberta legislature is clear. Class actions may be brought. Details of class action practice, however, are largely left to the courts.

¶ 32 Alberta's Rule 42 does not specify what is meant by "numerous" or by "common interest". It does not say when discovery may be made of class members other than the representative. Nor does it specify how notice of the suit should be conveyed to potential class members, or how a court should deal with the possibility that some potential class members may desire to "opt out" of the class. And it

does not provide for costs, or for the distribution of the fund should an action for money damages be successful.

¶ 33 Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies [page552] the parties ex ante certainty as to their procedural rights. One of the main weaknesses of the current Alberta regime is the absence of a threshold "certification" provision. In British Columbia, Ontario, and Quebec, a class action may proceed only after the court certifies that the class and representative meet certain requirements. In Alberta, by contrast, courts effectively certify ex post, only after the opposing party files a motion to strike. It would be preferable if the appropriateness of the class action could be determined at the outset by certification.

¶ 34 Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them: Bell v. Wood, [1927] 1 W.W.R. 580 (B.C.S.C.), at pp. 581-82; Langley v. North West Water Authority, [1991] 3 All E.R. 610 (C.A.), leave denied [1991] 1 W.L.R. 711n (H.L.); Newfoundland Association of Public Employees v. Newfoundland (1995), 132 Nfld. & P.E.I.R. 205 (Nfld. S.C.T.D.); W. A. Stevenson and J. E. Côté, Civil Procedure Guide, 1996, at p. 4. However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.

¶ 35 Alberta courts moved to fill the procedural vacuum in Korte, supra. Korte prescribed four conditions for a class action: (1) the class must be capable of clear and definite definition; (2) the principal issues of fact and law must be the same; (3) success for one of the plaintiffs must mean success for all; and (4) no individual assessment of the claims of individual plaintiffs need be made.

¶ 36 The Korte criteria loosely parallel the criteria applied in other Canadian jurisdictions in which comprehensive class-action legislation has yet to be enacted: see, e.g., Ranjoy Sales and Leasing Ltd. v. Deloitte, Haskins and Sells, [1984] 4 W.W.R. 706 [page553] (Man. Q.B.); International Capital Corp. v. Schafer (1995), 130 Sask. R. 23 (Q.B.); Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée (1988), 86 N.B.R. (2d) 342 (Q.B.); Lee v. OCCO Developments Ltd. (1994), 148 N.B.R. (2d) 321 (Q.B.); Van Audenhove v. Nova Scotia (Attorney General) (1994), 134 N.S.R. (2d) 294 (S.C.), at para. 7; Horne v. Canada (Attorney General) (1995), 129 Nfld. & P.E.I.R. 109 (P.E.I.S.C.), at para. 24.

¶ 37 The Korte criteria also bear resemblance to the class-certification criteria in the British Columbia, Ontario, and Quebec class action statutes. Under the British Columbia and Ontario statutes, an action will be certified as a class proceeding if (1) the pleadings or the notice of application disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the class representative; (3) the claims or defences of the class members raise common issues (in British Columbia, "whether or not those common issues predominate over issues affecting only individual members"); (4) a class proceeding would be the preferable procedure for the resolution of common issues; and (5) the class representative would fairly represent the interests of the class, has advanced a workable method of advancing the proceeding and notifying class members, and does not have, on the common issues for the class, an interest in conflict with other class members: see Ontario Class Proceedings Act, 1992, s. 5(1); British Columbia Class Proceedings Act, s. 4(1). Under the Quebec statute, an action will be certified as a class proceeding if (1) the recourses of the class members raise identical, similar, or related questions of law or fact; (2) the alleged facts appear to warrant the conclusions sought; (3) the composition of the group makes joinder impracticable; and (4) the representative is in a position to adequately represent the interests of the class members: see Quebec

Code of Civil Procedure, art. 1003.

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¶ 38 While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, supra, at paras. 4.190-4.207; Friedenthal, Kane and Miller, Civil Procedure (2nd ed. 1993), at pp. 726-27; Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.

¶ 39 Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of [page555] each class member with the same particularity as would be required in an individual suit.

¶ 40 Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

¶ 41 Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see Branch, supra, at paras. 4.210-4.490; Friedenthal, Kane and Miller, supra, at pp. 729-32.

¶ 42 While the four factors outlined must be met for a class action to proceed, their satisfaction does not mean that the court must allow the action to proceed. Other factors may weigh against allowing the action to proceed in representative form. The defendant may wish to raise different defences with respect to different groups of plaintiffs. It may be necessary to examine each class member in discovery. Class members may raise important issues not shared by all members of the class. Or the proposed class may be so small that joinder would be a better solution. Where such countervailing factors exist, the court has discretion to decide whether the class action should be permitted to proceed,

notwithstanding that the essential conditions [page556] for the maintenance of a class action have been satisfied.

¶ 43 The class action codes that have been adopted by British Columbia and Ontario offer some guidance as to factors that would generally not constitute arguments against allowing an action to proceed as a representative one. Both state that certification should not be denied on the grounds that: (1) the relief claimed includes a demand for money damages that would require individual assessment after determination of the common issues; (2) the relief claimed relates to separate contracts involving different members of the class; (3) different class members seek different remedies; (4) the number of class members or the identity of every class member is unknown; or (5) the class includes subgroups that have claims or defences that raise common issues not shared by all members of the class: see Ontario Class Proceedings Act, 1992, s. 6; British Columbia Class Proceedings Act, s. 7; see also Alberta Law Reform Institute, supra, at pp. 75-76. Common sense suggests that these factors should no more bar a class action suit in Alberta than in Ontario or British Columbia.

¶ 44 Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.

¶ 45 The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious", as the Chambers judge held. Unlike Rule 129, which is directed at the question of whether the claim should be prosecuted [page557] at all, Rule 42 is directed at the question of how the claim should be prosecuted. The "plain and obvious" standard is appropriate where the result of striking is to forever end the action. It recognizes that a plaintiff "should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success": Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094 (C.A.), at p. 1102 (quoted in Hunt, supra, at pp. 974-75). Denial of class status under Rule 42, by contrast, does not defeat the claim. It merely places the plaintiffs in the position of any litigant who comes before the court in his or her individual capacity. Moreover, nothing in Alberta's rules suggests that class actions should be disallowed only where it is plain and obvious that the action should not proceed as a representative one. Rule 42 and the analogous rules in other provinces merely state that a representative may maintain a class action if certain conditions are met.

¶ 46 The need to strike a balance between efficiency and fairness also belies the suggestion that class actions should be approached restrictively. The defendants argue that General Motors of Canada Ltd. v. Naken, [1983] 1 S.C.R. 72, precludes a generous approach to class actions. I respectfully disagree. First, when Naken was decided, the modern class action was very much an untested procedure in Canada. In the intervening years, the importance of the class action as a procedural tool in modern litigation has become manifest. Indeed, the reform that has been effected since Naken has been motivated in large part by the recognition of the benefits that class actions can offer the parties, the court system, and society: see, e.g., Ontario Law Reform Commission, supra, at pp. 3-4.

¶ 47 Second, Naken on its facts invited caution. The action was brought on behalf of all persons who purchased new 1971 or 1972 Firenza motor vehicles in Ontario. The complaint was that General [page558] Motors had misrepresented the quality of the vehicles and that the vehicles "were not reasonably fit for use" (p. 76). The statement of claim alleged breach of warranty and breach of representation, and sought $1,000 in damages for each of approximately 4,600 plaintiffs. Estey J., writing for a unanimous Court, disallowed the class action. While each plaintiff raised the same claims

against the defendant, the resolution of those claims would have required particularized evidence and fact-finding at both the liability and damages stages of the litigation. Far from avoiding needless duplication, a class action would have unnecessarily complicated the resolution of what amounted to 4,600 individual claims.

¶ 48 To summarize, class actions should be allowed to proceed under Alberta's Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of fact or law common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed.

¶ 49 Other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.

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¶ 50 Another procedural issue that may arise is how to deal with non-common issues. The court retains discretion to determine how the individual issues should be addressed, once common issues have been resolved: see Branch, supra, at para. 18.10. Generally, individual issues will be resolved in individual proceedings. However, as under the legislation of British Columbia, Ontario, and Quebec, a court may specify special procedures that it considers necessary or useful: see Ontario Class Proceedings Act, 1992, s. 25; British Columbia Class Proceedings Act, s. 27; Quebec Code of Civil Procedure, art. 1039.

¶ 51 The diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis. Courts should approach these issues as they do the question of whether a class action should be allowed: in a flexible and liberal manner, seeking a balance between efficiency and fairness.

C. Whether the Investors Have Satisfied Rule 42

¶ 52 The four conditions to the maintenance of a class action are satisfied here. First, the class is clearly defined. The respondents Lin and Wu represent themselves and "[229 other] immigrant investors ... who each invested at least the sum of $150,000.00 into a fund totalling $34,065,000.00, the said sum to be managed, administered and secured by ... Western Canadian Shopping Centres Inc.". Who falls within the class can be ascertained on the basis of documentary evidence that the parties have put before the court. Second, common issues of fact and law unite all members of the class. The essence of the investors' complaint is that the defendants owed them fiduciary duties which they breached. While the investors' Amended Statement of Claim alludes to claims in negligence and misrepresentation, counsel for the investors undertook in argument before this Court to abandon all but the fiduciary duty claims. Third, at this stage of the proceedings, it appears that [page560] resolving one class member's breach of fiduciary claim would effectively resolve the claims of every class member. As a result of security-pooling agreements effected by WCSC, each investor now has an

interest, proportional to his or her investment, in the same underlying security. Finally, the representative plaintiffs are appropriate.

¶ 53 The defendants argue that the proposed suit is not amenable to prosecution as a class action because: (1) there are in fact multiple classes of plaintiffs; (2) the defendants will raise multiple defences to different causes of action advanced against different defendants; and (3) in order to prevail, the investors must show actual reliance on the part of each class member. I find these arguments unpersuasive.

¶ 54 The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times, in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess rescissionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

¶ 55 The defendants' contention that the investors should not be permitted to sue as a class because [page561] each must show actual reliance to establish breach of fiduciary duty also fails to convince. In recent decades fiduciary obligations have been applied in new contexts, and the full scope of their application remains to be precisely defined. The fiduciary duty issues raised here are common to all the investors. A class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance, the court may then consider whether the class action should continue.

¶ 56 The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

¶ 57 I conclude that the basic conditions for a class action are met and that efficiency and fairness favour permitting it to proceed.

D. Cross-Appeal

¶ 58 The investors take issue on cross-appeal with the Court of Appeal's allowance of individualized discovery from each class member. The Court of Appeal held that the defendants are entitled, under Rules 187 and 201, to examination and discovery of each member of the class. The investors argue that the question of whether discovery should be allowed from each class member is a question best left to a case management judge appointed pursuant to the Alberta Rules of Court Binder, Practice Note No. 7.

¶ 59 I agree that allowing individualized discovery at this stage of the proceedings would be premature. One of the benefits of a class action is that discovery of the class representatives will usually suffice [page562] and make unnecessary discovery of each individual class member. Cases where individual discovery is required of all class members are the exception rather than the rule. Indeed, the necessity of individual discovery may be a factor weighing against allowing the action to proceed in representative form.

¶ 60 I would allow the defendants to examine the representative plaintiffs as of right. Thereafter,

examination of other class members should be available only by order of the court, upon the defendants showing reasonable necessity.

VI. Conclusion

¶ 61 For the foregoing reasons, I would dismiss the appeal and allow the investors to proceed as a class. I would allow the cross-appeal.

¶ 62 Costs of the appeal and cross-appeal are to the respondents.

Solicitors for the appellant/respondent on cross-appeal The Royal Trust Company: Burnet, Duckworth & Palmer, Calgary.
Solicitors for the appellants/respondents on cross-appeal James G. Engdahl, William R. MacNeill, Jon R. MacNeill, Gary L. Billingsley, R. Byron Henderson: McLennan Ross, Edmonton.
Solicitors for the appellant/respondent on cross-appeal C. Michael Ryer: Peacock Linder & Halt, Calgary.
Solicitors for the appellant/respondent on cross-appeal Peter K. Gummer: Brownlee Fryett, Edmonton.
Solicitors for the appellants/respondents on cross-appeal Ernst & Young and Alan Lundell: Parlee McLaws, Edmonton.

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Solicitors for the appellants/respondents on cross-appeal Bennett Jones Verchere and Garnet Schulhauser: Gowling Lafleur Henderson, Calgary.
Solicitors for the appellant/respondent on cross-appeal Arthur Andersen & Co.: Lucas Bowker & White, Edmonton.
Solicitors for the respondents/appellants on cross-appeal:

Durocher Simpson, Edmonton.

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cp/e/qllls

** Unedited **

Indexed as:

Windisman v. Toronto College Park Ltd.

Between
Anita Windisman, on behalf of herself for the plaintiff and
all others similarly situated, plaintiff, and
Toronto College Park Ltd., defendant
And between
Toronto College Park Ltd., plaintiff by counterclaim, and
Anita Windisman, on behalf of herself and all others similarly
situated, Metropolitan Condominium Corporation No. 901 and
Metropolitan Toronto Condominium Corporation No. 907,
defendants to the counterclaim

[1996] O.J. No. 2897
Court File No. 93-CQ-38966

Ontario Court of Justice (General Division)
Sharpe J.

Heard: June 27-28, 1996.
Judgment: August 26, 1996.
(22 pp.)

Barristers and solicitors — Compensation — Agreements, contingent fees — Calculation of — Practice — Costs — Party and party costs — Particular proceedings, class actions.

Motion to determine the solicitors fees and the claim of the representative plaintiff to compensation and costs. This was a class action. The plaintiff class was awarded $2.6 million, including pre-judgment interest. The action had been undertaken on a contingency basis. An agreement was made between the solicitors and the representative plaintiff, W, as to scale of fees to be charged, which included a multiplier of two point five, if successful.

HELD: The solicitors for the plaintiff class were entitled to a fee of $750,000 and disbursements of $10,509.69. W was entitled to compensation of $4,000 from the fund recovered on behalf of the plaintiff class. The plaintiff class was awarded costs from the defendant of $233,000 plus disbursements. This included solicitor and client costs from the date of the plaintiffs' offer to settle to the date of judgment, and party and party costs prior to the date of the offer to settle. The Class Proceedings Act and Rule 12 clearly contemplated the awarding of costs where the plaintiff class was the successful party. In determining the reasonableness of the base fee the court considered the time expended by the solicitor, the legal complexity of the matters to be dealt with, the degree of responsibility assumed by the solicitor, the monetary value of the matters in issue, the importance of the matter to the client, the degree of skill and competence demonstrated by the solicitor, the results achieved, the ability of the client to pay and the client's expectation as to the amount of the fee. Although there was no real basis in law for awarding compensation to W, she had shown that she had rendered active and necessary assistance in the preparation or presentation of the case and that her

assistance had resulted in monetary success for the class. W was compensated on a quantum meruit basis based on time dockets.

Statutes, Regulations and Rules Cited:

An Act Respecting Champerty, R.S.O. 1897, c. 327.
Class Proceedings Act, ss. 32, 32(1), 32(2), 32(3), 32(4), 33, 33(1), 33(2), 33(3), 33(4), 33 (5), 33(6), 33(7), 33(7) (b), 33(8), 33(9).
Condominium Act, s. 53(3).
Ontario Rules of Civil Procedure, Rule 12.
Solicitors Act.

Counsel:

J. Gardner Hodder and Andrew Frei, and defendants to the counterclaim.
Jonathon H. Fine and Jack D. Pappalardo, for the defendant/plaintiff by counterclaim.

SHARPE J.:—

Introduction

¶ 1 In a judgment, dated February 13, 1996, I awarded the plaintiff class approximately 2.6 million dollars, including pre-judgment interest. The claim of the plaintiff class was for interest on deposits paid pursuant to agreements to purchase condominium units, based on the Condominium Act, s. 53 (3). The claim was in three parts. First was the appropriate rate of interest payable on deposits; second was whether interest was payable on deposits for parking and storage units; and third was whether interest was payable on a compound basis. The plaintiff class succeeded on the first two questions but not on the third. This motion is to determine the fees to which the solicitors for the plaintiff class are entitled, to deal with the claim of the plaintiff class for party and party costs against the defendant, and to settle various terms of the judgment with respect to distribution and other issues.

Issues

¶ 2

1. What is an appropriate amount to be approved by way of fees and disbursements pursuant to ss. 32 and 33 of the Class Proceedings Act?
2. Is the representative plaintiff, Anita Windisman, entitled to compensation from the plaintiff class for the time and effort she expended in relation to this action?
3. Is the plaintiff class entitled to party and party costs and, if so, on what scale and in what amount?
4. Other terms relating to distribution and similar issues.

Analysis

1. What is an appropriate amount to be approved by way of fees and disbursements pursuant to ss. 32 and 33 of the Class Proceedings Act?

¶ 3 The solicitors for the plaintiff class undertook this action on a contingency basis. The

representative plaintiff signed a contingency fee retainer form which set out the proposed basis for calculation of the solicitors' fees with reference to the applicable provisions of the Class Proceedings Act. The agreement indicated that fees would be based on hourly rates ranging from $75 for clerks and students to $200 for the senior solicitor and counsel. The agreement also indicated that, as the matter was being undertaken on a contingency basis, the solicitors would be asking for the application of a multiplier to the fee at the rate of 1.75. This fee agreement was modified subsequently in two respects. First, the solicitor indicated that his hourly rate had increased from $200 to $210. Second, the solicitor indicated that in light of the manner in which the action was being defended, it was his assessment that the risk of continuing had increased and that accordingly the multiplier to be sought would be at the rate of 2.5.

¶ 4 The fee agreement, as amended, was mentioned in the certification order. Accordingly, all members of the plaintiff class received notice of its terms. The Class Proceedings Act makes the following provision with respect to such agreements:

> 32(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,
>
> (a) state the terms under which fees and disbursements shall be paid;
> (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
> (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.
>
> (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.
> (3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.
> (4) If an agreement is not approved by the court, the court may,
>
> (a) determine the amount owing to the solicitor in respect of fees and disbursements;
> (b) direct a reference under the rules of court to determine the amount owing; or
> (c) direct that the amount owing be determined in any other manner.
>
> 33(1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.
> (2) For the purpose of subsection (1), success in a class proceeding includes,
>
> (a) a judgment on common issues in favour of some or all class members; and
> (b) a settlement that benefits one or more class members.
>
> (3) For the purposes of subsections (4) to (7),
>
> "base fee" means the result of multiplying the total number of hours worked by an hourly rate;

"multiplier" means a multiple to be applied to a base fee.

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.
(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class member; or
(b) approved a settlement that benefits any class member.

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.
(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;
(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

(8) In making a determination under clause (7)(a), the court shall allow only a reasonable fee.
(9) In making a determination under clause (7)(b), the court may consider the manner in which the solicitor conducted the proceeding.

(a) Base Fee

¶ 5 The material before me includes detailed dockets of the solicitors for the plaintiff class setting out, on a day-by-day basis, the work time devoted to the file. Initially, Mr. Fine, on behalf of the defendant, took the position that he should be allowed to cross-examine the solicitors on their docket entries with a view to testing the veracity of the material before me. During the course of argument, Mr. Hodder conceded that there was one error in his docket entries, reducing the number of hours by 8.3, but otherwise maintained that the entries were accurate. During the course of argument, Mr. Fine withdrew his submission that he should be entitled to cross-examine and he proceeded to argue the question of costs, fees and related issues on the basis of the material I have.

¶ 6 The dockets indicate that the solicitor on the file, Andrew Frei docketed 665.5 hours while J. Gardner Hodder, who acted as counsel, docketed 848.2 hours (after correction for error mentioned above). Junior lawyers docketed 119.7 hours, approximately 25 hours of student time were docketed and just over 200 hours of law clerk time were also docketed. On the basis of the solicitors' dockets, I have no hesitation in accepting that the hours docketed were indeed expended upon this matter.

¶ 7 The hourly rates claimed by the solicitors appear to me to be reasonable. Mr. Frei, a solicitor of eleven years experience, has charged his time at $210 per hour. In view of the written fee agreement, this rate should only apply after the date of the amending agreement. Otherwise, it is reasonable. Mr. Hodder, who subsequent to the trial on the proceeding was certified as a specialist in civil litigation, is

charged at $200 per hour. The junior lawyers on the file are charged at $130 and $150 an hour and student's and clerk's time is billed at $75 per hour. The total amount claimed for fees, arrived at by multiplying the hours spent by the hourly rate is $349,372.25. The GST on this amount is $24,456.06.

¶ 8 Pursuant to s. 33(8) of The Class Proceedings Act, "the court shall allow only a reasonable fee" when determining the solicitor's base fee. It is common ground that in determining the reasonableness of the base fee, the usual factors are to be considered, namely:

(a) the time expended by the solicitor;
(b) the legal complexity of the matters to be dealt with;
(c) the degree of responsibility assumed by the solicitor;
(d) the monetary value of the matters in issue;
(e) the importance of the matter to the client;
(f) the degree of skill and competence demonstrated by the solicitor;
(g) the results achieved;
(h) the ability of the client to pay; and
(i) the client's expectation as to the amount of the fee.

(See Cohen v. Kealey & Blaney (1985), 26 C.P.C. (2d) 211 (Ont. C.A.).

¶ 9 I will proceed to consider these factors in relation to the circumstances of this proceeding.

Time expended and complexity

¶ 10 While the amount of time expended by the solicitors on this file is very substantial, undoubtedly far more than one would normally expect even for comparable complex commercial litigation, the second item on the list, the legal complexity of the matters to be dealt with, explains to some considerable extent the large amount of time expended. According to counsel, this was the first Ontario class action under the 1992 Class Proceedings Act to reach the trial stage. Accordingly, from the very beginning, they were in uncharted procedural waters of some considerable complexity.

¶ 11 The second aspect is that the complexity of the matter was significantly enhanced by virtue of the strategy, tactics, and positions taken by the defendant. The defendant chose to fight the plaintiff class every inch of the way, raising all available procedural hurdles and raising substantive arguments of considerable ingenuity with respect to the merits of the claim. While I was not involved in the pre-trial stage, it is apparent from the material before me and from the submissions of counsel that the combination of procedural novelty and defence tactics created a situation requiring a very considerable expenditure of time on the part of the solicitors for the plaintiff class. The defendant left no stone unturned in an effort to discourage the plaintiff class from proceeding with the action and to defeat the plaintiff's claim on the merits. The defendant not only counterclaimed against the individual members of the plaintiff class on the basis of its "package deal" argument relating its final closing package, but also counterclaimed against the condominium corporations themselves. Ms. Windisman's affidavit, filed in support of this motion, states that she perceived these strategies to be intended to scare off members of the plaintiff class and it is significant that in his affidavit, Mr. Cukierman chose not to deny those allegations (although they were strenuously resisted by counsel). While in my view, the defendant was legally entitled to take these steps and to advance these arguments, there is no doubt that the posture of the defendant throughout this proceeding considerably increased the legal costs of prosecuting the matter to completion.

¶ 12 Mr. Fine characterized the hours docketed by the solicitors for the plaintiff during argument

before me as a "docketing frenzy" and urged me to drastically reduce the fee claimed. I find that the while hours claimed are on the high side and subject to some reduction, many more hours were expended than would otherwise have been recorded solely by reason of the various procedural and substantive positions taken by the defendant.

Responsibility assumed

¶ 13 With respect to the degree of responsibility assumed by the solicitors, a relevant factor is the obvious one that this was a class proceeding. While the solicitors were legally entitled to deal with the representative plaintiff, the reality of the situation was that there were over 500 members of the plaintiff class, some of whom had a lively and active interest in the prosecution of the action. There can be little doubt but that managing a matter involving this added element of complexity increases the degree of responsibility assumed by the solicitors.

Monetary value

¶ 14 The monetary value of the matters in issue was substantial if one makes reference to the total amount of the claim. As indicated, the plaintiff class succeeded in obtaining a judgment in the approximate amount of 2.6 million dollars. While the average amount for each member of the class is just under five thousand dollars, this was a class proceeding and the relevant value to consider with respect to costs is the total amount of the claim.

Importance to Client

¶ 15 Similar considerations apply to determining the importance of the matter to the client. These claims would, in all likelihood, not have been adjudicated had it not been for the availability of the class action. In light of the strenuous resistance to the claims on the part of the defendant, it is virtually inconceivable to imagine how an individual plaintiff with a claim of five thousand dollars could have contemplated prosecuting the action. However, a claim of five thousand dollars is a significant one to almost any citizen and, in my view, as this is a class action, it is appropriate to look at the importance of the issues to the plaintiff class as a whole. From that standpoint, the matter was one of some considerable significance to over 500 individuals.

Skill and competence

¶ 16 The solicitors demonstrated skill and competence in the manner in which the action was prosecuted. While Mr. Fine submitted during argument that the solicitors had shown a lack of experience and care in the manner in which this action was prosecuted, it is my view that the facts do not bear out that submission. The case was considerably expedited by virtue of a summary judgment motion which, although unsuccessful, had the beneficial effect of narrowing the issues requiring evidence. The plaintiff class served a notice to admit and, with the assistance of Winkler J. who had heard the summary judgment motion, was able to streamline the trial action to some considerable extent. An agreed statement of facts ensued following the summary judgment motion, notice to admit and intervention of Winkler J.A trial that could have taken much longer was heard in approximately six days. Counsel for the plaintiff class relied largely upon a detailed written argument which admirably set out the issues and applicable authorities and significantly shortened the time taken for argument. In fairness to the defendant, it should be noted that the agreed statement of facts required the defendant's cooperation. However, this saving of court time came about as a direct result of the efforts of the solicitors for the plaintiff class and is indicative of skill and competence which benefited the court as well as the parties.

Results achieved

¶ 17 The results achieved were excellent. While the plaintiff class did not succeed in its argument that interest should be paid on a compound basis, it did succeed in all other respects and, as indicated, secured a very substantial judgment.

Ability to pay and client's expectation

¶ 18 The written retainer agreement indicates that the client did have some indication as to the amount of the fee to be charged and the evidence of Ms. Windisman is that she was kept very current with respect to the progress of the litigation and the charges she might expect as this matter proceeded. On this motion, Ms. Windisman testified and indicated on behalf of the plaintiff class that she thought the amounts claimed by the solicitors to be reasonable.

Conclusion

¶ 19 Taking all of these factors into account, I conclude as follows. In my view, the number of hours docketed is high and there must be some reduction. However, as I have indicated, there are a number of reasons for substantial expenditure of time beyond the control of the solicitors and, in light of those reasons, it would be unfair to the solicitors to reduce by any substantial extent the base fee which they claim. In my view, a reasonable fee, taking all of these factors into account, is $300,000 plus GST.

(b) Multiplier

¶ 20 The Class Proceedings Act makes a clear break with the past in authorizing contingency arrangements. The rationale for such an arrangement is fully explained in the report of the Ontario Law Reform Commission which led to the enactment of the Class Proceedings Act. As the example of this action demonstrates, the claim of an individual plaintiff may be significant but not sufficient to warrant that individual undertaking civil proceedings. The very purpose of class action procedure is to enhance access to the courts by individuals with such claims. As the Ontario Law Reform Commission Report indicates, the purpose of contingency arrangements permitting solicitors to undertake such actions on the basis that they are only to be paid if successful is to provide the necessary economic incentives to ensure that the goal of providing access to justice will be fulfilled. In Nantais v. Telectronics Propriety (Canada) Limited (1996), 28 O.R. (3d) 523, Brockenshire, J. stated as follows:

> I am here dealing with a contingency fee arrangement, which is a new concept in Ontario. Mr. Justice Cory, in an unreported motion decision of the Supreme Court of Canada dated August 8, 1994 in Coronation Insurance Company v. Florence, had this to say regarding contingency fees:
>
> > "The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal that should be encouraged.
> > For many years it has been rightly observed that only the very rich and those who qualify for Legal Aid can afford to go to court. This point was brought home with shocking clarity by Mr. Justice George Adams in his paper presented the week of July 11th at the Cornell Lectures. .... Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and

> enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the court's facilities in civil matters for the wealthy and powerful."

¶ 21 In view of the Act and this purpose, it seems to me that the solicitors for the plaintiff class are clearly entitled to a multiplier. In determining the appropriate multiplier, reference must be had to the degree of risk undertaken: s. 33 (7)(b). At the start, this did not appear to be a particularly risky proceeding. As initially framed, the claim was only for a higher rate of interest, and did not include the claims for interest on the parking and storage unit deposits or the claim for compound interest. The plaintiff class had the benefit of the decision of the Ontario Court of Appeal in the Ackland case in its favour. However, the risk of continuing the action significantly increased at each step of the way by virtue of the strenuous defence advanced by the defendant. While the defendant conceded the point decided in Ackland, it insisted on presenting, both by way of defence and by way of counterclaim against individual members of the class, its elaborately conceived "closing package" argument. It became clear that nothing short of a final judgment disposing of the issues would persuade the defendant to pay Ackland interest and the risk of proceeding with the litigation was thereby enhanced. While I found the "closing package" argument to be without merit, it was hardly something the solicitors for the plaintiff could ignore. In my view, they are entitled to be compensated for the risk inherent in litigating a case against a recalcitrant defendant. The claim for interest on parking and storage deposits clearly involved a higher degree of risk. While I found this claim to be well-founded, there were no prior decisions on the point and, again, this claim was strenuously resisted.

¶ 22 In my view, in light of the nature of the claims advanced and the positions taken by the defendant from both a procedural and substantive perspective, the solicitors for the plaintiff are entitled to a significant multiplier to compensate them for the risk of prosecuting this action. I find that the multiplier claimed, namely, 2.5, is appropriate. This would result in a fee of $750,000 which, in my view, is "fair and reasonable" within the terms of s. 33(7)(b) for the risk incurred in undertaking and continuing this proceeding.

(c) Disbursements

¶ 23 I am satisfied that the solicitors also incurred disbursements in the amount claimed, namely, $10,641.69, although that amount is to be reduced by $132 paid to file the Notice of Cross-Appeal, for a net claim of $10,509.69. This amount includes disbursements incurred by the plaintiff, Anita Windisman, in the amount of $541.28 which, in my view, is properly chargeable against the plaintiff class.

2. Is the representative plaintiff, Anita Windisman, entitled to compensation from the plaintiff class for the time and effort she expended in relation to this action?

¶ 24 The solicitors also claim, as a component of their fees, $13,275 as compensation to Anita Windisman for the time and effort she expended in relation to this action.

¶ 25 At the solicitors' suggestion, Anita Windisman recorded her time and docket type entries indicating the manner in which her time was expended were submitted to me. A total of 81.2 hours were docketed and Ms. Windisman estimates her unrecorded time at a further 25 hours. Compensation is claimed at $125 per hour.

¶ 26 It is submitted on behalf of Ms. Windisman that proceedings of this nature may involve a very

considerable expenditure of time and effort on the part of the representative plaintiff and that the very purpose of the Class Proceedings Act could be frustrated if representative plaintiffs are, in effect, left out of pocket at the end of the day.

¶ 27 Is there a basis in law for this claim? The Class Proceedings Act makes no reference to compensation for the representative plaintiff, and the issue appears not to have been considered by the Ontario Law Reform Commission in its very detailed report. In the United States, some courts have been prepared to make "incentive awards" to the class representative which have the dual function of encouraging class actions and compensating representative plaintiffs for their effort and for having assumed risks during the course of the litigation: see Dickerson, Class Actions: The Law of the 50 States, para. 2.02[5]; Enterprise Energy Corp. v. Columbia Gas Transmission Corporation 137 F.R.D. 240 (S.D. Ohio 1991). Commentators have suggested that such awards are justified, but only in special circumstances:

> ... such awards should only be made when the court supervising the award concludes, after taking all factors into account, that such an award is appropriate because of the special circumstances of the individual case. Awards should not be made as a matter of course. They should be granted only when the court finds unusual factors such as that the named plaintiff made an unusual contribution to the case (e.g. particular expertise or extraordinary time commitments), or that it was unlikely that other plaintiffs would have brought or continued the class action. Courts should also take into account whether there was unusual personal risk and whether the statutory scheme suggests that Congress intended to encourage class actions.

(The Report of the Commission on Professional Responsibility, Association of the Bar of the City of New York, "Financial Arrangements in Class Actions, and the Code of Professional Responsibility" 20 Fordham Urb. L.J. 831 (1993); see also Solovy, "The Head of The Class" (1990) vol. 12, no. 51 National Law Journal 13.)

¶ 28 Ordinarily, an individual litigant is not entitled to be compensated for the time and effort expended in relation to prosecuting an action. In my view, there is an important distinction to be drawn with reference to class proceedings. The representative plaintiff undertakes the proceedings on behalf of a wider group and that wider group will, if the action is successful, benefit by virtue of the representative plaintiff's effort. If the representative plaintiff is not compensated in some way for time and effort, the plaintiff class would be enriched at the expense of the representative plaintiff to the extent of that time and effort. In my view, where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated on a quantum meruit basis for the time spent. I agree with the American commentators that such awards should not be seen as routine. The evidence here is that Ms. Windisman took a very active part at all stages of this action. It seems clear that the case would not have been brought but for her initiative. She assumed the risk of costs and she devoted an unusual amount of time and effort to communicating with other class members, acting as a liaison with the solicitors, and assisting the solicitors at all stages of the proceeding. She kept careful records of her time and effort.

¶ 29 On the other hand, I find that the amount claimed by way of compensation for Ms. Windisman at the rate of $125 per hour is excessive. It bears no relation to Ms. Windisman's usual rate of compensation. In my view, the rate should be purely compensatory and, in that light, a rate of $40 per hour seems appropriate. There should also be a modest reduction in the time to exclude matters not strictly necessary to the prosecution of the action, such as dealing with the media after the judgment was rendered. For the very considerable amount of time and effort Ms. Windisman devoted to this matter, I

would award her a total compensation of $4,000 which amount is to be deducted from the net recovery to the plaintiff class.

3. Is the plaintiff class entitled to party and party costs and, if so, on what scale and in what amount?

(a) Entitlement

¶ 30 In my view, there is no reason why the plaintiff class, as the successful party, should not be awarded party and party costs against the defendant. Such awards are clearly contemplated by the Class Proceedings Act and by Rule 12.

(b) Scale

¶ 31 The plaintiff class relies on an offer to settle dated May 10, 1995 in which the plaintiff class offered to settle all issues for the amount of the interest differential claim, namely, $590,054.08. It is undisputable that the plaintiff class did significantly better than the offer. In my view, the ordinary consequences should follow. There is nothing in the Rules of Court or Act to exclude this possibility. Reference was made in argument to the reservations in the Ontario Law Reform Commission Report as to the application of the payment into court and offer to settle rules. As I read the Ontario Law Reform Commission Report, its concern was that defendants might take unfair advantage of the plaintiff class if there were not some judicial scrutiny. Those concerns had no application to offers made by plaintiffs and, in any event, those recommendations of the commission were not adopted.

¶ 32 The material submitted by the plaintiff class indicates that approximately two thirds of the hours devoted to this matter were expended prior to the date of the offer to settle. The offer to settle was served very shortly after the certification order was made. The plaintiff class takes the position that it could not have served an offer any earlier as there would be no basis upon which the offer could be made or accepted absent a court order certifying the class as appropriate. However, Mr. Hodder did not go so far as to suggest that this factor was itself sufficient to warrant an order of solicitor and client costs effective at a date earlier than the offer. He did, however, suggest that the court should take into account the conduct of the defendant and that the combined effect of the defendant's conduct in this proceeding and the fact that an offer was made at the earliest possible opportunity was sufficient to justify an award of solicitor and client costs throughout.

¶ 33 I have already reviewed the manner in which the defendant chose to defend this proceeding. The defendant chose to mount a strenuous defence using every available argument and procedural tactic. However, the defendant did not, in my view, resort to illegal or dishonest tactics, nor did the conduct of the defendant amount to an abuse of the process of the court. A strenuous but unmeritorious defence is not grounds for ordering costs on a solicitor and client scale: Foulis v. Robinson (1979), 21 O.R. (2d) 769 (C.A.). The positions taken by the defendant do not, in my view, qualify as "harassment of another party by the pursuit of fruitless litigation" so as to bring the case within the principle of Apotex Inc. v. Egis Pharmaceuticals and Novapharm Ltd. (1991), 4 O.R. (3d) 321 at 324. I have no doubt that many of the stratagems adopted by the defendant were designed to discourage the plaintiff class. I have already taken these tactics into account in fixing the reasonableness of the solicitor's fee which will be reflected in the amount of party and party costs I award but, in my view, it would be wrong to go further and to impose a significant sanction of an order of solicitor and client costs throughout.

¶ 34 Accordingly, I find that the plaintiff class is entitled to be paid solicitor and client costs from the

date of the offer which I fix at $100,000. The plaintiff class is entitled to party and party costs incurred prior to the date of the offer which I fix at two thirds of the $200,000 awarded as the base fee to the solicitors for that period, or $133,000. Accordingly, the plaintiff class is entitled to an award of party and party costs fixed at $233,000 plus GST and disbursements in the amount of $10,509.69.

¶ 35 Mr. Hodder submitted that any award of solicitor and client costs should include the multiplier if it is to achieve its stated purpose of giving the plaintiff class complete indemnity. In my view, this would be out of keeping with the scheme created by the Class Proceedings Act which provides for the multiplier and contingency arrangements with reference only to the fees chargeable to the solicitor against the plaintiff class. The rationale for a contingency fee arrangement is that the solicitor and the plaintiff class should be permitted to share in the potential recovery as a device to finance the litigation. Because the solicitor assumes the risk of not being paid, he or she is entitled to a premium. In my view, these arrangements are strictly a matter between the plaintiff class and the solicitor. As already noted, they are intended to create the incentives necessary to facilitate access to the courts and attainment of that objective in no way depends upon holding the defendant liable for more than the usual measure of costs. Moreover, I fail to see any basis for putting a defendant at greater risk with respect to costs when sued in an action brought on a contingency basis than where more usual fee arrangements are in place, a matter entirely beyond the control of the defendant.

¶ 36 Similarly, it is my view that the amount I have ordered by way of compensation to Anita Windisman for the time and effort she expended in relation to these proceedings is not a proper heading of costs awarded as against the defendant. It is conceded that there is nothing in the Act or Rules that would justify imposing those costs on the defendant and the basis for awarding those costs is that her effort benefited the class, a matter extraneous to the defendant.

4. Other terms relating to distribution and similar issues

¶ 37 It remains to settle the formal judgment and resolve certain issues regarding distribution. The parties filed written submissions in this regard but as there appear to be matters requiring argument, a further attendance before me is to be arranged to resolve those questions.

Conclusion

¶ 38 For the foregoing reasons I find as follows:

1. The solicitors for the plaintiff class are entitled to a fee of $750,000 plus GST and disbursements in the amount of $10,509.69.
2. The representative plaintiff, Anita Windisman is entitled to compensation from the fund recovered on behalf of the plaintiff class in the amount of $4,000.
3. The plaintiff class is entitled to recover costs from the defendant fixed at $233,000 plus GST and disbursements in the amount of $10,509.69.

SHARPE J.

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Class Actions
Law and Practice

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> (T)his report was less than helpful, in part because of the flaws in the underlying premise that a risk factor in litigation can be ascertained with mathematical precision...As Goudge J.A. stated in *Gagne*, the fixing of an appropriate fee in a class proceeding is "an art, not a science". As such, the court must be wary of attempts to measure appropriate fees by the application of pseudo-scientific or mathematical methods. Such an approach is inherently unreliable when a subject with as many variables as this litigation is considered.[2]

1 *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.).
2 *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at paras. 24 and 25.

§13.12 The Ontario Court of Appeal has stated that multipliers will tend to range between sightly greater than one at the low end and three to four in the most difficult cases. In *Gagne v. Silcorp* the claim was for payment of statutory entitlement under the *Employment Standards Act*; accordingly, the risk associated with the substantive litigation was very low. However, in reviewing the trial court decision which awarded no multiplier, the court of appeal noted that, at a minimum, there will always be a risk that the action will not be certified:

> The certification step in a class action is a significant one, often requiring extensive preparation by counsel. If certification is denied, a solicitor who has agreed to a fee contingent on success recovers nothing... This risk factor was material and ought to have been given weight.[1]

In *Gagne v. Silcorp*, the class proceeding was resolved and approved within a month of being commenced. The Court of Appeal awarded a 2.0 multiplier.[2] In awarding a multiplier of 1.5 in *Maxwell v. MLG Ventures Ltd.*, Ground J. held:

> ...[I]n view of the fact that a certain degree of risk was assumed by Messrs. Borden and Stratton in accepting the retainer and commencing the action but that the action did not proceed very far before a settlement was achieved which was largely the result of the settlement in the Public Trustee action and was not achieved by virtue of the efforts of Messrs. Borden and Stratton, the appropriate multiplier would, in my view, be 1.5 resulting in a total fee of $129,150 plus G.S.T. of $9,040.50 and disbursements of $1,940.30.[3]

In *Windisman v. Toronto College Park*, Sharpe J. similarly emphasized the risk of the proceeding. He considered not only the risk at the commencement of the litigation (which did not appear high) but also the fact that the risk of continuing the action increased significantly throughout the litigation by virtue of a strenuous defence mounted by the defendant. Sharpe J. indicated that he found the substantive argument of the defendant to be without merit. But he went on to say,

> ...[I]t was hardly something the solicitors for the plaintiff could ignore. In my view, they are entitled to be compensated for the risk inherent in litigating a case against a recalcitrant defendant.[4]

Accordingly, the multiplier used was 2.5.

1 *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 at p. 423 (Ont. C.A.).
2 *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (Ont. C.A.).

[3] *Maxwell v. MLG Ventures Ltd.* (1996), 3 C.P.C. (4th) 360 at para. 20 (Ont. Gen. Div.).
[4] *Windisman v. Toronto College Park* (1996), 3 C.P.C. (4th) 369 at para. 20 (Ont. Gen. Div.).

§13.13 In a case which appears risky at the outset (when class counsel makes the decision to accept the case), but rapidly becomes less risky due to other circumstances, such as discovery of a "smoking gun" document or the commencement of settlement discussions, there would be no corresponding reason to adjust the multiplier or percentage. To re-evaluate the risk with perfect hindsight is unfair to class counsel.[1] In *Parsons*, the court specifically rejected the submission that the multiplier applied should be reduced once settlement negotiations commenced or were concluded. With respect to the protracted settlement negotiations, Winkler J. observed that, "It is apparent that the time and resources committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued." Even after negotiations are concluded, a risk exists that the court will not approve the settlement agreement, or will require amendments, which one of the parties is not prepared to incorporate. One critical element of the rationale underlying contingent fees is that it discourages simply "putting in hours." Rather, the goal is to reward counsel who pursue their cases efficiently, aggressively, and successfully. To take any other approach would be to reward inefficiency.[2]

The approach of Winkler J. was not followed by Holmes J. in *Murphy v. Mutual of Omaha*. Counsel for the defendant argued that the risk to class counsel decreased at an early stage. The court held:

It is important that hindsight not be used unfairly to assess the risk existing at the time parties make their agreement as to fees. However in determination of a fair and reasonable fee an early and significant reduction of the original risk contemplated which occurs during the course of the retainer cannot be ignored.[3]

The judgement in *Murphy* was delivered on October 13, 2000. On February 9, 2001 Cumming J. declined to certify similar cases. These decisions would have made it evident that the risk was in fact very substantial in Murphy at all times, and highlight the difficulty in viewing risk with hindsight.

The preferable approach would seem to be an analysis of the requested fee based on what a sophisticated client would have agreed to at the commencement of the retainer.

This was the approach taken by Cumming J. in *Knowles v. Wyeth-Ayerst Canada Inc. et al.* A complex products liability action was settled before any contested proceedings. The 25% retainer agreement was approved, the court observing that "(t)he risks to prospective class counsel are properly to be considered at the point in time of the class action being commenced."[4]

[1] *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at para. 74.
[2] See, for example, *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at para. 28.

10

Residential Schools

IN THE FIRST FEW DECADES of the life of the new Canadian nation, when the government turned to address the constitutional responsibility for Indians and their lands assigned by the *Constitution Act, 1867*, it adopted a policy of assimilation[1]. As described in the previous chapter, the roots of this policy were in the pre-Confederation period. It was a policy designed to move communities, and eventually all Aboriginal peoples, from their helpless 'savage' state to one of self-reliant 'civilization' and thus to make in Canada but one community — a non-Aboriginal, Christian one.[2]

Of all the steps taken to achieve that goal, none was more obviously a creature of Canada's paternalism toward Aboriginal people, its civilizing strategy and its stern assimilative determination than education. In the mind of Duncan CampbellScott, the most influential senior official in the department of Indian affairs in the first three decades of the twentieth century, education was "by far the most important of the many subdivisions of the most complicated Indian problem". [3] As a potential solution to that 'problem', education held the greatest promise. It would, the minister of Indian affairs, Frank Oliver, predicted in 1908, "elevate the Indian from his condition of savagery" and "make him a self-supporting member of the state, and eventually a citizen in good staning." [4]

It was not, however, just any model of education that carried such promise. In 1879, Sir John A. Macdonald's government, pressured by the Catholic and Methodist churches to fulfil the education clauses of the recently negotiated western treaties,[5] had assigned Nicholas Flood Davin the task of reporting "on the working of Industrial Schools...in the United States and on the advisability of establishing similar institutions in the North-West Territories of the Dominion." Having toured U.S. schools and consulted with the U.S. commissioner of Indian affairs and "the leading men, clerical and

lay who could speak with authority on the subject" in western Canada, Davin called for the "application of the principle of industrial boarding schools" — off-reserve schools that would teach the arts, crafts and industrial skills of a modern economy. Children, he advised, should be removed from their homes, as "the influence of the wigwam was stronger than that of the [day] school", and be "kept constantly within the circle of civilized conditions" — the residential school — where they would receive the "care of a mother" and an education that would fit them for a life in a modernizing Canada.[6]

Davin's report received the unqualified support of the churches and the department, with the latter going so far as to suggest that within the wide range of assimilative policies, it would be through residential education, more than any other method, that "the solution of that problem, designated 'the Indian question' would probably be effected...".[7]

Politician, civil servant and, perhaps most critically, priest and parson all felt that in developing the residential school system they were responding not only to a constitutional but to a Christian "obligation to our Indian brethren" that could be discharged only "through the medium of the children" and "therefore education must be given the foremost place".[8]

At the same moment, however, they were driven by more prosaic motives. Macdonald's deputy superintendent general of Indian affairs, L. Vankoughnet, assured him that Indian expenditures were "a good investment", for in due course Aboriginal people, "instead of being supported from the revenue of the country...would contribute largely to the same."[9]

The socializing power of education had a similarly self-serving utility. Schools were part of a network of institutions that were to minister to industrial society's need for order, lawfulness, labour and security of property.[10] Scott admitted frankly that the provision of education to Indian communities was indispensable, for without it and "with neglect", they "would produce an undesirable and often dangerous element in society."[11]

Residential schools were more than a component in the apparatus of social construction and control. They were part of the process of nation building and the concomitant marginalization of Aboriginal communities. The

department's inspector of education wrote in 1900 that the education of Aboriginal people in frontier districts was an important consideration, not only as an economical measure to be demanded for the welfare of the country and the Indians, themselves, but in order that crime may not spring up and peaceful conditions be disturbed as that element which is the forerunner and companion of civilization penetrates the country and comes into close contact with the natives. That benefit will accrue to both the industrial occupants of the country covered by treaty and to the Indians by weaning a number from the chase and inclining them to industrial pursuits is patent to those who see [that] a growing need of intelligent labour must occur as development takes place.[12]

The Aboriginal leader George Manuel, a residential school graduate, was rather more blunt. The schools, he wrote,

were the laboratory and production line of the colonial system...the colonial system that was designed to make room for European expansion into a vast empty wilderness needed an Indian population that it could describe as lazy and shiftless...the colonial system required such an Indian for casual labour...[13]

Selfless Christian duty and self-interested statecraft were the foundations of the residential school system. The edifice itself was erected by a church/government partnership that would manage the system jointly until 1969. In this task the churches — Anglican, Catholic, Methodist and Presbyterian — led the way. Indeed, their energetic proselytizing resulted in the opening of residential schools in Ontario, the north-west and British Columbia even before the Davin report was submitted in 1879. Thereafter, the system — a combination of boarding schools built close to or in reserve communities and Davin's centrally located industrial schools — was expanded rapidly, reaching a high point with 80 schools in 1931 (see Table 10.1) and growing again in the 1950s as part of the nation's post-war expansion into Inuit homelands. It was maintained until the mid-1980s. Schools were built in every province and territory except Prince Edward Island, New Brunswick and Newfoundland.[14] They registered children from every Aboriginal culture — Indian, Inuit, and Métis children too — though the federal government assumed no constitutional responsibility for Métis people.[15] While Métis children would be invisible, rarely mentioned in the records, they were nevertheless there and were treated the same as all the

children were.

TABLE 10.1
Residential Schools, 1931

Nova Scotia	Shubenacadie (RC)		
Ontario	Albany Mission (RC)	Cecilia Jeffrey (PR)	Chapleau (CE)
	Fort Frances (RC)	Fort William (RC)	Kenora (RC)
	McIntosh (RC)	Mohawk (CE)	Moose Fort (CE)
	Mount Elgin (UC)	Shingwauk Home (CE)	Sioux Lookout (CE)
	Spanish (RC)		
Manitoba	Birtle (PR)	Brandon (UC)	Cross Lake (RC)
	Elkhorn (CE)	Fort Alexander (RC)	MacKay (CE)
	Norway House (UC)	Pine Creek (RC)	Portage la Prairie (UC)
	Sandy Bay (RC)		
Saskatchewan	Beauval (RC)	Cowessess (RC)	Duck Lake (RC)
	File Hills (UC)	Gordon's (CE)	Guy (RC)
	Lac La Ronge (CE)	Muscowequan (RC)	Onion Lake (CE)
	Onion Lake (RC)	Qu'Appelle (RC)	Round Lake (UC)
	St. Phillips (RC)	Thunderchild (RC)	
Alberta	Blood (RC)	Blue Quills (RC)	Crowfoot (RC)
	Edmonton (UC)	Ermineskins (RC)	Holy Angels (RC)
	Lesser Slave Lake (CE)	Morley (UC)	Old Sun's (CE)
	St. Albert (RC)	St. Bernard (RC)	St. Bruno (RC)
	St. Cyprian (CE)	St. Paul's (CE)	Sacred Heart (RC)
	Sturgeon Lake (RC)	Vermilion (RC)	Wabasca (CE)
	Wabasca (RC)	Whitefish Lake (CE)	
Northwest Territories	Aklavik (RC)	Fort Resolution (RC)	Hay River (CE))

	Providence Mission (RC)		
British Columbia	Ahousaht (UC)	Alberni (UC)	Alert Bay (CE)
	Cariboo (RC)	Christie (RC)	Coqualeetza (UC)
	Kamloops (RC)	Kitamaat (UC)	Kootenay (RC)
	Kuper Island (RC)	Lejac (RC)	Port Simpson (UC)
	St. George's (CE)	St. Mary's Mission (RC)	Sechelt (RC)
	Squamish (RC)		
Yukon	Carcross (CE)	St. Paul's Hostel (CE)	

In 1931 there were 44 Roman Catholic (RC), 21 Church of England (CE), 13 United Church (UC) and 2 Presbyterian (PR) schools. These proportions among the denominations were constant throughout the history of the system.

In Quebec two schools, Fort George (RC) and Fort George (CE), were opened before the Second World War. Four more were added after the war: Amos, Pointe Bleue, Sept-ëles and La Tuque.

Put simply, the residential school system was an attempt by successive governments to determine the fate of Aboriginal people in Canada by appropriating and reshaping their future in the form of thousands of children who were removed from their homes and communities and placed in the care of strangers. Those strangers, the teachers and staff, were, according to Hayter Reed, a senior member of the department in the 1890s, to employ "every effort...against anything calculated to keep fresh in the memories of the children habits and associations which it is one of the main objects of industrial education to obliterate."[16] Marching out from the schools, the children, effectively re-socialized, imbued with the values of European culture, would be the vanguard of a magnificent metamorphosis: the 'savage' was to be made 'civilized', made fit to take up the privileges and responsibilities of citizenship.

Tragically, the future that was created is now a lamentable heritage for those children and the generations that came after, for Aboriginal communities and, indeed, for all Canadians. The school system's concerted

campaign "to obliterate" those "habits and associations", Aboriginal languages, traditions and beliefs, and its vision of radical re-socialization, were compounded by mismanagement and underfunding, the provision of inferior educational services and the woeful mistreatment, neglect and abuse of many children — facts that were known to the department and the churches throughout the history of the school system.

In the course of that history there were those who understood that such a terrible legacy was being created. In 1943, R. Hoey, the department's superintendent of welfare and training, on receiving from the principal of St. George's School (located on the Fraser River, just north of Lyttons, B.C.) a set of shackles that had been used routinely "to chain runaways to the bed" and reports of other abuses at the school, wrote, "I can understand now why there appears to be such a widespread prejudice on the part of the Indians against residential schools. Such memories do not fade out of the human consciousness very rapidly."[17] Nevertheless, with very few exceptions, neither senior departmental officials nor churchmen nor members of Parliament raised their voices against the assumptions that underlay the system or its abusive character. And, of course, the memory did not and has not faded. It has persisted, festered and become a sorrowful monument, still casting a deep shadow over the lives of many Aboriginal people and communities and over the possibility of a new relationship between Aboriginal and non-Aboriginal Canadians.

1. The Vision and Policies of Residential School Education

1.1 The Vision

...it is to the young that we must look for a complete change of condition.[18]

The tragic legacy of residential education began in the late nineteenth century with a three-part vision of education in the service of assimilation. It included, first, a justification for removing children from their communities and disrupting Aboriginal families; second, a precise pedagogy for re-socializing children in the schools; and third, schemes for integrating graduates into the non-Aboriginal world.

The vision sprang from and was shaped and sustained by the representations of departmental officials and churchmen of the character, circumstances and destiny of the nation's Aboriginal population. For such social reformers in Canada, and indeed throughout the world of European empires, the contact between expansive and 'mature' non-Aboriginal culture and indigenous cultures in their 'infancy' imperilled the survival of Aboriginal peoples. According to an 1886 report from the department's inspector of schools for the north-west, for example, resource development and settlement had prevented Indian communities from following that course of evolution which has produced from the barbarian of the past the civilized man of today. It is not possible for him to be allowed slowly to pass through successive stages, from pastoral to an agricultural life and from an agricultural one, to one of manufacturing, commerce or trade as we have done. He has been called upon suddenly and without warning to enter upon a new existence.[19]

The need for government intervention to liberate these savage people from the retrograde influence of a culture that could not cope with rapidly changing circumstances was pressing and obvious. Without it, the inspector continued, the Indian "must have failed and perished miserably and he would have died hard entailing expense and disgrace upon the Country." The exact point of intervention that would "force a change in [the Indian's] condition" was equally clear — "it is to the young that we must look for a complete change of condition."

Only in the children could hope for the future reside, for only children could undergo "the transformation from the natural condition to that of civilization".[20] Adults could not join the march of progress. They could not be emancipated from their "present state of ignorance, superstition and helplessness";[21] they were "physically, mentally and morally...unfitted to bear such a complete metamorphosis".[22] Under departmental tutelage, adults might make some slight advance. They could, Davin suggested, "be taught to do a little at farming and at stock raising and to dress in a more civilized fashion, but that is all."[23] They were, in the words of the Reverend E.F. Wilson, founder of the Shingwauk residential school, "the old unimprovable people."[24]

The central difficulty in this analysis was not that adults were lost to civilization, but that they were an impediment to it. While they could not

learn, they could, as parents, teach their children. Through them to their children and on through successive generations ran the "influence of the wigwam". If the children's potential was to be realized, it could only be outside the family. As E. Dewdney, superintendent general of Indian affairs in Macdonald's second government, reasoned, children therefore had to be removed from "deleterious home influences";[25] they must be, the Archbishop of St. Boniface added, "caught young to be saved from what is on the whole the degenerating influence of their home environment."[26] Their parents were, by the light of the vision's compelling logic, unfit. Only Frank Oliver demurred, pointing out the essentially un-Christian implication of this formative conclusion:

I hope you will excuse me for so speaking but one of the most important commandments laid upon the human by the divine is love and respect by children for parents. It seems strange that in the name of religion a system of education should have been instituted, the foundation principle of which not only ignored but contradicted this command.[27]

No one took any notice of the minister, however, for no one involved in Indian affairs doubted for a moment that separation was justified and necessary and that residential schools were therefore indispensable. Such institutions would, Parliament had been informed in 1889, undoubtedly reclaim the child "from the uncivilized state in which he has been brought up" by bringing "him into contact from day to day with all that tends to effect a change in his views and habits of life."[28] In its enthusiasm for the schools, the department went so far as to suggest that it would be "highly desirable, if it were practicable, to obtain entire possession of all Indian children after they attain to the age of seven or eight years, and keep them at schools...until they have had a thorough course of instruction".[29]

The common wisdom of the day that animated the educational plans of church and state was that Aboriginal children had to be rescued from their "evil surroundings", isolated from parents, family and community,[30] and "kept constantly within the circle of civilized conditions".[31] There, through a purposeful course of instruction that Vankoughnet described as "persistent" tuition,[32] a great transformation would be wrought in the children. By a curriculum aimed at radical cultural change — the second critical element of the vision — the 'savage' child would surely be re-made into the 'civilized' adult.

The school, as department and church officials conceived it, was a circle, an all-encompassing environment of re-socialization with a curriculum that comprised not only academic and practical training but the whole life of the child in the school. This constituted the basic design of the schools and was maintained, with little variation, for most of the history of the system.

The classroom work of the teachers and students was to be guided by the standard provincial curriculum. To this was added equally important training in practical skills. The department held firm to Davin's industrial model, convinced that

no system of Indian training is right that does not endeavour to develop all the abilities, remove prejudice against labour, and give courage to compete with the rest of the world. The Indian problem exists owing to the fact that the Indian is untrained to take his place in the world. Once teach him to do this, and the solution is had.[33]

In every school, therefore, the children were to receive instruction in a range of subjects, including, for the boys, agriculture, carpentry, shoemaking, blacksmithing, tinsmithing and printing and, for the girls, sewing, shirt making, knitting, cooking, laundry, dairying, ironing and general household duties. As the curriculum was delivered in a half-day system until after the Second World War, with students spending half the day in the classroom and the other half in practical activities, trades training took place both in shops and in learn-by-doing chores. These chores had the additional benefit for the school of providing labour — on the farm and in the residences, bakehouse, laundry and dairy that made operation of the institution
possible.[34]

Although these academic and practical courses might clothe the children in the skills and experience they needed to survive and prosper, the department and the churches realized that the children would have to undergo much more profound socialization. Skills would be useless unless accompanied by the values of the society the children were destined to join. The seeds of those values were, of course, embedded in each and every academic subject, in the literature they read, the poetry they recited, and the songs they were taught to sing. As well, however, in its 1896 program of

study, the department directed that an ethics course be taught in each grade. In the first year, the students were to be taught the "practice of cleanliness, obedience, respect, order, neatness", followed in subsequent years by "Right and wrong", "Independence. Self-respect", "Industry. Honesty. Thrift", and "Patriotism....Self-maintenance. Charity." In the final year, they were confronted by the "Evils of Indian Isolation", "Labour the Law of Life" and "Home and public duties".[35]

Cardinal among these virtues was moral training for, as a memorandum from the Catholic principals explained, "all true civilization must be based on moral law." Christianity had to supplant the children's Aboriginal spirituality, which was nothing more than "pagan superstition" that "could not suffice" to make them "practise the virtues of our civilization and avoid its attendant vices." In the schools, as well as in the communities, there could be no compromise, no countenancing Aboriginal beliefs and rituals, which, "being the result of a free and easy mode of life, cannot conform to the intense struggle for life which our social conditions require."[36]

The children were not only to imbibe those values, and a new faith, they were to live them. The school was to be a home — a Canadian one. On crossing its threshold, the children were entering a non-Aboriginal world where, with their hair shorn and dressed in European clothes, they would leave behind the 'savage' seasonal round of hunting and gathering for a life ordered by the hourly precision of clocks and bells and an annual calendar of rituals, the festivals of church and state — Christmas, Victoria Day, Dominion Day and St. Jean Baptiste Day — that were the rapid, steady pulse of the industrial world. According to Dewdney, students had to be taught that "there should be an object for the employment of every moment", and thus the "routine...the recurrence of the hours for meals, classwork, outside duties...are all of great importance in the training and education, with a view to future usefulness".[37]

In school, in chapel, at work and even at play the children were to learn the Canadian way. Recreation was re-creation. Games and activities would not be the "boisterous and unorganized games" of "savage" youth. Rather they were to have brass bands, football, cricket, baseball and above all hockey "with the well regulated and...strict rules that govern our modern games", prompting "obedience to discipline" and thus contributing to the process of moving the children along the path to civilization.[38]

None of the foregoing would be achieved, however, unless the children were first released from the shackles that tied them to their parents, communities and cultures. The civilizers in the churches and the department understood this and, moreover, that it would not be accomplished simply by bringing the children into the school. Rather it required a concerted attack on the ontology, on the basic cultural patterning of the children and on their world view. They had to be taught to see and understand the world as a European place within which only European values and beliefs had meaning; thus the wisdom of their cultures would seem to them only savage superstition. A wedge had to be driven not only physically between parent and child but also culturally and spiritually. Such children would then be separated forever from their communities, for even if they went home they would, in the words of George Manuel, bring "the generation gap with them".[39] Only in such a profound fashion could the separation from savagery and the re-orientation as civilized be assured.

That the department and churches understood the central challenge they faced in civilizing the children as that of overturning Aboriginal ontology is seen in their identification of language as the most critical issue in the curriculum. It was through language that children received their cultural heritage from parents and community. It was the vital connection that civilizers knew had to be cut if progress was to be made. E.F. Wilson informed the department that at Shingwauk school, "We make a great point of insisting on the boys *talking English*, as, for their advancement in civilization, this is, of all things, the most necessary."[40] Aboriginal languages could not carry the burden of civilization; they could not "impart ideas which, being entirely outside the experience and environment of the pupils and their parents, have no equivalent expression in their native language."[41] Those ideas were the core concepts of European culture — its ontology, theology and values. Without the English language, the department announced in its annual report of 1895, the Aboriginal person is "permanently disabled" and beyond the pale of assimilation for, "So long as he keeps his native tongue, so long will he remain a community apart."[42]

The only effective road to English or French, however, and thus a necessary pre-condition for moving forward with the multi-faceted civilizing strategy, was to stamp out Aboriginal languages in the schools and in the children. The importance of this to the department and the churches cannot

be overstated. In fact, the entire residential school project was balanced on the proposition that the gate to assimilation was unlocked only by the progressive destruction of Aboriginal languages. With that growing silence would come the dying whisper of Aboriginal cultures. To that end, the department ordered that "the use of English in preference to the Indian dialect must be insisted upon."[43]

It was left to school principals to implement that directive, to teach the languages of 'civilization' — French in Quebec and English in all other parts of Canada, including Francophone areas, and to prevent the language of 'savagery' from being spoken in the school. Some instituted imaginative systems of positive reinforcement through rewards, prizes or privileges for the exclusive use of English. More often than not, however, the common method was punishment. Children throughout the history of the system were beaten for speaking their language.[44]

The third and final part of the vision was devoted to the graduates, their future life and their contribution to the civilization of their communities. It was this aspect of the vision that underwent the greatest change. While the ideology of the curriculum and its goal of extensive cultural replacement remained constant, the perceived utility of the schools to the overall strategy of assimilation and their relationship to Aboriginal communities underwent substantial revision. There were, in fact, two residential school policies. The first, in the long period before the Second World War, placed the school at the heart of the strategy to disestablish communities through assimilation. In the subsequent period, the residential school system served a secondary role in support of the integration of children into the provincial education system and the modernization of communities.

Initially, the schools were seen as a bridge from the Aboriginal world into non-Aboriginal communities. That passage was marked out in clear stages: separation, socialization and, finally, assimilation through enfranchisement. By this last step, the male graduate could avail himself of the enfranchisement provisions of the *Indian Act*, leaving behind his Indian status and taking on the privileges and responsibilities of citizenship.

Each stage in the passage had its difficulties, and the department was fully aware that its task was not completed with the training that led to graduation. Indeed, it declared in its annual report of 1887, "it is after its

completion that the greatest care...needs to be exercised, in order to prevent retrogression." Retrogression — cultural backsliding — was the great fear. Once the connection between child and community had been broken it should not be re-established; the child should never again fall under the influence of Indian "prejudices and traditions" or the "degradations of savage life."45 To prevent this unhappy occurrence, the department reported in 1887, it would be best "to prevent those whose education at an industrial institution...has been completed from returning to the reserves". They were instead to be placed in the non-Aboriginal world and secured there by employment in the trade they had learned at the school, "so as to cause them to reside in towns, or, in the case of farmers, in settlements of white people, and thus become amalgamated with the general community."[46] By implication, the future was not only one of amalgamating growing numbers of employable graduates but also the progressive decay and final disappearance of reserve communities.

Reality intervened in this strategy, however, and, indeed, the department and the churches did not exercise the "greatest care" of graduates. There was no placement program, and even if there had been, situations were not available in towns or "settlements of white people". "Race prejudice", an Indian agent informed the department, "is against them and I am afraid that it will take time, under the circumstances, before they can compete with their white brothers in the trades."[47] By 1896, the department had to face the fact that "for the majority [of graduates], for the present at least, there appears to be no alternative" but to return to the reserves.[48] That present became the future; there were always but few openings for graduates. With the exception of temporary labour shortages during the war, it was obvious that "no appreciable number of graduates of the Schools will be in a position to earn a livelihood by working as a craftsman among whites."[49]

The second fact that had to be faced was that in returning to their communities, as Reed predicted, "there will be a much stronger tendency for the few to merge into the many than to elevate them."[50] A great proportion of the graduates would go "back to the ways of the old teepee life",[51] to the "nomadic habits of his ancestors."[52] They could not, one principal reported "stand firm" or "overcome this tendency to drift with the current that carries so many of their own people."[53]

The department and the churches recognized the problem — one that cut to

the very heart of their strategy, blunting the usefulness of the schools and in fact so calling into question the industrial school model that, in 1922, it was abandoned in favour of the simpler boarding school, thereafter called a residential school. They recognized it but, as would be the case so often in the history of the system when it faced difficulties, they did very little apart from discuss it and formulate proposals.[54]

In 1898, the deputy superintendent general, James Smart, recognizing the impossibility of countering the drift back to reserves, decided to make a virtue out of necessity. He redesigned the system, supplementing its original emphasis on the enfranchisement of individual graduates with the additional goal of developing the communities to which the graduate returned. It would now be the object "to have each pupil impart what he has gained to his less fortunate fellows, and in fact become a centre of improving influence for the elevation of his race".[55] The graduates could be, the principal of the Regina industrial school predicted, a "great moral force in the uplift of the life of the reserve", providing "an object lesson" in farming, gardening, housekeeping, the care of the sick and "maintaining sanitary conditions about their homes."[56]

By 1901, the department had initiated an experiment, the File Hills colony on the Peepeekeesis reserve, designed to release the graduates' uplifting developmental potential. The colony, under the close supervision of the agent W.M. Graham, was a model settlement of 15 former pupils, each allocated an 80-acre lot, horses, farming equipment, lumber and hardware for houses. Departmental expenses were to be recouped from the young farmers when they achieved an adequate income and the funds transferred to "help others make a like start."[57]

Reports on the colony were promising in 1902 but in ensuing years they were much less so,[58] with the graduates described as being "all the way from 'lazy and indifferent' to 'making favourable or satisfactory progress'".[59] Reflecting these assessments, or perhaps because the experiment was, as the historian Olive Dickason has suggested, "too costly for the budget-minded department",[60] Duncan Campbell Scott chose not to extend it. Instead, he merely called upon principals and agents to co-ordinate the return of graduates to reserves and, so that they should not be thrown "entirely upon [their] own resources", he announced a modest start-up program — offering graduates "a gift of oxen and implements...and the

granting of a loan which must be repaid within a certain time, and for which an agreement is signed by the pupil."[61]

These loans substituted for what could have been a more ambitious attempt to resolve the problem of the graduates.[62] As the United Church's Association of Indian Workers in Saskatchewan pointed out in 1930, there continued to be "a missing link that should be forged into the present system along the line of 'Follow up work'."[63] Without such a link, without any effective "control over the graduates",[64] they were destined to return to the reserves, where rather than being that "great moral force",[65] they would fall under "the depressing influence of those whose habits still largely pertain to savage life".[66] For those ex-pupils and for the communities, assimilation would remain an ever-distant departmental goal.

1.2 Changing Policies

...the interests of the children are best served by leaving them with their parents.[67]

The fact that the department stumbled in planning this final step to assimilation was augmented by an even more disturbing reality. As a general rule, at no time in the history of the system did the schools produce the well-educated graduates that were the prerequisite for both the original scheme of enfranchisement and Smart's amended community-based strategy. Indeed, the use of the word graduate was rather misleading, for very few children completed the full course of study, though it is clear that many children did receive some of the basics of a rudimentary education and a few children reached advanced levels. Even for those that did complete the program, most schools did not provide the training that was such an essential part of the residential vision. According to a review of the educational performance of the system up to 1950, conducted in 1968 by R.F. Davey, the director of educational services, the practical training that had been in place "contained very little of instructional value but consisted mainly of the performance of repetitive, routine chores of little or no educational value."[68]

Davey's judgement of the quality of the academic program was equally harsh. The system had failed to keep pace with advances in the general

field of education and, because the schools were often in isolated locations and generally offered low salaries, the system had been unable to attract qualified staff. A departmental study quoted by Davey found that, as late as 1950, "over 40 per cent of the teaching staff had no professional training. Indeed, some had not even graduated from high school." Moreover, teachers worked under the most difficult conditions. Language training was a persistent problem, and the half-day system reduced class time to the extent that it was, Davey concluded, virtually impossible for students to make significant progress. He noted in his report that in 1945, when there were 9,149 residential school students, the annual report of the department showed only "slightly over 100 students enroled in grades above grade VIII and...there was no record of any students beyond the grade IX level."

In the 1950s and '60s the department made improvements in the educational component of the residential system. Additional departmental educational supervisory staff were employed, in 1951 the half-day system was abandoned, the department assumed direct responsibility for the hiring and remuneration of teachers in 1954,[69] and, in an attempt to attract more competent staff, teachers were "placed upon salary scales which bore some relationship to the salaries paid across the country."[70]

In attracting more competent staff, the department was able to achieve considerable success quickly. By 1957, the number of unqualified teachers in residential schools had been reduced by 50 per cent, and in 1962 the department reported that 91.1 per cent of the teachers it employed were fully qualified.[71] It was not easy to keep the percentage up, however, and two decades later the department admitted that it still had "difficulty in recruiting and retaining education staff."72 Nevertheless, the department could track advances in educational attainment. By 1959, the number of children in grades 9 to 13 in residential and day schools had increased from none in 1945 to 2,144, and in the next decade, it rose even more rapidly to 6,834, which was just over 10 per cent of the total school (day and residential) population.[73]

All these efforts were overshadowed by what had been and continued to be a most fundamental impediment. Both the curriculum and the pedagogy, which were not in any way appropriate to the culture of the students, made it difficult for the children to learn. This fact could not have escaped the department's and the churches' attention, for on a number of occasions

provincial school inspectors, employed by the department to assess the educational condition of the schools, had made the point that the "curricula in use in various provinces are not necessarily the courses of study adapted for use in Indian schools." "It should not be forgotten", Inspector Warkentin informed the department in 1951, "that there is very often a very wide difference in the life experiences of Indian children and white children, a difference which should be reflected in courses of study."[74] Another inspector, while reinforcing this point, added a call for a change in pedagogy to one that would be more familiar to the children. In considering the subject of social studies, for example, he advised that "this work be taught by a due recognition of Indian background. Story telling can be used more effectively to arouse interest."[75]

Although the department admitted in the 1970s that the curriculum had not been geared to the children's "sociological needs", it did little to rectify that situation. A national survey was undertaken "to identify textbooks that the Indian people considered offensive, and steps were taken to remove these books from the schools".[76] Research was commissioned from a number of universities to address "the absence from the school curriculum generally of an Indian cultural component",[77] but none of it was of the scope that would ever have met Warkentin's suggestion that a comprehensive "curriculum specially aimed at the instruction of Indian children should be drawn up".[78] There is no indication in school records that the results of any of this research found its way into the classrooms of residential schools.

Efforts to improve the school program in the post-war period were undercut further by one final factor — the system was gradually abandoned. In 1948, the federal government — on the recommendation of the joint parliamentary committee on Indian affairs, which in hearings held beginning in 1946, had received strong representations from Indian groups for "an end to the policy and practice of segregated education"[79] — initiated an extensive redesign of its Aboriginal education strategy that not only took the emphasis off residential schools but determined that the system should be shut down completely as soon as possible. Departmental efforts and resources were reallocated to a new policy, away from the residential system to creation of a day school system and, most significantly, integration by "transferring Indian children to provincial schools, and federal schools to provincial administrative school units."[80]

The representations of Indian groups cannot be wholly discounted in this development, but in fact the move away from the traditional strategy began even before the war, and the dynamics that motivated it were, as always, a non-Aboriginal assimilative strategy and more mundane considerations — financial ones in this instance. In 1943, R.A. Hoey appeared before a special parliamentary committee on reconstruction and re-establishment. Reacting to statements by one of the committee members — that residential schools "lose a great deal of the value of the education", because they "segregate the children" from their community, and that if children were educated in a day school "[y]ou would educate the parents and the children together" — Hoey admitted that he too had doubts about the efficacy of residential schools. His personal preference was "to see residential schools slowly and gradually closed".[81]

Hoey took back to the department the clear understanding that the "Indians in the judgement of the committee, should be encouraged to attend white schools" and that this would probably be the policy of the future. He was, as the department would be, in total agreement with such a policy directive. As he pointed out to the deputy minister, there was a definite educational benefit in giving the children the "opportunity of associating with white children during their formative years".[82] Such experience would increase the likelihood of their absorbing non-Aboriginal culture or, as Davey characterized it two decades later, would "quicken and give meaning to the accultural process through which [the children] are passing".[83] There also appeared to be a financial advantage for the government, in that integration, Hoey believed, "would in the end be substantially less than the cost of establishing" and operating an exclusively federal system of residential and day schools.[84]

The policy of integration, though an apparently radical redirection of educational policy, was not based on a wholly new vision of education's role in the quest for assimilation. It built upon Smart's idea of community development, but in this version, in a most surprising break with the civilizing logic of the late nineteenth century, an active part was assigned to the parents, whose dangerously savage character and baleful influence appear mysteriously to have disappeared. Indeed, the department took the position that maintaining the parent/child relationship was key — that "there can be no complete substitute for the care and concern of parents and the security which children feel when living at home".[85] Therefore,

It is considered that the parents, wherever possible, should assume the responsibility for the care of their children, and that the interests of the children are best served by leaving them with their parents when home circumstances and other factors are favourable.[86]

This now-valued parental involvement was even given institutional form in federal day and residential schools. In 1956, the department set up a number of school committees "to stimulate parental and community interest, and to provide experience for the further involvement of Indians in the management of education." The committees, made up of band members, were to act as "advisory boards to departmental staff" and were to be "involved in the operation of the schools", being given authority for the "school lunch program, daily school transportation, repairs and the maintenance of school buildings...and they also present the annual operating budget to the district superintendent of education."[87] While the department expanded this initiative, establishing some 180 such committees by 1971, there was no increase in their authority. Most noticeably, they were given no control over curriculum, perhaps so that whatever traces of the influence of the wigwam still existed might be effectively excluded from the classroom.

There is, indeed, reason to suspect that integration — despite the apparent cultural sensitivity of the textbook survey and commissioned research — did not lessen, and may even have increased, the corrosive impact of education on the culture of the children. Again, as in the original vision, the question of language was the essential template shaping the policy. The department realized that "the most formidable handicap that faces the Indian child entering [the provincial] school"[88] was the requirement to be able to function in English (and in French or English in Quebec). To that end, the greatest emphasis in this period was on the development of a language arts program,[89] and regional language specialists were employed to help the children "overcome any language difficulties",[90] in the belief that "much of the progress in Indian education" was to be realized by these "improved methods of language instruction."[91]

Most significantly, integration meant repositioning the residential school system. No longer the main thrust of the assimilative strategy, it became, as the department described it, "a supplementary service" for children "who for

very special reasons, cannot commute to federal day schools or provincial schools from their homes".[92] The new organizing principle of the policy was "that in educational services, everything possible will be done to enable families to stay together, so children will not have to be separated from their parents needlessly."[93]

The whole educational system could not, of course, be remodelled overnight to conform to this new dictum. Rather the change in status occurred school by school, at different times in different parts of the country owing to local circumstances — for example, the development of reserve roads to allow busing of children to day schools, the construction of schools close to communities, and the progress of integration, which could not go forward without negotiating local school board and provincial agreements. The residential school system therefore comprised, at any point in time, a spectrum of different types of residential schools — from those that remained classic residential schools because of community isolation, to those that combined "residential and day school with a preponderance of day students", to those that became hostels or student residences for children brought in from distant communities to provincial schools during the day. There were even some that

combined hostel, residential and day school, providing boarding facilities only for those pupils attending a nearby provincial school, boarding facilities and classroom instruction for others and classroom instruction only for day pupils.[94]

Finally, a boarding home program, involving the placement of high school students "in carefully selected private homes", was also introduced and substituted for residential assignment of children.[95]

The overall intention, of course, was for all residential schools to be closed as soon as implementation of the integration policy reduced enrolments. In 1948, 60 per cent of the Indian school population was enroled in federal schools.[96] In 1969, 60 per cent were in provincial schools,[97] and the number of residential schools and hostels was reduced from the 72 schools operating in 1948, with 9,368 students, to 52 schools with 7,704. That the number of schools and students did not fall proportionately was attributable not only to local circumstances but to two further difficulties — opposition to closures and the emergence of a new role for the schools as social welfare

institutions.

The development of a welfare function was not a completely unforeseen implication of the new integration policy. Hoey had warned the reconstruction and re-establishment committee in 1943 that there would continue to be a need for residential places for "orphans and children from disrupted homes".[98] Because of "such things as alcoholism in the home, lack of supervision, serious immaturity",[99] some parents would not be able, as the new policy directed, to "assume the responsibility for the care of their children".[100] To reflect that reality and at the same time control and reduce residential school enrolments, an admissions policy "based upon the circumstances of the student's family"[101] was adopted. In areas where federal day school attendance or integration was possible, priority was given to children deemed to be "Category 3" — those from families where "a serious problem leading to neglect of children exists". Neglect — measured, of course, against non-Aboriginal norms — was "interpreted as defined in the provincial statute of the province in which the family resides".[102] In line with the general post-war trend of involving provinces in Indian affairs, provincial child welfare agencies co-operated in determining cases of neglect and in placing children in care. Residential schools were an available and apparently popular option within the wider child care system.

As the integration program expanded, many residential schools, particularly in southern Canada, where the rate of progress was most extensive, became, to a degree alarming to the department, repositories for 'neglected' children.[103] A confidential 1966 departmental report estimated that 75 per cent of children in the schools were "from homes which, by reasons of overcrowding and parental neglect or indifference, are considered unfit for school children."[104] This trend caused a serious bottleneck in the process of reducing enrolments. It might have been remedied by providing support to families in communities to "alleviate the situations where children year in and year out are being removed from their homes and the home situation [remains] practically the same."[105] The more usual methods, however, appear to have been either the referral of children requiring long-term care "to a child welfare agency for foster home service" or adoption or the placement of "incorrigible" children with "an officer of a correctional or welfare agency."[106]

As the department characterized the situation, this welfare bottleneck put it in the anomalous position of having to administer a group of schools which have a degree of independence of operation permitting them to pursue policies which are diametrically opposed to those of the Federal Government, particularly with respect to segregation and welfare. The tension created by this internal conflict is damaging to the Indian education program and confusing to the Canadian public.[107]

Much of this conflict sprang from opposition to integration that the department had, in fact, anticipated from its old partner in education, the churches, and from "some Indian associations who dislike working with provincial governments, and from individuals, both Indian and non-Indian, who, for personal reasons, wish to keep the federal schools open."[108]

Church opposition came almost exclusively from the Catholic church,[109] which fought particularly hard in western Canada where, as the department noted, perhaps cynically, provinces "do not provide for separate schools".[110] According to the church, its position was purely altruistic. In *Residential Education for Indian Acculturation*, a study produced in 1959 by the Oblate Indian and Eskimo Welfare Commission, the church argued that separate on-reserve education in day schools or separate residential school education provided greater educational benefits and had greater "efficiency towards acculturation". Residential schools, in addition, provided healthier living conditions, more appropriate supervision, better grouping by grade and more vocational training possibilities than the average day school. It is also usually in a better position to offer a wider range of social and recreational activities including those with non-Indians.[111]

The church conducted an aggressive political campaign in the late 1950s and into the 1960s through the reserve-based Catholic Indian League to save the schools it managed and particularly to extend high school services through residential schools.[112] Each closure was a battle by "pulpit, press and politicians"[113] but they were made, school by school, normally by a complicated process of closing residences with low enrolments and transferring the remaining children to others, all the while carefully retaining the single denominational affiliation of each school.[114]

In 1969, the federal government obviated the need for that careful process when it formally ended the partnership with the churches, effectively

secularizing Aboriginal education.[115] The department then had almost unrestrained control of the residential school system. The rate of closures in the next decade bore witness to that; by 1979, the number of schools had fallen from 52 with 7,704 students to 12 with 1,899.

The withdrawal of the churches did not clear the way forward completely, however. Bands and political associations insisted on consultation when closures were proposed and pushed for "increased responsibility in the management of student residences".[116] In that same vein, the National Indian Brotherhood proposed in 1971 that "residence services be contracted to Indian groups having the approval of the bands served by the respective residences."[117] Communities connected with the Blue Quills school not only prevented its closure but forced the government to turn it over to the people of the Saddle Lake-Athabaska district.[118] The need for such co-operation became paramount after the government accepted, in 1972, the principle of Indian control of Indian education. In line with that, the department adopted the position that "major changes in the operation and administration of individual residences will be considered only in consultation with Indian parents or their representatives."[119] In the next few years six more schools in Saskatchewan followed the Blue Quills lead. By 1986, apart from a continued funding responsibility for such schools, the department virtually came to the end of the residential school road.[120]

The introduction of integration, the context for the final closure or transfer of the schools, was not the only significant development in the post-war period. As the nation moved north, further penetrating Indian, Métis and Inuit homelands, a whole new tier of schools was created in the Northwest Territories.

Northern Aboriginal peoples had not been untouched by the residential school system in the pre-war period. Schools in British Columbia, Alberta, Saskatchewan, Ontario and Quebec had taken in children from far northern communities. Yukon Indians were served by the Anglican residential school begun at Carcross in 1902 and by the Catholic Lower Post School in British Columbia.[121] In the Northwest Territories, residential schools operated at Fort Providence, Aklavik and Fort Resolution. Inuit students had been concentrated at the Roman Catholic and Anglican residential schools at Aklavik and Fort George on the eastern coast of James Bay in Quebec. There were, as well, federal and missionary day schools.[122]

In March 1955, the government, through the Department of Northern Affairs and National Resources, incorporated these largely church-initiated developments into an official educational strategy.[123] This administrative arrangement had been chosen to allow "a single system of schools for children of all races", facilitating "greater economy of effort" and removing "any element of segregation".[124] There any substantial differences with the southern system ended. The presumptive scenario and educational philosophy, the vision and the attitudes toward Aboriginal people that underlay this system, bore considerable resemblance to what they had been in the south. Growing scarcity in the resources that supported the traditional hunting and gathering culture, caused in part by incursions into the region by resource development, combined with a dramatic fall in the price of fur and the rapid growth of population — tied, the government suggested, to improved medical services[125] — provided both the need and the opportunity for a new life. It was the government's announced belief that as "[c]ivilization is now advancing into the Arctic areas at such a rapid pace...[it] is therefore essential that [Aboriginal people] be assisted in every possible way to face the future in a realistic manner — in a way which will result in their becoming true Canadian citizens...".[126]

That assistance was to come primarily by way of "an extensive program of construction of schools and hostels to provide better education."[127] By 1969-1970, as plans were finalized to transfer education to the government of the Northwest Territories,[128] the Northern Affairs department had completed a network of schools that included eight "large pupil residences", with room for an average of 150 children each, and a series of some eleven "small hostels" for up to 25 children in Arctic locations. The annual enrolment averaged some 1,200 children.[129]

Despite the fact that this development occurred in the 1950s and '60s, the 'frontier' nature of the north meant that the system stressed the value of residential schools and hostels. They were characterized, in this latest assimilative campaign, in terms that harked back to Davin's era, as "the most effective way of giving children from primitive environments, experience in education along the lines of civilization leading to vocational training to fit them for occupations in the white man's economy."[130] As in the south, the hostels brought children of "nomadic parents" into contact with day schools to facilitate the "complete integration of the education of

the Indians and Eskimos in the north with white children living in the same area." Again, the system would employ the acculturative medium of "provincial curricula", with teachers being "encouraged to adapt these to the special needs of the Eskimo child."

Residential schools and hostels were to make not only an educational contribution but also, Northern Affairs predicted, a wider socializing, civilizing function that would serve educational advancement. With respect to Inuit, for example, they would have the advantage of removing children from homes that lacked "all the more desirable habits of sanitation, cleanliness and health since the tents and snow houses in which they live are so small and their way of life is so primitive." In the schools, it would be possible to carry out "adequate health education programmes" which, with improvements on the traditional diet, would "make them better able to carry on with their schooling", which would in turn ensure their "orderly integration into the white economy."[131]

In the north, as in the south in the days before integration, the government with its church partners presumed to stand in the place of the children's parents, taking children into residential schools so that they could "face the future in a realistic manner" — that being as "true Canadian citizens". Unfortunately, the record of this national presumption, whether traced in the north or the south cannot be drawn as a "circle of civilized conditions."

2. Systemic Neglect: Administrative and Financial Realities

In any evaluation of the residential school record throughout its long history, a persistent reality appears amidst shifting vision and policies. Not only did the system fail to transport Aboriginal children through the classroom to the desired assimilative destination — or even, as Davey's 1968 record witnessed, to provide adequate levels of education — it failed to cherish them. In the building, funding and management of those purported "circles of civilized conditions", it failed to make of those schools homes where children would always be well-clothed and fed, safely housed and kindly treated. Even in the post-war period, administrative and financial reforms adopted in the midst of the general reorganization of Aboriginal education could not retrieve the situation and did not reverse the chronic neglect of the system, which forced children to live in conditions and endure levels of care

that fell short of acceptable standards.

The persistently woeful condition of the school system and the too often substandard care of the children were rooted in a number of factors: in the government's and churches' unrelieved underfunding of the system, in the method of financing individual schools, in the failure of the department to exercise adequate oversight and control of the schools, and in the failure of the department and the churches to ensure proper treatment of the children by staff. Those conditions constituted the context for the neglect, abuse and death of an incalculable number of children and for immeasurable damage to Aboriginal communities.

This is not the story of an aging nineteenth century structure falling into decay but of flaws, inherent in the creation and subsequent management of the system, that were never remedied. From Confederation, with two schools in operation, the system grew at the rate of some two schools a year, so that by 1904 there were 64 schools. Such growth was not the product of forethought, of a developmental strategy controlled by the government or by the department of Indian affairs. Rather it was the product of federal reactions to the force of missionary efforts across the country and the considerable force of the churches' political influence in Ottawa by which they secured funds to operate the schools.[132] No better summary of the process of building the system can be given than that contained in a departmental briefing to the minister, Charles Stewart, in 1927: "It thus happens that Churches have been pioneers in the remote parts of the country, and with missionary funds have put up buildings and induced the department to provide funds for maintenance."[133]

Though its senior officials were themselves dedicated to the concept of residential education, the department was in a sense driven before a whirlwind of missionary activity. No matter which way it turned — in the west, the north and into British Columbia — as it moved to implement Davin's industrial school design, the department found schools already constructed and holding classes for children. By 1907 — with 77 schools on the books, the great majority of them established by the churches, and with no sign of the flood of new schools or church petitions for support waning — the senior clerk in the education section, Martin Benson, proclaimed, with evident exasperation, "The clergy seem to be going wild on the subject of Indian education and it is time some limit should be fixed as to their

demands."[134]

Indeed, the department had already tried, unsuccessfully, to bring the system, especially its rapidly rising costs, under control. By order in council in 1892, the department introduced what Vankoughnet termed a "correct principle" — a per capita grant arrangement that remained in force until 1957.[135] This principle was attractive because, in theory at least, it would enable the department to "know exactly where we stand", limiting the federal contribution to the schools to a fixed annual figure tied to enrolments.[136]

This attempt by the department to "relieve the pressure of present expenditure" and to institute "economical management" on the part of the churches, to quote the order in council, was a total failure. In limiting the liability of the department, the per capita system automatically threw an increased financial burden onto the shoulders of the churches. In the case of schools where the per capita grant did not meet a large enough part of the operating costs, which were impossible to standardize owing to the differing circumstances of schools — location, access to supplies, the availability of students — or where school management continued to be faulty, churches soon claimed that their funds were oversubscribed. They returned to Ottawa, cap in hand, for additional funding and yearly made demands for increases in per capita rates. By 1904, the collective deficit was $50,000 and rising, and the auditor general demanded yet tighter control — "A rigid inspection of financial affairs should be made on behalf of the government at least once a year."[137]

The auditor general was not alone in pushing for reform. In 1906 the Protestant churches submitted their Winnipeg Resolutions, drawn up at a conference on education. These reiterated demands they had been making each year for increased per capitas, upgrading of schools at government expense, and increased allocations for teachers' salaries.[138] The resolutions and the deputy superintendent general's admission that the financial ills of the system lay in underfunding[139] rather than, as the department charged constantly, in the inefficient and extravagant hands of church appointed principals, brought on the second attempt to bring order to the system. This took the form of contracts between the government and the churches, signed in 1911, in which, the minister promised,

the whole conduct and management of these schools would be covered...the responsibilities of each toward the other would be definitely fixed and the financial straits in which the churches found themselves...would in a measure be relieved by the Government.[140]

The minister was as good as his word — in part. New, higher per capita rates, recognizing regional cost differences, were adopted,[141] and the contracts dealt with the obligations of the churches and the government, establishing the department as senior partner in the joint management of the schools. It had primary responsibility for setting standards of care and education, including the appointment and dismissal of teachers, and it reserved the right to cancel the contract pertaining to any school not being operated according to the regulations it formulated. To that end, the churches had to hold the schools ready for inspection by the department.[142]

The contracts were meant to mark a new beginning for the system, laying the basis for "improved relations" between the department and the churches that were in turn to result "in benefit to the physical condition and intellectual advancement of the Indian children."[143] Such hopeful predictions were not, however, the substance of effective reform. The system soon fell back into funding and management difficulties. The contracts were to be reviewed and renewed at the end of five years, but they never were and without any legal agreement to bind the parties, they drifted back into the previous "unbusinesslike lack of arrangement"[144] and into discord over operation of the system.

On the financial front, government intentions were overborne by a long string of excuses for continued underfunding. The First World War and then the Depression prevented significant increases or clawed back, in whole or part, those the department was able to allocate.[145] While the Second World War pulled the country out of the Depression, it also meant cuts "to almost every appropriation"[146] and made the department realize that "it would be exceedingly difficult to secure the funds necessary...at any time during the years that lie ahead of us."[147]

As a result, there were never enough funds in the pre-Second World War era to satisfy the appetite of the churches or to prevent them from again encountering substantial deficits.[148] While the department publicly contested the churches' assertion of how desperate the financial situation

was, privately it had its own figures that demonstrated dramatically that the per capita, pegged at $180 in 1938, was "exceptionably low" and inadequate for the needs of the children, particularly in relation to the funding of other residential care facilities. Hoey informed the deputy superintendent general, H. McGill, that the province of Manitoba provided grants of $642 and $550 per capita respectively to the School for the Deaf and the School for Boys. Private institutions in the province were also funded more generously. The Knowles School for Boys received $362 for each boy from the Community Chest, and the Catholic church provided St. Norbert's Orphanage with $294 per capita. The residential schools fared no better in comparison with funding for similar institutions in the United States, where the Child Welfare League of America estimated that the average per capita grant of large child care institutions was $541, with smaller ones running only as low as $313.[149]

The cumulative weight of underfunding of the system throughout this period, which pressed down on the balance books of the churches and the department and drove individual schools into debt, was nothing compared to its consequences for the schools and their students. Badly built, poorly maintained and overcrowded, the schools' deplorable conditions were a dreadful weight that pressed down on the thousands of children who attended them. For many of those children it proved to be a mortal weight. Scott, reviewing the history of the system for the new minister, Arthur Meighen, in 1918, noted that the buildings were "undoubtedly chargeable with a very high death rate among the pupils."[150]

When the churches and the department signed the 1911 contracts, it was clear to all the partners that there was a crisis in the conditions and sanitation of the schools and, therefore, in the health of the children. They could not have failed to know it for they had at hand two reports, one by the department's chief medical officer, Dr. P.H. Bryce, outlining in a most sensational manner the tragic impact of tuberculosis on the children, and another by a departmental accountant, F.H. Paget, who had been detailed to survey the condition of the schools in the west.

Throughout the initial stages of the unrestrained building of the system, the department had been, Duncan Campbell Scott admitted, "intensely apprehensive" about the quality and safety of the schools, which the churches routinely "erected on very primitive plans".[151] According to an

assessment of the system by Martin Benson in 1897, the department's own record was not a great deal better. Many of the buildings it was responsible for constructing, in association with the department of public works, had "been put up without due regard for the purpose for which they would be required, hurriedly constructed of poor materials, badly laid out without due provision for lighting, heating or ventilating."[152] The department had, in fact, insisted in the north-west on the "simplest and cheapest construction."[153]

Paget's 1908 report revealed the legacy of such a policy. The majority of the 21 schools he inspected were, like St. Paul's boarding school near Cardston, Alberta, "quite unfit for the purpose it is being used", with faulty heating, drainage and ventilation. The schools were "not modern in any respect." Moreover, his comments drew out what had become a tragic commonplace in the department — the connection between the condition of the buildings and disease, particularly the scourge of tuberculosis.[154] From early in the history of the system, alarming health reports had come into the department from local officials and doctors tracing out a pattern of interwoven factors contributing to "the present very high death rate from this disease": overcrowding, lack of care and cleanliness and poor sanitation.[155]

Overcrowding, the most critical dynamic in the spread of tuberculosis, was systemic,[156] a predictable outcome of underfunding and of the per capita grant arrangement that put a premium on each student taken from a community. Senior church officials lobbied the government constantly not only for higher rates but for implementation of a compulsory education regime that would ensure that the schools earned the maximum grant possible.[157] For their part, the principals, unable to make ends meet, as rates were rarely increased to the level of real costs, pushed to have their authorized enrolments raised. The pressure to keep schools full meant there was a tendency to take as many children as possible, often going past wise limits, with disastrous consequences.[158] This led to bizarre recruitment techniques, including, local officials reported, "bribing and kidnapping".[159] As well, officials were not very careful about the health of the children they brought into the schools. The Anglican Bishop of Caledonia in British Columbia admitted candidly, "The per capita grant system encourages the taking in of those physically and intellectually unfit simply to keep up numbers".[160]

The impact of Bryce's report, submitted in 1907, which in part only repeated

what was already in departmental files, stemmed from his statistical profile of the extent of tuberculosis among children in western schools. It became the stuff of headlines and critical editorial comment. *Saturday Night* concluded that "even war seldom shows as large a percentage of fatalities as does the education system we have imposed upon our Indian wards."[161] The percentage was indeed shocking. Bryce's death toll for the 1,537 children in his survey of 15 schools was 24 per cent, and this figure might have risen to 42 per cent if the children had been tracked for three years after they returned to their reserves.[162] The rate varied from school to school going as high as 47 per cent at Old Sun's on the Blackfoot reserve. Kuper Island school in British Columbia, which was not included in Bryce's sample, had a rate of 40 per cent over its 25-year history.[163] While a few officials and churchmen rejected Bryce's findings and attacked him as a "medical faddist",[164] most had to agree with him,[165] and no less an authority than Scott asserted that, system-wide, "fifty per cent of the children who passed through these schools did not live to benefit from the education which they had received therein."[166]

Not only was this, in the words of *Saturday Night*, "a situation disgraceful to the country",[167] but in the opinion of S.H. Blake, QC, who assisted in negotiations for the 1911 contracts, because the department had done nothing over the decades "to obviate the preventable causes of death, [it] brings itself within unpleasant nearness to the charge of manslaughter."[168] The churches too bore responsibility for what Bryce characterized, in a pamphlet published in 1922, as a "national crime",[169] but the department had a special responsibility. In the order in council of 1892 and in the 1911 contracts, it had taken to itself the authority to set standards and had instituted a regulation requiring that prospective students receive a health certificate signed by a doctor. This check, which would supposedly prevent tubercular children being taken into the schools, was — like so many other regulations relating to care of the children, such as those regarding clothes, food and discipline — implemented carelessly by the department and ignored by many school and departmental officials. Such laxity even continued, Scott admitted, in the decades after Bryce's report.[170]

Indeed, in those decades, almost nothing was done about tuberculosis in the schools, so that Bryce's charge that "this trail of disease and death has gone on almost unchecked by any serious efforts on the part of the Department of Indian Affairs",[171] was sorrowfully correct. The department

did not even launch a full investigation of the system. Again the explanation for this persistent carelessness was, in part, the government's refusal to fund the schools adequately to carry out a program of renovations to improve health conditions, which senior officials themselves proposed, or to undertake special measures, recommended by health authorities, to intervene in the case of sick children.[172] In a number of instances it did implement, because it was relatively cheap, a radical course of action — mass surgery, performed on school tables, to remove teeth, tonsils and adenoids, believed to be the frequent seats of infection.[173] Not surprisingly, conditions did not improve; schools in 1940 were still not being maintained "in a reasonable state",[174] and the few reports extant on the health of the children, which are scattered and sketchy (for the department never set up a procedure to monitor health) point to the continuation of alarmingly high rates of infection.[175]

The dramatic tuberculosis story, which chronicles what Bryce suggested was the government's "criminal disregard" for the "welfare of the Indian wards of the nation",[176] cannot be allowed to distract attention from the fact that the care of the children in almost every other area was also tragically substandard. Throughout the history of the system many children were, as the principal of St. George's testified in 1922, "ill-fed and ill-clothed and turned out into the cold to work", trapped and "unhappy with a feeling of slavery existing in their minds" and with no escape but in "thought".[177]

It is difficult to assess how widespread neglect was in the area of food and clothing, for again the department had no reporting procedure, and there is evidence of a fair deal of duplicity on the part of the churches, or individual principals, anxious to make the most favourable impression. A comment in 1936 by A. Hamilton, a local departmental official, on the children at Birtle school, just outside Birtle, Manitoba, symbolizes the situation.

In fairness I want to add that all the children have good clothes but these are kept for Sundays and when the children go downtown — in other words when out where they can be seen, they are well dressed.[178]

Such deception was often quite deliberate. "To almost everything at Round Lake", one teacher admitted, "there are two sides, the side that goes in the report and that inspectors see, and the side that exists from day to day."[179] This phenomenon was widespread. It was common practice that when an

official wanted to add weight to a school report, he introduced it with the remark, "There was no preparation made for my visit as I was quite unexpected."[180] When it was known the official was coming, the children could be and were cowed into answering questions about their care in the way school administrators wanted.[181]

Despite the duplicity, reports in departmental files from school staff, local agents and inspectors establish that the system did not guarantee that all children were always properly fed and clothed. Hunger was a permanent reality: the food was often "too meagre";[182] the fare was not appropriate "neither as to quantity or quality";[183] the children "were not given enough to eat especially meat";[184] the food supply was inadequate "for the needs of the children"; the "vitality of the children is not sufficiently sustained from a lack of nutritious food, or enough of the same for vigorous growing children."[185]

The same files carry images of the children that disrupt Hamilton's picture of Sunday downtown dress at Birtle school: "I have never seen such patched and ragged clothing";[186] their "uniform is so old and so worn out that we do not dare show them to anyone";[187] the children "are not being treated at all good, nothing on their feet, etc.";[188] the children were "dirty and their clothes were disgraceful";[189] and "I never had in my school a dirtier, more ill-clad or more likeable class of little folk". The children had the most ridiculous outfits. The little girls go teetering around in pumps with outlandish heels, sizes too large, or silly little sandals that wont stay on their feet — cheap lots that he [the principal] buys for next to nothing, or second hand misfits that come in bales.[190]

Those "second hand misfits that come in bales" signify that in these areas of care, the lack of funding by the government and the churches was yet again a major determinant in the treatment of the children. Whenever per capita rates were reduced or seen to be too low, someone was bound to point out that it would "render almost superhuman the task of feeding, clothing and treating the children in the manner required by the department."[191] It was often "utterly impossible" to do that "from the present per capita grant",[192] and thus principals took the tack of "economizing to the bone in every possible department."[193] In 1937, Hoey conceded that throughout the history of the system there had never been any connection

between "our payments and the cost of feeding and clothing pupils from year to year" and that principals had been left on their own to deal with "the actual costs of operation."[194]

While the resultant 'economizing' may have meant no more than charity clothes in some cases, in terms of food, the consequences were more drastic and damaging to the education and health of the children. To keep costs down, administrators strove to produce food and income from the school farm or orchard — an undertaking in which the children, in Scott's description of Qu'Appelle, were "simply used as so much manpower to produce revenue."[195] As his comment suggests, the department was fully aware of the situation and, indeed, of the way it undercut the education program, in some instances, as at Birtle, turning it on its head. Hamilton commented, after visiting the school, that "The farm should be operated for the school — not the school for the farm."[196] Agent W. Graham's 1916 review of school records at Qu'Appelle found that, owing to work, the boys were in class so infrequently that "the main idea and object of the school is being entirely neglected" and that the school had become a "workhouse".[197] This practice continued until 1951 when the half-day system was abandoned. At Morley school in Saskatchewan the inspector reported that, to the detriment of their education, the principal threw "a large burden of the institutional drudgery on to the children."[198]

Underfunding, short rations and overwork contributed, doctors and agents across the system reported, to the children's ill-health, and some doctors even alerted the department to a connection they observed between malnutrition and tuberculosis.[199] Furthermore, the range and quality of food the children did receive was affected by efforts to economize. It was a widespread practice "to sell most of the milk and eggs...in order to augment maintenance funds".[200] Inspector R.H. Cairns was so disturbed by this practice in the British Columbia schools, and in particular by milk skimming to collect cream for sale, that he declared, "if I had my way I would banish every separator....The pupils need the butter fat so much."[201]

By many departmental accounts, the variety of food served was limited; "decidedly monotonous" was the way Benson described the "regulation school meal" in 1897 — "bread and drippings or boiled beef and potatoes".[202] In fact, there appears to have been a persistent shortage of meat and fish which, unlike grains and vegetables, were difficult to secure in

bulk and to store.[203] Ironically, children entering a school likely left behind a better diet, provided by communities still living on the land, than what was provided by the churches and the department.

Unfortunately, it is impossible to assess the nutritional value of school diets before 1946. In that year, however, the nutrition division of the department of national health and welfare surveyed the food services at eight schools. Though the department characterized the results as "fairly satisfactory", the report itself did not support such a conclusion but rather confirmed the impressions given by the files throughout the history of the system. The dietitians found that "mediocre" salaries secured kitchen staff who were "unqualified", carried out their "work in a careless and uninterested fashion" and thus "the food quality was not good". Poor menu planning that failed to recognize the nutritional value of certain foods, equipment that was "unfit", "antiquated cooking facilities", and bad cooking practices contributed to the "nutritional inadequacy of the children's diet", which lacked sufficient amounts of vitamins A, B and C. The children received too little meat and not enough green vegetables, whole grains, fruit, juices, milk, iodized salt and eggs.[204]

The dietitians laid much of the blame for the conditions they described on "financial limitations" — the same limitations that plagued every other aspect of the system and always led in the end to neglect of the children. With the benefit of hindsight, Davey's 1968 review of the system up to 1950 acknowledged that fact. Neither the churches nor the department, he charged, appeared to have had any real understanding of the needs of the children....The method of financing these institutions by per capita grants was an iniquitous system which made no provision for the establishment and maintenance of standards, even in such basic elements as staffing, food and clothing.[205]

All that was to have changed in 1957, when the department brought an end to the per capita system and placed the schools on a "controlled cost basis" intended to achieve "greater efficiency in their operation" as well as to assure proper "standards of food, clothing and supervision at all schools." This system was formalized by new contracts with the churches signed in 1961. The government was prepared to "reimburse each school for actual expenditures within certain limitations."[206] Those limitations were translated into allowances — maximum rates set for teachers' salaries, transportation,

extra-curricular activities, rental costs, building repairs and maintenance, and capital costs.

In terms of standards of care, the department strove to bring the budgeting process more into line with the children's needs and regional cost differentials. In particular, with food and clothing, it attempted "to make special provision for the requirements of older children." Thus in calculating the allowances for food and clothes, the children were divided into two groups, those in grade 6 and lower grades and those in grade 7 or higher grades, with appropriate rates assigned to each.[207] In addition, as early as 1953, the department began to issue directives to the schools on issues of care, and more detailed reporting procedures by principals were developed.

None of this was enough, however, to prevent a continuation of problems still endemic in the system. The post-1957 record of the controlled cost system was not an improvement over the previous decades. There was in fact an underlying contradiction between the intention to close down the system and that of keeping the schools in peak physical condition. Davey himself signalled this in recommending that "expenditures should be limited to emergency repairs which are basic to the health and safety of the children" in cases "where closure is anticipated, due to integration".[208] Budgeting favoured integration, which was at the centre of the department's education strategy. In a detailed brief to the department in 1968, the national association of principals and administrators of Indian residences pointed out that in the allocation of funds, the integration program received a much greater proportion, resulting in a situation where "our Federal schools are sadly neglected when compared with the Provincial schools."[209] Indeed, a report commissioned by the department established in 1967 that the funding level was still very "low in comparison with most progressive institutional programs" in the United States and in the provincial sector.[210]

The principals' association went on to detail the effects of underfunding in a school-by-school survey that echoed the Paget report — a long system-wide catalogue of deferred maintenance, hazardous fire conditions, inadequate wiring, heating and plumbing, and much needed capital construction to replace structures that were "totally unsuitable and a disgrace to Indian affairs". Even schools built since the war to serve communities in areas outside the scope of integration gave evidence of

faulty construction and inadequate recreation, residence and classroom space. In conclusion, the association tried to impress upon the department the seriousness of the situation. It was not prepared to accept the "old cliche: lack of funds". That was "not an excuse, nor an explanation for we know that funds do exist."[211]

In a memo from Davey forwarded to the deputy minister along with the association's brief, he admitted that,

Although I can take exception to some of the examples given in the brief, the fact remains that we are not meeting requirements as we should nor have we provided the facilities which are required for the appropriate functioning of a residential school system.[212]

It was impossible to do so, for there were simply "too many of these units" and the department was too heavily committed in other areas of higher priority — in community development, integration and welfare expenditures. Nor did he think it was wise to devote effort to achieving increased appropriations for, with "the best interests of the Indian children" in mind, it was more sensible to close the system down.[213]

The deputy minister, J.A. Macdonald, followed this line in his reply to the principals. There was no attempt to refute their characterization of the condition of the system. The department had failed, he conceded, to carry out "necessary repairs and renovations and capital projects". This had been "simply due to financial limitations", which he was sure, taking refuge in the "old cliche", would not improve in the future.[214] In the final analysis, however, the funds were inadequate and, as the association asserted, it was always the children who were "the first to feel the pinch of departmental economy".[215]

Schools that were part of the northern affairs system after 1955 had their own doleful history and were not above the sort of critique made by the principals' association. A harsh review of the operation of Fort Providence school concluded with the remark, "I would sooner have a child of mine in a reform school than in this dreadful institution."[216] As in the south, the system did not ensure that adequate food and clothing and safe and healthy conditions were provided for all the children all the time. There was always, as at the Tent Hostel at Coppermine, for example, some considerable

distance between intention and reality. One of the teachers there submitted a remarkable report on a hostel term during which the staff and Inuit children had had a "satisfactory and happy experience", despite the fact that their accommodations were "very cold because all the heat escaped through the chimneys, there was a constant fire hazard", the children's clothes were "unsatisfactory", and the children received a most non-traditional diet of corn beef and cabbage at most dinners, while the staff ate their "monthly fresh food supply" at the same table, so as to give "the youngsters an opportunity to model their table manners from those of the staff".[217] A consulting psychologist, after a visit to the Churchill Vocational Centre, which was housed in an army barracks, commented that "I know what a rat must feel when it is placed in a maze." When he moved on to two schools in the Keewatin area, he found the buildings equally unsuitable.[218]

The history of Indian affairs' post-1957 determination to ensure high standards of care was no brighter than its record of repair and maintenance. At the end of the very first year of the operation of the controlled cost system, the department, on the advice of the churches and the nutrition division of the federal health department, had to raise rates, adjust the grade divisions and introduce a supplementary allowance to recognize additional costs for schools "where climatic conditions necessitate special clothing."[219] Such fine tuning became a permanent feature of the 1957 system. It was, unfortunately, always fruitless, for the funds provided by the department to feed and clothe the children continually lagged behind increases in cost, and thus the sorrowful consequences for the children went unrelieved.[220]

There was no improvement after 1969, when the government and the churches parted ways and the department took direct control of the system. A subsequent survey in the Saskatchewan region revealed that allowances were not adequate to provide proper clothes, especially for children in hostels who were attending provincial schools, or food or recreational activities. One administrator reported that he had to serve "more often than we should food such as hot dogs, bologna, garlic sausages, macaroni etc....the cheapest food on the market and still I can hardly make it."[221] Most of the others in the survey — and by implication most administrators and, therefore, most children in the system — were having the same experience.[222]

As in the case of tuberculosis, failure to provide adequate nutrition was rooted not only in the iniquitous per capitas and chronic underfunding, but in the fact that departmental regulations intended to guarantee good care were administrative fictions. From the beginning of the system, and subsequently in the order in council of 1892 and the 1911 contracts, the department stipulated that to receive funds schools had to be "kept up to a certain dietary [standard]"[223] — a regulated scale of rations outlining the foodstuffs and the amounts children were to receive weekly. This engendered considerable controversy between the department and the churches over the adequacy of the scale, how realistic it was given the level of grants, and the degree to which the principals adhered to it.[224] In fact, the 'dietary' was largely ignored by everyone, including the department which did not, according to Benson, inspect the schools on any regular basis.[225] Benson even repudiated the scale, explaining in 1904 that "it is not now and was never enforced" and that it was only ever a "guide...to arrive at the cost of feeding pupils."[226] Thereafter, any pretence that there was actually an enforceable regulation was abandoned and, in 1922, the churches and principals were given responsibility for drawing up their own meal plans, which the department was willing to submit to the "Health Department in Ottawa for their criticism."[227]

In subsequent decades, the department's relationship with nutrition services at the department of health remained purely consultative, with consultations being so irregular that the service told Indian affairs in 1954 that they had "almost lost touch with most of the residential schools due to the lack of requests for our services."[228] After 1957, the inspection service expanded, inspections became more regular, and food allowances were "established to provide a standard equivalent to the diet recommended by Canada's Food Rules".[229]

What did not change however, was the department's lax manner of responding to recommendations in inspection reports. Like the dietary standards of the earlier part of the century, they were not enforced but routinely passed along to principals with no more than a suggestion that everything be done "that can be done to live up to the recommendations of the dietician." Problems were thrown back into the laps of principals, who were to "see what can be done about them in a constructive way."[230] Despite the department's regulatory authority, which tied grants to the maintenance of standards, there was no stern intervention on behalf of the

children, so that even the most egregious neglect by church authorities and principals could drag on unresolved for years.[231] In light of such careless management, what Hamilton wrote of Elkhorn school in 1944 might stand as the motto of the system: "It is not being operated, it is just running."[232]

In reviewing the long administrative and financial history of the system — the way the vision of residential education was made real — there can be no dispute: the churches and the government did not, in any thoughtful fashion, care for the children they presumed to parent. While this is traceable to systemic problems, particularly the lack of financial resources, the persistence of those problems and the unrelieved neglect of the children can be explained only in the context of another deficit — the lack of moral resources, the abrogation of parental responsibility. The avalanche of reports on the condition of children — hungry, malnourished, ill-clothed, dying of tuberculosis, overworked — failed to move either the churches or successive governments past the point of intention and on to concerted and effective remedial action.

Neglect was routinely ignored, and without remedial action, it became a thoughtless habit. It was, however, only one part of a larger pattern of church and government irresponsibility writ more starkly in the harsh discipline, cruelty and abuse of generations of children taken into the schools. Here, too, the record is clear. When senior officials in the department and the churches became aware of cases of abuse, they failed routinely to come to the rescue of children they had removed from their real parents or, as they claimed ironically in the case of Category 3, children they had rescued from situations of neglect in communities.

2. Systemic Neglect: Administrative and Financial Realities

In any evaluation of the residential school record throughout its long history, a persistent reality appears amidst shifting vision and policies. Not only did the system fail to transport Aboriginal children through the classroom to the desired assimilative destination — or even, as Davey's 1968 record witnessed, to provide adequate levels of education — it failed to cherish them. In the building, funding and management of those purported "circles of civilized conditions", it failed to make of those schools homes where children would always be well-clothed and fed, safely housed and kindly

treated. Even in the post-war period, administrative and financial reforms adopted in the midst of the general reorganization of Aboriginal education could not retrieve the situation and did not reverse the chronic neglect of the system, which forced children to live in conditions and endure levels of care that fell short of acceptable standards.

The persistently woeful condition of the school system and the too often substandard care of the children were rooted in a number of factors: in the government's and churches' unrelieved underfunding of the system, in the method of financing individual schools, in the failure of the department to exercise adequate oversight and control of the schools, and in the failure of the department and the churches to ensure proper treatment of the children by staff. Those conditions constituted the context for the neglect, abuse and death of an incalculable number of children and for immeasurable damage to Aboriginal communities.

This is not the story of an aging nineteenth century structure falling into decay but of flaws, inherent in the creation and subsequent management of the system, that were never remedied. From Confederation, with two schools in operation, the system grew at the rate of some two schools a year, so that by 1904 there were 64 schools. Such growth was not the product of forethought, of a developmental strategy controlled by the government or by the department of Indian affairs. Rather it was the product of federal reactions to the force of missionary efforts across the country and the considerable force of the churches' political influence in Ottawa by which they secured funds to operate the schools.[132] No better summary of the process of building the system can be given than that contained in a departmental briefing to the minister, Charles Stewart, in 1927: "It thus happens that Churches have been pioneers in the remote parts of the country, and with missionary funds have put up buildings and induced the department to provide funds for maintenance."[133]

Though its senior officials were themselves dedicated to the concept of residential education, the department was in a sense driven before a whirlwind of missionary activity. No matter which way it turned — in the west, the north and into British Columbia — as it moved to implement Davin's industrial school design, the department found schools already constructed and holding classes for children. By 1907 — with 77 schools on the books, the great majority of them established by the churches, and with

no sign of the flood of new schools or church petitions for support waning — the senior clerk in the education section, Martin Benson, proclaimed, with evident exasperation, "The clergy seem to be going wild on the subject of Indian education and it is time some limit should be fixed as to their demands."[134]

Indeed, the department had already tried, unsuccessfully, to bring the system, especially its rapidly rising costs, under control. By order in council in 1892, the department introduced what Vankoughnet termed a "correct principle" — a per capita grant arrangement that remained in force until 1957.[135] This principle was attractive because, in theory at least, it would enable the department to "know exactly where we stand", limiting the federal contribution to the schools to a fixed annual figure tied to enrolments.[136]

This attempt by the department to "relieve the pressure of present expenditure" and to institute "economical management" on the part of the churches, to quote the order in council, was a total failure. In limiting the liability of the department, the per capita system automatically threw an increased financial burden onto the shoulders of the churches. In the case of schools where the per capita grant did not meet a large enough part of the operating costs, which were impossible to standardize owing to the differing circumstances of schools — location, access to supplies, the availability of students — or where school management continued to be faulty, churches soon claimed that their funds were oversubscribed. They returned to Ottawa, cap in hand, for additional funding and yearly made demands for increases in per capita rates. By 1904, the collective deficit was $50,000 and rising, and the auditor general demanded yet tighter control — "A rigid inspection of financial affairs should be made on behalf of the government at least once a year."[137]

The auditor general was not alone in pushing for reform. In 1906 the Protestant churches submitted their Winnipeg Resolutions, drawn up at a conference on education. These reiterated demands they had been making each year for increased per capitas, upgrading of schools at government expense, and increased allocations for teachers' salaries.[138] The resolutions and the deputy superintendent general's admission that the financial ills of the system lay in underfunding[139] rather than, as the department charged constantly, in the inefficient and extravagant hands of

church appointed principals, brought on the second attempt to bring order to the system. This took the form of contracts between the government and the churches, signed in 1911, in which, the minister promised,

the whole conduct and management of these schools would be covered...the responsibilities of each toward the other would be definitely fixed and the financial straits in which the churches found themselves...would in a measure be relieved by the Government.[140]

The minister was as good as his word — in part. New, higher per capita rates, recognizing regional cost differences, were adopted,[141] and the contracts dealt with the obligations of the churches and the government, establishing the department as senior partner in the joint management of the schools. It had primary responsibility for setting standards of care and education, including the appointment and dismissal of teachers, and it reserved the right to cancel the contract pertaining to any school not being operated according to the regulations it formulated. To that end, the churches had to hold the schools ready for inspection by the department.[142]

The contracts were meant to mark a new beginning for the system, laying the basis for "improved relations" between the department and the churches that were in turn to result "in benefit to the physical condition and intellectual advancement of the Indian children."[143] Such hopeful predictions were not, however, the substance of effective reform. The system soon fell back into funding and management difficulties. The contracts were to be reviewed and renewed at the end of five years, but they never were and without any legal agreement to bind the parties, they drifted back into the previous "unbusinesslike lack of arrangement"[144] and into discord over operation of the system.

On the financial front, government intentions were overborne by a long string of excuses for continued underfunding. The First World War and then the Depression prevented significant increases or clawed back, in whole or part, those the department was able to allocate.[145] While the Second World War pulled the country out of the Depression, it also meant cuts "to almost every appropriation"[146] and made the department realize that "it would be exceedingly difficult to secure the funds necessary...at any time during the years that lie ahead of us."[147]

As a result, there were never enough funds in the pre-Second World War era to satisfy the appetite of the churches or to prevent them from again encountering substantial deficits.[148] While the department publicly contested the churches' assertion of how desperate the financial situation was, privately it had its own figures that demonstrated dramatically that the per capita, pegged at $180 in 1938, was "exceptionably low" and inadequate for the needs of the children, particularly in relation to the funding of other residential care facilities. Hoey informed the deputy superintendent general, H. McGill, that the province of Manitoba provided grants of $642 and $550 per capita respectively to the School for the Deaf and the School for Boys. Private institutions in the province were also funded more generously. The Knowles School for Boys received $362 for each boy from the Community Chest, and the Catholic church provided St. Norbert's Orphanage with $294 per capita. The residential schools fared no better in comparison with funding for similar institutions in the United States, where the Child Welfare League of America estimated that the average per capita grant of large child care institutions was $541, with smaller ones running only as low as $313.[149]

The cumulative weight of underfunding of the system throughout this period, which pressed down on the balance books of the churches and the department and drove individual schools into debt, was nothing compared to its consequences for the schools and their students. Badly built, poorly maintained and overcrowded, the schools' deplorable conditions were a dreadful weight that pressed down on the thousands of children who attended them. For many of those children it proved to be a mortal weight. Scott, reviewing the history of the system for the new minister, Arthur Meighen, in 1918, noted that the buildings were "undoubtedly chargeable with a very high death rate among the pupils."[150]

When the churches and the department signed the 1911 contracts, it was clear to all the partners that there was a crisis in the conditions and sanitation of the schools and, therefore, in the health of the children. They could not have failed to know it for they had at hand two reports, one by the department's chief medical officer, Dr. P.H. Bryce, outlining in a most sensational manner the tragic impact of tuberculosis on the children, and another by a departmental accountant, F.H. Paget, who had been detailed to survey the condition of the schools in the west.

Throughout the initial stages of the unrestrained building of the system, the department had been, Duncan Campbell Scott admitted, "intensely apprehensive" about the quality and safety of the schools, which the churches routinely "erected on very primitive plans".[151] According to an assessment of the system by Martin Benson in 1897, the department's own record was not a great deal better. Many of the buildings it was responsible for constructing, in association with the department of public works, had "been put up without due regard for the purpose for which they would be required, hurriedly constructed of poor materials, badly laid out without due provision for lighting, heating or ventilating."[152] The department had, in fact, insisted in the north-west on the "simplest and cheapest construction."[153]

Paget's 1908 report revealed the legacy of such a policy. The majority of the 21 schools he inspected were, like St. Paul's boarding school near Cardston, Alberta, "quite unfit for the purpose it is being used", with faulty heating, drainage and ventilation. The schools were "not modern in any respect." Moreover, his comments drew out what had become a tragic commonplace in the department — the connection between the condition of the buildings and disease, particularly the scourge of tuberculosis.[154] From early in the history of the system, alarming health reports had come into the department from local officials and doctors tracing out a pattern of interwoven factors contributing to "the present very high death rate from this disease": overcrowding, lack of care and cleanliness and poor sanitation.[155]

Overcrowding, the most critical dynamic in the spread of tuberculosis, was systemic,[156] a predictable outcome of underfunding and of the per capita grant arrangement that put a premium on each student taken from a community. Senior church officials lobbied the government constantly not only for higher rates but for implementation of a compulsory education regime that would ensure that the schools earned the maximum grant possible.[157] For their part, the principals, unable to make ends meet, as rates were rarely increased to the level of real costs, pushed to have their authorized enrolments raised. The pressure to keep schools full meant there was a tendency to take as many children as possible, often going past wise limits, with disastrous consequences.[158] This led to bizarre recruitment techniques, including, local officials reported, "bribing and kidnapping".[159] As well, officials were not very careful about the health of the children they brought into the schools. The Anglican Bishop of Caledonia in British Columbia admitted candidly, "The per capita grant system encourages the

taking in of those physically and intellectually unfit simply to keep up numbers".[160]

The impact of Bryce's report, submitted in 1907, which in part only repeated what was already in departmental files, stemmed from his statistical profile of the extent of tuberculosis among children in western schools. It became the stuff of headlines and critical editorial comment. *Saturday Night* concluded that "even war seldom shows as large a percentage of fatalities as does the education system we have imposed upon our Indian wards."[161] The percentage was indeed shocking. Bryce's death toll for the 1,537 children in his survey of 15 schools was 24 per cent, and this figure might have risen to 42 per cent if the children had been tracked for three years after they returned to their reserves.[162] The rate varied from school to school going as high as 47 per cent at Old Sun's on the Blackfoot reserve. Kuper Island school in British Columbia, which was not included in Bryce's sample, had a rate of 40 per cent over its 25-year history.[163] While a few officials and churchmen rejected Bryce's findings and attacked him as a "medical faddist",[164] most had to agree with him,[165] and no less an authority than Scott asserted that, system-wide, "fifty per cent of the children who passed through these schools did not live to benefit from the education which they had received therein."[166]

Not only was this, in the words of *Saturday Night*, "a situation disgraceful to the country",[167] but in the opinion of S.H. Blake, QC, who assisted in negotiations for the 1911 contracts, because the department had done nothing over the decades "to obviate the preventable causes of death, [it] brings itself within unpleasant nearness to the charge of manslaughter."[168] The churches too bore responsibility for what Bryce characterized, in a pamphlet published in 1922, as a "national crime",[169] but the department had a special responsibility. In the order in council of 1892 and in the 1911 contracts, it had taken to itself the authority to set standards and had instituted a regulation requiring that prospective students receive a health certificate signed by a doctor. This check, which would supposedly prevent tubercular children being taken into the schools, was — like so many other regulations relating to care of the children, such as those regarding clothes, food and discipline — implemented carelessly by the department and ignored by many school and departmental officials. Such laxity even continued, Scott admitted, in the decades after Bryce's report.[170]

Indeed, in those decades, almost nothing was done about tuberculosis in the schools, so that Bryce's charge that "this trail of disease and death has gone on almost unchecked by any serious efforts on the part of the Department of Indian Affairs",[171] was sorrowfully correct. The department did not even launch a full investigation of the system. Again the explanation for this persistent carelessness was, in part, the government's refusal to fund the schools adequately to carry out a program of renovations to improve health conditions, which senior officials themselves proposed, or to undertake special measures, recommended by health authorities, to intervene in the case of sick children.[172] In a number of instances it did implement, because it was relatively cheap, a radical course of action — mass surgery, performed on school tables, to remove teeth, tonsils and adenoids, believed to be the frequent seats of infection.[173] Not surprisingly, conditions did not improve; schools in 1940 were still not being maintained "in a reasonable state",[174] and the few reports extant on the health of the children, which are scattered and sketchy (for the department never set up a procedure to monitor health) point to the continuation of alarmingly high rates of infection.[175]

The dramatic tuberculosis story, which chronicles what Bryce suggested was the government's "criminal disregard" for the "welfare of the Indian wards of the nation",[176] cannot be allowed to distract attention from the fact that the care of the children in almost every other area was also tragically substandard. Throughout the history of the system many children were, as the principal of St. George's testified in 1922, "ill-fed and ill-clothed and turned out into the cold to work", trapped and "unhappy with a feeling of slavery existing in their minds" and with no escape but in "thought".[177]

It is difficult to assess how widespread neglect was in the area of food and clothing, for again the department had no reporting procedure, and there is evidence of a fair deal of duplicity on the part of the churches, or individual principals, anxious to make the most favourable impression. A comment in 1936 by A. Hamilton, a local departmental official, on the children at Birtle school, just outside Birtle, Manitoba, symbolizes the situation.

In fairness I want to add that all the children have good clothes but these are kept for Sundays and when the children go downtown — in other words when out where they can be seen, they are well dressed.[178]

Such deception was often quite deliberate. "To almost everything at Round Lake", one teacher admitted, "there are two sides, the side that goes in the report and that inspectors see, and the side that exists from day to day."[179] This phenomenon was widespread. It was common practice that when an official wanted to add weight to a school report, he introduced it with the remark, "There was no preparation made for my visit as I was quite unexpected."[180] When it was known the official was coming, the children could be and were cowed into answering questions about their care in the way school administrators wanted.[181]

Despite the duplicity, reports in departmental files from school staff, local agents and inspectors establish that the system did not guarantee that all children were always properly fed and clothed. Hunger was a permanent reality: the food was often "too meagre";[182] the fare was not appropriate "neither as to quantity or quality";[183] the children "were not given enough to eat especially meat";[184] the food supply was inadequate "for the needs of the children"; the "vitality of the children is not sufficiently sustained from a lack of nutritious food, or enough of the same for vigorous growing children."[185]

The same files carry images of the children that disrupt Hamilton's picture of Sunday downtown dress at Birtle school: "I have never seen such patched and ragged clothing";[186] their "uniform is so old and so worn out that we do not dare show them to anyone";[187] the children "are not being treated at all good, nothing on their feet, etc.";[188] the children were "dirty and their clothes were disgraceful";[189] and "I never had in my school a dirtier, more ill-clad or more likeable class of little folk". The children had the most ridiculous outfits. The little girls go teetering around in pumps with outlandish heels, sizes too large, or silly little sandals that wont stay on their feet — cheap lots that he [the principal] buys for next to nothing, or second hand misfits that come in bales.[190]

Those "second hand misfits that come in bales" signify that in these areas of care, the lack of funding by the government and the churches was yet again a major determinant in the treatment of the children. Whenever per capita rates were reduced or seen to be too low, someone was bound to point out that it would "render almost superhuman the task of feeding, clothing and treating the children in the manner required by the

department."[191] It was often "utterly impossible" to do that "from the present per capita grant",[192] and thus principals took the tack of "economizing to the bone in every possible department."[193] In 1937, Hoey conceded that throughout the history of the system there had never been any connection between "our payments and the cost of feeding and clothing pupils from year to year" and that principals had been left on their own to deal with "the actual costs of operation."[194]

While the resultant 'economizing' may have meant no more than charity clothes in some cases, in terms of food, the consequences were more drastic and damaging to the education and health of the children. To keep costs down, administrators strove to produce food and income from the school farm or orchard — an undertaking in which the children, in Scott's description of Qu'Appelle, were "simply used as so much manpower to produce revenue."[195] As his comment suggests, the department was fully aware of the situation and, indeed, of the way it undercut the education program, in some instances, as at Birtle, turning it on its head. Hamilton commented, after visiting the school, that "The farm should be operated for the school — not the school for the farm."[196] Agent W. Graham's 1916 review of school records at Qu'Appelle found that, owing to work, the boys were in class so infrequently that "the main idea and object of the school is being entirely neglected" and that the school had become a "workhouse".[197] This practice continued until 1951 when the half-day system was abandoned. At Morley school in Saskatchewan the inspector reported that, to the detriment of their education, the principal threw "a large burden of the institutional drudgery on to the children."[198]

Underfunding, short rations and overwork contributed, doctors and agents across the system reported, to the children's ill-health, and some doctors even alerted the department to a connection they observed between malnutrition and tuberculosis.[199] Furthermore, the range and quality of food the children did receive was affected by efforts to economize. It was a widespread practice "to sell most of the milk and eggs...in order to augment maintenance funds".[200] Inspector R.H. Cairns was so disturbed by this practice in the British Columbia schools, and in particular by milk skimming to collect cream for sale, that he declared, "if I had my way I would banish every separator....The pupils need the butter fat so much."[201]

By many departmental accounts, the variety of food served was limited; "decidedly monotonous" was the way Benson described the "regulation school meal" in 1897 — "bread and drippings or boiled beef and potatoes".[202] In fact, there appears to have been a persistent shortage of meat and fish which, unlike grains and vegetables, were difficult to secure in bulk and to store.[203] Ironically, children entering a school likely left behind a better diet, provided by communities still living on the land, than what was provided by the churches and the department.

Unfortunately, it is impossible to assess the nutritional value of school diets before 1946. In that year, however, the nutrition division of the department of national health and welfare surveyed the food services at eight schools. Though the department characterized the results as "fairly satisfactory", the report itself did not support such a conclusion but rather confirmed the impressions given by the files throughout the history of the system. The dietitians found that "mediocre" salaries secured kitchen staff who were "unqualified", carried out their "work in a careless and uninterested fashion" and thus "the food quality was not good". Poor menu planning that failed to recognize the nutritional value of certain foods, equipment that was "unfit", "antiquated cooking facilities", and bad cooking practices contributed to the "nutritional inadequacy of the children's diet", which lacked sufficient amounts of vitamins A, B and C. The children received too little meat and not enough green vegetables, whole grains, fruit, juices, milk, iodized salt and eggs.[204]

The dietitians laid much of the blame for the conditions they described on "financial limitations" — the same limitations that plagued every other aspect of the system and always led in the end to neglect of the children. With the benefit of hindsight, Davey's 1968 review of the system up to 1950 acknowledged that fact. Neither the churches nor the department, he charged, appeared to have had any real understanding of the needs of the children....The method of financing these institutions by per capita grants was an iniquitous system which made no provision for the establishment and maintenance of standards, even in such basic elements as staffing, food and clothing.[205]

All that was to have changed in 1957, when the department brought an end to the per capita system and placed the schools on a "controlled cost basis" intended to achieve "greater efficiency in their operation" as well as to

assure proper "standards of food, clothing and supervision at all schools." This system was formalized by new contracts with the churches signed in 1961. The government was prepared to "reimburse each school for actual expenditures within certain limitations."[206] Those limitations were translated into allowances — maximum rates set for teachers' salaries, transportation, extra-curricular activities, rental costs, building repairs and maintenance, and capital costs.

In terms of standards of care, the department strove to bring the budgeting process more into line with the children's needs and regional cost differentials. In particular, with food and clothing, it attempted "to make special provision for the requirements of older children." Thus in calculating the allowances for food and clothes, the children were divided into two groups, those in grade 6 and lower grades and those in grade 7 or higher grades, with appropriate rates assigned to each.[207] In addition, as early as 1953, the department began to issue directives to the schools on issues of care, and more detailed reporting procedures by principals were developed.

None of this was enough, however, to prevent a continuation of problems still endemic in the system. The post-1957 record of the controlled cost system was not an improvement over the previous decades. There was in fact an underlying contradiction between the intention to close down the system and that of keeping the schools in peak physical condition. Davey himself signalled this in recommending that "expenditures should be limited to emergency repairs which are basic to the health and safety of the children" in cases "where closure is anticipated, due to integration".[208] Budgeting favoured integration, which was at the centre of the department's education strategy. In a detailed brief to the department in 1968, the national association of principals and administrators of Indian residences pointed out that in the allocation of funds, the integration program received a much greater proportion, resulting in a situation where "our Federal schools are sadly neglected when compared with the Provincial schools."[209] Indeed, a report commissioned by the department established in 1967 that the funding level was still very "low in comparison with most progressive institutional programs" in the United States and in the provincial sector.[210]

The principals' association went on to detail the effects of underfunding in a school-by-school survey that echoed the Paget report — a long system-

wide catalogue of deferred maintenance, hazardous fire conditions, inadequate wiring, heating and plumbing, and much needed capital construction to replace structures that were "totally unsuitable and a disgrace to Indian affairs". Even schools built since the war to serve communities in areas outside the scope of integration gave evidence of faulty construction and inadequate recreation, residence and classroom space. In conclusion, the association tried to impress upon the department the seriousness of the situation. It was not prepared to accept the "old cliche: lack of funds". That was "not an excuse, nor an explanation for we know that funds do exist."[211]

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It was impossible to do so, for there were simply "too many of these units" and the department was too heavily committed in other areas of higher priority — in community development, integration and welfare expenditures. Nor did he think it was wise to devote effort to achieving increased appropriations for, with "the best interests of the Indian children" in mind, it was more sensible to close the system down.[213]

The deputy minister, J.A. Macdonald, followed this line in his reply to the principals. There was no attempt to refute their characterization of the condition of the system. The department had failed, he conceded, to carry out "necessary repairs and renovations and capital projects". This had been "simply due to financial limitations", which he was sure, taking refuge in the "old cliche", would not improve in the future.[214] In the final analysis, however, the funds were inadequate and, as the association asserted, it was always the children who were "the first to feel the pinch of departmental economy".[215]

Schools that were part of the northern affairs system after 1955 had their own doleful history and were not above the sort of critique made by the principals' association. A harsh review of the operation of Fort Providence

school concluded with the remark, "I would sooner have a child of mine in a reform school than in this dreadful institution."[216] As in the south, the system did not ensure that adequate food and clothing and safe and healthy conditions were provided for all the children all the time. There was always, as at the Tent Hostel at Coppermine, for example, some considerable distance between intention and reality. One of the teachers there submitted a remarkable report on a hostel term during which the staff and Inuit children had had a "satisfactory and happy experience", despite the fact that their accommodations were "very cold because all the heat escaped through the chimneys, there was a constant fire hazard", the children's clothes were "unsatisfactory", and the children received a most non-traditional diet of corn beef and cabbage at most dinners, while the staff ate their "monthly fresh food supply" at the same table, so as to give "the youngsters an opportunity to model their table manners from those of the staff".[217] A consulting psychologist, after a visit to the Churchill Vocational Centre, which was housed in an army barracks, commented that "I know what a rat must feel when it is placed in a maze." When he moved on to two schools in the Keewatin area, he found the buildings equally unsuitable.[218]

The history of Indian affairs' post-1957 determination to ensure high standards of care was no brighter than its record of repair and maintenance. At the end of the very first year of the operation of the controlled cost system, the department, on the advice of the churches and the nutrition division of the federal health department, had to raise rates, adjust the grade divisions and introduce a supplementary allowance to recognize additional costs for schools "where climatic conditions necessitate special clothing."[219] Such fine tuning became a permanent feature of the 1957 system. It was, unfortunately, always fruitless, for the funds provided by the department to feed and clothe the children continually lagged behind increases in cost, and thus the sorrowful consequences for the children went unrelieved.[220]

There was no improvement after 1969, when the government and the churches parted ways and the department took direct control of the system. A subsequent survey in the Saskatchewan region revealed that allowances were not adequate to provide proper clothes, especially for children in hostels who were attending provincial schools, or food or recreational activities. One administrator reported that he had to serve "more often than we should food such as hot dogs, bologna, garlic sausages, macaroni

etc....the cheapest food on the market and still I can hardly make it."[221] Most of the others in the survey — and by implication most administrators and, therefore, most children in the system — were having the same experience.[222]

As in the case of tuberculosis, failure to provide adequate nutrition was rooted not only in the iniquitous per capitas and chronic underfunding, but in the fact that departmental regulations intended to guarantee good care were administrative fictions. From the beginning of the system, and subsequently in the order in council of 1892 and the 1911 contracts, the department stipulated that to receive funds schools had to be "kept up to a certain dietary [standard]"[223] — a regulated scale of rations outlining the foodstuffs and the amounts children were to receive weekly. This engendered considerable controversy between the department and the churches over the adequacy of the scale, how realistic it was given the level of grants, and the degree to which the principals adhered to it.[224] In fact, the 'dietary' was largely ignored by everyone, including the department which did not, according to Benson, inspect the schools on any regular basis.[225] Benson even repudiated the scale, explaining in 1904 that "it is not now and was never enforced" and that it was only ever a "guide...to arrive at the cost of feeding pupils."[226] Thereafter, any pretence that there was actually an enforceable regulation was abandoned and, in 1922, the churches and principals were given responsibility for drawing up their own meal plans, which the department was willing to submit to the "Health Department in Ottawa for their criticism."[227]

In subsequent decades, the department's relationship with nutrition services at the department of health remained purely consultative, with consultations being so irregular that the service told Indian affairs in 1954 that they had "almost lost touch with most of the residential schools due to the lack of requests for our services."[228] After 1957, the inspection service expanded, inspections became more regular, and food allowances were "established to provide a standard equivalent to the diet recommended by Canada's Food Rules".[229]

What did not change however, was the department's lax manner of responding to recommendations in inspection reports. Like the dietary standards of the earlier part of the century, they were not enforced but routinely passed along to principals with no more than a suggestion that

everything be done "that can be done to live up to the recommendations of the dietician." Problems were thrown back into the laps of principals, who were to "see what can be done about them in a constructive way."[230] Despite the department's regulatory authority, which tied grants to the maintenance of standards, there was no stern intervention on behalf of the children, so that even the most egregious neglect by church authorities and principals could drag on unresolved for years.[231] In light of such careless management, what Hamilton wrote of Elkhorn school in 1944 might stand as the motto of the system: "It is not being operated, it is just running."[232]

In reviewing the long administrative and financial history of the system — the way the vision of residential education was made real — there can be no dispute: the churches and the government did not, in any thoughtful fashion, care for the children they presumed to parent. While this is traceable to systemic problems, particularly the lack of financial resources, the persistence of those problems and the unrelieved neglect of the children can be explained only in the context of another deficit — the lack of moral resources, the abrogation of parental responsibility. The avalanche of reports on the condition of children — hungry, malnourished, ill-clothed, dying of tuberculosis, overworked — failed to move either the churches or successive governments past the point of intention and on to concerted and effective remedial action.

Neglect was routinely ignored, and without remedial action, it became a thoughtless habit. It was, however, only one part of a larger pattern of church and government irresponsibility writ more starkly in the harsh discipline, cruelty and abuse of generations of children taken into the schools. Here, too, the record is clear. When senior officials in the department and the churches became aware of cases of abuse, they failed routinely to come to the rescue of children they had removed from their real parents or, as they claimed ironically in the case of Category 3, children they had rescued from situations of neglect in communities.

3. Discipline and Abuse

...the failure to regard the children as persons capable of responding to love.[233]

At the heart of the vision of residential education — a vision of the school as

home and sanctuary of motherly care — there was a dark contradiction, an inherent element of savagery in the mechanics of civilizing the children. The very language in which the vision was couched revealed what would have to be the essentially violent nature of the school system in its assault on child and culture. The basic premise of resocialization, of the great transformation from 'savage' to 'civilized', was violent. "To kill the Indian in the child", the department aimed at severing the artery of culture that ran between generations and was the profound connection between parent and child sustaining family and community. In the end, at the point of final assimilation, "all the Indian there is in the race should be dead."[234] This was more than a rhetorical flourish as it took on a traumatic reality in the life of each child separated from parents and community and isolated in a world hostile to identity, traditional belief and language.

The system of transformation was suffused with a similar latent savagery — punishment. Prompt and persistent obedience to authority, order and discipline — what Davin referred to as "the restraints of civilization"[235] — were virtues of a civilized society, and in its homes, schools and judicial systems, punishment was one of its servants. Children removed from "permissive" Aboriginal cultures would be brought to civilization through discipline and punishment and would become, in the course of time, civilized parents able naturally to "exercise proper authority"[236] over the next generation of children. In the vision of residential education, discipline was curriculum and punishment an essential pedagogical technique. It could, one senior official advised, "produce circumstances to supplement and aid direct teaching." In fact, he continued, in terms of learning English, it "will lead to its acquirement more quickly than direct teaching."[237] Father Lacombe's experience in managing the High River industrial school in its first year of operation, 1884, a year in which almost all the children ran away or were removed by their parents, led him to conclude that "It is a mistake to have no kind of punishment in the Institution....It is absurd to imagine that such an institution in any country could work properly without some form of coercion to enforce order and obedience."[238]

Few principals would make that "mistake", and thus discipline and punishment in the service of cultural change formed the context of the children's lives. At school, they lived by a meticulous regimen of early rising, working, worshipping, learning and, finally, resting. Punishment for "insubordination",[239] for transgressing that regime and thus challenging the

authority of the schoolmasters was pervasive and to some observers poisonous. In 1936, G. Barry, district inspector of schools in British Columbia, described Alberni school on Vancouver Island, "where every member of staff carried a strap" and where "children have never learned to work without punishment."[240] Another critic, who saw the same negative implications of this tyranny of routinization, charged that at Mt. Elgin, "They learn to work under direction which doesn't require, and even discourages, any individual acting or thinking on their part. Punishment goes to those who don't keep in line."[241]

To "keep them in line", as Lacombe's successor at High River, Reverend E. Claude, explained, children could be deprived of food, confined or lectured. He tried to avoid "using too vigorous means with regard to the most rebellious tempers such as blows etc."[242] but he had no cause for concern on that score. Punishment, including striking children, was well within the bounds of non-Aboriginal community standards for most of the period covered by the history of the school system. Comments made by the deputy superintendent general, Vankoughnet, in 1889 on discipline — that "obedience to rules and good behavior should be enforced" by means including "corporal punishment"[243] — reflected such standards. There were, however, limits; there was always a line between acceptable chastisement and abuse. Children should not be, Hayter Reed stated in 1895, "whipped by anyone save the Principal", and if they were, "great discretion should be used and they should not be struck on the head, or punished so that bodily harm might ensue."[244]

Corporal punishment should not become, Reed thought, "a general measure of discipline";[245] inherent in the operation of the schools, however, was always the dangerous potential for just that eventuality — for not only the culture of corporal punishment instituted at Alberni and Mt. Elgin but also abuse, for situations in which deprivation verged on starvation, strapping became beating, and lecturing became the verbal abuse of ridicule and public indignity. For the staff, the schools were in many cases not peaceful or rewarding places to work; they were not havens of civilization. Rather they were, owing to the per capita grant system, sites of struggle against poverty and, of course, against cultural difference and, therefore, against the children themselves.

Isolated in distant establishments, divorced from opportunities for social

intercourse, and placed in closed communities of co-workers with the potential for strained interpersonal relations heightened by inadequate privacy, the staff not only taught but supervised the children's work, play and personal care.[246] Their hours were long, the remuneration below that of other educational institutions, and the working conditions irksome. Thus the struggle against children and their culture was conducted in an atmosphere of considerable stress, fatigue and anxiety that may well have dulled the staff's sensitivity to the children's hunger, their ill-kempt look or their ill-health and often, perhaps inevitably, pushed the application of discipline over the line into abuse and transformed what was to be a circle of care into a violent embrace. Although there were caring and conscientious staff, not every principal, teacher or employee was of the desired moral character; outside the gaze of public scrutiny, isolated from both Aboriginal and non-Aboriginal communities, schools were the opportunistic sites of abuse.

And abuse there was — identified as such by those inside the system, both in the churches and in the department. Head office, regional, school and church files are replete, from early in the system's history, with incidents that violated the norms of the day. In 1896, Agent D.L. Clink refused to return a child to the Red Deer school because he feared "he would be abused". Without ever being reprimanded by the principal, a teacher had beaten children severely on several occasions, one of whom had to be hospitalized. "Such brutality," Clink concluded, "should not be tolerated for a moment" and "would not be tolerated in a white school for a single day in any part of Canada."[247] A senior official in western Canada, David Laird, submitted a report on Norway House in 1907 detailing "frequent whippings" over an eight-year period of a young boy, Charlie Clines, for bedwetting. The "severity of his punishment" was not, Laird asserted, "in accordance with Christian methods."[248]

The result of Charlie Clines' punishment was what became an all too familiar episode. In "constant dread of the lash", Charlie finally fled. He slept out "in weather so severe that his toes were frozen and he...will lose them."[249] Hundreds of children ran away because, the assistant deputy of the department explained in 1917, of "frequent punishment" and "too much hard work" and "travelled through all sorts of hardships to reach their distant homes".[250] Many, however, did not make it to their communities and when the trail was followed back to the school from which an injured or dead child had fled, it led almost inevitably to conditions of neglect, mistreatment and

abuse.[251] It was a commonplace within the system that, in the words of one local agent, "there is certainly something wrong as children are running away most of the time." Subsequent investigations would discover, not surprisingly, that "conditions at the school are not what they should be."[252]

This certainly was the case, for example, in two quite representative tragedies in British Columbia. In 1902, Johnny Sticks found his son, Duncan, dead of exposure, having fled from the Williams Lake industrial school. Nearly four decades later, in 1937 at the Lejac school, four boys ran away and were found frozen to death on the lake within sight of their community. They were wearing only summer-weight clothes. In both cases, investigations uncovered a history of neglect and violence in evidence given by staff, children and some graduates.

At the Williams Lake inquest, Christine Haines explained why she had run off twice in the past: "...the Sisters didn't treat me good — they gave me rotten food to eat and punished me for not eating it." She was locked in a room, fed bread and water and beaten "with a strap, sometimes on the face, and sometimes [they] took my clothes off and beat me — this is the reason I ran away." Other children, including Duncan's sister, made the same charges. The sister responsible for the girls denied such brutal treatment but admitted that girls had been locked up, one for as long as 12 days.[253]

At Lejac, one graduate, Mrs. S. Patrick, recalled, "Even when we just smiled at one of the boys they gave us that much" — 30 strokes with the strap on each hand — and when they spoke their own language, the sister "made us take down our drawers and she strapped us on the backside with a big strap." At this school, too, food was an issue. Mrs. Patrick told the department's investigator, Indian commissioner D. MacKay, "Sometimes we ate worms in the meat, just beans sometimes and sometimes just barley." The new principal admitted that there had been a regime of severe punishment at the school but that he would bring the school into line with community norms and operate it, in regard to punishment, "along the line of the provincial public schools." MacKay's central recommendation was appropriate not only to the Lejac case but to the whole school system. "My investigation leads me to the conclusion that the department should take steps to strengthen its administrative control of our Indian Residential Schools through the full use of the privilege which it reserves of approving the more important appointments of these schools."[254] In 1937, this

suggestion was long overdue. The system was out of control; its record of abuse had grown more sorrowful each decade, and it was, as MacKay implied, a problem the department had not dealt with.

MacKay was correct. Here again, as in other areas of care, the department laid claim to authority to establish standards — its "privilege" as MacKay termed it — then failed in its self-appointed responsibility. Scott himself had laid out that claim forcefully in 1921. In a letter to the principal of Crowfoot school, where a visiting nurse had discovered nine children "chained to the benches" in the dining room, one of them "marked badly by a strap", Scott stated that the department would not countenance "treatment that might be considered pitiless or jail-like in character." The children "are wards of this department and we exercise our right to ensure proper treatment whether they are resident in our schools or not."[255]

Unfortunately, Scott's word was not the department's bond. It did not exercise its right to "ensure proper treatment."[256] Senior officials had made pronouncements on discipline to individual principals[257] and Reed, when he was deputy superintendent general in 1895, had suggested that "Instructions should be given if not already sent to the Principals of the various schools."[258] But comprehensive regulations on the acceptable means and limits to punishments were never issued, despite requests by more junior departmental employees,[259] and thus principals and staff behaved largely as they saw fit. Children were frequently beaten severely with whips, rods and fists, chained and shackled, bound hand and foot and locked in closets, basements, and bathrooms, and had their heads shaved or hair closely cropped.[260]

There was more to this irresponsibility than simply a failure of regulation and oversight. There was a pronounced and persistent reluctance on the part of the department to deal forcefully with incidents of abuse, to dismiss, as was its right, or to lay charges against school staff who abused the children. Part of that pattern was an abrogation of responsibility, the abandonment of the children who were "wards of the department"[261] to the churches, which in their turn failed to defend them from the actions of members of their own organizations.

All these factors are made clear in a series of cases in western Canada brought to the attention of the department by W. Graham, beginning with an

incident at Crowstand school in 1907. Graham, then an inspector of Indian agencies, reported that Principal McWhinney had, when retrieving a number of runaway boys, "tied ropes about their arms and made them run behind the buggy from their houses to the school." Referring the matter to a senior member of the Presbyterian church, the department suggested that the principal be dismissed. The church refused, for its investigation had found no reason to fault the principal's action: he had, it was claimed, tied the boys to the wagon only because there was no room inside; the distance was only some eight miles, and the boys did not have to run the whole way, as "the horses trotted slowly when they did trot and they walked a considerable part of the way." The department greeted this response with the cynicism it deserved. Benson saw these "lame arguments" as an attempt to "whitewash McWhinney". The church held firm, however. Despite a continuing record of ill-treatment of children and rising opposition to the school on the part of parents — which led Scott to demand in 1914 that McWhinney be transferred — he was kept on.[262]

In 1919, Graham forwarded reports to the department from a local agent and a police constable describing the case of a runaway from the Anglican Old Sun's school. On being brought back, the boy had been shackled to a bed, had his hands tied, and was "most brutally and unmercifully beaten with a horse quirt until his back was bleeding". The accused, P.H. Gentlemen, admitted using a whip and shackles and that the boy "might have been marked." Again, the department turned to the church for its 'advice'. Canon S. Gould, the general secretary of the Missionary Society, mounted a curious defence — such a beating was the norm "more or less, in every boarding school in the country." Scott accepted this, and Gentlemen remained at the school. Graham was irate, writing to Scott that "instead of placing this man in a position of responsibility, where he might repeat his disgraceful acts, he should have been relieved of his duties."[263]

In 1924, Graham brought forward another incident — the beating of a boy until he was "black from his neck to his buttocks" at the Anglican MacKay school in Manitoba. When he learned that the department had turned over investigation of the case to the church, Graham's reaction showed just how ingrained and corrosive this practice had become. "Chances are", he wrote, "it will end like all the other cases" and thus would undermine further the vigilance of local departmental staff, as they believed that "where the churches are concerned there is no use sending an adverse report, as the

department will listen to excuses from incompetent Principals of the schools more readily than to a report from our Inspectors based on the facts as they find them."[264]

Unfortunately, Graham was proved right. The agent, J. Waddy, confirmed in a letter to Scott that the punishment of this boy, and indeed of others by the principal, Reverend E. Bird, had been excessive. Bird admitted that he had marked the boy, but the church exonerated him, and the department let the matter drop. But this was not the end of it. The very next year another boy fled from the school "almost naked and barefoot" and was found after a week in the bush "nearly out of his mind" from being "whaled black and blue". One of the non-Aboriginal men who saw the boy before he was taken to the hospital warned that if the department did nothing, he would contact the "SPCA like he would if a dog was abused." Graham assumed that the department would realize that the time had come when "the services of this principal should be dispensed with." Scott, however, asked Gould to give the case "your customary careful attention." Bird was exonerated again, and when Graham attacked the church's investigation for ignoring everyone except the school staff, he was put in his place by the secretary of the department: "I have to assure you that the Department has dealt with this question seriously and I feel that no further action is advisable at present."[265]

In these and in dozens of other cases, no further action was ever taken, and thus abusive situations at many schools remained unresolved. In 1931, Graham wrote to Scott, after yet another bad report on MacKay, "I have not had good reports on this school for the past ten years, and it seems that there is no improvement. I think the Department should have the whole matter cleared up."[266] That the department seemed inherently incapable of following Graham's advice was part of the long established habit of neglect. But it stemmed, as well, from the fact that the department did not think it advisable to contradict the churches in these matters. The church was a force to be reckoned with in the national political arena and therefore in the school system. Calling for a tightening of regulatory guidelines in his 1897 report, Benson complained that the churches had "too much power."[267] In that light, he noted, in 1903, the department had "a certain amount of hesitancy in insisting on the church authorities taking the necessary action."[268]

Some officials certainly feared church influence and thought the department should as well. Agent A. Daunt, who conducted an inquiry into a 1920 incident at Williams Lake involving the suicide of one boy and the attempted mass suicide of eight others, admitted that he felt it unwise to accept the evidence of children, for "to take action on that will bring a religious hornets nest around the ears of the Department, unless the reverence in which the missionaries are held in the East has undergone a great change since I lived there."[269] Scott may not have feared those clerical hornets, but he certainly carried forward Benson's "hesitancy" throughout his long career as deputy superintendent general between 1913 and 1933, persistently deferring to church advice on issues of abuse. Chronic reluctance to challenge the churches and to insist upon the proper treatment of the children, together with the churches' persistent carelessness in the face of neglect and abuse by their members, became central elements in the pattern of mishandling abuse as long as the system continued to operate.

The department was not simply overawed by influential churches that refused to accept criticism of their treatment of children or disciplining of their staff. The department was complicit. In the face of criticism, and when abuse or neglect was revealed, too often it seemed to feel not sympathy for the children but its own vulnerability. For the department, the school system was an important symbol. As plans were being laid for the opening of the Shubenacadie school in Nova Scotia, Scott noted that it would be sited "within full view of the railway and highway, so that the passing people will see in it an indication that our country is not unmindful of the interest of these Indian children."[270] He was not, however, careful of that interest when it came into conflict with the reputation of the system and the department. In 1922, a journalist passed on to Scott a letter from a boy at the Onion Lake school detailing "how we are treated", in particular the lack of food.[271] Despite having departmental reports that confirmed the charges, Scott advised against publication, for the boy was not trustworthy and, in fact, he said, "ninety-nine percent of the Indian children at these schools are too fat."[272]

Such misinformation, which tried to ensure that the public could see the schools but not see *into* them, was another significant element in the management of the system. The importance of the civilizing mission far outweighed issues of justice for the children. The inspector of Indian agencies in British Columbia, referring to an incident in which two girls were

sexually "polluted" by male students, assured the department in 1912 that "it has been kept from the public, and I trust in the interest of the department's educational system, that it will remain so."[273] Members of that public, including parents, Indian leaders and journalists, felt the sting of aggressive departmental attacks when their criticism came too close to the bone.[274]

The department may have been unnecessarily anxious about public opinion. Through inquests, eye witness reports and newspaper articles, some information about abuse and neglect escaped the system. None of it, however — not even the shocking revelations of the Bryce report — elicited any sustained outcry or demand for reform. The issue of Aboriginal people had been consigned to the darker reaches of national consciousness. Thus the children remained trapped and defenceless within that "circle of civilized conditions", which was impervious both to criticism from without and to the constant evidence of abuse from officials within the department.

In the post-war era, as a part of the reorganization of the school system heralded by the new funding arrangement of 1957 and the contracts of 1961, the department did issue directives on punishment. As early as 1949, guidelines for strapping children were distributed to principals. They were expanded in 1953 and 1962,[275] but the focus remained on strapping, and other forms of punishment that continued to be commonly applied — confinement and deprivation of food, head shaving, and public beatings — were not specifically prohibited. As was the case in other areas of care, departmental intentions to improve standards — indicated by regulations, but by little else — were insufficient to solve the problem.

In southern schools, and in the northern affairs system too, children continued to be abused. From Turquetil Hall, Chesterfield Inlet, in the Northwest Territories, to the Kamloops school and across the country to Shubenacadie, the voices of Inuit, Indian and Métis adults who were children in those or other schools can now be heard describing the dreadful experiences suffered at the hands of church or departmental staff.[276] Writing in 1991 of her experience in both Anglican and Catholic schools, Mary Carpenter told an all too familiar story:

After a lifetime of beatings, going hungry, standing in a corridor on one leg, and walking in the snow with no shoes for speaking Inuvialuktun, and

having a heavy, stinging paste rubbed on my face, which they did to stop us from expressing our Eskimo custom of raising our eyebrows for 'yes' and wrinkling our noses for 'no', I soon lost the ability to speak my mother tongue. When a language dies, the world it was generated from is broken down too.[277]

Many of those stories, or certainly ones like them, were already known to church and government officials. In 1965, in preparation for the first Residential School Principals' Conference, the department asked six 'successful' former students to give their views on the schools. Two of them were brutally frank, describing the school experience as "an insult to human dignity." One listed the punishments meted out at the "mushole", the Mohawk Institute at Brantford, Ontario. Besides the usual beatings, "I have seen Indian children having their faces rubbed in human excrement...the normal punishment for bedwetters...was to have his face rubbed in his own urine", and for those who tried to escape, "nearly all were caught and brought back to face the music". They were forced to run a gauntlet where they were "struck with anything that was at hand....I have seen boys crying in the most abject misery and pain with not a soul to care — the dignity of man!"[278]

Some did get away from the schools, however, and some of those children met their deaths.[279] Other children tried to find escape in death itself. In June 1981, at Muscowequan Residential School, "five or six girls between the ages of 8 and 10 years had tied socks and towels together and tried to hang themselves." Earlier that year, a 15-year-old at the school had been successful in her attempt.[280]

A former employee of one school reported that the principal regularly entered classrooms and would "grab these children by the hair & pull them out of their seat" and then "thrash them unmercifully with a leather strap for no apparent reason."[281] Such incidents were not necessarily met with stern references to the directives by departmental employees. An incident at another school provides an illustration of the more common response. Two boys were beaten, leaving "marks all over the boys bodies, back, front genitals etcetera." Sweeping aside confirmation by a doctor, the department's regional inspector of schools for Manitoba conceded only that such punishment had "overstepped the mark a little", but as the boys had been caught trying to run away, "he had to make an example of them."[282]

"Coercion to enforce order and obedience"[283] — to the degree that it constituted a reign of disciplinary terror, punctuated by incidents of stark abuse — continued to be the ordinary tenor of many schools throughout the system.[284] In that light there can be no better summary comment on the system and the experience of the children than the rather diplomatic description of Pelican Lake school by the Bishop of Keewatin in 1960:

The Pelican Lake [school] has over the past many years suffered a somewhat unhappy household atmosphere. Too rigid regimentation, a lack of homelike surroundings and the failure to regard the children as persons capable of responding to love, have contributed at times to that condition. Children unhappy at their treatment were continually running away.[285]

As this description implies, the department and the churches knew something else about the system, and they knew it years before the voices of former students made the schools, their history and their consequences such a part of the public discourse on Aboriginal/government relations. They knew that the record of abuse and mistreatment being compiled by the school system comprised more than the sum of innumerable acts of violence against individual children. There were, in addition, pervasive and equally insidious consequences for all the children — for those who had been marked and for those whose scars were less visible but, perhaps, no less damaging.

From early in the history of the residential school system, it was apparent that the great majority of children leaving the schools — unlike the few 'successes' the department was able to consult in 1965 — rarely fit the vision's model of the enfranchiseable individual. In some manner, the educational process — an integral part of which was the system's overweening discipline, the "regimentation" noted at Alberni and Mt. Elgin — was counter-productive, undercutting the very qualities that were the prerequisites for assimilation — "individual acting and thinking",[286] the development of "individuality and self control", so that "children are prepared to accept responsibility" and "take their place in our democratic way of life."[287]

At the same time this phenomenon had darker hues. Local agents gave notice that not only did children not undergo a great transformation, but they

became stranded between cultures, deviants from the norms of both. In 1913, one agent reviewing the record of children who had come home from McWhinney's Crowstand school, commented that there were "far too many girl graduates...turning out prostitutes, and boys becoming drunken loafers."[288] Another agent, writing in 1918, opposed the schools because a much greater number of former students than children who had remained in the community were "useless", unable to get on with life on the reserve, and fell foul of the law. It would be, he concluded, "far better that they never go to school than turn out as the ex-pupils...have done."[289] In 1960, a Catholic bishop informed the department that the "general complaint made by our Indian Youth brought up to court shortly after leaving school for various reasons is that they cannot make a decent living nor have a steady job because they have not education to compete with their white neighbours."[290]

Whether the bishop was correct, and those youth ended up in trouble because they did not have enough education, or whether it was the wrong sort of education and a severely debilitating experience, was not normally a matter for inquiry. However, in the late 1960s, the department and the churches were forced to face the fact that there were severe defects in the system. The former students consulted in 1965 were unanimous in the opinion that for most children, the school experience was "really detrimental to the development of the human being." Isolated from both the Aboriginal and the non-Aboriginal community, schools were "inclined to make robots of their students", who were quite incapable of facing "a world almost unknown to [them]."[291]

More critically, the former student perspective was confirmed forcefully in 1967 by a report from George Caldwell of the Canadian Welfare Council. Caldwell submitted a scathing evaluation of nine schools in Saskatchewan:

The residential school system is geared to the academic training of the child and fails to meet the total needs of the child because it fails to individualize; rather it treats him en masse in every significant activity of daily life. His sleeping, eating, recreation, academic training, spiritual training and discipline are all handled in such a regimented way as to force conformity to the institutional pattern. The absence of emphasis on the development of the individual child as a unique person is the most disturbing result of the whole system. The schools are providing a custodial care service rather

than a child development service. The physical environment of the daily living aspects of the residential school is overcrowded, poorly designed, highly regimented and forces a mass approach to children. The residential school reflects a pattern of child care which was dominant in the early decades of the 20th century, a concept of combined shelter and education at the least public expense.[292]

While most of the report looked at the failure of the schools to achieve the goal of effective socialization, Caldwell did devote some attention to the consequences of that failure for children after they left school. Therein lay an even more "disturbing result." Caldwell confirmed what some local agents had observed decades before — that not only were children ill-prepared for life and work in Canadian society but that they were unable to deal with the unique reality facing former students. A product of both worlds, they were caught in "the conflicting pulls between the two cultures" — the "white culture of the residential school" and subsequently "the need to readapt and readjust to the Indian culture." Central to the "resolution of the impact of the cultural clash for the...child is an integration of these major forces in his life." Unfortunately, "few children are equipped to handle this struggle on their own",[293] though they would be left to do just that, to deal alone with the trauma of their school experience. Caldwell did not say, and the department never asked, how that struggle might be, or had been for generations, playing itself out in the lives of children, the families they returned to, the families and children they gave birth to, and their communities.

What Caldwell's report did venture was that his Saskatchewan findings could be replicated in schools throughout the system.[294] Though opposed by some churchmen, this position was supported by others. A consulting psychologist, for example, having interviewed and tested Inuit students, concluded that "the educational problems encountered in the Keewatin Area are there because the Southern white educational system, with all its 'hangups' has been transported to the North." Those educational problems included "a range of emotional problems", including "anxious kids, fearful kids, mildly depressed kids, kids with poor self-images...".[295]

For its part, the department, far from being prepared to dispute Caldwell's conclusions, welcomed and even amplified them in what amounted to its own serious critique of the system. Officials in the regions and in Ottawa

declared authoritatively that "more injury is done to the children by requiring them to leave their homes to attend Residential schools than if they are permitted to remain at home and not receive a formal education."[296] This was all suspiciously self-interested, however, for the department, pushing integration, used Caldwell's view that the schools were not an "environment to foster healthy growth and development"[297] as a counter-weight against those who argued for the retention of a particular school or, more broadly, for the continuation of separate and residential education. In what is perhaps the darkest irony in the history of the school system, the department acted vigorously on its failure, never having acted vigorously in the past to prevent the decades of "injury...done to children by requiring them to leave home." Soon, however, the department and the churches had to begin to face that issue of "injury"[298] — the product of the long unbroken history of abuse, mistreatment and neglect of children and of the sustained attack on Aboriginal culture.

4. Epilogue

...hurt, devastated and outraged.[299]

In December 1992, Grand Chief Edward John of the First Nations task force group forwarded to the minister of justice of the day, Kim Campbell, "a statement prepared and approved by B.C. First Nations Chiefs and leaders". In it, they pointed out that

The federal government established the system of Indian residential schools which was operated by various church denominations. Therefore, both the federal government and churches must be held accountable for the pain inflicted upon our people. We are hurt, devastated and outraged. The effect of the Indian residential school system is like a disease ripping through our communities.[300]

The chiefs' conclusion was not a rhetorical flourish; it was literally true. By the mid-1980s, it was widely and publicly recognized that the residential school experience, in the north and in the south, like smallpox and tuberculosis in earlier decades, had devastated and continued to devastate communities. The schools were, with the agents and instruments of economic and political marginalization, part of the contagion of colonization.

In their direct attack on language, beliefs and spirituality, the schools had been a particularly virulent strain of that epidemic of empire, sapping the children's bodies and beings. In later life, many adult survivors, and the families and communities to which they returned, all manifested a tragic range of symptoms emblematic of "the silent tortures that continue in our communities".[301] In 1990 Chief Ed Metatawabin of the Fort Albany First Nation community told the minister, Tom Siddon, that

Social maladjustment, abuse of self and others and family breakdown are some of the symptoms prevalent among First Nation Babyboomers. The 'Graduates' of the 'Ste Anne's Residential School' era are now trying and often failing to come to grips with life as adults after being raised as children in an atmosphere of fear, loneliness and loathing.

Fear of caretakers. Loneliness, knowing that elders and family were far away. Loathing from learning to hate oneself, because of the repeated physical, verbal or sexual abuse suffered at the hands of various adult caretakers. This is only a small part of the story.[302]

What finally broke the seal on the residential school system that had been affixed by Duncan Campbell Scott, making public the story of neglect and physical and cultural abuse, was, ironically, the deepest secret of all — the pervasive sexual abuse of the children. The official files efface the issue almost completely. There is rarely any mention of sexual behaviour that is not a concern about sexual activity among the children, which led administrators to segregate them and lock them away at night to prevent contact.[303] Any other references were encoded in the language of repression that marked the Canadian discourse on sexual matters. Clink at Red Deer commented that "the moral aspect of affairs is deplorable";[304] others wrote of "questions of immorality"[305] of "the breaking of the Seventh Commandment."[306] When the issue of sexual abuse emerged, this dearth of information became the first block in the foundation of a departmental response. In 1990, the director of education in the British Columbia region formulated an answer to any question about past abuse:

The sad thing is we did not know it was occurring. Students were too reticent to come forward. And it now appears that school staff likely did not know, and if they did, the morality of the day dictated that they, too, remain silent. DIAND staff have no record or recollection of reports — either verbal

or written.[307]

None of the major reports — Paget, Bryce, or Caldwell — that dealt critically with almost every aspect of the system mentioned the issue at all; that fell to Aboriginal people themselves. Responding to abusive conditions in their own lives and in their communities, "hundreds of individuals have stepped forward with accounts of abuse in at least 16 schools."[308] Women and men — like Phil Fontaine, the leader of the Assembly of Manitoba Chiefs, who attended the Fort Alexander school — "went out on the limb to talk...because they wanted to make things better."[309] They did more than just talk, more than just speak their pain and anguish; they and their communities acted. Steps were taken to form support groups and healing circles. Beginning in 1989-1990, abusers, including former residential school staff, were accused, taken to court in British Columbia and the Yukon, and convicted in each case of multiple counts of gross indecency and sexual assault. This set off a chain of police investigations and further prosecutions.[310]

These testimonies opened the floodgates of memories, and they poured out before the public. The trials, though far from being the first acts of resistance, may have had their greatest impact in validating the general critique of the system. In the long history of the schools, protests from parents and communities about conditions in the schools and the care of the children had not been uncommon. Many parents had struggled to protect their children, to prevent them being taken to schools, or petitioned for their return. More often than not, however, they had been brushed aside by the churches and the government. Even the initiatives that achieved their immediate goal — securing better food or calling for an inspection of the school, for example — never amounted to a serious challenge to the way the system operated, and thus they fell on stony ground.[311]

Times changed, however. In the 1980s, that public ground was well watered by growing concern for the safety of women and children in Canada and harrowed by reports of the sexual abuse of non-Aboriginal children at orphanages like Mount Cashel in Newfoundland and at the Alfred reform school in Ontario. Reflecting such concerns, the government set up a family violence and child abuse initiative, allocating funds for community-based projects dealing with sexual abuse and family violence.[312] Non-Aboriginal Canadians found that Aboriginal revelations and their attack on the schools,

and on the disastrous consequences of federal policy in general, fell within the parameters of their own social concerns, and thus non-Aboriginal voices joined the chorus of condemnation.

Experts working for government and Aboriginal organizations confirmed the connections made by Aboriginal people between the schools' corrosive effect on culture and the dysfunction in their communities. Experiential testimony, combined with professional analysis that charted the scope and pathology of abuse, put that reality beyond any doubt or dispute. In 1990, the *Globe and Mail* reported that Rix Rogers, special adviser to the minister of national health and welfare on child sexual abuse, had commented at a meeting of the Canadian Psychological Association that the abuse revealed to date was "just the tip of the iceberg" and that closer scrutiny of treatment of children at residential schools would show that all children at some schools were sexually abused.[313]

Abuse had spilled back into communities, so that even after the schools were closed their effects echoed in the lives of subsequent generations of children. A 1989 study sponsored by the Native Women's Association of the Northwest Territories found that eight out of 10 girls under the age of eight had been victims of sexual abuse, and 50 per cent of boys the same age had been sexually molested as well.[314] The cause was no mystery to social scientists. Researchers with the child advocacy project of the Winnipeg Children's Hospital, who investigated child abuse on the Sandy Bay reserve and other reserves in Manitoba, concluded in their report, *A New Justice for Indian Children*, that although the "roots of the problem are complex", it is "apparent that the destruction of traditional Indian culture has contributed greatly to the incidence of child sexual abuse and other deviant behaviour."[315] Consultants working for the Assembly of First Nations amplified this behaviour, detailing the "social pathologies" that had been produced by the school system.

The survivors of the Indian residential school system have, in many cases, continued to have their lives shaped by the experiences in these schools. Persons who attend these schools continue to struggle with their identity after years of being taught to hate themselves and their culture. The residential school led to a disruption in the transference of parenting skills from one generation to the next. Without these skills, many survivors had had difficulty in raising their own children. In residential schools, they

learned that adults often exert power and control through abuse. The lessons learned in childhood are often repeated in adulthood with the result that many survivors of the residential school system often inflict abuse on their own children. These children in turn use the same tools on their children.[316]

A central catalyst in that cycle of abuse were those powerful adults, men and women, employees of the churches and the department. In the years after 1969, when the church/state partnership in education was dissolved, the churches had boxed the political compass, so that at the highest levels and in the most public forums, they supported Aboriginal aspirations. In 1975, the Catholic, Anglican and United Churches formed Project North (the Aboriginal Rights Coalition) to co-ordinate their efforts in Aboriginal campaigns for justice; they were later joined by the Presbyterian church and other denominations. All of them, however, continued at the community level their historical missionary efforts within a new-found tolerance for Aboriginal spirituality.

By 1992, most of the churches had apologized, regretting, in the words of one of the Catholic texts, "the pain, suffering and alienation that so many have experienced."[317] However, as they told the minister in a joint communication through the Aboriginal Rights Coalition in August 1992, they wanted it recognized that they "share responsibility with government for the consequences of residential schools", which included not only "individual cases of physical and sexual abuse" but also "the broader issue of cultural impacts":

...the loss of language through forced English speaking, the loss of traditional ways of being on the land, the loss of parenting skills through the absence of four or five generations of children from Native communities, and the learned behaviour of despising Native identity.

They ended with an offer of fellowship, a re-creation of the old alliance. "We as churches encourage you, Mr. Siddon, to address the legacy of residential schools with greater vigour". In any such undertaking, they assured him their "moral support and...any experience we gain in responding to this legacy as churches."[318]

Having only just brought an end to the residential school era, the federal

government found that "the disclosures, criminal convictions and civil actions related to sexual abuse" forced it to consider that "legacy" and to "determine a course of action."[319] It was not lacking advice on the direction it should take. From all quarters, Aboriginal and non-Aboriginal, the government was encouraged to institute a public inquiry. A private citizen warned the minister that refusing to do so would be "an indication of your gross insensitivity to the staggering effect on its victims of the crime of sexual abuse." He went on to argue passionately that, more so than in the case of other crimes, sexual abuse of children thrives on the unwillingness of society to deal with it out in the open. So long as we as a society permit 'past events' to remain buried, no matter how painful, we cannot hope to halt the shocking epidemic that we are facing.[320]

In the House of Commons, Rod Murphy, the member for Churchill, rose in November 1990 to "urge the government to commission an independent inquiry", which he was confident would "assist the healing process for the victims of this abuse".[321] Réginald Bélair, the member for Cochrane-Superior, struck the same note in a letter to the minister. "How can the healing process begin without those who were responsible for these injustices publicly acknowledging the wrongs that were done to these children?"[322]

Within the department, Mr. Murphy's sentiments and calls for an inquiry found no apparent support. There was certainly no suggestion that full public disclosure would have any therapeutic value. Files covering the years 1990 to 1992 reveal that the department accepted the basic premise that the schools' extensive record of abuse meant that "many young innocent people have suffered"[323] and that the system had contributed to the "loss of culture and familial disruption."[324] It was recognized that the "serious psychological, emotional and social sequelae of child sexual abuse are well established" and that "there was a need to address these problems among former victims...their families and communities."[325] On the question of how that should be done it was first suggested that "Although much of the abuse has happened in the past, the department must take some responsibility and offer some solutions to this very serious problem."[326] This was superseded by a more characteristically cautious "framework to respond to incidents of abuse and the resultant effects on Indian communities". On what "is a major issue for DIAND...It is important that DIAND be seen as responding in a way that liability is not admitted, but that it is recognizing the

sequelae of these events."[327]

By December 1992, when the minister, Tom Siddon, replied to the August communication from the Aboriginal Rights Coalition, the government had developed its response fully. It would not launch a public inquiry. Suggestions that it do so were met with a standard reply. "I am deeply disturbed by the recent disclosures of physical and sexual abuse in the residential schools. However, I do not believe that a public inquiry is the best approach at this time."[328]

Nor did the government follow the churches' lead in extending an apology for the residential school system. To anyone who might suggest such a course, the minister was prepared to point out that in June 1991, at the first Canadian conference on residential schools, a former assistant deputy minister, Bill Van Iterson, had "expressed on behalf of all public servants in the department, a sincere regret over the negative impacts of the residential schools and the pain they have caused to many people." There would be no ministerial apology, no apology on behalf of Canadians, and there were no plans for compensation.[329]

The strategy the government adopted was a simple one. Essentially, it tried to externalize the issue, throwing it back onto the shoulders of Aboriginal people themselves. Under the guise of being "strongly committed to the principles of self-government", as Mr. Siddon informed the Aboriginal Rights Coalition in December 1992, the government would concentrate its efforts on "enabling First Nations to design and develop their own programs according to their needs."[330] It was committed "to working with Indian and Inuit communities to find ways to address this problem at the community level and to begin the healing of these wounds."[331] To facilitate such programs the government supplemented its family violence and child abuse initiative in 1991 with provisions and funds directed specifically to Aboriginal concerns.[332] In an echo of the old per capita debates, the coalition, in reviewing the funding, informed the minister "that these amounts are still relatively modest when looking at the deep and widespread nature of the problems."[333]

The approach to legal issues, particularly the identification and prosecution of purported abusers, was equally diffuse. There was no consideration that the system itself constituted a 'crime'. Rather, the focus was placed on

individual acts that violated the *Criminal Code*. Again, the government would not take the lead. There would be no internal inquiry, no search of departmental files. "DIAND will not without specific cause, initiate an investigation of all former student residence employees."[334] It would be the task of those who had been abused to take action. They would be directed to "the appropriate law enforcement agency, and DIAND will continue to cooperate fully with any police investigation."[335] The assistance they might receive from the department would be "as open as possible", with due respect to "the privacy rights of individuals."[336]

Such policies may well have been dictated by the norms of the criminal justice system and may even be appropriate in terms of community demands for funding and control. But there is in this a cynical sleight of hand. The government has refused to apologize or to institute a special public inquiry and instead wishes to concentrate on the 'now' of the problem, the 'savage' sick and in need of psychological salvation. This is an attempt to efface the 'then', the history of the system, which, if it were considered, would inevitably turn the light of inquiry back onto the source of that contagion — on the 'civilized' — on Canadian society and Christian evangelism and on the racist policies of its institutional expressions in church, government and bureaucracy. Those are the sites that produced the residential school system. In thought and deed this system was an act of profound cruelty, rooted in non-Aboriginal pride and intolerance and in the certitude and insularity of purported cultural superiority.

Rather than attempting to close the door on the past, looking only to the future of communities, the terrible facts of the residential school system must be made a part of a new sense of what Canada has been and will continue to be for as long as that record is not officially recognized and repudiated. Only by such an act of recognition and repudiation can a start be made on a very different future. Canada and Canadians must realize that they need to consider changing their society so that they can discover ways of living in harmony with the original people of the land.

The future must include making a place for those who have been affected by the schools to stand in dignity, to remember, to voice their sorrow and anger, and to be listened to with respect. With them Canada needs to pursue justice and mutual healing; it must build a relationship, as the Manitoba leader and much decorated veteran Thomas Prince encouraged

the government to do in his appearance before the joint committee of the Senate and the House of Commons in 1947, that will bind Aboriginal and non-Aboriginal people "so that they can trust each other and...can walk side by side and face this world having faith and confidence in one another."[337]

5. The Need for a Public Inquiry

We must carefully assess the nature, scope and intent of Canada's residential school strategy. We must carefully assess the role of the church. We must listen carefully to the survivors. We must thoroughly review the options available to Aboriginal people for restitution and redress. We must carefully consider how it might be possible to achieve justice after all that has been wrought by residential schools.

Wendy Grant,
Vice-Chief Assembly of First Nations
Canim Lake, British Columbia, 8 March 1993

Redressing the wrongs associated with the residential school system will involve concerted action on a number of fronts. We make a number of recommendations elsewhere in our report that bear directly on residential schooling. In particular, in Volume 3, our recommendations concerning an Aboriginal university include the recommendation that the federal government fund the establishment and operation of a national Aboriginal archive and library to house records concerning residential schools (see Volume 3, Chapter 3). Also in Volume 3, our recommendations concerning health and healing include the recommendation that the federal government take immediate steps to ensure that individuals suffering the effects of physical, sexual or emotional abuse have access to appropriate methods of healing (see Volume 3, Chapter 4). The remainder of this chapter addresses the need for further inquiry and investigation into the profound cruelty inflicted on Aboriginal people by residential school policies.

Our research and hearings indicate that a full investigation into Canada's residential school system, in the form of a public inquiry established under Part I of the *Public Inquiries Act*, is necessary to bring to light and begin to heal the grievous harms suffered by countless Aboriginal children, families and communities as a result of the residential school system.[338] The public inquiry's main focus should be to investigate and document the origins,

purposes and effects of residential school policies and practices as they relate to all Aboriginal peoples, with particular attention to the manner and extent of their impact on individuals and families across several generations, on communities, and on Aboriginal society as a whole. The inquiry should conduct public hearings across the country, with sufficient funding to enable those affected to testify. The inquiry should be empowered to commission research and analysis to assist in gaining an understanding of the nature and effects of residential school policies. It should be authorized to recommend whatever remedial action it believes necessary for governments and churches to ameliorate the conditions created by the residential school experience. Where appropriate, such remedies should include apologies from those responsible, compensation on a collective basis to enable Aboriginal communities to design and administer programs that assist the healing process and rebuild community life, and funding for the treatment of affected people and their families.[339]

We believe that a public inquiry into residential schools is an appropriate social and institutional forum to enable Aboriginal people to do what we and others before us have suggested is necessary: to stand in dignity, voice their sorrow and anger, and be listened to with respect. It has often been noted that public inquiries perform valuable social functions. In the words of Gerald Le Dain, a public inquiry has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they can affect the problem are of profound importance.

What gives an inquiry of this kind its social function is that it becomes, whether it likes it or not, part of this ongoing social process. There is action and interaction...Thus this instrument, supposedly merely an extension of Parliament, may have a dimension which passes beyond the political process into the social sphere....The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.[340]

A public inquiry is also an appropriate instrument to perform the investigative function necessary to understand fully the nature and ramifications of residential school policies. As Marius Tungilik told us at our public hearings, "We need to know why we were subjected to such treatment in order that we may begin to understand and heal."[341] A public inquiry benefits from independence and flexibility in this regard. As stated in a working paper of the Law Reform Commission of Canada,

Investigatory commissions supplement the activities of the mainstream institutions of government. They may investigate government itself, a function that must clearly fall to some body outside the executive and public service. They possess an objectivity and freedom from time constraints not often found in the legislature. They can deal with questions that do not require the application of substantive law by the courts. And they can reasonably investigate and interpret matters not wholly within the competence of Canada's various police forces.[342]

Given the range of subjects contemplated by our terms of reference, it was not possible for the Royal Commission to perform these social and investigative functions to the extent necessary to do justice to those harmed by the effect of Canada's residential school system. We hope that this chapter of our report opens a door on a part of Canadian history that has remained firmly closed for too long. In our view, however, much more public scrutiny and investigation are needed. A public inquiry into Canada's residential school system would be an indispensable first step toward a new relationship of faith and mutual confidence.

Recommendations

The Commission recommends that

1.10.1

Under Part I of the *Public Inquiries Act,* the government of Canada establish a public inquiry instructed to
(a) investigate and document the origins and effects of residential school policies and practices respecting all Aboriginal peoples, with particular attention to the nature and extent of effects on subsequent generations of individuals and families, and on communities and Aboriginal societies;

(b) conduct public hearings across the country with sufficient funding to enable the testimony of affected persons to be heard;

(c) commission research and analysis of the breadth of the effects of these policies and practices;

(d) investigate the record of residential schools with a view to the identification of abuse and what action, if any, is considered appropriate; and

(e) recommend remedial action by governments and the responsible churches deemed necessary by the inquiry to relieve conditions created by the residential school experience, including as appropriate,

• apologies by those responsible;

• compensation of communities to design and administer programs that help the healing process and rebuild their community life; and

• funding for treatment of affected individuals and their families.

1.10.2

A majority of commissioners appointed to this public inquiry be Aboriginal.

1.10.3

The government of Canada fund establishment of a national repository of records and video collections related to residential schools, co-ordinated with planning of the recommended Aboriginal Peoples' International University (see Volume 3, Chapter 5) and its electronic clearinghouse, to

• facilitate access to documentation and electronic exchange of research on residential schools;

• provide financial assistance for the collection of testimony and continuing research;

• work with educators in the design of Aboriginal curriculum that explains the history and effects of residential schools; and

• conduct public education programs on the history and effects of residential schools and remedies applied to relieve their negative effects.

Notes:

1 This chapter is based on extensive original research conducted for the Royal Commission by John Milloy of Trent University. Research on the school system was conducted in a number of archives: the National Archives of Canada in Ottawa, the Presbyterian, Anglican and United church archives in Toronto, and the Deschatelets Archives of the Oblates of Mary Immaculate in Ottawa. These represent the most significant public documentary collections for the history of the school system. There are, however, other records in regional, provincial and diocesan archives throughout Canada.

Research was also conducted at the Department of Indian Affairs and Northern Development on approximately 6,000 residential school files that are still held by the department. The Royal Commission secured access to this documentation only after protracted and difficult negotiations; these were eventually successful, but they seriously delayed completion of the project. Only one member of the research team was allowed to review the material and then only after signing an agreement setting out a detailed research protocol and obtaining an 'enhanced reliability' security clearance.

Information that fell, in the department's determination, within the bounds of solicitor/client privilege or confidences of the Queen's Privy Council for Canada within the last 20 years was not made available. All other files, including those carrying access restrictions ('Confidential' or 'Protected', for example) were to be made available. Most critically, access to the departmental collection was granted under the provisions of the *Privacy Act*, which stipulates that no disclosure of personal information, in the meaning of the act, can be made in a form that could reasonably be expected to identify the individual to whom it relates. The foregoing text and footnotes

and these notes were written to comply with that stipulation.

The following abbreviations are used in the notes:

INAC - files (stored at the headquarters of the Department of Indian Affairs and Northern Development in Hull, Quebec) that come under the Privacy Act restrictions

NAC - National Archives of Canada
MG - Manuscript Group
RG - Record Group
RG10 - Indian Affairs records (held by the National Archives)
RG85 - Northern Affairs records (held by the National Archives)
MR - Microfilm Reel

2 For a review of Canadian policy, see John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy", in *As Long as the Sun Shines and Water Flows*, ed. Ian A.L. Getty and Antoine S. Lussier (Vancouver: University of British Columbia Press, 1983); J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, revised edition (Toronto: University of Toronto Press, 1989); and Olive P. Dickason, *Canada's First Nations: A History of Founding Peoples* (Toronto: McClelland & Stewart Inc., 1992).

3 Annual Report of the Department of Indian Affairs for the Year Ended 31 March 1911 [cited hereafter as Annual Report], p. 273. For details of Scott's career, see E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986).

4 National Archives of Canada (NAC), Record Group 10 (RG10), volume 6039, file 160-1, MR C 8152, F. Oliver to Joint Church Delegation, 21 March 1908.

5 NAC RG10, volume 3674, file 11422, MR C 10118, To Sir John A. Macdonald from the Archbishop of Quebec, February 1883, and volume 3647, file 8128, MR C 10113, To the Superintendent General of Indian Affairs from A. Sutherland, 30 July 1883.

6 NAC MG 26A, Sir John A. Macdonald Papers, volume 91, "Report on Industrial Schools for Indians and Half-Breeds" [The Davin Report], 14 March 1879, pp. 35428-45. See C.B. Koester, *Mr. Davin, M.P., A Biography of Nicholas Flood Davin* (Saskatoon: Western Producer Prairie Books, 1980) for biographical information.

7 Annual Report 1890, p. xii.

8 NAC RG10, volume 6040, file 160-2, part 4, MR C 8153, T. Ferrier, *Report of the Alberta Indian Commission of the Methodist Church* (1911).

9 INAC file 1/25-1, volume 15, To Sir John A. Macdonald from L. Vankoughnet, 26 August 1887.

10 N. Sheehan, "Education, Society and the Curriculum in Alberta 1905-1980: An Overview", and E. Brian Titley, "Indian

Industrial Schools in Western Canada", in *Essays in Canadian Educational History*, ed. N. Sheehan, J.D. Wilson and D.C. Jones (Calgary: Detselig, 1986). Also R.M. Connelly, "Missionaries and Indian Education", in *The Education of Indian Children in Canada*, ed. L.G.P. Waller (Toronto: The Ryerson Press, 1965); and David A. Nock, "The Social Effects of Missionary Education: A Victorian Case Study", in *Reading, Writing and Riches: Education and the Socio-economic Order in North America*, ed. Randle W. Nelson and David A. Nock (Kitchener: Between the Lines, 1978).

11 Annual Report 1911, p. 273.

12 NAC RG10, volume 3947, file 123764, MR C 10166, To the Superintendent General of Indian Affairs from Inspector J.A. Macrae, 7 December 1900.

13 George Manuel and Michael Posluns, *The Fourth World* (Don Mills: Collier-Macmillan Canada Ltd., 1974), p. 63.

14 Relatively few schools were established in Quebec, however, for reasons that are not entirely clear. It may have been because the major portion of the Aboriginal population that concerned the Catholic church was

served by a day school system that had emerged in the southern part of the province before Confederation. Or it could have been because the Catholic church's missionary focus and energy were concentrated, in the nineteenth and early twentieth centuries, on the Canadian west and north-west, very much in competition with a similar advance of the Protestant churches into those regions. In those regions and in British Columbia, Catholic residential schools dominated.

15 From the outset the position taken on the education of Métis children in residential schools was rather ambiguous. The deputy superintendent general, J. Smart, noted in October 1899 (see NAC RG10, volume 3931, file 117377, MR C 10163, To the Secretary from D. Laird, 27 August 1900) that although he did not consider it appropriate "that the children of the Half-Breeds proper, of Manitoba and the Territories, should be admitted into Indian schools and be paid for by the Department---all children, even those of mixed blood, whether legitimate or not, who live upon an Indian Reserve and whose parents on either side live as Indians upon a Reserve, even if they are not annuitants, should be eligible for admission to the schools." There was, however, no hard and fast policy until the 1911 contract, clause 4(b) of which stated, "No Half-breed child shall be admitted to the said schools unless Indian children cannot be obtained to complete the number authorized [for any particular school]---in which event the Superintendent General may in his discretion permit the admission of any Half-breed child; but the Superintendent General will not pay any grant for any such Half-breed pupil---nor any part of the cost of its maintenance or education whatever." (Correspondence and Agreement relating to the Maintenance and Management of Indian Boarding Schools [Ottawa: Government Printing Bureau, 1911].) This policy was maintained throughout the rest of the history of the system.

It is impossible to determine the number of Aboriginal children who attended the schools over the life of the system. Estimates have been given. In T. Lascelles, OMI, "Indian Residential Schools", *The Canadian Catholic Review* 10/5 (May 1992), it is suggested that fewer than one in six attended. In his study, "Attendance at Indian Residential Schools in British Columbia, 1890-1920", *B.C. Studies* 44 (Winter 1979-80), James Redford concluded that only 17.6 per cent of children aged 6 to 15 attended residential schools in British Columbia in 1901 and that the proportion rose to 22.3 per cent in 1920. In "Owen Glendower, Hotspur, and Canadian Indian Policy", *Ethnohistory* 37/4 (Fall 1990), J.R. Miller concluded that "the system never

reached more than a minority of young Indians and Inuit." In fact, the extant school records for the system as a whole are not complete enough to allow useful calculations to be made. Given that fact, this text relies on annual enrolment lists found in NAC RG10 files, INAC files and the tabular statements in annual reports. These give only total enrolments per year, however, and cannot be used to determine the number of children who had a residential school experience. Any figures, including the minorities mentioned by Lascelles, Redford and Miller, are dangerously misleading unless they are fully contextualized. The impact of the system was felt not only by the children who attended schools but by the families and communities that were deprived of their children and had to deal subsequently with children who returned damaged from the schools. In that sense, communities, parents and, indeed, children later born to former students of the residential schools were all 'enroled'.

16 NAC RG10, volume 3818, file 57799, MR C 10143, Reed Report (1889).

17 NAC RG10, volume 6462, file 888-1 (2-3, 6), MR C 8781, C. Hives to R.A. Hoey, 21 June 1942, and R.A. Hoey to C. Hives, 29 June 1942.

18 NAC RG10, volume 3647, file 8128, MR C 10113, To Indian Commissioner, Regina, from J.A. Macrae, 18 December 1886.

19 Macrae to Indian Commissioner (cited in note 18).

20 Annual Report 1897, p. xxvi.

21 Annual Report 1888, pp. ix-x.

22 Macrae to Indian Commissioner (cited in note 18).

23 Davin Report (cited in note 6).

24 David A. Nock, *A Victorian Missionary and Canadian Indian Policy: Cultural Synthesis versus Cultural Replacement* (Waterloo, Ontario: Wilfrid Laurier University Press, 1988), p. 73. The school was at Sault Ste. Marie.

25 Annual Report 1889, p. xi.

26 NAC RG10, volume 6039, file 160-1, MR C 8152, To the Minister from the Archbishop of St. Boniface, 30 November 1912.

27 General Synod Archives, GS 75-103, Series 1-14, Box 15, MSCC Blake Correspondence, To S.H. Blake from F. Oliver, 28 January 1908.

28 Annual Report 1889, p. xi.

29 Annual Report 1890, p. xii.

30 Annual Report 1911, p. 273.

31 Davin Report (cited in note 6).

32 L. Vankoughnet to Sir John A. MacDonald (cited in note 9).

33 Annual Report 1895, p. xxii.

34 Annual Report 1891.

35 Annual Report 1896, pp. 398-399.

36 NAC RG10, volume 6040, file 160-3A, MR C 8153, Memorandum of the Convention of the Catholic Principals of Residential Schools held at Lebrett, Saskatchewan, 28 and 29 August 1924.

37 Annual Report 1891, p. xiii.

38 NAC RG10, volume 6040, file 160-7, part 1, MR C 8153, Report of the Following Institutions Under the Management of the Home Board of Missions for the United Church of Canada, 31 March 1927.

39 Manuel and Posluns, *The Fourth World* (cited in note 13), p. 67.

40 Nock, *A Victorian Missionary* (cited in note 24), p. 78 [emphasis in original].

41 Annual Report 1899, p. xxxi.

42 Annual Report 1895, pp. xxii-xxiii.

43 NAC RG10, volume 3674, file 11422-5, MR C 10118, To H. Reed from the Deputy Superintendent General, 24 August 1890.

44 Nock, *A Victorian Missionary* (cited in note 24), p. 78; and NAC RG10, volume 6443, file 881 (1-3), MR C 8767, To H. McGill from D. MacKay, 25 March 1937.

45 Macrae to Indian Commissioner (cited in note 18).

46 Annual Report 1887, p. lxxx.

47 NAC RG10, volume 4037, file 317021, MR C 10177, To the Secretary from Agent [unsigned], Birtle, Manitoba, 20 December 1907.

48 Annual Report 1896, p. xxxviii.

49 NAC RG10, volume 3927, file 116836-1A, MR C 10162, To the Superintendent General of Indian Affairs from R. MacKay and J. Menzies, 11 March 1904.

50 NAC RG10, volume 3920, file 116751-1A, MR C 10161, To the Deputy Superintendent General from H. Reed, 12 July 1889.

51 Annual Report 1902, p. 189.

52 NAC RG10, volume 6039, file 160-1, MR C 8152, To the Secretary from Principal Heron, 14 April 1909.

53 NAC RG10, volume 4072, file 431636, MR C 10183, To the Assistant Deputy and Secretary from Reverend W. McWhinney, 26 February 1913.

54 See, for example, H. Reed to the Deputy Superintendent General (cited in note 50).

55 Annual Report 1898, p. xxvii.

56 NAC RG10, volume 6039, file 160-1, MR C 8152, Principal Heron to the Secretary.

57 Annual Report 1903, p. 89.

58 See, for example, Annual Report 1906.

59 Annual Report 1911, p. 296.

60 Olive P. Dickason, *Canada's First Nations: A History of Founding Peoples* (Toronto: McClelland & Stewart Inc., 1992) p. 320.

61 Annual Report 1911, p. 275; 1912, p. 302.

62 Annual Report 1914, p. 115.

63 NAC RG10, volume 6041, file 160-7, part 1, MR C 8153, Resolution passed by the Association of Indian Workers in Saskatchewan at their meeting held in May 1930.

64 Annual Report 1910, p. 275.

65 Principal Heron to the Secretary (cited in note 52).

66 Annual Report 1903, p. 89.

67 INAC file 501/25-1-019, volume 1, To A.B. Weselak, MP, from H.M. Jones, Director, 4 June 1954.

68 INAC file 601/25-2, volume 2, R.F. Davey, Residential Schools Past and Future, 8 March 1968. For further information on the failure of the system to reach educational standards comparable to those of non-Aboriginal schools, see J. Barman, Y. Hébert and D. McCaskill, "The Legacy of the Past: An Overview", in *Indian Education in Canada*, ed. J. Barman, Y. Hébert and D. McCaskill, Volume 1: The Legacy (Vancouver: University of British Columbia Press, 1986).

69 INAC file 6-37-1, volume 2, Notes on Highlights of Indian Affairs Operations 1957 to Date, Memorandum for the Director, Education Division, 1952-1957.

70 Residential Schools Past and Future (cited in note 68).

71 INAC file 6-37-1, volume 2, Notes on Highlights of Indian Affairs Operations 1957 To Date.

72 INAC file D4700-1, volume 2, Economic and Social Development — Indian Education, Discussion Paper, 22 July 1981.

73 INAC file 1/25-1, volume 22, Memorandum on Education, R.F. Davey, 15 September 1969.

74 NAC RG10, volume 8448, file 06/23-5-019, MR C 13800, Fort Alexander Inspection Report, B. Warkentin, 1951.

75 NAC RG10, volume 8449, file 511/23-5-017, MR C 13800, Portage La Prairie Inspection Report, Eldon Simms, 9 November 1944.

76 INAC file 4745-1, volume 1, Indian Education Program, 1972.

77 INAC file 1/25-1, volume 22, Memorandum on Education, R.F. Davey, 15 September 1969.

78 NAC RG10, volume 8448, file 506/23-5-019, MR C 13800, Fort Alexander Inspection Report, B. Warkentin, 15 June 1942.

79 INAC file E4974-1, volume 3, Historical Trends in Indian Education, 1982.

80 INAC file 1/25-1, volume 35, Educational Services for Indians, 24 March 1969.

81 House of Commons, Special Committee on Reconstruction and Re-Establishment, *Minutes of Proceedings and Evidence*, No. 9, 24 May 1944,

p. 306.

82 NAC RG10, volume 6205, file 468-1, MR C 7937, To Dr. Dorey from R.A. Hoey, 29 May 1944; To the Deputy Minister from R.A. Hoey, 7 June 1944.

83 INAC file 6-21-1, volume 3, Statement Presented by Mr. R.F. Davey on Behalf of Indian Affairs Branch to the Standing Committee of Ministers of Education, 25 September 1963.

84 NAC RG10, volume 6205, file 468-1, MR C 7937, To the Deputy Minister from R. A. Hoey, 7 June 1944.

85 INAC file 601/25-1, volume 6, To Chief D. Ahenakew from J. G. McGilp, 24 February 1970.

86 INAC file 501/25-1-019, volume 1, To A.B. Weselak, MP, from H.M. Jones, 4 June 1954.

87 INAC file 4745-1, volume 1, Indian Education Program, 1972.

88 INAC file 6-21-1, volume 2, To D. Watters, Treasury Board, from L. Fortier, 22 July 1958.

89 INAC file 1/25-1, volume 22, Memorandum on Education, R.F. Davey, 15 September 1969.

90 INAC file 4745-1, volume 1, Indian Education Program, 1972.

91 INAC file 1/25-1, volume 22, Memorandum on Education, R.F. Davey, 15 September 1969.

92 INAC file 601/25-2, volume 2, Admissions Policy for Indian Student Residences, Preface, June 1969.

93 INAC file 301/25-13, volume 4, To R.L. Boulanger from D. Kogawa, 25 January 1973.

94 INAC file 601/25-2, volume 2, R.F. Davey, Residential Schools Past and Future, 8 March 1968.

95 INAC file 1/25-1, volume 22, Memorandum on Education, R.F. Davey, 15 September 1969.

96 INAC file 601/25-2, volume 2, R.F. Davey, Residential Schools Past and Future, 8 March 1968.

97 INAC file 1/25-1, volume 35, Educational Services for Indians, 24 March 1969.

98 House of Commons, Special Committee on Reconstruction and Re-Establishment, *Minutes of Proceedings and Evidence*, No. 9, 24 May 1944 p. 306.

99 INAC file 601/25-1, volume 6, To Chief D. Ahenakew from J.D. McGilp, 24 February 1970.

100 INAC file 501/25-1-019, volume 1, To A.B. Weselak, MP, from H.M. Jones, 4 June 1954.

101 INAC file 601/25-2, volume 2, R.F. Davey, Residential Schools Past and Future, 8 March 1968.

102 INAC file 601/25-1, volume 6, To Chief D. Ahenakew from J.D. McGilp, 24 February 1970.

103 INAC file 671/25-2, volume 3, Reasons for Admission — Category 3 Student Residences, J. B. Freeman, 7 May 1974.

104 INAC file 40-2-185, volume 1, Relationships Between Church and State in Indian Education, 26 September 1966. See also file 671/25-2, volume 3, To W. Grant from F. Misiurski, 24 January 1974; and file 675/25-13, volume 2, To E.L. Davies from R. Martin, 16 June 1975, and to E.L. Davies from R. Martin 24 March 1975.

105 INAC file 671/25-2, volume 3, To W. Grant from F. Misiurski, 24

January 1974.

106 INAC file 601/25-1, volume 6, To Chief D. Ahenakew from J.G. McGilp, 24 February 1970.

107 INAC file 40-2-185, volume 1, Relationships Between Church and State in Indian Education, 26 September 1966.

108 INAC file 1/25-1 volume 35, Educational Services for Indians, 24 March 1969.

109 INAC file 40-2-185 volume 1, Relationships Between Church and State in Indian Education, 26 September 1966.

110 INAC file 1/25-1 volume 35, Educational Services For Indians, 24 March 1969.

111 Indian and Eskimo Welfare Commission, "Residential Education for Indian Acculturation" (Ottawa: Oblate Fathers in Canada, 1958), p. 15.

112 INAC file 6-21-7, volume 1, To Mrs. L. Potts from L. Fortier, 22 December 1959.

113 INAC file 40-2-185, volume 1, Relationships Between Church and State in Indian Education, 26 September 1966.

114 INAC file 501/1, volume 2, To Assistant Deputy Minister from R.F. Davey, 18 August 1969.

115 See Norman Andrew Gull, "The 'Indian Policy' of the Anglican Church of Canada from 1945 to the 1970s", M.A. thesis, Trent University (1992), for a discussion of this event.

116 INAC file 853/25-13, volume 3, To Reverend J. P. Mulvihill from J. Chrétien, 8 January 1971.

117 INAC file 601/25-13, volume 3, A Proposal to Transfer the Control and Management of Student Residences to Indian People, January 1971.

118 INAC file 779/25-1-009, volume 1. This file contains a number of documents related to the dispute over the school and the final resolution. Blue Quills was located on the Blue Quills reserve, west of Saddle Lake, Alberta.

119 INAC file 853/25-13, volume 3, To Reverend J.P. Mulvihill from J. Chrétien, 8 January 1971.

120 INAC file 12-04-93, To P. Isaac from P. Bisson, 24 August 1984.

121 See INAC file 40-2-185, volume 1, To E.A. Côté, Deputy Minister, Department of Northern Affairs and National Resources, from G.R. Cameron, 26 May 1966; INAC file 600-1, volume 2, Education in Canada's Northland, 12 December 1954; and Kenneth Coates, "'Betwixt and Between': The Anglican Church and the Children of the Carcross (Chooulta) Residential School, 1911-1954", *B.C. Studies* 64 (Winter 1984-85).

122 See INAC file 600-1, volume 2, Education of Eskimos (1949-1957); and file 603-2, volume 1, Education of Eskimos, 5 March 1957.

123 INAC file 600-1, volume 2, Education in Canada's Northland. Shelagh D. Grant, *Sovereignty or Security? Government Policy in the Canadian North, 1936-1950* (Vancouver: University of British Columbia Press, 1988); Richard Finnie, *Canada Moves North* (New York: The Macmillan Company, 1943); Morris Zaslow, *The Northward Expansion of Canada 1914-1967* (Toronto: McClelland and Stewart, 1988); and Norman J. Macpherson, *Dreams and Visions, Education in the Northwest Territories from Early Days to 1984* (Yellowknife: Department of Education, Government of the Northwest Territories, 1991).

124 INAC file 630-101-1, volume 4, Memorandum for the Minister, R.G. Robertson, Deputy Minister, 12 August 1957.

125 INAC file 40-2-185, volume 1, Memorandum For Cabinet — Education in the Northwest Territories, Jean Lesage, 4 March 1955.

126 INAC file 600-1, volume 2, Education in Canada's Northland, 12 December 1954.

127 INAC file 600-1, volume 2, "New Education Programme in the Northwest Territories", press release, 20 March 1955.

128 INAC file 1/25-13-2, volume 1, To R.F. Davey from F.A.G. Carter, 24 April 1968; file 250-9-20, volume 1, To J.A. Macdonald, Deputy Minister, from S. Hodgson, Commissioner of the N.W.T., 13 February 1969, and To S. Hodgson from J.A. Macdonald, 18 December 1968; and Norman J. Macpherson, *Dreams and Visions, Education in the Northwest Territories from Early Days to 1984* (Yellowknife: Department of Education, Government of the Northwest Territories, 1991), p. 20.

129 INAC file 600-1-6, volume 5, Memorandum for the Deputy Minister, 11 October 1963. Large Hostels: Fleming Hall (at Fort Macpherson), Bompas Hall (Fort Simpson), Lapointe Hall (Fort Simpson), Breynat Hall (Fort Smith), Grollier Hall (Inuvik), Stringer Hall (Inuvik), Akaitcho Hall (Yellowknife), Turquetil Hall (Chesterfield Inlet). Small Hostels: Cambridge Bay, Baker Lake, Belcher Islands, Broughton Island, Cape Dorset, Eskimo Point, Great Whale River, Igloolik, Pangnirtung, Payne Bay, Pond Inlet and Port Harrison (Inukjuak).

130 INAC file 600-1, volume 2, Education in Canada's Northland, 12 December 1954.

131 INAC file 603-2, volume 1, Education of Eskimos, 5 March 1957.

132 Right from the outset churches lobbied for funds. See, for example, NAC RG10, volume 3674, file 11422, MR C 10118, To Sir John A. Macdonald from the Archbishop of Quebec, February 1883, and To Superintendent General of Indian Affairs from J. McDougall, 28 October 1883.

133 NAC RG10, volume 7185, file 1/25-1-7-1, MR C 9696, Memorandum to the Honourable Charles Stewart, 31 October 1927.

134 NAC RG10, volume 6436, file 878-1 (1-3), MR C 8762, To the Deputy Superintendent General from M. Benson, 23 October 1907.

135 INAC file 600-1, volume 2, Report of the Committee of the Privy

Council, approved by His Excellency the Governor General in Council on 22nd October 1892.

136 To E. Dewdney from L. Vankoughnet, NAC RG10, volume 3927, file 116836-1A, MR C 10162, 2 June 1890; and volume 3926, file 116836-1, MR C 10162, 10 June 1890.

137 NAC RG10, volume 6039, file 160-1, MR C 8152, To the Deputy Superintendent General from the Auditor General, 7 December 1904. For a discussion of funding and management difficulties, see E. Brian Titley, *Narrow Vision, Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986), pp. 80-82; and NAC RG10, volume 3927, file 116836-1A, MR C 10162, To the Deputy Superintendent General from M. Benson, 19 March 1904, and To Deputy Superintendent General from M. Benson, 25 April 1905.

138 NAC RG10, volume 6039, file 160-1, MR C 8152, To F. Pedley from Reverend A.E. Armstrong, 1 February 1907.

139 NAC RG10, volume 6730, file 160-2 (1-3), MR C 8092, To Dr. Roche from D.C. Scott, 27 June 1917.

140 NAC RG10, volume 6039, file 160-1, MR C 8152, Memorandum on Conference in F. Oliver's Office, 8 November 1910. For a discussion of the details of the contracts, see file 160-1, To the Superintendent General from F. Pedley, 17 November 1910.

141 NAC RG10, volume 6039, file 160-1, MR C 8152, Memorandum on Conference in F. Oliver's Office, 8 November 1910; School Classification and Per Capita Rates æ 1910.

142 NAC RG10, volume 6039, file 160-1, MR C 8152, Memorandum on Conference in F. Oliver's Office, 8 November 1910, To the Superintendent General from F. Pedley, 17 November 1910.

143 NAC RG10, volume 6039, file 160-1, MR C 8152, Memorandum on Conference in F. Oliver's Office, 8 November 1910.

144 Correspondence and Agreement Relating to the Maintenance and Management of Indian Boarding Schools (Ottawa: Government Printing Bureau, 1911), p. 4.

145 NAC RG10, volume 7185, file 1/25-1-7-1, Memorandum, F.T. Ferrier, 5 April 1932; Circular from Deputy Superintendent General, 22 February 1933; Circular, 15 April 1935; Circular, 13 July 1935; Circular, 26 March 1936; Circular, 25 June 1936; and volume 6041, file 160-5, MR C 8153, To Reverend J. Scannell from H. McGill, 17 February 1936.

146 NAC RG10, volume 6041, file 160-5, MR C 8153, To J. Plourde from R.A. Hoey, 15 October 1940.

147 NAC RG10, volume 6730, file 160-2 (1-3), MR C 8092, To Reverend Dr. T. Westgate from R.A. Hoey, 11 January 1941.

148 NAC RG10, volume 6730, file 160-2 (1-3), MR C 8092, To D.C. Scott from Canon S. Gould, 23 September 1924. See also volume 6040, file 160-3A, MR C 8153, To the Minister from Canon S. Gould, 7 January 1921; and volume 6039, file 160-1, MR C 8152, Memo for File, R.T. Ferrier, 8 February 1926.

149 NAC RG10, volume 7185, file 1/25-1-7-1, Memorandum for H. McGill from R.A. Hoey, 4 November 1938.

150 NAC RG10, volume 6001, file 1-1-1(1), MR C 8134, Memorandum for A. Meighen from D.C. Scott, January 1918.

151 NAC RG10, volume 7185, file 1/25-1-7-1, To Honourable Charles Stewart from D.C. Scott, 31 October 1927.

152 NAC RG10, volume 6039, file 160-1, MR C 8152, To J. McLean from M. Benson, 15 July 1897.

153 NAC RG10, volume 3674, file 11422, MR C 10118, To Reverend A. Lacombe from E. Dewdney, 23 July 1883.

154 NAC RG10, volume 4041, file 334503, MR C 10178, Paget Report, 25

November 1908.

155 NAC RG10, volume 3917, file 116575-5, MR C 10161, To the Indian Commissioner from M.M. Seymour, MD, 17 September 1895. See also volume 3674, file 11422 5, MR C 110118, To the Deputy Superintendent General from H. Reed, 13 May 1891; volume 3922, file 116820-1A, MR C 10162, To the Deputy Superintendent General from J. Day, n.d.; volume 6027, file 117-1-1, MR C 8147, To the Assistant Commissioner, Regina, from A. Baird, 24 December 1894; volume 6039, file 160-1, MR C 8152, To J. McLean from M. Benson, 15 July 1897; and volume 6305, file 652-1, MR C 8682, To J. McLean from A. MacArthur, 27 December 1910.

156 NAC RG10, volume 6039, file 160-1, To J. McLean from M. Benson, 15 July 1897.

157 The department did attempt to force parents to send their children by threatening to cancel rations and other "privileges" and, in both the Indian affairs and northern affairs systems, by the suspension of family allowance payments. See, for example, NAC RG85, volume 1507, file 600-3, To R.A. Gibson from F. Fraser, 16 December 1948; INAC file 501/25-1, volume 1, Circular No. 42, School Attendance, R.D. Ragan, 6 October 1958; To R.D. Ragan from R.F. Davey, 24 July 1958; and file 773/25-2-004, Family Allowances, Unsatisfactory School Report, 1 March 1967.

158 NAC RG10, volume 6348, file 752-1, MR C 8705, To the Deputy Superintendent General from D.C. Scott, 23 April 1909.

159 NAC RG10, volume 4041, file 334503, MR C 10178, Paget Report. See also volume 3927, file 116836-1A, MR C 10162, To the Superintendent General from R. MacKay and J. Menzies, 11 March 1904.

160 NAC RG10, volume 3937, file 120048-1, MR C 10164, To A. Vowell from the Bishop of Caledonia, 11 November 1907.

161 NAC RG10, volume 4037, file 317021, MR C 10177, *Montreal Star*, 15 November 1907, and *Saturday Night*, 23 November 1907.

162 NAC RG10, volume 4037, file 317021, MR C 10177, *Montreal Star*, 15 November 1907, and *Saturday Night*, 23 November 1907; Report on the

Indians of Manitoba and the Northwest Territories [Bryce report] (Ottawa: Government Printing Bureau, 1907).

163 NAC RG10, volume 1346-7, no file no., MR C 13916, To W. Robertson from Principal W. Lemmens, 31 March 1915.

164 NAC RG10, volume 1346-7, no file no., MR C 13916, To the Secretary from S. Swinford, 4 December 1907.

165 NAC RG10, volume 1346-7, no file no., MR C 13916. The Secretary of the Department solicited reactions to the Bryce report from local agents. They were generally in agreement with Bryce. See, for example, To the Secretary from D. Mann, 22 November 1907 and To the Secretary from T. Eastwood, 15 December 1907.

166 Duncan C. Scott, "Indian Affairs, 1867-1912", in *Canada and its Provinces: A History of the Canadian People and their Institutions by One Hundred Associates*, ed. Adam Shortt and Arthur G. Doughty (Toronto: Glasgow, Brook & Company, 1914), volume 7, p. 615.

167 NAC RG10, volume 4037, file 317021, MR C 10177, *Saturday Night*, 23 November 1907.

168 Anglican Church of Canada, General Synod Archives, S.H. Blake File, G.S. 75-103, "To the Honourable Frank Oliver, Minister of the Interior, 27 January 1907", quoted in To the Members of the Board of Management of the Missionary Society of the Church of England, 19 February 1907.

169 P.H. Bryce, *The Story of a National Crime, being an Appeal for Justice to the Indians of Canada* (Ottawa: James Hope & Sons, Limited, 1922).

170 NAC RG10, volume 6015, file 1-1-13, MR C 8141, To W. Graham from D.C. Scott, 16 February 1925. See also To D.C. Scott from W. Graham, 10 February 1925.

171 Bryce, *A National Crime* (cited in note 169), p. 14.

172 See NAC RG10, volume 6001, file 1-1-1 (1), MR C 8134, Memorandum

for Arthur Meighen from D.C. Scott, January 1918; volume 6015, file 1-1-13, MR C 8141, To Dr. H. McGill from E.L. Stone, MD, 27 November 1903; and George J. Wherrett, *The Miracle of Empty Beds: A History of Tuberculosis in Canada* (Toronto: University of Toronto Press, 1977), p. 107.

173 NAC RG10, volume 4092, file 546898, MR C 10187, To W. Graham from Dr. F.A. Corbett, 1922; and volume 3918, file 116659-1, MR C 10161, To J. Smith from the Assistant Deputy and Secretary, 29 March 1918.

174 NAC RG10, volume 6482, file 941-2, MR C 8796, To J. Plourde from H. McGill, 10 February 1940.

175 See, for example, NAC RG10, volume 4092, file 546898, MR C 10187, To D.C. Scott from W. Graham, 7 December 1920 and To W. Graham from H.N. Kennedy, MD, 7 January 1922; volume 8451, file 655/23-5, MR C 13801, To H. McGill from M. Christianson 25 January 1935; volume 6446, file 881-23, MR C 8770, To R.H. Moore from C. Pitts, MD, 22 October 1935; and Wherrett, *The Miracle of Empty Beds* (cited in note 172), p. 109.

176 Bryce, *A National Crime* (cited in note 169), p. 14.

177 NAC RG10, volume 6462, file 888-1, MR C 8781, To D.C Scott from Reverend A. Lett, 6 March 1922.

178 NAC RG10, volume 8448, file 506/23-5-014, MR C 13800, Inspection Report on Birtle School, A. Hamilton, 4 December 1936.

179 NAC RG10, volume 6332, file 661-1 (1-2) MR C 9809, To W. Graham from L. Affleck, 15 November 1929.

180 NAC RG10, volume 3933, file 117657-1, MR C 10164, To D.C. Scott from W. Graham, 10 October 1914.

181 NAC RG10, volume 3918, file 116659-1, MR C 10161, To the Assistant Deputy and Secretary from J. Smith, 8 February 1918; and volume 6479, file 940-1 (1-2), MR C 8794, To the Deputy Superintendent General from E. Stockton, 29 November 1912.

182 NAC RG10, volume 6426, file 875-1-2-3-5, MR C 8754, Inspection Report, Alert Bay Boys School, British Columbia, R.H Cairns, 27 April 1926.

183 NAC RG10, volume 6451, file 883-1 (1-2), MR C 8773, Inspection Report, Kitamaat School, Kitamaat, British Columbia, R.H. Cairns, 19 April 1926.

184 NAC RG10, volume 6309, file 654-1, MR C 8685, To W. Graham from J. Waddy, 15 October 1930.

185 NAC RG10, volume 3918, file 116659-1, MR C 10161, To the Assistant Deputy and Secretary from J. Smith, 29 March 1918; and To the Assistant Deputy and Secretary from F.V. Agnew, MD, 18 June 1918.

186 NAC RG10, volume 6332, file 661-1 (1-2), MR C 9809, To W. Graham from R. Murison, 29 June 1929.

187 NAC RG10, volume 3918, file 116659-1, MR C 10161, To D.C. Scott from J. Salles, 2 April 1917.

188 NAC RG10, volume 3933, file 117657-1, MR C 10164, To W. Graham from C. Stockdale, July 1914.

189 NAC RG10, volume 6262, file 578-1 (4-5), MR C 8653, Report of Dr. A.B. Simes on Elkhorn School, 19 October 1944.

190 NAC RG10, volume 6332, file 661-1 (1-2), MR C 9809, To W. Graham from L. Affleck, 15 November 1929.

191 NAC RG10, volume 6041, file 160-5, MR C 8153, To H. McGill from U. Langlois, 28 April 1928.

192 NAC RG10, volume 3918, file 116659-1, MR C 10161, To the Assistant Deputy and Secretary from J. Smith, 8 February 1918. For other examples, see volume 6039, file 160-1, MR C 8152, To Reverend C. Bouillet from J.T. Ross, 25 January 1919; file 160-2, part 4, To B. Neary from Canon Cook, 5 July 1950; and volume 6040, file 160-3A, MR C 8153, To D.C. Scott from T. Ferrier, 2 July 1917.

193 INAC file 951/23-5, volume 1, To the Secretary from a Principal, 15 April 1934.

194 INAC file 6-37-1, volume 1, Memorandum for Dr. H. McGill from R.A. Hoey, 13 February 1937.

195 NAC RG10, volume 6327, file 660-1 (1-3), MR C 9807, To Reverend C. Cahill from D.C. Scott, 1 March 1917. Qu'Appelle School was located outside Lebrett, Saskatchewan.

196 NAC RG10, volume 8448, file 506/23-5-019, MR C 13800, Inspection Report on Birtle School, A. Hamilton, 4 December 1936.

197 NAC RG10, volume 6327, file 660-1 (1-3), MR C 9807, To D.C. Scott from W. Graham, 18 October 1916.

198 INAC file 772/23-5-010, volume 1, Inspection Report, Morley School, located at the Morleyville Settlement on the Stony reserve, Saskatchewan, L.G.P. Waller, 31 October 1952.

199 NAC RG10, volume 6268, file 581-1 (1-2), MR C 8657, To D.C. Scott from J.R. Bunns, 24 September 1915; volume 6262, file 578-1 (4-5), MR C 8653, Report of Dr. A.B. Simes, Elkhorn School, 19 October 1944; volume 6426, file 875-1-2-3-5, MR C 8756, Inspection Report on Alert Bay Boys School, Inspector R.H. Cairns, 27 April 1926.

200 NAC RG10, volume 6452, file 884-1 (1-3), MR C 8773-8774, Memorandum, Assistant Commissioner Perry, 16 June 1930. See also volume 6479, file 940-1 (1-2), MR C 8794, To the Deputy Superintendent from E. Stockton, 29 November 1912.

201 NAC RG10, volume 6455, file 885-1 (1-2), MR C 8777, Inspection Report, Kuper Island School, R.H. Cairns, 9 November 1922.

202 NAC RG10, volume 6039, file 160-1, MR C 8152, To J. McLean from M. Benson, 15 July 1897.

203 See NAC RG10, volume 6268, file 581-1 (1-2), MR C 8657, To D.C.

Scott from J.R. Bunns, 25 September 1915; volume 6309, file 654-1, MR C 8685, To W. Graham from J. Waddy, 15 October 1930; volume 6451, file 883-1 (1-2), MR C 8773, To the Secretary from I. Foughner, 15 June 1922; and volume 8754, file 651/25-1, MR C 9701, To the Director from R.S. Davis, 15 July 1942.

204 NAC RG10, file 150-44, MR C 8149, Health Aspects in Relation to Food Service, Indian Residential Schools, November 1946.

205 INAC file 601/25-2, volume 2, R.F. Davey, Residential Schools Past and Future, 8 March 1968.

206 INAC file 116/25-13, Operation of Government-Owned Residential Schools on a Controlled Cost Basis, April 1958.

207 INAC file 1/18, volume 1, To the Secretary, Treasury Board, from L. Fortier, 25 November 1958.

208 INAC file 601/25-2, volume 2, R.F. Davey, Residential Schools Past and Future, 8 March 1968.

209 INAC file 6-21-1, volume 4, The National Association of Principals and Administrators of Indian Residences, Brief Presented to the Department of Indian Affairs, 1968.

210 INAC file E4974-1, volume 1, The Canadian Welfare Council, "Indian Residential Schools æ A research study of child care programs of nine residential schools in Saskatchewan", p. 91.

211 INAC file 6-21-1, volume 4, The National Association of Principals and Administrators of Indian Residences, Brief Presented to the Department of Indian Affairs, 1968.

212 INAC file 6-21-1, volume 4, Memorandum on the Brief æ National Association of Principals, R.F. Davey, 11 January 1968.

213 INAC file 6-21-1, volume 4, Memorandum on the Brief æ National Association of Principals, R.F. Davey, 11 January 1968.

214 INAC file 6-21-1, volume 4, To Reverend J. Levaque from J.A. Macdonald, 28 May 1968.

215 INAC file 6-21-1, volume 4, The National Association of Principals and Administrators of Indian Residences, Brief Presented to the Department of Indian Affairs, 1968.

216 NAC RG85, volume 1224, file 630/110-3 (6), To R.G Robertson from---, 19 November 1957. Correspondent not identified for reasons of confidentiality (see note 1).

217 NAC RG85, volume 1338, file 600-1-5, Report on Coppermine Tent Hostel, A Teacher, 1 August 1959.

218 INAC file 1/25-1, volume 22, To R.F. Davie [sic] from---, Consultant Psychologist, 10 April 1969.

219 INAC file 1/1-18, volume 1, To the Secretary, Treasury Board, from L. Fortier, 25 November 1958.

220 See, for example, INAC file 501/25-13-067 volume 3, Memorandum to File, Mr. Chapple, 11 May 1967; file 1/25-13, volume 12, To R.F. Davey from Canon T. Jones, 28 September 1966; and Treasury Board Submission, Food and Clothing Allowances, Indian Residential Schools, 25 July 1966; file 44/25-2, To Regional Supervisor North Bay from R.F. Hall, 10 July 1964; file 676/25-13-005, volume 2, Food Services Report, Beauval School, 20 September 1962.

221 INAC file 601/25-13, volume 2, To I. Robson from Reverend G. Gauthier, 17 November 1969.

222 For a similar situation, see INAC file 1/25-1-4-1, To J. Boys from R.F. Davey, 15 August 1969.

223 NAC RG10, volume 3922, file 116820-1A, MR C 10162, To Archdeacon J. Mackay from the Deputy Superintendent General, 1 March 1895.

224 See, for example, NAC RG10, volume 3674, file 11422-4, MR C 11422, To E. Dewdney from Reverend J. Hugonard, 5 May 1891; and file 16836, MR C 10162, To F. Pedley from J. McKenna, J. Menzies and R. MacKay, 11 March 1904.

225 See NAC RG10, volume 3920, file 116818, MR C 10161, To the Deputy Superintendent General from Martin Benson, 12 August 1903; and volume 3925, file 116823-1A, To the Deputy Superintendent General from M. Benson, 1 June 1903.

226 NAC RG10, volume 3927, file 16836-1A, MR C 10162, To the Deputy Superintendent General from M. Benson, 17 March 1904.

227 NAC RG10, volume 10411, Shannon Box 36, MR C 10068, Circular, R. Ferrier, 19 January 1922.

228 INAC file 1/25-1-4-1, volume 2, To H.M. Jones from L.B. Pett, MD, 7 January 1954.

229 INAC file 501/25-13-075, volume 2, To Reverend A. Masse from R.F. Davey, 6 November 1962.

230 INAC file 701/25-1-4-1, volume 1, To Reverend P. Hudon from R.F. Davey, 7 March 1966. For other examples, see file 779/25-13-012, volume 1, To Dr. P.E. Moore from H. Jones, 30 October 1961; file 772/25-1-002, volume 1, To N. Goater from R.F. Davey, 19 June 1961; file 775/25-1-006, volume 1, To Reverend G. Montmigny from P. Deziel, 13 July 1961.

231 NAC RG10, volume 7194, file 511/25-1-015, MR C 9700. The diet at Brandon school, which was condemned by nutritionists, was allowed to remain wholly inadequate for more than six years, from 1950 to 1957.

232 NAC RG10, volume 6264, file 578-1 (4-5), MR C 8653, To Indian Affairs Branch from A. Hamilton, 22 September 1944. Elkhorn School was erected just outside the town of Elkhorn, Manitoba.

233 NAC RG10, volume 6859, file 494/25-2-014, MR C 13727, To F. Foss from the Bishop of Keewatin, 31 October 1960.

234 Nock, *A Victorian Missionary* (cited in note 24), p. 5.

235 Davin Report (cited in note 6).

236 INAC file 501/29-4, volume 9, To Sir John A. Macdonald from L. Vankoughnet, 26 August 1887.

237 NAC RG10, volume 3647, file 8128, MR C 10113, To Indian Commissioner, Regina, from J.A. Macrae, 18 December 1886.

238 NAC RG10, volume 3674, file 11422-2, MR C 110118, To the Indian Commissioner from Reverend A. Lacombe, 2 June 1885. High River Industrial School, also called St. Joseph's, was located near Davisburg, Alberta.

239 NAC RG10, volume 3920, file 116818, MR C 10161, To the Indian Commissioner from C. Somerset, 1 November 1900.

For an excellent description of school routine, see Jacqueline Gresko, "Creating Little Dominions Within the Dominion: Early Catholic Indian Schools in Saskatchewan and British Columbia", in *Indian Education in Canada*, ed. J. Barman, Y. Hébert and D. McCaskill (Vancouver: University of British Columbia Press, 1986), Volume 1: The Legacy, pp. 93-109.

240 NAC RG10, volume 6430, file 876-1, MR C 8759, Inspection Report on Alberni School, G. Barry, 25 April 1934.

241 NAC RG10, volume 6205, file 468-1, (1-3), MR C 7937, To A. Moore from A. McKenzie, 9 January 1934. Mount Elgin School was located at Muncey, Ontario.

242 NAC RG10, volume 3674, file 11422-4, MR C 110118, To E. Dewdney from Reverend E. Claude, 29 October 1887.

243 NAC RG10, volume 6452, file 888-1 (2-3, 6-7), MR C 8773-8774, To the Bishop of Westminster from L. Vankoughnet, 17 October 1889.

244 NAC RG10, volume 3920, file 116818, MR C 10161, To Assistant

Commissioner from H. Reed, 28 June 1895.

245 NAC RG10, volume 3920, file 116818, MR C 10161, To Assistant Commissioner from H. Reed, 28 June 1895.

246 See, for example, NAC RG10, volume 6187, file 461-1 (1-2), MR C 7922, To J. Edmison from J. McLean, 4 August 1917; and volume 6251, file 575-1 (1,3), MR C 8645, To Reverend A. Grant from J. McLean, 12 December 1912.

247 NAC RG10, volume 3920, file 116818, MR C 10161, To the Indian Commissioner, Regina, from D. Clink, 4 June 1896. The school was near Red Deer, Alberta.

248 NAC RG10, volume 6268, file 581-1 (1-2), MR C 8657, To the Secretary from D. Laird, 11 September 1907. The school was located close to Norway House reserve on Little Playgreen Lake in Manitoba.

249 NAC RG10, volume 6268, file 581-1 (1-2), MR C 8657, To the Secretary from D. Laird, 11 September 1907.

250 NAC RG10, volume 6187, file 461-1 (1-2), MR C 7922, To J. Edmison from J. McLean, 4 August 1917.

251 See, for example, NAC RG10, volume 6309, file 654-1 (1), MR C 8685, To R. Hoey from G. Castledon, MP, 19 February 1941. In this case, which is a direct parallel to the one brought forward by Laird, the young boy, having run away, froze to death. Departmental files contain many other examples.

252 NAC RG10, volume 7194, file 511/25-1-015, MR C 9700, To P. Phelan from R.S. Davis, 25 October 1951.

253 NAC RG10, file 6436, file 878-1 (1-3), MR C 8762, To the Secretary from A. Vowell, plus attachments, 17 March 1902.

For a history of this incident and others at Williams Lake, see Elizabeth Furniss, *Victims of Benevolence: Discipline and Death at the Williams Lake Residential School, 1891-1920* (Williams Lake: Cariboo Tribal Council,

1992). Williams Lake industrial school was at Williams Lake, and Lejac was on Fraser Lake, in the northern part of British Columbia.

254 NAC RG10, volume 6443, file 881-1 (1-3), MR C 8767, To H. McGill from D. MacKay, 25 March 1937.

255 NAC RG10, volume 6348, file 752-1, MR C 8705, To Reverend J. Rioui from D.C. Scott, 16 December 1901. The school was located south of Cluny, Alberta, on the Blackfoot reserve.

256 NAC RG10, volume 6348, file 752-1, MR C 8705, To Reverend J. Rioui from D.C. Scott, 16 December 1901.

257 NAC RG10, volume 6452, file 884-1 (1-3), MR C 8773-8774, To the Bishop of Westminster from L. Vankoughnet, 17 October 1889.

258 NAC RG10, volume 3920, file 116818, MR C 10161, To the Assistant Commissioner from H. Reed, 28 June 1895.

259 NAC RG10, volume 6268, file 581-1 (1-2) MR C 8657, To the Secretary from D. Laird, 11 September 1907.

260 See NAC RG10, volume 6462, file 888-1 (2-3, 6-7), MR C 8781, To R.A. Hoey from Reverend C. Hives, 21 June 1943; volume 6200, file 466-1 (1-5), MR C 7633, To Reverend H. Snell from H. Craig, 29 July 1937, and attached correspondence; volume 6187, file 461-1 (1-2), MR C 7922, To Reverend A. Grant from the Secretary, 11 April 1916; volume 6342, file 750-1, MR C 8699, To D.C. Scott from J. Pugh, 25 January 1928, and attached correspondence; volume 6309, file 654-1, MR C 8685, To the Secretary from T. Robertson, 10 November 1938, and attached correspondence; and volume 6479, file 940-1 (1-2), MR C 8794, To the Superintendent General from Reverend H. Grant, 5 February 1940.

261 NAC RG10, volume 6348, file 752-1, MR C 8705, To Reverend J. Rioui from D.C. Scott, 16 December 1901.

262 NAC RG10, volume 6027, file 117-1-1, MR C 8147, Report on Crowstand School, W. Graham, 4 July 1907, and attached correspondence;

To Reverend A. Grant from D.C. Scott, 19 September 1914. Crowstand School was located on Côté's reserve near Kamsack, Saskatchewan.

263 NAC RG10, volume 6358, file 758 (1-2), MR C 8713, To D.C. Scott from W. Graham, 25 December 1919, and attached correspondence.

264 NAC RG10, volume 6267, file 580-1 (1-3), MR C 8656, To W. Graham from J. Waddy, 1 September 1924, and attached correspondence. The school was located just outside The Pas.

265 NAC RG10, volume 6267, file 580-1 (1-3), MR C 8656, To W. Graham from J. Waddy, 1 September 1924, and attached correspondence.

266 NAC RG10, volume 6267, file 580-1 (1-3), MR C 8656, To D.C. Scott from W. Graham, 30 November 1931.

267 NAC RG10, volume 6039, file 160-1, MR C 8152, To J. McLean from M. Benson, 15 July 1897.

268 NAC RG10, volume 3920, file 116818, MR C 10161, To the Deputy Superintendent General from M. Benson, 12 August 1903.

269 NAC RG10, volume 6436, file 878-1 (1-3), MR C 8762, To the Assistant Deputy and Secretary from A. Daunt, 16 August 1920.

270 NAC RG10, volume 6041, file 160-5, part 1, MR C 8153, To Reverend J. Guy, from D.C. Scott, 11 July 1926. The school was located in Shubenacadie, Nova Scotia.

271 NAC RG10, volume 6320, file 658-1, MR C 8692, To His Parents from Edward B., 14 December 1923. The school was located close to Lloydminster, Saskatchewan.

272 NAC RG10, volume 6320, file 658-1, MR C 9802, To F. Mears from D.C. Scott, 11 January 1924. See also, To the Secretary from L. Turner, 23 March 1921.

273 NAC RG10, volume 6455, file 885-1 (1-2), MR C 8777, To the

Secretary from W. Ditchburn, 31 October 1912.

274 See, for example, NAC RG10, volume 6191, file 462-1, MR C 7926, To J. McLean from H. Jackson, 9 September 1921, and attached correspondence; volume 7190, file 493/25-1-001, MR C 9698, To Mrs. L. Pinsonnault from J. McLean, 11 July 1924, and attached correspondence; and volume 8799, file 487/25-13-015, MR C 9718, To the Head of the Secretariat from V.M. Gran, 9 August 1965.

275 INAC file 501/25-1-067, volume 1, memo from A. Hamilton, 1949. See also "Manual of Instructions for Use in Government-Owned and Operated Student Residences", 1 January 1962.

276 Several works have been published that are memoirs by former students or based on interviews with students. See, for example, Celia Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Vancouver: Tillacum Library, 1988); Isabelle Knockwood with Gillian Thomas, *Out of the Depths, The Experiences of Mi'kmaq Children at the Indian Residential School at Shubenacadie, Nova Scotia* (Lockeport, Nova Scotia: Roseway Publishing, 1992); Basil H. Johnston, *Indian School Days* (Toronto: Key Porter Books Limited, 1988); G. Manuel and M. Posluns, *The Fourth World* (Don Mills: Collier-Macmillan Canada Ltd., 1974); Linda Jaine, ed., *Residential Schools: The Stolen Years* (Saskatoon: University [of Saskatchewan] Extension Press, 1993); Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (Toronto: Lester & Orpen Dennys, 1989); Assembly of First Nations, *Breaking the Silence, An Interpretive Study of Residential School Impact and Healing as Illustrated by the Stories of First Nations Individuals* (Ottawa: First Nations Health Commission, 1994). See also the transcripts of the hearings of the Royal Commission on Aboriginal Peoples, which contain testimony from former students about their school experience and subsequent lives. (For information about transcripts, see *A Note About Sources* at the beginning of this volume.)

277 Mary Carpenter, "Recollections and Comments: No More Denials Please", *Inuktitut* 74 (1991), pp. 56-61.

278 INAC file 1/25-20-1, volume 1, To Miss---from L. Jampolsky, 16 February 1966, and attached correspondence. The student opinions were circulated at the conference in an unpublished pamphlet, "Indian Viewpoints

Submitted for the Consideration of the Residential School Principals' Workshop, Elliot Lake, Ontario". Copies exist in church archives.

279 There were many incidents of runaway children being injured or killed accidentally. See, for example, INAC file 451/25-2-004, volume 2, To H.B. Rodine from a Principal, 9 September 1968 æ a young boy struck by a train and killed; file 961/25-1, volume 1, Telegram to R.F. Davey from W. Arneil, 19 January 1959 æ two girls drowned; file 601/25-13, volume 3, Circular, Saskatchewan Region, E. Korchinski, 16 March 1971, and attached correspondence æ death of two young boys from exposure; and file 487/25-1-014, volume 1, To the Acting Minister from R.F. Battle, 26 January 1967, and attached correspondence æ the death of a boy from exposure.

280 INAC file E4974-2018, volume 1, To G. Sinclair from H. Lammer, 22 June 1981. The school was on Muscowequan's reserve near Lestock, Saskatchewan.

281 INAC file 487/25-1, volume 1, Memorandum to the Deputy Minister, 1 November 1907 and attachment. The school was located in Kenora, Ontario.

282 INAC file 501/25-1-064, volume 1, To D. Neild from R.F. Davey, 19 November 1953, and attached correspondence.

283 NAC RG10, volume 3674, file 11422-2, MR C 110118, To the Indian Commissioner from Reverend A. Lacombe, 12 June 1885.

284 See, for example, NAC RG10, volume 7194, file 511/25-1-015, MR C 9700, Inspection Report on Brandon school, 1950, and attached correspondence; and INAC file 501/25-1-067, volume 1, To D.M. MacKay from R.S. Davis, 4 March 1949.

285 NAC RG10, volume 6859, file 494/25-2-014, MR C 13727, To F. Foss from the Bishop of Keewatin, 31 October 1960. The school was located near Sioux Lookout, Ontario.

286 NAC RG10, volume 6205, file 468-1 (1-3), MR C 7937, To A. Moore from A. Mackenzie, 9 January 1934.

287 INAC file 777/23-5-007, volume 1, memo from P. Phelan, 24 April 1945.

288 NAC RG10, volume 6027, file 117-1-1, MR C 8147, To the Secretary from R. Blewett, 21 May 1913.

289 NAC RG10, volume 3933, file 117657-1, MR C 10164, To the Assistant Deputy Superintendent General from the Agent, Blood Reserve, 18 July 1918.

290 INAC file 853/25-1, volume 2, To the Honourable J.W. Pickersgill from a Catholic Bishop, 12 November 1956.

291 INAC file 1/25-20-1, volume 1, To Miss---from L. Jampolsky, 16 February 1966, and attached correspondence.

292 INAC file E4974-1, volume 1, The Caldwell Report, p. 151.

293 INAC file E4974-1, volume 1, The Caldwell Report, p. 61.

294 INAC file 1/25-13-2, volume 1, memo from G. Caldwell, 18 July 1967.

295 INAC file 1/25-1, volume 22, To R.F. Davie [sic] from---, Consultant Psychologist, 10 April 1969. See attached Report on Psychological Consultation Trip to the Keewatin Area, January 8-22, 1969.

296 INAC file 81/25-1, volume 1, To T.A. Turner from G.S. Lapp, 28 August 1964. See also file 1/25-1 volume 35, Memo on Education for J.B. Bergevin, 15 September 1969.

297 INAC file 1/25-1-7-3, volume 2, To Mrs. G. Long from J.B. Bergevin, 2 July 1970.

298 INAC file 81/25-1, volume 1, Memo on Education for J.B. Bergevin, 2 July 1969.

299 INAC file E6575-18-2, volume 01 (Protected), To the Honourable Kim Campbell from Grand Chief Edward John, 18 December 1992, and attachment, “First Nations Leaders in B.C. Call for Specific Actions

Following the Bishop O'Connor Case". This call had been prompted by the dropping of the case against the bishop.

300 INAC file E6575-18-2, volume 01 (Protected), To the Honourable Kim Campbell from Grand Chief Edward John, 18 December 1992, and attachment.

301 INAC file E6575-18-2, volume 01 (Protected), To the Honourable Kim Campbell from Grand Chief Edward John, 18 December 1992, and attachment.

302 INAC file E6575-18-2, volume 4, To the Honourable Tom Siddon from Chief Ed Metatawabin, 15 November 1990.

303 See, for example, NAC RG10, volume 3711, file 19850, MR C 10125, To L. Vankoughnet from E. Dewdney, 12 July 1888; and INAC file 1/25-20-1, volume 1, To L. Jampolsky from---, an ex-student, 24 December 1965.

304 NAC RG10, volume 3920, file 116818, MR C 10161, To the Indian Commissioner from D. Clink, 4 June 1896.

305 NAC RG10, volume 3922, file 116820-1, MR C 10162, To D. Laird from F. Pedley, 25 February 1905.

306 NAC RG10, volume 6251, file 575-1 (1, 3), MR C 8645, To D.C. Scott from G. Campbell, 1 February 1915.

307 INAC file E6575-18, volume 10, To J. Fleury, Jr. from J. Tupper, 19 June 1990.

308 INAC file E6575-18, volume 13, House Response, J. Cochrane, 24 April 1992. This was a departmental estimate.

309 "Abuse report too hot, shelved æ Author says study revealed epidemic", *Winnipeg Free Press*, 24 July 1992. The story refers to a report, *A New Justice for Indian Children*, compiled by the Child Advocacy Project of the Children's Hospital, Winnipeg, which studied conditions on Manitoba reserves.

310 See, for example, INAC file E6575-18-2, To C. Belleau from R. Frizell, 1 June 1989 and attached correspondence; To J. Cochrane from M. Sims, 16 April 1993; To D. Mullins from R. Frizell, 2 June 1989; file E6575-18, volume 10, To H. Swain from N.D. Inkster, 10 December 1990, and attached correspondence; To J. Bray from H. McCue, Communications Strategy and Press Line, 20 July 1990, and attachment, "Frappier Case in the Yukon and Memorandum æ Examples of First Nations Communities Responding to Residual Effect of Abuse in Residential Schools", 21 June 1990; and Terry Glavin, "Anglican Priest faces sex counts in new trial", *The Vancouver Sun*, 29 May 1989, p. A9.

311 See, for example, NAC RG10, volume 6262, file 578-1 (4-5), MR C 8653, To R.A. Hoey from D.J. Allan, 4 March 1944, and attached correspondence; and volume 6451, file 883-1 (1-2), MR C 8773, To the Secretary from I. Foughner, 15 June 1922, and attached correspondence.

312 INAC file E6575-18, volume 10, Press Line æ Child Sexual Abuse in Indian Residential Schools, 20 July 1990.

313 "Reports of sexual abuse may be low, expert says", *The Globe and Mail*, 1 June 1990, p. A3.

314 The report is noted in INAC file E6575-18, volume 10, Communications Strategy, Child Sexual Abuse in Residential Schools, n.d.

315 INAC file E6757-18, volume 13, *A New Justice for Indian Children,* Child Advocacy Project, Children's Hospital, Winnipeg, 1987, p. 24.

316 INAC file E6757-18, volume 13, Memorandum for the Deputy Minister from J. Cochrane, 6 June 1992, and attachment, "First Nations Health Commission æ May 1992 æ Proposal, Indian Residential School Study, Draft No. 4". For further discussion of the effects, see L. Bull, "Indian Residential Schooling: The Native Perspective", and N.R. Ing, "The Effects of Residential Schools on Native Child-Rearing Practices", *Canadian Journal of Native Education* 18/supplement (1991).

317 The Canadian Conference of Bishops, "Let Justice Flow Like a Mighty River", brief to RCAP (Ottawa: CCCB, 1995), p. 16.

318 INAC file E6575-18-2, volume 4, To The Honourable Tom Siddon from John Siebert et al., Aboriginal Rights Coalition, August 1992.

319 INAC file E6575-18, volume 10, To Bill Van Iterson from J. Fleury, Jr., 21 June 1990.

320 INAC file E 6575-18-2, volume 04, To Mr. T. Siddon from ---, 1 November 1990.

321 INAC file E4974-1, volume 1, Unedited Transcript, Statements by Members, Rod Murphy (Churchill), 19 November 1990.

322 INAC file E6575-18-2, volume 04, To S. Morton from R. Bélair, 8 February 1991.

323 INAC file E6575-18, To J. Fleury, Jr. from J. Tupper, 19 June 1990.

324 INAC file E4974-1 volume 1, Pressline: The First Canadian Conference on Residential Schools Government's Response, 21 June 1991.

325 INAC file E6575-18-2, volume 01 (Protected), Child Sexual Abuse in Residential Schools, Memorandum for the Deputy Minister from W. Van Iterson, 11 June 1990.

326 INAC file E6575-18 volume 10, Communications Strategy, Child Sexual Abuse in Residential Schools, Draft, 1990.

327 INAC file 6575-18-2, volume 01 (Protected), To Bill Van Iterson from J. Fleury, Jr., 21 June 1990.

328 INAC file E6575-18-2, volume 04, To --- from Tom Siddon, MP, 14 December 1990.

329 INAC file E6575-18, House Response, J. Cochrane, 24 April 1992.

330 INAC file E6575-18-2, volume 04, To John Siebert from Tom Siddon, MP, 15 December 1992.

331 INAC file E6575-18, volume 10, Briefing Card æ Will the Minister of the Department of Indian Affairs and Northern Development call an inquiry into sexual abuse of Indian children by teachers and clergymen at boarding schools?

332 INAC file E6575-18-2, volume 04, To R. Bélair, MP, from S. Martin, 12 March 1991.

333 INAC file E6575-18-2, volume 04, To the Honourable Tom Siddon from John Siebert et al., Aboriginal Rights Coalition, August 1992.

334 INAC file E6575-18, volume 10, Communications Strategy, Child Sexual Abuse in Residential Schools, Draft, 1990.

335 INAC file E6575-18, volume 13, House Response, J. Cochrane, 24 April 1992.

336 INAC file E6575-18, volume 10, Communications Strategy, Child Sexual Abuse in Residential Schools, Draft, 1990.

337 Parliament, Special Joint Committee of the Senate and the House of Commons appointed to continue and complete the examination of the Indian Act, *Minutes of Proceedings and Evidence*, No. 30 (1947), p. 1609.

338 R.S.C. 1985, chapter I-11. See generally, Law Reform Commission of Canada, *Administrative Law: Commissions of Inquiry*, Working Paper 17 (1977). Section 2 of the *Inquiries Act* confers broad powers on the federal government in this regard:

The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

See also *North West Grain Dealers Association* v. *Hyndman* (1921), 61 D.L.R. 548 (Man. C.A.), p. 563: "The words in the Inquiries Act, "good government of Canada," are broad, general and designedly used, and extend to all matters and considerations that come within the Federal

jurisdiction."

339 See Denise Réaume and Patrick Macklem, "Education for Subordination: Redressing the Adverse Effects of Residential Schooling", research study prepared for RCAP (1994).

340 Gerald E. Le Dain, "The Role of the Public Inquiry in Our Constitutional System", in *Law and Social Change*, ed. Jacob S. Ziegel (Toronto: Osgoode Hall Law School, York University, 1973), p. 85. See also Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: 1992), pp. 9-10.

341 RCAP transcripts, Rankin Inlet, Northwest Territories, 19 November 1992.

342*Law Reform Commission of Canada, Administrative Law* (cited in note 338), pp. 19-20.

BAXTER, et al. v. **THE ATTORNEY GENERAL OF CANADA** v. THE SYNOD OF ANGLICAN CHURCH, et al.

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ONTARIO
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Proceeding commenced at TORONTO

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