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COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE ST. PAUL

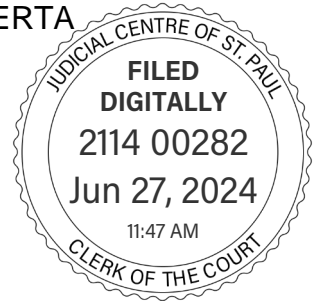
PLAINTIFFS/APPLICANTS LAURELLE DOWNEY and RAMONA  
JEBEAUX

DEFENDANTS/  
RESPONDENTS ATTORNEY GENERAL OF CANADA,  
KEHEWIN COMMUNITY EDUCATION  
CENTRE, KEHEWIN CREE NATION

DOCUMENT **REVISED BRIEF OF THE**  
**APPLICANTS/PLAINTIFFS IN SUPPORT**  
**OF APPLICATION FOR CERTIFICATION**

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## **PART I: OVERVIEW**

1. The Plaintiffs, Laurelle Downey and Ramona Jebeaux, (collectively the “**Applicants**”) seek certification from this Honourable Court to proceed as a Class Proceeding. This application is on behalf of the proposed Survivor Class (the “**Class**”) as defined in this action’s Amended Statement of Claim, filed 7 September 2021 (the “**Action**”), and the Application for Certification of Class Proceeding (the “**Application**”), filed 27 February 2023. The Applicants further seek the appointment of Laurelle Downey and Ramona Jebeaux as joint Representative Plaintiffs for the Class, in addition to such other Orders as set out in the Application.

2. Section 5 of the *Class Proceedings Act*, RSA 2003, C-16.5 (the “**CPA**”) provides that this Honourable Court shall certify a proceeding as a class proceeding if it is satisfied that five conditions are met. For the reasons below, the Applicants submit that each of the requisite conditions are satisfied, and therefore the Application for Certification of Class Proceeding must be granted.

3. None of the Respondents have or will be filing affidavit evidence on certification.

## **PART II: FACTUAL SUMMARY**

4. In 1884, amendments to the *Indian Act* made it mandatory for Indigenous children to attend a day school, industrial school or residential school. The Government of Canada undertook a policy of “aggressive assimilation” with regard to educating Indigenous persons such as the Applicants.

5. In 1972, the Government of Canada ceased operation of its Indian Day School on Kehewin Cree Nation and began transporting children from Kehewin Cree Nation to the nearby Town of Bonnyville to attend school. This practice continued until 1975, when the Kehewin Community Education Centre (the “**KCEC**”) was built and operated as a day school.

6. Although KCEC was a Kehewin-run school, many of the colonial staff from the Kehewin Indian Day School remained employed even after the Kehewin Cree Nation took over operation of the school. Consequently, physical abuse continued to be practiced as an accepted means of disciplining the Indigenous students. Sexual and

psychological abuse also continued to occur at KCEC.

7. The Defendants established, funded, oversaw, operated, supervised, controlled, maintained and supported KCEC through common national policies and procedures.

These policies and procedures resulted in KCEC participating in state-sanctioned physical abuse and shaming, in addition to sexual and psychological abuse.

8. The Applicants and proposed Class, as defined below, were subjected to such abuse over an approximate 10-year period between 1975 and 1985 (the “**Class Period**”).

9. The Defendants failed to establish and implement adequate policies and procedures to oversee the actions of KCEC, resulting in the Class being physically harmed, emotionally traumatized and sexually abused.

10. The Applicants therefore seek certification of the Action so that the Defendants can be held accountable for the injuries and harms caused to the putative members of Class (the “**Class Members**”) as a result of their negligence.

### **PART III: ISSUE**

11. The sole issue is whether this Application satisfies the five preconditions of Rule 5(1) of the *CPA* such that the Action shall be certified as a class proceeding. These five preconditions are summarized as follows:

- a. Do the pleadings disclose a cause of action?;
- b. Is there an identifiable class of two or more persons?;
- c. Do the claims of the prospective class members raise a common issue?;
- d. Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?; and
- e. Is there a person eligible to be appointed as representative plaintiff for the Classes?

## **PART IV: LEGAL ARGUMENT**

### **A. Overview of certification test**

12. The test for certification of a class proceeding is well established. It requires the Plaintiff to satisfy all five of the above-mentioned preconditions.<sup>1</sup> This onus is satisfied “if the Plaintiff shows ‘some basis in fact’ for each of the certification preconditions, other than the cause of action requirement in s5(1)(a), which is decided based on the pleadings alone”.<sup>2</sup> If the Plaintiff satisfies these five preconditions, then “the action *must* be certified”.<sup>3</sup>

13. Pursuant to section 6(2) of the *CPA*, an inquiry at the certification stage of a class proceeding is purely procedural and ought not to turn into a preliminary review of the merits of the claim.<sup>4</sup>

14. The Supreme Court of Canada (“**SCC**”) has stated that the evidentiary burden of “some basis in fact” is less than a balance of probabilities and focusses upon “whether the action can properly proceed as a class action”.<sup>5</sup>

### **B. The pleadings disclose a cause of action**

15. The test for whether the pleadings disclose a cause of action is similar to the test used for striking actions. The Applicants meet this threshold unless “it is plain and obvious that the Plaintiff’s claim is bound to fail, assuming the facts alleged in the pleadings are true”.<sup>6</sup>

16. Section 5(1)(a) of the *CPA* is intended “to ‘winnow out actions which are clearly frivolous or manifestly unfounded’, not to determine whether the cause of action is appropriate for a class proceeding”.<sup>7</sup> This is a “*very low bar*”.<sup>8</sup>

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<sup>1</sup> [VLM v Dominey, 2022 ABQB 299](#) at para 11 [**VLM**]

<sup>2</sup> *VLM* at para 11; see also *AIC Limited v Fischer*, 2013 SCC 69 at paras 39-43, 48-49 [**Fischer**].

<sup>3</sup> [Spring v Goodyear Canada Inc, 2021 ABCA 182](#) at para 17 [**Goodyear**].

<sup>4</sup> See *Goodyear* at para 18.

<sup>5</sup> [Pro-Sys Consultants Ltd. v Microsoft Corporation, 2013 SCC 57](#) at para 99, 101-102 [**Pro-Sys**].

<sup>6</sup> *VLM* at para 17.

<sup>7</sup> [Fisher v Richardson GMP Limited, 2019 ABQB 450](#) at paras 32-33 [**Richardson**].

<sup>8</sup> *VLM* at para 19.

17. The Applicants assert that the Defendants breached their respective Treaty, common law, fiduciary, and/or statutory duties of care owed to the Classes through their direct or indirect establishment, funding, control, and/or maintenance of KCEC throughout the Class Period. Furthermore, the Defendants knew or ought to have known that the Class Members would suffer injury and damages as a result of their respective misfeasance and/or nonfeasance.

18. The Action therefore meets the low threshold required by section 5(1)(a) of the *CPA*.

### **C. There Is An Identifiable Class Of Two Or More Persons**

19. The second precursor to certification is that there be an “identifiable class of two or more persons”.<sup>9</sup> As stated by the SCC, “the class must be capable of clear definition”<sup>10</sup> and “based on objective criteria and bear on a rational connection to the claims, causes of action, and common issues. It must not be overly broad”.<sup>11</sup> However, “[i]t is not necessary that every class member be named or known.”<sup>12</sup>

20. Clear identification of a class “is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment.”<sup>13</sup>

21. The Class is clearly identifiable based on objective criteria. The Action’s precise definitions proposed for the Class is:

- a. Survivor Class: all Indigenous persons, wherever they may now reside or be domiciled, who attended KCEC during the Class Period; and

22. The Survivor Class is defined with respect to objective criteria based on ethnicity, *alma mater*, and family status respectively. Membership in the Survivor Class requires a person to be Indigenous and to have attended KCEC during the Class Period.

23. The pleadings for this Action state that this Class was directly harmed as a result of the Defendants’ misfeasance and/or nonfeasance. This creates a rational connection

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<sup>9</sup> *CPA* at s 5(1)(b).

<sup>10</sup> *VLM* at para 28 citing [Western Canadian Shopping Centres v Dutton, 2001 SCC 46](#) at para 38 [*WCSC*]

<sup>11</sup> *VLM* at para 29.

<sup>12</sup> *VLM* at para 28 citing *WCSC* at para 38.

<sup>13</sup> *WCSC* at para 38.

between the proposed common issues – whether the Defendants owed and breached common law duties of care, fiduciary duties, statutory duties, and/or Aboriginal rights through their establishment, funding, control, and/or maintenance of KCEC during the Class Period, resulting in any quantum of damages to the Class.

24. Mere variance between Class Members with respect to the extent or types of injuries suffered, or the nature or source of the Treaty, common law, fiduciary or statutory breach, should not be a bar to certification under section 5(1)(b):

Chief Justice McLaughlin held that there was an identifiable class since a person was a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Since the class was clearly defined, she held that it was a class within the meaning of Section 5 (1)(b) of the Class Proceedings Act.

This finding in *Hollick* indicates how low the threshold is for this branch of the certification process...

In this case, the proposed class is factually similar to the class in *Hollick* as it is defined as people living in a certain geographic area at a specified time. Since the class in *Hollick* satisfied the requirements of the Act even though it included people who suffered damage from one or more of several causes or no damage at all as well as people who may be unable to eventually prove damages, I am satisfied that the class as defined by the plaintiff in this action meets the requirements of Section 5 (1)(b) of the Act.”<sup>14</sup> [Emphasis added]

25. Section 7 of the *CPA* permits this Honourable Court to appoint additional representative plaintiff(s) if it is satisfied that a subclass exists whose members have claims raising common issues not shared by all class members. Such representative plaintiffs must satisfy similar criteria with respect to the subclass.

26. While the number of Survivor Class members is not yet fully known, the *CPA* does not require that all members of a class be ascertained or ascertainable at the time of certification.<sup>15</sup>

<sup>14</sup> [McLaren v City of Stratford, 2005](#) CanLII 19801 (ONSC) at paras 28-30, commenting on *Hollick v Toronto (City)*, 2001 SCC 68.

<sup>15</sup> *CPA* s8(d); *WCSC* at para 38.

27. The requirement for an identifiable class is met on the basis of the class definitions proposed by the Applicant.

#### **D. The claims raise common issues**

28. The third criteria pursuant to s.5(1)(c) of the *CPA* requires that “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”. [Emphasis added]

29. The SCC has “reaffirmed the principles set out in its earlier decision in *Dutton*, by explaining that ‘the underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis’.”<sup>16</sup> [Emphasis added]

30. In *Pro-Sys*, the SCC summarized these principles in the following manner:

- a. The commonality question should be approached purposively.
- b. An issue will be “common” only where its resolution is necessary to the resolution of each class member’s claim.
- c. It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
- d. It [is] not necessary that common issues predominate over non-common issues. However, the class members’ claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.<sup>17</sup>

31. The SCC subsequently clarified a fifth principle, “that success for one class member on a common issue need not *necessarily* mean success for all, but success for one member must not mean failure for another.”<sup>18</sup>

32. The onus is on the Applicants to show “some basis in fact” for the common issue(s) is “lower than the balance of probabilities threshold” but is “more than symbolic”.<sup>19</sup>

33. The common issues proposed by the Applicants are outlined at paragraph 1(e) of the Application, filed herewith:

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<sup>16</sup> *VLM* at para 37.

<sup>17</sup> *Pro-Sys* at para 108.

<sup>18</sup> [Vivendi Canada Inc v Dell’Aniello, 2014 SCC 1](#) at paras 45-46.

<sup>19</sup> *VLM* at para 40, citing *Pro-Sys* at paras 102-103 and *Goodyear* at para 34.



- i. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of KCEC throughout the Class Period owe a duty of care to the Survivor Class, or any member of the Class?
- ii. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of KCEC throughout the Class Period breach the requisite standard of care owed by it to the Survivor Class or any member of the Class?
- iii. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of KCEC breach a fiduciary duty owed to the Survivor Class or any member of the Class?
- iv. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of KCEC breach the aboriginal rights of the Survivor Class or any member of the Class?
- v. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of KCEC breach a statutory obligation owed, under the *Indian Act* or any other statute, to the Survivor Class, or any member of the Class?
- vi. What injury or damages have the Survivor Class suffered as a result of the Defendants' malfeasance and/or nonfeasance identified in issues (i) through (v) above?
- vii. Whether aggregate damages are available and, if so, on what basis and in what amount?
- viii. What proportion of culpability should be attributed to each respective Defendant for the injuries and/or damages identified in issues (vi) and (vii) above?

*i. Purposive Approach*

34. A purposive approach must be taken to determine whether common issues exist which may involve the liberal interpretation of legislation in order to facilitate, rather than stifle, the development and use of class actions as a procedural tool.<sup>20</sup>

35. The Representative Plaintiffs have framed the common issues similarly to analogous aboriginal school class actions, most notably *McLean v Canada*, 2019 FC 1075 and *Gottfriedson v Canada*, 2015 FC 706 in which certification was granted. The Applicants submit that the proposed common issues enhance judicial economy,

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<sup>20</sup> See [Ayrton v PRL Financial \(Alta.\) Ltd., 2006 ABCA 88](#) at para 24.

improve access to justice, promote continued behavior modification, avoid inconsistent results, reduce adversity, and increase the likelihood of reaching a fair and equitable result.<sup>21</sup>

36. The first six common issues as outline above are all necessary elements to the tort of negligence, dealing with duty of care, standard of care, the Defendants' breach of their respective duties and the resulting recoverable injury and damages suffered by the Class Members.

37. The determination of whether a duty of care is owed to a class is frequently recognized by the courts as an appropriate common issue in class proceedings. As stated previously by this Honourable Court, "[w]hen the focus is on the actions of the Defendants, common factual and legal issues arise."<sup>22</sup>

38. The determination of causation and damages on an individual level does not prevent the court from determining whether a duty of care was owed and breached on a global basis.<sup>23</sup>

39. The seventh and eighth common issues deal with the method of damage assessment and the Defendants' individual level of culpability towards the Classes.

40. The underlying facts for each member of their respective class are the same and so the same analysis applies to each Class Member. The legal issues revolve around common facts arising from the Defendants' direct or indirect establishment, funding, control, and maintenance of KCEC throughout the Class Period affecting all the putative Class Members in a similar way and can therefore be resolved as common issues.

*ii. Resolution Of Issue Necessary For Resolution Of Each Class Member's Claim*

41. "A class member's claim must share a substantial common ingredient to justify a class action and an issue will only be 'common' if 'its resolution is necessary to the resolution of each class member's claim'."<sup>24</sup> [Emphasis added]

<sup>21</sup> See [TL v Alberta \(Director of Child Welfare\)](#), 2008 ABQB 114 at para 96.

<sup>22</sup> [Condominium Plan No. 0020701 v Investplan Properties Inc](#), 2006 ABQB 224 at para 70.

<sup>23</sup> [Walls v Bayer](#), 2005 MBQB 3 at paras 56-61.

42. The common issues in the case at bar are fashioned to establish the contours of basic standards of care, fiduciary duties, and statutory duties owed to Indigenous attendants of KCEC during the Class Period. The Applicants submit that a determination of common law, fiduciary, and/or statutory breach will necessarily be linked to the overall manner in which the schools were established, funded, controlled, and maintained and will thus impact every class member by mere virtue of their having attended KCEC. In this respect, the claims of all Class Members benefit from the proposed framing of the common issues.

*iii. Class Members Need Not Be Situated Identically Vis-à-vis The Opposing Party*

43. Similarities between the proposed Survivor Class members vis-à-vis the Defendants far outweigh any individualistic differences. Even when the SCC was presented with a claim argued to be “inescapably individualistic”, the SCC concluded that “these differences are not insurmountable” and “question[ed] the extent to which differed between class members should be taking into account at this [certification] stage”.<sup>25</sup>

44. In a similar case, the SCC found:

[A]n issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individuals issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial.<sup>26</sup>

45. Every member of the proposed Survivor Class was a minor, of Indigenous descent, originated from a common community, and attended a specific school in a relatively narrow time frame. Every Survivor Class member was tasked with the

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<sup>24</sup> [Bruno v Samson Cree Nation, 2021 ABCA 381](#) at para 103.

<sup>25</sup> [Eaton v HMS Financial Inc. 2008 ABQB 631](#) at para 99, quoting [Rumley v British Columbia, 2001 SCC 69](#) at para 28, 33.

<sup>26</sup> [Cloud v Canada \(Attorney General\); 2004](#) CarswellOnt 5026, 247 DLR (4th) 667 at paras 52-53, referencing [Hollick v Metropolitan Toronto \(Municipality\), 2001 SCC 68](#).

common and fundamental journey of discovering their identity while interacting with, or under the care of one or more of the Defendants and was subject to abuse during the Class Period.

*iv. Common issues need not dominate over individual issues*

46. In *WCSC*, the SCC stated:

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...In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.<sup>27</sup>

47. The proposed common issues of standards of care, fiduciary duties, and statutory provisions, along with their respective breaches, represent a substantial common ingredient towards advancing the claims of each Class Member and form the basis through which further individual issues, such as physical, psychological or sexual abuse claims, necessarily flow.

48. The proposed common issues are framed in such a way as to predominate over, and form the necessary condition for, issues particular to individual Class Members.

*v. Success For One Class Member Does Not Mean Failure For Another*

49. Following *Pro-Sys*, the SCC clarified the fifth principle, stating "that success for one class member on a common issue need not *necessarily* mean success for all, but success for one member must not mean failure for another."<sup>28</sup>

50. In the case at bar, determination of whether the Defendants breached any duties owed to the Class Members will materially benefit each Class Member and advance their individual claims accordingly.

51. This Honourable Court has previously confirmed that "a common issue does not have to answer a claim completely, as long as its resolution materially advances the

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<sup>27</sup> *WCSC* at para 39.

<sup>28</sup> *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at paras 45-46.

litigation.”<sup>29</sup> A determination of the common issues will advance the Action and establish a *prima facie* negligence claim for each Class Member.

**E. A Class Proceeding Would Be The Preferable Procedure For The Fair And Efficient Resolution Of The Common Issues**

52. The fourth precondition pursuant to s.5(1)(d) of the *CPA* is that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. The SCC has stated that “preferability must be examined in reference to the three principal aims of the class action regime: ‘...judicial economy, access to justice, and behaviour modification’”.<sup>30</sup>

53. In addition to the statutory framework provided in s.5(2) of the *CPA*, the Alberta Court of Appeal adopted an overall analytical framework for determining if a class proceeding is suitable:

A class proceeding is the preferable procedure if it presents a fair, efficient and manageable method of determining common issues, and if such determination will advance the proceeding in accordance with the goals of achieving judicial economy, access to justice, and behaviour modification... The essence of the inquiry is to assess the common and individual issues contextually, and consider the impact of the individual issues on the trial process, including fairness to plaintiffs, defendants and the court. The inquiry focuses on two questions: firstly, would the class action be a fair, efficient and manageable method of advancing the claim; and secondly, would the class action be preferable to all other reasonably available means of resolving the claims of class members... As such, the preferability analysis requires the court to look at all reasonably available means of resolving the class members' claims, such as joinder, test cases, consolidation and so on, and not just at the possibility of individual actions...

In summary, preferability involves a balancing of all the interests of the parties and of the Court and may include an assessment of the economics of the litigation, the number of individual issues to be dealt with, the complexities if there are third party claims and the alternative means available for adjudicating the dispute...<sup>31</sup>

<sup>29</sup> *Condominium Plan No. 0020701 v Investplan Properties Inc*, 2006 ABQB 224, at para 70 [*Investplan*].

<sup>30</sup> *Pro-Sys* at para 137.

<sup>31</sup> *Sullivan v Golden Intercapital (GIC) Investments Corp*, 2014 ABQB 212 at para 41, citing *L(T) v Alberta (Director of Child Welfare)*, 2009 ABCA 182 at para 26.

*i. Common Questions Predominate Over Any Individual Questions*

54. This Action is regarding how the Defendants negligently established, funded, oversaw, operated, supervised, controlled, maintained, and/or supported KCEC through common national and provincial policies and procedures. Evidence shows that the Defendants' conduct caused Class Members to suffer frequent physical, psychological, and sexual abuse in addition to other harms.

55. While each putative Class Member lived their own personal experience during the Class Period, the individual issues in the case are limited to the extent of harm each Class Member suffered and to what damages they are entitled. The common questions regarding the Defendants' misfeasance and nonfeasance significantly predominate over any individual questions, and so determining the factual and legal issues in a class proceeding promotes judicial economy and favours certification.

*ii. No Valid Interest In Individually Controlling Separate Actions*

56. Based on feedback from within the Kehewin community, the Applicants say that a significant number, if not all, of the putative Class Members are in favour of a class proceeding. However, even if some Class Members are not in favour of the Action, and prefer bringing their own individual actions, the fundamental factual and legal issues being determined would remain the same. Thus, there can be no valid interest in individually controlling the prosecution of separate actions.

*iii. Claims Have Not Been The Subject Of Other Proceedings*

57. The Applicants are unaware of any claim made in the Action that is, or has been, the subject of any other proceeding.

*iv. A Class Proceeding Is The Most Practical And Efficient Means Of Resolving The Claims And Is The Simplest Means Of Obtaining The Relief Sought*

58. At this stage of the analysis, "[i]t is both mandatory and helpful to ask what alternative procedures there are to decide the common issues and to canvass their

relative benefits and drawbacks.”<sup>32</sup> However, efficiency should not be approached blindly. As this Honourable Court has stated:

the only advantage of a multi-party action would appear to be that some plaintiffs might be discouraged and walk away, which is an advantage only to the Defendants, and which is not a legitimate reason to refuse certification given the goal of ‘access to justice.’<sup>33</sup>

59. In the case at bar, even if alternative individual claims are pursued, the same factual and legal issues will need to be determined, and some individual assessment will be a factor regardless of whether the claims are determined individually or as a class proceeding.<sup>34</sup>

60. An individual claim cannot produce the same magnitude of damages as a class proceeding, resulting in less behavior modification on the part of the Defendants. Furthermore, the cost of litigation deters many individuals from bringing a claim resulting in fewer individuals having access to justice. A class proceeding is therefore the most effective way to ensure the fair and efficient resolution of the common issues.

61. Recent jurisprudence from this Honourable Court confirms that a class action proceeding is the most efficacious means to ensure a just and expedient adjudication of matters addressing the harms suffered by Aboriginal children and their kin due to the Federal Crown’s maltreatments and negligence.

62. In *Tk’emlúps te Secwépemc First Nation v. Canada*<sup>35</sup>, (“**Gottfriedson**”) the Federal Court approved a Settlement Agreement amounting to \$2.8 billion, endorsing it as a fair and reasonable settlement. The *Gottfriedson* claim shares considerable commonality to the case at bar, including the exposure of First Nation individuals and communities to a cultural genocide through Canada’s Aboriginal policies and Residential School programs.

63. The Court agreed in *Gottfriedson* that \$2.8 billion settlement aptly served the purposes of reviving and protecting Indigenous languages, cultures, heritage and

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<sup>32</sup> *Investplan* at para 99.

<sup>33</sup> *Investplan* at para 99.

<sup>34</sup> *Investplan* at para 100.

<sup>35</sup> [\*Tk’emlúps te Secwépemc First Nation v. Canada\*, 2023 FC 327](#)

wellness.<sup>36</sup> While the present case concentrates more acutely on the trauma and harms endured by the Survivor and Family Law classes, *Gottfriedson* provides a useful paradigm for practical and efficient settlement of similar claims.

64. Further reinforcing this approach, the Court approved a Settlement Agreement totaling \$23.34 billion in *Moushoom v. Canada (Attorney General)*<sup>37</sup> as a fair and reasonable resolution. *Moushoom* addressed the severe and enduring trauma inflicted by Canada's underfunding of Provincial child and family services. The Court not only approved the settlement's fairness, but provided additional guidance, delineating class action proceedings as the proper mode for resolving claims analogous to those before the Court.

#### **F. The Applicants are eligible to be appointed as Representative Plaintiffs**

65. The fifth and final precondition that must be satisfied prior to certification is providing a representative plaintiff that:

- a. Will fairly and adequately represent the interests of the class;
- b. Has produced a plan for the proceeding that sets out a workable method in advancing the proceeding on behalf of the class and notifying class members of the proceeding; and
- c. Does not have any conflicting interest, in respect to the common issues, with those of the other prospective class members.<sup>38</sup>

66. For the reasons set out below, it is respectfully submitted that the Applicants satisfy all three of these requirements and should be appointed as Representative Plaintiffs for the Survivor Class and Family Class respectively.

#### v. *The Applicants Will Fairly And Adequately Represent The Interests Of The Classes*

67. A representative plaintiff bears a duty "akin to that of a fiduciary" and "must have

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<sup>36</sup> [Gottfriedson at para 27.](#)

<sup>37</sup> [Moushoom c. Canada, 2023 FC 1466](#)

<sup>38</sup> *CPA* at s5(1)(e).



adequate knowledge and ability to instruct counsel".<sup>39</sup> The SCC has stated:

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.<sup>40</sup>

68. In the present case, the Applicants have experienced firsthand the harms claimed in the Action. As Status Indians under the *Indian Act*, the Applicants, along with other Kehewin Cree Nation members, attended KCEC from approximately 1975 to 1985 and 1981 to 1994 respectively.<sup>41</sup>

69. During the described time frame, the Applicants personally experienced and witnessed psychological, physical, and sexual abuse resulting in both short and long term harm to themselves, their families and their community -- many of whom make up the Survivor Class.<sup>42</sup>

70. The Applicants have deep roots in the Kehewin community and a vested interest in vigorously advocating for those, like themselves, who suffered and/or continue to suffer as a result of the Defendants' conduct.

71. The Applicants have also shown an understanding of the major steps within the Action and their responsibilities as representative plaintiffs and confirm that they are capable and willing to fairly and adequately represent the interests of the Class.<sup>43</sup>

72. As for competence of the Applicants' counsel, the Applicants have retained Grey Wowk Spencer LLP, an established law firm with experience in class action lawsuits.

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<sup>39</sup> [Hoffman v Monsanto Canada Inc, 2005 SKQB 225](#), at para 337; aff'd 2007 SKCA 47; LTA ref'd 2007 CarswellSask 725 (SCC).

<sup>40</sup> [Western Canadian Shopping Centres Inc v Dutton, 2001 SCC 46 at para 41.](#)

<sup>41</sup> Affidavit of Ramona Jebeaux, sworn 4 May 2022 at para 4; Affidavit of Laurelle Downey, sworn 16 January 2023 at para 4

<sup>42</sup> Affidavit of Ramona Jebeaux, sworn 4 May 2022 at para 8-9; Affidavit of Laurelle Downey, sworn 16 January 2023 at para 8-9

<sup>43</sup> Affidavit of Ramona Jebeaux, sworn 4 May 2022 at para 13-17; Affidavit of Laurelle Downey, sworn 16 January 2023 at para 13-17

Details regarding counsel have been provided in paragraphs 3-4 of the Litigation Plan, attached to the Application as **Appendix “A”**.

*vi. The Applicants Have Produced A Litigation Plan*

73. The Applicants’ Proposed Litigation Plan has been attached to the Application as **Appendix “A”** and provides, in part, a comprehensive plan regarding timelines, notices, questioning and discovery, settlements and expert evidence.

*vii. The Applicants Have No Competing Interests*

74. The Applicants do not have any conflicting interests with other members of the Survivor Class.<sup>44</sup> The Applicants will continue to use their best efforts, in conjunction with counsel’s guidance, to represent the interests of each class objectively and fairly to ensure that any potential conflicts that may arise are dealt with quickly and fairly.

**PART V: RELIEF SOUGHT**

75. Based upon the foregoing, the Applicants seek an Order:

- a. Certifying this Action as a class proceeding;
- b. Defining the “Survivor Class” as follows:
  - All Aboriginal persons, wherever they may now reside or be domiciled, who attended KCEC during the Class Period;
- c. Appointing Laurelle Downey and Ramona Jebeaux as Representative Plaintiffs of the Class;
- d. Stipulating the following common issues for trial:
  - i. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of KCEC throughout the Class Period owe a duty of care to the Survivor Class and/or Family Class, or any member of either Class?

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<sup>44</sup> Affidavit of Ramona Jebeaux, sworn 4 May 2022 at para 18; Affidavit of Laurelle Downey, sworn 16 January 2023 at para 18

- ii. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of KCEC throughout the Class Period breach the requisite standard of care owed by it to the Survivor Class or any member of the Class?
  - iii. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of KCEC breach a fiduciary duty owed to the Survivor Class or any member of the Class?
  - iv. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of KCEC breach the aboriginal rights of the Survivor Class or any member of the Class?
  - v. Did the Defendants, through the direct or indirect establishment, funding, control, and maintenance of KCEC breach a statutory obligation owed, under the *Indian Act* or any other statute, to the Survivor Class or any member of the Class?
  - vi. What injuries or damages have the Survivor Class and Family Class suffered as a result of the Defendants' malfeasance and/or nonfeasance identified in issues (i) through (v) above?
  - vii. Whether aggregate damages are available and, if so, upon what basis and in what amount?
  - viii. What proportion of culpability should be attributed to each respective Defendant for the injuries and/or damages identified in issues (vi) and (vii) above?
- e. Approving the proposed Litigation Plan attached as **Appendix "A"** to the Application with any modifications, additions, or deletions as required by this Honourable Court;
  - f. Designating Grey Wowk Spencer LLP as exclusive legal counsel for the Survivor Class;
  - g. Staying any other putative class actions relating to this class proceeding pending further order of this Honourable Court;
  - h. Granting costs of this Application; and
  - i. For any such further and other relief as counsel may request and this Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 25<sup>th</sup> day of June  
2024.

A handwritten signature in blue ink, consisting of stylized initials 'L' and 'G'.

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Leighton B.U. Grey, K.C.  
Counsel for the Applicants/Plaintiffs

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