Date: 20141231
Docket: CI 12-01-77146
Indexed as: Anderson et al v. Manitoba et al
Cited as: 2014 MBQB 255
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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- and -	)	Paul R. Anderson and Cary D. Clark for Canada
DAUPHIN RIVER FIRST NATION, LAKE ST. MARTIN FIRST NATION, LITTLE SASKATCHEWAN FIRST NATION AND PINAYMOOTANG FIRST NATION, third parties.	)	Brian J. Meronek, Q.C., Andrew W. Marshall and Ian B. Scarth for The Manitoba Association of Native Firefighters Inc.
	)	Kaitlin E. Lewis for Dauphin River First Nation and Little Saskatchewan First Nation
	)	Corey Shefman for Lake St. Martin First Nation
	)	John B. Harvie for Pinaymootang First Nation
	)	JUDGMENT DELIVERED: December 31, 2014

DEWAR J.

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1.0 INTRODUCTION

[1] In 2011, a devastating flood occurred in parts of Manitoba. One of those parts involved the land around the waterway between Lake Manitoba into Lake Winnipeg. Some of this land includes reserves belonging to Pinaymootang First Nation, Little Saskatchewan First Nation, Lake St. Martin First Nation, and Dauphin River First Nation.

[2] This decision is made following a hearing of an application by certain members of the above-noted First Nations requesting that the court certify a class action against the Government of Manitoba ("Manitoba"), the Attorney General for Canada ("Canada"), and The Manitoba Association of Native Firefighters Inc. ("MANFF"). The action alleges that the flood in the area of the four First Nation reserves was caused by Manitoba while exercising its water control functions during the spring and summer of 2011, and that all three defendants failed to adequately provide evacuation and post-flood care to the plaintiffs. The plaintiffs claim compensation for all personal losses which the flooding and evacuation has caused them.

2.0 BACKGROUND FACTS

[3] A quick look at a map of Manitoba illustrates the amount of water which moves across the province. Rivers, streams, and lakes are plentiful, and water from them ultimately drains north into Hudson Bay. Although water in abundance is generally a good thing for the people of Manitoba, an

overabundance is not. During the spring and summer of 2011, there was an overabundance of water in many areas of the province.

[4] This application is brought by members of the four First Nations. These communities are all situated along the shores of the waterway which stretches between two of Manitoba's major lakes, namely Lake Manitoba and Lake Winnipeg. Water flows out of Lake Manitoba through the Fairford River, into and through Lake St. Martin, and out through the Dauphin River into Lake Winnipeg. The Pinaymootang First Nation is situated at and around the inlet to the Fairford River, and adjacent to the Fairford Dam, a water control work completed in 1961, which regulates the outflow of water from Lake Manitoba. The little Saskatchewan First Nation is a community primarily situated on the northwest shore of Lake St. Martin, just east and north of the Pinaymootang First Nation. Lake St. Martin First Nation is situated near the Narrows of Lake St. Martin. Dauphin River First Nation is situated adjacent to the outflow point where the Dauphin River meets Lake Winnipeg.

[5] As of the spring and summer of 2011, the Fairford Dam was the only water control structure which regulated the outflow of water from Lake Manitoba. The inflow of water into Lake Manitoba is somewhat varied. Paragraph 2.1.2 of the Lake Manitoba Regulation Review Advisory Committee report of July 2003 describes the source of Lake Manitoba's water:

> Lake Manitoba receives the majority of its water from Lake Winnipegosis. Other contributions come from the Whitemud River, artificial drains, intermittent streams and groundwater and from overland runoff. During flood years on the Assiniboine and/or Red rivers, the Portage Diversion also contributes water to Lake Manitoba.

[6] The Portage Diversion is a water control work completed by Manitoba in 1970. The purpose of the Portage Diversion was to divert water from the Assiniboine River during periods of high water in order to prevent flooding downstream of the Diversion, thereby protecting valuable farmland and the residents of the City of Winnipeg. The water diverted from the Assiniboine River is routed north into the south basin of Lake Manitoba.

[7] Another flood control water work which is located on the Assiniboine River is the Shellmouth Dam which is located about 24 km northwest of Russell, Manitoba. This dam stores water from the Assiniboine in a reservoir which is approximately 56.3 km long and which is known as the Lake of the Prairies. The purpose of this water control work is to store water in the reservoir and release it in a controlled way that protects farmland as well as the Cities of Brandon, Portage la Prairie and Winnipeg from the ravages of serious flooding on the Assiniboine River.

[8] The plaintiffs are all members of one of the four described First Nations. Clifford Anderson and Kurvis Anderson are members of the Pinaymootang First Nation. Bertha Travers and Priscilla Anderson are members of the Little Saskatchewan First Nation. Lillian Traverse and Mathew Traverse are members of the Lake St. Martin First Nation, and Melloney Francois, Mary Stagg and Norman Stagg are members of Dauphin River First Nation. Each of these plaintiffs alleges that they have sustained personal damage from the flooding

which occurred around their respective reserves in 2011. There are, however, differences in the impact of the flooding upon them.

[9] For example, Clifford Anderson left his house in June 2011, and moved an old RV to a campground north of the Fairford Dam. His son stayed on at his house for a period of time. At some point Clifford Anderson went to live with his niece until his new house became available in 2012. He mentioned that the water came into his basement because of a high water table. There was no water in the basement at the time that he left. He testified that there are in excess of 1,200 residents on the reserve, of which about 150 were evacuated.

[10] Kurtis Anderson, however, lived in a house which was dyked. The water seeped through the dykes and entered the structure. He left his house on May 26, 2011. He said that 125 of 1,242 residents had to be evacuated. He went to Winnipeg for a short while and then returned to the campground at Pinaymootang. He was a band constable.

[11] Bertha Travers is a member of the Little Saskatchewan First Nation. She left her house in mid-July. She left to live in Winnipeg with her son and his family. Her crawlspace filled with water. She acknowledges that some of the water came from neighbouring farmers' fields, some from a nearby gully, some from snow melt and some from precipitation. She stayed first with her son, then went to a hotel in Winnipeg, then to Gimli and then to Selkirk.

[12] Priscilla Anderson, a resident of Little Saskatchewan First Nation, left her house in May. Her family left earlier. Water was in the crawlspace when she

left. Unlike some people, her driveway was never flooded. She went to Winnipeg. She says that people she knew who left the reserve went to Winnipeg, to Pine Falls and to Gimli.

[13] Lillian Traverse is a member of the Lake St. Martin First Nation. She was told by her brother that the Chief and Council of the First Nation had made an order to evacuate and she therefore left on May 6, 2011. She was told by her brother to report to a hotel in Winnipeg, which she did. She and her daughter experienced bed bugs at that location and moved to another hotel until the beginning of September at which time she moved into an apartment in Winnipeg. At the time of her cross-examination she continued to live there. She does indicate that the house in which she resided sustained water damage which she saw when she visited it in July or August 2011.

[14] Melloney Francois is a member of the Dauphin River First Nation. She lived with her family in the teacheridge, namely building number 34, which appears to be right on the shore of the Dauphin River. She learned of the proposed evacuation from her brother. Her house was not flooded. The road in and out of Dauphin River First Nation was flooded. She says that she tried to drive down the road at the time of evacuation but was unsuccessful and needed to be evacuated by boat. She complains that her house has developed a problem with mould and the foundation appears to have been affected by the construction of a nearby dyke. She left for Winnipeg where she and her family lived in a hotel for approximately two weeks and then moved into a rented

apartment. By the time of her cross-examination, she had relocated to Thompson where her husband was teaching.

[15] Mary Stagg is a 73-year-old member of the Dauphin River First Nation. She says that she was evacuated in April 2011 and went to Winnipeg for one year and moved into a suite thereafter. She also ran a campground. She says that there was some water in the crawlspace in her house and some foundation problems which she attributes to the construction of a dyke.

[16] Norman Stagg is a member of the Dauphin River First Nation. At the time of the flood, he was living in Winnipeg taking care of his elderly mother. He had a house on the reserve. He says that he experienced some groundwater issues and mould in his house. He is a commercial fisherman and has been unable to fish because of lack of access to the boat landing.

[17] The plaintiff Dauphin River Fisheries Company Ltd. is a fish processing company that operates near to the Dauphin River First Nation Reserve and its business depends on people in nearby First Nations to supply fish to it.

[18] Controversy over flooding generally around the areas of these four First Nations is not new phenomena. Pinaymootang had limited success in a claim versus Canada in 1998, alleging breach of fiduciary duties relating to the construction and operation of the Fairford Dam. The other First Nations have brought actions against Manitoba and Canada starting as long ago as the late 1990s alleging that both governments were liable for damages arising from the regulation of water which passed their respective reserves. The two

governments and the First Nations have all been involved in negotiations since then and the litigation has not progressed.

[19] After the issuance of this proposed class action, all four of the First Nations have issued new statements of claim against Manitoba and Canada (hereinafter the "First Nation Claims"), specifically referencing the 2011 flood and making many of the same allegations that are made in the statement of claim pursued by the plaintiffs. The four First Nations are consenting to the plaintiffs bringing this proposed class action to avoid an argument being made in the First Nation Claims that the Chief and Council have no right to bring an action for individual members' personal losses, such as loss of personal property, general damages for pain and suffering as a result of being evacuated and displaced from their homes, loss of use and enjoyment of their homes caused by the flooding, and loss of income. The First Nations are riding both sides of this issue, however, since they are prepared to assign to the individual plaintiffs any right which the First Nations have for breach of treaty rights and/or interference with treaty rights as it relates to individual losses and individual damages. I perceive from this that the First Nations are not saying that they do not have the right to bring a representative action on behalf of their members for individual losses, in which case an assignment would have been unnecessary. They provide the assignment to avoid one or more issues in their own respective actions against Canada and Manitoba. I might add that the assignment is only effective upon the granting of an order of certification and is further subject to a

condition that any monies paid by the defendants in the proposed class action would not diminish the collective losses and collective damages claimed by the First Nations in the First Nation Claims.

[20] It should also be noted that since the 2011 flood, there have been ongoing negotiations between the First Nations and the two government defendants to arrive at a plan of compensation as well as a program of reconstruction respecting damage caused by flooding on the reserves in 2011. Additionally, Manitoba has provided individual members of the four First Nations with access to disaster relief compensation provided under ***The Emergencies Measures Act of Manitoba***, C.C.S.M. c. E80 (the "*EMA*"). Any settlement as well as the payment of any disaster relief compensation under the *EMA* would be achievable without a requirement on the part of the individual plaintiffs to show any fault on the part of any of the defendants.

[21] Following the flooding, in July 2011, Manitoba, through its Minister of Aboriginal and Northern Affairs , wrote to the Chiefs of the four First Nations and said this:

> In addition to community benefits agreements, I am pleased to inform you at this time that the Province is prepared to establish a program to fully compensate the four affected First Nations for damages and losses caused by the 2011 Lake St. Martin and Dauphin River flooding disaster. This program will pay compensation for losses in addition to those that are eligible under normal disaster financial assistance programs, such as non-essential personal property and income losses. Program terms and conditions will be prepared and provided to you shortly, and necessary damage and loss assessments will proceed as expeditiously as possible.
>
> [emphasis added]

[22] The plaintiffs claim that three years later, although some progress has been made on some community issues with some First Nations, nothing concrete has been announced in respect of their personal losses beyond the disaster assistance relief provided under the *EMA*.

THE SCOPE OF THE LITIGATION

[23] It is common ground amongst all of the parties in this case that flooding occurred during the spring and summer of 2011 in and around the reserves of Pinaymootang First Nation, Little Saskatchewan First Nation, Lake St. Martin First Nation, and Dauphin River First Nation. The plaintiffs claim that the flooding was caused by decisions made by Manitoba in operating the water control works that affected the water levels around the First Nation lands. In particular, the plaintiffs point to the operation of the Shellmouth Dam, the Portage Diversion, and the Fairford Dam. At paras. 15-17 of the amended amended statement of claim, the plaintiffs allege as follows:

> 15. The Defendant, Manitoba's practice prior to 2011 was to forecast anticipated water levels for the Assiniboine River and to draw down the water level in the Shellmouth Reservoir in anticipation of Spring melt. In the winter to 2010-11, Manitoba was at all material times aware that groundwater levels, one of the factors to be considered in estimating Spring water levels, were well above average.
>
> 16. The plaintiffs state that the Defendant, Manitoba, knew or should have known that the above average groundwater levels would materially contribute to the volume of water during a Spring melt, and should have taken reasonable steps in anticipation of above average water flow including, but not limited to, greater drawdown of water in the Shellmouth Reservoir before Spring runoff in 2011.
>
> 17. In the Spring of 2011 and subsequently, the defendant, Manitoba, operated the Shellmouth Dam, Portage Diversion and Fairford Water Control Structure so as to cause massive amounts of water from the Assiniboine River to be diverted into Lake Manitoba, through the Fairford

> River into Lake St. Martin and through the Dauphin River to Lake Winnipeg. In doing so, Manitoba knowingly and recklessly caused extensive flooding to occur on each of the four First Nation Reserves that flooding caused the evacuation, displacement and relocation of hundreds of persons from their homes on Reserve as well as damage to their personal and real property.

[24] The plaintiffs go on to allege that the faulty operation of the described water control structures form the subject matter of three causes of action against Manitoba, namely negligence, nuisance and breach of treaty.

[25] The plaintiffs further allege that the faulty operation of those water control works necessitated the plaintiffs' evacuation from their homes and reserves. They allege that here too Manitoba was negligent in that having caused the flooding, there existed a duty on the part of Manitoba to provide care for them during their evacuation and that the care provided was substandard, for which they are entitled to be compensated. The plaintiffs also claim that the duty owed by Manitoba to provide post-flood evacuation care was a fiduciary duty and it was also breached.

[26] During the case conferences leading to the certification application, I made a decision to require the defendant Manitoba to plead to the statement of claim before the certification motion could be heard. That decision was prompted not only by a desire to see what was going to be at issue in the litigation, but also because there had been an indication that Manitoba intended to seek indemnity from other parties. The concern which I had was that if the pleadings were not closed by the time of the certification hearing, third parties would find themselves subsequently being dragged into a certified class action

without having had the opportunity to argue that the action did not possess the necessary criteria for certification. Although they certainly would have had the opportunity to argue that the action should then be decertified, in my view that is a more uphill battle since a party is then obliged to convince a judge to change his/her mind rather than assess a submission before a decision is made in the first place. I also was concerned about the impact that a class action by personal claimants might have on any settlement discussions ongoing between the First Nations and the governments.

[27] When required to plead to the statement of claim, Manitoba did choose to third party the four First Nation bands as well as crossclaim against Canada and MANFF for indemnity and arbitration.

[28] This action began initially as a claim against Manitoba. After it was issued on April 3, 2012, the plaintiffs identified some uncertainty as to who it was that directed the post-flood evacuation and care respecting the members of the four First Nations. In July 2013, the plaintiffs issued a separate statement of claim against Canada and MANFF, alleging that they were responsible for the evacuation and post-flood care of the plaintiffs. In September 2013, the plaintiffs applied to consolidate that action with the initial action which they had issued against Manitoba, and on October 25, 2013, over the objections of MANFF, I granted the requested order of consolidation. The result is the current amended amended statement of claim (the "Consolidated Statement of Claim"). It names Manitoba as a defendant alleging that it is responsible for the flooding

and for the post-flooding evacuation and care. The Consolidated Statement of Claim also alleges that Canada and MANFF are liable for damages arising from the post-flood evacuation and care. Manitoba, Canada and MANFF have each defended the action, and crossclaimed against each other. Manitoba and MANFF have also issued third party claims against each of the four First Nations.

[29] Manitoba has defended the action on a number of grounds. Firstly, Manitoba denies that it caused the flooding. Although it recognizes that the operation of the three water control works does have an effect on the water levels in the Lake Manitoba to Lake Winnipeg waterway, it says that the flooding in 2011 was more the product of natural conditions than anything else. Indeed, at para. 19 of its statement of defence, Manitoba says:

> 19. Flooding in 2011 at the Pinaymootang, Lake St. Martin, Little Saskatchewan and Dauphin River First Nation reserves incurred principally as a result of unprecedented high water levels, high runoff levels, high groundwater levels or high precipitation, not as a result of the operation of the FRWCS [the Fairford Dam], the Portage Diversion and the Shellmouth Reservoir. Therefore, damage to land and property at the communities in 2011 was largely as a result of natural factors and not caused by Manitoba's operation of those provincial water control works. Manitoba therefore denies liability for damage resulting from flooding at those communities.

[30] Secondly, even if the operation of the water control works caused flooding, Manitoba maintains that it does not owe the duties to individual plaintiffs that would need to exist in order to create causes of action for negligence, breach of treaty and breach of fiduciary duty. More particularly, Manitoba alleges that it has statutory responsibilities to operate water control works as necessary or expedient in the public interest, and policy decisions which

balance the interests of all Manitobans are immune from civil liability. Also, Manitoba alleges that individual members of a First Nation cannot sue for breaches of a treaty made with the First Nation.

[31] Thirdly, Manitoba submits that it has no duty to either provide evacuation services nor post-flood care beyond the programs which are prescribed under the *EMA* and in any event, it did not make the decision for members of the First Nations to evacuate. Rather, Manitoba alleges that the evacuation decisions were made by the Chief and Council in each of the First Nations and evacuation help and post-flood care was the responsibility of and provided by MANFF acting under arrangements made with Canada and/or the respective First Nation.

[32] As well, there are other matters pleaded by Manitoba which, if established, may reduce or eliminate its exposure to the claim. Where flooding occurred on a provincial road which is alleged to have had ramifications on the plaintiffs, Manitoba argues that there can be no liability because the flooded property is Crown land. Secondly, Manitoba pleads a release given in the 1970s by three of the First Nations in favour of Manitoba in respect of any loss or damage sustained as a result of the operation of the Fairford Dam. Thirdly, Manitoba alleges that the plaintiffs and their respective First Nations have been contributorily negligent in failing to take appropriate preventative measures on their own. And, Manitoba alleges that it has already taken steps to address some of the damages sustained by the plaintiffs by offering programs to

members of the First Nation bands to compensate them for flood losses, for which it should be given credit.

[33] In the Consolidated Statement of Claim, the plaintiffs allege that as a consequence of the flooding allegedly caused by Manitoba, Canada undertook, with the assistance of MANFF, to evacuate the plaintiffs from their homes and thereafter to provide for their accommodation, care and welfare pending the plaintiffs' return to their homes and reserves. In the case of Canada, it is alleged that this undertaking arose as a result of "its historic role and relationship with First Nation peoples and its fiduciary responsibilities for First Nation Reserve Lands." The plaintiffs allege that the failure of Canada to provide a suitable type or standard of post-evacuation care constituted a breach of that fiduciary duty. Further, the plaintiffs allege that both Canada and MANFF owed duties of care to provide appropriate evacuation services and post-flood care for the plaintiffs and were therefore negligent in providing the quality of care that was ultimately given.

[34] The defendant Canada pleads that it simply funded the costs of evacuation and post-flood care as a matter of public law responsibility, not duty. It alleges that if there was any government that owed duties to the plaintiffs for evacuation services and post-flood care, that was Manitoba. It suggests that it only became involved in funding the evacuation services and post-flood care because Manitoba did not. It alleges further that the actual care provided was the result of the work of MANFF and that Canada did not have a relationship with

MANFF from which vicarious liability would arise. Canada denies the existence of any private law duty being owed to the plaintiffs and denies that in these circumstances it owed any fiduciary duty to the plaintiffs.

[35] Canada further relies upon common law immunity for the Crown in actions of tort. It further alleges that concerning any conduct of Canada or MANFF prior to July 4, 2011, the claim is statute barred.

[36] However, Canada does claim indemnity from both Manitoba and MANFF.

[37] MANFF defends on the basis that it acted pursuant to directions of Canada and Manitoba, that it provided good services to the plaintiffs and adopts the arguments of Canada that conduct occurring prior to July 4, 2011 is statute barred. It also claims indemnity from Canada and Manitoba as well as indemnity from the four First Nations on the basis that the First Nations failed to take any or any adequate preventative flood-proofing or flood control measures.

[38] The plaintiffs argue that since the First Nations have been named as third parties in this action by two of the three defendants, a conflict of interest has arisen between the First Nations and each of their members who might have sustained an individual personal loss. They argue that it therefore would be inappropriate for the Chief and Council to represent them in litigation of this sort since it has been alleged by the defendants that their personal losses are attributable to bad management on the part of the band government. The conflict alleged is that the Chief and Council may not be able to advance the case

of the personal plaintiffs without, at least in theory, being mindful of the First Nation's own exposure for the same losses.

[39] As can be seen, the issues that arise are plentiful and thorny. The plaintiffs have proposed that this claim should be resolved in a class proceeding. The proposed common issues are set out in Appendix A to these reasons.

3.0 THE LAW

[40] Class actions in Manitoba are governed by ***The Class Proceedings Act***, C.C.S.M. c. C130 (the "*CPA*"). The *CPA* contemplates that early in the proceeding, a court should adjudge whether an action should proceed as a class action or whether it should simply proceed in a manner that affects only the interests of the named plaintiffs. If the action is adjudged to proceed as a class action, it is said to be certified. An application for certification is made pursuant to s. 2 of the *CPA*. It reads:

> **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.
>
> **Timing of motion**
> 2(3) A motion under subsection (2) must be made
> (a) within 90 days after the close of pleadings or the noting of a defendant in default; or
> (b) with leave of the court, at any other time.

[41] Section 4 of the *CPA* sets forth criteria which, if found to exist, compels the court to certify the action as a class action. Section 4 reads as follows:

> **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.

[42] Furthermore, s. 7 of the *CPA* sets forth certain factors which on their own should not frustrate an application for certification. Section 7 reads:

> **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;
> (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 class members.

[43] The *CPA* was passed initially in this province in the year 2002 and proclaimed in force at the beginning of 2003. There are similar pieces of legislation in other provinces and the *CPA* is modelled upon some of those other statutes. There are, however, differences in the various provincial statutes and some care should be taken against automatically following an appellate decision

in another jurisdiction without considering whether the differences in the legislation are material to the reasoning in that case.

[44] There does not appear to be any argument about the purposes of the class action legislation. They have been proclaimed by the Supreme Court in ***Hollick v. Toronto (City)***, 2001 SCC 68, [2001] 3 S.C.R. 158, and are threefold:

a) to encourage judicial efficiency;

b) to improve access to the courts; and

c) to result in behavior modification.

[45] Paragraph 15 of ***Hollick*** reads:

> 15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), class actions provide 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 distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (February 1990), at pp. 16-18. In my view, it 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.

[46] Further, the authorities remind litigants that an application for certification is a procedural motion, and the focus should be on whether a class action is an

appropriate way to proceed, and, except in certain clear circumstances, not on whether the action will ultimately be successful. Nonetheless, the judge hearing a certification application does serve a gatekeeper function.

[47] In order for the judge to assess the criteria outlined in subsections 4(b), (c), (d), and (e) of the *CPA*, there should be some evidentiary basis upon which the assessment can be made. In ***Hollick***, McLachlin, C.J. said, "I agree that the representative of the asserted class must show some basis in fact to support the certification order" (para. 25).

[48] Certain comments made by me in the case of ***Cloud v. MTS Allstream Inc.***, 2013 MBQB 16, 287 Man.R. (2d) 85, were relied upon by the defendants. There, I said at para. 22:

> There must be a degree of rigour to the evidence placed before the court on a certification motion in order to establish the remaining four criteria. Although a court must be careful against prejudging the merits of an action at the certification stage, it ought to at least insist upon enough evidence to satisfy it that there is some basis in fact for processing the claim as a class action.

[49] The purpose of that approach was to recognize that class actions can turn into complex and cumbersome proceedings and that the gatekeeper function of a certification judge requires there to be some substance to the case sought to be certified. However, whatever the words were which I expressed then, the Supreme Court has since further addressed the evidentiary requirements in a certification application. In the case of ***Pro-Sys Consultants Ltd. v. Microsoft Corporation***, 2013 SCC 57, [2013] 3 S.C.R. 477, the litigants were

at odds over the extent of evidence that should be provided on a certification motion. Rothstein J., writing for a unanimous court, said this:

> 103 Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.
>
> 104 In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.
>
> 105 Finally, I would note that Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).
>
> [emphasis added]

[50] Therefore, any assessment of the quality and extent of the evidence adduced by the applicants during the course of a certification motion should be made with the comments of Rothstein J. in mind.

[51] I might add that the general approaches outlined above which are taken from ***Hollick***, a case from Ontario, and ***Pro-Sys***, a case from British Columbia,

are not affected by differences in the wording of the class action legislation found in those provinces.

4.0 ANALYSIS

[52] There are essentially three categories of claims which are set out in the Consolidated Statement of Claim, namely:

a) the claims by the individual plaintiffs against Manitoba for damages articulated in causes of action in nuisance, negligence, breach of treaty, and breach of fiduciary duty, but all premised on the allegation that Manitoba caused the flooding (the "Flooding Claims");

b) the claims against Manitoba by businesses represented by Dauphin River Fisheries Company Ltd. alleging negligence and nuisance, also premised on the allegation that Manitoba caused the flooding (the "Business Claims"); and

c) the claims by the individual plaintiffs against Manitoba, Canada, and MANFF articulated in causes of action in negligence and breach of fiduciary duty, all premised on the existence of some kind of duty on the part of the defendants to properly provide post-flood care (the "Evacuation Claims"), regardless of what or who caused the flooding.

[53] I prefer to deal with this application for certification by considering each of the above categories separately.

THE FLOODING CLAIMS

[54] The plaintiffs ground their action against Manitoba under four causes of action, namely nuisance, negligence, breach of treaty, and breach of fiduciary duty. Of the proposed common issues listed on Appendix A to these reasons, the plaintiffs argue that the following common issues relate to these four causes of action, namely:

1. Did the Defendant, Government of Manitoba, by its actions cause flooding to occur on the Pinaymootang (Fairford), Little Saskatchewan, Lake St. Martin and Dauphin River Reserves?

    a. If the answer to common issue #1 is yes, where on each of the four Reserves did flooding occur as a result of the Defendant's conduct?

    b. To what extent did the actions or omissions of Canada and Third Parties cause or contribute to the flooding of those lands?

2. Did the Defendant, Government of Manitoba, substantially interfere with the use and enjoyment of land occupied by the Plaintiffs?

3. If the answer to issues 1 and/or 2 is "yes", was the flooding or interference unreasonable?

4. Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the design, construction, management and operation of the water control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam?

5. Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?

6. Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the design, construction, management and operation of the water control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam?

7. Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?

> 8. Did the Defendant, Government of Manitoba, interfere with the treaty rights of the members of the Pinaymootang, Little Saskatchewan, Lake St. Martin and Dauphin River classes by the flooding and flood control measures which were taken in 2011?
>
> . . .
>
> 13. Does the conduct of the Defendants merit an award of punitive damages?

[55] The plaintiffs argue that their claim meets all of the criteria mandated by s. 4 of *CPA*, and as such, there is no discretion available to the court – the action must be certified. And, the plaintiffs argue that to the extent that there is any doubt, then the doubt must be resolved in favour of the applicants.

[56] Manitoba argues that the approach of the plaintiffs does not satisfy most of the s. 4 criteria. Under the wording of the *CPA*, it is only necessary for Manitoba to convince the court that the plaintiffs have failed to satisfy one of the criteria listed in s. 4 of the *CPA*.

[57] I propose to address each of the s. 4 criteria as they relate to the Flooding Claims in the order set out in the *CPA*.

Whether the pleadings disclose a cause of action for the Flooding Claims (s. 4(a))

[58] The approach to assessing this first criterion is similar to that taken when confronted with a motion to strike out a statement of claim which discloses no cause of action. This approach was recently confirmed in ***Alberta v. Elder Advocates of Alberta Society***, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 20:

> 20 The test for striking out pleadings is not in dispute. The question at issue is whether the disputed claims disclose a cause of action, assuming the facts pleaded to be true. If it is plain and obvious that a claim cannot succeed, then it should be struck out: See *Hollick v. Toronto*

> *(City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980.

[59] If the "plain and obvious" test is used, Steel J.A. of the Manitoba Court of Appeal in ***Soldier v. Canada*** (Attorney General), 2009 MBCA 12, 236 Man.R. (2d) 107, at para. 42, described the practical application of that test as follows:

> 42 All allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proved. The statement of claim must be read as generously as possible with a view to accommodating any inadequacies in the allegations due to drafting. Evidence is not admissible on the question of whether there is a cause of action aside from the pleadings themselves. See *Pearson*, at para. 52. While that is a low standard, there must be some air of reality to the cause of action. It cannot be entirely speculative.

[60] The plaintiffs here maintain that their statement of claim discloses four causes of action against Manitoba – nuisance, negligence, breach of treaty and breach of fiduciary duty.

Is there a cause of action in nuisance disclosed within the Consolidated Statement of Claim?

[61] Both the plaintiffs and Manitoba acknowledge that the elements of a cause of action in nuisance involve an interference with a person's use or enjoyment of land that is both substantial and unreasonable. In this case, that means:

a) Did Manitoba, in the operation of its water control works, cause flooding to occur?

b) Did the flooding damage land occupied by the plaintiffs, or did it interfere with a plaintiff's use or enjoyment of the lands which they occupied?

c) If there was interference, was the interference substantial and unreasonable?

[62] The plaintiffs have pleaded the following at paras. 25-29 of the Consolidated Statement of Claim:

> 25. The Defendant, Manitoba, caused the diversion of water from the Assiniboine River into Lake Manitoba via the Portage Diversion thereby significantly increasing the volume of water and water level in Lake Manitoba.
>
> 26. Manitoba opened and kept open the Fairford River Water Control Structure thereby allowing water to flow from Lake Manitoba into the Fairford River, Lake St. Martin and Dauphin River suddenly and at a substantially higher water level than would normally occur.
>
> 27. Manitoba's diversion of the water caused sudden and massive flooding on the four Reserves and the roads and highways connecting those Reserves.
>
> 28. The flooding destroyed and/or damaged homes, garages, sheds and other buildings owned or occupied by the Plaintiffs, and deposited contaminants onto lands used and occupied by the Plaintiffs for their homes, businesses, farming enterprises, traditional and recreation purposes.
>
> 29. The Plaintiffs state that the flooding caused by Manitoba's conduct constitutes a nuisance for which the said Defendant is responsible in law.

[63] Manitoba acknowledges that if there was damage to property upon which a plaintiff resided, a cause of action has been appropriately pleaded. However, it argues that if no property loss has been sustained, then no cause of action in nuisance exists. Manitoba argues that a person who lived in a residence untouched by flood waters but who was evacuated and kept away from their home would not qualify as a plaintiff in a nuisance action.

[64] The plaintiffs argue that in such event, that person would be able to maintain a claim in nuisance based upon the interference with their enjoyment of

their property. They rely upon language contained in the case of ***Smith v. Inco Limited***, 2011 ONCA 628, 107 O.R. (3d) 321 at paras. 42-43:

> 42 In *St. Pierre v. Ontario (Minister of Transportation and Communication)*, [1987] 1 S.C.R. 906, at para. 10, McIntyre J. for the court, accepted as a working definition of private nuisance, the definition found in an earlier edition of *Street on Torts*:
>
> > A person, then, may be said to have committed the tort of private nuisance when *he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.* [Emphasis added.]
>
> 43 As evident from the definition relied on in *St. Pierre,* while all nuisance is a tort against land predicated on an indirect interference with the plaintiff's property rights, that interference can take two quite different forms. The interference may be in the nature of "physical injury to land" or it may take the form of substantial interference with the plaintiff's use or enjoyment of his or her land. The latter form of nuisance, sometimes described as "amenity nuisance" is not alleged here: see *Street on Torts* at p. 429; *The Law of Nuisance in Canada* at pp. 69-71; Conor Gearty, "The Place of Private Nuisance in a Modern Law of Torts" [1989] Cambridge L.J. 214.

[65] Whether a person who has been obliged to evacuate has a cause of action in nuisance even though no water damage to their house or personal property was sustained is therefore an arguable case. It may or may not be that a plaintiff's position is correct in law, but for the purposes of this motion, it is only necessary to say that it is not plain and obvious that the plaintiffs are wrong.

[66] A reasonable cause of action in nuisance has been pleaded within the meaning of s. 4(a) of the *CPA*.

Is there a cause of action in negligence disclosed in the Consolidated Statement of Claim?

[67] The major components of the negligence cause of action are:

a) the plaintiff must owe the defendant a duty of care;

b) the defendant must be shown to have breached that duty of care; and

c) damages must have resulted to the plaintiff from that breach.

[68] At para. 21 of the Consolidated Statement of Claim, the following duties are alleged to be owed by Manitoba to the plaintiffs, namely, to:

a. protect the plaintiffs from flooding;
b. properly design, construct, inspect, repair, maintain, operate and supervise the water control structures which it owned, operated and controlled;
c. have in place adequate and appropriate flood control systems and structures to prevent or minimize flooding of the Plaintiffs' Reserves;
d. provide timely and appropriate warning of potential flooding;
e. take reasonable steps to mediate and prevent flooding resulting from its operation of its water control facilities;
f. avoid interference with the Plaintiffs' exercise of their rights of use and occupation of their Reserve lands; and,
g. assist those affected by the flood in a timely manner so as to restore their property and allow a prompt return to their homes.

[69] The plaintiffs have alleged at para. 22 of the Consolidated Statement of Claim that the duties have been breached in the following manner. It is alleged that Manitoba:

a. failed to obtain, calculate, analyze or interpret data properly or in a timely manner to estimate water levels in the Assiniboine River, Shellmouth Reservoir, Lake Manitoba, Fairford River, Lake St. Martin or Dauphin River in the Spring of 2011 and subsequently;
b. failed to take into account existing groundwater levels in, along or near the four Reserves;
c. diverted excess water unnecessarily into Lake Manitoba and through the Fairford River Water Control Structure;
d. fully opened the Fairford River Water Control Structure and allowed that structure to remain open thereby channeling excessive amounts of water into the Fairford River without regard for the Plaintiffs and their property;
e. failed to have in place reasonable or adequate flood control measures in the Spring of 2011 and subsequently despite earlier floods and

earlier investigations with respect to the inadequacy of the [sic] Manitoba's flood control structures;

f. failed to properly operate the existing flood control structures including the Shellmouth Dam, Portage Diversion and Fairford River Water Control Structure;
g. failed to properly maintain the said Water Control Structures;
h. allowed the situation of overloading of Lake Manitoba and the Fairford River Water Control Structure beyond their original and acceptable limits;
i. failed to establish and maintain adequate design, planning, construction, installation, maintenance and inspection of the Shellmouth Dam including, but not limited to, reservoir limits and spillway control;
j. failed to draw down water from the Shellmouth Reservoir in advance of the Spring melt;
k. failed to warn the Plaintiffs of the impending flood in a timely manner;
l. failed to warn the Plaintiffs of the dangers associated with contact with the flood waters at the time of the flood and subsequently;
m. failed to adequately or properly inspect the Water Control Structures;
n. failed to take adequate measures to protect the Plaintiffs and their property from the flood caused by the [sic] Manitoba's diversion of water from the Assiniboine River;
o. failed to have in place adequate or any dykes or other protective measures prior to the diversion of water from the Assiniboine River;
p. hired or engaged servants or agents who were not competent, who lacked the necessary experience and skill and/or were not properly trained; and,
q. failed to take adequate or timely steps to remediate the Plaintiffs' property or to provide for their care following their evacuation.

[70] Manitoba argues that the Consolidated Statement of Claim does not disclose a reasonable cause of action because insufficient facts are pleaded to demonstrate the proximity required to establish a private law duty to the plaintiffs. By relying upon a combination of ***R. v. Imperial Tobacco Canada Ltd.***, 2011 SCC 42, [2011] 3 S.C.R. 45, and ***Eliopoulos v. Ontario (Minister of Health & Long-Term Care*** (2006), 82 O.R. (3d) 321 (C.A.), Manitoba submits that whether this is a case of liability arising explicitly or by implication from a statutory scheme, or from simply an interaction between the claimants

and the government, the regulation of water levels within the province is a matter of public interest and policy, and therefore, does not create a private law duty. Manitoba argues that the Consolidated Statement of Claim does not clearly set out the basis upon which it is alleged that it is negligent, other than Manitoba is able to control the level of the waterway between Lake Manitoba and Lake Winnipeg and flooding occurred in 2011. Manitoba cites the case of ***Robertson v. Manitoba Keewatinowi Okimakanak Inc.***, 2011 MBCA 4, 262 Man.R. (2d) 126, which is an illustration of a case in which the Manitoba Court of Appeal struck out a statement of claim where the allegations were found to be insufficient to ground a cause of action.

[71] The argument advanced by Manitoba is that many of the decisions made to control water flow which result in flooding in one area and no flooding in another fall within the ambit of decisions made by a government for the public interest. It is trite to say that not everyone in the province will be satisfied by many decisions that a government is obliged to make. Governments must balance the competing interests of people affected by its actions, and hard choices must be made. A decision to send water into Lake Manitoba in order to protect more populous areas of the province is one of those hard choices. It is argued that the absence of a private law duty allows governments to make those decisions free from automatic liability in negligence to those who are unhappy with those decisions.

[72] The ***Robertson*** case is an entirely different kind of case than this one, although the approach taken by the Court of Appeal in that case has some relevance here. There, a person claimed that an aboriginal organization was vicariously liable for a sexual assault perpetrated by an employee of the organization but away from the organization's premises and operations. The Court of Appeal concluded that there needed to be facts pleaded which would ground the cause of action, failing which, the action could not succeed. Since there were no facts pleaded that justified the application of vicarious liability on the part of the organization, the Court felt at liberty to conclude that the normal application of vicarious liability principles should be applied. In other words, on the face of the pleading, no cause of action had been shown. In that case, the Court commented upon the fact that any facts necessary to make the case would have been known to the plaintiff at the time of issuance of the statement of claim.

[73] The duties and breaches of duty described in the Consolidated Statement of Claim are very broadly stated. The allegations would catch policy decisions made by Manitoba in respect of the control of water levels in 2011. However, they would also catch any actions by employees of Manitoba who are charged with the responsibility of implementing so-called policy decisions, a situation in which a successful cause of action would be more likely. The wording of the *CPA* and the manner in which it has been interpreted by appellate courts encourages what exists here. All that is required are unsubstantiated allegations drafted so

as to "articulate" a cause of action. The assessment as to whether the conduct of Manitoba involves policy decisions or implementation decisions is better left to be made on an evidentiary record, or perhaps on a summary judgment motion when the lack of an evidentiary record could be a factor. There is enough pleaded in the Consolidated Statement of Claim to satisfy the plain and obvious test.

[74] There is no evidence demonstrated in the affidavits filed by the plaintiffs that would support the allegations of breach of duty pleaded in the Consolidated Statement of Claim other than flooding occurred and Manitoba operates control structures in the watershed. However, the authorities indicate that at this stage of the analysis that concern is irrelevant. However, it could arise in the other portions of the analysis including the examination of common issues.

[75] I therefore conclude that it is not plain and obvious that the plaintiffs failed to disclose a cause of action in negligence in the Consolidated Statement of Claim.

Has a cause of action in breach of treaty been disclosed?

[76] The plaintiffs claim in their Consolidated Statement of Claim as follows:

> 30. By treaty dated August 21, 1871, the Pinaymootang First Nation (Fairford), Little Saskatchewan, Lake St. Martin and Dauphin River Reserves were set apart for the use of the Indians belonging to the bands for whom the Reserves were established. The Plaintiffs (described in paragraph 7 a-d above) at all material times occupied and enjoyed possession of particular areas of their Reserves which were allocated and/or provided by their First Nations for their lawful possession and use.
>
> 31. The Plaintiffs state that pursuant to Treaty #2, the Plaintiffs and Plaintiff Classes were entitled to occupy and reside upon the lands reserved and to the quiet enjoyment of those lands free from interference

> by the Defendant, Manitoba, with the exercise and enjoyment of those rights.
>
> 32. The Plaintiffs state that the flooding of the Reserves by the Defendant, Manitoba, constitutes an unlawful interference with the exercise and enjoyment of the Plaintiffs' treaty rights.

[77] Manitoba argues that the treaty rights belong to the collective, namely the First Nation, and are incapable of being enforced by an individual member of a First Nation. Manitoba relies on the wording of Treaty No. 2 which sets aside land for the First Nation, not individuals. Manitoba points to cases such as ***Blueberry River Indian Band v. Canada*** (***Indian Affairs and Northern Development***), 2001 FCA 67, [2001] 4 F.C.R. 451, at paras. 16, 18, 19 and 26, and ***Joe v. Findlay*** (1981) 122 D.L.R. (3d) 377 (B.C.C.A.), at para. 7, where there are comments supportive of the notion that treaty rights belong to the collective as distinct from individual members. Manitoba argues that to the extent that its ability to control water levels might impact people on reserves, that is a matter for the Chief and Council to advance, not the individual members.

[78] The plaintiffs rely upon decisions where individual members of the band have been recognized as people with standing to enforce treaty rights, namely, ***Custer v. Hudson's Bay Company Developments*** (1982), 141 D.L.R. (3d) 722 (Sask. C.A.), and indirectly by ***Whitesand First Nation v. Canada (Attorney General)***, 2003 CanLII 12214 (Ont. Sup. Ct. Jus.). Furthermore, the plaintiffs rely on the decision of the Manitoba Court of Appeal in ***Soldier v. Canada (Attorney General)***, *supra*, where the Court found that it was not

plain and obvious that an individual had no standing to commence a class action which put into question the quantum of annual payments made by Canada to individual members of a First Nation.

[79] This debate remains unresolved as was illustrated in the recent case from the Supreme Court of Canada of ***Behn v. Moulton Contracting Ltd.***, 2013 SCC 26, [2013] 2 S.C.R. 227. This was a case involving the objections of individual members to timber harvesting rights which had been authorized by the province. Although the individuals were unsuccessful, the Court made certain comments about the rights of individuals to enforce treaty rights at paras. 32-35:

> 32 The Behns also challenge the legality of the Authorizations on the basis that they breach their rights to hunt and trap under Treaty No. 8. This is an important issue, but a definitive pronouncement in this regard cannot be made in the circumstances of this case. I would caution against doing so at this stage of the proceedings and of the development of the law.
>
> 33 The Crown argues that claims in relation to treaty rights must be brought by, or on behalf of, the Aboriginal community. This general proposition is too narrow. It is true that Aboriginal and treaty rights are collective in nature: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1112; *Delgamuukw*, at para. 115; *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 36; *R. v. Marshall*, [1999] 3 S.C.R. 533, at paras. 17 and 37; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 31; *Beckman*, at para. 35. However, certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights, as some of the interveners have proposed.
>
> 34 Some interesting suggestions have been made in respect of the classification of Aboriginal and treaty rights. For example, the interveners Grand Council of the Crees and Cree Regional Authority propose in their factum, at para. 14, that a distinction be made between three types of Aboriginal and treaty rights: (a) rights that are exclusively collective; (b) rights that are mixed; and (c) rights that are predominantly individual.

> These interveners also attempt to classify a variety of rights on the basis of these three categories.
>
> 35 These suggestions bear witness to the diversity of Aboriginal and treaty rights. But I would not, on the occasion of this appeal and at this stage of the development of the law, try to develop broad categories for these rights and to slot each right in the appropriate one. It will suffice to acknowledge that, despite the critical importance of the collective aspect of Aboriginal and treaty rights, rights may sometimes be assigned to or exercised by individual members of Aboriginal communities, and entitlements may sometimes be created in their favour. In a broad sense, it could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature. Nothing more need be said at this time.
>
> [emphasis added]

[80] Therefore, it remains "not plain and obvious" that the plaintiffs have no standing to make a claim for breach of Treaty, and accordingly I am prepared to say that the plaintiffs have disclosed a cause of action in breach of treaty within the meaning of s.4(a) of the *CPA*.

Is a cause of action for breach of fiduciary duty disclosed in the Consolidated Statement of Claim?

[81] The allegations which describe a breach of fiduciary duty against Manitoba are found at paras. 33-36 of the Consolidated Statement of Claim. They are as follows:

> 33. As a result of the flood caused by the Defendant, the Plaintiffs were particularly vulnerable and were evacuated and displaced from their homes.
>
> 34. Many of those displaced or evacuated from their homes obtained accommodation at the direction of and with the assistance of the Defendant.
>
> 35. The Plaintiffs state that having unilaterally caused the flood and evacuation of the Plaintiffs from their homes and having accepted responsibility to provide lodging and other care, the Defendant, Manitoba, owed and continues to owe a fiduciary duty to the members of the Classes affected.

36. The Plaintiffs state that the Defendant, Manitoba, has breached its fiduciary obligation to the Plaintiffs in that the said Defendant has failed,

a. to provide adequate accommodation;

b. to provide adequate and timely medical care;

c. to assist and provide schooling for children who were unable to continue their education at their schools on or near their Reserve;

d. to provide appropriate and adequate recreational facilities;t

e. to provide a reasonable allowance for clothing given that most of their possessions were destroyed or contaminated through the flood;

f. to provide transportation;

g. to meet their dietary needs; and,

h. to meet their cultural and religious needs.

[82] In essence, the Consolidated Statement of Claim does not allege that the act of causing the flooding was a breach of a fiduciary duty. Rather, the Consolidated Statement of Claim alleges that because the defendant Manitoba caused the flooding, and undertook to provide lodging and other care, a fiduciary duty arose on the part of Manitoba to provide a particular level of care, and it failed to provide that level of care.

[83] Manitoba submits that the Consolidated Statement of Claim does not contain any facts from which a fiduciary duty might arise.

[84] The practical effect of what the plaintiffs argue is this – when a government commits a tort or breach of treaty, a fiduciary duty to make it right arises. In my view, that is not the law. When a government is negligent, it is liable, as a result of the breach of duty, to pay damages. So also when it commits a nuisance or breaches a treaty. It is the illegal conduct which drives

the legal obligation to compensate, not the existence of a separate fiduciary duty arising only after causation has occurred.

[85] Furthermore, in my opinion, the extension of fiduciary law should only arise where no other remedy exists. In the circumstances pleaded in the Consolidated Statement of Claim, there is no need for a fiduciary duty. Reasonable compensation flows if and once liability is determined. An adequate remedy already exists.

[86] In my view, the allegations do not support a cause of action in breach of fiduciary duty against Manitoba.

[87] In its brief, Manitoba takes a less literal approach to the wording of the Consolidated Statement of Claim than I have taken, but still argues that from the facts that have been pleaded throughout the Consolidated Statement of Claim, there is an insufficient foundation for such a cause of action. Manitoba argues that support for this proposition comes from the recent case of ***Alberta v. Elder Advocates of Alberta Society***, *supra*. In that case, the Supreme Court addressed a claim by a class of plaintiffs who alleged that the misuse by the Alberta government of part of the funds provided by senior citizens for their housing and meals in long term care facilities was a breach of a fiduciary duty. In the unanimous judgment of the Court written by McLachlin C.J., the Court concluded at para. 36 that where a claimant is not relying upon an established fiduciary relationship, in addition to the vulnerability arising from the relationship, a claimant must show:

(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;

(2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and

(3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[88] However, notwithstanding these characteristics, the Court went even further to say these criteria will only impact a government in very limited and special circumstances. That is because governments generally act on behalf of all citizens and to the extent that it makes decisions that affect people differently, a strict application of fiduciary principles cannot arise. In short, on most days, a government does not owe a duty of loyalty to only one segment of society.

[89] In this case, the plaintiffs allege that they were vulnerable because their reserves were flooded. As McLachlin C.J. said in the ***Elder Advocates*** case, "vulnerability alone is insufficient to ground a fiduciary obligation" (para. 57). There are no facts pleaded which support the notion that Manitoba undertook to act in the best interests of the plaintiffs to the exclusion of all other citizens, nor is it pleaded that the plaintiffs had to rely upon Manitoba alone, nor is any legal interest or substantial practical interest referred to in the Consolidated Statement

of Claim. Here the ***Robertson*** case is applicable. Nothing is pleaded to support a claim based on breach of fiduciary duty.

[90] Out of an abundance of caution, Manitoba argued that the fact that the plaintiffs were aboriginal people also does not mandate the existence of a fiduciary duty. I do not read the Consolidated Statement of Claim as making that allegation against Manitoba, and I therefore do not propose to read more into the Consolidated Statement of Claim than exists. More however will be said about the subject when I deal with the claim for breach of fiduciary duty against Canada.

[91] The plaintiffs have not disclosed a cause of action against Manitoba in breach of fiduciary duty.

Summary of section 4(a) of the CPA in respect of the Flooding Claims

[92] I accept that in respect of the Flooding Claims, there is a cause of action in nuisance, negligence and breach of treaty disclosed in the Consolidated Statement of Claim, within the meaning of 4(a) of the *CPA*.

Whether there is an identifiable class of two or more persons (s. 4(b))

[93] The plaintiffs have proposed a class description for each of the four First Nations in respect of the Flooding Claims. These descriptions are set out as follows:

a. The **"Pinaymootang (Fairford) Class"**: all members of the First Nation

    i. whose property on Reserve, real or personal, was flooded in 2011; or,

ii. who were evacuated, displaced or were unable to reside on Reserve because of the flooding on Reserve in 2011; or,

iii. who were unable to work and thereby earn income because of the flooding on Reserve in 2011,

including the estates of any persons who have died since March 1, 2011 who meet any of the criteria in (i-iii) preceding.

b. The **"Little Saskatchewan Class"**: all members of the First Nation

i. whose property on Reserve, real or personal, was flooded in 2011; or,

ii. who were evacuated, displaced or were unable to reside on Reserve because of the flooding on Reserve in 2011; or,

iii. who were unable to work and thereby earn income because of the flooding on Reserve in 2011,

including the estates of any persons who have died since March 1, 2011 who meet any of the criteria in (i-iii) preceding.

c. The **"Lake St. Martin Class"**: all members of the First Nation

i. whose property on Reserve, real or personal, was flooded in 2011; or,

ii. who were evacuated, displaced or were unable to reside on Reserve because of the flooding on Reserve in 2011; or,

iii. who were unable to work and thereby earn income because of the flooding on Reserve in 2011,

including the estates of any persons who have died since March 1, 2011 who meet any of the criteria in i-iii preceding.

d. The **"Dauphin River Class"**: all members of the First Nation

i. whose property on Reserve, real or personal, was flooded in 2011; or,

ii. who were evacuated, displaced or were unable to reside on Reserve because of the flooding on Reserve in 2011; or,

iii. who were unable to work and thereby earn income because of the flooding on Reserve in 2011,

including the estates of any persons who have died since March 1, 2011 who meet any of the criteria in (i-iii) preceding.

[94] The purpose of the class definition and the approach to arriving at a class definition were set out by Winkler J. in the case of ***Bywater v. Toronto Transit Commission*** (1998), 83 O.T.C. 1 (Ont. Ct. (G.D.)), as follows:

> 10 The purpose of the class definition is threefold: a) it identifies those persons who have a potential claim for relief against the defendant; b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and c) lastly it describes who is entitled to notice pursuant to the **Act**. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad.
>
> 11 In the instant proceeding the identities of many of the passengers who would come within the class definition are not presently known. This does not constitute a defect in the class definition. In **Anderson et al. v. Wilson et al.** (1998), 107 O.A.C. 274; 37 O.R.(3d) 235 (Div. Ct.), Campbell, J., adopted the words of the Ontario Law Reform Commission and stated at p. 248:
>
> > "... a class definition that would enable the court to determine whether any person coming forward was or was not a class member would seem to be sufficient."
>
> On this point, Newberg on **Class Actions** (3rd Ed. Looseleaf) (West Publishing) states at pp. 6-61:
>
> > "Care should be taken to define the class in objective terms capable of membership ascertainment when appropriate, without regard to the merits of the claim or the seeking of particular relief. Such a definition in terms of objective characteristics of class members avoids problems of circular definitions which depend on the outcome of the litigation on the merits before class members may be ascertained ..."
>
> The **Manual for Complex Litigation** (3rd Ed., 1995) (West Publishing), states at p. 217:
>
> > "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 (e.g. a plaintiff's state of mind) or that depend upon the merits (e.g., 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."

[95] Manitoba raises three concerns in respect of the proposed class definition.

[96] Firstly, in respect of subpara. i. of the proposed definition, it argues that the reference to "real" should no longer be included given the acknowledgement that the plaintiffs are not claiming for "damage to land, homes and improvements to same". I do not agree. The reference to "real" is not intended to advance a claim for damage to real property. Rather, it is to be a marker upon which a person might qualify to make a claim for damages excluding a claim for compensation for physical damage to real property. The continued existence of the word "real" in the proposed class description is not, in my view, objectionable.

[97] Secondly, Manitoba argues that subpara. ii. is too broad in that it would catch members of the First Nation who were not on reserve at the time of the flood and who had no intention of living on the reserve at that time. I consider this to be a reasonable concern. The purpose of this lawsuit ought to be to claim compensation for people who were directly affected by the flood. A claim by a member of a First Nation who lives off reserve and was unaffected except that, for a period of time, he/she lost an option to decide to return to the reserve because parts of it had been flooded is simply too remote. I am not prepared to

certify such a broad description which would include people with no rational connection to the common issues which are being proposed. In my view, subpara. ii. of the proposed class description should be amended to read:

> who were evacuated or displaced from the Reserve because of flooding on Reserve in 2011;

[98] Thirdly, Manitoba argues that subpara. iii. of the proposed description is too broad in that it includes people who did not reside on the reserve, who sustained no property loss, and who simply came onto the reserve to work. Manitoba claims such people would have no claim – this is a claim in pure economic loss.

[99] In my view this is an arguable issue. I draw a distinction between a member of a First Nation who comes onto his/her reserve to work and a third party non-member who simply does business with people on the reserve. A member who comes to work on land in which his/her First Nation has occupation rights and who has been unable to do so because of flooding would have a closer connection to the issues in this case. It is arguable that they may be viewed differently.

[100] I am content to permit subpara. iii. to remain as proposed.

[101] Canada has raised an objection to the use of the words "including the estates of any persons who have died since March, 2011 who meet any of the criteria in (i-iii) preceding." It argues that under ss. 42-44 of the ***Indian Act***, R.S.C., 1985, c. I-5, and amendments thereto, it is the Minister of Indian Affairs and Northern Development who has authority to administer estates, not the

plaintiffs. Canada argues that insufficient evidence has been advanced which details how many estates would be involved and what direction is to be given to current executors or administrators, including the Minister, upon certification. The effect would potentially place the Minister in a conflict of interest.

[102] The plaintiffs argue that the Minister's jurisdiction under s. 42 is limited to estate matters such as those which might be seen in a surrogate or probate court (***Morin v. Canada***, 2001 FCT 1430, 213 F.T.R. 291), but does not extend to a question concerning the right of an Indian's estate to bring an action (***Lafrance Estate v. Canada (Attorney General)***, [2002] O.T.C. 25 (Ont. Sup. Ct. Jus.)). The plaintiffs therefore argue that the language is appropriate.

[103] The proposed description is intended to permit the personal representatives of the estates of people who, if living, would qualify as a member of the class to participate in this proceeding, if certified. However, this creates certain practical problems. Given the provisions of the ***Indian Act***, it will place the Minister in a conflict of interest. Additionally, if no personal representative for an estate is appointed, a problem arises when the notice to opt out is sent, or any other notice which requires a class member to do something. Estates do not act on their own – they only act through a personal representative (see ***Canada (Attorney General) v. Hislop***, 2007 SCC 10, [2007] S.C.R. 429, at para. 73). Furthermore, given that there is a separate limitation period that exists under ***The Trustee Act***, C.C.S.M. c. T160, (s. 53(2)), which runs from the date of

death rather than from the date of the cause of action, the existence of a class description which involves people who have died may be problematical.

[104] In my view, the safest course in this case is to refrain from adding the language proposed by the plaintiffs for estates. That would oblige personal representatives of deceased persons to commence their own actions, or if certification occurred, to make application to this court for an order adding them to the class which is ultimately certified. I do not anticipate there to be the need for many such applications, the procedure for which, if it arises, is not time-consuming and allows such situations to be dealt with on a case-by-case basis.

Summary of s. 4(b) of the CPA

[105] I have concluded that in the event of certification there would be four classes, one for each First Nation, and the identifiable class would be:

> ... all members of the First Nation:
>
> i. whose property on Reserve, real or personal, was flooded in 2011; or,
>
> ii. who were evacuated, displaced or were unable to reside on Reserve because of the flooding on Reserve in 2011; or,
>
> iii. who were unable to work and thereby earn income because of the flooding on Reserve in 2011,

Whether the claims of the class members raise a common issue (s. 4(c))

[106] The proposed common issues that apply to the case against Manitoba in respect of the flooding claims are set out at para. 54 of these reasons. The plaintiffs argue that the proposed issues will advance the case in a material way. They argue that it is not necessary in a class action that a determination of the

issues will resolve the action – the determination need only advance the action. This is especially so in this jurisdiction since s. 4(c) of the *CPA* requires the court to look for the existence of common issues, "whether or not the common issue predominates over issues affecting only individual members." I might add, however, that such wording does not foreclose the predominance factor being considered when the preferability criteria outlined in s. 4(d) is being addressed.

[107] One of the most important considerations in finding a common issue is that a decision on that issue must be applicable to the claim of every member of the class. Indeed, it is that feature which drives the appropriateness of a class action. Every class member need not be affected in an identical way by the decision on the common issue, but there needs to be some realistic common effect on every member. A "win" for one should be a "win" for all.

[108] Can that be said in this case?

The cause of action in nuisance

[109] The first three proposed common issues are as follows, namely:

1. Did the Defendant, Government of Manitoba, by its actions cause flooding to occur on the Pinaymootang (Fairford), Little Saskatchewan, Lake St. Martin and Dauphin River Reserves?

    a. If the answer to common issue #1 is yes, where on each of the four Reserves did flooding occur as a result of the Defendant's conduct?

    b. To what extent did the actions or omissions of Canada and Third Parties cause or contribute to the flooding of those lands?

2. Did the Defendant, Government of Manitoba, substantially interfere with the use and enjoyment of land occupied by the Plaintiffs?

3. If the answer to issues 1 and/or 2 is "yes", was the flooding or interference unreasonable?

[110] The first three proposed common issues are intended to address the elements necessary in the tort of nuisance. The actions of Manitoba must be shown to have caused the flooding in 2011 which damaged the property or caused substantial and unreasonable interference in the use and enjoyment of property for every member of the class.

[111] The first common issue proposed by the plaintiffs is, "Did the Defendant, Government of Manitoba, by its actions cause flooding to occur on the Pinaymootang (Fairford), Little Saskatchewan, Lake St. Martin and Dauphin River Reserves?" This presupposes that the flooding is consistent to all members of the class. That cannot be seen from the evidence of each of the representative plaintiffs. For example, Clifford Anderson had water in his crawlspace. Kurvis Anderson had water seeping through the dyke around his house. Melloney Francois had no water in her house, but there was moisture around. She alleges that dyke construction caused damage to her house. Some people complain of mould in the house, but does that arise from the 2011 flood or from earlier years? And there are many houses on the reserves which are away from the shores of the lake and/or river, as the aerial pictures provided in the materials filed by Manitoba illustrate.

[112] Manitoba has acknowledged that the diversion of water through the Portage Diversion has some effect on the water level of Lake Manitoba. However, did it have enough effect to cause the flooding along the Lake Manitoba to Lake Winnipeg waterway in 2011, or would there have been flooding

in any event? The authorities indicate that a certification application is not the time to make that decision. But it does not follow that even if Manitoba is found to have caused the flooding in some areas along the waterway between Lake Manitoba and Lake Winnipeg, that all properties of every plaintiff in the proposed classes were impacted either in the same way, or at all, even within the same First Nation. In the request for a class action, that must be shown to be the case. It has not been shown in this case.

[113] Additionally, the use of flooding as a generic term is too broad. There may be flooding easily perceived when a residence is seen to be below the waterline of a lake or stream. However some of the flooding in this case seems to have arisen because ground water levels are too high. I am not prepared to accept that a high water table in all areas of the reserve is necessarily caused by water from Lake Manitoba. I suspect that the water level of Lake Manitoba does have a material effect on the water table at least near the Fairford Dam, but I see no evidence which would rule out other causes such as the topography of the land, variances in rainfalls, or snow drift accumulation, and potentially others. It simply does not follow that even if a representative plaintiff could prove that Manitoba caused the flooding on his property that Manitoba caused the flooding, whether by water overtopping banks or groundwater, to every other class member's residence. The test is not whether some of the class members would be affected – the test is whether all other members would be affected in some material way.

[114] The plaintiffs have proposed to deal with this issue by suggesting that a common issue should be, "... where on each of the four Reserves did flooding occur as a result of the Defendant's conduct?" This is not a common issue. This is a question that one might see in an inquiry. The fact that it needs to be asked demonstrates the absence of a common issue. It is akin to saying that every location on a particular reserve needs to be assessed before liability can be established. Class actions were not intended to address such a situation.

[115] An additional problem with such a question is compounded by the "opt out" regime of the *CPA*. The plaintiffs and the defendants would be obliged to present evidence in respect of flooding on all portions of the reserve even though no plaintiffs would complain about water found in many portions of the reserve. It is unfair to a defendant to be forced to prove a negative for matters which it need not address.

[116] The same concerns can be raised with common issues 2 and 3. In the case of interference, an assessment as to whether the interference is substantial and unreasonable will require an examination of the circumstances of each individual class member. A person who is faced with water lapping over the first floor of their home is in a very different position than a person who lives much further away from the lakeshore. The person who may have some degree of access to their home may or may not need to evacuate. The evidence from the cross-examinations of the plaintiffs showed different levels of interference. Indeed, an evacuation for a brief time may or may not be either a substantial or

an unreasonable interference in a province which experiences serious floods form time to time. This is not a common issue.

[117] My decision is not unlike the result reached in the recent case of ***Canada (Attorney General) v. MacQueen***, 2013 NSCA 143, 369 D.L.R. (4th) 1, [2013] N.S.J. No. 640 (QL), where the subject of certification of a cause of action in nuisance was considered by the court. There, the claim was made that airborne contaminants from the Sydney Steel Works landed on property of people in the proposed class and caused damage. The Court of Appeal concluded that causation could not be a common issue. The court *per curiam* wrote at para. 143:

> 143 As explained in *Antrim*, to be successful in nuisance there must be a substantial interference with the plaintiff's actual use or enjoyment of the land. Thus, liability is an individual issue. It is not possible to answer common issue (e) without inquiring how each class member used their property and the extent to which contaminants interfered with their use and enjoyment of the property or substantially caused physical injury to the property itself. Success for one class member on this issue in this case will not mean success for any other member because each class member's nuisance claim is unique.

[118] There may well be plaintiffs who would be in identical circumstances on the question of causation. For example, I would anticipate that neighbours who are at the same elevation and live on the shores of Lake St. Martin would all profit from a finding that Manitoba caused flooding at one of their homes. However, the elevations and characteristics of each of the neighbouring homes would need to be considered before that linkage could occur. Further, not every property is at the same elevation or location. There are differences in the descriptions as to how water entered each of the plaintiffs' homes, and in the

nature of the impact which the water caused. I am not prepared to conclude without more evidence than was given to me that if Manitoba caused water to rise to the first floor of a residence situated on the shore of the lake, that is proof that Manitoba caused water in a crawlspace or over a driveway or over a road at residences farther away. I am content to say that success on this common issue will not mean success for all other members of the proposed class.

[119] The plaintiff distinguishes the ***MacQueen*** case from the case at bar by saying that it dealt with the release of contaminants over a 95-year period whereas this case is concerned with a singular event – flooding in 2011. Furthermore, the plaintiffs posit that there is no reason why experts could not say what flooding contributed to what property, or that there is any need to ask each member if substantial interference occurred because there was a mass evacuation. In my view, none of these points diminish the comments made at para. 143 of ***MacQueen***. Put very simply, nuisance claims involve individual enjoyments of property and do not easily lend themselves to a class action regime. Even the contention that all of the plaintiffs were evacuated does not take away the common issue. As the evidence of the various plaintiffs shows, evacuations were on different dates, on the advice of different people, and for different reasons and to difference places. It is not just the fact of an evacuation that is important. The fact of the evacuation must be unreasonable, and this may change depending upon the nature and extent of the evacuation. Further, the defendants are entitled to question whether the evacuation of every person

was reasonably necessary, again an individual assessment. The plaintiff has not convinced me that the individual nature of a nuisance cause of action ought not to be respected in this case.

[120] The plaintiffs have also argued that ***MacQueen*** does not stand for the proposition that there can be no class action for nuisance. By way of illustration, they refer to ***Hollick*** where the Supreme Court of Canada recognized that there could be common issues in a nuisance claim, although rejecting certification in that case on the preferability criteria. I do not conclude that the comments of the Supreme Court are directly opposite to the comments of the Nova Scotia Court of Appeal in ***MacQueen***. McLachlin C.J. in ***Hollick*** does not write very much about common issues. She says:

> 18 A more difficult question is whether "the claims ... of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act, 1992*. As I wrote in *Western Canadian Shopping Centres*, 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" (para. 39). 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.
>
> 19 In this case there is no doubt that, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5(1)(c). For any putative class member to prevail individually, he or she would have to show, among other things, that the respondent emitted pollutants into the air. At least this aspect of the liability issue (and perhaps other aspects as well) would be common to all those who have claims against the respondent. ...

[121] There was not the same detailed description of the nature of the nuisance claim in ***Hollick*** as there was in ***MacQueen***. Indeed, the question in ***Hollick*** as to whether the defendant "emitted pollutants into the air" is not analogous to

any issue in this case. It might be analogous to an issue asking whether Manitoba adjusted the water level of Lake Manitoba, but even that is not an issue in this case. Manitoba does not contest that during the spring and summer of 2011, it regulated water levels, including the water levels of Lake Manitoba. The issue in this case is whether the regulation caused damage to every plaintiff in the class.

The cause of action in breach of negligence

[122] What then of the proposed common issues which deal with negligence?

[123] The proposed common issues for negligence are as follows:

> 4. Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the design, construction, management and operation of the water control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam?
>
> 5. Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?
>
> 6. Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the design, construction, management and operation of the water control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam?
>
> 7. Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?

[124] Here arises the gatekeeper function of a certification judge. The proposed common issues described at "4" and "6" in para. 123 above are not fully supported by the evidence before me. They put into question the design and construction of the specified water works and refer to breaches without specifying when they occurred. There must be some assessment of the common

issues which a party purports to advance in relation to the evidence before the court. The Shellmouth Dam was constructed between 1964 and 1972, the Portage Diversion was completed in 1970, and the Fairford Dam was completed in 1961. There is no evidence before me that there is anything wrong with the design of these works nor are there shown to be any construction deficiencies. The broad characterization of proposed issues 4 and 6 appears to me to be simply a catch-all, just in case some information might arise during the course of discoveries, perhaps even inadvertently. Class actions should not become fishing expeditions in the hands of creative lawyers who know how to plead. There should be some evidence laid before the certification court to suggest that a class action plaintiff is not speculating. I would not certify proposed common issues 4 and 6 as written. This case is about flooding that took place in 2011, and whether Manitoba's response to severe weather conditions makes it liable for damages sustained by the plaintiffs. In my view, on the question of negligence, the following common issues would be certifiable:

> Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the management and operation of the water control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam between September 1, 2010 and December 31, 2011?
>
> Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?
>
> Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the management and operation of the water control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam between September 1, 2010 and December 31, 2011?

> Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?

[125] I have used September 1, 2010 as the beginning date to provide for the allegation that Manitoba did not adequately draw water from the Shellmouth Dam during the winter of 2010-2011. The end date of December 31, 2011 fits with the allegations in the Consolidated Statement of Claim.

[126] I might add that I have reviewed the case of ***McLaren v. Stratford (City)***, 2005 CanLII 19801 (Ont. Sup. Ct. Jus.), in coming to this decision on the common issues. There, common issues were found in regard to a claim in negligence against the City of Stratford arising from the flooding of basements after a heavy rainfall. Causation was at issue there, but the court nonetheless proceeded to accept the existence of common issues respecting duty and breach. As I read it, ***McLaren*** was not a case in nuisance. One of the factors that makes negligence different from nuisance is that in negligence, causation is generally a consideration after a court is satisfied that there is a duty and the duty has been breached. However, with the tort of nuisance, the first item on the agenda is whether there has been any damage to or interference with the enjoyment of property. Although causation is a factor in both torts, it is more immediate in the tort of nuisance than it is in negligence, and that has allowed courts to certify class actions in negligence while deferring the issue of causation until duty and breach have been decided.

[127] As I have said, there are common issues in negligence.

The cause of action in breach of treaty

[128] What can be said for the proposed common issue dealing with breach of treaty rights?

[129] The common issue proposed is as follows:

> 8. Did the Defendant, Government of Manitoba, interfere with the treaty rights of the members of the Pinaymootang, Little Saskatchewan, Lake St. Martin, and Dauphin River classes by the flooding and flood control measures which were taken in 2011?

[130] There is an issue as to whether an individual plaintiff has the right to claim on the basis of the breach of a treaty right, presumably on the basis that the flooding somehow constituted a breach of Canada's agreement to "lay aside and reserve for the sole and exclusive use of the Indians inhabiting" the tract of land that was flooded. There are authorities which indicate that provinces are bound by treaties between Canada and First Nations (***Grassy Narrows First Nation v. Ontario (Natural Resources)***, 2014 SCC 48, at paras. 50-51. In addition, there are authorities that suggest that individuals of First Nation bands may in some circumstances enforce a treaty (***Behn v. Moulton Contracting Ltd.***, *supra.*)

[131] I am prepared to conclude that the proposed common issue regarding breach of treaty is a certifiable common issue, subject, of course, to the satisfaction of all other criteria.

The cause of action in breach of fiduciary duty

[132] Given the decision which I have made respecting the non-disclosure of a cause of action of breach of fiduciary duty, I need not address the common issue

criteria for that cause of action, namely nos. 11 and 12 as listed on Appendix A.

The claim for punitive damages

[133] To the extent that I have concluded that causes of action in nuisance, negligence and breach of treaty have been disclosed in the Consolidated Statement of Claim, it is necessary to consider whether punitive damages would generate a common issue in respect of those causes of action. The proposed common issue is: "Does the conduct of the Defendants merit an award of punitive damages?"

[134] General and special damages require individual assessments. The plaintiffs argue that the decision whether to award punitive damages can be made on a universal basis since the factors which would drive such an award would apply equally to all plaintiffs. Punitive damages are not compensatory, but rather are intended to discipline a defendant for conduct which is "high-handed, malicious, arbitrary or highly reprehensible that departs to a marked degree from ordinary standards of decent behaviour." The focus is on the defendants' conduct, not on the individual plaintiff's conduct.

[135] I accept the plaintiffs' argument about the universality of the question regarding punitive damages. However, I am not prepared to say that punitive damages will be a common issue in this case. The evidence indicates that whether or not Manitoba caused the flooding, the spring of 2011 was an unusual year. If any flooding caused by Manitoba was the result of a conscious decision to divert water into Lake Manitoba in order to prevent flooding downstream and

protect a larger population of people, that is hardly the kind of decision which would attract punitive damages. That is the kind of decision which governments are sometimes forced by circumstances to make. No doubt such a decision could well cause suffering by people north and east of the Portage Diversion, but that does not make it a decision which attracts punitive, as distinct from compensatory, damages. Alternatively, if the governments have misestimated the situation in an abnormal flood year, significant leeway would be given for such an error so as to make the notion of punitive damages unrealistic. There is nothing in the evidence before me which supports the notion that I should consider that an award of punitive damages in this case is likely enough to make it a common issue.

Whether a class proceeding is a preferable procedure in respect of the Flooding Claims (s. 4(d))

[136] The assessment on whether a proposed class proceeding is a preferable procedure is to be viewed through the lens of the three goals of a class proceeding, namely judicial economy, access to justice, and behaviour modification. If there are no common issues, then it follows that a class proceeding is not a preferable procedure.

[137] If there are a few common issues, then it is necessary to address whether the common issues are material enough to save time and expense compared to the overall conduct of an individual claim, or whether the saving would be minimal at best. The less substantive the common issues, or the more issues that need to be decided after the common issues have been determined before

an ultimate judgment can be made, the less likely that a class action will be the preferable procedure.

[138] What then are the results of my conclusions reached in respect of the criteria set out in subsections 4(a), (b) and (c) of the *CPA* as they pertain to the Flooding Claims? I have found that the plaintiffs have disclosed within the meaning of subsection (a) causes of action in nuisance, negligence, and breach of treaty. There is an identifiable class of two or more persons. However, I have only identified five common issues, namely:

a) Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the management and operation of the water control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam between September 1, 2010 and December 31, 2011?

b) Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?

c) Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the management and operation of the water control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam between September 1, 2010 and December 31, 2011?

d) Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?

e) Did the Defendant, Government of Manitoba, interfere with the treaty rights of the members of the Pinaymootang, Little Saskatchewan, Lake St. Martin and Dauphin River classes by flooding and flood control measures which were taken in 2011?

[139] These issues do not fully address all of the elements in a negligence or breach of treaty cause of action because they do not involve the issue of causation, i.e. whether any negligent act or breach of a treaty actually caused a

particular member of the class any loss. They also do not address the extent of the damages which might be allowed to a particular claimant, if causation was proved. In addition, they do not address any of the issues that might arise in the cause of action in nuisance.

[140] What then of judicial economy or efficiency in this case? In my view, what is fatal to the certification of this case is the fact that one of the main causes of action is not certifiable. The conventional cause of action for the plaintiffs to advance in a claim of this nature is a claim in nuisance. I have concluded that there is no common issue in this case respecting nuisance within the meaning of the *CPA*. Certifying only parts of other causes of actions in breach of treaty or negligence means that there would still need to be issues in nuisance as well as causation in the certified causes of action to be decided, issues of contributory negligence to be addressed and assessments of damages to be made. In the overall scheme of things a class action which addresses only part of two causes of action does not save much time or expense. A class proceeding that does not encompass all critical causes of action would not normally be a preferable procedure.

[141] In my view, the tort of nuisance may well be the strongest of the causes of actions available to the plaintiffs, and to certify a class action on some of the elements of negligence and breach of treaty does not provide the finality that is necessary for a class action.

[142] Further, I would not be prepared to certify this action even if counsel for the plaintiffs were willing to jettison the allegations of nuisance. Were that done, it would leave a whole group of people who rely on the existence of a class action exposed because a major cause of action has not been pursued.

[143] I acknowledge that failing to certify this action may require the issuance of many statements of claim by each individual member of the class who wished to advance a claim. That is the worst case scenario. Notwithstanding, even in the worst case scenario, the issuance of many statements of claims each containing the name of a different plaintiff and thereafter identical allegations is not a horrendous task in today's world of computers. And it will identify those people who consider that they have a case, at the front end of the process.

[144] I might add that there are ways to avoid the need for issuing several statements of claim. The only reason for doing so promptly would be to satisfy any limitation of actions issues. If the defendants did not wish to be troubled by managing a number of statements of claim at this stage, they could alleviate that administrative hassle by entering into tolling agreements pending the resolution of some representative claims.

[145] To the extent that the issuance of separate claims could result in discordant findings by judges, I say this. A decision in a case will normally have persuasive, if not binding, effect upon a subsequent case involving the same or similar issue. The common issues which I have identified could well be resolved for most class members after one or two cases have been heard. Litigants who

persist in advancing the same or similar positions after successive losses are seldom tolerated in this court. To do so runs the risk of increased orders of costs. That should be enough to dissuade either plaintiffs or defendants from repetitively arguing unsuccessful briefs.

[146] In my view, the best approach for the parties is to take a sample of class members from various locations in each reserve and press on with those cases ahead of the others. Alternatively, after issuing the statements of claim, or after entering into a tolling agreement, the plaintiffs could await the outcome of the actions commenced by their respective First Nation, or could request that representative cases be heard at the same time as the First Nation actions. Or further consideration could be given which would allow the First Nations to carry on with their representative actions, perhaps with some provision for independent representation to address the conflict of interest concerns of the plaintiffs.

[147] If required by the defendants, the issuance of several individual statements of claim does not mean that there needs to be a trial for every case. Case management rules exist to help cases move along in an orderly and efficient manner. I see no reason why representative cases could not be suggested, or even imposed. One example of this occurred in the case of ***John Doe v. Nunavut (Commissioner)***, 2008 NUCJ 13, where the court ordered that the parties identify a number of representative plaintiffs, failing which the court could choose the cases. In that case, the plaintiffs were named in one

statement of claim, a difference which I do not consider material. In this case, decisions rendered on some representative cases would address all of the various issues in the context of particular plaintiffs in particular locations, and even though the judgment may not be binding, they would prove useful in the resolution of the actions of other plaintiffs.

[148] The additional advantage of the process is that it ensures that the judge who deals with such cases has the ability to consider the whole case, from the finding of liability, if any, and if so, to the question of causation, to the assessment of damages, to a determination of contributory negligence and the claims for indemnity. In my view, deciding parts of cases oftentimes requires a court to make a decision in a vacuum. Where possible, judges should be able to make a decision in a case when the whole case is before him or her. Justice is more easily achievable in such circumstances.

[149] The government defendants argued during the certification hearing that the negotiation process underway with the First Nations before the proposed class action was commenced is a preferable procedure within the meaning of s. 4(d) of the *CPA*. I accept that efforts by parties to settle matters outside of a courtroom are to be encouraged.

[150] However, there is a problem with negotiations being classified as an alternative procedure. There is no guarantee that negotiations will yield any result. There is no compensation program in place today which fully meets the concerns of the plaintiffs. There is a compensation program in place which

addresses some of the plaintiffs' concerns (for example personal property loss), but it does not cover full property loss nor does it cover other categories of loss claimed by the plaintiffs. The political commitment of the Minister of Aboriginal Affairs and Northern Development "to pay compensation for losses in addition to those that are eligible under normal disaster financial assistance programs, such as non-essential personal property and income losses", is not of sufficient certainty to permit a court to conclude that the plaintiffs will ultimately be satisfied by the program ultimately provided by Manitoba. The most that could be accomplished in this case from the argument that negotiations are the preferable procedure would be to adjourn this application, but, given the time that has elapsed since 2011, my approach has been to address the issue rather than defer it further. In addition, simply because the defendants are facing a number of actions does not mean that negotiations should come to a halt. In this day and age, it is the rare case which finds its way into a trial without there having been some efforts by the parties to settle. Further, settlements are normally encouraged by a pending trial date.

[151] As to access to justice, the submission made to me by counsel for the plaintiffs was that a dismissal of a certification application will result in many individual claims. I was not told that no claims would be pursued. In my view, counsel are able to seek the authority of numerous claimants to issue claims on their behalf. This may require some additional legwork at the front end of the process, but in my view, is not a major impediment. Indeed, to the extent that

the solicitors who appeared on behalf of the plaintiffs in this action appear to be able to work together with the First Nations in their respective actions suggests to me that there would be more facility than usual for current plaintiff counsel to become counsel for most individual plaintiffs in a number of claims to be filed. In my view, a court should not automatically consider that a dismissal of a certification claim takes away access to justice. In the same way that lawyers in this country have creatively advanced class actions, lawyers can also find ways to represent a stable of individual plaintiffs who might share the costs of the proceedings.

[152] As to behavior modification, I do not consider that to be a major factor in this case. The government defendants have been trying to deal with the complaints of the plaintiffs. There just seems to be an honest difference of opinion as to what kind and level of compensation is appropriate.

[153] The result is that a class proceeding respecting the Flooding Claims is not a preferable procedure.

Whether the plaintiffs are suitable representatives of the class (s. 4(e))

[154] I see no reason to conclude that the suggested individual representatives are not appropriate representative plaintiffs if the action, or any part thereof, is certified.

THE BUSINESS CLAIMS

[155] One of the plaintiffs in this action is Dauphin River Fisheries Company Ltd. It carries on a business of receiving, weighing, and packing fresh fish caught on

Lake Winnipeg by local fishermen. It is located adjacent to, but not on the Dauphin River First Nation Reserve. In this action, it claims both property loss and economic loss as a result of the flooding which took place in the various communities, most importantly, but not exclusively, Dauphin River First Nation. It claims damages against Manitoba pursuant to a cause of action in negligence and in nuisance.

[156] The result on this motion for the Business Claims follows at least in part my analysis on the Flooding Claims. For example, the existence of the cause of action in nuisance applies equally here. There must be an individual assessment of the damage to or interference with property rights for every member of the class. Accordingly, since that is required, that is not conducive to a class action.

[157] The allegation of negligence also suffers from the prospect that some of the damages sustained by some people in the class would be pure economic loss. Some of the losses claimed by the Business Class arise because the plaintiff alleges that it has sustained losses attributable to the effect of the flooding upon the people in the nearby First Nations. For example, a business that sells goods to people in the First Nation would be expected to have decreased revenues if the people in the First Nation have moved away. In the case of Dauphin River Fisheries Company Ltd., it is expected that if members of Dauphin River First Nation, or Lake St. Martin First Nation or little Saskatchewan First Nation are unable to fish, there will be less fish for the company to process and less revenues. These kinds of losses might arise whether or not a particular plaintiff

sustained property damage of its own as a result of the flooding. Dauphin River Fisheries Company Ltd. claims both property damage and economic loss. The suggested class does not require any property loss criteria nor does it limit the economic loss to the property loss sustained.

[158] Manitoba argues that much of the loss sustained by the proposed plaintiff in the Business Claims is pure economic loss which is not compensable at law. It relies upon the case of ***Brooks v. Canadian Pacific Railway Ltd,*** 2007 SKQB 247, 298 Sask.R. 64, which dealt with an application for certification by plaintiffs who were impacted by a train derailment in the city of Estevan in Saskatchewan. Part of the class was intended to include people who were beyond the evacuated area who suffered economic loss. At para. 85 of the decision, the court wrote:

> 85 Here, we have pure economic loss caused by the evacuation order made by City of Estevan officials after the train derailment. The category of persons who suffer economic loss as a result of such an order goes well beyond persons described as plaintiffs in the amended amended statement of claim. An evacuation carries with it, obviously, indeterminate liability. The category of persons who may suffer economic losses is incalculable. The plaintiffs assert that all of the persons who were residents, property owners or lessees of property or employed in the designated area are the persons who suffered losses. But, yet, the plaintiffs also suggest, in their written argument, that the category of plaintiffs who can claim economic loss should be expanded to persons beyond the evacuated area. This suggestion illustrates the obvious problem of indeterminate liability. It is obvious that economic loss may have been suffered by many persons beyond the proposed plaintiffs. Loss may have been suffered by suppliers of evacuated businesses. Loss may have been suffered by consumers who did not reside in the evacuated area, but who frequented the evacuated businesses, and who had to purchase goods elsewhere or spend money travelling a greater distance to do so. Loss may have been suffered by people who had to reroute their normal travel at a cost. Loss may have been suffered by family members or friends of evacuated persons who assisted evacuees, etc.

[159] One of the rationales for the doctrine of pure economic loss is that there should be some limit on how far a duty of care extends. A duty of care does not exist to an indeterminate number of people. The common law therefore avoids such a result, except in certain circumstances, by saying that no duty arises to people who have sustained only economic loss from damage sustained by third parties.

[160] Manitoba has argued that the existence of the notion of pure economic loss affects the existence of a cause of action. That may be, but I would prefer in this case to deal with this issue on the question whether there are common issues.

[161] The plaintiffs have countered the concept of indeterminate liability by attempting to restrict the size of class, namely by geographical proximity to the First Nation and to the proportionate amount of business done with members of the First Nation. In its reply brief, counsel for the plaintiffs proposes the following:

> **"Business Class"**: All persons situate and carrying on business
> (i) Whose property, real or personal, was flooded or damaged by the flood in 2011; or,
> (ii) Whose customers or suppliers were members of the Pinaymootang, Little Saskatchewan, Lake St. Martin, or Dauphin River First Nations and those members constituted a minimum of 50% of the revenues generated or expenses incurred for supplies in the calendar year 2010; and,
> (iii) For either (i) or (ii), whose businesses or property, real or personal, was situate and operated in the Interlake Region of Manitoba within 30 kilometres of any of those First Nations.

[162] The common issues proposed by the plaintiffs for the Business Claims are the same as were proposed for the Flooding Claims. For the same reasons

which I expressed in my analysis of the Flooding Claims, the Business Claims would not also be certifiable. In addition, however, the Business Claims have the pure economic loss hurdle to overcome. I am not prepared to say at this stage on the record before me that there is no arguable cause of action by Dauphin Fisheries Company Ltd. to advance a claim for lost income. However, I am also not prepared to say that a geographical proximity of 30 km or less, or a particular proportion of revenues makes a duty arise to a particular business claimant. I do say that it is arguable that no such duty exists at all and it is also arguable that depending upon the proximity and interaction of the business with a particular community as well as other factors, that a duty might arise. However, that requires an assessment of each business and the assessment of the duty and, therefore, cannot be subject of a common issue.

[163] The individualistic nature of the Business Claims results in a class action not being a preferable procedure.

[164] I am not prepared to certify the Business Claims.

THE EVACUATION CLAIMS

[165] The plaintiffs claim that there is an independent cause of action in respect of the provision of evacuation services and post-flood care. This is a cause of action independent of a heading of damage which would exist if the plaintiffs were successful in establishing that Manitoba caused the flooding. This portion of the claim should therefore be analyzed as if Manitoba has not been found

liable for the flooding. It brings into question the potential exposure of governments and others in the event of a natural disaster.

Whether the pleadings disclose a cause of action (s. 4(a))

[166] Although there is some confusion on the part of Manitoba, Canada, and MANFF as to their respective involvement in the provision of evacuation services and post-flood care, there is a consensus amongst them that there is no duty owed by any of them to the plaintiffs in such circumstances. This argument is made in the context of the criteria as to whether the pleadings disclose a cause of action.

[167] This requires an examination into whether there is a duty on either government or MANFF to care for flood victims, or whether services that are provided are simply voluntarily provided by the government to those in need. If the government is simply a volunteer, does the assumption of that task carry with it an assumption of risk of liability if the task is not carried out appropriately?

With regard to Manitoba

[168] The allegations of breach of fiduciary duty against Manitoba that are contained in the Consolidated Statement of Claim are tied to a finding that Manitoba caused the flooding and, therefore, need not be considered here. They were dealt with when I considered the Flooding Claims. This portion of my reasons deals with a situation where Manitoba is alleged to have been negligent in circumstances where it did not cause the flooding. Although not entirely

clearly, the plaintiffs allege that in such circumstances, Manitoba had a duty to provide evacuation services and post-flood care, and Manitoba breached that duty.

[169] Manitoba essentially asks: Where in the law does such a duty arise? Manitoba submits that there is no overarching duty to provide post-flood care. I agree. As harsh as it may seem, absent appropriate legislation, governments are not obliged to provide catastrophe assistance to its citizens. No doubt, governments do. But is there any reason for so doing, apart from the notion that it may be the moral thing to do when people become victims of a natural disaster?

[170] In Manitoba, the *EMA* provides for disaster assistance. That statute delegates responsibilities for the administration of emergencies, including who it is that makes evacuation decisions, references the need and development of emergency preparation plans, and provides powers to government officials so that they can act effectively during periods of emergency. Part IV of the *EMA* addresses disaster assistance and authorizes the Emergency Measures Organization to administer disaster assistance programs approved by the Lieutenant Governor in Council. There is then a procedure set in place for the level of compensation which is provided to disaster victims, including the right of an appeal to the Disaster Financial Assistance Appeal Board.

[171] Nowhere in the Consolidated Statement of Claim is there any reference to the *EMA*. There are simply allegations that the plaintiffs were evacuated and

received inadequate care. In my respectful opinion, the Consolidated Statement of Claim does not plead sufficient facts in order to establish a cause of action against Manitoba for post-flood care in the absence of any finding that Manitoba caused the flooding that necessitated the evacuation.

[172] The government in times of natural disaster is a volunteer, or put another way, a rescuer. The plaintiffs have not provided any authority to support the notion that in a catastrophe, the government has a legal duty to arrange for evacuation and provide post-disaster care. The case cited by the plaintiffs to support the notion that a government has a duty to repair a mistake, namely, ***Grant v. Canada (Attorney General)*** (2005), O.R. (3d) 481 (Ont. Sup. Ct. Jus.) does not support the existence of a private law duty on the part of the government to provide disaster assistance. That case dealt with a claim by aboriginal plaintiffs against Canada alleging that Canada had built substandard housing for a First Nation when their community was relocated. That case does not address any duty of a government to provide care following a natural disaster.

[173] Further, even if it could be assumed that Manitoba provided the evacuation orders ambiguously described by the plaintiffs in their pleading, the *EMA* specifies the relief contemplated by the legislation. And, if the plaintiffs are dissatisfied that they did not get the relief contemplated by the disaster assistance program then they have an appeal to the Disaster Financial Assistance Appeal Board. If, however, they complain that they did not receive

compensation which they may feel reasonable but which is not contemplated by the disaster relief program, there is no remedy for them. Again, that is because absent the *EMA*, the government has no duty to provide disaster assistance to its citizens.

[174] Indeed, this is reinforced by the legislation itself. In the *EMA*, s. 16.1(2) reads as follows:

> **Disaster assistance is gratuitous**
> 16.1(2) Any disaster assistance granted under this Act is gratuitous and, subject to subsection 17(6), is not subject to appeal or review in any court of law.

[175] In other words, the government confirms what I understand the common law to be – that in a no-fault situation, governments do not have a duty to provide disaster relief, and the fact that they do provide some relief ought not to be construed that such a common law duty exists.

[176] Absent a question of fault, it is my opinion that no cause of action lies against Manitoba for disaster relief, including in this case evacuation services and post-flood care. If there is a question of fault, then the level of care provided becomes an issue in the assessment of damages that flows from the finding of liability.

[177] In this case, the complaints which are made are outlined at para. 24 of the Consolidated Statement of Claim which reads:

> 24. The Plaintiffs state that since the evacuation and displacement of the members of the Plaintiff Classes, the Defendant, Manitoba, has breached the duty of care owed; in particular,

a. Manitoba failed to remediate and replace damaged homes in a timely manner so as to allow the Plaintiffs to return to their Reserves;

b. Manitoba has failed to provide reasonable or adequate long-term housing/accommodation for those evacuated or displaced who cannot return to their homes on Reserve;

c. Manitoba has failed to provide timely, adequate or any assistance with respect to medical care and/or schooling; and,

d. Manitoba has failed to provide adequate assistance for those members of the Classes affected by the flood.

[178] The claim does not allege that the plaintiffs were "damaged" by the efforts of the Manitoba. Rather, the complaints are that the services rendered were either inadequate or non-existent. If there was no requirement to provide assistance, there cannot be a cause of action in which the extent of assistance is put in issue. Further, if with regard to Manitoba there was a requirement to provide assistance, its duty was to provide assistance only in accordance with the authorized programs under the *EMA*. In the latter case, there is an appeal procedure for the plaintiffs.

[179] Manitoba goes even further. It submits that even if Manitoba did arrange the evacuations in this case (and that is not supported by any evidence that I have seen) s.18(1) of the *EMA* becomes applicable. It reads:

> 18(1) No action or proceeding may be brought against any person acting under the authority of this Act, including a member of an assisting force, for anything done, or not done, or for any neglect
> (a) in the performance or intended performance of a duty under this Act; or
> (b) in the exercise or intended exercise of a power under this Act;
> unless the person was acting in bad faith.

[180] There is no bad faith alleged in this Consolidated Statement of Claim. This section would provide protection to Manitoba in respect of the allegations in the Consolidated Statement of Claim, where the cause of action is in negligence.

[181] The Consolidated Statement of Claim discloses no cause of action against Manitoba in negligence in respect of the Evacuation Claims.

With regard to Canada

The claim in negligence

[182] The plaintiffs bring the Evacuation Claims against Canada under causes of action in negligence and breach of fiduciary duty. With regard to negligence, Canada makes the same argument as Manitoba, but in slightly different language. It argues that any relief program which it might provide is a question of policy which does not invite private law liability. Although Canada does not have the limitation of liability provision in a federal statute, its liability would have to be based upon the existence of a duty to provide catastrophe disaster assistance. I have concluded that there is no overarching duty on the part of governments to provide that relief, unless there is legislation which provides for it. The Consolidated Statement of Claim contains no provisions which identify any such legislation and under the circumstances there are insufficient facts pleaded which disclose a reasonable cause of action in negligence against Canada for the Evacuation Claims.

The claim in breach of fiduciary duty

[183] Canada has the further task of meeting allegations of breach of fiduciary duty.

[184] The allegations of breach of fiduciary duty by Canada are set out in paras. 37-42 of the statement of claim. They are:

> 37. The sudden evacuation of the four Reserves displaced the Plaintiffs from their homes and deprived the Plaintiffs of the exercise of their treaty rights, including, most particularly, their use and occupation of those lands on the Reserve on which they resided and of which they were in lawful possession.
>
> 38. The plaintiffs state that as a consequence of the flood caused by the Defendant, Manitoba, the Defendant, Canada, unilaterally undertook with the assistance of the Defendant, MANFF, to evacuate the Plaintiffs from their homes and Reserves and thereafter, to provide for their accommodation, care and welfare pending the Plaintiffs' return to their homes and Reserves.
>
> 39. Many of the Plaintiffs removed from their homes and evacuated from their Reserves are poor, elderly, minors and/or in poor health, and by virtue of their loss of homes and personal belongings were and remain vulnerable.
>
> 40. The Defendant, Canada, unilaterally undertook to provide for the housing, care and welfare of the Plaintiffs. Canada did so as a consequence of its historic role and relationship with First Nations peoples and its fiduciary responsibilities for First Nation Reserve lands.
>
> 41. The Defendant, Canada, entered into contracts and/or contribution arrangements with the Defendant, MANFF, to evacuate and thereafter provide for the accommodation and care of the Plaintiffs pending their return to their homes and Reserves.
>
> 42. The Plaintiffs state that Canada breached its fiduciary obligations owed to the Plaintiffs. In particular, Canada has failed:
>
> a. To provide adequate accommodations;
>
> b. To provide adequate and timely medical care;
>
> c. To assist and provide schooling for children who were unable to continue with their education at their schools on or near their Reserve;

d. To provide appropriate and adequate recreational facilities;

e. To provide a reasonable allowance for clothing given that most of their possessions were destroyed or contaminated through the flood;

f. To provide transportation;

g. To meet their dietary needs;

h. To meet their cultural and religious needs;

i. To properly supervise MANFF in the discharge of its responsibilities and mandate; and,

j. To act upon complaints made with respect to the performance or lack of performance by MANFF.

[185] Canada takes the position that there is no cause of action demonstrated for breach of fiduciary duty. Earlier in these reasons (paras. 87-88) I set forth the requirements that must exist for a fiduciary duty in a non-traditional fiduciary relationship. (***Alberta v. Elder Advocates of Alberta Society***, *supra*). The ***Elder Advocates*** case generally sets forth the factors which should be considered to ascertain if any fiduciary duty arises.

[186] Does the fact that the plaintiffs in this case are aboriginal present a special circumstance involving a recognized fiduciary relationship which would cause a fiduciary duty to arise? Canada submits not, and I agree. The application of fiduciary law to aboriginal peoples began with the case of ***Guerin v. The Queen***, [1984] 2 S.C.R. 335, in which the court held that the Crown was under a fiduciary duty in the management of Indian lands for their benefit. Historically, that started a trend in aboriginal cases where lawyers regularly pleaded breach of fiduciary duty in a wide range of circumstances. Courts found

fiduciary duties in some cases, but the Supreme Court of Canada more latterly has sent signals that a cause of action in breach of fiduciary duty is not a "cure-all" for every case in which aboriginal people are parties. This was stated by Binnie J. in ***Wewaykum Indian Band v. Canada***, 2002 SCC 79, [2002] 4 S.C.R. 245, at paras. 81-83, excerpts of which are:

> 81 But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. Land was also the subject matter of *Ross River* ("the lands occupied by the Band"), *Blueberry River* and *Guerin* (disposition of existing reserves). Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*.
>
> 82 Since *Guerin*, Canadian courts have experienced a flood of "fiduciary duty" claims by Indian bands across a whole spectrum of possible complaints, for example:
>
> > (i) to structure elections (*Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band*, [1997] 1 F.C. 689 (C.A.), at para. 60; subsequently dealt with in this Court on other grounds);
> > (ii) to require the provision of social services (*Southeast Child & Family Services v. Canada (Attorney General)*, [1997] 9 W.W.R. 236 (Man. Q.B.));
> > (iii) to rewrite negotiated provisions (*B.C. Native Women's Society v. Canada*, [2000] 1 F.C. 304 (T.D.));
> > (iv) to cover moving expenses (*Paul v. Kingsclear Indian Band* (1997), 137 F.T.R. 275; *Mentuck v. Canada*, [1986] 3 F.C. 249 (T.D.); *Deer v. Mohawk Council of Kahnawake*, [1991] 2 F.C. 18 (T.D.));
> > (v) to suppress public access to information about band affairs (*Chippewas of the Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)* (1996), 116 F.T.R. 37, aff'd (1999), 251 N.R. 220 (F.C.A.); *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*, [1989] 1 F.C. 143 (T.D.); *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997), 132 F.T.R. 106);

> (vi) to require legal aid funding (*Ominayak v. Canada (Minister of Indian Affairs and Northern Development)*, [1987] 3 F.C. 174 (T.D.));
> (vii) to compel registration of individuals under the *Indian Act* (rejected in *Tuplin v. Canada (Indian and Northern Affairs)* (2001), 207 Nfld. & P.E.I.R. 292 (P.E.I.S.C.T.D.));
> (viii) to invalidate a consent signed by an Indian mother to the adoption of her child (rejected in *G. (A.P.) v. A. (K.H.)* (1994), 120 D.L.R. (4th) 511 (Alta. Q.B.)).

83 I offer no comment about the correctness of the disposition of these particular cases on the facts, none of which are before us for decision, but I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals, supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

84 I note, for example, what was said by Rothstein J.A. in *Chippewas of the Nawash First Nation v. Canada (Minister of Indian and Northern Affairs), supra*, at para. 6:

> The second argument is that the Government of Canada has a fiduciary duty to the appellants not to disclose the information in question because some of it relates to Indian land. We are not dealing here with the [page289] surrender of reserve land, as was the case in *Guerin v. Canada*. Nor are we dealing with Aboriginal rights under s. 35 of the *Constitution Act, 1982*. This case is about whether certain information submitted to the government by the appellants should be disclosed under the *Access to Information Act*. [Emphasis added.]

See also *Lac La Ronge Indian Band v. Canada* (2001), 206 D.L.R. (4th) 638 (Sask. C.A.); *Cree Regional Authority v. Robinson*, [1991] 4 C.N.L.R. 84 (F.C.T.D.); *Tsawwassen Indian Band v. Canada (Minister of Finance)* (1998), 145 F.T.R. 1; *Westbank First Nation v. British Columbia* (2000), 191 D.L.R. (4th) 180 (B.C.S.C).

85 I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty", as discussed below.

[187] ***Wewaykum*** was followed by both the majority and the minority in the case of ***Manitoba Metis Federation Inc. v. Canada (Attorney General)***, 2013 SCC 14, 2013 1 S.C.R. 623. Writing for the majority, McLachlin C.J. and Karakatsanis J. said at para. 49:

> 49 In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.

[188] In short, a fiduciary duty does not arise in every interaction between Canada and aboriginal peoples. There needs to be a cognizable Indian interest and an undertaking by the Crown of discretionary control in relation thereto in a way that invokes responsibility in the nature of a private law duty.

[189] If the case at bar is a case which is said to arise from the presence of a historical fiduciary relationship between the Crown and aboriginals, is there a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty" (***Wewaykum***, at para. 85)? In my view it is plain and obvious that there is not. This is a case which deals with the efforts of Canada to provide a form of disaster relief. There is no special Indian interest in that respect. Every person in Canada, aboriginal or otherwise, would have the same interest in this subject. There is no dealing by Canada of a particular Indian interest over which Canada had exclusive and discretionary control. There is simply no foundation in

the pleading which would ground a fiduciary duty based on a plaintiff's aboriginal status.

[190] Alternatively, if this is a case where the fiduciary duty arises out of unrecognized relationships as described in the ***Elder Advocates*** case, does it meet the criteria set out therein? I have found it does not with regard to Manitoba earlier in these reasons and conclude the same here. There are no facts pleaded to support the bald assertion of an undertaking, but even more, there is no mention of the "legal or substantial practical interest of the beneficiary or beneficiaries [plaintiffs] that stands to be adversely affected by the alleged fiduciary's [Canada's] exercise of discretion or control." There is nothing in the statement of claim that suggests the provision of evacuation services and post-flood care by Canada was anything beyond the political or policy decision of a government program to help a segment of its citizens who were impacted by a flood. Simply because a government attempts to provide some disaster assistance, whether it be by providing funding, or by taking a more active role, does not make the government a fiduciary to the people requiring that assistance, nor does it create a fiduciary duty on the part of the government to achieve a particular level of assistance.

[191] In my view it is plain and obvious that no cause of action in breach of fiduciary duty in regard to the Evacuation Claims is disclosed in the Consolidated Statement of Claim.

With regard to MANFF

[192] What then of MANFF? The statement of claim alleges that MANFF is a not-for-profit company which contracted with and/or received funding from Canada and/or Manitoba to evacuate and thereafter provide for the accommodation and welfare of the plaintiffs. It then goes on to allege that as a result, MANFF owed a duty of care to the plaintiffs.

[193] The plaintiffs do not allege that they have any kind of a contractual relationship with MANFF. Indeed, the facts pleaded point to MANFF acting under some contractual or other relationship with either or both of the two government defendants. MANFF argues that since there is no contractual relationship with the plaintiffs, no duty of care could therefore arise to them in negligence. They cite the case of ***London Drugs Ltd. v. Kuehne & Nagel International Ltd.***, [1992] 3 S.C.R. 299, as supporting that principle. I do not agree. The ***London Drugs*** case involved the issue as to whether employees could benefit from a limitation of liability clause in a contract between their employer and a third party. That is a different situation. Here the plaintiffs do not claim to be contracting parties with the two governments, or even if they were, there is no contract with a limitation of liability clause and it is not alleged that MANFF is an employee of the governments. Further, even if there was a relationship between the governments and MANFF which triggered vicarious liability on the part of the governments, the majority in the ***London Drugs*** case had no difficulty

concluding that an employee could have a duty of care in tort to the customers of the employer.

[194] Some argument could be mustered to say that if there is no duty on the part of the governments to provide disaster assistance, then there can be no duty from MANFF. That to me is not certain. I am of the view that it is equally arguable that even though the governments had no duty to provide disaster assistance beyond the *EMA*, to the extent that they volunteered to do so and retained MANFF to assist, a duty by MANFF towards the recipients of such services in negligence could arise. The well-being of the recipients would certainly be foreseeable to MANFF when it performed its contractual services for the governments. Otherwise, there would be no means of legally requiring MANFF to properly perform the services which it had undertaken to perform. The governments could not recover a judgment for damages because they sustained no damage – only the people for whom the services were rendered (to whom the governments owed no duty) are the people who sustained any damage. There certainly is an arguable cause of action against MANFF. I am not prepared to say that it is plain and obvious that there is no cause of action disclosed in the Consolidated Statement of Claim against MANFF in negligence.

[195] Therefore regarding s. 4(a) of the *CPA* in relation to the Evacuation Claims, there is no cause of action in negligence and/or breach of fiduciary duty disclosed in the Consolidated Statement of Claim against either Manitoba or Canada. There is a cause of action in negligence disclosed against MANFF.

Whether there is an identifiable class of two or more persons (s. 4(b))

***and* Whether the plaintiffs are suitable representatives for the Class (s. 4(e))**

[196] I see no reason to change the conclusions which I came to when I considered the Flooding Claims.

Whether the claims of the class members in the Evacuation Claims raise a common issue (s. 4(c))

[197] The common issues sought to be certified in respect of the Evacuation Claims are:

> 9. Upon evacuation and removal of members of the Pinaymootang, Little Saskatchewan, Lake St. Martin and Dauphin River First Nation from their Reserves, did the Defendants owe a duty of care to the Plaintiffs with respect to their care and well-being while displaced from their homes on Reserve?
>
> 10. Did the Defendants breach their breach the [sic] duty of care owed to the Plaintiffs with respect to their care and well-being while displaced from their homes on Reserve?
>
> 11. Upon evacuation and removal of members of the Pinaymootang, Little Saskatchewan, Lake St. Martin and Dauphin River First Nation from their Reserves, did the Defendants owe fiduciary obligations to those Plaintiffs?
>
> 12. Did the Defendants breach their fiduciary obligations to the Plaintiffs upon their evacuation and removal from the Reserves?
>
> 13. Does the conduct of the Defendants merit an award of punitive damages?

[198] I need not consider these criteria with regard to Manitoba and Canada, given my decision that no cause of action in negligence or breach of fiduciary duty was disclosed in the Consolidated Statement of Claim. However, proposed common issues nos. 9, 10 and 13 still need to be considered with regard to MANFF.

[199] There is no need to address proposed common issues nos. 11 and 12, because there is no claim for breach of fiduciary duty against MANFF.

[200] In my view, proposed common issues nos. 9 and 10 would be difficult to assess without looking at the circumstances of each member of the class.

[201] In assessing whether a common issue exists, a court is able to look at evidence. The affidavits filed by the plaintiffs and their cross-examinations demonstrate the uniqueness of these claims. A review of some of the court materials illustrates this.

[202] For example, in the case of Clifford Anderson, that when he was evacuated and left his house, because he belonged to the Pinaymootang Fire Department, he could not move far and lived in a trailer which he purchased. He complains that the province would not help him purchase or rent the trailer. He then went to live in a house provided by his niece until his new house was ready.

[203] For example, in the case of Bertha Travers of the Little Saskatchewan First Nation, she went to Winnipeg where she lived with her son, his wife and their four children. She then went to live in a hotel until December 2011 after which time she went to Gimli and then to Selkirk. Priscilla Anderson lived at the Greenwood Inn, an Express Hotel, Canad Inns, and then obtained duplex accommodations. Lillian Travers, when evacuated, went to the Marlborough Hotel, then to a Delta Hotel, and then moved into an apartment. Mary Stagg of the Dauphin River reserve stayed in a hotel in Winnipeg for one year and then

moved into a suite in Mainstay Suites. There are different evacuation days and times.

[204] The long and the short of it is that there would be close to as many different circumstances as there were people who were evacuated, and there would be a number of different complaints, assuming that everyone had a complaint. The duty of care could well vary from circumstance to circumstance as well as the manner in which it was breached, or if so, how it impacted on various class members.

[205] This is more than just an assessment of damage left to be done at the end of the trial of the common issues.

[206] Because of the individual nature of these claims, I do not consider that issues nos. 9 and 10 are common issues in this case. In addition, there is little evidentiary support to suggest that issue no. 13, i.e. whether punitive damages should be assessed, is a realistic claim in this case.

Whether a class action for the Evacuation Claims is a preferable procedure (s. 4(d))

[207] Here again, due to the individual nature of these claims, a class action is not a preferable procedure.

[208] Additionally, since I have not certified a class proceeding against the government defendants, to do so against MANFF alone would only create further complication in the ultimate realization of the plaintiffs' claims. MANFF is not the prime target of the plaintiffs. The target is one or both of the government defendants. MANFF is a not-for-profit corporation. To expect that certifying a

class proceeding against MANFF would result in the plaintiffs' discontinuance of their claims against the two governments would be naïve. Rather, I would anticipate actions against the two governments to continue as well as a separate action against MANFF. That is not an efficient process.

[209] The better course would be to decline to certify the action against MANFF and encourage the plaintiffs, if they feel strongly about their position, to try and obtain decisions in representative individual cases at the same time as the same is done in the Flooding Claims, and then use those decisions to try and solve the rest of the cases, if possible. I do acknowledge that because of the wide variety of individual elements in the post-flood care, obtaining direction from decided cases which advance Evacuation Claims may be more difficult than obtaining direction from representative cases in the Flooding Claims. However, it is simply not preferable to certify the Evacuation Claims against MANFF.

5.0 CONCLUSION

[210] The result of my analysis is as follows:

(a) With respect to the Flooding Claims against Manitoba, I have concluded that there is no cause of action disclosed in breach of fiduciary duty, and the only common issues that do exist relate to causes of action in negligence and breach of treaty. I have also concluded that the lack of any common issue respecting nuisance as well as the individualistic nature of each of the claims prevent a class proceeding from being a preferable procedure.

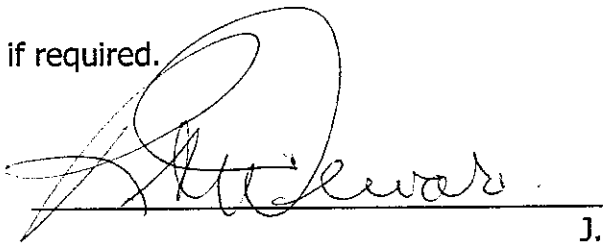
(b) With respect to the Business Claims against Manitoba, I have concluded that a class action is not a preferable procedure.

(c) With respect to the Evacuation Claims, I have concluded that no cause of action exists against Manitoba and Canada, and the issues against MANFF are too individualistic to make a class proceeding a preferable proceeding.

[211] I have tried to assess the claims which have been made with reference to the criteria outlined in s. 4 of the *CPA*. Although the authorities have indicated that the *CPA* should be given a wide and remedial interpretation, that does not mean that a certification judge is free to do anything. The legislation requires certain criteria to be met. If they are not, then a proposed class proceeding ought not to be certified. The criteria are there so that proposed class actions are not just rubber stamps. There are reasons for the criteria. They are intended to be a balance between plaintiffs who wish to mount a global attack on an institutional defendant and the right of such a defendant to fairly defend itself.

[212] I recognize that a number of people in Manitoba around and downstream of Lake Manitoba, including the peoples in the four First Nations described in this case, have been severely impacted by the 2011 flood. However, class proceedings are not the panacea for every situation in which a number of plaintiffs, even in similar circumstances, fairly seek a remedy.

[213] Having reached the conclusion that for the Flooding Claims, the Business Claims and the Evacuation Claims, the plaintiffs have not proven that all of the criteria under s. 4 of the *CPA* have been satisfied, the application of the plaintiffs is dismissed. Costs may be addressed if required.



J.

APPENDIX A

1. Did the Defendant, Government of Manitoba, by its actions cause flooding to occur on the Pinaymootang (Fairford), Little Saskatchewan, Lake St. Martin and Dauphin River Reserves?

    a. If the answer to common issue #1 is yes, where on each of the four Reserves did flooding occur as a result of the Defendant's conduct?

    b. To what extent did the actions or omissions of Canada and Third Parties cause or contribute to the flooding of those lands?

2. Did the Defendant, Government of Manitoba, substantially interfere with the use and enjoyment of land occupied by the Plaintiffs?

3. If the answer to issues 1 and/or 2 is "yes", was the flooding or interference unreasonable?

4. Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the design, construction, management and operation of the water control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam?

5. Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?

6. Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the design, construction, management and operation of the water control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam?

7. Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?

8. Did the Defendant, Government of Manitoba, interfere with the treaty rights of the members of the Pinaymootang, Little Saskatchewan, Lake St. Martin and Dauphin River classes by the flooding and flood control measures which were taken in 2011?

9. Upon evacuation and removal of members of the Pinaymootang, Little Saskatchewan, Lake St. Martin and Dauphin River First Nation from their Reserves, did the Defendants owe a duty of care to the Plaintiffs with respect to their care and well-being while displaced from their homes on Reserve?

10. Did the Defendants breach their breach [sic] the duty of care owed to the Plaintiffs with respect to their care and well-being while displaced from their homes on Reserve?

11. Upon evacuation and removal of members of the Pinaymootang, Little Saskatchewan, Lake St. Martin and Dauphin River First Nation from their Reserves, did the Defendants owe fiduciary obligations to those Plaintiffs?

12. Did the Defendants breach their fiduciary obligations to the Plaintiffs upon their evacuation and removal from the Reserves?

13. Does the conduct of the Defendants merit an award of punitive damages?