IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

CLIFFORD J. ANDERSON, KURVIS ANDERSON, BERTHA TRAVERS, PRISCILLA ANDERSON, LILLIAN TRAVERSE, MATHEW TRAVERSE, MELLONEY FRANCOIS, MARY STAGG, NORMAN STAGG, DAUPHIN RIVER FISHERIES COMPANY LTD.	)	***M. J. Peerless*** *and* ***J. A. Troniak*** *for the Appellants*
(Plaintiffs) Appellants	)	***W. G. McFetridge*** *and* ***J. R. Koch*** *for the Respondent, The Government of Manitoba*
- and -	)	***C. D. Clark*** *for the Respondent, The Attorney General for Canada*
THE GOVERNMENT OF MANITOBA, THE ATTORNEY GENERAL FOR CANADA and THE MANITOBA ASSOCIATION OF NATIVE FIREFIGHTERS INC.	)	***A. W. Marshall*** *and* ***I. B. Scarth*** *for the Respondent, The Manitoba Association of Native Firefighters Inc.*
(Defendants) Respondents	)	***M. T. Gerstein*** *on a watching brief for the Third Party, Pinaymootang First Nation*
- and -	)	
DAUPHIN RIVER FIRST NATION, LAKE ST. MARTIN FIRST NATION, LITTLE SASKATCHEWAN FIRST NATION and PINAYMOOTANG FIRST NATION	)	*Chambers motion heard:* ***June 4, 2015***
	)	*Decision pronounced:* ***December 31, 2015***
(Third Parties)	)	

STEEL JA

Introduction

[1] This is a motion seeking leave to appeal the decision of the certification judge refusing to certify a class action. The main action concerns extensive flooding that took place in the spring of 2011 on the Pinaymootang (Fairford), Little Saskatchewan, Lake St. Martin and Dauphin River First Nations in Manitoba (the Four First Nations).

Background

[2] As the certification judge indicated in his reasons for decision, the issues that arise in this case are "plentiful and thorny" (2014 MBQB 255 at para 39, 312 ManR (2d) 259). In these reasons, I have attempted to focus only on the issues relevant for the purposes of the leave application. A complete recital of the facts and history of this case are contained in the reasons of the certification judge.

[3] In the spring of 2011, the Four First Nations suffered widespread flooding, which resulted in damage to property and the evacuation of many people from their homes on the reserves. In the cases of Lake St. Martin and Little Saskatchewan First Nations, the complete evacuation of those communities was necessary. Evacuees were relocated to temporary housing in Winnipeg and other communities. Many continue to be displaced even today.

[4] The plaintiffs are members of those Four First Nations, who seek leave to appeal the dismissal of their application to certify a class action in relation to that flooding.

[5] They allege that the Government of Manitoba (Manitoba) caused the flooding through its operation of flood control measures in the spring and summer of 2011, which led to the flooding of the reserves which, in turn, ended up causing damage to the homes and personal property of hundreds of reserve members as well as the displacement of many members from the reserves. 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 Four First Nations. In particular, the plaintiffs point to the operation of the Shellmouth Dam, the Portage Diversion and the Fairford Dam.

[6] The plaintiffs sued Manitoba in nuisance, negligence, breach of treaty and breach of fiduciary duty. Furthermore, they brought a claim for punitive damages against Manitoba, as well as claims in nuisance and negligence in relation to economic loss suffered by nearby businesses that relied upon commerce with evacuated members of the Four First Nations.

[7] The plaintiffs also alleged that their post-evacuation care and treatment fell below acceptable standards and sued Manitoba, Canada and the Manitoba Association of Native Firefighters Inc. (MANFF) for negligence. They alleged that 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. The plaintiffs also alleged breach of fiduciary duty on the part of both Manitoba and Canada.

[8] With respect to Canada, 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 to provide for their accommodation, care and welfare pending their return to their homes and reserves. The failure of Canada to provide a suitable level of post-evacuation care constituted a breach of fiduciary duty. As well, 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.

[9] Manitoba raises many defences to these claims but, most relevant to this leave to appeal motion, it denied that it caused the flooding. It submits that the flooding in 2011 was the product of natural conditions. Alternatively, Manitoba argued that, even if their operation of the water control works caused or contributed to the flooding, it has statutory responsibilities to operate water control works as is necessary or expedient in the public interest, and policy decisions of this nature are immune from civil liability.

[10] Canada submitted that it owed no private duty of care to the plaintiffs nor does a fiduciary duty arise in these circumstances. It was a mere volunteer. With respect to the acts of MANFF, Canada indicated it has no relationship with MANFF from which vicarious liability would arise.

[11] MANFF defended on the basis that it acted pursuant to directions of Canada and Manitoba, and that it provided good services to the plaintiffs.

Decision of the Certification Judge

[12] The certification judge declined to certify a class action in

this matter.

[13] With respect to the claims against Manitoba, he held that, while there were reasonable causes of action in nuisance, negligence and breach of treaty rights, there was no reasonable cause of action disclosed with respect to a breach of fiduciary duty, nor regarding punitive damages, nor regarding the independent post-evacuation care claims in negligence.

[14] He held that there were common issues with respect to negligence against Manitoba, those being whether Manitoba owed the plaintiffs a duty of care and whether Manitoba breached that duty, as well as with respect to breach of treaty. However, he did not find any common issues with respect to nuisance, nor did he find common issues with respect to the business claims against Manitoba.

[15] He concluded that, because there were common issues only with respect to negligence and breach of treaty, and not with respect to nuisance, a class action was not the preferable procedure with respect to the claims against Manitoba.

[16] In regard to the claims against Canada, the certification judge determined that there was no reasonable cause of action against Canada in negligence, as there was no legal duty on Canada to provide disaster relief. He also determined that there was no reasonable cause of action against Canada for breach of fiduciary duty, as there was no cognizable Indian interest involved.

[17] With respect to the negligence claim against MANFF, the certification judge held that, although there was an arguable cause of action

that MANFF owed a duty of care to the reserve members, there were no common issues, as the issues of duty of care and whether that duty was breached would require individual assessment.

Grounds of Appeal

[18] The grounds of appeal were clarified by counsel in their motion brief and during argument at the hearing of the motion for leave to appeal.

[19] The plaintiffs' motion brief makes no mention of any error with respect to the certification judge's decision regarding punitive damages.

[20] During the hearing, plaintiffs' counsel indicated that the plaintiffs were no longer pursuing breach of fiduciary duty as a separate cause of action against Manitoba. As well, counsel clarified that the claim for post-evacuation care against Manitoba arose as a result of consequential loss in a successful negligence, nuisance or breach of treaty action.

[21] There were also certain concerns regarding the class definitions, particularly with respect to claims by the business class and estate claims. The defendants submit that the proposed class definitions require amendment and the plaintiffs acknowledge that it is certainly not uncommon that the class definition is "fine-tuned" at the certification motion. In fact, in their reply brief, the plaintiffs proposed an alternate business class definition for consideration. With respect to estate claims, they do not identify any error of law made by the certification judge.

[22] A leave application is not the place for this Court to consider alternate proposals. I am focussed only on whether there is an arguable case

of importance that the certification judge erred on a question of law.

Test for Leave to Appeal Certification Decision

[23] In Manitoba, leave is required to appeal an order certifying or refusing to certify a class proceeding. The relevant legislation is *The Class Proceedings Act*, CCSM c C130 (the *CPA*), section 36(4), which states:

> **Appeal of certification decision**
> **36(4)** With leave of a justice of The Court of Appeal, a representative plaintiff or defendant may appeal to The Court of Appeal from
>
> (a) an order certifying or refusing to certify a proceeding as a class proceeding; or
>
> (b) an order decertifying a proceeding.

[24] The test for leave to appeal a certification decision in Manitoba has recently been discussed in the case of *Meeking v Cash Store Inc et al*, 2014 MBCA 69, 306 ManR (2d) 261. In that case, I adopted the test set out earlier in *Pelchat v Manitoba Public Insurance Corp*, 2006 MBCA 90, 40 CCLI (4th) 46; and *Soldier v Canada (Attorney General)*, 2007 MBCA 153, 225 ManR (2d) 101, which set out three factors to be considered by the chambers judge:

1) Whether the appeal raises a question of law;

2) Does the case warrant the attention of the full court, being a case of importance not just in the present case, but also in future cases; and

3) There must be an arguable case of substance.

[25] However, in *Meeking*, I also pointed out that the nature of the order would colour the deliberations as to whether to grant leave. So, for example, I highlighted the fact that (at para 22):

> Moreover, there are different effects from a grant or refusal of certification. A refusal to certify means the end of the possibility of a class action, while the grant of certification is not final. (See s. 10(1) of the **CPA** which provides that "at any time after a certification order is made, the court may amend the order, decertify the proceeding or make any other order it considers appropriate.")

[26] The different nature of the order is reflected in class action certification decisions in Ontario. Leave to appeal to the Divisional Court is not required from a refusal to certify a class action, while leave to appeal is required from an order granting certification. See the *Class Proceedings Act, 1992*, SO 1992, c 6, sections 30(1) and (2).

[27] Consequently, when considering whether there is an arguable case of substance in Manitoba, regard should be had to the fact that, if leave is denied in a situation where certification has been denied, the possibility of a class action is at an end, while the opposite is not true in a situation where certification has been granted.

The Law

[28] Class actions in Manitoba are governed by the *CPA*. Section 4 sets out the criteria for certification of a class proceeding and states:

> **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.

[29] Section 7 of the *CPA* sets out certain factors which, on their own, should not frustrate an application for certification:

> **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.

[30] The certification of an action is an interlocutory, procedural step and does not predict the success of the final action; nevertheless, there must be some evidentiary basis upon which a judge can assess the criteria outlined in section 4 of the *CPA*.

Analysis and Decision

[31] I will deal with the claims against Manitoba, Canada and MANFF separately, in reverse order.

Claim Against MANFF

[32] MANFF is a not-for-profit company pursuant to the laws of Manitoba. It has been retained in the past by Canada to assist in the management of forest fires and other environmental events that either impact, or could potentially impact, First Nations communities in Manitoba. In fulfilling its contractual duties, MANFF coordinates with Manitoba and leaders of First Nations communities. It has assisted Canada, Manitoba and various First Nations communities with the co-ordination of care and accommodation of evacuees who were displaced as a result of floods throughout Manitoba.

[33] In 2011, MANFF received instructions from Canada to assist with the care of individuals after they were evacuated from their homes due to flooding. The plaintiffs acknowledge that they have no contractual relationship with MANFF, but argue that a duty of care arose in negligence to provide post-evacuation care in an appropriate manner, and that MANFF failed to do so.

[34] The affidavit evidence indicated that individual members of the reserves experienced different types of post-evacuation accommodation and care according to their individual circumstances. In some cases, MANFF simply sent individuals a cheque, while in other cases, MANFF arranged accommodation and meals for people. There was a wide range of services provided; each evacuee needed different things and had a different story to tell.

[35] The certification judge held that, although the pleadings disclosed a reasonable cause of action relating to post-evacuation care, because of the different experiences of the reserve members, the duty of care owed to each reserve member could well vary from circumstance to circumstance, and the manner in which a duty was breached could also vary between individuals. Consequently, the certification judge concluded that there were no common issues relating to the MANFF claims.

[36] On the leave application, the plaintiffs argued that MANFF had a general duty of care to ensure the care and well-being of the class members and that the certification judge erred in placing too much importance on the different experiences of the plaintiffs.

[37] The Supreme Court of Canada warned against framing class

actions in overly broad terms. In *Rumley v British Columbia*, 2001 SCC 69, [2001] 3 SCR 184, McLachlin CJC cautions that (at para 29):

> There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in *Western Canadian Shopping Centres*, *supra*, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

[38] That caution applies here. MANFF's role varied with respect to individual reserve members to such an extent that it is difficult to understand how one standard of care would apply. The standard of care fluctuated depending upon location, accommodations and time periods. In some cases, the duty of care might be breached if a cheque was not sent, in others the nature of the accommodation and meals might be challenged. Given the possible variations on the duty and standard of care owed, the certification judge concluded that the manner in which the specific duty and standard was breached would require an individual determination, and that a class action would not advance the litigation.

[39] Not only have the plaintiffs not raised a question of law, but the plaintiffs also have not raised an arguable case of substance by contending that the certification judge incorrectly assessed the materiality of the importance of the different experiences of the plaintiffs. I would deny leave with respect to MANFF.

Claims Against Canada

[40] The plaintiffs brought claims against Canada under causes of action in negligence and breach of fiduciary duty. The certification judge held that there was no reasonable cause of action against Canada in negligence, as there was no legal duty on Canada to provide emergency disaster flood relief. The judge essentially considered Canada to be a volunteer.

[41] On appeal, the plaintiffs allege that the certification judge erred by approaching the issue of whether Canada owed the plaintiffs a duty of care by considering the flood to be a natural disaster. The plaintiffs state this is an error, as their pleadings allege that the flood was caused by Manitoba's negligence; and it is their view that Manitoba would have to be found at fault in order for the negligence claim against Canada to succeed.

[42] I do not understand why the claim against Canada related to post-evacuation assistance depends on whether Manitoba was negligent in causing the flood in the first place, or whether the flood was caused by a natural disaster. No case law is provided suggesting that the law respecting volunteers would not apply in both situations.

[43] In arguing their case, the plaintiffs relied upon the case of *Grant v Canada (Attorney General)*, [2005] OTC 771 (Sup Ct). However, the *Grant* case is distinguishable. In that case, Canada decided to move a First Nation community within the Indian reserve, and not only built the new community on swamp land, but built the new houses in a manner that would allow moisture in. This led to mould which, in turn, caused damage to the houses and to the health of the inhabitants. In that situation, the court found that

Canada owed a duty of care to the inhabitants of the houses. What is clear is that, in *Grant*, Canada did not act as a mere volunteer or rescuer when it decided to move the community and build the new houses.

[44] The plaintiffs have failed to identify a question of law regarding the certification judge's decision that there is no reasonable cause of action in negligence against Canada with respect to the post-evacuation claims.

[45] With respect to breach of fiduciary duty, the plaintiffs pleaded that Canada owed a duty of care to provide the evacuated reserve members with adequate care, assistance and accommodation, either because of the historic role and relationship of the Crown with First Nation peoples or because of the Crown's fiduciary responsibilities for First Nations reserve lands, and that Canada breached this duty of care.

[46] The plaintiffs make two claims with respect to breach of fiduciary duty. They state in their motion brief for leave to appeal that:

> The pleadings and the evidentiary record available thus far indicates that Canada did nothing to assess the potential impact of Manitoba's actions on those lands leading up to and during the 2011 Flood. The record further shows that Canada did nothing to stop Manitoba once it was clear that Manitoba's operations would result in catastrophic flooding on the Four First Nations.
>
> As a result of its failure to protect the Indian Lands in question, a great many members of the Four First Nations had to be evacuated. As a result of this breach of its fiduciary obligations, Canada owed a fiduciary duty to protect those people evacuated and displaced as a result of its failure as a fiduciary to protect those lands.

[47] Before dealing with the substance of this argument, I would like to

point out that this argument is different than the one in the pleadings. As well, the case was not presented in this way before the certification judge. In the statement of claim and in the motion brief before the certification judge, there was no suggestion that Canada had a fiduciary duty to protect the reserves from the flooding; or that Canada had failed to assess how Manitoba's actions would affect the flooding risk; or that Canada had a duty to stop Manitoba's actions.

[48] So before me, it would appear that the plaintiffs have slightly recast their argument to include a duty, not only to step forward, but also to have assessed the potential impact of Manitoba's actions and to have taken steps to prevent Manitoba from making the decision it did.

[49] There is much case law that indicates that appellants are generally not allowed to bring up new issues before a court of appeal, even more so on a leave application. In *Harder v Manitoba Public Insurance Corp et al*, 2012 MBCA 101, 284 ManR (2d) 254, Chartier JA (as he then was) explained the reason why new arguments are generally not heard on appeal (at para 12):

> The basis for this general rule is simple. Appellate courts review decisions to correct error. If an issue is not raised in the first instance, it is difficult for an appellant to argue that the decision-maker committed an error on that issue.

See also *Bernard v Canada (Attorney General)*, 2014 SCC 13 at para 98, [2014] 1 SCR 227; *Quan v Cusson*, 2009 SCC 62 at paras 36-38, [2009] 3 SCR 712; and *R v Beaulieu*, 2015 MBCA 90 at paras 64-66.

[50] I understand that it could be said that this is an argument simply

recast rather than a new issue. However, the plaintiffs did not plead that Canada had a duty to assess the actions of Manitoba and failed to do so; nor did they plead that Canada was aware of the potential negative impact of Manitoba's actions; nor did they make this argument in front of the certification judge. See *Arenson v Toronto (City)*, 2013 ONSC 5837 (QL), where the Court stated that an appellate court will be reluctant to allow a recasting of the claim as part of a certification appeal, unless required by the interests of justice. I therefore decline to consider this argument at this stage in the proceedings.

[51] With respect to the argument that Canada owed a fiduciary duty to the reserve members post-evacuation as a result of the special relationship between the parties, there does not appear to be an arguable case that the judge erred in determining that there was no cause of action for breach of fiduciary duty in these circumstances.

[52] The argument before the certification judge was that, due to the *sui generis*, historic relationship between Canada and Aboriginal peoples, and the presence of a treaty with respect to the reserve lands, there is a fiduciary obligation on the part of Canada to adequately look after the reserve members when the exercise of their treaty rights is damaged, interfered with or prevented. Canada had a duty to look after the reserve members, or as counsel for the plaintiffs phrased it, "Canada has a duty to step forward," when the reserve members had to leave their reserve lands after the flood.

[53] In *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623, the Court summarized the two ways in which a fiduciary duty may arise in the Aboriginal context. The Court stated

(at paras 49-50):

> 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.
>
> A fiduciary duty may also arise from an undertaking, if the following conditions are met:
>
> > (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.
>
> (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36)

[54] In this case, the plaintiffs argued that Canada's fiduciary duty could arise in either of the two ways identified in *Manitoba Metis*.

[55] With respect to the first way, the plaintiffs argue that Canada's fiduciary duty arises in relation to the specific or cognizable Aboriginal interest in the reserve lands. They submit that once the reserve lands were interfered with by Manitoba's actions such that the members of the reserve could not exercise their treaty rights to use and enjoy the land, the fiduciary duty which Canada owed to them to protect and preserve the reserve lands

transformed into a fiduciary duty to care for them off reserve and provide for their accommodation and general care. The plaintiffs relied upon the cases of *Guerin et al v The Queen et al*, [1984] 2 SCR 335; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; and *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447.

[56] The plaintiffs relied upon *Guerin* for the proposition that Canada has "a fiduciary duty with respect to Indian interests in land", and argued that *Guerin* "clearly establishes that Canada had a fiduciary duty to protect the Indian Lands of the Four First Nations from the flooding caused by Manitoba".

[57] However, *Guerin* does not appear to stand for such broadly-worded propositions. Rather, that case indicates that the Crown has a fiduciary duty to protect the Indian interest in the lands when that interest is being surrendered to the Crown, which of course, is not the case here.

[58] *Guerin* was a case in which the federal Crown convinced an Indian Band to surrender surplus reserve lands to the Crown for lease to a golf club. The Crown accepted less favourable lease terms for the lands than what had been expressed to the Band, and failed to consult the Band prior to accepting those less favourable terms. In the end, the Crown was held to be liable to the Band for breach of fiduciary duty, and owed the Band damages.

[59] In his majority reasons, Dickson J makes it clear that the fiduciary duty owed by the Crown to the Indians derived from the fact that the Indian interest in reserve lands can only be surrendered to the Crown. He states (at p 376):

> The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.

[60] In *Wewaykum*, a case relied on by the plaintiffs, two Indian Bands laid claim to each other's reserve lands, and claimed that Canada had breached its fiduciary duties towards them. The Supreme Court of Canada unanimously concluded that, although the Crown owed a fiduciary duty towards the Bands, Canada had not breached that fiduciary duty. Binnie J, for the entire Court, explained how the Crown owed a fiduciary duty to an Indian Band to protect and preserve the Band's quasi-proprietary interest in the reserve lands from exploitation (at paras 98-100):

> The content of the fiduciary duty changes somewhat after reserve creation, at which the time the band has acquired a "legal interest" in its reserve, even if the reserve is created on non-s. 35(1) lands. In *Guerin*, Dickson J. said the fiduciary "interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown" (p. 382). These dicta should not be read too narrowly. Dickson J. spoke of surrender because those were the facts of the *Guerin* case. As this Court recently held, expropriation of an existing reserve equally gives rise to a fiduciary duty: *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85. See also *Kruger v. The Queen*, [1986] 1 F.C. 3 (C.A.).
>
> At the time of reserve *disposition* the content of the fiduciary duty may change (e.g. to include the implementation of the wishes of the band members). In *Blueberry River*, McLachlin J. observed at para. 35:
>
> > It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident—a decision that constituted

> exploitation—the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.
>
> It is in the sense of "exploitative bargain", I think, that the approach of Wilson J. in *Guerin* should be understood. Speaking for herself, Ritchie and McIntyre J.J., Wilson J. stated that prior to any disposition the Crown has "a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction" (p. 350). The "interests" to be protected from invasion or destruction, it should be emphasized, are legal interests, and the threat to their existence, as in Guerin itself, is the exploitative bargain (e.g. the lease with the Shaughnessy Heights Golf Club that in Guerin was found to be "unconscionable"). This is consistent with Blueberry River and Lewis. Wilson J.'s comments should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself.

[61] The *Wewaykum* case thus indicates that the Crown does not have a general fiduciary duty to protect and preserve the Indian lands from destruction, as seems to be argued by the plaintiffs, but rather will have a fiduciary duty to protect and preserve the Indian Band's legal, quasi-property interest from invasion or destruction by third parties or the Crown itself.

[62] Finally, in *Grassy Narrows,* the main issue was whether the provincial Crown could "take up", for forestry purposes, Crown land which was subject to Aboriginal harvesting rights under a treaty, without the prior approval of the federal Crown. The Supreme Court of Canada held that the provincial Crown could do so, but that it had to do so "in conformity with the honour of the Crown" and would be "subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests" (at para 50).

McLachlin CJC went on to state (at para 52):

> Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway of their rights to hunt, fish and trap, and communicate its findings to them. It must then deal with the Ojibway in good faith, and with the intention of substantially addressing their concerns (*Mikisew*, at para. 55; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168).

[63] Thus, where the Crown attempts to take up non-reserve lands which are subject to Aboriginal treaty rights, the Crown will owe a fiduciary duty towards the Aboriginal peoples to attempt to accommodate those rights. In the present case, of course, Canada has not attempted to take up non-reserve lands, nor, for that matter, have they attempted to take up reserve lands. They assisted First Nations members who were forced to evacuate as a result, allegedly, of the actions of Manitoba.

[64] Consequently, the plaintiffs have not convinced me that there is an arguable case that the certification judge erred when he concluded that Canada did not owe the plaintiffs a fiduciary duty on the basis of *Guerin*, *Wewaykum* and *Grassy Narrows.*

[65] The *Manitoba Metis* case indicates that a fiduciary duty may also arise as a result of the Crown assuming discretionary control over specific Aboriginal interests, and that the focus will be on the particular interest that is the subject matter of the dispute. As stated earlier, the plaintiffs allege that the specific or cognizable Aboriginal interest in dispute in this case is the reserve members' interest in the reserve lands. However, the plaintiffs have made no allegation that Canada assumed any kind of discretionary

control over that land interest. It has not been alleged that Canada attempted to have the plaintiffs surrender their interest in the lands or attempted to sell or lease the land interest.

[66] All that has been alleged is that Canada stepped in to assist the reserve members who had been evacuated and, in that manner, took control of the post-evacuation care. Yet, Canada taking control of the situation does not equate with Canada taking discretionary control over the Indian land interest. Thus, it does not appear that the plaintiffs have established an arguable case that the certification judge erred in denying the claim for breach of fiduciary duty on the basis that Canada assumed discretionary control over the specific Aboriginal interest in the lands.

[67] The plaintiffs also argued that Canada owed a fiduciary duty to adequately accommodate and care for the displaced reserve members based upon the principles outlined in *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261, and upon the case of *Brown et al v Canada (Attorney General),* 2014 ONSC 6967, 329 OAC 140 (Div Ct). In its pleadings, the plaintiffs allege that Canada unilaterally undertook to evacuate the plaintiffs from their homes and provide for their accommodation, care and welfare, and "did so as a consequence of its historic role and relationship with First Nations peoples and its fiduciary responsibilities for First Nation Reserve lands." Furthermore, the plaintiffs allege that many of those evacuated were poor, elderly, minors and/or in poor health, and that they were and remained vulnerable after the loss of their homes and belongings.

[68] In *Elder Advocates*, the Supreme Court of Canada noted generally

that a fiduciary duty can arise whenever one person exercises power over another vulnerable person, but expanded upon the requirements for the imposition of a fiduciary duty. The Court noted that, to establish such a duty, the evidence must firstly show that the alleged fiduciary "gave an undertaking of responsibility to act in the best interests of a beneficiary" (at para 30), and that the party alleging the fiduciary duty had to show that the alleged fiduciary had forsaken the interests of all others in favour of the beneficiary's specific legal interests. Furthermore, the beneficiary must be someone who is vulnerable to the fiduciary, in the sense that the fiduciary had a discretionary power over them. What must be looked at is not simply vulnerability, however, but the extent to which the vulnerability arises from the relationship as opposed to factors external to the relationship.

[69] Nowhere in the pleadings do the plaintiffs allege that Canada undertook to act in their best interests, nor do the pleadings allege that Canada had forsaken the interests of all others in favour of the plaintiffs' legal or substantial practical interests. Furthermore, and more to the point, the plaintiffs did not allege that Canada had any kind of discretionary power over them—that is, there is no allegation that Canada had any kind of exclusive control over their care, or where they lived, after evacuation. In fact, the certification judge noted that several of the proposed class members had sought out their own accommodations, and that some had moved in with family members, either before or after being put up in accommodations by Canada or MANFF.

[70] I note that the *Brown* case, which the plaintiffs relied upon, differed substantially from the case at bar. In *Brown*, the facts indicated that Canada entered into an Agreement with Ontario to extend Ontario's child

welfare program to Aboriginal children in Ontario. It was alleged that Canada failed in its fiduciary duty to protect Aboriginal children by failing to monitor Ontario's program, which permitted these children to be fostered or adopted by non-Aboriginals, which in turn led to the systematic eradication of the Aboriginal culture, society, language, customs, traditions and spirituality of these children. In *Brown*, therefore, it had been alleged that Canada had undertaken to care for Aboriginal children, as evidenced by the Agreement with Ontario, and had a discretionary power over the substantial practical and legal interests of Aboriginal children (i.e., their protection and welfare) who were vulnerable to that power.

[71] The plaintiffs have not established an arguable case that the certification judge erred in denying the claim for breach of fiduciary duty on the basis of an undertaking by Canada to care for the displaced reserve members.

Claims Against Manitoba

[72] The crux of this appeal against Manitoba lies with the decision of the certification judge with respect to common issues. At the initial hearing, the plaintiffs listed many issues which they submitted were common issues that would advance the litigation with respect to all four proposed causes of action. The certification judge held that there were common issues in negligence and breach of treaty, although the common issues found by him were slightly different than those proposed by the plaintiffs.

[73] However, the certification judge held that there were no common issues with respect to the nuisance claim against Manitoba. Consequently, because he believed that the nuisance claim "may well be the strongest of

the causes of actions available to the plaintiffs" (at para 141), he ultimately determined that a class action was not the preferable procedure, as "one of the main causes of action [nuisance] is not certifiable" (at para 140).

[74] The plaintiffs appeal, arguing that the certification judge erred in law in his determination that there was no common issue with respect to nuisance.

[75] In their motion brief, the plaintiffs state that they are seeking to certify the following common issues with respect to the nuisance caused by Manitoba:

> a) 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?
>
> b) Did the Defendant, Government of Manitoba, substantially interfere with the use and enjoyment of land occupied by the Plaintiffs?
>
> c) If the answer to 1 and/or 2 is "yes", was the flooding or interference unreasonable?

[76] In these reasons, I focus on the first proposed common issue. The real issue here is the cause of the flooding. There would have to be a significant amount of expert evidence adduced to determine the cause of the flooding—whether it was caused by natural factors or by negligent operation of the flood control measures by Manitoba, or whether the flood was the result of policy decisions taken by Manitoba. If it was determined that Manitoba's conduct caused or contributed to the flooding, it would also require significant expert evidence to determine what reserve lands were

flooded as a result of that conduct, as opposed to flooding caused on reserve lands naturally.

[77] The certification judge found that to determine the above issue would not advance the litigation in a material fashion because, in the case of nuisance, one would then have to determine for each individual applicant whether the flooding was an unreasonable interference with that person's use and enjoyment of land. It then followed, according to the certification judge, that if there were no common issues in nuisance, then certification was not the preferable procedure, even if there were common issues in negligence and breach of treaty.

[78] In *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443, 293 OAC 204, leave to appeal to SCC ref'd, [2012] SCCA No 326 (QL), the Ontario Court of Appeal listed the legal principles regarding how to determine whether a common issue exists, stating (at para 81):

> There are a number of legal principles concerning the common issues requirement in s. 5(1)(c) that can be discerned from the case law. Strathy J. provided a helpful summary of these principles in Singer v. Schering-Plough Canada Inc., 2010 ONSC 42, 87 C.P.C. (6th) 276. Aside from the requirement just described that there must be a basis in the evidence to establish the existence of the common issues, the legal principles concerning the common issues requirement as described by Strathy J. in Singer, at para. 140, are as follows:
>
> > The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46, [2001] S.C.R. 534 at para. 39.
> >
> > An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many

individual issues remain to be decided after its resolution: Cloud**,** at para. 53.

There must be a rational relationship between the class identified by the plaintiff and the proposed common issues: Cloud**,** at para. 48.

The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: Hollick, at para. 18.

A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: Harrington v. Dow Corning Corp., [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: Dutton, at para. 40, Ernewein v. General Motors of Canada Ltd., 2005 BCCA 540, 46 B.C.L.R. (4th) 234, at para. 32; Merck Frosst Canada Ltd. v. Wuttunee, 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-46 and 160.

A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: Williams v. Mutual Life Assurance Co. of Canada (2000), 51 O.R. (3d) 54, at para. 39, aff'd (2001), 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and [2003] O.J. No. 1161 (C.A.); Fehringer v. Sun Media Corp. (2002), 27 C.P.C. (5th) 155 (S.C.J.), aff'd (2003), 39 C.P.C. (5th) 151 (Div. Ct.).

Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable

> methodology for determining such issues on a class-wide basis: Chadha v. Bayer Inc., 2003 CanLII 35843 (C.A.), at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and Pro-Sys Consultants Ltd. v. Infineon Technologies AG, 2008 BCSC 575, at para. 139.

[79] In his reasons, the certification judge correctly acknowledged that every class member need not be affected in an identical way by the decision, but there needs to be some realistic common effect on every member to find a common issue. A decision on that issue must be applicable to the claim of every member of the class.

[80] However, when considering the common issue identified above, that being whether Manitoba caused the flooding to occur by its actions, the plaintiffs argue that the certification judge confuses the fact of flooding with the damage caused by flooding. The certification judge states (at paras 112-113):

> 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.
>
> 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.**
>
> [Bold and underlining added; italics indicate certification judge's emphasis]

[81] There are several problems with these statements that raise a concern as to whether the certification judge erred in the legal test related to common issues. First, it must be remembered that the plaintiffs alleged that they were forced to evacuate their homes as a result of the flooding on the reserve lands, which are, of course, communally held lands. It was never alleged that every class member's home or property was flooded. In fact, the certification judge accepted that the identifiable class for each First Nation would be all members of the First Nations whose property on reserve lands was flooded OR all members of the First Nations who were evacuated, displaced or unable to reside on the reserve lands because of the flooding on the reserve lands OR all members of the First Nations who were unable to work and earn income because of the flooding on the reserve lands.

[82] Instead, the certification judge focussed on the issue of whether all properties or homes of every member of the proposed class were affected in the same way, or at all, by the flooding; but the proposed common issue was not whether the property of each class member was affected by the flooding or whether Manitoba caused flooding on the property of each class member. The proposed common issue question asked was whether Manitoba caused the flooding on the reserve lands.

[83] The fact that each class member may have suffered different types of damage by the flooding on the reserve lands does not appear relevant. As stated in *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46, [2001] 2 SCR 534 (at para 39), "It is not essential that the class members be identically situated *vis-à-vis* the opposing party", and as stated by the certification judge himself (at para 107), "Every class member need not be affected in an identical way by the decision on the common issue". Rather, what appears to be important is whether the decision on the common issue affects the claim of every member of the class in the same way.

[84] As well, as mentioned above, the certification judge commented (at para 113):

> 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.

[85] That is exactly the issue that the plaintiffs wanted resolved that was common to all the plaintiffs who suffered damage as a result of excess water on reserve lands. Did the flooding, excess water or high ground water levels occur as a result of the actions of Manitoba? It should be remembered that Manitoba contends, among other things, that the flooding occurred as a result of natural forces, not as a result of anything that it did or, alternatively, that the flooding was a result of a policy decision and not operationally faulty actions.

[86] Essentially, in the above passages, the certification judge focussed on whether the properties of every member of the proposed class were

affected in a consistent way by the flooding, rather than focussing on whether the resolution of the proposed common issue would affect each class member's claim in a consistent way. Commonality of the answer to the proposed question is what is important, not the commonality of the effects of the flooding on the reserve lands.

[87] As Manitoba takes the position that it did not cause the flooding on the reserve lands, but that the flooding was a natural disaster, the resolution of the issue of whether Manitoba was the cause (or a contributing cause) of the flooding on the reserve lands would be necessary for the determination of each class member's nuisance claim, and would appear to be a substantial ingredient of that claim.

[88] Of course, each proposed class member would still have to prove that the flooding of the reserve lands substantially interfered with his or her use or enjoyment of the reserve lands, and that the interference was unreasonable in the circumstances, which would require an individual assessment. But, as indicated in the case law, even if many individual issues remain, that is not a determinative factor.

[89] Thus, there is an arguable question of law, in my view, that the certification judge may have failed to consider the actual question put to him. That is whether he failed to consider whether the proposed question—did Manitoba cause the flooding on the reserve lands—was an issue common to all class members. Had the certification judge done so, there is at least an arguable case that he would have found the issue to be a common issue in nuisance.

[90] There is no issue being taken with the conclusion of the

certification judge that the remaining two questions—whether Manitoba substantially interfered with the use and enjoyment of the land occupied by the plaintiffs, and whether the flooding or interference was unreasonable—were not common questions. In *MacQueen et al v Nova Scotia et al*, 2013 NSCA 143 at para 117, 338 NSR (2d) 133, the Court determined that it is an individual issue as to whether an applicant's use or enjoyment of land has been substantially interfered with.

[91] However, just to repeat, this does not mean that causation, as an aspect of overall liability, is also an individual issue in every case. In *MacQueen*, the proposed class action related to an action alleging that a steel company had released environmental contaminants into the air over the course of several decades, and that these contaminants had settled on class members' individual properties which, *inter alia*, created a nuisance.

[92] The plaintiffs proposed to ask as a common question whether the defendant caused the emission of the contaminants onto the properties of the class members. However, the Court broke this question down into separate questions, being whether the defendant emitted the contaminants and whether the contaminants went onto the class members' properties. The Court indicated that the issue as to whether the defendant emitted the contaminants was a common question, whereas the question as to whether the contaminants went onto each of the class members' properties was not. It is clear from *MacQueen* that common issues relating to causation in nuisance can be, and have been, found. Also see *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158, on this point.

[93] Thus, it is arguable that the certification judge may have erred in

law by misinterpreting the law and focussing on whether there was commonality as to the effects of the flooding on the reserve lands, as opposed to focussing on whether there would be commonality with respect to the answer to the proposed question.

Preferability

[94] In *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 (CA), leave to appeal to SCC dismissed, [2005] SCCA No 50 (QL), Goudge JA, for the Court, explains the preferability criteria (at paras 73-74, 76):

> As explained by the Supreme Court of Canada in *Hollick, supra*, at paras. 27-28, the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice and behaviour modification, and must consider the degree to which each would be achieved by certification.
>
> *Hollick* also decided that the determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in their context. The inquiry must take into account the importance of the common issues in relation to the claim as a whole.
>
> That decision tells us that the critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action.

[95] In his reasons, the certification judge discussed the importance of the materiality of the common issues and whether their resolution would save time and expense in the action and concluded (at paras 140-41):

> 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.
>
> 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.

[96] In the above passage, the certification judge essentially rested his preferability decision on the fact that there was no common issue in the case respecting nuisance. The plaintiffs argue that, because the certification judge erred in law in refusing to recognize a common question of causation in relation to the nuisance action, his decision on preferability was thereby affected.

[97] I understand that the preferability decision is discretionary and therefore the certification judge's decision is entitled to significant deference. However, I agree that the argument of the plaintiffs on this point raises an arguable case that if the certification judge had correctly applied the law with respect to common issues, he may have found a common

question in nuisance, and this would have materially affected his decision on preferability. See *MacQueen* (at para 171) where the Court stated that an appeal court can reweigh preferability after finding that the certification judge erred with respect to identifying common issues.

[98] Also, had the first proposed question—did Manitoba cause the flooding on the reserve lands—been identified as a common issue, it is arguable that it would also have been relevant to proving causation in negligence and breach of treaty. This is all the more so, since Manitoba has not contested the fact that it was responsible for opening the various flood control systems which the plaintiffs allege was the cause of the flooding on the reserve lands, but rather, is contesting that its actions caused any flooding and consequent damage beyond what would have occurred naturally.

[99] The plaintiffs' second argument is that the certification judge erred when he indicated that the certification of only some of the causes of action did "not provide the finality that is necessary for a class action" (at para 141). The plaintiffs argue that *Cloud* and *Hollick* do not require the resolution of common issues to finalize litigation, but rather, simply requires that the resolution of the common issues significantly advances the litigation.

[100] The plaintiffs' second argument does not raise an arguable case that the certification judge erred. The certification judge properly stated the law when he said (at para 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.

[101] The passage reproduced above indicates that the certification judge was alive to the requirement that he needed to decide if, "[i]n the overall scheme of things", the resolution of the common issues would advance the litigation and "save much time or expense" (at para 140).

[102] Although I have already held that there is an arguable case that the certification judge erred in the test he applied with respect to common issues, and that this may have affected his decision with respect to preferability, I feel that some commentary should be made with respect to his preferability decision and access to justice issues.

[103] When analyzing an application to certify a class action, a certification judge "must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice and behaviour modification, and must consider the degree to which each would be achieved by certification" (*Cloud* at para 73). Also see *Hollick* at para 27.

[104] With respect to access to justice, the certification judge stated (at para 143, 151):

> 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, <u>at the front end of the process</u>.

> 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.

[105] These passages seem to reflect that the certification judge saw the access to justice problem as somewhat of an organizational issue for the lawyers involved. However, litigation is not only about the amount of work the lawyers would have to do, but whether plaintiffs would be willing to fund that work on an individual basis or open themselves up to possible liability for costs. Litigation is always difficult, but especially so when the plaintiffs are economically disadvantaged or vulnerable in other ways. Class actions help level the legal playing field when many plaintiffs with relatively small claims come up against governments or corporations with infinite resources.

[106] In *Western Canadian*, McLachlin CJC, made this clear (at para 28):

> [B]y allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by

> making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied.

See also *AIC Limited v Fischer*, 2013 SCC 69, [2013] 3 SCR 949, where Cromwell J, for the Court, discusses the barriers to access to justice at para 27.

Conclusion

[107] In this case, I am of the view that there is an arguable case of substance that the certification judge erred in law when making his determination that there was no common issue with respect to causation. All of the plaintiffs' pleadings are predicated on the argument that the flooding was not a natural disaster, but rather that the flooding was artificial and caused by Manitoba. While each of the plaintiffs may have suffered a different degree and nature of damage, the decision as to whether the flooding on the reserve lands was a natural disaster or caused by the actions of Manitoba is a decision that must be accompanied by significant expert evidence.

[108] Furthermore, it may be that the certification judge's alleged error on this issue could have affected his determination on preferability. Finally, it is arguable that the certification judge erred in law with respect to his consideration of whether a class action in this case would meet the access to justice goals of such actions.

[109] With respect to the case warranting the attention of the full court,

guidance with respect to class actions and, in particular, the manner in which common issues, preferability and access to justice concerns are to be assessed with respect to class actions, are of importance not only to this case, but also would be of assistance in future cases in Manitoba. Furthermore, any guidance the court may be able to give with respect to nuisance cases and First Nations reserve lands may also be welcome.

[110] With respect to Canada and MANFF, I would dismiss the plaintiffs' motion for leave to appeal.

[111] With respect to Manitoba, I would grant leave to the plaintiffs on the following questions of law:

1) Did the certification judge apply the correct legal test to the question of common issue with respect to nuisance?

2) If he did so err, did that impact his decision on the question of preferability?

_____ JA