Federal Court  Cour fédérale

Date: 20190626

Docket: T-541-18

Citation: 2019 FC 869

Ottawa, Ontario, June 26, 2019

PRESENT: The Honourable Mr. Justice Southcott

CERTIFIED CLASS ACTION

BETWEEN:

EUGENE KELLY TIPPETT

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Overview

[1] This decision relates to a motion filed by the Plaintiff on November 26, 2018, seeking an order certifying this action as a class action under Rule 334.16 of the *Federal Courts Rules*, SOR/98-106 and granting an order under Rule 334.17.

[2] As explained in greater detail below, the Plaintiff's motion is granted, because I have found that the Plaintiff has satisfied the requirements of Rule 334.16. These Reasons explain the contents of the Order that is being issued under Rule 334.17.

II. **Background**

[3] The Plaintiff is presently a resident of the Province of Ontario. He has commenced this action against the Defendant, Her Majesty the Queen, as a result of events alleged to have occurred in British Columbia in the early 1980s.

[4] At the relevant time, the Canadian Armed Forces [the Armed Forces] operated a sea cadet training centre known as HMCS Quadra near Comox on Vancouver Island, British Columbia [Quadra]. In or before the early 1980s, the British Columbia Department of Youth and Child Development partnered with the Armed Forces to offer at Quadra a program called "Developing Adolescence Strengthening Habits", known as "DASH" [the DASH Program]. The DASH Program was intended to represent an alternative to incarceration for juvenile offenders and involved sending certain offenders to Quadra to work on building a replica tall ship that was to be used as a training vessel for the cadets. The intention was that the juvenile offenders would develop skills and contribute meaningfully to society as a result. The juvenile offenders were not themselves cadets.

[5] On December 15, 1981, following a charge for break and entry and theft, the Plaintiff was adjudged to be a juvenile delinquent (in the parlance of the day), was given a disposition of probation for twelve months, and was required to attend the DASH Program. He was 15 years

old and had previously been living on the streets and in various group homes around Courteney, British Columbia.

[6] The Plaintiff and two other participants in the DASH Program at the same time [together, the Residential Participants] lived on the Quadra base with Armed Forces members, while others were essentially "day" participants and had other off-base accommodations [the Day Participants]. The Plaintiff alleges that the one of the Armed Forces officers who supervised the DASH Program, and who lived in the same bunkhouse as him, abused him sexually, physically and emotionally [the Alleged Abuser].

[7] Approximately eight months after entering the DASH Program, the Plaintiff escaped from the base and began living on the streets again. However, he alleges that, approximately six months later, the Alleged Abuser located him and brought him to a house in Royston, British Columbia where he lived for several months, with the Alleged Abuser and the other two Residential Participants, before leaving for good. The Plaintiff alleges that the abuse continued during that period.

[8] The Plaintiff also alleges that programs similar to the DASH Program were implemented in British Columbia and in other provinces in Canada in conjunction with the Armed Forces and controlled by it and its members. The Plaintiff has filed his Statement of Claim, as a proposed class action, asserting an action on behalf of a proposed class including himself, the current proposed definition of which is as follows:

> All persons in Canada (including, as a subclass, residents of Québec) who participated in juvenile delinquent sentencing

> programs operated by or in conjunction with the Canadian Armed Forces (including but not limited to the "Developing Adolescence Strengthening Habits" program in British Columbia at HMCS Quadra) and suffered injury due to sexual abuse, assault, or harassment by Canadian Armed Forces members while participating in said juvenile delinquent sentencing programs.

[9] The Plaintiff's Statement of Claim alleges negligence on the part of the Defendant and members of the Armed Forces, as well as vicarious liability of the Defendant under the *Crown Liability Act*, RSC 1985, c C-50 for torts committed by members of the Armed Forces. He also alleges breach of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*] and, where the actions of the relevant Armed Forces members and the Defendant took place in Québec, causes of action arising under the *Civil Code of Québec*, SQ 1991, c 64, and the *Charter of Rights and Freedoms*, RSQ, c C-12. The Statement of Claim seeks damages including punitive damages.

[10] The present motion seeks an order certifying this action as a class action and granting an order with certain contents under Rule 334.17 in connection with such certification. The Defendant's position is that the request for certification should be denied. Of the requirements that must be met for certification (as canvassed in detail below), the Defendant concedes that the Plaintiff's Statement of Claim discloses a reasonable cause of action but argues that none of the other requirements are met.

III. **Issues**

[11] The sole issue in this motion is whether this action is suitable for certification as a class proceeding pursuant to Rule 334.16 and, if so, the details of the certification order that should be issued under Rule 334.17 as a result.

IV. **Analysis**

A. *General Principles*

[12] This motion is governed principally by Rules 334.16(1) and (2), which provide as follows:

Certification	**Autorisation**
Conditions	**Conditions**
334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	**334.16 (1)** Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :
(a) the pleadings disclose a reasonable cause of action;	**a)** les actes de procédure révèlent une cause d'action valable;
(b) there is an identifiable class of two or more persons;	**b)** il existe un groupe identifiable formé d'au moins deux personnes;
(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions	**c)** les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne

affecting only individual members;

concernent qu'un membre;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

(e) there is a representative plaintiff or applicant who

e) il existe un représentant demandeur qui:

(i) would fairly and adequately represent the interests of the class,

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au

and the solicitor of record.

dossier.

Matters to be considered

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

Facteurs pris en compte

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l’objet d’autres instances;

(d) other means of resolving the claims are less practical or less efficient; and

d) l’aspect pratique ou l’efficacité moindres des autres moyens de régler les réclamations;

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

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d’autres mesures de redressement.

[13] Before beginning analysis of the individual requirements prescribed by these Rules, it is useful to review some general principles governing certification motions. As a general statement of the objectives of class action legislation, Chief Justice McLachlin provided the following explanation in *Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68 [*Hollick*] at para 15:

> 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. [Emphasis added]

[14] As will be explained in greater detail below in my analysis of the evidence, the parties' arguments in this matter focused significantly on the principle that the threshold for meeting the requirements for certification is the establishment of "some basis in fact" to support the certification order. Chief Justice McLachlin explained this principle as follows in *Hollick* at para 25:

> 25 I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see *Report*, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch, *supra*, at para. 4.60. [Emphasis added]

[15] The law is clear that the "some basis in fact" threshold does not require that the party seeking certification establish the certification requirements on a balance of probabilities (see *Pro-Sys Consultants v Microsoft Corp*, 2013 SCC 57 [*Pro-Sys*] at paras 101-102). Further analysis of the meaning of this threshold, and principles applicable to meeting the threshold through the introduction of evidence and otherwise, will follow below in my consideration of the evidence before the Court in relation to the individual requirements. It is useful to begin by explaining the nature of the evidence upon which the parties relied in support of their respective positions on this motion.

B. *Evidence in this Certification Motion*

[16] The Plaintiff's motion is supported by an Affidavit that he has sworn, detailing his knowledge of and experiences in the DASH Program, the abuse that he alleges he sustained,

and its effects upon him. The Plaintiff's Affidavit attaches as an exhibit a document entitled *Corrections Branch Annual Report*, published by the Province of British Columbia Ministry of Attorney General for the period January 1, 1979 to March 31, 1980 [the BC Corrections Report], which refers to the DASH Program and other programs of the British Columbia Corrections Branch. The Affidavit also attaches as exhibits an Independent Auditor's Report entitled *Inappropriate Sexual Behaviour – Canadian Armed Forces*, forming part of the 2018 Fall Reports of the Auditor General of Canada to the Parliament of Canada; a March 2015 report of an External Review Authority, entitled *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*; and several media reports related to sexual misconduct in the Canadian military. The Plaintiff was cross-examined on his Affidavit, and the resulting transcript formed part of the record in this motion.

[17] The Defendant did not file an affidavit in response to the certification motion as permitted by Rule 334.15(1). Other than the Plaintiff's Affidavit and cross-examination transcript, the only evidence before the Court consisted of an Affidavit sworn by Vivian Olatunji, a legal assistant employed by the Plaintiff's counsel, which in turn attached a number of exhibits found in counsel's files. The most material of these exhibits is a copy of documents obtained by the Plaintiff or his counsel in response to a request under the *Privacy Act*, RSC 1985, c P-21 for a copy of "PPE 835 Military Police Investigation Case File 2015-3556". This documentation, referred to by the Defendant as a Canadian Forces National Investigation Service Report [the Investigation Report], details an Armed Forces investigation in response to allegations disclosed by the Plaintiff to the Armed Forces in 2015 regarding sexual abuse by the Alleged Abuser while the Plaintiff was involved with the DASH Program.

[18] The Investigation Report is approximately 850 pages in length and includes information obtained from interviews with a large number of witnesses in relation to the DASH Program at Quadra. Each of the parties relies significantly on the contents of the Investigation Report in support of submissions surrounding the Rule 334.16 certification requirements. In large measure, the portions of the Investigation Report referenced in the parties' submissions consist of interview notes made by Captain Pamela Harris, who appears to have led the investigation, typewritten summaries of the interviews, and a few pages summarizing certain results of the investigation.

[19] At the hearing of the certification motion, each of the parties made submissions as to the evidentiary role of the Investigation Report, recognizing that neither the investigators nor any of the witnesses who were interviewed (other than the Plaintiff) have provided affidavit evidence in this motion. The Defendant acknowledged that, as it had agreed to the filing of the Investigation Report, it is clearly part of the record before the Court. However, the Defendant took the position that the filing of the Investigation Report does not necessarily mean that it is admissible for all purposes. The evidence of the various witnesses interviewed as part of the investigation represents hearsay and, while Rule 81(1) permits an affidavit filed in a motion to provide evidence that is not within the personal knowledge of the deponent, this Rule still requires a statement as to the deponent's belief in the evidence. There is no such statement in the affidavit of Ms. Olatunji which attaches the Investigation Report.

[20] Nevertheless, while taking the position that the Investigation Report is inadmissible for the truth of its contents, the Defendant recognizes that the role of the Court in a certification

motion is not to make findings of fact, but rather to assess whether there is some basis in fact for the certification requirements. Noting that both parties rely on the contents of witness statements within the Investigation Report in support of their respective positions on the certification requirements, the Defendant agrees that the Court may rely on this evidence for purposes of assessing whether some basis in fact has been established. The Defendant draws a distinction between the witness statements in the Investigation Report and the opinions of the investigators, taking the position that the former are more inherently reliable than the latter and that little reliance should be placed upon the investigators' opinions.

[21] The Plaintiff takes a somewhat different position, arguing that, as the Defendant has agreed to the filing of the Investigation Report, it is admissible in its entirety for all purposes. The Plaintiff also notes that, in the course of argument on the motion, the Defendant has not identified any particular opinions in the Investigation Report that the Defendant submits should not be relied upon.

[22] The Defendant refers the Court to *Sweetland v Glaxosmithkline Inc*, 2014 NSSC 216 [*Sweetland*], in which the Supreme Court of Nova Scotia addressed at paragraphs 13-15 the distinction between the low threshold of proof required on a certification motion, i.e. the "some basis in fact" threshold, and the requirement for admissible evidence:

> 13 A certification motion in a class proceeding is considered to be procedural and, therefore, hearsay evidence is permissible provided the deponent establishes the source and the witness' belief of the information.
>
> 14 The evidentiary onus on plaintiffs seeking certification of a class proceeding is not high. It is sufficient that they show "some basis in fact" for each of the certification requirements. Indeed,

> courts on certification motions are not expected to resolve conflicts in the evidence or engage in assessments of evidentiary weight.
>
> 15 The low threshold of proof required on a certification motion should not be equated with a relaxation of the requirements for admissibility of evidence. A certification motion, like any motion, can only be decided on evidence that is properly before the court. The motion must comply with the rules of evidence. For procedural motions this includes hearsay, provided the source is identified and the witnesses able to establish their belief in the information. These requirements allow the Court to assess the credibility and reliability of the hearsay statements being offered.

[23] In *Sweetland,* at paragraphs 16-17, the Court declined to admit into evidence a report prepared by staff of the Committee on Finance of the United States Senate, related to the drug that was the subject of the proposed class action, because the plaintiffs had not established that the report contained information relevant to the requirements for certification. However, this ruling can be contrasted with the Court's explanation at paragraph 18 of *Sweetland* that, in *Rumley v British Columbia*, 2001 SCC 69 [*Rumley*], the report of special counsel appointed to investigate sexual abuse at a residential school for deaf children was used in determining whether the class certification criteria were met. In *Rumley*, neither party disputed the admissibility of the special counsel's report.

[24] The Plaintiff relies on the decision in *Johnson v Ontario*, 2016 ONSC 5314 at paras 54-67, which explained that, while a certification motion is not to be treated as an "evidentiary free for all," the procedural nature and purpose of the motion must be kept in mind. The Court held that, while the evidence contained in inquest material and newspaper articles, as well as an ombudsman report referenced therein, was not admissible for the truth of its contents, it could be considered and assessed, along with the frailties it may contain, to determine whether the

moving party has met the onus of establishing some basis in fact for the certification requirements.

[25] Returning to the case at hand, I agree with the Defendant's position that the technical requirements prescribed by Rule 81(1) have not been met. However, taking into account the limited extent to which factual assessment is to be performed by the Court on a certification motion, the fact that the Investigation Report clearly contains information relevant to the certification requirements, and in particular the fact that both parties agree to its use for purposes of determining whether those requirements are met, I will consider the information in the Investigation Report in deciding this motion. While I note that the Defendant's agreement does not extend to investigators' opinions expressed in the report, I agree with the Plaintiff that the Defendant has not identified any portions of the report, relied upon which the Plaintiff, which represent opinion as opposed to a record of the evidence of the witnesses interviewed by the investigators.

[26] Turning to a different evidentiary point, the Plaintiff argues that the Court should draw adverse factual inferences based on the Defendant's decision not to file an affidavit in response to the certification motion. As will be explained in greater detail below, two of the principal areas in dispute between the parties are whether there is some basis in fact to conclude that participants in the DASH Program other than the Plaintiff were subjected to abuse and whether there is some basis in fact to conclude that that there were other programs, similar to the DASH Program, in which the Armed Forces were involved. The Plaintiff submits that the Defendant

would be in possession of information related to both these points and that, having declined to file evidence, the Defendant should be subject to adverse inferences on these points.

[27] The Plaintiff relies on *Piscitelli v Ontario (Liquor Control Board)*, 2001 FCT 868 (Fed TD) [*Piscitelli*] at paras 46-50, in which the Federal Court drew a negative inference from the respondent's failure to provide details related to the adoption and use of the official mark that was at issue in that case. The Court held that the applicant had raised enough doubt as to the adoption and use of the official mark by the respondent that, in the face of such conflict, the respondent who had the applicable evidence could not just sit back and rely upon a bald assertion as to adoption and use.

[28] Similarly, in *Jian Sheng Co v Great Tempo SA*, [1998] 3 FC 418 (Fed CA) [*Jian Sheng*] at paras 39-40, the Federal Court of Appeal relied upon what it described as a well-established principle that courts may make negative inferences where a party fails to bring forward evidence within its knowledge which is necessary for the resolution of the dispute.

[29] The Plaintiff also notes that, while it is clear from Rule 314.15(4) that a respondent to a certification motion is not required to file an affidavit, Rule 314.15(5) provides that, where such an affidavit is filed, it must set out the material facts on which the respondent intends to rely; state that the affiant knows of no fact material to the motion that has not been disclosed in the affidavit; and set out, to the best of the affiant's knowledge, the number of members in the proposed class. The Plaintiff argues that the imposition of these evidentiary obligations upon a

respondent militates in favour of adverse inferences being drawn when the respondent declines to file evidence.

[30] The Plaintiff's counsel further submits that, to his knowledge, this is the first class action certification motion in which a defendant has not filed evidence in response, as a result of which there is no authority speaking to this argument. The Defendant disputes this submission, although without referring the Court to any particular cases where no evidence has been filed by a defendant, and submits that there is no authority for the Plaintiff's argument that Rule 314.15(5) supports the drawing of an adverse inference where no evidence is filed. The Defendant notes that *Jian Sheng* and *Piscitelli* arose outside the context of class actions and submits that adverse inferences apply in circumstances where there is contradictory evidence and the party against which the inference is drawn is known to have evidence that could resolve the contradiction.

[31] The record before the Court does not permit an assessment as to whether this is the first class action proceeding in which a defendant has declined to file evidence. While neither *Jian Sheng* nor *Piscitelli* arose in the context of a class action certification motion, the Plaintiff has also referred the Court to *Lambert v Guidant Corporation*, [2009] OJ No 1910 (ONSC) [*Lambert*] at para 81, in which Justice Cullity spoke to this issue to some extent as follows:

> 81 As has been insisted on many prior occasions, the certification motion is essentially procedural in nature. There is, of course, nothing to prevent the defendants from making full disclosure on facts that will assist in narrowing the class, or formulating the issues. Just as obviously, the proceedings are adversarial and they cannot be compelled to do this. If, however, they choose to rely on assertions of facts peculiarly within their own knowledge, and which cannot properly and adequately be tested on the motion,

> they cannot, in my opinion, insist that their evidence must be accepted as conclusive. The Court must decide the weight that is to be given to it in the light of all the evidence and with strict attention to, and its focus on, the claims actually advanced by the plaintiffs on behalf of the class, and the standard of proof applicable to them.

[32] *Lambert* also noted, at paragraph 68, that the effect of the very weak evidential burden of "some basis in fact" is that, if a defendant delivers evidence to rebut that of the plaintiff, the defendant faces an inversely heavy onus of demonstrating that there is "no basis" in the evidence to support a determination that the certification requirements are met (see also *Walter v Western Hockey League*, 2017 ABQB 382 at para 14).

[33] In my view, while it is within a defendant's right to choose not to file evidence, such a decision has the potential to give rise to an adverse inference, and whether the Court can or should draw such an inference depends very much on the circumstances of the particular case. These circumstances include the evidence presented by a plaintiff on a particular issue, such that a doubt or conflict arises in relation to that issue, and the extent to which the defendant could be expected to have evidence relevant to that issue. I will return to these principles when considering the evidence and the Plaintiff's arguments related to certain of the certification requirements addressed below.

C. *Disclosure of a Reasonable Cause of Action*

[34] The first of the certification requirements is that the pleadings disclose a reasonable cause of action. A plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the claim cannot succeed (see *Pro-Sys* at para 63). It is also not necessary

that a plaintiff meet this requirement in relation to all causes of action asserted. It is sufficient if the plaintiff's pleading discloses one valid cause of action (see *Gay v Regional Health Authority 7*, 2014 NBCA 10 at para 36).

[35] In the present case, the Defendant does not argue that the Plaintiff has failed to meet this requirement. The Defendant concedes that a duty of care was owed to the youth participants in the DASH Program at Quadra and accepts that the Plaintiff's individual claim discloses a cause of action in negligence related to breach of that duty of care. To be clear, I do not understand the Defendant to be that conceding that the duty was breached, only that the duty exists. However, it is apparent that the Plaintiff's pleading discloses a reasonable cause of action in negligence. I will return to the other causes of action asserted by the Plaintiff in his Statement of Claim, when considering the common issues which the Plaintiff proposes for certification.

D. *Identifiable Class of Two or More Persons*

[36] The requirement that the Plaintiff show some basis in fact for a conclusion that there is an identifiable class of two or more persons is one of the principal areas in dispute between the parties.

[37] It is clear from the Plaintiff's Affidavit and his cross-examination thereon that, other than his own experiences, he has no direct knowledge of any participant in the DASH Program being subjected to abuse. He asserts in his Affidavit a belief that the other two Residential Participants were likely abused by the Alleged Abuser or by other Armed Forces members or DASH Program personnel. However, he acknowledged in cross-examination that he does not have any

information as to whether or not the other Residential Participants were physically or sexually assaulted while they were in the DASH Program. He did not witness any such abuse and never discussed the topic of abuse with the other Residential Participants. He does describe a statement attributed to the Alleged Abuser to the effect that nobody would believe "you kids", a reference to him and the other two Residential Participants, over a military officer.

[38] In support of his position that there is some basis in fact to conclude that he was not the only victim of abuse, the Plaintiff relies on the "you kids" statement by the Alleged Abuser, as well as information in the Investigation Report surrounding circumstances that led to the Alleged Abuser's release from the military in the 1980s. Many of the witnesses interviewed in connection with the investigation were canvassed as to their knowledge of those circumstances. The information in the Investigation Report resulting from witness interviews discloses an incident in which the Alleged Abuser is said to have been observed by a senior officer to be asleep in a bedroom in the Quadra barracks, in his underwear, at a time that one or more youths were also asleep in that room. The Officer who made this observation initiated an investigation of what he considered to be an inappropriate situation, and the Alleged Abuser was subsequently discharged from the Armed Forces.

[39] As might be expected with interviews conducted 30 or more years after the incident, there are a number of discrepancies in the information obtained from different witnesses. The witness who appears to have the most firsthand knowledge, Commander Leitch (described as the Commanding Officer of Quadra from the fall of 1978 to 1982) describes an early morning sometime between the fall of 1981 and the spring of 1982, when he observed the Alleged

Abuser sitting on a chair asleep inside one of the bedrooms, wearing only his underwear, and a young person asleep in the bed and under the covers in that room. Cdr. Leitch was not able to provide a description of the youth. He reported what he believed to be an inappropriate situation to a Captain Clark and recalls that, soon thereafter, the Alleged Abuser was released from the military.

[40] Another witness, Major Letson (described as the Regional Cadet Officer for the Pacific Region from 1978 to 1983), explained that he was located at CFB Esquimalt but would make visits to Quadra. Maj. Letson's witness statement indicates that, in late 1982 to early 1983, he recalled hearing about an incident, in which a Lieutenant Commander Hunt walked in on the Alleged Abuser in a compromising position in a barracks room with two youths. Maj. Letson was not sure of the details of the incident, as Capt. Clark was tasked to investigate it and he had never seen a report from the investigation. However, Capt. Clark advised him that the Alleged Abuser was no longer working at Quadra. Maj. Letson's explanation of the response he received from Capt. Clark, when he inquired as to whom the incident involved, appears to contain redactions and reads, "Capt CLARK responded that it was [REDACTION] the youth who had been sent down to do community service by the judge who [REDACTION] working on the boat;".

[41] A third witness, Mr. Taylor (no rank indicated, but described as an officer cadet assigned to Quadra around September 1981 to June 1982), explains that he was living in the senior officer quarters with the Residential Participants and the Alleged Abuser and recalls one evening when LCdr. Hunt attended the Alleged Abuser's room very upset. Mr. Taylor observed

LCdr. Hunt speaking with the Alleged Abuser, who was in his underwear. Mr. Taylor later spoke with Cdr. Leitch and learned that LCdr. Hunt had seen the Plaintiff in the Alleged Abuser's bed. Mr. Taylor stated that the Alleged Abuser was gone shortly after the incident.

[42] None of the witness statements canvassed above, or other statements in the Investigation Report which address the same subject matter, refer to allegations or conclusions that the Alleged Abuser abused the youth or youths who are referenced in the statements. However, the Plaintiff submits that the combination of his evidence as to the abuse to which he was subjected by the Alleged Abuser, the evidence of the Alleged Abuser having been observed in what was considered to be an inappropriate situation with one or two youths, and the evidence that the Alleged Abuser was subsequently discharged from the military as a result is sufficient to constitute some basis in fact for a conclusion that the Plaintiff was not the only participant in the DASH Program who suffered abuse.

[43] I do not understand the Defendant to particularly take issue with the proposition that this evidence upon which the Plaintiff relies, considered on its own, could meet the low threshold of some basis in fact for there being more than one class member. Rather, the Defendant submits that, when the evidence in the Investigation Report is considered in its entirety, in combination with the statements in the Investigation Report taken from the other two Residential Participants, it is apparent that the incident which resulted in the Alleged Abuser's discharge from the military involved the Plaintiff, not any other participant in the DASH Program, and therefore does not support a conclusion that there is an identifiable class of two or more persons.

[44] The Defendant notes that each of the two other Residential Participants was interviewed as part of the investigation, and their witness statements included in the Investigation Report do not refer to either individual experiencing any abuse by the Alleged Abuser. Moreover, the Defendant submits that the statement by Mr. Taylor indicates that the youth involved in the incident that resulted in the Alleged Abuser's release from the military was actually the Plaintiff.

[45] There are obviously inconsistencies among the witness statements in the Investigation Report, such as the number of youths in the bedroom in which the Alleged Abuser was observed by one of the senior officers, which of the senior officers made that observation, and whether the youth was identified as the Plaintiff. Indeed, the Plaintiff's counsel submits that these inconsistencies suggest that there was more than one incident and that, even if one of them involved the Plaintiff, the other did not. The Plaintiff denies being involved in an incident of this sort. He also refers in his cross-examination to having spoken with his parole officer from that period, Mr. Hillian, after the commencement of the 2015 investigation, and states that Mr. Hillian referred to having spoken with the Plaintiff and his mother about sexual misconduct by the Alleged Abuser. The Plaintiff stated that he had no contact with his mother for many years, as a result of which he concludes that Mr. Hillian must be recalling a discussion with some other youth.

[46] As a result of the parties' different positions on how the evidence should be interpreted, each made submissions on whether and to what extent the Court should engage in a process of weighing the evidence relevant to the certification requirements. The Plaintiff submits that no

weighing is permitted. The Defendant argues that there is scope for limited weighing of evidence.

[47] As explained by the Supreme Court of Canada in *Pro-Sys* at paragraph 102:

> 102 The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (*Cloud*, at para. 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (Ont. S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.)).
>
> …

[48] On the other hand, *Pro-Sys* also confirmed the following at paragraph 103:

> 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.

[49] To similar effect, *Hollick* speaks of the sufficiency of the evidence to support certification. In my view, there is a distinction between assessing the sufficiency of the evidence and resolving conflicts in the evidence. The former is very much within the mandate of the Court hearing a certification motion, and is required in order to determine whether the plaintiff

has established some basis in fact for the certification requirements. The latter is typically not to be undertaken by the Court considering certification.

[50] However, I would not necessarily conclude that a certification court can never engage in some limited weighing of the evidence relevant to whether the threshold has been met. Indeed, in *Fischer v IG Investment Management Ltd*, 2013 SCC 69 [*Fischer*] at para 43, the Supreme Court states that, at the certification stage, the court cannot engage in any detailed weighing of the evidence but should confine itself to whether there is some basis in the evidence to support the certification requirements [my emphasis]. I also note the caution in *Pro-Sys* at para 104 that there is limited utility in attempting to define "some basis in fact" in the abstract. In my view, it is unnecessary for me to make definitive pronouncements on whether or to what extent the Court can weigh evidence relevant to the certification requirements. Rather, it is clear that the examination of the evidence which the Defendant urges upon the Court in the case at hand extends beyond assessing its sufficiency and would represent a level of weighing and resolution of conflicts in the evidence that is not appropriate for a certification motion.

[51] I appreciate the Defendant's argument that the evidence surrounding the Alleged Abuser's dismissal from the military could be interpreted as resulting from one incident which involved only the Plaintiff, such that there would be no evidence of any other class member. This interpretation is also consistent with the lack of any allegations of abuse by the other Residential Participants. However, it is far from clear that this is the only interpretation of the evidence, and to arrive at such an interpretation would require the Court to resolve conflicts in the evidence and engage in the sort of detailed weighing which is outside the scope

contemplated by the assessment whether there is some basis in fact. I also note the Plaintiff's submission that the other two Residential Participants are not the only individuals who may have been the subject of the incident resulting in the Alleged Abuser's discharge, as the Plaintiff's evidence is that there were somewhere between 20 and 40 Day Participants also involved in the DASH Program.

[52] My conclusion, applying the principles described above, is that the Plaintiff has met the low threshold of establishing some basis in fact for the requirement that there be an identifiable class of two or more persons. It is therefore unnecessary, in connection with this particular determination, to consider the Plaintiff's argument that an adverse inference should be drawn from the Defendant's decision not to file an affidavit in this motion.

[53] However, the Plaintiff also advances the adverse inference argument in relation to the definition of the class. As previously noted, the Plaintiff seeks certification of a class that extends beyond participants in the DASH Program to include participants in other "juvenile delinquent sentencing programs operated by or in conjunction with the Canadian Armed Forces". The Defendant takes the position that there is no evidence of the existence of any other programs, similar to the DASH Program, attended by youth as a condition of a youth court sentence.

[54] The Plaintiff acknowledged in his cross-examination that he did not personally know of any other similar programs that were operated by the Armed Forces. The Plaintiff also does not seek to include participants in Armed Forces cadet programs. The principal piece of evidence to

which the Plaintiff points, in support of the existence of other similar programs, is the BC Corrections Report, which dates to 1970-1980 and refers to the DASH Program and other programs of the British Columbia Corrections Branch. The Plaintiff notes that this report identifies the DASH Program as operated in the South Fraser Region of British Columbia, at a location described as Pierce Creek Camp. There is also a separate reference to a Metchosin Camp, operated in the Vancouver Island Region, which included a boat program, involving marine safety training, navigation and steamship skills, using an old motor vessel named *Freedom Found*. This reference states that the *Freedom Found* was twice used by the DASH Program, once by Centre Creek and once by Porteau Cove Camp.

[55] The Plaintiff also identifies a reference in the Investigation Report to a program operated at a farm. This reference appears in the investigator's notes of an interview with Mr. O'Donnell, the retired judge who sentenced the Plaintiff to participation in the DASH Program in December 1981. The notes refer to a program at a farm and a program at "the spit", the latter being, as I understand it, the Quadra location.

[56] The Plaintiff also refers the Court to the Affidavit of Ms. Olatunji, which attaches as an exhibit a screenshot of a description of a program entitled "Canada. Dept. of National Defence. Youth Training and Employment Program." This document describes the history of this program as follows:

> The Youth Training and Employment Program (YTEP) was initiated in 1983, and was designed to assist in the relief of Canadian youth unemployment. The specific program objectives were to provide meaningful and challenging training, to provide job skills which would benefit participants on their return to the civilian workforce; and to contribute to the level of readiness and

> sustainability of the Canadian Forces (CF). Through a one-year contract, participants were provided with basic and trades training, followed by on-job assignment in the Department of National Defence (DND).

[57] In my view, none of this evidence is sufficient to represent some basis in fact for the existence of youth sentencing programs, operated by or in conjunction with the Armed Forces, other than the DASH Program operated at Quadra. The BC Corrections Report suggests that the DASH Program was operated more broadly than just the operation at Quadra. That report also indicates the existence of a number of other programs, which perhaps can also be characterized as youth sentencing programs. Mr. O'Donnell's evidence about a program at a farm may be a reference to one such program. However, there is no evidence suggesting that any of these programs were operated by or in conjunction with the Armed Forces. The Youth Training and Employment Program does appear to be a program operated by the Armed Forces, but there is nothing in the description that indicates that it is a youth sentencing program.

[58] This is not a situation where the Court is required to resolve conflicts in the evidence. The evidence is simply insufficient to establish some basis in fact for the existence of youth sentencing programs, operated by or in conjunction with the Armed Forces, other than the DASH Program operated at Quadra.

[59] The Court must therefore consider the Plaintiff's argument that an adverse inference should be drawn from the Defendant's failure to file affidavit evidence on this point, as presumably the Defendant would know whether or not the Armed Forces operated or partnered in any programs other than the DASH Program. I accept the Plaintiff's submission that this is

information that would be known by the Defendant. Nevertheless, I am not convinced that this is an appropriate circumstance in which to draw the requested inference. This is not a situation where the evidence presented by the Plaintiff raises a doubt or results in a conflict in the evidence in relation to the existence of other programs. There is simply no evidence at all suggesting that the Armed Forces' participation in youth sentencing programs extended beyond the DASH Program at Quadra.

[60] It is therefore my conclusion that the class should be described in terms of participants in the DASH Program operated at Quadra who suffered injury due to sexual abuse, assault, or harassment by Canadian Armed Forces members.

[61] I note the Defendant's position that the class definition should be confined to participants who were sexually abused specifically by the Alleged Abuser. I recognize that there is no evidence before the Court of any abuse perpetrated by any Armed Forces member other than the Alleged Abuser. However, I find compelling the Plaintiff's argument that the Court should be cautious about certifying a class definition which expressly names the Alleged Abuser, resulting in broad publication of the Alleged Abuser's name in notices of the class action, particularly in a circumstance where the Alleged Abuser is not a party to the action and the allegations against him have not been proven. Among the many authorities cited to the Court in this motion, it appears that the only matter involving allegations of institutional abuse or other wrongdoing, in which the alleged perpetrator was expressly identified in the class definition, is *Doucet v The Royal Winnipeg Ballet*, 2018 ONSC 4008 [*Doucet*], in which the perpetrator was also a defendant.

[62] In my view, the objectives of an appropriate class definition are achieved without expressly identifying the Alleged Abuser. That approach does not make the class unnecessarily broad (see *Hollick* at para 21) and, as submitted by the Plaintiff, potential class members should not experience difficulty in identifying whether the class applies to them. I would therefore reformulate the Plaintiff's proposed definition of the class as follows:

> All persons who participated in the juvenile delinquent sentencing program "Developing Adolescence Strengthening Habits" operated at HMCS Quadra in British Columbia and suffered injury due to sexual abuse, assault, or harassment by Canadian Armed Forces members while participating in said juvenile delinquent sentencing program.

E. *Common Questions of Law or Fact*

[63] The next requirement is that the Plaintiff demonstrate some basis in fact for the claims of the class members raising common questions of law or fact, regardless of whether those common questions predominate over questions affecting only individual members. The Plaintiff proposes the following common questions:

(a) Did the Defendant owe a duty of care to the Plaintiff and the Class and if so, what was the nature of that duty of care?

(b) If the answer to question (a) is yes, did the Defendant breach that duty of care?

(c) Was the Defendant negligent or systemically negligent in the administration of the DASH program or similar programs elsewhere in Canada?

(d) Did the actions or inactions of the Defendant breach the rights of the Plaintiff and the Class pursuant to ss. 7, 12, or 15 of the *Charter*?

(e) If the answer to question (d) is yes, is the Defendant liable for damages pursuant to s. 24 of the *Charter*?

(f) With respect to residents of Québec:

(i) did the actions or inactions of the Defendant constitute a breach of art. 1457 CCQ?

(ii) did the actions or inactions of the Defendant constitute a breach of arts. 1, 4, 10, 10.1, or 25 of the *Québec Charter*?

(iii) if the answer to questions (f)(i) or (f)(ii) is yes, is the Defendant liable for damages flowing therefrom?

(g) Is the Defendant liable to the Class for punitive damages? If so, may the amount be determined on an aggregate basis before or after the resolution of individual issues and distributed on a proportional basis?

[64] The Defendant takes the position that the requirement to demonstrate that the claims of the class members identify common questions has not been met. The Defendant's principal submission is that the proposed common questions cannot be answered without first making findings of fact with respect to each individual claimant. Focusing upon the Plaintiff's allegations of systemic negligence, the Defendant frames its argument in its Memorandum of Fact and Law as follows:

> 41 In assessing the issue of systemic negligence, the management and operational procedures of the Defendant organization need to be analysed in the context of the particular incidents alleged. This would include the adequacy and reasonableness of management and operational procedures in relation to the specific conduct of an Armed Forces supervisor such as [the Alleged Abuser], where and when alleged abuse occurred, how it occurred, whether it was reported, if so to whom, and what steps, if any, were taken as a result. An analysis of the facts relating to the management and

> operational procedures in place at the time of the alleged events is required. This analysis must also consider the circumstances of each specific claimant in order to determine if the organizational defendant should have prevented any abuse found to have occurred, or if the response should have been different to any reported or discovered abuse.

[65] I agree with the Plaintiff's submission that to accept such an argument would be inconsistent with the numerous authorities that have certified class actions in the context of allegations of institutional abuse and inconsistent with particular pronouncements in some of the more prominent authorities. In *Rumley* at paragraphs 28-30, the Supreme Court of Canada considered similar arguments and concluded that allegations of systemic negligence could be determined without reference to the circumstances of any individual class member, although it would remain necessary for each individual member to show causation in the individual component of the proceedings, i.e. that the negligence caused the particular instance of abuse that the individual suffered. In reliance on *Rumley*, the Ontario Court of Appeal arrived at similar conclusions in *Cloud v Canada (Attorney General)*, [2004] OJ No 4924 (Ont CA) at paras 59-65, addressing various arguments to the effect that differences among the individual claims precluded satisfaction of the commonality requirement.

[66] I find that the Plaintiff has met the requirement to demonstrate that the claims of the class members raise common questions. However, there is some duplication in the questions which requires consideration, and the Plaintiff has not established some basis in fact for all the questions he proposes.

[67] The first three proposed questions all surround allegations of negligence. The first two questions ask whether the Defendant owes a duty of care to the Plaintiff and the class, the extent of that duty, and whether it was breached. The third question asks whether the Defendant was negligent or systemically negligent in the administration of the DASH Program. (The third question also relates to similar programs elsewhere in Canada for which, as I have found above, the Plaintiff has not established some basis in fact.) At the hearing of this motion, the Plaintiff acknowledged that there is some redundancy among these questions but encouraged the Court to leave the resolution of such redundancy to the common issues trial judge. The Plaintiff argues that the common issues certified in other institutional abuse cases demonstrate similar redundancy.

[68] I disagree that the authorities cited by the Plaintiff support this proposition. Those cases demonstrate certification of common issues that raise more than one cause of action, for instance often alleging both a breach of a duty of care as well as a breach of a fiduciary duty. However, they do not demonstrate certification of overlapping causes of action in negligence. In my view, the first three proposed questions can be reformulated as follows, eliminating the redundancy without detracting from the content of the proposed questions:

(a) Did the Defendant owe a duty of care to the Plaintiff and the Class, including a duty of care in the administration of the DASH Program, and if so, what was the nature of that duty of care?

(b) If the answer to question (a) is yes, did the Defendant breach that duty of care such that the Defendant was negligent or systemically negligent?

[69] The next two questions proposed by the Plaintiff relate to breaches of the *Charter* and a resulting claim for damages. At the hearing of this motion, the dispute surrounding these questions focused on the timing of the events giving rise to the proposed class action. The Plaintiff acknowledges that, as his claims predate the *Charter* coming into force on April 17, 1985, he has no cause of action under the *Charter*. However, he submits that the evidence demonstrates some basis in fact for the DASH Program having continued until 1986 and that there is therefore a basis for inclusion of the *Charter* claims for the benefit of other class members.

[70] As an initial point, I note that there is no evidence of any participants in the DASH Program having suffered abuse in 1985 or 1986, even if the program did extend to that time period. However, in *P(W) v Alberta*, 2013 ABQB 296 at para 27, the Court of Queen's Bench of Alberta considered an argument that the Court should restrict the class definition to the years in which the plaintiff had produced some evidence of abuse. Associate Chief Justice Rooke rejected this argument, finding that it is not necessary that there be a factual basis for each year in the class definition. I see no reason not to apply that reasoning to the identification of the common questions as well.

[71] However, it is also far from clear that the DASH Program itself extended into 1985 or 1986. The evidence before the Court derived from the Investigation Report does not indicate definitively when the program ended. The evidence of a number of the witnesses interviewed was to the effect that the incident (or possibly incidents), involving the Alleged Abuser in a bedroom with a youth (or possibly youths), resulted in him being discharged from the military a

short time later, and that the DASH Program ended following his departure. While there are discrepancies in the dates employed by the witnesses, they centre on 1982 or 1983, from which it appears unlikely that the program was still in operation in 1985 or 1986. Indeed, the Plaintiff's own evidence, while not perfectly clear and possibly based on hindsight, appears to be that the Alleged Abuser was no longer in the military when he found the Plaintiff and brought him to the house in Royston (which event seems to be positioned in late 1982 or early 1983).

[72] The outlier among the witnesses is Mr. O'Donnell (the retired judge). The investigator's notes contain the following entry:

> Believes program was approx 9 months – 1 year w various #s in it. Ship building program may have been around 1983-1984 up to 1986. Possibly around six kids in program at a time.

[73] The Defendant argues that Mr. O'Donnell was simply mistaken in his recollection that the DASH Program may have continued until as late as 1986. One could easily arrive at this conclusion, particularly as Mr. O'Donnell refers to the program extending from nine months to one year, and there is clear documentary evidence in the record that the Plaintiff was sentenced to participate in the program in December of 1981. On the other hand, it is presumably possible that Mr. O'Donnell was mistaken in his evidence as to the length of time the program was in operation (nine months to one year), not in his evidence as to the year it ended (1986), and it could be argued that a judge who was sentencing juvenile offenders to participate in the program may recall its duration better than Armed Forces members whose postings cycled them in and out of the Quadra base. However, I am concerned that any such analysis, which

compares Mr. O'Donnell's admittedly uncertain recollection to the recollections of other witnesses including the Plaintiff, represents an effort to reconcile conflicting evidence in which, as previously discussed, the Court should not engage in a certification motion.

[74] Therefore, applying the principles canvassed in greater detail earlier in these Reasons, I cannot conclude that there is no basis in fact for the DASH Program extending to 1986. Regardless, the effect of this analysis is merely the inclusion of the Plaintiff's proposed questions related to the *Charter* in the list of common questions. If it is subsequently determined that there are no class members whose claims post-date the *Charter* coming into force, the common issues trial judge can simply answer the *Charter* questions in the negative.

[75] The next proposed question relates to causes of action asserted under Québec law. As I have previously concluded that there is no basis in fact for the existence of youth sentencing programs, operated by or in conjunction with the Armed Forces, other than the DASH Program operated at Quadra in British Columbia, there is no basis for the common questions to include questions arising under the laws of Québec.

[76] Finally, the last set of common questions proposed by the Plaintiff relates to liability for punitive damages and the possibility that such damages be assessed on an aggregate basis. The Defendant's arguments in response focus upon the aggregate damages point. Indeed, the decision in *Doucet*, upon which the Defendant relies, certified common questions as to the availability of punitive damages (at para 110), although rejecting proposed questions related to the assessment of damages on an aggregate basis (at paras 107-109). Many of the institutional

abuse cases cited by the Plaintiff also certified questions as to whether an award of punitive damages was justified. I see no basis not to certify that question.

[77] However, the Defendant argues that aggregate damages are not available unless liability can be determined on a class wide basis, with no questions of fact or law remaining. Unless liability can be established through the common issues, an aggregate common damages issue cannot be certified (see *Doucet* at paras 107-108). The Defendant also submits that a global amount of damages cannot be determined without examining the individual circumstances of each potential class member (see *McCrea v Canada (Attorney General)*, 2015 FC 592 at para 377).

[78] In contrast, the Plaintiff refers the Court to the institutional abuse authorities upon which he relies, several of which certified the question whether the court can make an aggregate assessment of damages as part of the common issues trial, in the event the defendant is found at the common issues trial to have breached an applicable duty. Indeed, in *Pro-Sys* at paras 132-134, while observing that aggregate damages are applicable only once liability has been established, Justice Rothstein held that the question, whether damages assessed in the aggregate are an appropriate remedy, could be certified as a common issue, to be determined at the common issues trial once a finding of liability has been made.

[79] In my view, there is no inconsistency in these authorities. Establishing a defendant's liability to the class is a pre-requisite to the availability of aggregate damages. It may also be that, in certain cases, assessment of damages in the aggregate cannot be determined without

examining the individual circumstances of each class member. However, the proposed question, as framed by the Plaintiff, contemplates these nuances, as it asks the common issues court to assess whether the amount of damages can be determined on an aggregate basis, either before or after the resolution of individual issues. I find this question appropriate for certification.

F. *Preferable Procedure*

[80] The next requirement is that a class proceeding is the preferable procedure for the just and efficient resolution of the common questions. In assessing this requirement, the Court must consider all relevant matters, including those expressly set out in Rule 334.16(2).

[81] The Defendant's submissions on this issue focus in particular upon an argument that individual issues surrounding liability, injury, causality, and damages, specific to each individual claimant, predominate over the common issues. I accept that, as expressly contemplated by Rule 334.16(2)(a), whether common or individual issues predominate is a factor to be considered in assessing whether there is procedure that is preferable to a class action. I also acknowledge the guidance in *Hollick* at para 27 that the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification.

[82] The Defendant argues that the Plaintiff's allegation of systemic negligence underlying the proposed class proceeding will require a great deal of pre-trial production and discovery work, which would be unnecessary if his allegation instead focused upon the actions of the Alleged Abuser and vicarious liability on the part of the Defendant for those actions. The Defendant

further argues that this analysis is particularly compelling in the case of a small class, which it submits is likely to result in the case at hand.

[83] However, it must be recalled that, as expressly stated in Rule 334.16(1)(d), the question is whether a class proceeding is the preferable procedure "…for the just and efficient resolution of the common questions of law or fact" [my emphasis]. The Plaintiff is entitled to frame his claim as he chooses and to assert systemic negligence as a cause of action. While that claim may give rise to more complex and time-consuming litigation than if he had framed it differently, that is not what matters. What matters is whether there is a preferable procedure for resolving the common questions raised by the claim as the Plaintiff has framed it.

[84] I find little in the Defendant's submissions to convince me that the Plaintiff has failed to demonstrate that a class proceeding is the preferable procedure for resolving these common questions. Indeed, I consider the Defendant's arguments surrounding the complexity of the systemic negligence allegation to militate against its position, as presumably it is more efficient to litigate a complex allegation once, through a class proceeding, rather than through individual actions. While I accept that there will be individual issues to be resolved following determination of the common issues, I find the analysis in *Rumley* at para 36 to apply to the present case. If the Plaintiff and other members of the class are successful on the common issues surrounding the Defendant's duty to them, including whether that duty has been breached by way of systemic negligence or otherwise, individual claimants will still be required to litigate issues of injury and causation. However, it appears to me that those individual issues are unlikely to predominate over the common issues.

[85] Taking into account judicial economy, access to justice, and behaviour modification, I find no compelling argument that there is a procedure for resolution of the common questions that would achieve those objectives more efficiently than a class proceeding. As explained by the Supreme Court in *Fischer* at para 49, a plaintiff must show some basis in fact for concluding that a class action would be preferable to other litigation options and, if a defendant presents evidence about an alternative, the plaintiff has the burden of satisfying the preferability requirement. However, a defendant cannot simply assert that there are procedures that would be preferable without an evidentiary basis.

[86] The Defendant submits that other methods of resolution may include joinder, test cases, consolidation, and any other means of resolving the dispute, including not certifying the claim as a class proceeding and allowing the Plaintiff to pursue his claim in the usual course. However, the Defendant has adduced no evidence in support of its position that any of these alternative procedures would better achieve the interests of judicial economy, access to justice, and behaviour modification, or would otherwise be preferable to a class action. Considering the various matters set out in Rule 334.16(2) and the parties' arguments on this issue, and relying on the evidence identifying the nature of the claim and the class in this matter, I am satisfied that there is some basis in fact to conclude that a class proceeding is the preferable procedure.

G. *Representative Plaintiff*

[87] The final requirement for certification is that there is a representative plaintiff who meets certain conditions prescribed by Rule 334.16(1)(e). The Defendant takes the position that the Plaintiff is not an appropriate representative. The Defendant relies on the Plaintiff's cross-

examination as indicating that he is motivated to pursue a civil claim by the fact that he has learned that criminal charges will not be pursued against the Alleged Abuser. The Defendant also submits that his cross-examination indicates that the Plaintiff does not understand his role as proposed representative in a class proceeding, and it argues that the proposed litigation plan presented in the motion materials is inadequate.

[88] I accept that a number of the Plaintiff's responses to answers posed during his cross-examination demonstrate that he has little understanding of the litigation process. However, I do not consider this to disqualify him from being a representative plaintiff, when he has the benefit of competent counsel experienced in class action litigation. In *Pederson v Saskatchewan (Minister of Social Services)*, 2016 SKCA 142 at paras 95-106, the Saskatchewan Court of Appeal held that the certification judge erred in concluding that the proposed representative plaintiffs were unsuitable based on personal motivations and lack of understanding of the claim. The Court of Appeal noted that it is not surprising that litigants do not know the law or litigation procedures, as they look to competent counsel for advice in that respect. A detailed examination of the competence and circumstances of a proposed representative is not in accordance with the relatively low threshold for this requirement. Rather, a representative plaintiff should only be rejected where he or she clearly will not or cannot represent a class.

[89] Similarly, in *Shah v LG Chem Ltd*, 2015 ONSC 6148 [*Shah*] at paras 292-302, the Court considered the defendants' submission that the plaintiffs performed very poorly during cross-examination, in answering questions about the role and responsibilities of a representative plaintiff. The Court rejected this submission, observing that, notwithstanding their poor

performance in cross-examination, the plaintiffs had pleaded a viable cause of action and showed some basis in fact that there is an identifiable class with common issues and that a class proceeding was a preferable procedure for the resolution of that cause of action.

[90] I agree with the submission by the Plaintiff's counsel that these authorities support the proposition that a plaintiff is entitled to rely on his or her counsel to supply knowledge of the litigation process and that a lack of understanding in that regard is not an impediment to being a suitable representative.

[91] The Defendant's submissions in relation to the proposed litigation plan focus on the lack of a plan to collect relevant documents, concerning the creation and operation of the DASH Program, and an overly aggressive timeframe for the completion of examinations for discovery. These comments on the plan may be fair. However, the requirement is that the representative plaintiff has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members as to how the proceeding is progressing. In my view, the overall plan meets this requirement, and I agree with the Plaintiff's submission that the plan can be amended and supplemented as necessary as the action proceeds (see *Shah* at para 301).

[92] At the hearing of this motion, the parties agreed that, in the event the Court granted the motion and issued an Order certifying this matter as a class proceeding, the Order should reserve on the specifics for providing notice to class members including the opt out procedure. This matter is under case management, and the parties jointly proposed that the details

surrounding notice be developed through the case management process, following the decision on certification. I agree with this approach. Following issuance of this Order and Reasons, a case management conference can be convened to discuss next steps in this proceeding, including the notice process and other details of the litigation plan.

[93] Turning briefly to the other requirements in Rule 334.16(1)(e), nothing in the record indicates a conflict between the interests of the Plaintiff and those of other class members, and I note that the Plaintiff's Affidavit provides details of the contingency fee agreement that he has executed with his counsel. My conclusion is that the Rule 334.16(1)(e) requirements are satisfied.

V. **Conclusion**

[94] In conclusion, I find that the requirements for certification are met. The Order issued with these Reasons will address the points contemplated by Rule 334.17(1), in a manner consistent with the conclusions in these Reasons, subject to the reservation on the time and manner for class members to opt out of the class proceeding as mentioned above.

VI. **Costs**

[95] Pursuant to Rule 334.39, there are typically no costs awarded on a motion for certification. Neither party has sought costs, and there is no basis to award costs in the present motion.

ORDER IN T-541-18

THIS COURT ORDERS that:

1. This action is hereby certified as a class proceeding.

2. Eugene Kelly Tippett is appointed as the representative Plaintiff.

3. The definition of the class [the Class] shall be:

> All persons who participated in the juvenile delinquent sentencing program "Developing Adolescence Strengthening Habits" operated at HMCS Quadra in British Columbia [the DASH Program] and suffered injury due to sexual abuse, assault, or harassment by Canadian Armed Forces members while participating in said juvenile delinquent sentencing program.

4. The nature of the claims made on behalf of the Class is as follows:

> The claims assert negligence, including systemic negligence, and breach of the *Canadian Charter of Rights and Freedoms* [the *Charter*].

5. The relief claimed by or from the Class is as follows:

> The claims seek general, special, and punitive damages.

6. The following questions are certified as common issues:

   (a) Did the Defendant owe a duty of care to the Plaintiff and the Class, including a duty of care in the administration of the DASH Program, and if so, what was the nature of that duty of care?

   (b) If the answer to question (a) is yes, did the Defendant breach that duty of care such that the Defendant was negligent or systemically negligent?

   (c) Did the actions or inactions of the Defendant breach the rights of the Plaintiff and the Class pursuant to ss. 7, 12, or 15 of the *Charter*?

(d) If the answer to question (c) is yes, is the Defendant liable for damages pursuant to s. 24 of the *Charter*?

(e) Is the Defendant liable to the Class for punitive damages? If so, may the amount be determined on an aggregate basis before or after the resolution of individual issues and distributed on a proportional basis?

7. The time and manner for Class members to opt out of the class proceeding are reserved to be addressed through the case management process.

8. This Order is made on a without costs basis.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-541-18
STYLE OF CAUSE:	EUGENT KELLY TIPPETT v HER MAJESTY THE QUEEN
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	MAY 27-29, 2019
ORDER AND REASONS:	SOUTHCOTT J.
DATED:	JUNE 26, 2019

APPEARANCES:

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