Federal Court Cour fédérale

Date: 20210623

Docket: T-2158-18

Citation: 2021 FC 656

Ottawa, Ontario, June 23, 2021

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

DIANE NASOGALUAK AS LITIGATION GUARDIAN OF JOE DAVID NASOGALUAK

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

I. Introduction

[1] This is a hearing to determine if the action in question is to be certified as a class action. The motion is brought by Diane Nasogaluak as the litigation guardian for Joe David Nasogaluak for an order certifying this action as a class proceeding under Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 [*Rules*].

[2] The Plaintiff is Joe David Nasogaluak. He is Indigenous and resides in Tuktoyaktuk, Northwest Territories. He alleges that when he was fifteen years old, the RCMP assaulted him during an arrest and held him in RCMP custody. When this action started, Joe Nasogaluak was below the age of majority so his mother acted as his litigation guardian. The hearing was postponed the first time because of COVID-19 pandemic, and when the hearing was rescheduled, he was over the age of majority. The parties disagree on his appropriateness as a representative plaintiff but for simplicity in these reasons, I will refer to Joe Nasogaluak as the "Plaintiff" and deal with the representative issue below.

[3] The proposed class of the proceeding is described by the Plaintiff in the Amended Statement of Claim as:

> all Aboriginal Persons who allege they were assaulted at any time while being held in custody or detained by RCMP Officers in the Territories, and were alive as of December 18, 2016.

[4] The Plaintiff is seeking:

> a) an order certifying the action as a class proceeding and appointing the Plaintiff as the representative plaintiff for the class;
>
> b) a declaration that Canada was, and continues to be systemically negligent in the funding, oversight, operation, supervision, control, maintenance and support of its RCMP Detachments, and RCMP Officers who committed assaults against the Plaintiff and Class Members in the course of their duties in the Territories;
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> c) a declaration that Canada breaches its fiduciary duties to the Plaintiff and Class by virtue of funding, oversight, operation, supervision, control, maintenance and support of its RCMP Detachments, and RCMP Officers who committed assaults against the Plaintiff and Class Members in the course of their duties in the Territories;

> d) a declaration that Canada and its agents systemically violated, and continue to violate sections 7 and 15 of the *Charter* in a way that is not demonstrably justified by section 1 of the *Charter*;
>
> e) a declaration that Canada is liable to the plaintiff and Class Members for damages cause by its negligence and breach of fiduciary duty in relation to the funding, operation, supervision, control, maintenance, oversight and support of RCMP Detachments and RCMP Officers in the Territories;
>
> f) a declaration that Canada is liable to the Plaintiff and Class Members for damages under section 24(1) of the *Charter* for breaches of sections 7 and 15 of the *Charter* in relation to the actions of the RCMP Officers;
>
> g) damages for negligence, and breach of the *Charter* in the amount of $500 million;
>
> h) punitive and exemplary damages in the amount of $100 million;
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> i) prejudgment and post-judgment interest;
>
> j) costs;
>
> k) costs of notice and of administering the plan of distribution of the recovery in this action, plus taxes.

[5] The Defendant is the Attorney General of Canada, representing the RCMP ["Canada" or the "RCMP"]. The Defendant's position is that the Claim does not disclose any cause of action or satisfy any of the rest of the certification test. But, Canada stated that refusing certification would not preclude any individual litigants from alleging negligence in individual cases.

[6] The Defendant agrees with some facts. Those are:

> Canada agrees with the Plaintiffs overview of the organizational structure of the RCMP and its operation in the Territories since 1928. In sum, the RCMP conducts policing in a way that aims to protect the public through the enforcement of the law. The duties and responsibilities of RCMP peace officers (Members) are established in statute and regulation: Members are to preserve the peace, protect the public, enforce the law, and apprehend those

> who may be lawfully taken into custody. The RCMP polices in a variety of circumstances and throughout Canada: in rural areas or small towns, where there are small RCMP detachments, and in urban settings with large police forces. The RCMP is charged to maintain law and order in Yukon, the Northwest Territories and Nunavut.
>
> Canada agrees with the Plaintiffs overview of the RCMP's mandates and authorities. Members may apply reasonable force where necessary to detain and arrest individuals believed to have committed an offence, without causing death or grievous bodily harm except where necessary to protect themselves or others from same. Members are to respect the rights of all persons; under the Code of Conduct, they must not "engage in discrimination or harassment" and must use only "as much force as is reasonably necessary in the circumstances." No other policy supersedes these directives.
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> (Defendant's Memorandum of Fact and Law ["DMFL"] at paras 7-8, footnotes and paragraph numbers omitted)

II. Background

[7] The Plaintiff was born on January 22, 2002. He alleges that in November of 2017, when he was fifteen years old, RCMP officers assaulted him. He says that the RCMP officers pushed him to the ground with no provocation, and then proceeded to beat, choke, punch, and "taser" him while uttering racial slurs. Then the RCMP took him into custody and subsequently released to his parents.

[8] Other potential class members in affidavits describe experiences of racism and RCMP violence when being arrested and detained.

[9] The Plaintiff submitted that the evidence and material facts pled shows systemic negligence, a breach of fiduciary duty, and breaches of sections 7 and 15 of the *Charter* by

Canada in its treatment of Indigenous people in the Territories who have been arrested, detained or held in custody by the RCMP.

III. Issue

[10] The issue is whether or not to grant this motion for certification.

IV. The Law

[11] The criteria for certification are set out in Rule 334.16(1) of the *Rules*, and are attached in Annex "A".

[12] Justice Stratas writing for the Federal Court of Appeal ["FCA"] in *Wenham v Canada (Attorney General)*, 2018 FCA 199 [*Wenham*], echoes the *Rules*, indicating that the Court will certify a proceeding if:

> (a) the pleadings disclose a reasonable cause of action;
> (b) there is an identifiable class of two or more persons;
> (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
> (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
> (e) there is an adequate representative plaintiff or applicant.
>
> (*Wenham* at para 17)

[13] Each certification criterion will be assessed below in the reasons. The applicable law will be included in the particular section.

[14] The evidence relied on by the parties is found in Annex "B".

V. Analysis

A. *Do the pleadings disclose a reasonable cause of action?*

[15] The requirements for certification are set out in the *Rules*. However, the Ontario and British Columbia requirements are similar, and this Court may look to and benefit from the interpretation by those provincial courts and of course follow the FCA, and the Supreme Court of Canada ["SCC"] (see *Buffalo v Samson Cree Nation*, 2010 FCA 165 at para 8; *Canada (Attorney General) v Jost*, 2020 FCA 212 at para 23).

[16] The first requirement is that the pleadings disclose a cause of action. (334.16(1)a) The SCC has repeatedly said that on a motion for certification, a cause of action will be struck, taking the material facts pled as true, if it is "plain and obvious" that no claim exists and it is doomed to fail (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at p 980, 74 DLR (4th) 321; *Hollick v Toronto (City)*, 2001 SCC 68 at para 25 [*Hollick*]; *Pro-Sys Consultants v Microsoft Corporation*, 2013 SCC 57 at para 63 [*Pro-Sys*]; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 20 [*Alberta Elders*]).

[17] This is the same test as the test to strike an action (*Wenham* at paras 32-33). I am not to weigh the evidence or assess the merits at this screening stage (*Canada v John Doe*, 2016 FCA 191 at para 23 [*John Doe*]; *Wenham* at paras 24-25), but I can reject facts pled if they are "manifestly incapable of being proven" (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 87).

[18] The Plaintiff has alleged several causes of action in his pleadings:

- systemic negligence by the RCMP in their dealings with Aboriginal people who have been detained or in custody;
- breaches of the *Charter* (sections 7 and 15); and
- a breach of fiduciary duty owed by the RCMP to the Indigenous people in the Territories.

(1) Systemic Negligence

[19] The Plaintiff argues that he has properly pled all of the elements for a claim of systemic negligence: a duty of care owed, a breach of the standard of care, damages sustained, and caused by the negligence of the tortfeasor.

[20] He says that there is no question that the RCMP owe a duty of care to the safety of person in their care, custody and control when the RCMP have arrested, detained or taken them into custody including suspects under investigation. He argues that in this case there is a relationship of proximity because Canada is responsible for "establishing, funding, overseeing, operating, supervising, controlling, maintaining and supporting the RCMP…in the Territories". He submitted that "Canada knew that the Plaintiff and the class were part of a 'distinct group of potential victims' of abuse which gave rise to a relationship of proximity…" (Plaintiff's Memorandum of Fact and Law ["PMFL"] at para 52).

[21] He says the pleadings have sufficient material facts to support the proximity and foreseeability to satisfy the first stage of the *Anns* test (*Anns v Merton London Borough Council*, [1977] UKHL 4, [1978] AC 728 [*Anns*]). Because the discriminatory practices of the RCMP in

the Territories have been long known to Canada, and so it was foreseeable that there would be harm caused.

[22] Breaches of the duty of care include that Canada repeatedly ignored calls for reform and broke promises to do better. The pleadings have the materials facts supporting that breaches occurred and the Plaintiff indicates that the he pled material facts to support the class members suffered damages.

[23] Canada's response is that "[t]he Plaintiff alleges systemic negligence of a type that contradicts settled law". Their position is that no private law duty of care arises out of the Claim because private law duties of care do not arise in respect of policy making, and that this is confirmed in *Brazeau v Canada (Attorney General)*, 2020 ONCA 184 at paragraph 32 [*Brazeau*]. What the Plaintiff is complaining about, Canada argues, are policy decisions and therefore they do not create a duty of care.

[24] Canada's position is that this Claim relies on a broadly stated private law duty of care oriented towards policy level decision making. Thus, these issues do not give rise to a *prima facie* duty of care under the first part of the *Anns* test.

[25] Canada says that the Claim is not about effecting arrests or individual interactions with citizens, but about a duty of care to create sound and effective policy; relying on the alleged assaults as evidence of systemic negligence at the policy level.

[26] Further submissions are that even if there were a private law duty of care in policymaking, the Claim is not properly structured because there would need to be case-by-case adjudication required to determine whether any individual was actually assaulted by an RCMP member.

[27] Canada purports that the Plaintiff does not identify an applicable standard of care in policymaking, or how an alleged breach may lead to particular instances of an unreasonable use of force so therefore the result should be the striking of the cause of action.

[28] The Plaintiff's response to this argument is that Canada misconstrues the meaning of policy immunity; only "core policy" decisions bestow immunity on governments, and the Plaintiff seeks to address operational failures. He argues that these types of claims are actionable, and have been repeatedly certified. He also says that this action is a "top down" analysis, rather than Canada's focus on the individual circumstances of the class members; the systemic failures are the negligence as described by the SCC in *Rumley v British Columbia*, 2001 SCC 69 at paragraph 30 [*Rumley*].

(a) *Analysis - Systemic Negligence*

[29] The Defendant alleges that policymaking is immune from negligence claims; however, I agree with the Plaintiff that there is some equivocation in its arguments. The law with regards to policy immunity is set out in *R v Imperial Tobacco*, 2011 SCC 42 [*Imperial Tobacco*], and applied in *Brazeau* and pertains to a policy decision that they said resulted in harm.

[30] In the instant case, the allegation is not that a specific policy resulted in the harm to the Plaintiff and class members, but rather the operationalization of policing in the Territories. In *Imperial Tobacco*, the unanimous Court said:

> In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a "true" or "core" policy, in the sense of a course or principle of action that the government adopted. The government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out.
>
> (*Imperial Tobacco* at para 95)

[31] In this case, the Plaintiff points not to a true policy that violates the rights of the class members, but the lack of following policy—thus making it operational, and so it is plead as negligent application of operational decisions. In *Brazeau*, the claim was based on policies allowing for administrative segregation, and the claim attacked those core policies. Making these types of policy decisions immune is not what the *Brazeau* or *Imperial Tobacco* stands for, and is distinguishable from the facts of the case.

[32] The Plaintiff is not alleging that policy decisions resulted in the damage, but rather that there is a duty of care owed to the class members by the Defendant "through the establishment, funding, oversight, operation, supervision, control, maintenance, and support of RCMP Detachments in the Territories" given they are the exclusive policing in the North. Canada

claims that "[s]ystemic negligence cannot substitute the case-by-case adjudication required to determine whether any individual was in fact assaulted by an RCMP member".

[33] The SCC held :

> … the respondents' argument is based on an allegation of "systemic" negligence – "the failure to have in place management and operations procedures that would reasonably have prevented the abuse"…. The respondents assert, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member.
>
> (*Rumley* at para 30, emphasis added)

This is precisely in line with what the Plaintiff is alleging is the case here.

[34] The pleading sets out the material facts that are clear it is operation and not policy at issue:

> Class members had the reasonable expectation that Canada would operate its RCMP detachment in the Territories in a manner that was substantially similar to the care, control and supervision provided to non-Aboriginal Persons in custody of the RCMP during the Class Period.
>
> (Amended Statement of Claim at para 51)

[35] The Ontario Court of Appeal ["ONCA"], in *Francis v Ontario*, 2021 ONCA 197 [*Francis*], upheld the finding of systemic negligence related to the province's placement of inmates in administrative segregation. The defendant in that case had argued that these were policy decisions and therefore there was no duty of care. The ONCA, however, upheld that the actions were operational in nature. They found that the *Brazeau* decision did not predetermine

the outcome given the way the plaintiff pled his case, which was that the systemic negligence claim challenged what were policy decisions (*Francis* at paras 97-98). In *Francis*, the plaintiff had defined the class in two groups (see *Francis* at para 99), and the pleadings focused on the implementation of segregation in Ontario which were operational in nature such as operation of the correctional facilities.

[36] Further, the pleadings in *Francis* set out a number of operational decisions that allege negligence (*Francis* at para 100). In that case, proximity and foreseeability were found to support a basis to find a duty of care. In this case, it is well established that governments owe a duty of care to individuals arrested, detained and/or in their custody.

[37] The ONCA indicated: “again it is accepted to be the case on an individual basis. If identical action is taken regarding the inmate population, or a subset of that population, and harm results, it is as foreseeable on a group-wide basis as it is on an individual basis” (*Francis* at para 103). The ONCA said “[t]here is no reason in principle to adopt an approach to these claims that requires each individual inmate to commence their own action in order to see relief for the resulting harm. Indeed, such a result would run counter to the very purpose behind the Class Proceedings Act…” (*Francis* at para 107). They relied on the jurisprudence of *Rumley* and *Cloud v Canada (Attorney General)*, [2004] OJ No 4924 (CA) [*Cloud*], for examples and support for the granting of class action certification for systemic negligence in those instances the operation of a residential school for the deaf and blind and a residential school respectively.

[38] Of course, in *Francis* it was acknowledged that "[w]hile individual circumstances may ultimately be relevant to the proof of individual levels of damages they are not required for proof of a breach of the duty of care on a system-wide basis, nor are they required for determining a base level of damages applicable to all" (*Francis* at para 110).

[39] I see strong similarities between this case and *Francis*, excepting that *Francis* had already been certified, and the decision was on appeal from a summary judgement. I have a far lower standard to meet given I am looking only at the material facts pled, remembering that I am only at the screening stage of deciding whether it is plain and obvious the claim will fail.

[40] Canada's response is that this case is distinguishable from other systemic negligence cases that have been certified because "such claims have involved alleged abuse of a specific and identifiable group of vulnerable individuals under government or institutional care".

[41] However, the Plaintiff is pleading that the relationship of proximity stems from the fact that the RCMP is the sole policing agent in the Territories, and that the class members are Indigenous people that who were alive as of December 18, 2016, and allege assault by RCMP officers while being held in custody or detained. That is a relationship that meets the proximity and foreseeability test based on the material facts pled. Thus, the material facts disclose the elements for a duty of care. It needs to be said yet again that at trial this will need to be proved and is far from an easy hurtle.

[42] I find the remaining requisite elements have been pled to show that it is not plain and obvious that this cause of action will fail.

(2) Fiduciary Duty

[43] The Plaintiff claims that there was a fiduciary duty owed to him and members of the Class by the RCMP, and that this duty was breached. He argues that the already low hurdle for certification is even lower in the context of fiduciary duty and Indigenous claims, citing the FCA in *Brake v Canada*, 2019 FCA 274 at paragraph 66 [*Brake*], where the Court says that there is a "particularly heavy burden" to strike a pleading when fiduciary obligations and Indigenous law intersect.

[44] The Plaintiff says that there are two ways in which a fiduciary duty can arise between Canada and Indigenous persons on these facts:

> (a) When the Crown assumes discretionary control over specific Indigenous interests; or
> (b) if the following conditions are met:
>
> (i) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
> (ii) a defined person or class of persons vulnerable to the fiduciary's control; and,
> (iii) 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.

[45] The Plaintiff's position is that "Canada undertook to act in the best interests of Indigenous persons when it assumed exclusive jurisdiction over the internal management of the

Territorial Police Services, in circumstances where it knew that Indigenous Persons made up a majority of the population subject to its jurisdiction".

[46] He says that the breach was because Canada did not adequately protect class members from the discriminatory practices of the RCMP. He also points out that the law of fiduciary duties is a regularly evolving area of law, and it cannot be said that it is plain and obvious that the claim will fail.

[47] Canada, on the other hand, says that the concept of fiduciary duty does not apply in the context of policing. Doing so, they say, would conflict with the Crown's duty to act in the best interests of society as a whole, because they must put their beneficiary's interests before anyone else's.

[48] They cite *Alberta Elders* for the proposition that a duty of loyalty to a group will be rare. Further, they argue that there is no general or overarching fiduciary duty from the Crown to Indigenous peoples, but only in particular circumstances, and that the Court would have to find a "cognizable Aboriginal interest" and a Crown undertaking of discretionary control in relation thereto, creating a responsibility in the nature of a private law duty. This, they argue, is not possible under the facts pled, and that the circumstances of the pleadings do not give rise to any kind of Aboriginal rights which would distinguish the relationship from non-Indigenous persons.

(a) *Analysis - Fiduciary Duty*

[49] Support for the novel claim of the Plaintiff is found in *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 [*Manitoba Metis*]. *Manitoba Metis* provides for when a fiduciary duty between Canada and an Indigenous person can arise as a result of an undertaking:

> [49] In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.
>
> [50] 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)
>
> (*Manitoba Metis* at paras 49-50)

[50] Canada's submissions are that because of competing interests, the Crown cannot be a fiduciary in regards to their relationship to the Indigenous people of the Territories in Canada. With respect, this is simply not true. The Crown does not have to sacrifice their duty to protect

Canadians as a whole in order to ensure that Indigenous people within the policing territory of the agreement are not unnecessarily harmed during arrest and incarceration.

[51] As was said in *Wewaykum Indian Band v Canada*, 2002 SCC 79 at paragraph 96:

> When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, 1995 CanLII 3602 (FCA), [1995] 2 F.C. 762 (C.A.). As the Campbell River Band acknowledged in its factum, "[t]he Crown's position as fiduciary is necessarily unique" (para. 96). In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were "vulnerable" to the adverse exercise of the government's discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute.

[52] In the instant case, the pleading is that Canada has undertaken to act in the best interest of Indigenous persons by the fact that they have assumed internal management of an area, which is made up primarily of Indigenous people, and that this satisfies the test for a fiduciary relationship.

[53] *Alberta Elders*, as cited by Canada, stands for the rarity of a duty of loyalty, not for its impossibility. The rarity of a necessary aspect cannot then be used, logically, to say that it is plain and obvious that there will be no cause of action.

[54] I agree that the three conditions of a fiduciary relationship set out in *Manitoba Metis* are potentially satisfied by the material facts plead in this case. The undertaking could be present by

the fact that the RCMP are the sole providers of policing in the Territories; the defined class of Indigenous people are subject to the RCMP's control; and finally, there is an interest of the beneficiary which stands to be adversely affected by the exercise of the RCMP's discretion and control: namely, their wellbeing, and order.

[55] In my recent decision of *BigEagle v Canada*, 2021 FC 504 [*BigEagle*], I dismissed a motion for certification for no cause of action. While the facts of the cases might seem similar, as they both involve alleged systemic negligence and breaches of fiduciary duties and the *Charter* by the RCMP, the cases are quite different. In *BigEagle*, I found that a fiduciary relationship was not properly pled, and that it was plain and obvious that a claim based on a fiduciary relationship would fail (see *BigEagle* at paras 95-118, 165-174).

[56] The Claim here is much more narrow. Unlike *BigEagle*, in the instant case the RCMP is the sole policing body in the Territories, and a fiduciary duty owed by the RCMP is specifically pled by the Plaintiff. Further, unlike *BigEagle*, in this case the class members were in custody of the RCMP when the alleged breaches occurred. I find that the facts here are different enough to distinguish the current matter from *BigEagle*.

[57] Again, at this stage of the matter, the pleadings may only be struck if it is plain and obvious that no claim exists. Though this cause of action seems unlikely to be successful on the merits, that is not the test. I find that this novel fiducial relationship is best left for a trial judge to determine, and should not be struck at this stage of the case.

(3) Section 7 of the *Charter*

[58] The Plaintiff's argument is that by using excessive force, the RCMP violated his security of the person rights, and that this has cause physical and psychological injury. He states that physical restraint engaged the right to liberty under section 7 of the *Charter* and that there is an increased risk of death due to injuries resulting form the RCMP's discriminatory actions towards vulnerable Indigenous individuals. His position is that the violations of these rights occurred arbitrarily or were grossly disproportionate and so were not done in accordance with the principles of fundamental justice and that any breaches of sections 7 (and 15) cannot be justified under section 1 of the *Charter* in a free and democratic society.

[59] In contrast Canada submits that the section 7 claims are akin to a claim in systemic negligence, citing *JB v Ontario (Child and Youth Services)*, 2020 ONCA 198 at paragraphs 19, 60 [*JB v Ontario*]. In *JB v Ontario*, the Court said that a negligence claim cannot be recast as a *Charter* breach. They also state that the claim does not plead sufficient facts to lead to a section 7 breach because there are highly individualized circumstances of each assault allegation.

[60] The Plaintiff responds saying that his argument is a top-down argument, and does not depend on individualized circumstances, and simply that the "systemic excessive use of force and abuses by the RCMP are racially motivated and cause physical and psychological injuries…"

(a) *Analysis - Charter section 7*

[61] While the instant case might deal with decisions that are top-down, and concern the health and well-being of people affected, there is a significant difference between *JB v Ontario* and the alleged actions of RCMP officers whose alleged actions would constitute *Charter* breaches themselves. *JB v Ontario* concerned hair follicle testing for alcohol and drug abuse for the purpose of child protection proceedings. The facts of the cases are different enough to warrant a full and fresh analysis.

[62] The deliberate actions of RCMP officers versus classic examples of negligence are too different, in my opinion, to decide on a certification motion. This, again, distinguishes this matter from the facts of *BigEagle*. In *BigEagle*, the allegations were that the RCMP should have done a better job in finding missing and murdered Indigenous women through out Canada whether within their jurisdiction or not. In the present case, however, there are allegations of deliberate misconduct, racism and violence. I cannot say that these allegations will be successful, but there are sufficient differences in the facts of the cases to be able to say that they are not devoid of any reasonable chance.

[63] Importantly, the Plaintiff has made the required pleadings for a section 7 *Charter* claim: government action, which resulted in a risk to life, liberty, and security of the person, was grossly disproportionate and arbitrary, and is not justified under section 1 of the *Charter*. This is not the stage for analysis of evidence, but for the form of the pleadings.

[64] A final note regarding this cause of action (as well as the section 15 *Charter* issue below) is that Canada submitted that this cause of action could not proceed given that there would be class members and incidents that may have happened before the *Charter*. The *Charter* came into effect April 17, 1982 with section 15 not coming into force until April 17, 1985. It is true that some potential class members may have claims arising before these dates, it is important to consider the definition of class member in the Statement of Claim only includes people alive in 2016. This span of 34 years for section 7 practically somewhat limits the number of people of an age likely to be arrested, detained or custody before 1982 alive in 2016 and otherwise meeting the definition of a class member. But, the short answer to that argument is that a pre-*Charter* claim would exclude a person at the individual stage. This should not cause it to be plain and obvious this cause of action is doomed to fail at the certification stage (see also paragraphs 73-75 below).

[65] In summary, while I do not find it plain and obvious that this cause of action will fail though it is obvious, it will have some high hurtles to jump at trial. I will allow this as a valid cause of action.

(4) Section 15 of the *Charter*

[66] The Plaintiff says that Canada discriminated against the class members based on race, national identity, spiritual beliefs, religious beliefs, and ethic origin contrary to section 15 of the *Charter*. This breach was because the RCMP:

> (i) [allowed] its agents to target Indigenous persons during their time in custody;

> (ii) [allowed] its agents to use excessive force on Indigenous persons; and
>
> (iii) [were] careless, reckless, wilfully blind or deliberately accepting of a policy of discrimination against Indigenous persons in custody in the territories.
>
> (PMFL at para 38)

[67] The Plaintiff's position is that this differential treatment is based on an enumerated ground. He further says that the impact of this treatment devalues the dignity of the class members. This satisfies, he says, the requirements for a pleading of section 15(1) of the *Charter*.

[68] Canada concedes that the first two allegations meet the threshold under the cause of action test, but that they do not constitute viable common issues and they arise only after April 17, 1985, when section 15 of the *Charter* came into force, not before.

[69] However, they do not concede the third; they argue that the Claim pleads no material facts in support of the allegation that the RCMP holds and pursues an actual policy of discrimination against Indigenous persons in the territories and that the *Code of Conduct* of the RCMP expressly holds them to a standard of non-discrimination.

[70] The Plaintiff replies that *Fraser v Canada (Attorney General)*, 2020 SCC 28, bolsters his section 15 claim. He quotes the SCC's opinion on evidentiary requirements in discrimination cases, which says that evidence about a group's situation can help establish a *prima facie* case of discrimination, as can evidence about the outcome of law or action, including statistical evidence. He argues that their expert witness will provide such evidence but does not specifically address the common issues objection in their reply.

(a) *Analysis - Charter section 15*

[71] I agree with Canada's concession that the two aspects of the section 15 allegations have been properly pled and when the facts are assumed to be true potentially satisfy this test. As stated in *R v Kapp*, 2008 SCC 41 at paragraph 17, the test for discrimination under section 15 of the *Charter* is:

> (1) Does the law create a distinction based on an enumerated or analogous ground?
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[72] Canada, however, argues that because the class spans a period prior to the enactment of the *Charter*, there is no connected common issue, and hence no cause of action.

[73] As of now, the allegations in the affidavits submitted would all be covered under the *Charter* based on dates; but it is true that potential class members' claims might not have taken place while the *Charter* was in force. This is properly a common issues question, not a cause of action question but because Canada objects on this point, however, I will deal with their objection here (see para 64 above).

[74] *Hollick* characterizes an issue to be "common 'only where its resolution is necessary to the resolution of each class member's claim' ... Further, an issue will not be 'common' in the requisite sense unless the issue is a 'substantial ... ingredient' of each of the class members'

claims" *(Hollick* at para 18, citing *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 39 [*Western Canadian*]*). Western Canadian*, however, goes on to say:

> Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significant of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.
>
> (*Western Canadian* at para 39, emphasis added)

[75] For those reasons I do not find a problem with the common issue, and, subsequently, with this cause of action. If I am wrong, however, a simple division into two subclasses would cure any defect with different timelines for causes of action. I will allow this as a valid cause of action.

[76] Having finished with the first certification requirement, I will move on to the second. For the remaining four criteria, the test to be met is whether there is "some basis of fact" to support the certification order (Hollick at para 25).

B. *Rule 336.16(1)(b): identifiable class of two or more persons*

[77] The Plaintiff contends that the affidavits submitted by proposed class members provides that there is some basis in fact that two or more persons fall within the proposed class definition. The Plaintiff claims that the class definition meets the test because it is objective and rationally linked the common issue, with the definition not being dependent on the outcome of the

litigation. The Plaintiff's submission is that there is no reason to reject the class because there is a claims limit—those who allege they were assaulted—as it is necessary and there is support in the case law for this type of class, including, among others, *Rumley* at paragraphs 21 and 40.

[78] In contrast, Canada says that the proposed class is "imprecise, overbroad, and unmanageable, precluding meaningful identification of class members". They cite *Cotter v Levy*, [2000] OJ No 1086 at paragraph 10, for the idea that the class definition must be "certain, objective and readily ascertainable by lay persons".

[79] Canada submits that the proposed class definition is based on non-objective criteria that precludes identification, and that the mere fact of having made an allegation is not sufficiently objective. Further, they argue that the definition is unnecessarily complex, as it would require determining whether those involved would be considered Aboriginal under section 35 of the *Constitution Act, 1982*.

[80] Canada's position is that this requirement is not met because:

- the class is overbroad given that the class period is far too long, dating back to 1928 and some of the causes of action were not even available that long ago;
- the class would be over- inclusive because it would be populated by members with disparate experience involving the RCMP because the definition covers assaults occurring during arrest, detainment and custody. They draw an analogy with the Ontario Lottery and Gaming Corporation's alleged failure to enforce gambling limits in *Dennis v Ontario Lottery and Gaming Corporation*, 2013 ONCA 501 at paragraphs 61-75

[*Dennis*]. In that case it was found over-inclusive because some individuals had signed self exclusive forms and some had not;

- a class compromising of individuals who make allegations, without more, is unmanageable;
- there is no basis of fact for finding an identifiable class because the evidence does not reveal two or more individuals with viable common issues. Canada says there are too many variabilities in experiences and that Ms. MacDonald and Ms. Randhawa's affidavits do not support allegations of unlawful assaults. Nor does the expert affidavit of Professor Wortley. This method, they say, would require proof of assaults through individual adjudication if it were to exclude those who have suffered no legal wrong; and
- the proposed class definition does not have a rational connection to the proposed common issues because there is no causal link in the pleadings between the assault allegations and the common issues.

[81] The Plaintiff states in reply that Canada used the wrong test, and they must follow *Rumley*. Further, he points out that Canada's characterization of the criteria being non-objective is simply wrong; Indigenous status is an objective criterion. The Plaintiff is, however, willing to amend the definition from "Aboriginal" to "Racialized", if that is a preferable class.

[82] He contends that there is no need for the evidence to reveal two or more individuals with viable common issues, but rather "some basis in fact" that there is an identifiable class.

[83] In *Lin v Airbnb, Inc*, 2019 FC 1563 [*Airbnb*], the Court notes that:

> Three criteria must be met to find an identifiable class: (i) the class must be defined by objective criteria; (ii) the class must be defined without reference to the merits of the actions; and (iii) there must be a rational connection between the common issues and the proposed class definition (*Hollick* at para 17; *Dutton* at para 38; *Wenham* at para 69). Though the SCC instructed courts to generously interpret class action legislation, the burden lies on the proposed representative plaintiff to show that the defined class is sufficiently narrow, thereby meeting the criteria (*Hollick* at paras 14, 20). Still, the burden is not unduly onerous: **the representative does not need to show that "everyone in the class shares the same interest in the resolution of the asserted common issue[s]", only that the class is not "unnecessarily broad"** (emphasis added) (*Hollick* at para 21; *Paradis Honey Ltd. v Canada*, 2017 FC 199 [*Paradis Honey*] at para 24). **As such, over-inclusion and under-inclusion are not fatal to certification, as long as they are not illogical or arbitrary** (*Rae* at para 56). [emphasis added]
>
> (*Airbnb* at para 91, emphasis added and omitted)

[84] In *Rumley*, the SCC certified an action where the class was defined as "[s]tudents at the Jericho Hill School between 1950 and 1992 who reside in British Columbia and claim to have suffered injury, loss or damage as a result of misconduct of a sexual nature occurring at the school" (*Rumley* at para 21).

[85] The class in *Rumley* is of the same form as the one proposed by the Plaintiff, and is, on the face, suitable. I disagree with Canada that the Indigenous status of the class members is not an objective criterion, and disagree that it is overly complex to determine. In fact, Canada filed the affidavit of Sheri Tait where she outlines various locations in the Territories, and those who identify as Indigenous are listed by number.

[86] While there could be some instances that are disputed at the individual level, many will not, and this should not prevent the Court from certifying this as a class action. I find that this criterion has been met for the purpose of certification.

C. *Rule 336.16(1)(c): the claims of the class members raise common questions of law or fact*

[87] The Plaintiff submits that the proposed common issues track previously certified common issues in systemic negligence, fiduciary duty, and *Charter* cases so are not novel or exceptional.

[88] The common issues are set out in the litigation plan as follows:

> a. By its operation or management of the Royal Canadian Mounted Police ("RCMP"), did the defendant breach a duty of care it owed to the class to protect them from actionable physical or psychological harm?
> b. By its operation or management of the RCMP, did the defendant breach a fiduciary duty owed to the class to protect them from actionable physical or psychological harm?
> c. By its operation or management of the RCMP, did the defendant breach the right to life, liberty and security of the person of the class under section 7 of the *Canadian Charter of Rights and Freedoms*?
> d. If the answer to common issue (c) is yes, did the defendant's actions breach the rights of the class in a manner contrary to the interests of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*?
> e. Did the actions of the defendant breach the right of the class to the equal protection and equal benefits of the law without discrimination based on race, religion or ethnicity under section 15 of the *Canadian Charter of Rights and Freedoms*?
> f. If the answer to common issue (c), (d), or (e) is "yes", were the defendant's actions saved by section 1 of the *Canadian Charter of Rights and Freedoms*, and if so, to what extent and for what time period?
> g. If the answer to common issue (c), (d), or (e) is "yes", and the answer to common issue (f) is "no", do those breaches make

> damages an appropriate and just remedy under section 24 of the *Canadian Charter of Rights and Freedoms*?
> h. If the answer to any of common issues (a), (b), or (g) is "yes", can the court make an aggregate assessment of damages suffered by some or all class members as pan of the common issues trial, and if so, in what amount?
> i. Does the defendant's conduct justify an award of punitive damages?
> j. If the answer to common issue (i) is "yes", what amount of punitive damages ought to be awarded against the defendant?

[89] Regarding issues a-f (“Liability Common Issues”), the Plaintiff submits that they do not depend on the evidence of individual class members, and that they all share an interest in whether the Crown has committed breaches. He further argues that the negligence, *Charter* and fiduciary duty common issues have been certified in numerous class actions. He cites, for negligence: *John Doe* at para 63; *Rumley* at para 34 and more; for fiduciary duty: *Brake* at paras 79-80; *Manuge v Canada*, 2008 FC 624 at para 43 rev’d 2009 FCA 29, aff’d 2010 SCC 67 and more; and for the *Charter*: *Brake*; *Brazeau v AG*, 2016 ONSC 7836 [*Brazeau ONSC*] and more.

[90] Regarding issues g-j (“Damages Common Issues”) where Canada has concerns whether the Court can make an award of damages (either a *Charter* award or an aggregate assessment), the Plaintiff argues that aggregate *Charter* awards have been granted in class actions previously (*Brake*, *Brazeau ONSC* and more) and is appropriate in this case.

[91] Further, he argues that Rule 334.28(1) permits the Court to make an award of aggregate damages, which are frequently certified in class proceedings. The Plaintiff also says punitive/exemplary damages are common issues that may be properly certified (*Good v Toronto Police Services Board*, 2016 ONCA 250 at para 75 [*Good*]; *Cloud* at para 70 and more).

[92] Canada submits that there are no common issues identified. They argue that an overwhelming amount of individual adjudication will be necessary. They say that because the negligence and fiduciary issues mirror the causes of action, which they claim are not valid, they cannot be common issues. Further, they say that negligence and fiduciary breaches are individual in nature, and cannot move the class members' claims forward in any meaningful way because of the individual adjudication required.

[93] Regarding the section 7 *Charter* questions, Canada argues that they are individual rights and can only be asserted by the rights holder; and that no third party, including a representative plaintiff, can invoke, claim, resolve, or forfeit the remedies available. They also claim the individual inquiries issue noted above apply to this question.

[94] For section 15, Canada submits that there is no supporting evidence of discriminatory laws or policy. Canada's position is that the express policy of the RCMP is contrary to the allegations of discrimination. Insofar as the actions of the individual officers, Canada argues, this is not a fact common to all class members as the allegations span decades, different communities, and there are no particular officers identified. Further, they say that admissions of systemic racism by the Prime Minister do not refer to individual circumstances or answer particular allegations, and so do not establish a basis in fact for the common issues. Canada contends that the statements of the government do not constitute legal admissions, especially in light of apology legislation.

[95] The three proposed common issues relating to damages are insufficient Canada says because the litigation plan does not state how they intend to establish aggregate damages as a common issue. This raises structural concerns about the claim in the sense that individual assault allegations would have to be adjudicated. They argue similarly for punitive damages, and distinguish *Good* and *Brazeau* on the basis that there is no general breach established.

[96] Finally, Canada asserts that the evidence does not establish commonality in the sense that the evidence of Professor Wortley's analysis is deficient. He does not consider, Canada says, the potential lawfulness of force. They say that Ms. MacDonald's affidavit does not detail any deficiencies in the operation and management of the RCMP, and that Ms. Randhawa's affidavit lacks probative value, focusing on the media. They convey that the test is not met because the evidence from the five potential class members and Plaintiff does not touch on the management and operation of the RCMP, but rather describes individual incidents and personal beliefs.

[97] Replying to these assertions the Plaintiff indicates that it will not be necessary for individuals to prove assaults for the first two common issues to be answered, and that the existence of individual issues, even substantial ones, is not a bar to certification, citing *Hollick* at paragraph 30.

[98] He characterizes Canada's position that *Charter* claims cannot be invoked by a representative plaintiff as incorrect at law. The Plaintiff declares that the *Charter* claims do not require individual assessment, and that *Brazeau* supports this, and that Canada's distinguishing of *Good* is not determinative.

[99] Finally, the Plaintiff replies to the charge that they have not filed specific policies with the fact that he cannot be, and is not, required to file any policies at this stage of the proceeding; there has been no discovery, and this is a premature argument.

[100] The test for common question of law is in *Western Canadian*:

> …The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party.
>
> (*Western Canadian* at para 39)

The decision goes on to explain the rest of the test, reproduced above at paragraph 74.

[101] Concerning Canada's argument (above) that an inordinate amount of individual fact-finding will be necessary. I disagree. The Liability Common Issues (a-f) are predominantly legal questions, which must be answered: if the allegations are true, was there a breach of various rights of the class members? The remaining questions are also general questions regarding the appropriateness of damage awards. Answering the common questions in either the positive or the negative will then allow for the determination of the individual class members situations where some degree of individual assessment will be appropriate.

[102] Similarity, I disagree with Canada's characterization of these claims as individual because the framing of the pleadings is not. There will not need to be individual assessment until the common questions are answered. This is because the claims do not ask if an RCMP officer

illegally assaulted a class member, but rather whether the operations of the RCMP create a system where illegal assaults happen. After this has been established, then it can be determined whether a particular class member was a victim of this system. The damage to the class member is both evidence of the system as well as potential cause for damages because of the alleged breach of their rights from the operation of the RCMP in the Territories.

[103] Nor do I agree with Canada's position that *Charter* breaches, negligence, and breaches of fiduciary duty are not appropriately subjects of common issues (see above). This is not reflected in the case law, and the above discussion on causes of action adequately deal with this issue.

[104] To clarify and distinguish the facts in *BigEagle*, in that case the victims were relatives of those claiming the breaches, and in this case they are the victims themselves. While the claim may not be ultimately successful, there is a sufficient connection on some basis of fact standard to warrant having it decided at the appropriate stage.

[105] Because I have deemed the causes of action to be valid, it is not necessary to consider the argument put forward by Canada that because the causes of action are invalid, there is no common issue.

[106] I am of the opinion that the common questions proposed by the Plaintiff are appropriate by which the determination will move the litigation forward—avoiding duplication of legal analysis.

D. *Rule 336.16(1)(d): a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law and fact*

[107] The Plaintiff's position is that a class action is the preferable procedure for these claims. He argues that no other procedure available would provide the same access to justice, and that individual litigation would not address the economic barriers or judicial economy that a class proceeding would. Further, he voices that the goal of behaviour modification would be satisfied through a class proceeding.

[108] He also noted during oral submissions that the Defendant must file evidence about which alternative proceeding type would be preferable and did not. In reply to the assertion that they must file evidence about which proceeding type would be better, Canada quoted *AIC Limited v Fischer*, 2013 SCC 69 [*AIC*] for the proposition that the evidentiary burden only shifts to the defendant when it is a non-litigation alternative alleged to be preferable.

[109] Canada says that a class proceeding is not appropriate where the litigation requires detailed individual assessment, and they cite *Harrison v Afexa Life Sciences Inc*, 2018 BCCA 165 at paragraph 62 to support this. They also assert that it is not appropriate where the target of the litigation is policy-making. They cite *RG v The Hospital for Sick Children*, 2017 ONSC 6545 at paragraph 159, and hold that they are analogous in the sense that "in the context of the claim as a whole, the degree to which the common issues trial would advance the proposed class claims would be small compared to the legal claim that each class member would need to establish in an individual issues trial". Canada mentioned that even if a duty of care were to be

found, it would leave breach of the standard of care, causation, and damages to be individually assessed.

[110] Canada strongly suggests that because other judicial proceedings are available for resolution of the assault claims and because individuals may bring their own civil actions, there is no economy to be gained by a class proceeding.

[111] To support their position Canada states that the expert methodology suggests a methodology that would stand in place of the process of civil litigation, and that Professor Wortley's evidence is better suited to policy-making bodies.

[112] Canada says that there are existing independent recourse mechanisms which are intended to address the issues raised, and that the SCC has accepted that the availability of non-judicial processes may be a factor in determining preferability (*AIC* at para 19). The assault allegations should be resolved, they say, under a complaints process designed to determine these issues. Institutional issues should be addressed, they say, through a public inquiry.

[113] *Hollick* instructs the preferability procedure be conducted through the lens of the three principal goals of class actions: judicial economy, behaviour modification, and access to justice (*Hollick* at para 27; *AIC* at para 22). When looked at through this lens, and taking into account the vulnerable state of northern Indigenous people, it is evident that a class action is the preferable procedure for the resolution of these issues. The cost to individuals to mount

individual cases would be prohibited to most litigants given the general economic status of the class members.

[114] Importantly, Rule 334.18(a) states that "A judge shall not refuse to certify a proceeding as a class proceeding solely on one or more of the following grounds: (a) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact". In this case, the Plaintiff is not asking for individual assessments before the common questions are answered, but only after the fact, to determine if individual class members satisfy the criteria for damages.

[115] Canada declares that individual actions would be more appropriate; however, in my opinion, that would negate the benefit of the three overarching purposes of the class action: judicial economy, access to justice, and behaviour modification, if access to justice of the litigants was frustrated. There is little doubt that Indigenous people in Canada's Territories qualify as a vulnerable group. A class action is likely the only way that these three principles will actually be realized.

[116] Canada had relied on *Dennis* for the proposition that individual determination will render a class action inappropriate. But a further review of that case shows the Court finding that:

> …[t]he determination of significant elements of the claims of individual class members can be decided on a class-wide basis, and individual issues relating to issues such as causation and damages can be dealt with later on an individual basis, especially when the assessment of damages can be accomplished by application of a simple formula.
>
> (*Dennis* at para 53)

[117] In the instant case, the determination being asked for by the Plaintiff could be decided on a class-wide basis, and the individual situation of each class member could be decided after.

[118] I do not agree that Canada's claim that a public inquiry or internal complaint process would be preferable procedure.

[119] Through the lens of judicial economy, behaviour modification and access to justice, a class action is the preferable procedure.

E. *Rule 336.16(1)(e): Representative Plaintiff*

[120] Canada argues that because Joe David Nasogaluak is over the age of majority now, Diane Nasogaluak does not meet the class definition; and Joe David Nasogaluak has not provided any evidence regarding his capacity or intention to serve as representative plaintiff. Further, Canada's position is that the proposed litigation plan is inadequate because there is no provision to determine who is a class member, and no pathway for the determination of individual issues following a common issues trial.

[121] The Plaintiff replies saying that there is no reason not to certify simply because Joe David Nasogaluak no longer needs a litigation guardian. He has confirmed to counsel that he is willing to act as the representative plaintiff. Further, had the hearing not be delayed due to COVID-19 pandemic, he would have still been a minor, and represented by his mother, Diane Nasogaluak who clearly met all the requirements. His position is that he always intended to take over when he turned eighteen.

[122] The Plaintiff submits he has developed a practical and reasonable litigation plan, and that he has given unchallenged evidence that he will fairly and adequately represent the interests of the proposed class, will fairly and adequately represent the interests of the class members, and that there is an understanding of the major steps in the litigation and his responsibilities.

[123] The Plaintiff submits that even if the Court finds that the proposed representative plaintiff is unsuitable, this should not result in the denial of certification, but a new plaintiff should be substituted, and so he requests that the Court certify on the condition that himself (Joe David Nasogaluak) or another class member file an affidavit that they would be a representative plaintiff.

[124] *Airbnb* summarizes the requirements for a suitable representative plaintiff:

> [146] According to Rule 334.16(1)(e), the requirements for establishing that the proposed representative plaintiff is appropriate are that he or she: (i) would fairly and adequately represent the interests of the class; (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; (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 (iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record. In *Dutton*, the SCC noted that the proposed representative need not be typical of the class or the best possible representative, but the court assessing this criterion should "be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class" (*Dutton* at para 41 with reference to *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46).
>
> (*Airbnb* at para 146)

[125] The rules which bind this Court, the *Federal Courts Rules*, states the conditions for a suitable representative plaintiff:

> 334.16(1)
> (e) there is a representative plaintiff or applicant who
> (i) would fairly and adequately represent the interests of the class,
> (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,
> (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
> (iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

[126] The world is in flux with the COVID-19 pandemic, and courts have had to push back hearings and trials. This hearing was set down to be heard when Joe David Nasogaluak was a minor. Because of COVID-19 pandemic, the hearing was postponed and when this matter was heard he was no longer a minor. Class actions are meant to simplify mass litigation, and should not be hung up on minor issues. The Plaintiff indicates that Joe David Nasogaluak is willing to submit that he is ready, willing, and able to act as representative plaintiff, and Canada has not submitted any convincing arguments to the contrary.

[127] I am satisfied that there is no reason why the proposed representative plaintiff would not satisfy all of the criteria set out in the *Rules* or in *Airbnb*. There is some basis in fact on the basis of what was put forward by his litigation guardian to think that he will be an adequate representative plaintiff now that he is of age.

[128] But, at the same time the requirements must be met. Therefore, I ask the Plaintiff to bring a motion in writing (Rule 369), hopefully with the consent of the Defendant, for the substitution of the representative plaintiff within 30 days of the date of this Order. Support for this type of conditional order in circumstances far less clear than in this one have been canvased by the Ontario courts and conditional certifications have been ordered.

[129] In *Ottawa (City) Police Assn v Ottawa (City) Police Services Board*, 2014 ONSC 1584 [*Ottawa Police Assn*], Justice Hennessy for the panel said:

> 41 It is not uncommon in certification proceedings that certain elements of the certification are met and the parties return to court at another time to address those elements which did not satisfy the court in the first instance. In *Graham v. Impark*, 2010 ONSC 4982, 74 B.L.R. (4th) 172 at para. 201, Perell J. made a similar decision, certifying a class action conditional upon the substitution of a new representative plaintiff. In *6323588 Canada Ltd. v. 709528 Ontario Ltd. (c.o.b. Panzerotto Pizza and Wing Machine)*, 2012 ONSC 2985, [2012] O.J. No. 2324, Strathy J. (as he then was), found that where all the conditions for a certification had been met except the existence of an eligible representative plaintiff, it was appropriate to adjourn the proceeding in order to provide the plaintiff with an opportunity to substitute a new representative plaintiff. I agree with Strathy J.'s assessment at paras. 101-102 that:
>
> > 101. Having found the action otherwise suitable for certification, it would be a waste of time, money and judicial resources to require that the class start afresh, if indeed there is a will amongst franchisees to pursue the matter. [...]
> > 102. This approach is supported by the authorities. In *Martin v. Astrazeneco Pharmaceuticals PLC*, [2009] O.J. No. 3847 (S.C.J.), Cullity J. observed, at para. 20, that our courts have not generally been receptive to arguments that the action has to go back to square one if the putative plaintiff is found wanting:
> >
> > > Even if defendants' counsel were correct in their submission that other persons could not then be substituted as plaintiffs, there would

> be nothing to prevent the commencement of a new and otherwise identical action by such persons. As one of the fundamental features of proceedings under the CPA is the existence of a class of similarly situated claimants, the likelihood that a substitute plaintiff would be available cannot, in my opinion, be dismissed as fanciful or unduly speculative. In view of the important responsibilities of representative plaintiffs, it has become quite common for changes to be made -- and sometimes more than once -- in those proposed to act as such as the proceeding moves towards certification. The court has, moreover, not generally been receptive to submissions that the removal or withdrawal of plaintiffs requires a new action to be commenced rather than a substitution of new plaintiffs. [Citations omitted.]
>
> 42 Also, it is noteworthy that in the context of a 12.08 motion specifically, in *Kelly v. Canada*, the Court of Appeal (2014 ONCA 92) approved the appointment of a representative plaintiff on a conditional basis (para. 21).
>
> (*Ottawa Police Assn* at paras 41-42)

[130] As well, Justice Perell in *Graham v Imperial Parking Canada Corp*, 2010 ONSC 4982 [*Graham*], also certified an action conditional on substitution of a new representation when the two presented did not met the Ontario rules and he knew that there were other individuals that would meet the qualifications (*Graham* at paras 13 and 201-2). I am of the same view that if upon receipt of the motion he does not meet the requirements then counsel for the class will present someone that does.

[131] In this case, the proposed representative plaintiff has developed a litigation plan, and while Canada has claimed that it is deficient in some respects, the courts have said that they can be a “work in progress” (*Cloud* at para 95). In *Graham*, Justice Perell asked for a new litigation

plan when the new representative plaintiffs were appointed (*Graham* at paras 13 and 202). It seems unnecessary on these facts, and the plan can be further developed as the matter proceeds and amended if proved to be deficient in anyway, as it is a work in progress.

VI. Conclusion

[132] In conclusion, I find the requirements of Rule 334.16(1) have been met in this action on the condition of the Representative Plaintiff being substituted for his litigation guardian.

[133] The definition of the class will be:

> all Aboriginal Persons who allege they were assaulted at any time while being held in custody or detained by RCMP Officers in the Territories, and were alive as of December 18, 2016.

[134] The Plaintiff must file a Rule 369 motion formally requesting that Joe David Nasogaluak be appointed as the representative plaintiff for the class within 30 days of the date of this Order and provide what is needed for me to determine if he meets the requirements.

[135] The proposed litigation plan is accepted and will be further developed through the passage of time and the case management process.

[136] I will certify file T-2158-18 as a Class Proceeding on the following common issues:

> a. By its operation or management of the Royal Canadian Mounted Police ("RCMP"), did the defendant breach a duty of care it owed to the class to protect them from actionable physical or psychological harm?

b. By its operation or management of the RCMP, did the defendant breach a fiduciary duty owed to the class to protect them from actionable physical or psychological harm?
c. By its operation or management of the RCMP, did the defendant breach the right to life, liberty and security of the person of the class under section 7 of the Canadian Charter of Rights and Freedoms?
d. If the answer to common issue (c) is yes, did the defendant's actions breach the rights of the class in a manner contrary to the interests of fundamental justice under section 7 of the Canadian Charter of Rights and Freedoms?
e. Did the actions of the defendant breach the right of the class to the equal protection and equal benefits of the law without discrimination based on race, religion or ethnicity under section 15 of the Canadian Charter of Rights and Freedoms?
f. If the answer to common issue (c), (d), or (e) is "yes", were the defendant's actions saved by section 1 of the Canadian Charter of Rights and Freedoms, and if so, to what extent and for what time period?
g. If the answer to common issue (c), (d), or (e) is "yes", and the answer to common issue (f) is "no", do those breaches make damages an appropriate and just remedy under section 24 of the Canadian Charter of Rights and Freedoms?
h. If the answer to any of common issues (a), (b), or (g) is "yes", can the court make an aggregate assessment of damages suffered by some or all class members as pan of the common issues trial, and if so, in what amount?
i. Does the defendant's conduct justify an award of punitive damages?
j. If the answer to common issue (i) is "yes", what amount of punitive damages ought to be awarded against the defendant?

ORDER IN T-2158-18

THIS COURT ORDERS that:

1. The motion for certification is granted subject to condition number 3 being met.

2. The Class definition shall be:

> all Aboriginal Persons who allege they were assaulted at any time while being held in custody or detained by RCMP Officers in the Territories, and were alive as of December 18, 2016.

3. The Plaintiff is to file a Rule 369 motion within 30 days of the date of this Order to request that Joe David Nasogaluak be appointed the Representative Plaintiff. If no motion is received or the motion is not granted, then the matter will be returned to the Court given the condition is not met;

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

> The claims assert systemic negligence, breach of fiduciary duty, breaches of section 7 and 15 of the *Charter*.

5. The Claims seek: declarations, general, special and exemplary damages including *Charter* damages; prejudgment and post-judgment interest; costs of notice and administration;

6. The following questions are certified as common issues:

    a. By its operation or management of the Royal Canadian Mounted Police ("RCMP"), did the defendant breach a duty of care it owed to the class to protect them from actionable physical or psychological harm?

    b. By its operation or management of the RCMP, did the defendant breach a fiduciary duty owed to the class to protect them from actionable physical or psychological harm?

c. By its operation or management of the RCMP, did the defendant breach the right to life, liberty and security of the person of the class under section 7 of the Canadian Charter of Rights and Freedoms?

d. If the answer to common issue (c) is yes, did the defendant's actions breach the rights of the class in a manner contrary to the interests of fundamental justice under section 7 of the Canadian Charter of Rights and Freedoms?

e. Did the actions of the defendant breach the right of the class to the equal protection and equal benefits of the law without discrimination based on race, religion or ethnicity under section 15 of the Canadian Charter of Rights and Freedoms?

f. If the answer to common issue (c), (d), or (e) is “yes”, were the defendant's actions saved by section 1 of the Canadian Charter of Rights and Freedoms, and if so, to what extent and for what time period?

g. If the answer to common issue (c), (d), or (e) is “yes”, and the answer to common issue (f) is “no”, do those breaches make damages an appropriate and just remedy under section 24 of the Canadian Charter of Rights and Freedoms?

h. If the answer to any of common issues (a), (b), or (g) is “yes”, can the court make an aggregate assessment of damages suffered by some or all class members as part of the common issues trial, and if so, in what amount?

i. Does the defendant's conduct justify an award of punitive damages?

j. If the answer to common issue (i) is “yes”, what amount of punitive damages ought to be awarded against the defendant?

7. The litigation plan is approved;
8. The time and manner for Class members to opt out of the class proceeding are reserved to be addressed through the case management process;
9. This Order is made on a without costs basis.

"Glennys L. McVeigh"
Judge

Annex "A" – Relevant legislation

Federal Courts Rules **SOR/98-106**

Certification

334.16 (1) Conditions- Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

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

(e) there is a representative plaintiff or applicant who

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

(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,

(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

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

Autorisation

334.16 (1) Conditions- Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

a) les actes de procédure révèlent une cause d'action valable;

b) il existe un groupe identifiable formé d'au moins deux personnes;

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 concernent qu'un membre;

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

e) il existe un représentant demandeur qui :

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

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

Matters to be considered

(2) All relevant matters shall be considered in a determination of whether a class

Facteurs pris en compte

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de

proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether
(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;
(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;
(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;
(d) other means of resolving the claims are less practical or less efficient; and
(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :
a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;
b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;
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) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;
e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

Annex "B" – Evidence

Plaintiff's Evidence

Affidavit of Catherine MacDonald, October 17, 2019

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- “Deadly Force: 10 years after fatal encounter with Yukon police, man’s family still wants justice”, CBC News, April 13, 2018
- “N.W.T. chief coroner to hold inquest into death of man in police custody”, CBC News, August 24, 2016
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Affidavit of Jasmine Randhawa, June 24, 2020

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Affidavit of Marvin Showshoe, October 15, 2019

Affidavit of Anthony Gargan, October 15, 2019

Affidavit of Willie Aglukkaq, October 16, 2019

Affidavit of Dr. Scot Wortley, October 18, 2019

- Report of Dr. Scot Wortley, undated
- Acknowledgement of Expert's Duty, October 19, 2019

Defendant's Evidence

Affidavit of Joshua Savill, February 10, 2020

Affidavit of Sheri Tait, February 17, 2020

Affidavit of Sarah Shields, February 18, 2020

- Police Reporting and Occurrence System results for Michael Payne
- Police Reporting and Occurrence System results for Darlene Bugghins
- Police Reporting and Occurrence System results for Marvin Showshoe
- Police Reporting and Occurrence System results for Anthony Gargan
- Police Reporting and Occurrence System results for Willie Aglukkaq

FEDERAL COURT

SOLICITORS OF RECORD

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DATE OF HEARING:	JANUARY 25, 2021
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