

Federal Court



Cour fédérale

Date: 20211201

Docket: T-541-18

Citation: 2021 FC 1338

Ottawa, Ontario, December 1, 2021

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 October 18, 2021, seeking an order under Rule 334.19 of the *Federal Courts Rules*, SOR/98-106 [the Rules], amending the class definition in this certified class action.

[2] As explained in greater detail below, the Plaintiff's motion is dismissed, because the new evidence upon which the Plaintiff relies does not raise a basis in fact that supports the requested amendment to the class definition.

II. **Background**

[3] In 2018, the Plaintiff 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 sea 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’s Statement of Claim includes allegations of 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. The Statement of Claim seeks damages including punitive damages.

[9] The Plaintiff filed his Statement of Claim as a proposed class action, asserting an action on behalf of a proposed class including himself. As of the time of the Plaintiff’s certification motion filed on November 26, 2018 and heard on May 27-29, 2019 [the Certification Motion], he proposed the following definition of the class:

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.

[10] On June 26, 2019, this Court issued an Order and Reasons [the Certification Order], certifying the Plaintiff’s action as a class action and defining 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 [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.

[11] In his original Statement of Claim, the Plaintiff asserted that the juvenile offenders who participated in the DASH Program were not themselves part of the sea cadet training program. However, the Plaintiff now takes the position that, as a result of documentary production by the Defendant subsequent to certification, he has identified that he and other participants in the DASH Program were in fact integrated into the sea cadets/tall ships program operated at Quadra. On October 18, 2021, the Plaintiff amended his Statement of Claim to reflect this position. The resulting Second Amended Statement of Claim includes the following paragraph:

The DASH program was operated conjunctively with the Sea Cadets program at HMCS Quadra, in that attendees in each program participated in many of the same activities and were under the care, control, and supervision of the same commanding officers. Activities that attendees in each program were required to engage in included the Tall Ships program of the Canadian Armed Forces.

[12] On October 18, 2021, the Plaintiff also filed the present motion, seeking amendments to the class definition in the Certification Order (blacklined against the definition in the Certification Order):

All persons who participated in the juvenile delinquent sentencing program “Developing Adolescence Strengthening Habits”, or the Sea Cadets Tall Ships program, or any Sea Cadets program 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~~ programs.

[13] The Defendant has filed written submissions which oppose any amendment to the class definition and, in the alternative, propose that any amendment to the definition should be limited so that the definition reads as follows (blacklined against the definition in the Certification Order):

All persons who participated in the juvenile delinquent sentencing program “Developing Adolescence Strengthening Habits” or whom participated in the Sea Cadets Tall Ships program operated at HMCS Quadra in British Columbia ~~[the DASH Program]~~ from 1980-1986, and suffered injury due to sexual abuse, assault, or harassment by Canadian Armed Forces members while participating in said ~~juvenile delinquent sentencing~~ programs.

[14] The Plaintiff subsequent filed written submissions in reply, which *inter alia* indicated agreement with the temporal limitation in the definition proposed by the Defendant in its alternative position. At the hearing of this motion, the Plaintiff advised that the version of the amended definition he currently proposes reads as follows (blacklined against the definition in the Certification Order):

All persons who participated in the juvenile delinquent sentencing program “Developing Adolescence Strengthening Habits”, or any Sea Cadets program operated at HMCS Quadra in British Columbia in the years 1980-1986 ~~[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 programs~~.

III. **Issue**

[15] The sole issue in this motion is whether the class definition should be amended and, if so, how the amended definition should read.

IV. **Analysis**

A. *General Principles*

[16] The Plaintiff brings this motion under Rule 334.19, which provides as follows:

Amendment and decertification

334.19 A judge may, on motion, amend an order certifying a proceeding as a class proceeding or, if the conditions for certification are no longer satisfied with respect to the proceeding, decertify it.

Modification ou retrait de l’ordonnance

334.19 Le juge peut, sur requête, modifier l’ordonnance d’autorisation ou, si les conditions d’autorisation ne sont plus respectées, retirer l’autorisation.

[17] I understand the parties to agree that, although this motion seeks an amendment to a certification order, as opposed to an initial certification order, it is governed principally by

Rules 334.16(1) and (2), which provide as follows as to when a judge shall certify a class proceeding:

Certification

Conditions

334.16 (1) 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

Autorisation

Conditions

334.16 (1) 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

the interests of the class,

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 and the solicitor of record.

(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

Facteurs pris en compte

(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

(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

a) la prédominance des points de droit ou de fait

class members predominate over any questions affecting only individual members;	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.

[18] Following questioning of the parties at the hearing, I understand that they also agree that, because this motion seeks an amendment to the Certification Order, the proposed amendment must flow from new evidence that was not available at the time of the Certification Motion. As submitted by the Defendant, the Plaintiff cannot simply re-argue the Certification Motion and seek a different result based on the evidence then available. However, the Defendant concedes that the Plaintiff can argue the effect of the new evidence in combination with the evidence that was previously available, in support of his proposed amendment. While the Court is not aware

of any authority directly addressing these aspects of a motion under Rule 334.19, I find it logical to apply these principles.

[19] Before beginning analysis of the evidence upon which the Plaintiff relies in support of this motion, it is useful to review the evidentiary threshold governing certification of class actions. 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 v Toronto (City of)*, 2001 SCC 68 at paragraph 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 § 4.60.

[Emphasis added]

[20] 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 Ltd v Microsoft Corp*, 2013 SCC 57 at paras 101-102).

B. *Evidence Relied upon by the Plaintiff to Support Amendment of Class Definition*

[21] The Plaintiff's motion is supported by a combination of evidence that was before the Court at the time of the Certification Motion and new evidence that the Plaintiff subsequently acquired, including through document production by the Defendant.

[22] The evidence that was before the Court at the time of the Certification Motion includes an Affidavit sworn by the Plaintiff, detailing his knowledge of and experiences in the DASH Program, the abuse that he alleges he sustained and its effects upon him, and attaching various exhibits. The Plaintiff was cross-examined on his Affidavit, and the resulting transcript formed part of the record in the Certification Motion. In support of the present motion, the Plaintiff again relies on both his Affidavit (without exhibits) and the cross-examination transcript.

[23] The Defendant did not file an affidavit in response to the Certification Motion. Other than the Plaintiff's Affidavit and cross-examination transcript, the only evidence then 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.

[24] 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. In the Certification Motion, both parties relied significantly on the contents of the Investigation Report in support of their respective submissions surrounding the Rule 334.16 certification requirements. In large measure, these submissions relied on 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.

[25] In the present motion, the Plaintiff again relied on Ms. Olatunji's Affidavit and a small number of excerpts from the exhibited Investigation Report.

[26] The present motion is also supported by two new pieces of evidence. The first is the affidavit of Liesa Covill, another legal assistant in the offices of the Plaintiff's counsel, which attaches as an exhibit a document described as having been produced by counsel for the Defendant on July 13, 2021. While different portions of the documentation within the exhibit bear different titles, the Plaintiff refers to the documentation, or at least the portion upon which he relies, as the Pacific Petrel Board of Inquiry Report [the Petrel Report]. As will be explained below, the Plaintiff relies on only a brief excerpt from the Petrel Report. However, from a quick review of the larger document, it appears that the "Pacific Petrel" is the name assigned to the tall ship under construction at Quadra at the time of the events giving rise to this action. In its

submissions on this motion, the Defendant characterized the Petrel Report, in my view correctly, as the result of an inquiry into the tall ship construction project and in particular its financial administration.

[27] The second piece of new evidence is an Affidavit sworn on October 18, 2021, by one of the other Residential Participants who resided at Quadra at the same time as the Plaintiff [the Residential Participant Deponent]. This deponent states that he was also subjected to sexual abuse by the Alleged Abuser.

C. Analysis of the Evidence

[28] While the Defendant opposes this motion based on arguments surrounding several of the Rule 334.16 requirements, in my view the outcome of this motion turns on paragraph 334.16(1)(b), the requirement for an identifiable class of two or more persons. The Plaintiff's arguments focus on this paragraph and correctly observe that the jurisprudence requires that the class be defined in relation to objective criteria that bear a rational relationship to the proposed common issues (see *Pearson v Inco Ltd* (2006), 78 OR (3d) 641, 2006 CanLII 913 at para 57 (ONCA)), which is not dependent upon the merits of the claim (see *Keatley Surveying Ltd v Teranet Inc*, 2012 ONSC 7120 at paras 159-161, rev'd on other grounds 2014 ONSC 1677). The class definition serves three primary purposes: it identifies individuals who have a potential claim against the defendant, it defines the boundaries of the lawsuit so as to identify those who will be bound by the result, and it describes who is entitled to notice of certification (see *Kuiper v Cook (Canada) Inc*, 2018 ONSC 6487 at para 144, rev'd on other grounds 2020 ONSC 128).

[29] The Plaintiff also correctly observes that it is unnecessary for him to prove that there are multiple claimants actually seeking relief through the class proceeding. Returning to the evidentiary threshold identified earlier in these Reasons, the Plaintiff need only demonstrate that there is some basis in fact to believe that there are two or more such potential claimants in the class as defined (see *Keatley Surveying Ltd v Teranet Inc*, 2015 ONCA 248 at paras 70-72).

[30] Against the backdrop of this jurisprudential guidance, the principal new evidence upon which the Plaintiff relies, in support of his position that the class definition should be expanded to encompass not only participants in the DASH Program but also the sea cadets, is an excerpt from the Petrel Report. That excerpt sets out questions by the Board of Inquiry and answers by a witness, described by the Plaintiff as "...a commanding officer of the Pacific Region appointed in 1978 and which is very likely Major Letson ...". (As explained in the Certification Order at paragraph 40, Major Letson was one of the witnesses, described as the Regional Cadet Officer for the Pacific Region from 1978 and 1983, whose interview was captured in the Investigation Report that was before the Court on the Certification Motion.) The Plaintiff relies upon the following questions and answers in the Petrel Report:

Q.8 Thank you, What are your responsibilities relative to the Cadet
— Regional Cadet Program?

A.8 I am responsible to the Regional Commander for all Cadet matters in the Region. My terms of reference, sir, are contained in the CFOO 101 and also in the Regional Orders.

...

Q.71 Could you also tell me how many sea cadets have been involved in the PETREL project and by this I mean working on the project as opposed to a tour through it?

A.71 In the summertime, sir, this is the first summer that they got properly involved in it. We had a course of 24 on the shipwright's

course of which oh, 12 or 16 were working directly on the project on any one day. That is for two months of the summer. **During the winter time, as you will see you when you go through the files, we had some sea cadets assigned to us by the local judge to atone for their sins for things they had done in the community. In exchange for room and board, they worked on the project. We occasionally gave them what is called a training bonus because they had no other source of income; we are not their parents, so we didn't have any way of giving them an allowance. I think once a term we gave them a training bonus of \$240.00 which is equivalent to six weeks of course. The numbers, involved I think they are on a nominal role. I can't tell you the actual numbers. I think you probably have that from Commander Rhodes or he was getting it for you this morning. That would be all, sir.**

[Plaintiff's emphasis]

[31] The Plaintiff submits that this statement to the Board of Inquiry is a sufficient basis to conclude that, as far as the Armed Forces were concerned, participants in the DASH Program in their care and control were considered to be sea cadets.

[32] In response, the Defendant emphasizes that the Petrel Report is the product of an inquiry into the financial administration of the tall ship construction project at Quadra. It is not an inquiry into alleged sexual abuse and does not provide any evidence in support of a conclusion that any individuals who were not participants in the DASH Program were abused. Similarly, while the affidavit of the Residential Participant Deponent provides new evidence of abuse by the Alleged Abuser, that evidence again relates only to abuse of a participant in the DASH Program. The Defendant submits that there is no basis to amend the class definition to include sea cadets, as the evidence provides no basis in fact to conclude that any individuals outside the DASH Program were abused.

[33] The Defendant supplements these submissions by identifying differences in the circumstances faced by DASH Program participants and sea cadets. As the Defendant submits, there was a unique relationship between the Plaintiff and other Residential Participants in the DASH Program and the Alleged Abuser, not only because the Residential Participants resided in the Quadra barracks with the Alleged Abuser but also because the Alleged Abuser framed himself as their legal guardian and manipulated them to remain in his custody, even after they departed Quadra. The Defendant argues that this unique relationship did not extend to the Day Participants in the DASH Program or to sea cadets who were present at Quadra.

[34] The Plaintiff responds to this argument by pointing out that the current class definition, as certified based on the evidence available on the Certification Motion, is framed in terms of participants in the DASH Program, not just Residential Participants. As such, the Plaintiff submits that there is no qualitative difference between the current class definition, which includes Day Participants in the DASH Program, and an expanded definition that includes the sea cadets. The Plaintiff also points out that there were periods, at least in the summer months, when sea cadets resided in the bunkhouses at Quadra.

[35] In the Plaintiff's submission, the expansion of the class definition to include sea cadets is appropriate, not because there is currently evidence of abuse of individuals outside the DASH Program, but because such individuals were under the control of those who were the source of abuse and, like the DASH Program participants, were therefore in harm's way. The Plaintiff argues that, with the benefit of the new evidence from the Petrel Report, indicating that DASH

Program participants were considered to be sea cadets, the evidence now supports the proposed expanded definition.

[36] In my view, if new evidence of abuse of the sea cadets had been adduced, that would almost certainly have warranted an expansion of the class definition. However, for the reasons articulated by the Plaintiff, I agree with the Plaintiff that the absence of such evidence is not determinative of the outcome of this motion. Rather, my decision to dismiss this motion turns on what is, in my view, a logical flaw in the Plaintiff's argument as to how the new evidence supports an expansion of the definition.

[37] I take the Defendant's point as to the purpose of the inquiry giving rise to the Petrel Report, i.e. focusing upon the financial administration of the project at Quadra. It was not focused upon allegations of abuse or factors such as care and control relevant to such allegations. Therefore, while conscious of the low evidentiary threshold that applies, I find it difficult to interpret the line in the report, referring to "...sea cadets assigned to us by the local judge ...", as conveying anything particularly meaningful about the relationship between DASH Program participants and sea cadets or about their care and control.

[38] More significantly, the evidence in the Petrel Report does not add anything to the evidence that was available on the Certification Motion that supports the Plaintiff's argument for expanding the class definition, i.e. that, like the DASH Program participants, the sea cadets were also in harm's way.

[39] In support of this amendment motion, the Plaintiff identified evidence from the Certification Motion that he argued represented evidence of integration between the DASH Program and the sea cadets program at Quadra. This evidence included, in the Investigation Report, excerpts of a statement by Mr. Douglas Hillian, the Plaintiff's probation officer. As the Plaintiff submits, this evidence described the Alleged Abuser as being in charge of the sea cadets program. Mr. Hillian stated that the Alleged Abuser, who was posted to Quadra, approached a provincial Community Service Worker, explained that a tall ship was being constructed as a training vessel for cadets and, as there were no cadets during the winter months, he was interested in taking young people to work on the project.

[40] The Investigation Report also identifies another witness (Mr. Jerry Kruz) who similarly referred to the Alleged Abuser as running a cadet program and somehow becoming connected with a "CSW program", described as an alternative to jail for youth. This appears to be a reference to the DASH Program.

[41] Therefore, as the Plaintiff acknowledges, the Alleged Abuser's role with the sea cadets was in evidence at the Certification Motion. The information available surrounding that role is not derived from the new evidence. I find no logical relationship between new evidence in the Petrel Report, in which the DASH Program participants are referred to as sea cadets, and the Plaintiff's argument that the sea cadets were in harm's way. As the Defendant submits, while the Plaintiff is entitled to rely on the new evidence in combination with the evidence that was available on the Certification Motion, it is not available to the Plaintiff to re-argue the

Certification Motion. In the absence of any support in the new evidence for the expanded class definition, I find that this motion must fail.

[42] I note that, while not emphasized by the Plaintiff, I also have taken into account the new evidence in the affidavit of the Residential Participant Deponent. As previously observed, that affidavit provides no evidence of abuse of sea cadets. It also states that members of the Armed Forces who were in charge and had supervision over the sea cadets also considered the Residential Participants to be sea cadets under their care and control. However, as with the evidence in the Petrel Report, this evidence does not support the Plaintiff's argument that the sea cadets were in harm's way.

[43] Finally, the affidavit of the Residential Participant Deponent refers to local sea cadets coming to work with the Residential Participants on Wednesdays and weekends, but going home at night, and refers to a period of about a month after the Plaintiff left Quadra, when sea cadets came from all over Canada and worked with the Residential Participants on the tall ship. The Residential Participant Deponent states that the Alleged Abuser and his superior were in charge of both the Residential Participants and the sea cadets who were present during the non-summer and summer months.

[44] Again, while this affidavit is new, it does not add substantively to the evidence on the Certification Motion. As noted above, the evidence on the Certification Motion identified that the Alleged Abuser was in charge of the sea cadets. As identified by the Plaintiff in the present motion, the evidence in the Certification Motion also included the Plaintiff's evidence that

Quadra was a cadet facility, described by the Plaintiff as having "...bunkhouses all over the base ...", and that cadets attended while the Plaintiff was residing there.

[45] In conclusion, I find that none of the new evidence in this motion raises a basis in fact that supports the requested amendment to the class definition. As briefly noted, the Defendant also raises a number of arguments under other requirements of Rule 334.16, including whether the Plaintiff would be an appropriate representative plaintiff if the definition of the class were expanded. However, having reached the above conclusion, there is no need for the Court to address those arguments. There is also no need to address the Defendant's alternative argument surrounding the particular language of an amended definition.

V. **Conclusion**

[46] As a result of the above analysis, this motion must be dismissed. As the Plaintiff submits, Rule 334.39 provides that, other than in particular prescribed circumstances, no costs may be awarded against any party on a motion of this nature. The Defendant has not claimed costs, I find no basis for a conclusion that any of the prescribed circumstances apply, and my Order will therefore make no award of costs.

ORDER IN T-541-18

THIS COURT ORDERS that:

1. The Plaintiff's motion is dismissed.
2. 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: EUGENE KELLY TIPPETT v HER MAJESTY THE QUEEN

PLACE OF HEARING: HEARD BY VIDEOCONFERENCE VIA OTTAWA, ONTARIO

DATE OF HEARING: NOVEMBER 22, 2021

ORDER AND REASONS: SOUTHCOTT J.

DATED: DECEMBER 1, 2021

APPEARANCES:

Anthony E.F. Merchant	FOR THE PLAINTIFF
Anthony A. Tibbs	
Iqbal S. Barr	
Jayne Anton	FOR THE DEFENDANT
Sean Sass	

SOLICITORS OF RECORD:

Merchant Law Group LLP	FOR THE PLAINTIFF
Barristers & Solicitors	
Regina, Saskatchewan	
Deputy Attorney General of Canada	FOR THE DEFENDANT
Edmonton, Alberta and Saskatoon, Saskatchewan	