Federal Court of Appeal No.: A-188-21

FEDERAL COURT OF APPEAL

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

DIANE NASOGALUAK AS LITIGATION GUARDIAN OF JOE DAVID NASOGALUAK

Respondent

MEMORANDUM OF FACT AND LAW OF THE ATTORNEY GENERAL OF CANADA

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OVERVIEW

1. The motion judge erred in certifying a series of highly individual, free-standing assault and battery allegations as a class proceeding. The class action certification test must be a meaningful screening mechanism, and the Court a mindful gatekeeper. Only those issues that may be fairly and efficiently advanced through common determination are appropriate for certification.

2. In this case, the central allegation is that individual members (Members) of the Royal Canadian Mounted Police (RCMP) from detachments across the three Territories committed actionable assaults against Indigenous persons since 1928, during the course of arresting, detaining or holding those individuals in custody. From a legal standpoint, "[a]n issue is not common simply because the same question arises in connection with the claim or each class member, if that issue can only be resolved by inquiry into the circumstances of each individual's claim."[1] The Plaintiff has cloaked the individual nature of these assault claims by reframing them as broad questions of systemic negligence, breach of fiduciary duty, and *Charter* breaches that are incapable of assessment without individual inquiries.

3. The motion judge erred in certifying these broad questions, which she characterized as asking whether the RCMP created a "system where assaults happen." Though framed in a way suggesting commonality, the broad duties and breaches alleged are not rationally connected to the independently actionable wrongs alleged by each class member. Causation is an essential component of any negligence claim: a defendant is not "a wrongdoer at large," but only in respect of damages actually caused.[2]

4. The motion judge did not appreciate the essentially individual nature of the allegations before her as she considered class definition, common issues, and preferable procedure. She failed to recognize that the requirement for there to be 'some evidence'

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[1] *Cirillo v Ontario*, 2019 ONSC 3066 at para 66 [*Cirillo ONSC*], citing with approval to Warren Winkler et al, *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014) at 112-113.
[2] *Clements v Clements*, 2012 SCC 32 at para 16 [*Clements*].

to support four of the five elements of the test for certification cannot be met through untenable extrapolation from one set of circumstances to another.[3]

5. The motion judge also erred by conflating private law duties with public law duties, individual claims with systemic ones, and operational decisions with policy. She erroneously found high-level decisions about "operations and management" in policing could give rise to private law duties in negligence in this case, despite the *Anns/Cooper* test, which she failed to perform. She also erred in finding a potential fiduciary duty in respect of public policing duties, contrary to the *Elder Advocates* test, and in permitting the alleged section 7 *Charter* breach to proceed.

6. Canada is committed to reconciliation and a renewed relationship with Indigenous peoples based upon recognition of rights, respect, cooperation and partnership. When required to respond to litigation, Canada endeavors to narrow the scope of the litigation and be constructive in assisting the Court in its task of adjudicating the matters brought before it. Canada is committed to continuously improving policing and to holding individual Members accountable for wrongful actions. That said, when required to respond to litigation, Canada endeavors to assist the Court in its task of adjudicating the matters brought before it by focusing on proper issues. A class action is not a commission of inquiry. Neither is it an appropriate forum for examining individual instances of such alleged wrongdoing or any other questions that require such examination to resolve. Accordingly, this is not a proceeding that is viable or suitable for certification.

PART I – FACTS

A. The Certified Claim

7. The Plaintiff alleges that Indigenous persons in Canada's three Territories have faced frequent assaults by Members of the Royal Canadian Mounted Police since 1928. The Claim is a class action framed in systemic negligence and breach of fiduciary duty regarding Canada's "funding, oversight, operation, supervision, control, maintenance

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[3] *Canada v Greenwood*, 2021 FCA 186 at para 173 [*Greenwood*].

and support" of the RCMP and its Members who allegedly committed the assaults.[4] The Plaintiff pleads that proximity arises from Canada's operation of RCMP detachments and that Canada was required to establish, fund, and operate detachments "with a reasonable standard of care" including certain policies, procedures, and training.[5] The Claim further alleges systemic *Charter* breaches.[6] Under section 7, the Plaintiff raises widespread, arbitrary, and grossly disproportionate instances of excessive force.[7] Under section 15, the Plaintiff pleads that a "policy of discrimination" permitted Members to target Indigenous persons with excessive force.[8] The "injury and damages" include assault, battery, and forced confinement.[9]

B. Uncontested Facts

8. The RCMP conducts policing operations, manages detachments, and employs officers ("Members") throughout Canada, including at about 60 detachments in the three Territories under police service agreements.[10] The RCMP's statutory duty is to preserve the peace, prevent crime, and apprehend those who may be lawfully taken into custody. RCMP Members are to respect the rights of all persons.[11] Under the RCMP's *Code of Conduct*, Members must not "engage in discrimination or harassment" and must "use only as much force as is reasonably necessary in the circumstances."[12] Under section 25 of the *Criminal Code of Canada,* Members may apply reasonable force where necessary to detain and arrest individuals believed to have committed an offence,

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[4] Amended Statement of Claim filed February 2, 2021 at para 1(b), (c) [Claim] **[Appeal Book (AB), VOL 1, TAB 3, p 64]**.
[5] Claim, paras 47 and 52. The alleged breaches are set out at Claim, para 60 **[AB, VOL 1, TAB 3, pp 73, 74-75, 76-77]**.
[6] *Ibid,* at para 1(d) **[AB, VOL 1, TAB 3, p 64]**.
[7] *Ibid,* at paras 64 and 65 **[AB, VOL 1, TAB 3, p 77]**.
[8] *Ibid,* at para 70 **[AB, VOL 1, TAB 3, p 78]**.
[9] *Ibid,* at para 72 **[AB, VOL 1, TAB 3, p 79-80]**.
[10] Claim, para 19 **[AB, VOL 1, TAB 3, p 69]**.
[11] *Royal Canadian Mounted Police Act,* RSC 1985, c.R-10, ss 18, 37; *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281, s 14.
[12] *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281, Schedule Code of Conduct of the Royal Canadian Mounted Police, ss 2.1, 5.1.

without causing death or grievous bodily harm except where necessary to protect themselves or others from same.[13] No other policy supersedes these directives.

C. The Evidence on Certification

i. Specific Accounts Detailing RCMP Encounters

9. Several self-identifying Indigenous affiants described arrest-related incidents involving the RCMP. None pertains to the first 62 years of the class period.[14] There is no evidence of convictions, judgments or other adjudicated findings of unlawful use of force by Members in the Territories as against these affiants.

10. The affiants' allegations are fact-specific, occurring in different places with different individuals, and spanning 27 years.[15] One affiant raises two incidents that both led to charges (and a conviction) against him for assaulting a peace officer.[16] Another affiant describes how her leg was caught in a Member's car door until she successfully alerted him.[17] A third affiant was "roughed up" as a Member attempted to secure control for an arrest.[18] Diane Nasogaluak describes the use of force in the arrest of her son, the Representative Plaintiff Joseph David Nasogaluak.[19] RCMP Member, Cst. Savill, describes his participation in that same arrest first-hand, acknowledging the use of force,

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[13] *Criminal Code*, RSC 1985, c C-46, ss 25(1), 25(3).
[14] The earliest alleged incident occurred in 1990. See Affidavit of Willie Aglukkaq, sworn October 16, 2019 (Mr. Aglukkaq Affidavit) at para 4 **[AB, VOL 9, TAB 11, p 2884]**.
[15] The most recent was in 2017. See Affidavit of Diane Nasogaluak, sworn October 11, 2019 (Ms. Nasogaluak Affidavit) at para 5 **[AB, VOL 9, TAB 6, p 2861]**.
[16] Willie Aglukkaq Cross-Examination Transcript (June 30, 2020), page 5, lines 14-27 to page 6, lines 1-20 **[AB, VOL 11, TAB 20, pp 3584-3585].** See also Record of criminal convictions, Exhibit 1 to the Willie Aglukkaq Cross-Examination Transcript (June 30, 2020) **[AB, VOL 11, TAB 20A, p 3620]**.
[17] Darlene Bugghins Cross-Examination Transcript (June 29, 2020), page 3, lines 20-27 to page 4, lines 1-6, page 5, lines 6-16 **[AB, VOL 11, TAB 19, pp 3544-3545, 3546].**
[18] Affidavit of Michael Payne, sworn October 11, 2019 (Mr. Payne Affidavit) at para 9 **[AB, VOL 9, TAB 7, p 2869]**. See Michael Payne Cross-Examination Transcript (June 29, 2020), page 57, lines 18-27 to page 58, lines 1-11**,** where Mr. Payne notes "….I started resisting because I didn't know why I was being detained…" **[AB, VOL 11, TAB 18, pp 3521-3522]**.
[19] Ms. Nasogaluak Affidavit at paras 8-9 **[AB, VOL 9, TAB 6, p 2861].**

but disputing certain details (i.e., a conductive energy weapon was not used) and speaking to the reasonableness of the force applied.[20]

11. The affiants suggest racial motivation behind the incidents but also acknowledge other reasons. For example, one affiant says that relative physical stature was a factor,[21] and another differentiates between "good" and "bad" Members.[22]

ii. Expert Evidence – The Wortley Report

12. The Plaintiff filed the expert report of Dr. Scot Wortley to support the position that the Claim gave rise to common issues. The report notes there is little empirical research on police use of force, especially in Canada: "detailed Canadian research has yet to be conducted on racial differences in the police use of force." [23] His opinion was that no link has been demonstrated between racial disparities and non-lethal use of force:

> "[W]hile limited data suggests that Indigenous and Black Canadians are over-represented in deadly police encounters, we cannot yet determine whether these racial disparities extend to non-lethal use of force incidents or complaints about police brutality."[24]

13. Dr. Wortley uses media reports to draw conclusions about the rate of fatal police encounters in the Territories between 2012 and 2017. He suggests that other factors like age, gender, socioeconomic status, and criminal record may impact the likelihood of use of force, explaining this through theories about police conduct and behaviour. [25] He does not make any distinction between lawful and unlawful force.

14. A significant portion of the report is dedicated to policy options that may reduce police use of force and police bias, although Dr. Wortley acknowledges gaps in his knowledge and understanding of past and current RCMP policies. He considers that the

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[20] Affidavit of Joshua Savill, sworn February 10, 2020 (Cst Savill Affidavit) at paras 10-14 **[AB, VOL 10, TAB 15, pp3266-3267]**.
[21] Mr. Aglukkaq Affidavit at para 8 **[AB, VOL 9, TAB 11, p 2884]**.
[22] Michael Payne Cross-Examination Transcript (June 29, 2020), page 45, lines 2-21 **[AB, VOL 11, TAB 18, p 3509]**.
[23] Affidavit of Scot Wortley, sworn October 18, 2019 (Professor Wortley Affidavit), Exhibit A at p 3, 12 **[AB, VOL 9, TAB 12A, pp 2893, 2902]**.
[24] *Ibid,* at p 26 **[AB, VOL 9, TAB 12A, p 2916].**
[25] *Ibid,* at pp 29-40 **[AB, VOL 9, TAB 12A, pp 2919-2930]**.

discovery process is likely to furnish him with data so as to be able to offer opinions about the policing of Indigenous persons in Canada's Territories.[26]

iii. Clerical Affidavits

15. The Plaintiff filed clerical affidavits containing government and Non-Governmental Organization reports about policing, news articles about specific incidents, and coroners' reports about deaths in custody. Also included are statements by government officials that more work is needed to eliminate systemic discrimination against Indigenous persons, including from the operations of the RCMP.

D. The Certification Decision

16. The motion judge granted certification. She found it was not plain and obvious the causes of action would fail. She certified common issues in liability and damages (aggregate general and punitive). The common issues ask whether by its operation or management of the RCMP, Canada (i) breached a duty of care or fiduciary duty to protect the class from "actionable physical or psychological harm" or (ii) unjustifiably infringed class members' *Charter* rights under sections 7 and 15. Without elaboration, she held these "predominantly legal" issues would "move the litigation forward."[27] However, she noted the negligence and *Charter* section 7 claims face significant hurdles[28] and the fiduciary duty claim is "novel" and "unlikely to be successful."[29]

17. The motion judge accepted the following class definition: "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."[30] She accepted the class period from January 1, 1928 to December 18, 2018. Moreover, she decided a class proceeding would be the preferable procedure, finding that Indigenous

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[26] *Ibid,* at pp 26-27 **[AB, VOL 9, TAB 12A, pp 2916-2017]**.
[27] Order and Reasons of the Federal Court, per McVeigh J, June 23, 2021 [Reasons], at paras 101, 106 **[AB, VOL 1, TAB 2, pp 39, 40]**.
[28] *Ibid,* at paras 41, 65 **[AB, VOL 1, TAB 2, pp 20, 28]**.
[29] *Ibid,* at para 57 **[AB, VOL 1, TAB 2, p 25]**. Of note, Canada conceded that the pleadings potentially disclosed a cause of action under section 15 of the *Charter*.
[30] *Ibid,* at paras 85, 86 and Order at para 2 **[AB, VOL 1, TAB 2, pp 34, 35 and p 51]**.

persons in the Territories are vulnerable and the cost for them to bring individual actions is prohibitive.[31]

PART II – ISSUES

1) Did the motion judge err in law by finding that it is not plain and obvious that the causes of action in negligence, breach of fiduciary duty, and breach of section 7 of the *Charter* would fail?

2) Did the motion judge err in fact or mixed fact and law, or rely on an extricable error of law, by finding that:
    a. Common issues exist in negligence, breach of fiduciary duty, and breach of sections 7 and 15 of the *Charter*;
    b. An identifiable class exists; or,
    c. A class proceeding constitutes the preferable procedure?

PART III – SUBMISSIONS

A. Analytical Framework

18. Two themes pervade the motion judge's errors on each of the first four criteria of the certification test: a failure to provide adequate reasons and the failure to exercise a proper gatekeeping role.

19. The motion judge was obligated to provide adequate reasons for certification. Her articulation and application of the law on the causes of action pled is insufficient to support the conclusions made. Even where deference would typically be appropriate—like findings on identifiable class, common issues, and preferable procedure—the reasons are inadequate to justify deference.[32]

20. Certification is intended to perform a meaningful screening function, overseen by the judge as gatekeeper.[33] The motion judge framed the Claim as asking "whether the operations of the RCMP create a system where illegal assaults happen."[34] It was her responsibility to determine whether the representative plaintiff had demonstrated a

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[31] *Ibid,* at paras 113, 115 **[AB, VOL 1, TAB 2, pp 42, 43]**.
[32] Reasons, paras 42, 100-106, 113-119 **[AB, VOL 1, TAB 2, pp 21, 39-40, 42-44]**.
[33] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 103 [*Pro-Sys*].
[34] Reasons, para 102 **[AB, VOL 1, TAB 2, pp 39-40].**

viable theory for how a finding of systemic breach could be made at a common issues trial, and to ask whether a finding of systemic breach could assist in the resolution of particular assault or battery claims. She ought to have rejected the Plaintiff's recasting of allegations of individual events as evidence of a systemic breach of a novel and general common duty. Instead, in her view, the existence of the alleged system could be evidenced by individual determination of assault claims.[35] Even if possible—which Canada does not accept—this theory would require determining common questions by proving individual assault claims. This is the opposite of what a class action is designed to do and can reasonably do. The recent Ontario Court of Appeal decision in *Cirillo ONCA,*[36] among other cases, demonstrates that a prerequisite need to examine individual complaints may overwhelm commonality, militating against certification.

B. Standard of Review

21. The issues on appeal attract different standards of review. Whether the Claim discloses one or more reasonable causes of action is a question of law, reviewable on a standard of correctness.[37] Each other certification criterion (commonality, identifiable class, and preferable procedure) requires "some basis in fact," thus attracting review on the palpable and overriding error standard.[38] Extricable errors in principle or law in any part of the certification analysis are reviewable on a correctness standard.[39] Where reasons are inadequate, the standard of review depends on the nature of the error; however, in some circumstances, inadequate reasons may equate to an error of law.[40]

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[35] Reasons, para 102 **[AB, VOL 1, TAB 2, pp 39-40]**.
[36] *Cirillo ONSC*, supra, note 1 at paras 61-66, affirmed in *Cirillo v Ontario*, 2021 ONCA 353 at para 67-70 [*Cirillo ONCA*], leave to appeal to SCC requested.
[37] *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 57 [*Pioneer Corp*]; *Canada (AG) v Jost*, 2020 FCA 212 at para 21 [*Jost*]; *Canada v John Doe*, 2016 FCA 191 at paras 30-32.
[38] *Jost*, *supra* note 37 at para 21.
[39] *Southwind v Canada*, 2021 SCC 28 at paras 85, 157; *Salomon v Matte-Thompson*, 2019 SCC 14 at para 180; *AIC Limited v Fischer*, 2013 SCC 69 at para 65; *Housen v Nikolaisen*, 2002 SCC 33 at para 36.
[40] *R v Sheppard*, 2002 SCC 26 at para 46.

C. No Reasonable Causes of Action

22. The motion judge erred in the articulation and application of the legal tests for each cause of action. Those legal errors include: misstating the law on fiduciary duty, finding a potential duty of care without conducting an *Anns/Cooper* analysis, and failing to consider the other constituent elements of negligence. At this stage, pleadings are taken as true, except for bald conclusions or allegations manifestly incapable of proof.[41] Where plain and obvious that a claim (even a novel one) has no reasonable prospect of success, a certification judge should not allow it.[42]

23. The causes of action had no prospect of success; the motion judge thus had a responsibility to dismiss them. It was inconsistent with the court's gatekeeping role and the screening function of certification[43] to permit the Claim to proceed. None of the causes of action pled are sustainable.

1. *No Cause of Action for Breach of Fiduciary Duty*

24. The motion judge erred in law by finding a potential cause of action for breach of fiduciary duty, erroneously relying on the second test in *MMF*.[44]

25. Public duties are owed not to individuals, but to society as a whole. They do not create fiduciary duties.[45] "No fiduciary duty is owed to the public as a whole."[46] The RCMP's central and public duty is to preserve the public peace and to enforce the law for the benefit of all Canadians. The demographics of the Territories, and that there is one police force there, do not convert public duties into fiduciary duties.

26. Although the Crown is in a fiduciary relationship with Indigenous peoples, "not all dealings between parties in a fiduciary relationship are governed by fiduciary

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[41] *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 para 19 [*Atlantic Lottery Corp*].
[42] *Ibid*, at paras 14, 19, 68, 72.
[43] See *Pro-Sys*, *supra* note 33 at para 103.
[44] Reasons, at para 54; test at para 49 **[AB, VOL 1, TAB 2, pp 24-25 and 23]**.
[45] *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 37 [*Elder Advocates*], quoting with approval from *Guerin v The Queen*, [1984] 2 SCR 335 at 385.
[46] *Ibid*, at para 50.

obligations."[47] The requirements for fiduciary duty must be rigorously applied to the circumstances of each case.[48]

27. The motion judge relied on the second test for fiduciary duties in the Indigenous context, as set out in *MMF*. However, that test arises from *Elder Advocates*, which goes on to discuss fiduciary duty in the government context and specifies that there must be an undertaking covering specific private law interests to which the beneficiary has pre-existing, distinct, and complete legal entitlement.[49] General impacts on well-being or security do not create a fiduciary relationship.[50]

28. The plaintiffs have not pled an undertaking. In the context of this matter, involving public duties, there is no viable undertaking. The essential requirement that the fiduciary put the best interests of the beneficiary above all other interests is at odds with the Crown's—and the RCMP's—duty to act in the best interests of society as a whole.[51] Exercises of government discretionary power are not typically undertakings to act in a beneficiary's best interests or in some particular manner.[52] Such a burden is inherently at odds with the Crown's duty to act in the public interest and with the inherent discretion infused in such a duty.[53] Further, "a general obligation to the public or sectors of the public cannot meet the requirement of an undertaking."[54]

29. Policing is akin to a "grant to a public authority of discretionary power to affect a person's interest."[55] Indeed, "[i]n performing his or her duties, a police officer does not,

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[47] *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14 at para 48 [*MMF*].
[48] *Elder Advocates*, *supra* note 45 at para 54.
[49] *Elder Advocates*, *supra* note 45 at paras 37-41, 51, 59. Sufficient interests include property rights, interests akin to property rights, and fundamental human or personal interests such as state guardianship over a child or incompetent person. See also *MMF*, *supra* note 47 at para 61.
[50] *Elder Advocates*, *supra* note 45 at para 51.
[51] *Ibid*, at para 44.
[52] *Ibid*, at para 42.
[53] *Ibid*, at para 44. See also *Romagnuolo v Hoskin*, [2001] O.J. No. 3537 (ONSC), [2001] OTC 673, 2001 CarswellOnt 3183 (WL Can) at para 38 [*Romagnuolo*]; *Cox v Her Majesty the Queen in Right of Ontario and Children's Aid Society of Ottawa*, 2016 ONSC 6715 at paras 21-23; *R v Mosquito*, 2005 SKCA 31 at paras 8, 9.
[54] *Elder Advocates*, *supra* note 45 at para 48.
[55] *Ibid*, at para 45.

either personally or statutorily, undertake to act in the exclusive interest of each individual member of the public."[56] Policing does not create duties of loyalty to particular persons or groups, and the fair maintenance of public order and safety does not permit "forsaking … the interests of all others in favor of those of [a] beneficiary."[57] Moreover, the at-stake interests identified by the plaintiff do not meet the requirements of specific private law interests to which the beneficiary has pre-existing, distinct, and complete legal entitlement.[58] It is well-established that general impacts on well-being or security do not create a fiduciary relationship.[59]

2. *No Cause of Action for Systemic Negligence*

30. The motion judge erred in finding a potential cause of action in systemic negligence.[60] Her analysis was deficient in three ways. First, she failed to characterize the claim in a manner consistent with the pleadings. Second, she failed to apply the *Anns/Cooper* test for duty of care and thus misapprended questions of proximity and policy immunity. Third, she failed to consider the viability of the cause of action as a whole (including standard of care, breach, causation and damages).

31. She was required to consider the remaining required elements for the systemic negligence claim.[61] Simply examining the alleged systemic duty of care was insufficient. An examination of the standard of care and breach, for example, would have shown that those pled were policy oriented.[62]

a) Motion Judge Did Not Analyze the Claim as Pled

32. The motion judge adopted an inaccurate characterization of the negligence claim, finding the claim is about "the lack of following policy" or failures to take preventative management or operational action.[63] The pleadings in fact allege a duty of care to

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[56] *Romagnuolo*, *supra* note 53 at para 38.
[57] *Elder Advocates*, *supra* note 45 at para 31.
[58] *Ibid*, at paras 51, 59. See also *MMF*, *supra* note 47 at para 61.
[59] *Ibid*, at para 51.
[60] Reasons, para 41 **[AB, VOL 1, TAB 2, p 20]**.
[61] *Greenwood*, *supra* note 3 at paras 153-154.
[62] Claim, paras 52, 60 **[AB, VOL 1, TAB 3, pp 74-75, 76-77]**.
[63] Reasons, paras 31, 33 **[AB, VOL 1, TAB 2, pp 17,18]**.

Indigenous persons "through the establishment, funding, oversight, operation, supervision, control, maintenance, and support of RCMP detachments" in the Territories. Moreover, the standard of care and breach aspects of the pleadings are framed by reference to policy decisions. To develop her characterization, the motion judge erroneously applied *Rumley*, which dealt with an uncontroversial duty of care in a claim about abuse against minors in a residential facility, saying it was precisely the same pleading.[64] The motion judge erred in accepting that analogy: in *Good ONSC*, a claim for systemic negligence in policing, the Court rejected the same analogy to *Rumley* and called it "clearly distinguishable since [it] did not involve police officers and the issue of when police owe a private law duty of care."[65]

b) Motion Judge Did Not Conduct an *Anns/Cooper* Duty of Care Analysis

33. The motion judge failed to refer to or apply the two-part *Anns/Cooper* test for duty of care.[66] The Supreme Court of Canada has recently again expressed approval of the *Anns/Cooper* test.[67] The motion judge was required to examine whether the pleadings disclose a relationship of sufficient proximity, whether by past recognition of such proximity or by a fresh analysis.[68] Next, she was to consider if any residual policy considerations negate or limit an established duty.[69] Policy is particularly important for systemic negligence claims, which often target higher-level decision-making and can be barred by the policy immunity defence.[70]

c) No Relationship or Indicia of Proximity

34. A proper proximity analysis requires a review of the pleadings to determine whether they set out a recognized relationship of proximity, failing which a fresh analysis is to

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[64] Reasons, para 33, citing to *Rumley v British Columbia*, 2001 SCC 69 **[AB, VOL 1, TAB 2, p 18]**.
[65] *Good v Toronto Police Services Board*, 2013 ONSC 3026 at para 47 [*Good ONSC*]. This finding was not challenged on appeal; *Good v Toronto Police Services Board*, 2014 ONSC 4583.
[66] *Cooper v Hobart*, 2001 SCC 79 [*Cooper*].
[67] *Nelson (City) v Marchi*, 2021 SCC 41 at paras 16, 17 [*Nelson*].
[68] *Cooper*, *supra* note 66 at para 23, cited in *Nelson*, *supra* note 67 at para 16, 17.
[69] *Cooper*, *supra* note 66 at para 30, cited in *Nelson*, *supra* note 67 at para 18.
[70] Policy considerations' important role described in *Cooper*, *supra* note 66 at para 25.

be undertaken.[71] The motion judge's minimal proximity analysis ignores and contradicts jurisprudence confirming that high-level policing operations do not attract private law duties of care.[72] The exclusivity of the RCMP's policing authority in the Territories does not invite a different result.[73] There are no viable indicia of proximity.

35. In the present case, the motion judge wrongly appears to have found proximity on a "well established" duty of care owed by government to individuals on arrest, detention, or holding in custody. The ultimate source of that duty is the 1972 *MacLean* case, which recognized a duty owed by government officials to persons in their custody, and the government's corresponding vicarious liability.[74] However, the *MacLean* duty is entirely distinct from the one alleged. *MacLean* is about an on-the-ground duty owed by officers to the individuals they interact with, whereas this Claim is about systemic negligence and requires proximity at the institutional level. The Supreme Court of Canada urges attentiveness "to the particular factors which justified recognizing [a] prior category" in determining whether an analogy exists to the claim before the court.[75]

36. A recognized duty to individuals in custody was found insufficient to ground a systemic negligence claim in*Good ONSC*, where the plaintiff pled a duty of care by public authorities in planning, preparing, directing, and overseeing the G20 Summit security.[76] The Court rejected the cause of action in systemic negligence arising from a breach at such a high level.[77] In *Good ONSC*, like this case, the plaintiff attempted to rely on the duty to individuals in custody to ground systemic negligence; the problem was that "this is not what the plaintiff pleads."[78] Like *Good ONSC*, the Plaintiff's claim for

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[71] *Cooper*, *supra* note 66 at para 23.
[72] *Good ONSC*, *supra* note 65 at para 55, 56, 59, 87-89.
[73] *BigEagle v Canada*, 2021 FC 504 at para 156; *Elder Advocates*, *supra* note 45 at para 72.
[74] *MacLean v R*, [1973] SCR 2, 1972 CanLII 124 (SCC) at p. 7.
[75] *Nelson*, *supra* note 67 at para 27.
[76] *Good ONSC*, *supra* note 65 at para 58.
[77] *Ibid*, at paras 42, 43, 50, 55.
[78] *Ibid*, at para 50.

systemic negligence "is grounded in the planning and supervising activities of the defendants […]."[79]

37. The motion judge thus erroneously relied on a duty of care potentially arising by virtue of case-by-case interactions between public officials and civilians in order to ground a systemic duty in the establishment, funding, oversight, operation, supervision, control, maintenance, and support of the RCMP. The latter is not capable of demonstrating a relationship of promixity for the purposes of giving rise to a duty of care. Because this Claim is framed in systemic negligence, it "can only succeed if [it is] systemic in nature and cannot succeed if based upon a series of discrete breaches of duty [owed to individuals]."[80]

38. Equally, under a fresh analysis, there is no private law duty of care in the circumstances pled. The pleadings refer to public decision-making lacking proximity.[81] The public nature of the duties created by the *RCMP Act*[82] are simply incompatible with a private law duty of care, as specifically affirmed in *Good*.[83] Public authorities must be free to make decisions "without being subjected to a private law duty of care to specific members of the general public."[84] Not only is the alleged duty in this case unknown to law but it was previously rejected in *Good*.[85]

39. While the proximity analysis leaves open the possibility that specific interactions between the RCMP and an individual plaintiff might give rise to a duty of care, that determination logically arises only on an individual and not a class basis. Particular acts of

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[79] *Ibid*, at para 55.
[80] *Brazeau v Canada (AG)*, 2020 ONCA 184 at para 118 [*Brazeau/Reddock*].
[81] *Taylor v Canada (Attorney General)*, 2012 ONCA 479 at paras 75-77; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 44-45 [*Imperial Tobacco*]; *Good ONSC* *supra* note 65 at para 65.
[82] *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, s 18.
[83] *Good ONSC*, *supra* note 65 at paras 59, 72, 73. This finding not disturbed on appeal, *Good v Toronto Police Services Board*, 2014 ONSC 4583. See also *Imperial Tobacco*, *supra* note 81 at para 45; *Spencer v Canada (AG)*, 2010 NSSC 446 at para 56; *Deloitte Restructuring Inc v Canada (AG)*, 2019 NBQB 201 at paras 233 and 235; *Jones v Canada (AG)*, 2018 NBCA 86 at paras 26-30. See also *Allen v New Westminster (City)*, 2017 BCSC 1329 at paras 29-30; *Burnett v Moir*, 2011 BCSC 1469 at para 432.
[84] *Wellington v Ontario*, 2011 ONCA 274 at para 44.
[85] *Good ONSC*, *supra* note 65 at paras 55-59, 72, 73.

negligence against individuals might give rise to liability without creating an institutional duty of care to those individuals as a group, and they could not be advanced as a systemic claim in a class proceeding.

d) Policy Immunity Applies

40. The motion judge ought to have found that policy immunity bars the systemic negligence claim under the second branch of the *Anns/Cooper* test. Instead, the Court erroneously rejected policy immunity, finding the Claim to implicate operational decisions[86] notwithstanding its focus on high-level questions like Canada's management of the RCMP and its detachments.[87] The Supreme Court of Canada has confirmed that, subject to threshold questions of rationality and good faith, policy immunity applies to "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors."[88]

41. The plaintiffs in *Brazeau*/*Reddock* similarly alleged that there existed a class-wide duty with respect to the "design, organization, administration and staffing of the Federal Institutions, as well as the policies and procedures applied therein."[89] The Ontario Court of Appeal rejected the alleged institutional duty of care as consisting of a claim in negligence at the policy-making level and held that the failure to have policies to avoid harm cannot ground a systemic duty of care.[90] As in *Brazeau/Reddock*, proposed class members in the present case may have claims about specific acts (here, in assault or battery)—but not for negligence in creating "a system where assaults happen."

42. In *Cirillo ONCA*, the Court of Appeal for Ontario similarly found "the claims on their face relate to core policy decisions."[91] In very similar pleadings, *Cirillo* claimed "damages caused by [Ontario's] breach of its common law duty in relation to the operation, management, administration, supervision, funding and control of bail

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[86] Reasons, paras 29-34 **[AB, VOL 1, TAB 2, pp 16-18]**.
[87] Claim, para 43 **[AB, VOL 1, TAB 3, p 72]**.
[88] *Hinse v Canada (AG)*, 2015 SCC 35 at para. 23.
[89] *Brazeau/Reddock*, *supra* note 80 at para 115.
[90] *Ibid*, at paras 119-120.
[91] *Cirillo ONCA*, *supra* note 36 at para 37.

hearings in Ontario."[92] Both *Cirillo* and the present Claim take aim at high-level decision-making for the purposes of creating commonality, but in doing so, they entrench on core policy decisions and fail to advance a viable systemic negligence claim.

e) Failure to Consider the Remaining Elements of Systemic Negligence

43. The motion judge erroneously permitted the systemic negligence claim to proceed without considering all elements of negligence (standard of care, breach, causation, and damages), apart from noting they had been pled.[93] Each element is necessary for all negligence claims.[94] Judicial gatekeeping on certification requires more than a partial assessment of the plaintiff's theory of liability.

44. A review of the whole negligence claim pled reveals that it has no reasonable prospect of success. The Claim itself suggests that the RCMP's high-level management, funding and oversight decisions have caused assaults. The main proof of breach is the occurrence of assaults. Similarly, the primary form of injury and damages is the occurrence of assaults.[95] Yet, the causal link between systemic decisions and individual assaults cannot be meaningfully established at law.[96]

45. Every systemic negligence claim must be assessed on its own facts to determine if a reasonable cause of action has been pled. While systemic negligence claims in the institutional context[97] and in the context of workplace harassment[98] have been certified, none of these claims have engaged the same issue of broad public duties that are central to this action. The motion judge erred by relying on the distinguishable *Francis* decision. *Francis* pled a clear theory of negligence, including duty, breach, causation, and damages. The claim involved the holding of certain classes of persons in segregation—

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[92] *Ibid*, at para 10.
[93] Reasons, para 42 **[AB, VOL 1, TAB 2, p 21]**.
[94] *Greenwood*, *supra* note 3 at para 154, citing *Saadati v Moorhead*, 2017 SCC 28 at para 13.
[95] *Rumley v British Columbia*, 2003 BCSC 234 at para 58 [*Rumley BCSC 2003]*.
[96] *Ibid*, at para 59.
[97] *LR v British Columbia*, 1999 BCCA 689 [*Rumley BCCA*]; *Francis v Ontario*, 2021 ONCA 197 [*Francis*].
[98] *Greenwood*, *supra* note 3.

the fact of which caused damages—under the authority of an "identical action."[99] The better analogy is *Brazeau/Reddock*, whose theory of systemic negligence the Ontario Court of Appeal held could not be established through "different acts in different circumstances and in relation to different individuals."[100]

46. The negligence theory, apart from being fundamentally flawed as set out above, is framed so abstractly as to be an allegation of negligence "in the air," which the Supreme Court of Canada has cautioned against.[101] The Plaintiff asserts that Canada's negligent operation and management of the RCMP (including funding decisions) has caused psychological and physical harm. However, when the RCMP funds, manages, or operates policing in the Territories, no duty of care arises vis-à-vis the class or indeed any individual. Nor is there any way the RCMP could breach that alleged duty so as to be liable to compensate individual plaintiffs.

3. *No Cause of Action for Breach of Section 7 of the Charter*

47. In addressing the section 7 cause of action, the motion judge erred by failing to reconcile a fundamental inconsistency in the Claim, finding it to be a "top-down claim" not based on individual circumstances, but proceeding to analyze the cause of action as a series of individual breaches. The Plaintiff characterizes the breach as systemic by virtue of the "frequency, duration, and severity" of the conduct[102] but fails to plead any particular systemic action.

48. If the Plaintiff's section 7 breach allegation is indeed "top-down" and not based on individual acts, it is reiterative of the systemic negligence claim. The acts of particular RCMP Members would not be relevant. The *JB* case, which the motion judge distinguished, stands for the proposition that negligence claims cloaked as *Charter* claims should not be certified.[103] Otherwise, the Plaintiff's section 7 claim consists of

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[99] *Francis*, *supra* note 97 at para 103.
[100] *Brazeau/Reddock*, *supra* note 80 at para 120.
[101] *Atlantic Lottery Corp*, *supra* note 41 at para 33, citing to *Clements*, *supra* note 2 at para 16: "[a] defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff."
[102] Claim, para 64 **[AB, VOL 1, TAB 3, p 77]**.
[103] *JB v Ontario (Child and Youth Services)*, 2020 ONCA 198 at para 60, leave to SCC refused 2020 CanLII 74017 (SCC).

a series of individual acts rather than any systemic action (which will fail for a lack of common issues, as set out below).

D. Identifiable Class

49. The motion judge erred by accepting an overbroad and subjective class definition, which hinges on prospective class members' own views as to whether unreasonable force was used on them. The conditions for class membership (i.e., making an allegation of assault) are not rationally connected to the common issues, which seek to frame government liability in systemic breach of duty.

1. *Legal Framework for Class Definitions*

50. The class definition should rely on stated, objective criteria with a rational relationship to the common issues. It should not depend on the outcome of the litigation. Not all class members need be named or known, but their status must be objectively determinable.[104] The three-fold purpose, not noted by the motion judge, is: to identify persons with potential claims against the Defendant, to identify those who will be bound by any final judgment, and to describe who is entitled to notice.[105]

2. *The Class is Not Objectively Identifiable*

51. For a class proceeding to be viable, the class must have an objective definition. That is not the case here: the class definition is subjective. Each Indigenous class member must allege assault while being detained or in custody. This means individuals can determine their own class membership simply by alleging assault.

52. Class membership arises purely from the personal views of class members as to complex questions of fact and law. The class definition contains no objective standard for an "assault allegation," such as a pre-existing judicial or administrative finding of assault or wrongdoing. Rather, prospective class members are invited to allege they have suffered an independent actionable wrong in assault or battery. Assault requires

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[104] *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at para 38 [*Western Canadian*], followed in *Kwicksutaineuk/Ah-Kwa-Mish First Nation v BC (Min of Agriculture and Lands)* 2012 BCCA 193 at para 84.
[105] *Kuiper v Cook (Canada) Inc.*, 2018 ONSC 6487 at para 144.

proof of intent by the tortfeasor to cause another person to have a reasonable apprehension of imminent harm.[106] Battery requires proof of intentional infliction of unlawful force by one individual against another.[107] Assault and battery require sufficient proof of intent to distinguish them from acts of negligence. The legal and evidentiary logistics of supporting assault and battery allegations are further complicated in the context of police use of force. Section 25 of the *Criminal Code of Canada* imports a reasonableness standard: reasonable use of force is permitted—even where it may otherwise constitute assault or battery—in order for police to perform basic arrest and detention duties. Police officers, as all civilians, may further be justified in their use of force in circumstances of reasonable self-defence.

53. Some allegations will not involve true assaults. Others will be justified as reasonable uses of force by police or as reasonable self-defence. Still others may arise in contexts of questionable relevance (i.e., a further fact-specific inquiry may be required to prove detention or custody). A class definition tied together by such allegations—arising entirely from the subjective views of class members—is not objectively determinable.

3. *Selective Reliance on Rumley*

54. The motion judge relies on *Rumley* alone to support her findings on class definition. Both here and in *Rumley*, the plaintiffs advanced a claims-based class definition; that is to say, the respective classes were each to be comprised of members making allegations of wrongdoing.[108] The present Claim, which is far broader, more subjective, and less defined in scope than *Rumley* and other claims-based class definitions, should not have been certified.

55. *Rumley* is distinguishable. Its class definition was based on an uncontroversial duty of care owed to a tightly defined group: the provincial government's duty to protect vulnerable minors from sexual assaults by staff members in its operation of a residential

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[106] *M(K) v M(H)*, [1992] 3 SCR, 1992 CanLII 31 (SCC) at 25-26; *McLean v McLean*, 2019 SKCA 15 at para 59.
[107] *M(K) v M(H)*, at 25-26; *Norberg v Wynrib*, [1992] 2 SCR 226, 1992 CanLII 65 (SCC) at 246, 303-304.
[108] *Rumley BCCA*, *supra* note 97 at para 51.

facility for the deaf. Those allegations are of a different character than the excessive force allegations certified in the case at bar. Unlike the current case, relying on a sexual assault allegation to define membership did not require prospective class members to contemplate legal justification or the amount of force that was reasonable in a specific situation. The introduction of complex concepts to a claims-based definition further stretches the tenuous connection between the class and the common issues.

56. Claims-based class definitions are also not universally accepted.[109] Where certified, claims-based definitions have included an objective, identifiable factor rationally linked to harm or damage. Examples include sexual assault by one specific individual,[110] prescription and ingestion of a particular drug[111] or purchase/lease of a specific product.[112] The objective criteria is then followed by a claim to have suffered damage as a result. A claims-based element to a class definition should be used to limit an existing, identifiable class to only those members who claim damage resulting from the objectively definable criteria. The current claim instead uses claim or allegation language to create a class, rather than to narrow it to only those individuals who suffered harm as a result of some objective fact that potential plaintiffs can self-identify.

4. *The Class Period Exceeds the Scope of Evidence*

57. The motion judge erred by accepting a class definition and period that exceeds the evidence. The Court did not have "some basis in fact" to conclude that the class period should reasonably extend back to 1928. Of the prospective class members who filed affidavits, none addressed actions earlier than 1990. The motion judge cannot extrapolate findings beyond the evidence before the Court.

5. *Absence of Rational Connection Between the Class and Common Issues*

58. The motion judge committed palpable and overriding error by accepting the proposed class despite the lack of the necessary rational connection[113] between the class

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[109] *Attis v Canada (Minister of Health)*, 2007 CanLII 15231 at para 56 (ON SC).
[110] *Hayes v Saint John (City)*, 2017 NBQB 87.
[111] *Pardy v Bayer Inc*, 2004 NLSCTD 72; *Walls v Bayer Inc*, 2005 MBQB 3.
[112] *Thorpe v Honda Canada Inc*, 2011 SKQB 72.
[113] *Hollick v Toronto (City)*, 2001 SCC 68 at para 20 [*Hollick*]; *Western Canadian*, *supra* note 104 at para 38.

definition and common issues. Only a series of individual inquiries can fill the gap between the class definition and common issues.

59. The failure to establish a rational connection is fatal to a class proceeding. In *Dennis*,[114] the Court of Appeal for Ontario found a "gap" between the proposed class and the quality of having an actionable claim. The proposed class members signed self-exclusion forms to be refused entry into gambling facilities, but allege they were allowed in anyway. The court would have to conduct a "detailed inquiry" into the particular circumstances of each class member, because the issue of fault "cannot usefully or fairly be considered in the abstract and without reference to the circumstances of each individual class member."[115] Similarly, in *RG*, the Ontario Superior Court of Justice found that the alleged general unreliability of a particular drug test did not meaningfully connect the proposed class (who tested positive using the test) to a compensation claim: individual inquiries would be required to determine whether the test yielded a false positive and whether it caused injury.[116]

60. Here, as in *Dennis*, the allegations within the common issues cannot usefully be considered in the abstract. An allegation of assault alone is not logically linked to determining whether the RCMP breached any class wide duty. Nor can it be rationally connected to an award of aggregate damages. Even on the Plaintiff's theory of the Claim, RCMP liability for breach of a duty of care, or Charter breach would require prior inquiry into the alleged assaults at an individual level, including all associated factual and legal issues. Like *RG*, general findings respecting RCMP management and operation will not assist in determining whether an alleged assault is in fact an assault.

E. Common Issues

61. None of the common issues warranted certification. The motion judge erroneously concluded that common issues were established in circumstances where the Claim depends entirely on the resolution of individual claims in assault or battery. The

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[114] *Dennis v Ontario Lottery and Gaming Corp.*, 2013 ONCA 501 at para 28 [*Dennis*].
[115] *Ibid*, at paras 56, 57.
[116] *RG v The Hospital for Sick Children*, 2017 ONSC 6545 at para 154 [*RG*].

Certified Common Issues will not significantly advance the litigation, and their determination is unnecessary to the resolution of each individual claim.

1. *Legal Framework for Common Issues*

62. At certification, plaintiffs must adduce evidence demonstrating some basis in fact to believe that a common issue exists beyond a bare assertion in the pleadings.[117] A question is "common" if it advances every class member's claim.[118] In this case, the motion judge stated, without reasons, that the common issues would move the litigation forward and accepted that they would avoid duplication of legal analysis.[119] The common issues do not assist in determining the real issue in this case—whether a particular class member suffered an intentional tort in assault or battery.

63. The Supreme Court of Canada in *Western Canadian* outlined the essential requirements for establishing common issues of fact and law.[120] An issue can only be certified as a common issue where it satisfies each of the following: (i) its resolution avoids duplication of fact-finding or legal analysis; (ii) its resolution will advance the litigation for (or against) the class; (iii) claims must share a substantial common ingredient and the common issue's resolution is necessary to the resolution of that claim; (iv) it is not dependent upon individual findings of fact that have to be made with respect to each individual claimant; and, (v) it is not framed in such overly broad terms as to undermine the goals of either fairness or efficiency.[121]

2. *The Theory of the Common Issues is Flawed*

64. The Plaintiff has framed essentially individual allegations as systemic negligence, fiduciary duty, and *Charter* claims. Only if the individual assaults are first proven can this inquiry then identify relevant systemic flaws. Even then, the inquiry could not advance the class members' claims that certain policy flaws could cause illegal assaults on the "but for"

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[117] *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443 at para 79 [*Fulawka*]; *Hollick*, *supra* note 113 at para 25.
[118] *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at para 46, cited with approval in *Pioneer Corp*, *supra* note 37 at para 105.
[119] Reasons, para 106 **[AB, VOL 1, TAB 2, p 40]**.
[120] *Western Canadian*, *supra* note 104 at para 39.
[121] *Ibid*, at paras 39-40. *Fulawka*, *supra* note 117 at paras 80-81.

standard or whether any proposed class member was a victim thereof. There are no viable common issues in play.

65. The motion judge wrongly suggested that the following question explains the relationship between the common issues and individual assessments: "if the [common issues] allegations are true, was there a breach of various rights of the class members?"[122] The Court's question cannot be fully answered at a common issues trial because it requires individual assessment of each allegation. The class' rights are not breached in theory, but only if if each class member experienced an assault in the circumstances of their situation.

66. The motion judge's second problematic characterization of the Claim—asking "whether the operations of the RCMP create a system where illegal assaults happen"—was likewise flawed.[123] Shortcomings in an organization's management or operation cannot be adjudicated in a vacuum. The overly broad question of whether there were flaws in the system is simply not a substantial ingredient of each class member's claim. With or without such a finding, any individual alleging illegal assault could bring their claim forward in the same fashion.

3. *The Common Issues are Beyond the Scope of Evidence*

67. As with the class definition, the motion judge certified common issues in a manner that exceeded the scope of the evidentiary record. The evidence of the prospective class members does not elaborate on any pertinent decisions about the management or operation of the RCMP. Rather, they describe on-the-ground incidents and their impacts by reference to the individual affiant. One cannot reasonably extrapolate from the affiants' respective expressions of dissatisfaction with the RCMP to some basis in fact for very different systemic issues. Similarly, the expert report of Dr. Wortley, which speaks to the lack of research on the topic of systemic discrimination by the RCMP, and the media reports he relies on, which relate primarily to deceased persons outside the class definition, do not provide a sufficient basis for the conclusions reached by the motions judge.

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[122] Reasons, para 101 **[AB, VOL 1, TAB 2, p 39]**.
[123] Reasons, paras 101, 102 **[AB, VOL 1, TAB 2, pp 39-40]**.

4. *The Private Law Duties Do Not Meet the Test For Common Issues*

68. The first and second common issues ask: "by its operation and management of the RCMP, did the defendant breach a duty of care or fiduciary duty, owed to the class to protect them from actionable physical or psychological harm?" Neither warrants certification. Judicial economy is not achieved by allowing a lengthy process to determine general shortcomings in Canada's operation or management of the RCMP.[124]

69. Legal theories of class-wide negligence or breach of fiduciary duty do not contribute meaningful answers to class members' allegations that they were illegally assaulted. They do not offer insight as to how and whether force was applied or the reasonableness of that force. They do not connect or explain disparate activity by different (unidentified) RCMP Members across very many years and circumstances. In sum, these questions do not advance the action; their resolution is not necessary to—or even a substantial ingredient in—the outcome of any assault claim.

70. As previously described at para 52, an illegal assault or battery is an intentional tort, which in the context of police use of force and s. 25 of the Criminal Code, requires detailed individual legal and factual analysis on the reasonableness standard.

71. A common issue cannot depend upon the outcome of inquiries in which individual fact-finding is required for each claimant.[125] In this case, the motion judge stated that the damage to a class member would be evidence of the system (as well as potential cause for damages).[126] This statement shows that, in fact, that determination of the common issues is dependent on individual findings of fact. It is an acknowledgement that individual issues predominate, and it also shows that the common issues truly do not move the litigation forward: each class member's allegation will inevitably require an individual inquiry into the facts and the law. It contradicts her ultimate finding, which is thus made in error, that there would not need to be individual assessment until after the common questions were answered. The true claims embedded in this action are individual ones.

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[124] *Dennis*, *supra* note 114 at paras 57-59**.**
[125] *Rumley BCSC 2003*, *supra* note 95 at para 30.
[126] Reasons, para 102 **[AB, VOL 1, TAB 2, pp 39-40]**.

72. *Rumley*, on which the motion judge relied heavily, demonstrates the lack of true common issues here. The duty of care in *Rumley* was not in controversy. The principal common issue was a broad question about whether there was a failure to take reasonable measures in management and operations to prevent abuse. Only two years after the class was certified, the common issues in *Rumley* had become unmanageable and were judicially rewritten.[127]

73. As here, the *Rumley* class members sought to prove a systemic wrong through a claimed pattern of individual assault. That approach devolved into requests to adduce voluminous individual student files and evidence from former students, contrary to the principle that common issues are to be determined without reference to individual plaintiffs.[128] The Court concluded that alleged sexual misconduct is individual, questioned whether it was even possible to conduct a common issues trial that "[would] be of any benefit to the individual plaintiffs," and replaced the common issues with 11 revised common issues.[129] Even so, the Court warned the plaintiffs it had reached a "precarious balance" between a workable class proceeding and "unmanageable confusion."[130]

5. *The Charter Issues Do Not Meet the Test For Common Issues*

74. Like negligence, *Charter* breaches must exist more than just in theory. There is no evidence— and no basis in fact—for "top-down" management and operation decisions which have the capacity to breach Charter rights on a class-wide basis. While on-the-ground decisions may lead to *Charter* breaches, those breaches manifest as individual assaults and lack the feature of commonality.

75. Indeed, the jurisprudence shows that *Charter* breaches must generally be determined through a review of individual circumstances. Courts have refused to certify *Charter* claims as common issues where the true challenge is to multiple persons' decisions, based on multiple sets of circumstances, at multiple times. *Cirillo* provides such an example. At issue was timely bail hearings. The motion judge declined to find

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[127] *Rumley BCSC 2003*, *supra* note 95 at para 30.
[128] See *Rumley BCSC 2003*, *supra* note 95 at para 64, 74.
[129] *Ibid*, at paras 62, 75, 81.
[130] *Ibid*, at para 91.

requisite commonality in the systemic negligence and *Charter* issues alleged there. He concluded "a finding for one putative class member would not be a finding for all, or even any other one, of the class members."[131] The litigation would not be advanced in any legal way and legal duplication would not be avoided. The Ontario Court of Appeal agreed, specifically referencing the *Charter* claims.[132]

76. *Thorburn* provides another example, in which the British Columbia Court of Appeal held that *Charter* rights are individual in nature.[133] The Court accepted that a general finding of a systemic wrong, in that case an unreasonable strip search policy, would not provide the foundation for determining a cause of action. Only an individual assessment of the relevant circumstances would allow the determination of whether a cause of action was established. Determination of the common issues would not advance the litigation in any "meaningful" way.[134]

77. There are exceptional cases certifying Charter issues which arose from a single course of conduct.[135] The exception applies where the class is undifferentiated, the breach arises from a single action or single order, and the class members suffer the same base damages from that single action or order. The section 9 breach in *Good ONCA* is an example, as it alleged a single command order led to mass detentions at five specified locations in one day.[136] The change in membership criteria in *Brake* similarly led to a common denial of membership in a First Nation.[137] In each of *Brazeau/Reddock* and *Francis*, class members were placed in segregation within the same system for at least

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[131] *Cirillo ONSC*, *supra* note 1 at para 65.
[132] *Cirillo ONCA*, *supra* note 36 at para 67.
[133] *Thorburn v British Columbia*, 2013 BCCA 480 at para 41 [*Thorburn*].
[134] *Ibid*, at para 42. See also *Monaco v Coquitlam (City)*, 2015 BCSC 2421 at paras 164-166.
[135] *Cirillo ONCA*, *supra* note 36 at para 65.
[136] *Good v Toronto Police Services Board*, 2016 ONCA 250 at paras 36, 57-60 [*Good ONCA*].
[137] *Brake v Canada (AG)*, 2019 FCA 274 [*Brake*] at paras 8, 9, referred to in Reasons, para 89, 103 **[AB, VOL 1, TAB 2, pp 36, 40]**.

a certain period of time.[138] In *Murray,* a section 8 claim arose from a single order which resulted in searches of 33 residents.[139]

78. The present Claim follows the default *Charter* rule of individuality, as set out in *Cirillo, Thorburn*, and *Monaco*, as opposed to the exceptional rule of an undifferentiated class, as in *Good ONCA, Brake, Brazeau/Reddock,* or *Murray*. This Claim has no single order, and no *prima facie* shared base level harm. The motion judge erroneously relied on the exceptional cases even though this Claim is not within the exception.

79. There was no basis in fact to certify a s. 15 Charter breach as a common issue. Dr. Wortley's report does not provide that basis; it simply points to the fact that further evidence is necessary to opine on whether whether racial disparities exist among use of force incidents.[140] In fact, Dr. Wortley suggested that a number of other factors may impact an individual's likelihood of experiencing force by police officers. A common issue should not be certified in the hope that a basis in fact will later emerge.

6. *Error in Certifying Aggregate Damages as a Common Issue*

80. The motion judge erred in law in certifying aggregate damages as a common issue. At law, no class member would be entitled to any damages unless he or she were a victim of an unlawful assault. Aggregate damages cannot be certified as a common issue unless a plaintiff provides a basis to calculate them without reference to individual circumstances.[141] In this case, entitlement to damages depends entirely on the individual circumstances of the alleged assault. There is thus no basis to determine an award of aggregate damages at a common issues trial. *Brake*, *Good ONCA*, and *Brazeau/Reddock*, in which aggregate damages were certified, are distinguishable on the basis that each class member was alleged to have suffered the same loss, from the same breach.[142]

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[138] *Brazeau/Reddock, supra* note 80 at paras 16, 17; *Francis*, *supra* note 97 at para 16.
[139] *Capital District Health Authority v Murray,* 2017 NSCA 28 at paras 56, 57, 74 [*Murray*].
[140] Professor Wortley Affidavit, Exhibit A at p 26 **[AB, VOL 9, TAB 12A, p 2916]**.
[141] *Pro-Sys, supra* note 33 at para 118; *Greenwood*, *supra* note 3 at paras 188, 189.
[142] In *Brake*, *supra* note 137, referenced in Reasons at para 90 **[AB, VOL 1, TAB 2, p 36]**, the section 15 claim arose from a class wide loss of entitlement to membership. In *Good ONCA*, *supra* note 136 at para 75, the trial judge could calculate base damages

7. *Error in Certifying Punitive Damages as a Common Issue*

81. Nor did the motion judge provide reasons for certifying punitive damages as a common issue. Punitive damages should be awarded with reference to compensatory damages, to avoid double recovery, because compensatory damages also punish.[143] Therefore, if the common issues trial does not sufficiently determine entitlement to and quantum of compensatory damages, punitive damages cannot be determined at the common issues trial.[144] The motion judge erred when certifying punitive damages as a common issue, because the common issues trial could not result in any aggregate damages award.

F. Preferable Procedure

82. The motion judge made a palpable and overriding error of fact and law in finding that a class action was the preferable procedure. Preferable procedure asks whether a class action is preferable to other means of pursuing claims.

83. The motion judge was required by both Rule 334.16(2) of the *Federal Courts Rules* and *Hollick* to consider the importance of the common issues in relation to the claims as a whole.[145] The Court did not do so. As stated in *Western Canadian*: class members' claims must share a substantial common ingredient to justify a class action; and when determining whether a class action is justified, a court may need to examine the significance of the common issues in relation to individual issues.[146]

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owed to class members suffering from the same mass detention. The Court stated that aggregate damages must be reasonably determinable without proof by individual class members. See also *Fulawka*, *supra* note 117 at para 126. In *Brazeau/Reddock*, *supra* note 80 at para 102, a base level of damages in *Reddock* could again be established because the judge accepted that placement in administrative segregation for more than a certain period of time caused harm.

[143] *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 123. The Ontario Court of Appeal reiterated that principle in *Good ONCA*, *supra* note 136, a class action, stating that the trial judge must have a sufficient measure of the compensatory damages to determine entitlement to and quantum of punitive damages (at para 76-80).

[144] *Good ONCA*, *supra* note 136 at paras 76-80; *Peter v Medtronic*, 2010 ONSC 3777 at paras 34-40.

[145] *Hollick*, *supra* note 113 at para 30; *Federal Courts Rules*, SOR/98-106, r 334.16(2).

[146] *Western Canadian*, *supra* note 104, cited in Reasons at para 74 **[AB, VOL 1, TAB 2, pp 30-31]**.

84. In this case, the foundational issue is the allegation of individual assaults by each class member, which demonstrably overwhelms any common issues that might exist. The causes of action in systemic negligence, breach of fiduciary duty, and *Charter* breaches are not just secondary—on the Plaintiff's theory of liability, they simply cannot exist without first proving or assuming that assaults have occurred. The individualistic quality of the assault allegations requires a case-by-case inquiry rather than a class wide determination.

85. Where the relative insignificance of the common issues in comparison to the individual issues is pronounced, a class action is not a preferable procedure. In *Dennis*, the Ontario Court of Appeal accepted that "a general finding of 'systemic wrong' would not avoid the need for protracted individualized proceedings into the vulnerability and circumstances of each class member." Individual actions were "more efficient and expeditious" and, ultimately, inevitable.[147] The Court relied on the same logic in *Cirillo ONCA*.[148] The Ontario Divisional Court accepted the same approach in *RG*,[149] which challenged the general unreliability of certain medical tests, and *Bennett*,[150] which alleged poor design and implementation of a billing system. In *RG*, the contributions of the common issues would "be infinitesimal compared to what the class member must establish at his or her inevitable individual issues trial."[151] In short, a class action "will not be preferable if, at the end of the day, [the] claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action."[152]

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[147] *Dennis*, *supra* note 114 at para 71. The motion judge relied in her Reasons at para. 116, on an excerpt from *Dennis* at para 53 **[AB, VOL 1, TAB 2, p 43]**. The full paragraph containing that excerpt does not support the motion judge's preferable procedure analysis, focusing on cases in which a wrong causes harm to an undifferentiated class of individuals, "especially when the assessment of damages can be accomplished by application of a simple formula." This case does not concern an undifferentiated class, nor can damages be assessed by simple formula.

[148] *Cirillo ONCA*, *supra* note 36 at para 69.

[149] *RG*, *supra* note 116, affirmed in *RG v The Hospital for Sick Children*, 2018 ONSC 7058 [*RG Appeal*].

[150] *Bennett v Hydro One*, 2018 ONSC 7741 (Div Court) at para 40 [*Bennett*].

[151] *RG Appeal*, *supra* note 149 at para 39. See also para 34.

[152] *Ibid*, at para 29.

86. The Plaintiff's theory of liability, taken at its highest, suggests that Canada's operation and management of the RCMP caused harms as evidenced by a pattern of assaults. A class member is not harmed at all unless an assault is shown, which can only be determined through individual inquiry. Answering the certified common issues would not meaningfully advance any class member's claim for liability and damages.

87. With or without a class proceeding, the underlying claims must all be proven as if each class member had initiated an individual action. There is no benefit to a class proceeding, as it fails to meet any of the goals of class actions. After any common issues trial, class members would face the same economic and practical hurdles that they faced at the outset of the proposed class action.

PART IV – ORDER SOUGHT

88. Canada asks that the appeal be allowed and the order granting certification be set aside, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Edmonton, in the Province of Alberta this 2nd day of November, 2021.

Christine Ashcroft / Brent Thompson /
Courtney Davidson

Counsel for the Appellant

PART V. LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Legislation

Criminal Code, RSC 1985, c C-46
Royal Canadian Mounted Police Act, RSC 1985, c.R-10

Regulations and Statutory Instruments

Federal Courts Rules, SOR/98-106
Royal Canadian Mounted Police Regulations, 2014, SOR/2014-281, Schedule
Code of Conduct of the Royal Canadian Mounted Police

CASES

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Alberta v Elder Advocates of Alberta Society, 2011 SCC 24
Allen v New Westminster (City), 2017 BCSC 1329
Atlantic Lottery Corp Inc v Babstock, 2020 SCC 19
Attis v Canada (Minister of Health), 2007 CanLII 15231
Bennett v Hydro One Inc., 2018 ONSC 7741
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Brake v Canada (AG), 2019 FCA 274
Brazeau v Canada (Attorney General), 2020 ONCA 184
Burnett v Moir, 2011 BCSC 1469
Canada (AG) v Jost, 2020 FCA 212
Canada v Greenwood, 2021 FCA 186
Canada v John Doe, 2016 FCA 191
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Cirillo v Ontario, 2021 ONCA 353
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Cooper v Hobart, 2001 SCC 79
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Francis v Ontario, 2021 ONCA 197
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Good v Toronto Police Services Board, 2013 ONSC 3026
Good v Toronto Police Services Board, 2014 ONSC 4583
Good v Toronto Police Services Board, 2016 ONCA 250
Guerin v The Queen, [1984] 2 SCR 335

Hayes v Saint John (City), 2017 NBQB 87
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Pioneer Corp v Godfrey, 2019 SCC 42
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R v Imperial Tobacco Canada Ltd, 2011 SCC 42
R v Mosquito, 2005 SKCA 31
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RG v The Hospital for Sick Children, 2017 ONSC 6545
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Romagnuolo v Hoskin, [2001] O.J. No. 3537 (ONSC), [2001] OTC 673, 2001 CarswellOnt 3183 (WL Can)
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