

Federal of Appeal File No.: A-188-21  
Federal Court File No.: T-2158-18



**FEDERAL COURT OF APPEAL**

**THE ATTORNEY GENERAL OF CANADA**

Appellant

and

**DIANE NASOGALUAK AS LITIGATION GUARDIAN OF  
JOE DAVID NASOGALUAK**

Respondent

**NOTICE OF APPEAL**

**TO THE RESPONDENT:**

**A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the appellant. The relief claimed by the Appellant appears on the following page.

**THIS APPEAL** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the Appellants. The Appellant requests that this appeal be heard at the Federal Court of Appeal in Edmonton, Alberta.

**IF YOU WISH TO OPPOSE THIS APPEAL**, to receive notice of any step on the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules*, and serve it on the Appellant's solicitor **WITHIN 10 DAYS** after being served with this notice of appeal.

**IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION** of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules*, instead of serving and filing a notice of appeal.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (613-992-4283) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGEMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

Date: JUL 05 2021 Issued by: **ORIGINAL SIGNED BY  
JENNIFER SORVISTO  
A SIGNÉ L'ORIGINAL**  
(Registry Officer)

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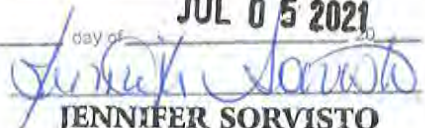
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Solicitor for the Respondents

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the

day of **JUL 05 2021** A.D. 20

Dated this **JUL 05 2021** day of



**JENNIFER SORVISTO  
REGISTRY OFFICER  
AGENT DU GREFFE**

## APPEAL

**THE APPELLANT, THE ATTORNEY GENERAL OF CANADA APPEALS** to the Federal Court of Appeal from the Order of the Honourable Glennys L. McVeigh (the “Motion Judge”) dated June 23, 2021, in which she granted the Respondents’ motion and ordered that this matter be certified as a Class Proceeding (the “Order”).

**THE APPELLANT ASKS** that this Honourable Court:

1. Allow the appeal and set aside the Order;
2. Dismiss the motion for certification; and
3. Grant such further and other relief as counsel may advise and this Honourable Court may permit.

**THE GROUNDS OF APPEAL** are as follows:

1. The Motion Judge erred in law by failing to provide adequate reasons for her Order and thus failing to provide the parties and the public with proper justification for the Order.
2. The Motion Judge erred in law by failing to address the pleadings as drafted and failing to fulfill the gatekeeping function assigned to judges determining certification motions. In particular, the Motion Judge ignored the complex and multifaceted factual issues underpinning the pleadings, which span:
  - a) Funding, operation and management of the RCMP in the Territories,
  - b) Viability of internal complaints processes related to the conduct of RCMP Members,
  - c) Use of force by RCMP Members and the legal justifications therefore,

- d) Use of force by RCMP Members against Indigenous persons in the Territories in particular, both upon arrest and in custody,
  - e) Incidents of death of Indigenous persons in the Territories while in RCMP custody or otherwise while interacting with RCMP Members,
  - f) The role of racism within the RCMP,
  - g) The role of systemic factors in connection to the foregoing, and,
  - h) The distinction between proven facts and allegations of fact in respect of the foregoing.
3. The Motion Judge erred in principle by misdirecting her certification inquiry under Rule 334.16. In particular, she erred:
- a) In finding that the pleadings, which are based on allegations of independent actionable wrongs under the torts of battery and assault, gave rise to common issues in negligence, breach of fiduciary duty, and breach of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, and
  - b) In ignoring the common law and statutory authorities governing the torts of battery and assault, including the justificatory provision of section 25 of the *Criminal Code*.
4. The Motion Judge erred in law by finding that the pleading disclosed various reasonable causes of action. In particular, she erred by:
- a) Failing to correctly appreciate or apply the legal requirements of negligence, fiduciary duty, and section 7 of the *Charter*;
  - b) Failing to take into account the true contents of the pleadings as specified at paragraphs 2 and 3 above in making determinations on negligence, fiduciary duty, and section 7 of the *Charter*;
  - c) Regarding the duty of care:
    - i. Finding it was not plain and obvious there is no duty of care to the proposed class;

- ii. Failing to rationalize the systemic cause of action in negligence with the central metric of individual assaults;
    - iii. Erroneously finding the relationship between the RCMP and Indigenous persons in the Territories to be one of sufficient proximity to ground a *prima facie* duty of care; and
    - iv. Failing to find that any *prima facie* duty of care should be negated at the second stage of the *Anns* and *Cooper v Hobart* test;
  - d) Regarding fiduciary duty:
    - i. Finding it was not plain and obvious there is no fiduciary duty owed to the proposed class;
    - ii. Erroneously characterizing policing in the Territories as an undertaking capable of grounding a fiduciary duty to Indigenous persons there; and
    - iii. Failing to apply the common law as set out in *Alberta v Elder Advocates Society*; and,
  - e) Regarding section 7 of the *Charter*, erroneously accepting that a systemic cause of action may arise separately from or in addition to a series of alleged individual breaches.
5. The Motion Judge erred in law, mixed fact and law and in principle by finding there is an identifiable class. In particular, she erred by:
- a) Failing to impose any temporal limits on the class definition, thereby certifying the action without any class period;
  - b) Neglecting to identify evidentiary support constituting “some basis in fact” to recognize an identifiable class;
  - c) Failing to address the manageability of the class definition, including questions of vagueness, complexity, and subjectivity;

- d) Accepting the proposed class definition based purely on its resemblance to previously accepted class definitions involving institutional facilities without distinguishing this fact; and,
  - e) Accepting the proposed class definition notwithstanding the vagueness of its internal condition precedent that class members must allege an assault by a RCMP Member, which itself is an independent actionable wrong requiring individual legal inquiry.
6. The Motion Judge erred in law, mixed fact and law and in principle by certifying the proposed common issues. In particular, she erred by:
- a) Determining that the evidence established a rational connection between those who allege assault by the RCMP and the proposed common issues;
  - b) Failing to acknowledge that individual assessment of class members claims is required to answer the common questions in finding that common issues would be a substantial ingredient in the resolution of class members' claims;
  - c) Framing the common issues so broadly that they will be incapable of reasonable or efficient resolution and will not advance the resolution of class members' claims;
  - d) Failing to apply the evidence before her regarding the lawfulness of use of force, as well as the disparate circumstances of interactions between the RCMP, its Members, and members of the public; and,
  - e) Failing to acknowledge the deficiencies of the proffered expert evidence, particularly on questions of the use of non-lethal force.
7. The Motion Judge erred in law by finding that a class proceeding is the preferable procedure for the just and efficient resolution of the proposed common issues. In particular, she erred by:
- a) Failing to consider whether the proposed common issues will predominate over questions affecting only individual class members; and,
  - b) Relying on findings made without evidence.

8. Such further and other grounds as counsel may advise and this Honourable Court may permit.

Date: July 5, 2021

*Catherine Coughlan* (Electronically Signed)

**ATTORNEY GENERAL OF CANADA**

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