

**CITATION:** Papassay v. The Queen (Ontario), 2017 ONSC 2023  
**COURT FILE NO.:** CV-14-0018  
**DATE:** 2017-03-30

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

Holly Papassay, Toni Grann, Robert Mitchell, )  
Dale Gyselinck and Lorraine Evans, ) *Messrs. J. Ptak and G. Myers for the*  
 ) Plaintiffs

Plaintiffs )

- and -

Her Majesty The Queen In Right of the ) *Ms. L. Favreau and A. Leaman, and Mr. A.*  
Province of Ontario ) *Sinnadurai, for the Defendant*

Defendant )

) **HEARD:** January 23 – 24, 2017  
) at Thunder Bay, Ontario

**Madam Justice H.M. Pierce**

**Reasons on Motion for Certification of Class Action**

**Introduction**

[1] The plaintiffs move for certification of this action as a class action in accordance with s. 5 (1) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (“the Act”). The criteria for certification are:

- 5 (1) The court shall certify a class proceeding on a motion under section 2, 3, or 4 if,
- (a) the pleadings or the notice of application discloses a cause of action;
  - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
  - (c) the claims or defences of the class members raise common issues;

- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative or plaintiff who,
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced 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 of the proceeding, and
  - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[2] Subsection 5 (5) of the Act confirms that certification is not a determination on the merits. Rather it is the beginning of a process to determine claims of the class as against the defendant. Among other things, section 6 of the Act stipulates that certification shall not be refused if individual assessments of claims for damages are required; nor shall it be refused if the number of class members or the identity of each class member is not known.

[3] In this case, the plaintiffs were removed from their families and made Crown wards when they were children. They were apprehended because they suffered criminal assaults, neglect or abuse at the hands of their family members. Many Crown wards suffered further abuse while in the care of the Crown.

[4] The plaintiffs allege that there was province-wide systemic negligence and breaches of fiduciary duty when the Crown failed to consider advancing the children's claims for compensation from the Criminal Injuries Compensation Board or in the civil courts. By failing to do so, the plaintiffs argue that they were deprived of compensation that could have mitigated the harms they suffered when they were young.

[5] The claim also alleges that the defendant failed to preserve evidence in support of such claims and failed to advise the Crown wards of their own ability to make claims for compensation when they attained their majority. Finally, the plaintiffs allege that the Crown failed to exercise province-wide oversight of the Children's Aid Societies to ensure that these legal rights of the Crown wards were respected.

[6] In a previous motion, the court determined that the pleadings disclose a cause of action as required by s. 5 (1)(a) of the Act. However, the court must still consider the criteria in s. 5 (1)(b) – (e) of the Act in deciding whether certification should proceed.

[7] The test for certification deals with the form of the action and whether it can proceed as a class action. It is not intended to be an adjudication on the merits. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R. 477, at paras. 99 – 100, the court held that the class representatives must show some basis in fact for each of the certification elements.

[8] In *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 15, the court reviewed the advantages of class actions over a multiplicity of law suits. It concluded that they:

- (a) achieve judicial economy by avoiding duplicated actions that require fact-finding and analysis;
- (b) improve access to justice by spreading the costs among the class members; and
- (c) encourage behaviour modification among actual or potential wrong-doers.

[9] For these reasons, the court discouraged judges from taking an overly restrictive approach when considering whether to certify an action.

### **Identifiable Class**

[10] The first consideration is whether there is an identifiable class of two or more persons that would be represented by the plaintiffs.

[11] The plaintiffs propose that the class consists of persons who were Crown wards on or after January 1, 1966, which was the date that the *Child Welfare Act, 1965*, S.O. 1965, c. 14 came into force.

[12] The plaintiff, Holly Papassay, has withdrawn from the action because it was learned that she was not a Crown ward. The defendant does not take issue with the four remaining plaintiffs. All were Crown wards during the specified period and all suffered abuse of varying kinds. None of them were advised upon coming of age that they could advance claims to redress their abuse.

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[13] None were given documents in order to support such a claim. None of them received compensation as a child.

[14] Without further consideration, by a strict reading of the Act, there are at least four plaintiffs who meet the test for an identifiable class.

[15] However, rather than taking issue with the representative plaintiffs, the Crown argues that, by including all Crown wards during this time frame, the proposed class is over-broad and/or that there may be no claims to advance.

[16] The Supreme Court of Canada discussed the importance of class definition in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 38. The court observed that the class must be capable of clear definition. This is so because the class definition determines who is entitled to notice and relief, and who is bound by the judgment. The court held that while each member of the class need not be known, each must be determinable by objective criteria.

[17] In a case that predates *Western Canadian Shopping Centres, Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10, Mr. Justice Winkler explained that the class definition identifies the parameters of the lawsuit.

[18] The Crown submits that it is likely that only a fraction of Crown wards suffered the kinds of losses claimed in this action. It cites statistics that between 1980 and 1984, the percentage of children who entered care for abuse and neglect and later became Crown wards varied between 5.9% and 17%. It argues that during that period, children more often entered care because of parental inadequacy or special needs.

[19] The Crown also submits that between 1997 and 2009, the average percentage of children entering care due to physical or sexual abuse was 32%. Further, the Crown argues that “available statistics” show that Crown wards suffering abuse in care ranged between 2% and 6%.

[20] In my view, the statistics cited by the Crown obscure as much as they illuminate. No statistics are cited for the period 1966 – 1979.

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[21] The five-year summary of reasons Children's Aid Societies were prompted to seek Crown wardship is found in the Crown's motion record (Volume 3, Tab 30). It shows *primary* reasons for applications. It does not enumerate other reasons that may have factored into Crown wardship applications.

[22] The Crown's witness conceded on cross-examination that there may be secondary or tertiary reasons for apprehension that are not recorded. He also admitted that the statistics probably underestimate the number of situations in which children experienced physical or sexual abuse. He agreed that the primary reason for admission to care under-reports physical and sexual abuse.

[23] The summary includes categories that may overlap with neglect and abuse. For example, is the category, "abandonment," different from "neglect or abuse," or is it an example of neglect and abuse? The same question might be posed for categories, "rejection of child," or "alcoholism" or "parental inadequacy." If these categories are included in "neglect and abuse," the percentage of Crown wardship applications increases significantly.

[24] In the Crown's motion record (Volume 3, Tab 31), there is a table titled "Verified Maltreatment of Crown wards while in care." There are no statistics about unverified reports of maltreatment and no definition of what constitutes "maltreatment." Does it include physical abuse, sexual abuse, or neither? The period, 1980 – 1990 contains no statistics. Nor are there statistics for 1995 – 1996 or 2011.

[25] Likewise, one wonders if there are instances where maltreatment was not reported or not investigated. The defendant indicates that Crown ward records are not maintained by the Crown, but are kept by the Children's Aid Society that apprehended the child. These records include reasons why a child was made a Crown ward. The Crown did not track reasons why children came into care until 2010.

[26] The evidence filed by the Crown indicates that the Children's Aid Society caring for a child, and not the Crown, made any application for compensation.

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[27] The Crown contends that of the children suffering compensable abuse, the evidence shows that many of them have already been compensated in respect of that abuse. It is difficult to understand the basis for such a statement on the record before me. There is limited data about applications made by Children's Aid Societies on behalf of children between 1996 and 2016. The Crown reports that it recommended pursuing compensation for children on Crown ward reviews in 0% - 4% of cases.

[28] While the Crown's record references applications made by two Children's Aid Societies to the Criminal Injuries Compensation Board on behalf of children (the Toronto Children's Aid Society after 1995 and the Toronto Catholic Children's Aid Society), there is a dearth of evidence about the policy or practice of seeking compensation for children at other times or places. The representative plaintiffs came into care and were fostered or adopted in diverse locations around the province and did not receive compensation as children.

[29] Even if the Crown is correct that not all Crown wards suffered abuse or neglect before and after apprehension, that is not a basis to determine that the class is over-broad. By their nature, classes may include members who will not succeed in their claims. In *Mayotte v. Ontario*, 2010 ONSC 3765 (CanLII), at para. 66, the court observed,

It is not uncommon that a class will include members who as individuals may not have successful claims even if the representative plaintiff succeeds on the common issues benefiting the class.

[30] Mr. Justice Perell concluded that the class was not over-broad on that account.

[31] While the Crown argues that the court may refuse to certify a proceeding if it is over-broad, as in *Loveless v. Ontario Lottery and Gaming Corporation*, 2011 ONSC 4744 (CanLII), at para. 54, this is not such a case. In the case at bar, there is a rational connection between the class and the common issues because a court has previously determined that the class members were children in need of protection in accordance with the governing child welfare legislation of the day. That judicial determination led to the class members' status as Crown wards.

[32] The Crown submits that none of the representative plaintiffs have established that they have lost an opportunity to obtain compensation. It suggests that there is no evidence that the

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plaintiffs are foreclosed from making application to the Criminal Injuries Compensation Board or to commencing a civil suit. It points to the amendments to the *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)*, 2016, S.O. 2016, c. 2 and the *Limitations Act*, 2002, S.O. c. 24, Sch. B. that abolished limitations for sexual assault claims to the Criminal Injuries Compensation Board or in civil claims.

[33] The plaintiffs counter that the reform of limitations is not as expansive as the Crown suggests. They also submit that regulations for the retention of medical records create their own evidentiary problems for advancing claims.

[34] *Pederson v. Saskatchewan (Minister of Social Services)*, 2016 SKCA 142 (CanLII) is a case similar to the case at bar. In *Pederson*, the plaintiffs alleged that the defendant had not pursued civil remedies for children injured in foster care as a result of criminal or tortious conduct. The allegations involved breaches of statutory, fiduciary and common law duties to protect the legal rights of the class members. The motions judge rejected certification on the grounds that the plaintiffs could have sought extension of the time to apply for statutory compensation.

[35] The Saskatchewan Court of Appeal concluded that the proposed claim was broader than the limitation issue on which the motion judge focused. At para. 49, the court concluded,

...The mere presence of such an extension provision is neither here nor there. The primary allegations are that the applications were never made by the Government in a timely manner and there are injurious consequences such as failures that also go beyond the monetary award itself....

[36] The Crown argues here that in order to belong to the class, each class member must prove that he or she has a valid claim, that no claim has been made, and that it is no longer possible to make a claim.

[37] There are two problems with the Crown's submissions.

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[38] First, the Crown continues to misapprehend the full scope of the claim. The claim is not purely for loss of opportunity to claim compensation. Rather, the plaintiffs assert that the Crown failed to look after their legal interests and they suffered as a result.

[39] The plaintiffs claim damages for the Crown's failure to advise Crown wards of their right to make claims when they were of age, for failing to refer them to counsel so that they might do so, and for failing to preserve evidence. The allegation is of systemic negligence and breach of fiduciary duty owed by the Crown to Crown wards in Ontario. The claim alleges that the defendant had no policy to protect the legal rights of the Crown wards, even though it had responsibility for oversight, direction, control and supervision of Children's Aid Societies that provided their day-to-day care.

[40] Second, the Crown asks the certification judge to consider the merits of each claimant's case at the certification stage, rather than determining the form of the action and whether it can proceed as a class action. As we have seen, it is settled law that the purpose of a certification motion is to determine whether the case is amenable to certification as a class proceeding, not to consider the merits of the case.

[41] In my view, there is an identifiable class of two or more persons that would be represented by the proposed plaintiffs. The class is readily ascertainable by the legal requirement of Crown wardship and the time for membership in the class is fixed: on or after January 1, 1966.

### **Common Issues**

[42] The second consideration is whether the claims of the class members raise common issues. The proposed questions are summarized at Appendix "A" to these reasons.

[43] Section 1 of the Act defines common issues as follows:

"common issues" means,

- (a) common but not necessarily identical issues of fact, or
- (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts...

[44] In *Hollick*, para. 18, Chief Justice McLachlin discussed the criteria for determining whether the claims raise common issues. She explained that the underlying question is:

... “whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis”. Thus an issue will be common “only where its resolution is necessary to the resolution of each class member’s claim....” Further, an issue will not be “common” in the requisite sense unless the issue is a “substantial...ingredient” of each of the class members’ claims.

[45] The Supreme Court of Canada elaborated on principles governing proposed common issues in *Vivendi Canada Inc. v. Dell’Aniello*, [2014] 1 S.C.R. 3 at paras. 44 – 46. It concluded that:

- (a) a question can be common even if the answer given to the question might vary from one member of the class to another;
- (b) the question will be considered common if it advances the resolution of every class member’s claim, although a “varied and nuanced” answer may be required based on the circumstances of each class member;
- (c) a common question does not require an identical answer for all members of the class, or even that the answer benefits each of them to the same extent. It is sufficient that the answer to the question does not give rise to conflicting interests among the class members.

[46] On a certification motion, the court must look to the factual background and the issues of law in order to determine whether to certify common issues in the action. Mr. Justice Perell put it this way in *Arenson v. Toronto (City)*, 2012 ONSC 3944 (CanLII), at para. 63:

Commonality is not manufactured through the statement of common issues. The common issues are derived from the facts and from the issues of law arising from the causes of action asserted by class members and not the other way around....

[47] The Crown asserts that the proposed questions are asserted in overly-broad terms, a point which the Supreme Court warned against in *Rumley v. British Columbia*, 2001 SCC 69 (CanLII), at para. 29. The court explained that if issues are common only when stated in the most general terms, the architecture of a class proceeding will break down into individual actions.

[48] The *Rumley* case involved allegations that the defendant failed to have in place management and operational procedures that would have prevented abuse of students in a school

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for the deaf and blind operated by the province. The allegation was one of systemic negligence. The court determined that the common issues framed about systemic breach of a duty of care were properly certified.

[49] The Crown relies on *Loveless* in arguing that the proposed common issues in this case should not be certified. *Loveless* was a case in which the plaintiff sought to certify a proceeding in which he alleged that the Ontario Lottery and Gaming Corporation failed to protect Ontario citizens from retailers who committed fraud in the redemption of winning tickets since 1975. The class proposed was all persons who had bought lottery tickets from the defendant between 1975 and 2009.

[50] The court refused to certify the action, holding that “the answer to a general question asking whether some retailers have defrauded some ticket purchasers is utterly meaningless” because each class member would also have to prove an actual deprivation by the retailer. In other words, the court determined that the goal of avoiding duplicated fact finding and/or legal analysis would not be met because the common question was so generally stated. It determined that the answer to such a general question would not advance the claim (See: *Loveless*, paras. 62 – 66).

[51] The first six questions that the plaintiffs propose be certified deal with allegations of negligence and breach of fiduciary duty. They are:

1. Does the defendant owe a duty of care to the class?
2. If so, what is the standard of care applicable to the defendant?
3. Did the defendant breach that standard of care? If so, when and how?
4. Does the defendant owe a fiduciary duty to the class?
5. If so, what is the content of that fiduciary duty?
6. Did the defendant breach its fiduciary duty? If so, when and how?

[52] As was the case in *Rumley*, these questions raise allegations that are systemic in nature. The plaintiffs, as Crown wards, all shared the same legal status in relation to the defendant. The

defendant was bound by the same legislative framework, albeit one that changed when child welfare legislation was repealed or amended.

[53] The defendant admits it was responsible for supervision and oversight of the Children's Aid Societies that provided day-to-day care of the Crown wards. In addition, the defendant also engaged in regular Crown ward reviews with respect to members of the class. Undoubtedly, the defendant's role with the societies and Crown wards evolved over time.

[54] In my view, the common legal relationship between the plaintiffs and the defendant allows for meaningful inquiry into whether there were duties owed to the class as a whole, and if so, the nature of the duties, and whether there was a breach at a systemic level. These questions are a "substantial ingredient" of the claim. The answers to these common questions are largely policy-driven. Among other things, the court will consider what policies were in place and how they were implemented. The analysis of these issues will advance the litigation and avoid the necessity of fact-finding and analysis about systemic issues on a case by case basis.

[55] Several certifications of cases similar to the case at bar have been made. For example, the Court of Appeal certified *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924.

[56] *Cloud* involved a claim by former students of a residential school for abuse suffered between 1922 and 1969. They alleged vicarious liability, breach of fiduciary duty and negligence as a result of the climate of fear and intimidation at the school and the school's objective of assimilation. The Court of Appeal agreed that the common issues relating to students, including negligence, fiduciary obligations, and aboriginal rights, were necessary to resolve each class member's claim and should be certified (paras. 55 – 56).

[57] Also of interest was the certification of a class action confirmed by the Alberta Court of Appeal in *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2009 ABCA 182 (CanLII). Compared to this case, the *T.L.* class was broader. It encompassed persons who suffered personal injury while a minor as a result of a tort by a third party between July 1, 1966 and June 29, 2004 while in the actual custody of the defendant as a permanent ward, under a

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permanent or temporary guardianship order, or under a permanent guardianship agreement (para.11).

[58] In reviewing the proposed certification, the Alberta Court of Appeal approved of claims that included allegations that the Director of Child Welfare failed to protect the plaintiff's legal rights, to advise her of those rights to claim compensation, and failed to hire a lawyer to represent her interests (para. 3).

[59] Finally, the Saskatchewan Court of Appeal certified the *Pederson* case in which claims were made by foster children who were harmed in care.

[60] For the reasons set out above, I conclude that questions # 1 – 6 of the proposed common issues will advance the litigation for members of the class, achieving judicial economy, access to justice, and in the event the claim is successful, behaviour modification. Accordingly, they are certified.

[61] The next proposed common issue is:

7. Can the amount of damages for negligence and/or breach of fiduciary duty, or some portion thereof, be determined on an aggregate basis? If so, in what amount and who should pay it to the class?

[62] Section 24 (1) of the Act authorizes a court to award aggregate damages in class proceedings. It provides:

24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[63] The plaintiffs have filed expert evidence on this motion opining that common themes experienced by the members of the class, such as delay in receiving compensation, give rise to an award of damages for base level harm.

[64] The defendant has filed an expert report that opines that individual assessments will be necessary to determine damages. The Crown argues that the plaintiffs' experts proceeded on a faulty assumption.

[65] In *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913, the plaintiffs claimed for damages for personal injury suffered in a subway fire. The court declined to certify aggregate damages. At para. 18, the court commented that the claims for personal injury, property damage and under the *Family Law Act* could not "reasonably be determined without proof by individual class members."

[66] The Court of Appeal also refused to certify aggregate damages as a common issue in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 (CanLII), at para. 139. *Fulawka* involved a group of employees advancing claims for unpaid overtime work. The court concluded that aggregate damages could only be certified where resolving the other certifiable issues could determine liability following which the aggregate damages could "reasonably" be calculated without proof by individuals in the class.

[67] However, the Court of Appeal took the opposite approach in *Cloud*, decided in 2004. At para. 72, the court certified aggregate damages and left it to the common issues trial judge to determine whether the court could make an aggregate assessment.

[68] The Court of Appeal also left the issue of whether damages could be assessed on an aggregate basis to the trial judge in *Good v. Toronto (Police Services Board)*, 2016 ONCA 250 (CanLII) at para. 82.

[69] In *Johnson v. Ontario*, 2016 ONSC 5314 (CanLII), the plaintiffs were former inmates in a correctional facility. They claimed in a class action for systemic negligence, assault and battery, breaches of fiduciary duty, and breaches of their rights under the *Charter of Rights and Freedoms*. At para. 120, the court cited the *Pro-Sys Consultants Ltd.* case (referred to in the

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reasons as *Microsoft*), observing that the aggregate damages provision is procedural. It can only be invoked once liability and a compensable loss are determined.

[70] At para. 121 of *Johnson*, the court adopted the reasoning of Mr. Justice Rothstein as follows:

The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the *CPA* should be available is one that should be left to the common issues trial judge.

[71] Ultimately, the motions judge in *Johnson* certified aggregate damages to be determined by the common issues trial judge.

[72] In my view, the motions judge is ill-equipped to determine from a certification record whose expert is correct. It should not be attempted. It is a debate for the common issues trial (See: *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2009] O.J. No. 1874 at para. 102).

[73] If the defendant is liable in respect of the plaintiffs' claims, the common issues trial judge will be better equipped to determine whether aggregate damages are appropriate. Accordingly, Question #7 dealing with aggregate damages is certified.

[74] The remaining common issue is:

8. Should the defendant pay punitive damages?

[75] The defendant objects to certification of punitive damages on the grounds that the plaintiffs have not proven that there is any plausible claim for such damages.

[76] The defendant also submits that whether punitive damages should be assessed is not sufficiently common and should not be certified. It relies on *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120 (CanLII) at paras. 27 – 28. In that case, the court found that the defendant's conduct towards the plaintiffs was not sufficiently linked to warrant certification.

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[77] In *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 at para. 167, the court also declined to certify punitive damages because the extent of harm caused by the defendant was not known at certification. However, the motions judge indicated that the matter could be considered after individual assessments of causation and damages.

[78] In my view, the issue of whether punitive damages are warranted should be certified so that it can be considered by the common issues judges once liability and damages have been determined. In the case at bar, the issues are systemic in nature; they lend themselves to a comprehensive approach in the consideration of whether punitive damages are warranted. Punitive damages were assessed as a common issue in *T.L.* and *Pederson*, which are similar to this case. Accordingly, common issue # 8 dealing with punitive damages is certified.

#### **Preferable Procedure**

[79] The next question for consideration is whether a class proceeding is the preferable procedure for the resolution of the common issues. The defendant argues that a class action is not the preferable proceeding because:

- 1) the adjudication of common issues will be lengthy and onerous and their resolution will not significantly advance the action;
- 2) the individual assessments will be lengthy and complex; and
- 3) the Criminal Injuries Compensation Board offers the claimants the most accessible, economical and just path to compensation.

[80] The first objection has already been dealt with as common issues have been certified.

[81] The plaintiffs submit that a class action is preferable because it affords them access to justice, and achieves the goals of judicial economy and behaviour modification.

[82] The Supreme Court of Canada discussed the preferability analysis in *AIC Limited v. Fischer*, [2013] 3 S.C.R. 949 at para. 23 to this effect:

[Preferability] is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the *CPA*, but the ultimate question is whether other available means of resolving the claim are

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preferable, not if a class action would fully achieve those goals. The point is well expressed in one U.S. Federal Court of Appeals judgment and it applies equally to the *CPA* proceedings: “our focus is not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever other forms or litigation [and, I would add, dispute resolution] might be realistically available to the plaintiffs....” [citation omitted].

[83] In *Blair v. Toronto Community Housing Corp.*, 2011 ONSC 4395 (CanLII) at para. 55, Mr. Justice Perell enumerated the criteria that should be considered in determining whether a class proceeding would be the preferable path to the resolution of the issues. They are:

- (a) the nature of the proposed common issues;
- (b) the individual issues which would remain after the determination of the common issues;
- (c) the factors listed in the Act;
- (d) the complexity and manageability of the proposed action as a whole;
- (e) alternative procedures for dealing with the claims asserted;
- (f) the extent to which certification furthers the objectives underlying the Act; and
- (g) the rights of the plaintiffs and the defendant.

[84] I have concluded that the architecture of a class action is preferable to the alternatives because it is capable of resolving all issues between the parties. In addition, it is the preferable procedure because it is more likely to foster access to justice, promote judicial economy, and lead to behaviour modification.

[85] The class of former Crown wards is, by its nature, a vulnerable group. Many suffered abuse or neglect as children to the extent that they were removed permanently from their families. Some suffered further abuse as foster children. At the tender age of 18, they were deemed independent. Against this life experience, it would not be surprising that they would encounter barriers in access to justice if required to litigate their claims individually.

[86] The defendant urged that the Criminal Injuries Compensation Board is more victim-focused and that claimants do not require lawyers. However, this submission does not address several problems.

[87] Firstly, how would former Crown wards learn of their right to make claims if certification is refused? There would be no means by which they could be contacted and advised of their rights.

[88] In this case, even the simple act of obtaining Crown wardship orders and Children's Aid files for the representative plaintiffs required a court order. The leadership of the representative plaintiffs will enable others who are less able to navigate the court system or to afford legal advice and litigation to have their claims heard.

[89] In addition, given the vintage of some of these claims, there is every possibility that the plaintiffs' medical records have been lost or destroyed. It is probable that claimants will need legal help to address issues such as lost evidence.

[90] As I have previously indicated, the plaintiffs' claims are not merely to receive compensation for injuries that they would have been entitled to receive as children had their claims been brought. The claimants seek redress for what they say was the Crown's negligence and breach of fiduciary duty by failing to protect and advance their legal rights. The Crown concedes that the Criminal Injuries Compensation Board has no jurisdiction to consider claims of this nature and that actions for those claims could only be heard in a civil court.

[91] To require the claimants to split their cases and litigate the remaining issues individually in the civil courts, as the Crown suggests, would impose a significant burden on the members of the class. It would be equally burdensome for the courts to adjudicate such claims and for the defendant to defend them, assuming that individual claims for negligence and breach of fiduciary duty were brought. Civil claims for residual relief could potentially be launched all over the province, a process that would be inefficient, tie up the defendant in a variety of venues, and risk inconsistent verdicts.

[92] Requiring the claimants to litigate in two forums to achieve the full scope of relief claimed is unfair, costly, and risks that claims will never be fully litigated because it is too onerous. The goal of access to justice would be defeated in these circumstances.

[93] Furthermore, the Criminal Injuries Compensation Board lump sum awards are presently capped at \$25,000, a sum that may be wholly inadequate for some class members who suffered serious personal injury.

[94] Generally, s. 6 of the *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C. 24 prescribes a two year limitation to apply for compensation for injury; however, subsection 6 (2) of this Act provides that the Board may entertain applications notwithstanding the limitation if the compensation sought is for a crime of sexual violence or violence that occurred within a relationship of intimacy or dependency. The jurisdiction of the board to extend limitation periods is therefore circumscribed, such that it is unlikely that a claimant could expect an extension of the limitation where he or she was assaulted by an individual outside the ambit of intimacy or dependency.

[95] The Crown submits that processes are already in place to hear the plaintiffs' claims. At the same time, it estimates that the class may be as large as 94,000. Apart from the difficulties already mentioned, there is no evidence that the Criminal Injuries Compensation Board is equipped to handle claims on that scale in a timely fashion. On the other hand, the court has wide discretion under the Act to fashion a procedure that addresses the number and scope of claims, including individual components to the claims. That is what the Act is intended to do.

[96] The Crown submits that the goal of behaviour modification is not necessary because directives and policies are now in place to protect Crown wards' legal rights and that there is no evidence that contemporary claims are not being pursued. It adds that, alternatively, the Crown funds the Criminal Injuries Compensation Board.

[97] Respectfully, the Crown's evidence discusses contemporary policies for making claims to the Criminal Injuries Compensation Board in three Children's Aid Societies. However, between 47 and 55 societies operated in the province between 1961 and 2016. There is no evidence

whatever about policies and practices in the remaining Children's Aid Societies. Thus, the Crown's submission that the court need not concern itself with behaviour modification may be premature.

[98] In addition to the broad case management powers available to the court under the Act, a class action is preferable because it provides a mechanism to notify class members of the potential for claims. It mandates collective action that will achieve a result that is binding on the parties. It will achieve wide powers of distribution of any awards and protects the plaintiffs from adverse costs consequences.

[99] I therefore conclude that a class proceeding is the preferable procedure for the resolution of the common issues.

#### **Representative Plaintiff**

[100] Finally, the court must be satisfied that there is a representative plaintiff who would fairly and adequately represent the interests of the class, with no conflict of interest with the other members on the common issues.

[101] The Crown does not object to the representative plaintiffs on this score. I agree that they are suitable.

[102] The Crown does, however, take issue with the litigation plan that the plaintiffs, through their counsel, have put forward. Specifically, it submits that provision for developing a class list is unworkable because names and addresses of prospective plaintiffs may have changed over time by virtue of adoption, marriage or other cause.

[103] The defendant also submits that the process proposed for adjudication of individual issues is also unworkable. It objects to adjudications being made by non-lawyers.

[104] The parties agree that differences over the litigation plan are not fatal to certification. The defendant recommends that if the action is certified, the court leave it open to the parties to return to address the litigation plan.

[105] The plaintiffs suggest that if the parties cannot agree on the form of notice to the proposed class members, they return to court for directions.

[106] The courts have recognized that a litigation plan is a work in progress and that whatever its flaws, it may be amended as the litigation proceeds (See: *Cloud* at para. 95). I agree that, the proceeding being certified, the wiser course would be to await negotiations between the parties over notification and other aspects of the litigation plan. The litigation landscape may change once the defendant has delivered its statement of defence; it may change again after the common issues trial.

[107] I conclude, therefore, that the representative plaintiffs are suitable within the requirements of the Act. If the parties cannot agree on the form of notice to the class or other matters specified in the litigation timetable, they may return to court for directions.

#### **Conclusion**

[108] The motion for certification of the within proceeding is granted subject to the parties returning for directions with respect to the litigation plan if required as the case proceeds.

#### **Costs**

[109] If the parties cannot agree on costs, either party may apply to the trial coordinator within thirty days of the release of these reasons for an appointment to argue costs. Counsel have leave to appear by teleconference or videoconference if so advised.

  
The Hon. Madam Justice H.M. Pierce

## **Appendix "A"**

### **PROPOSED COMMON ISSUES**

1. Does the Defendant owe a duty of care to the class?
2. If so, what is the standard of care applicable to the Defendant?
3. Did the Defendant breach that standard of care? If so, when and how?
4. Does the Defendant breach owe a fiduciary duty to the class?
5. If so, what is the content of that fiduciary duty?
6. Did the Defendant breach its fiduciary duty? If so, when and how?
7. Can the amount of damages for negligence and/or breach of fiduciary duty, or some portion thereof, be determined on an aggregate basis? If so, in what amount and who should pay it to the class?
8. Should the Defendant pay punitive damages?

**CITATION:** Papassay v. The Queen (Ontario), 2017 ONSC 2023  
**COURT FILE NO.:** CV-14-0018  
**DATE:** 2017-03-30

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

Holly Papassay, Toni Grann, Robert Mitchell,  
Dale Gyselinck and Lorraine Evans,

Plaintiffs

**- and -**

Her Majesty The Queen In Right of the  
Province of Ontario

Defendant

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**REASONS ON MOTION**

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Pierce J.

**Released:** March 30, 2017

/sab