Federal Court of Appeal File 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 RESPONDENT

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TABLE OF CONTENTS

PART I - INTRODUCTION

1. This is a class proceeding about systemic racism by the Royal Canadian Mounted Police ("**RCMP**") against Indigenous people in the Canadian North. Both the RCMP Commissioner and the Prime Minister of Canada have publicly admitted that systemic racism against Indigenous people is an acute issue within the RCMP. The voluminous evidence before the lower court shows that systemic police racism manifests in a remarkably disproportionate use of force on Indigenous People in the Northwest Territories, Nunavut and the Yukon (the "**Territories**").

2. The reality on the ground in the Territories is stark. Victims of RCMP racism describe ubiquitous fear, distrust and racially-motivated violence. Canada's leading expert on racially-motivated police use of force, Dr. Wortley of the University of Toronto, opined that the statistics paint a disturbing picture when compared to other areas of Canada or even the United States. Dozens of media accounts and other publicly available documents describing systemic violence were filed on the motion. It is an unfortunate reality that systemic violence against Indigenous Canadians by the RCMP is now common knowledge in Canada.

3. The Appellant goes to great lengths to reframe Mr. Nasogaluak's class action as something it is not. It is not a collection of unrelated assaults nor is it a coincidence that the data shows disproportionate violence against Indigenous people in the Territories. Canadian courts have repeatedly recognized that systemic government failures are amenable to treatment in class proceedings. The Respondent followed that precedent in framing his case.

4. The Appellant displays a lack of discipline by seeking to relitigate its plentiful arguments, none of which were accepted by the Motions Judge. The Appellant: i) unfairly reformulate the Plaintiff's case as one that cannot be certified; ii) misstates the motions judge's findings; and, iii) misstates the applicable law and evidence. The Appellant's factum also attacks the Respondent's case in multiple manners which were not raised before the lower Court. The result is a "kitchen sink" appeal. The Respondent will not

engage in every issue raised in the Appellant's factum, but will repeatedly re-focus the Court on the true nature of this class proceeding.

5. This is a classic "top-down" systemic class action, which Canadian appeal courts have repeatedly certified for decades. As the Motion Judge recognized, the Class's claims "ask whether the operations of the RCMP create a system where illegal assaults happen".[1] In fact, the Motion Judge explicitly rejected Canada's reframing - "I disagree with Canada's characterization of these claims as individual because the framing of the pleadings is not".[2] The Appellant seeks to relitigate here.

6. The Appellant's factum attempts to walk a legal tightrope, simultaneously arguing there is no problem, and Canada should be trusted to address the problem. These positions are contradictory, either is untenable and this case calls for full consideration at a common issues trial.

7. The Appellant strenuously argues that there is no evidence to support the systemic failures at issue in this Class proceeding. With respect, this position is astonishing on any review of the record and the Motion Judge's reasons.

8. Alternatively, the Appellant urges this Court to overturn the certification order so it may unilaterally address this acute systemic issue. It simply ignores access to justice for the vulnerable and marginalized class and the behaviour modification goal of class proceedings. The Appellant presents no alternative to this class proceeding.

9. The Motion Judge's highly discretionary decision attracts deference, and she did not err. She compared and contrasted the within class proceeding with another case against the RCMP that she declined to certify in reasons released on the same day.[3] She applied the correct certification principles in both cases. The Appellant's wide-ranging, scattershot appeal should be dismissed.

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[1] Order and Reasons of the Honourable Madam Justice McVeigh dated June 23, 2021 at para. 101 ["**Certification Reasons**"], Appeal Book ["**AB**"] Vol. 1, Tab 2, p. 39.
[2] Certification Reasons at para. 101, AB, Vol. 1, Tab 2, p. 39.
[3] *BigEagle v. Canada,* 2021 FC 504.

PART II - THE FACTS

10. The Respondent alleges systemic negligence, breach of fiduciary duty and breach of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* in relation to Aboriginal Persons who are regularly assaulted by RCMP Officers because they are Aboriginal.[4] The class is objectively restricted to Status Indians who reside in the Territories, following established jurisprudence.[5]

11. The Representative Plaintiff (Respondent), Joe David Nasogaluak, is Indigenous and currently resides in the City of Tuktoyaktuk, in the Northwest Territories.[6] In November 2017, when Joe was just fifteen (15) years old, he was detained and assaulted by RCMP Officers.[7] With no provocation, the RCMP Officers pushed Joe to the ground. He was beaten, choked, punched and tasered by the RCMP Officers. The RCMP Officers called him a "stupid fucking Native" and a "Native punk kid".[8]

12. Like Nasogaluak's experiences, the other Class Member affiants describe similar experiences of overt racism and police brutality in their affidavits. They testified that even when they are not being assaulted or detained, they live in constant fear.[9] The following evidentiary excerpts display the common experiences of Class Members:

> Michael Payne: "Dealing with the RCMP in the north feels like you are dealing with a gang"; "When someone is being victimized, I am scared to call the RCMP….I want to report it and I want to help people, but I am too scared to go down there because I don't want to end up in jail"[10]

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[4] Amended Statement of Claim at para. 3-4, AB, Vol. 1, Tab 3, p. 66.
[5] See *Gottfriedson v. Canada*, 2015 FC 766 ("'Aboriginal(s)', 'Aboriginal Person(s)' or 'Aboriginal Child(ren)' means a person or persons whose rights are recognized and affirmed by the *Constitution Act* , 1982, s. 35").
[6] Affidavit of Diane Nasogaluak, sworn October 11, 2019 ("**Nasogaluak Affidavit**"), at para. 2 & 4, AB, Vol. 9, Tab 6, p. 2860.
[7] Nasogaluak Affidavit, at para. 5, AB, Vol. 9, Tab 6, p. 2861.
[8] Nasogaluak Affidavit, at para. 8, AB, Vol. 9, Tab 6, p. 2861.
[9] See Affidavit of Michael Payne, sworn October 11, 2019 ("**Payne Affidavit**"), at para 29-30, AB, Vol. 9, Tab 7, p. 2872; Affidavit of Willie Aglukkaq, sworn October 16, 2019, at para. 30 ("**Aqlukkaq Affidavit**"), AB, Vol. 9, Tab 11, p. 2887; Affidavit of Marvin Snowshoe, sworn October 15, 2019, at para. 12 (**Snowshoe Affidavit**), AB, Vol. 9, Tab 9, p. 2878; Transcript of Darlene Bugghins dated June 29, 2020, ("**Bugghins Transcript**"), at p. 10, AB, Vol. 11, Tab 19, p. 3551; Affidavit of Anthony Gargan, sworn October 15, 2019, at para. 18, ("**Gargan Affidavit**") Vol. 9, Tab 10, p. 2882.
[10] Payne Affidavit at para. 29-30, AB, Vol. 9, Tab 7, p. 2872.

> Willie Aqlukkaq: "I've had sprained shoulders, black eyes and bruises that my children had to witness, as a result of RCMP beatings…To hear my children and grandchildren say they do not trust the RCMP makes me feel worried about the next generation of Indigenous people in the north";[11]
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> Marvin Snowshoe: "I feel as if I cannot call on the RCMP for assistance. I am afraid of the RCMP, and I believe that any interaction with them may lead to me being arrested and assaulted";[12]
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> Darlene Bugghins: …you know, the words that really bugged me is "she's lying, she's just another drunk Indian. Like I don't even know why that was even called for him to say something like that. Like I felt like I was labelled already";[13]
>
> Anthony Gargan: "It is not uncommon for RCMP officers to assault Indigenous peoples in Yellowknife. It happened to me, and I have seen and heard of it happening to others."[14]

A. Other Evidence With Respect to Systemic Failures

13. In the court below, the Plaintiff filed a considerable number of public/media reports and investigations, and two expert reports of Dr. Scot Wortley. These evidence demonstrates widespread and systemic assaults and use of excessive force by the RCMP against Indigenous Persons in the Territories.

14. Dr. Wortley is a Professor in the Centre of Criminology and Socio-legal Studies at the University of Toronto, and is Canada's foremost expert on systemic racism and overuse of force in police services. Dr. Wortley's analysis of the available data revealed that police deadly use of force rates against Indigenous People are particularly high in the Territories, where the RCMP has exclusive jurisdiction:[15]

> (a) Between 2012 and 2017, Indigenous Persons accounted for 100% of police shooting deaths in the Territories.[16] This is consistent with Dr. Wortley's findings that generally, there are more police killings in areas with higher Indigenous populations, that the RCMP is over-represented in lethal use of force cases involving Indigenous Persons,

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[11] Aqlukkaq Affidavit at para. 30, AB, Vol. 9, Tab 11, p. 2887.
[12] Snowshoe Affidavit at para. 12, AB, Vol. 9, Tab 9, p. 2878.
[13] Bugghins Transcript, AB, Vol. 11, Tab 19, p. 3554.
[14] Gargan Affidavit at para. 18, Vol. 9, Tab 10, p. 2882.
[15] Affidavit of Dr. Scot Wortley, sworn October 18, 2019, Exhibit A ("**Wortley Report**"), AB, Vol. 9, Tab 12.
[16] Wortley Report, AB, Vol. 9, Tab 12 at p. 2913.

and that Indigenous Persons in the Territories are over-represented in lethal police use of force incidents.[17]

(b) The proportion of police-related Indigenous deaths involving the RCMP has increased over time.[18] Between 2012 and 2017, the RCMP was involved in 66.7% of police-related Indigenous deaths across Canada.[19]

(c) Indigenous Persons are particularly vulnerable to lethal use of force in Nunavut.[20]

i. Appellant's Mischaracterization of The Expert Evidence

15. The Appellant badly misstates the purpose and contents of Dr. Scot Wortley's expert opinion. Dr. Wortley opines that: a) the existing data shows serious RCMP use of force problems against Indigenous people in the Territories; and, b) he will be able to perform a complete statistical analysis using the Defendant's records, post-certification. Dr. Wortley's opinion is that he will obtain the data he needs through the discovery process to draw a final conclusion on the extent of the racially motivated use of force in the Territories. [21] In addition, he will be able to determine whether RCMP data collection, use of force policies, anti-bias policies and training are effective, appropriate, and meet the standards required to adequately protect Indigenous Persons within the Territories.[22]

16. In other words, at the common issues trial, he will provide the court with an opinion on whether racial bias, training and policy issues explain the excessive use of force against Indigenous Persons in Canada's Territories.[23] This is how systemic *Charter* or negligence class actions are proven once they reach the common issues stage.[24]

17. Dr. Wortley has applied his proposed methodology successfully in the context of numerous other police systems in Canada.[25] Dr. Wortley's opinion illustrates the workability of this class proceeding. Dr. Wortley was never cross-examined on his

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[17] Wortley Report, AB, Vol. 9, Tab 12, at pp. 2905, 2912-2913.
[18] Wortley Report, AB, Vol. 9, Tab 12, at p. 2912.
[19] Wortley Report, AB, Vol. 9, Tab 12, at p. 2912.
[20] Wortley Report, AB, Vol. 9, Tab 12, at p. 2914.
[21] Wortley Report, AB, Vol. 9, Tab 12, at pp. 2917-2918.
[22] Wortley Report, AB, Vol. 9, Tab 12, at p. 2894.
[23] Wortley Report, AB, Vol. 9, Tab 12, at p. 2934.
[24] See for example *Francis v. Ontario,* 2020 ONSC 1644, at paras. 216 – 232; 246 – 260; *Francis v. Ontario,* 2021 ONCA 197, at para. 16-19; *Brazeau v. Canada (Attorney General)* 2019 ONSC 1888, at para. 160, 187-240, var'd 2020 ONCA 184, *Brazeau v. Canada (Attorney General),* 2020 ONCA 184, at para. 25.
[25] Wortley Report at p. 50, AB, Vol. 9, Tab 12, p. 2940; Wortley Reply Report at p. 2, AB, Vol. 9, Tab 13, p. 3041.

reports, and no responding expert evidence was filed. As such, his opinion before the Motion Judge was unchallenged. The Appellant now distorts the purpose and findings of Dr. Wortley's evidence in its attempt to undermine the certification order.

B. The Certification Decision

18. On June 23, 2021, the Motion Judge released her decision, certifying the Respondent's action as a class proceeding.[26] The Motion Judge correctly identified the applicable test and principles for each certification criteria.[27] The Motion Judge rightly appreciated that the Respondent's claim was directed at systemic racism and use of force. In particular, she rejected the very re-characterization the Appellant seeks to advance on this appeal, noting that "the claims do not ask if an RCMP officer illegally assaulted a class member, but rather whether the operations of the RCMP create a system where illegal assaults happen." [28]

19. The Motion Judge found that the requirements of Rule 334.16(1) had been met, and defined the class as "all Aboriginal Persons who allege they were assaulted at any time while being held in custody or detained by RCMP Officers in the Territories, and were alive as of December 18, 2016."[29]

20. The Motions Judge released reasons in another class action alleging systemic failures against the RCMP on the same day, *BigEagle v. Canada*.[30] She dismissed the *BigEagle* certification motion for being too broad and unworkable, but correctly recognized that the within proceeding is appropriately structured and should proceed to a determination on the merits.

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[26] Certification Reasons, AB, Vol. 1, Tab 2.
[27] Certification Reasons, AB, Vol. 1, Tab 2, at paras. 15-17; 76; 83; 100; 113-114; 124-125, p. 13, p. 31, p. 34, p. 39, pp. 42-43, pp. 45-46.
[28] Certification Reasons, AB, Vol. 1, Tab 2, at para. 102, pp. 39-40.
[29] Certification Reasons at para. 133, AB, Vol. 1, Tab 2, p. 49.
[30] *BigEagle v. Canada,* 2021 FC 504.

PART III - ISSUES AND THE LAW

21. The only issue on this appeal is whether the Motion Judge properly exercised her discretion in granting certification of the action as a class proceeding pursuant to Rule 334.16(1). The Respondent respectfully submits that the answer to this is "yes".

A. Standard of Review

22. The Respondent agrees that the standards of review described in *Housen v. Nikolaisen* apply to an appeal of a certification order – errors of law are reviewable for correctness, whereas errors of fact or of mixed fact and law, from which a legal error cannot be extricated, are reviewable for palpable and overriding error. [31] The palpable and overriding error standard is a "highly deferential standard of review".[32]

23. This Court has explained the "palpable and overriding error" standard as follows:

> "Palpable" means an error that is obvious. Many things can qualify as "palpable." Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.
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> But even if an error is palpable, the judgement below does not necessarily fall. The error must also be overriding.
>
> "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place.[33]

24. The Appellant baldly argues that the Motions Judge's reasons are inadequate in an attempt to avoid the palpable and overriding standard of review. This is a thinly-veiled attempt to obtain permission to re-litigate the certification motion before this Honourable Court. The Motions Judge's reasons are appropriate for a procedural and interlocutory

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[31] *Canada v. Greenwood,* 2021 FCA 186, at para. 89; *Housen v. Nikolaisen,* 2002 SCC 33, at paras. 8-10.
[32] *Mahjoub v. Canada (Citizenship and Immigration),* 2017 FCA 157, at para. 61.
[33] *Mahjoub v. Canada (Citizenship and Immigration),* 2017 FCA 157, at paras. 62-65.

motion and the ordinary deferential standard applicable to certification decisions ought to apply.[34]

B. The Motion Judge's Reasons are Appropriate and Sufficient

25. The sufficiency of reasons is driven by the circumstances of the case and turn on whether the reasons enable appellate review.[35] This Court very recently rejected the same argument made by the same Appellant in *Greenwood v. Canada,* noting:

> … In the context of a civil appeal, the most important purpose of a trial court's reasons is to permit meaningful appellate review, as the Ontario Court of Appeal recently noted in *Manos v. Riotrin Properties (Flamborough) Inc.*, 2020 ONCA 211, 2020 CarswellOnt 3794, at para. 11.
>
> In the present case, where the Federal Court was not called upon to weigh competing evidence or to make credibility determinations, meaningful appellate review is possible in respect of each of the issues raised by the Crown before this Court. Thus, the alleged inadequacy of the Federal Court's reasons does not provide a basis for intervention. The Crown's concerns can be adequately addressed by this Court through consideration of the issues the Crown raises.[36]

26. The Certification Reasons are 54 pages long and clearly consider each of the certification criteria. It bears repeating that the low thresholds of "plain and obvious" and "some basis in fact" apply here. The Motion Judge is not to weigh evidence or make findings of fact.[37] They are perfectly appropriate on a certification motion, and permit appellate review.

27. The sheer volume and breadth of the Appellant's attacks on the Motions Judge's reasons on this betray their argument that this Court cannot review her reasons. The Appellant seeks to create complexity and confusion where there is none. The Court clearly and succinctly ruled on the Respondent's case as presented.

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[34] *Canada v. John Doe*, 2016 FCA 191, at para. 28.
[35] *R v. Sheppard,* 2002 SCC 26, at paras. 42 and 46.
[36] *Canada v. Greenwood,* 2021 FCA 186, at paras. 101-102.
[37] *Cloud v. Canada (Attorney General)*, 2004 O.J. No. 4924 (C.A.) at para. 50, leave to appeal to SCC ref'd [2005] S.C.C.A No. 50.

28. The Appellant attempts to conjure inadequacy in the Motion Judge's reasons to: i) constitute a camouflaged attempt to avoid application of the palpable and overriding standard of review; and/or, ii) re-argue of the same motion.[38] This Court should treat the Appellant's arguments in this regard with suspicion.

29. The Motions Judge's reasons should be compared to the recent *Jost v. Canada* class proceeding, where the Appellant was successful in arguing that the certification reasons were insufficient. In *Jost*, the certification reasons were remarkably brief - 29 paragraphs long (7 pages) and the order did not adhere to the *Rules*. As a result, this Honourable Court sent aspects of the certification decision back to the lower court for reconsideration.[39] The reasons in this matter are obviously distinguishable from *Jost* and speak for themselves.

C. The Motion Judge Correctly Ruled That It Is Not Plain and Obvious That The Pleadings Disclose No Cause of Action

30. The Motion Judge applied the correct test in determining whether the first certification criteria had been met, noting that she should only strike a cause of action if it is plain and obvious that no claim exists and it is doomed to fail.[40]

31. It is well established that pleadings should be read as a whole and be given a generous interpretation, with a view to accommodating any inadequacies or drafting deficiencies.[41] That being said, the Motion Judge made no findings with respect to any inadequacies in the Respondent's pleadings.

i. Systemic Negligence Cause of Action

1) The Motion Judge properly characterized the systemic negligence claim

32. The Appellant clearly disagrees with the Motion Judge's description of the pleadings and argues that the she failed to characterize or analyze the claim as pled.[42] However, the Motion Judge's characterization of the claim is well-supported by the

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[38] Appellant's Factum at para. 21.
[39] *Jost v. Canada (Attorney General)*, 2019 FC 1356, rev'd 2020 FCA 212.

[40] Certification Reasons at para. 16, AB, Vol. 1, Tab 2, p. 13.
[41] *Operation Dismantle v. The Queen,* [1985] 1 SCR 441, at para. 14.
[42] Appellant's Factum at para. 32.

pleadings themselves and is consistent with the broad and forgiving approach to the pleadings analysis at the certification stage. Any fair reading of the statement of claim reveals a "top-down" systemic pleading, which can function in the context of a class proceeding. The Appellant should not be permitted to recast the true character of the claim and call it an error of law on the Motion Judge's part.

33. In fact, this aspect of the Appellant's appeal flows from the Appellant's stubborn misapprehension of the nature of the claim. The Motion Judge understood the nature of this systemic negligence claim – she extensively cited to the applicable test as outlined by the Court of Appeal for Ontario in *Francis v Ontario* only weeks before she released her decision.[43] In *Francis*, Justice Perell helpfully re-articulated the nature of a systemic claim such as the within class proceeding:

> "systemic negligence provides a means for a group to formulate a common issue that would justify certification of a class action….the representative plaintiff is entitled to shape the negligence claim to make it more amenable to a collective action".[44]

34. The Motion Judge rightly followed the direction of this Court in *Wenham*, in reading the pleading "to get at its 'real essence' and 'essential character' by 'reading it holistically and practically without fastening onto matters of form'".[45] The Appellant not only ignores the "essence" of the systemic claim here, but attempts to redraft it as something that would unravel at a trial.

2) The Motion Judge properly applied and analyzed the *Anns/Cooper* test in assessing whether a duty of care could be found

35. The motions judge did not err in her duty of care analysis. The lack of an explicit reference to the *Anns* test alone is not grounds for overturning her decision nor is it evidence of an error of law. In fact, the Supreme Court of Canada recently confirmed that

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[43] Certification Reasons at para. 19, AB, Vol. 1, Tab 2, p. 14.
[44] *Francis v. Ontario,* 2020 ONSC 1644, at para 464, aff'd 2021 ONCA 197.
[45] *Wenham v. Canada (Attorney General),* 2018 FCA 199, at para. 34.

where the duty of care at issue is not novel, there is generally no need to proceed through the full-two stage *Anns/Cooper* framework.[46]

36. The duty of care in this case is not novel. It is well-established that governments owe a duty of care to individuals arrested, detained and/or held in their custody and the Motion Judge was explicitly cognizant of this.[47] Indeed, the Ontario Court of Appeal in *Francis v. Ontario* recognized such a duty to persons in custody on the merits of the case, not just on a pleadings motion.[48]

37. The Appellant relies heavily on *Good v. Toronto* to argue that that police do not owe a duty of care to persons they detain. This is a bold argument that ignores decades of case law.[49] In fact, the Court in *Good* expressly recognized the existence of a duty of care owed by police to persons in custody.[50] The Appellant also misstates the lower court's ruling on *Good* (which was subsequently overturned by the Court of Appeal for Ontario).

38. The systemic negligence claim in *Good* failed before the lower court due to frailties in the statement of claim as drafted in that particular case.[51] The Ontario Superior Court ruled that Ms. Good had failed to plead that the police owed a general class-wide duty, and that she did not plead a duty owed by the police to all class members in custody.[52] Ms. Good dropped her negligence claim, and only appealed systemic *Charter* breaches. The Court of Appeal certified the *Charter* breaches and the case led to a sizeable settlement and an acknowledgement of wrongdoing.[53]

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[46] *Nelson (City) v. Marchi,* 2021 SCC 41, at para. 19.
[47] Certification Reasons at para. 36, AB, Vol. 1, Tab 2, p. 19.
[48] *Francis v. Ontario,* 2021 ONCA 197, at para. 102.
[49] See *Good v. Toronto Police Services Board,* 2013 ONSC 3026, at para. 49, rev'd 2014 ONSC 4583, aff'd 2016 ONCA 250, leave to appeal to SCC ref'd [2016] S.C.C.A. No. 255, citing *Ellis v. Home Office,* [1953] All E.R. 149 (C.A.), *Abbott v. Canada* (1993), 64 F.T.R. 81 (T.D.), *Funk v. Clapp* (1986), 1986 CanLII 1119 (B.C.C.A.), *Rhora v. Ontario,* [2004] O.J. No. 3087 (S.C.J.), aff'd [2006] O.J. No. 3484 (C.A.); *Hill v. Hamilton-Wentworth Regional Police Services Board,* 2007 SCC 41, at para. 3.
[50] *Good v. Toronto Police Services Board,* 2013 ONSC 3026, at para. 49.
[51] The Plaintiff did not appeal the lower court ruling on systemic negligence, and instead focussed her claim on *Charter* breaches before the Ontario appeal courts. See *Good v. Toronto Police Services Board,* 2014 ONSC 4583, at para. 17, and *Good v. Toronto Police Services Board,* 2016 ONCA 250, at paras. 29-30.
[52] *Good v. Toronto Police Services Board,* 2013 ONSC 3026, at para. 50.
[53] *Good v. Toronto Police Services Board,* 2020 ONSC 6332, at para. 28.

39. In this case, the representative plaintiff has very clearly pleaded class-wide duties.[54] However, the statement of claim goes even further, pleading the ongoing *knowledge* of the Defendant,[55] which was recognized by the motions judge:

> "Breaches of the duty of care include that Canada repeatedly ignored calls for reform and broke promises to do better. The pleadings have the material facts supporting that breaches occurred and the Plaintiff indicates that he pled material facts to support that the class members suffered damages"[56]

40. Certainly, Canada's long-standing knowledge, its promises to make systemic change in these circumstances, and failure to do better simplify the proximity and foreseeability analyses. The *Good* decision simply does not assist the Appellant on negligence.

41. In *Francis,* the Ontario Court of Appeal ruled that the duty of care owed by governments to individuals does not become idiosyncratic when similarly situated people are aggregated into a class proceeding. Put another way, the same duty of care applies in an individual action as does in a systemic class proceeding. The Ontario Court of Appeal endorsed the Motion Judge's finding of a prima facie duty of care on a class-wide basis based on the recognized duty of care found to be owed by governments to people in custody by the Supreme Court of Canada in *MacLean v R.* [57] This ground of appeal must also fail.

42. In the within case, the Motion Judge expressly referenced the same duty recognized in *Francis.* She understood that at this stage of the inquiry, her task was simply to determine whether it was plain and obvious that the claim will fail.[58] The Appellant fails to grapple with this Court's clear ruling in this regard.

43. In any event, the Motion Judge applied the *Anns/Cooper* test.[59] She ruled that the Respondent pleaded that the RCMP is the sole policing agent in the Territories, and that

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[54] Amended Statement of Claim at para. 43-51, AB, Vol. 1, Tab 3, pp. 72-74.
[55] Amended Statement of Claim at para. 25-30, AB, Vol. 1, Tab 3, p. 70.
[56] Certification Reasons at paras. 22-24, AB, Vol. 1, Tab 2, p. 15.
[57] See *Francis v. Ontario,* 2021 ONCA 197, at para. 102-103, citing MacLean v. R. [1973] SCR 2.
[58] Certification Reasons at para. 37-38, AB, Vol. 1, Tab 2, pp. 19-20.
[59] Certification Reasons at para. 21, AB, Vol. 1, Tab 2, pp. 14-15.

the class is made up of Indigenous individuals who alleged assault by RCMP officers while being held in custody or detailed – this was sufficient to establish proximity and foreseeability.[60] The argument that the class members in this case were not proximate to the RCMP members who racially abused them fails on ordinary logic. Given the Defendant's knowledge of the systemic failures, and even its apologies, such harms were obviously foreseeable.

44. The Motion Judge also thoroughly considered whether there were policy considerations to negate or limit the duty and dealt extensively with the policy immunity arguments raised by the Appellant,[61] which shows that she considered the second step of the *Anns* test, i.e., whether there are policy reasons to negate a duty of care. The Appellant fails to point to any policy reasons to limit the duty a police officer would owe to the vulnerable Class Members in this case.

3) The Motion Judge correctly found that the systemic negligence claim concerned operational decisions

45. The Motion Judge did not err in law in finding that the Appellant could not articulate any policy immunity in negligence. For the Appellant to succeed, it would need to point to a policy that authorizes racially motivated violence by RCMP officers. Such a policy simply does not exist.

46. Operational government conduct is actionable in negligence. High level government policy decisions are not.[62] The reasons clearly reflect that the claim at bar concerned the operationalization of policing in the Territories, not a policy decision made by government.[63] Once again, the Motions Judge explicitly referenced fresh appellate jurisprudence on the issue, *Francis v. Ontario*, appropriately comparing the case at bar to that matter.

47. The Supreme Court of Canada recently observed in *Nelson*, "Government activities that attract liability in negligence … are generally left to the discretion of

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[60] Certification Reasons at para. 41 AB, Vol. 1, Tab 2, p. 20.
[61] Certification Reasons at para. 29 – 39, AB, Vol. 1, Tab 2, pp. 16-20.
[62] *R v. Imperial Tobacco,* 2011 SCC 42, at para. 90.
[63] Certification Reasons at para. 30-34, AB, Vol. 1, Tab 2, pp. 17-18.

individual employees or group of employees. They do not have a sustained period of deliberation, but reflect the exercise of an agent or group of agents' judgment or reaction to a particular event."[64] On any review of the pleadings in this matter, in particular, para. 52 of the Amended Statement of Claim, it is clear this case concerns operational conduct, that is conduct that concern decisions left to individual groups of agents and reflect the exercise of judgment (or lack thereof).[65]

48. Even the reference to the "funding" of the RCMP detachment in the pleadings does not automatically attract the "core policy decision" immunity. In *Nelson,* the Supreme Court of Canada confirmed that "the mere presence of budgetary, financial, or resource implications does not determine whether a decision is a core policy – too many government decisions, even the most operational decisions, involve some consideration of a department's budget or the scarcity of its resources."[66]

49. In the present case – the "high-level" decisions have already been made by the legislature and the executive and can be found under the *Royal Canadian Mounted Police Regulations, 2014,* SOR/2014-281, the Police Services Agreements and the *Criminal Code* provision on use of force.[67] The systemic negligence claim focuses on the *operationalization* of the "core policy" choices reflected in the abovementioned legislation and agreements.

4) The Motion Judge considered all the elements of the systemic negligence claim

50. Finally, the Motion Judge did not fail to consider the remaining elements of systemic negligence. She expressly ruled that all requisite elements were pleaded at para. 42 of her reasons. The Appellant again tries to make out some deficiency in the reasons, but as *Sheppard* confirms, deficiency in reasons is not a stand-alone ground of appeal[68] and in any event, the Motion Judge's finding is self-evident.

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[64] *Nelson (City) v. Marchi,* 2021 SCC 41, at para. 55.
[65] Amended Statement of Claim at para. 52, AB, Vol. 1, Tab 3, pp. 74-75.
[66] *Nelson (City) v. Marchi,* 2021 SCC 41, at para. 58.
[67] Amended Statement of Claim at paras. 44-47, AB, Vol. 1, Tab 3, pp. 72-73.
[68] *R v. Sheppard,* 2002 SCC 26, at para. 42.

ii. The Motion Judge did not err in finding the pleadings disclosed a breach of section 7 of the *Charter*

51. The Motion Judge found that the Plaintiff had pleaded the requisite elements for a section 7 *Charter* claim, namely government action, which resulted in a risk to life, liberty and security of the person, was grossly disproportionate and arbitrary, and is not justified under section 1 of the *Charter.*[69] Contrary to the Appellant's assertion, the section 7 breach is not a negligence claim cloaked as a *Charter* claim. This exact argument has been repeatedly rejected by Courts across Canada, both at certification and on the merits.

52. Negligence and *Charter* breaches are different causes of action which attract different remedies. These claims can rest on the same underlying facts, but require an entirely different legal analysis and often co-exist in a civil action. The government action pleaded for the purpose of the *Charter* claim is not the government's negligence – rather, it is the systemic excessive use of force and abuse by the RCMP. While these failures result from the operation and management of the RCMP, it is still government conduct that is actionable under the *Charter*. Neither the Plaintiff nor the Court have made the error the Appellant attempt to assemble.

53. The Supreme Court of Canada has made clear that tort damages and *Charter* damages are available on the same facts – they do not somehow cancel each other out.[70] Systemic *Charter* breaches are actionable in class proceedings alongside systemic negligence and systemic breaches of fiduciary duty. That the same underlying facts can give rise to different causes of action is evident from *Francis* where the Court found the Ontario Crown liable for both *Charter* breaches and systemic negligence vis-à-vis Ontario's system of administrative segregation.[71] Earlier this year, the Ontario Court of Appeal upheld the award of damages for systemic negligence, systemic breaches of section 7 and section 12 of the *Charter.*[72] Moreover, the same argument that the Appellant seeks to advance was rejected by the British Columbia Supreme Court, which recognized

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[69] Certification Reasons at para. 61, AB, Vol. 1, Tab 2, p. 27.
[70] *Vancouver (City) v. Ward,* 2010 SCC 27, at para. 36.
[71] See *Francis v Ontario,* 2020 ONSC 1644, aff'd 2021 ONCA 197.
[72] *Francis v. Ontario,* 2021 ONCA 197.

the possibility of advancing *concurrent* tort and *Charter* claims on a certification motion only last December.[73]

iii. The Motion Judge did not err in finding that the fiduciary duty claim was properly pleaded

54. The Motion Judge correctly found that the Respondent pleaded material facts to support a claim for the existence of a fiduciary duty. First, she held that an undertaking was pleaded because RCMP are the sole providers of policing in the Territories pursuant to contract. Second, she found the defined class of Indigenous people are subject to RCMP control. Third, she found that the well-being and order of Indigenous Persons stand to be adversely affected by the exercise of the RCMP's discretion and control.[74] This clearly satisfies the "plain and obvious" standard on a pleadings motion.

55. The Motion Judge's finding is consistent with this Court's observation in *Brake* that the law of fiduciary duty in the context of Crown-Indigenous relations is "a very dynamic area of law that is rapidly evolving" and accordingly, "a defendant has a particularly heavy burden in seeking to strike a pleading" in this context.[75]

56. The Appellant contends that the Respondent has not pleaded a viable undertaking because a duty of loyalty cannot attach to policing. [76] There is no legal support for this extremely broad statement. The Supreme Court of Canada in *Elder Advocates* recognized that the existence and character of an undertaking is informed by the norms relating to the particular relationship, and an undertaking may also be found in the relationship between the parties and through an imposition of responsibility by statute.[77]

57. Once again, the Appellant fails to address the plain wording of the Respondent's pleadings. The undertaking arises as a result of the Appellant's sole assumption of policing responsibilities in the Territories and its constitutional obligations to monitor, influence, safeguard, secure and otherwise protect the vital interests of vulnerable Aboriginal

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[73] *North v. British Columbia,* 2020 BCSC 2044, at paras. 40-52.
[74] Certification Reasons at para. 54 and 57, AB, Vol. 1, Tab 2, pp. 24-25.
[75] *Brake v. Attorney General (Canada),* 2019 FCA 274, at para. 66.
[76] Appellant's Factum at para. 28.
[77] *Alberta v. Elder Advocates of Alberta Society,* 2011 SCC 24, at paras. 32-33.

Persons.[78] The Respondent's pleadings with respect to the existence of an undertaking are consistent with the Supreme Court of Canada's guidance described in *Elder Associates* – the relationship is governed by the norms relating to the relationship and the sordid history of the relationship between Indigenous persons and the RCMP and the exclusive statutory responsibility undertaken by the Federal government. The Prime Minister of Canada and the Commissioner of the RCMP have explicitly promised to address the issues raised by this case.[79] The Motion Judge committed no error in finding that an undertaking had been properly pleaded.

58. Further, the Appellant cites no authority that supports its proposition that a fiduciary duty to Aboriginal Persons can never arise in the context of the Crown's policing activities. This position runs contrary to this Court's ruling in *Brake,* cited above. In the absence of any authority on this point, it is not plain and obvious that the Respondent's claim for breach of fiduciary duty will fail.

59. The Motion Judge was rightly aware of the qualification in *Elder Advocates,* that while an undertaking by a government actor will be rare, it is not impossible.[80] Additionally, she noted that in the circumstances of the present case, "The Crown does not have to sacrifice their duty to protect Canadians as a whole in order to ensure that Indigenous people within the policing territory of the agreement are not unnecessarily harmed during arrest and incarceration."[81] As a matter of fact, the compatibility of an undertaking in this regard with the RCMP's public duties is evidenced by the statutory requirement that the RCMP "treat every person with respect and courtesy and not engage in discrimination or harassment." [82]

60. Further, the well-being and order interests affected here relate to fundamental human and personal interests of Aboriginal Peoples, which include their right to be treated equally under the law, and their right to carry on their daily lives, and engage in cultural,

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[78] Amended Statement of Claim at paras. 53-59, AB, Vol. 1, Tab 3, p. 75.
[79] Affidavit of Jasmine Randhawa, sworn June 24, 2020, Exhibit C & G, AB Vol. 10, Tab 14, p. 3114 & 3138
[80] Certification Reasons at para. 53, AB, Vol. 1, Tab 2, p. 24.
[81] Certification Reasons at para. 50, AB, Vol. 1, Tab 2, pp. 23-24.
[82] See *Royal Canadian Mounted Police Regulations,* 2014, SOR/2014-281, s. 18 & Schedule, para 2.1.

social and spiritual practices without the threat of excessive use of force by the RCMP driven by discrimination and racism.

61. The Motion Judge's findings that the requisite elements of the breach of fiduciary duty cause of action is therefore correct in law and principle. The Motion Judge was well-aware of the proper standard to apply, and in fact, where the requisite elements had not been pleaded, she would not have certified the cause of action, which was the case in the *BigEagle* decision released concurrently with the Motion Judge's decision in this case.[83]

D. The Motion Judge did not err in finding that there was an identifiable class

i. The class definition certified is objective

62. The Motion Judge correctly articulated and applied the test for determining whether the identifiable class requirement is met.[84] She determined that the Respondent's "claims-based" class definition, which was similar to the class definition certified by the Supreme Court of Canada in *Rumley,* was suitable.[85] Her decision in this regard is consistent with numerous class actions that have been certified using "claims-based" class definitions.[86]

63. The reference to an allegation of assault in the class definition certified by the Motion Judge is no different from the reference to the "claim to have suffered injury, loss or damage as a result of misconduct of a sexual nature occurring at the school" employed in the class definition certified in *Rumley.* The determination of whether any particular class member in *Rumley* suffered "misconduct of a sexual nature" will take place after the common issues, at the individual issues stage. It could be described as a "legally-suffused inquiry" to borrow the Appellant's term, which is perfectly acceptable at the individual issues stage. As a result, such class definitions are appropriate.

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[83] See *BigEagle v. Canada,* 2021 FC 504, at paras. 104-119 and 165-174.
[84] Certification Reasons at para. 83, AB, Vol 1, Tab 2, p. 34.
[85] Certification Reasons at para. 85, AB, Vol 1, Tab 2, p. 34.
[86] See Schedule "A" of this Factum.

64. The issues raised by the Appellant with respect to the use of claims-based definitions are addressed directly by former Chief Justice of Ontario Winkler's comments in *Attis,* wherein he held:

> If membership in a class is defined as those who make claims in respect of a particular event or alleged wrong, no determination of the merits of any particular claim is necessary prior to making a determination as to whether the claimant is a member of the class. Similarly, if a person's claim fails, it does not eliminate the person from the class, rather it demarks the claimant as a class member whose claim has been determined through a binding process. It is not the purpose of class proceedings, or class definitions, to bind only successful claimants. All those who may bring claims in respect of a particular event or allegation should be bound if possible, subject of course to the legislated exception of those putative class members who exercise the right to opt out of the class proceeding
>
> Another criticism of a "claims made" limiter on class description is that it does not provide the necessary certainty of identifying those who are bound by the class definition. In my view, this criticism is founded on too narrow an interpretation of both the class definition and the functions of a court supervising a class proceeding. Defining a class as those persons "who claim" includes those persons who may come forward in the future to make a claim. A defendant and, for that matter, the court, will be in a position to ascertain whether a particular person is included in the class and bound by the resolution of the common issues. In this respect, it is trite that class members need not be identified individually at the time the class is certified. Accordingly, utilizing a "claims made" in the appropriate case leaves the defendant in no different position vis à vis knowledge of the class membership than would be otherwise the case. As for the potential class members, the court can ensure that the notice adequately conveys the effect of the class definition and the fact that claims in the future may be barred as a result of the resolution of the proceeding.[87]

65. The Motion Judge's decision to accept a claims-based class definition is well-supported in the jurisprudence. A non-exhaustive list of class proceedings where "claims-based" class definitions were certified can be found in Schedule "A" to this factum.

66. The Appellant argues that a claims-based class definition must be followed by an objective fact. There is no basis in law for this position.[88] However, even on the Defendant's proposition, the class definition is followed by objective facts: a) the need to

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[87] *Attis v. Canada (Minister of Health),* 2007 CanLII 15231 (ON SC) at para. 56, see also para. 57.
[88] Appellant's Factum at para. 56.

be an Aboriginal Person, b) the need to be detained or be in the custody of the RCMP and c) for the events to occur within the Territories.

67. The applicable test requires "some basis in fact that two or more persons will be able to determine if they are in fact a member of the class"[89] so they may decide if they wish to have their rights determined within the class proceeding, or if they would prefer to opt out of their class proceeding.[90] The affiants were certainly aware that they are class members. There is simply no procedural problem here that requires appellate intervention.

68. It is noteworthy that the Motion Judge's finding that the class definition was sufficiently objective was not limited to the fact that similar class definitions have been repeatedly certified. She also grounded her decision in the evidence before her, specifically the fact that in the affidavit filed by *Canada*, Sherri Tait was able to outline various locations in the Territories and individuals who identified as Indigenous.[91] Put simply, the Motion Judge found that there was "some basis in fact" that the class was objectively determinable, even relying on the Appellant's evidence.

69. The Appellant has not identified a palpable and overriding error in this regard. Accordingly, the Motion Judge's finding that the identifiable class criteria is satisfied should be afforded deference.

ii. The class period does not exceed the scope of the evidence

70. The Appellant again ignores the nature and context of the claim in arguing that the Motion Judge erred by extrapolating findings beyond the evidence before the Court in extending the class period back to 1928.

71. The motion record filed by the Plaintiff included evidence of instances of historical systemic racism by the NWMP (the North-West Mounted Police), the predecessor to the RCMP, which was formed in 1920. These acts of systemic racism included the enforcement of laws by NWMP that separated children from their brothers, sisters, parents

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[89] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, paras. 58, 61.
[90] *Gariepy v. Shell Oil Company,* [2002] O.J. No. 2766 at para. 47, Respondent's Book of Authorities ("**RBOA**"), Tab 1.
[91] Certification Reasons at para. 85, AB, Vol. 1, Tab 2, p. 34.

and grandparents, and the enforcement of laws that criminalized customary practices,[92] as well as evidence of systemic racism faced by First Nation peoples in Yukon.[93] Given the particular nature of systemic racism, it was open to the Motion Judge to infer, based on the evidence before her, that there was "some basis in fact" that there was a class of individuals who experienced systemic racism in policing back to 1928.

72. In the alternative, if this Court finds that the Motion Judge erred in failing to limit the class definition, the class period is sustainable from at least 1990 onwards. The Respondent filed direct evidence, in the form of Mr. Aglukkaaq's affidavit in which he swore that he subjected to racially-motivated use of force by the RCMP in the Territories in or around 1990.[94] Accordingly, there is evidence to support the class period at the very least from the period 1990 to the present.

iii. The Motion Judge did not err in finding that the proposed class was rationally connected to the proposed common issues

73. The Appellant baldly asserts that the Motion Judge erred in finding that the class definition lacked a rational connection to the common issues. The rational connection between the class definition and the proposed common issues is, with respect, obvious. In fact, the Supreme Court of Canada in *Hollick* recognized that in most cases, the relationship is clear from the facts.[95] The Appellant's complaint is again driven by its mischaracterization of the claim. The circumstances outlined in *Dennis* and *RG* are simply not applicable in this case. Justice Perell's clarification in *Francis* is helpful in this regard, wherein he noted:

> [Systemic negligence claims] do not change the legal nature of negligence and rather are a means for a collective or group to assert claims. There was no requirement in *Rumley* or *Cloud,* the systemic negligence cases described above, that would make the negligence action dependant upon calling out particular civil servants. The negligence was systemic involving a breakdown of the system.[96]

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[92] Affidavit of Catherine MacDonald, Exhibit A, p. 10, AB, Vol. 1, Tab 5, p. 131.
[93] Affidavit of Catherine MacDonald, Exhibit A, p. 11, AB, Vol. 1, Tab 5, p. 132.
[94] Aglukkaq Affidavit, at paras. 4-10, AB, Vol. 9, Tab 11, p. 2884.
[95] *Hollick v. City of Toronto,* 2001 SCC 68, at para. 20.
[96] *Francis v. Ontario,* 2020 ONSC 1644.

74. As with *Francis,* the Respondent and Class Members' claims are not claims for individual negligence or individual *Charter* breaches, but claims for systemic negligence and systemic *Charter* breaches. With this framing in mind, the rational connection between the common issues and the class definition is evident – the Class Members all have been directly impacted by the Defendants' systemic failures.

E. The Motion Judge was correct to certify the common issues proposed

75. The Motion Judge correctly found that claims raise common issues, the resolution of which would advance the litigation. In arriving at her finding, she found that the common issues (a) to (f) are predominantly legal questions that had to be answered for each and every class members' claim.[97] She also found that the remaining questions are general questions regarding the appropriateness of damage awards.[98] In an ongoing theme, the Appellant's argument that the common issues necessarily depend on individualized inquiries is based upon its repeated mischaracterization of the Respondent's claim.[99]

76. Further, the Appellant misconstrues the Motion Judge's simple description of the common issues by conflating what must be considered at the common issues trial with the subsequent individual issues stage of the class proceeding.[100] The Motion Judge was simply providing a rough summary of the liability common issues, which she held to be predominantly legal questions.[101] This is a confusing argument that ignores the basic operation of class proceedings legislation in which the common issues trial is followed by individual issues determinations.[102]

77. These exact, or very similar common issues have been used in systemic class actions for decades in this country.[103]

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[97] Certification Reasons at para. 101; for common issues see Certification Reasons at para. 136, AB, Vol. 1, Tab 2, p. 39.
[98] Certification Reasons at para. 136, AB, Vol. 1, Tab 2, pp. 49-50.
[99] See Appellant's Factum at para. 64.
[100] Appellant's Factum at para. 65 citing Certification Reasons at para. 101.
[101] Certification Reasons at para. 101, Vol. 1, Tab 2, p. 39.
[102] *Federal Courts Rules,* SOR/98-106, r. 334.26-334.27
[103] For the negligence common issues see: *Canada v. John Doe*, 2016 FCA 191, at para. 63; *Rumley v. British Columbia*, 2001 SCC 69, at para. 34; *Dine v. Biomet*, 2015 ONSC 7050, at paras. 65-66, leave to appeal to Div. Ct. ref'd 2016 ONSC 4039; *Cloud v. Canada (Attorney General)*, 2004 O.J. No. 4924 (C.A.) at para. 71, leave to appeal to SCC ref'd [2005] S.C.C.A No. 50; *Tippett v. Canada*, 2019 FC 869, at para.

iv. The Common Issues are not beyond the scope of the evidence

78. In *Pro-Sys,* the Supreme Court of Canada clearly articulated the evidence on a certification motion does not go to proving the case, only to show some basis in fact for the common issues.[104]

> [i]n order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members." [emphasis added]

79. The Appellant takes issue with the Respondent's failure to prove his case on the merits at certification. Canada ignores the purpose of a certification motion, which is purely procedural, and only requires the court to determine whether there is some basis in fact that the procedural framework proposed by the Plaintiff will work at a trial. The merits of the Respondent's case have no place here.

80. Further, the Appellant badly misconstrues the record before the Motions Judge in arguing that there is no evidence of systemic failings. The opposite is true - there is direct affidavit evidence from those who survived police abuses. They were cross-examined on racially-motivated RCMP brutality and the culture of fear that exists in the Territories, and they confirmed their experiences.

81. The Respondent also filed expert evidence from Dr. Wortley, who opined that the data shows a serious problem with use of force on the Class as a whole. [105] He does not go further to opine that Canada fell below the standard of care, because doing so would be inappropriate on a certification motion – the Court is unable to make any merits determinations on this purely procedural motion. It is worth pointing out that Dr. Wortley's

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68; for fiduciary duty common issues see: *Brake v. Canada (Attorney General)*, 2019 FCA 274, at paras. 79-80, 83; *Manuge v. Canada*, 2008 FC 624, at para. 43, rev'd 2009 FCA 29, aff'd 2010 SCC 67; *Riddle v. Canada*, 2018 FC 641, at para. 66; *McLean v. Canada (Attorney General)*, 2018 FC 642, at para. 5; *Rumley v. British Columbia*, 2001 SCC 69, at paras. 27, 34; *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.), at para. 72, leave to appeal to SCC ref'd [2005] S.C.C.A No. 50; for *Charter* common issues: *Brake v. Canada (Attorney General)*, 2019 FCA 274; *Brazeau v. Attorney General (Canada)*, 2016 ONSC 7836; *Ewert v. Canada (Attorney General)*, 2016 BCSC 962; *Johnson v. Ontario*, 2016 ONSC 5314; *Tippett v. Canada*, 2019 FC 869.

[104] *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57, at paras. 100 and 110.

[105] Wortley Report, AB, Vol. 9, Tab 12, at p. 2913.

comments about the lack of *research* on the issue does not mean that there is a lack of a *problem.*

82. The Motion Judge rightly found that the commonality requirement had been met here. Dr. Wortley explains how the Defendant's own evidence will allow him to provide a more final merits opinion at trial:

> "My previous research on police use of force has involved the examination of records from Ontario's Special Investigations Unit (SIU). These records capture information from dozens of Ontario police services including the Ontario Provincial Police. My research has also examined information from the Toronto Police Service, including data derived from TPS Use of Force Reports, Injury Reports and General Occurrence Reports. Based on this experience, I strongly believe that, through the discovery process, an examination of RCMP use of force data is feasible. Such an examination would enable me to form an opinion with respect to potential systemic failures, at both the operational and policy level, regarding the RCMP's use of force against Indigenous peoples in the Territories"[106]

83. This methodology is applicable across the determination of the systemic negligence, *Charter* breaches and breach of fiduciary duty common issues. The Plaintiff has easily satisfied the "some basis in fact" standard. Dr. Wortley's evidence must be considered alongside the affidavits of the class members, the public and media reports as well as the Defendants' own admissions.

v. Systemic Negligence Common Issues

84. The Appellant's case re-framing continues in its argument on the negligence common issues. As noted above at para. 8, the Motion Judge expressly rejected the Appellant's characterization of the case as individual.[107] The Appellant's disagreement with the Motion Judge's appreciation of the claim does not equate to a palpable and overriding error justifying this Court's intervention. The Motion Judge's findings of commonality with respect to all the common issues and the capability of such claims to be determined in common are entitled to deference.[108]

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[106] Affidavit of Scot Wortley, sworn May 21, 2020, Exhibit A, AB, Vol. 9, Tab 13 at p. 3041 ("**Wortley Reply Opinion**")
[107] Certification Reasons at para. 102, Vol. 1, Tab 2, pp. 39-40.
[108] *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57, at para. 111.

85. The Plaintiff satisfied the "some basis in fact" test. The Motion Judge had ample evidence before her to find that the common issues could be established on a class-wide basis without resorting to individualized inquiries of assault. In particular, the Motion Judge had before her Dr. Wortley's opinion, who described a workable methodology to determine the extent to which racial bias contributes to the RCMP use of force decisions in the Territories.[109]

86. The Appellant's bald assertion that "only if the individual assaults are first proven can this inquiry then identify relevant systemic flaws"[110] is false. It is undermined by Dr. Wortley's unchallenged opinion, decades of systemic class action jurisprudence and logic. The Motion Judge's finding that there need not be individual assessment until *after* the common questions are answered is supported by the record and the *Federal Courts Rules*.[111] Further, her statement about "damages being evidence of the system" being scrutinized is consistent with Dr. Wortley's report, which found *prima facie* evidence of systemic racism based on use of force data.

87. The Appellant's reliance on the lower court decision in *Rumley* does not assist either. In that case, the Plaintiff had no plan to prove a "top-down" case. The B.C. Supreme Court in *Rumley* pointed out as much when it noted:

> "Part of the problem is that plaintiffs' counsel … have not appeared to have had a consistent vision as to how the case should be conducted in order to address the common issues rather than the individual issues. For instance, there has been considerable emphasis over the past two years on the production of individual student files and the necessity of calling as witnesses numerous members of the plaintiff class in order to testify about observations and experiences over the course of the school's operations."[112]

88. Here, the Respondent has outlined a methodology to prove their case using documents available through discovery and the use of expert opinion. The Respondent relies on the much more recent *Francis* decision, in which expert opinion was used to

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[109] Wortley Report, AB, Vol. 9, Tab 12, at p. 2894.
[110] Appellant's Factum at para. 64.
[111] *Federal Courts Rules, SOR/98-106,* R. 334.26-334.27.
[112] *Rumley v. B.C. (Province of),* 2003 BCSC 234, at para. 64.

prove systemic negligence. Dr. Wortley's opinion is designed to outline the manner in which the Respondent's top-down" systemic case will be proven at trial.

vi. Charter Common Issues

89. The Appellant ignores years of recent appellate jurisprudence when it argues that *Charter* rights are individual, and cannot be determined in common. The breaches in this case can be determined collectively as they were in *Good v Toronto*, *Francis v. Ontario*, *Brazeau v. Canada*, *North v. British Columbia* and *CCLA v. Canada*.[113] A particularly apt example is *Fraser v. Canada* – section 15 rights are almost always considered in common.[114] This is yet another of the Appellant's arguments that have been recently and repeatedly rejected by numerous unanimous appellate panels. Other very recent systemic class action claims in which section 15 *Charter* claims have been certified include *Tidd v. Regional Health Authority A* (systemic claim involving allegations of abuse suffered by individuals at the Restigouche Hospital Centre, upheld by the New Brunswick Court of Appeal) and *North v British Columbia (Attorney General)* (systemic claims arising from solitary confinement practices at B.C.'s provincial correctional institutions).[115]

90. The overarching question is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis.[116] The Motion Judge ruled found a single action (namely, the operation of the RCMP in a manner that created a system of illegal assaults) that resulted in a common experience (i.e., assault of class members while in the custody of or detained by the RCMP), and determined that all class members would benefit from a common determination of that issue.[117]

91. Her finding in this regard distinguishes it from *Thorburn,* where the common issues were not framed in a systemic nature –they were framed in terms of whether

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[113] *Good v. Toronto,* 2014 ONSC 4583, aff'd 2016 ONCA 250, leave to appeal ref'd [2016] SCCA No. 255; *Francis v. Ontario,* 2020 ONSC 1644, aff'd 2021 ONCA 197; *Brazeau v. Canada,* 2019 ONSC 1888, var'd 2020 ONCA 184; *North v. British Columbia (Attorney General),* 2020 BCSC 2044; *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243.

[114] *Fraser v. Canada (Attorney General*), 2020 SCC 28, at paras. 53-67.

[115] *Tidd v. Regional Health Authority A & Province of New Brunswick,* 2021 NBQB 208 (as yet unreported) RBOA, Tab 2, leave to appeal ref'd 2021 CanLII 121098 (NBCA)*; North v. British Columbia (Attorney General),* 2020 BCSC 2044.

[116] *Western Canadian Shopping Centres Inc. v Dutton,* 2001 SCC 46, at para. 39.

[117] Certification Reasons at paras. 101-102, Vol. 1, Tab 2, pp. 39-40.

individual strip searches were conducted without a warrant or were subjectively unreasonable.[118] Put simply, the "government action" for the purpose of the analysis in *Thorburn* was the act of strip-searching proposed class members. This case was not framed in a manner that was amenable to certification and is entirely distinct from the present case where the government action at issue is the "top down" operational focus of the RCMP. Likewise, in *Cirillo* there was no single course of conduct giving rise to the alleged breaches. Further, *Cirillo* is also distinguishable as the Plaintiff in that case alleged a *Charter* breach based on delay but the actual cause of delay in any given bail case could not be properly determined.[119] The allegations here are that the Appellant failed to protect vulnerable Class Members from ongoing harms within the confines of a particular system. The systemic claim is workable in this case.

92. With respect to the section 15 *Charter* breach common issue, some basis in fact for commonality is easily made out. Only Indigenous people are included in the Class. The Plaintiff filed evidence of his and Class Members' experiences of racism and abuse, as well as statistical evidence showing that RCMP use of force against Indigenous Persons have been unacceptably high.[120] The availability of this evidence in the record directly contradicts the Appellant's assertion that there was no basis in fact to certify the section 15 *Charter* breach. This being the case, it cannot be said that the Motion Judge committed a palpable and overriding error.

vii. Damages

93. The Motion Judge made no error in certifying aggregate damages as a common issue. The Motion Judge found that the questions pertaining to damages are "general questions regarding the appropriateness of damage awards".[121] Her decision to certify the damages questions as common issues is consistent with the various certification decisions across the country that have aggregate and punitive damages as common issues.[122] Indeed,

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[118] *Thorburn v. British Columbia (Public Safety and Solicitor General),* 2013 BCCA 480, at para. 15.
[119] *Cirillo v. Ontario,* 2019 ONSC 3066, at paras. 51-52.
[120] Wortley Report, AB, Vol. 9, Tab 12(A), p. 2894.
[121] Certification Reasons at para. 101, AB, Vol. 1, Tab 2, p. 39.
[122] See for example, *Brake v. Canada (Attorney General)*, 2019 FCA 274; *Brazeau v Attorney General (Canada)*, 2016 ONSC 7836; *Ewert v. Canada (Attorney General)*, 2016 BCSC 962; *Daniells v. McLellan*, 2017 ONSC 6887; *Paradis Honey Ltd. v. Canada*, 2017 FC 199; *Condon v. Canada*, 2015 FCA 159; *Gottfriedson v. Canada*, 2015 FC 706.

her decision to certify the aggregate damages question is consistent with *Brazeau,* in which Justice Perell found that *Charter* damages for vindication and deterrence did not require an assessment of individual harm. It is important to note that in *Brazeau,* after a common issues trial, Justice Perell made an $20 million aggregate damages award without any finding of common harm.[123] *Francis* and *Reddock* are two other class proceedings in which aggregate damages were awarded for *Charter* breaches. Contrary to the Appellant's argument, there is no need in the present case for the Plaintiff to provide a basis to calculate damages in the aggregate for the purpose of certification. The Plaintiff need only show that the issue of damages can be determined in common, and the case law confirms that it can where *Charter* breaches are alleged. In *Good,* the Ontario Court of Appeal explicitly held that aggregate damages in *Charter* claims can be determined without proof by class members:

> […] And, as the Divisional Court observed, it would be open to a common issues judge to determine that there was a base amount of damages that any member of the class (or subclass) was entitled to as compensation for breach of his or her rights. It wrote, at para. 73, that "[i]t does not require an individual assessment of each person's situation to determine that, if anyone is unlawfully detained in breach of their rights at common law or under s. 9 of the Charter, a minimum award of damages in a certain amount is justified".[124]

94. Similarly, the Motion Judge's decision to certify the punitive damages question as a common issue is also supported by appellate authority, particularly *Good,* wherein the Ontario Court of Appeal noted: "It is undisputed that whether a defendant's conduct merits an award of punitive damages can be certified as a common issue."[125]

F. The Motion Judge did not err in finding that a class action is the preferable procedure

95. The Appellant's issue with the Motion Judge's determination on this criteria is, once again, entirely based on the Appellant's recalibration of the Respondent's claim.[126]

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[123] *Brazeau v. Attorney General (Canada),* 2019 ONSC 1888, at para. 17, var'd 2020 ONCA 184, and 2020 ONSC 3272 at para. 35.
[124] *Good v. Toronto Police Services Board,* 2016 ONCA 250, at para. 75.
[125] *Good v. Toronto Police Services Board,* 2016 ONCA 250, at para. 76.
[126] This is evident from the Appellant's Factum at para. 84.

As repeatedly noted, the Motion Judge rightly appreciated that the claim is NOT about individual assaults and consequently does NOT require individual assessments before the common questions are answered, and that any individual assessments would be to determine if individual class members satisfy the criteria for individual damages.[127] The Appellant's arguments would only hold water if this were not a systemic case.

96. Furthermore, the Motion Judge correctly applied Rule 334.18, in that she accepted that she ought not to refuse to certify a proceeding simply because the relief claimed includes a claim for damages that may require an individual assessment after a determination of the common questions of law or fact.[128] Had she done otherwise, her decision would be vulnerable to challenge. Indeed, *Brazeau* has proceeded into individual assessments after common findings of liability and base-level aggregate damages.[129] This is how the drafters of class proceedings legislation designed the process.

97. The Motion Judge also rejected the Appellant's argument that individual determinations will be more appropriate. Her findings in this regard is informed by the overarching goals of class actions, namely judicial economy, access to justice and behaviour modification. She expressly found that a class action is likely the only way for the three goals of class actions to be realized.[130] Her decision in this regard is highly discretionary, and should be afforded deference. There is also no evidence to suggest that individual legal representation is available – in fact, the barriers to access to justice for this marginalized group are well known.

98. The Appellant's argument that the Class's claims are *too* serious for class action treatment ignores behaviour modification, is disingenuous and self-serving.

PART IV - ORDER REQUESTED

99. The Plaintiff requests that the appeal be dismissed.

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[127] Certification Reasons at para. 114, AB, Vol. 1, Tab 2, p. 43.
[128] Certification Reasons at para. 114, AB, Vol. 1, Tab 2, p. 43.
[129] *Brazeau v. Canada (Attorney General),* 2021 ONSC 1828
[130] Certification Reasons at para. 115, AB, Vol. Vol. 1, Tab 2, p. 43.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of December, 2021.

James Sayce / Sue Tan
KOSKIE MINSKY LLP

Lawyer for the Respondent

PART V - LIST OF AUTHORITIES

STATUTES AND REGULATION

Legislation

Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss. 1, 7, 12, 15

Regulation and Statutory Instruments

Federal Courts Rules, SOR/98-106, r. 334.26, 334.27

Royal Canadian Mounted Police Regulations, 2014, SOR/2014-281, s. 18 & Schedule, para 2.1.

CASES

Alberta v. Elder Advocates of Alberta Society, 2011 SCC 24

Attis v. Canada (Minister of Health), 2007 CanLII 15231 (ON SC)

BigEagle v. Canada, 2021 FC 504

Brake v. Attorney General (Canada), 2019 FCA 274

Brazeau v. Attorney General (Canada), 2016 ONSC 7836

Brazeau v. Canada (Attorney General) 2019 ONSC 1888

Brazeau v. Canada (Attorney General) 2020 ONSC 3272

Brazeau v. Canada (Attorney General), 2021 ONSC 1828

Brazeau v. Canada (Attorney General), 2020 ONCA 184

Burnell v. Canada (Fisheries and Oceans), 2014 BCSC 1071

Canada v. Greenwood, 2021 FCA 186

Canada v. John Doe, 2016 FCA 191

Canadian Civil Liberties Association v. Canada, 2019 ONCA 243

Cirillo v. Ontario, 2019 ONSC 3066

Cloud v. Canada (Attorney General), 2004 O.J. No. 4924 (C.A.)

Condon v. Canada, 2015 FCA 159

Daniells v. McLellan, 2017 ONSC 6887

Dine v. Biomet, 2015 ONSC 7050

Dine v. Biomet, 2016 ONSC 4039

Ewert v. Canada (Attorney General), 2016 BCSC 962

Francis v. Ontario, 2020 ONSC 1644

Francis v. Ontario, 2021 ONCA 197

Fraser v. Canada (Attorney General), 2020 SCC 28

Gariepy v. Shell Oil Company, [2002] O.J. No. 2766

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

Good v. Toronto Police Services Board, 2020 ONSC 6332

Gottfriedson v. Canada, 2015 FC 766

Francis v. Ontario, 2020 ONSC 1644

Francis v. Ontario, 2021 ONCA 197

Hayes v. Saint John (City), [2017] N.B.J. No. 57 (Q.B.), var'd 2018 NBCA 51

Hill v. Hamilton-Wentworth Regional Police Services Board, 2007 SCC 41

Hollick v. City of Toronto, 2001 SCC 68

Housen v. Nikolaisen, 2002 SCC 33

Johnson v. Ontario, 2016 ONSC 5314

Jost v. Canada (Attorney General), 2019 FC 1356

Jost v. Canada (Attorney General) 2020 FCA 212

MacLean v. R. [1973] SCR 2

Mahjoub v. Canada (Citizenship and Immigration), 2017 FCA 157

Manuge v. Canada, 2008 FC 624

McKay v. Rowe, Certification Order of the Honourable Justice Warkentin dated May 25, 2018

McLean v. Canada (Attorney General), 2018 FC 642

Nelson (City) v. Marchi, 2021 SCC 41

North v. British Columbia, 2020 BCSC 2044

Operation Dismantle v. The Queen, [1985] 1 SCR 441

Paradis Honey Ltd. v. Canada, 2017 FC 199

Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57

R v. Imperial Tobacco, 2011 SCC 42

R v. Sheppard, 2002 SCC 26

Riddle v. Canada, 2018 FC 641

Rumley v. British Columbia, 2001 SCC 69

Rumley v. B.C. (Province of), 2003 BCSC 234

Sun-Rype Products Ltd. v. Archer Daniels Midland Company, 2013 SCC 58

Thorburn v. British Columbia (Public Safety and Solicitor General), 2013 BCCA 480

Thorpe v. Honda Canada Inc., 2011 SKQB 72

Tidd v. Regional Health Authority A & Province of New Brunswick, 2021 NBQB 208 (as yet unreported), leave to appeal ref'd 2021 CanLII 121098 (NBCA)

Tippett v. Canada, 2019 FC 869

Vancouver (City) v. Ward, 2010 SCC 27

Walls et al. v. Bayer Inc., 2005 MBQB 3, leave to appeal to C.A. ref'd 2005 MBCA 93, leave to appeal to S.C.C. ref'd [2005] S.C.C.A. No. 409

Wenham v. Canada (Attorney General), 2018 FCA 199

Western Canadian Shopping Centres Inc. v Dutton, 2001 SCC 46

Wheadon v. Bayer Inc., 2004 NLSCTD 72, leave to appeal to C.A. ref'd 2005 NLCA 20, leave to appeal to S.C.C. ref'd [2005] S.C.C.A. No. 211

SCHEDULE "A"
CLAIMS BASED CLASS DEFINITIONS

CASE	CLASS DEFINITION
Hayes v. Saint John (City), [2017] N.B.J. No. 57 (Q.B.), var'd 2018 NBCA 51.	All persons who allege that they suffered injury, loss or damage as a result of being sexually abused by Kenneth Estabrooks in the city of Saint John, New Brunswick between January 1, 1953 and December 31, 1983
Wheadon v. Bayer Inc., 2004 NLSCTD 72, leave to appeal to C.A. ref'd 2005 NLCA 20, leave to appeal to S.C.C. ref'd [2005] S.C.C.A. No. 211.	(i) Persons resident in Newfoundland and Labrador who were prescribed and ingested Baycol and who claim personal injury as a result ("Provincial Class") (ii) Persons who have a derivative claim on account of a family relationship with a person in (i) ("Provincial Family Class") (iii) Persons resident in Nova Scotia, New Brunswick and Prince Edward Island who were prescribed and ingested Baycol, who claim personal injury as a result, and who opt-in to this proceeding ("Atlantic Class") (iv) Persons who have a derivative claim on account of a family relationship with a person in (iii), who opt-in to this proceeding ("Atlantic Family Class")
Walls et al. v. Bayer Inc., 2005 MBQB 3, leave to appeal to C.A. ref'd 2005 MBCA 93, leave to appeal to S.C.C. ref'd [2005] S.C.C.A. No. 409.	(a) all persons resident in Manitoba and elsewhere in Canada who were prescribed and ingested Baycol which was purchased in Canada and who claim personal injury as a result ("Injury Class") (b) all persons who have a derivative claim on account of a family relationship with a person described in paragraph (a) ("Family Class"); and (c) such other persons as the court recognizes or directs. Excluded from the Injury Class are persons resident in Quebec, persons resident in a province other than Manitoba who are members of an already certified class action in that other province, and as well, persons who are entitled to participate in a settlement approved by the Ontario and British Columbia courts (and the Quebec courts as and when approval is given).

Thorpe v. Honda Canada Inc., 2011 SKQB 72.	Persons who owned or leased 2006 or 2007 model year Honda Civic (except Si and Hybrid) automobiles (the "Class Vehicles") in Canada and who claim to have suffered damages as a result of irregular and premature tire wear as a result of geometry-related rear suspension defect.
McKay v. Rowe, Certification Order of the Honourable Justice Warkentin dated May 25, 2018.	All persons who were alive as of May 11, 2015 who allege that they were sexually abused by Ralph Rowe in the geographic boundaries of the Anglican Diocese of Keewatin between 1975 and 1987 except the Excluded Persons ("Sexual Assault Class Members"); and All persons who were parents of Sexual Assault Class Members as of the date of the alleged abuse of their child, who were alive as at May 11, 2015, that have standing pursuant to s. 61(1) of the Family Law Act, R.S.O. 1990, c. F.3, or equivalent legislation in other provinces and territories as set out in Schedule "A" (the "Family Law Claimants"). "Excluded Persons" are all Sexual Assault Class Members and their respective Family Law Claimants who, as of May 11, 2017 had fully and finally settled their claims against the Synod of the Diocese of Keewatin and Scouts Canada (a.k.a. Scouts of Canada a.k.a. Boy Scouts of Canada) and released these entities with respect to any and all alleged abuse by Ralph Rowe.
Burnell v. Canada (Fisheries and Oceans), 2014 BCSC 1071.	Subclass defined as: All owners of fishing vessels with a Category L Commercial Halibut License to fish for halibut issued by the Minister of Fisheries and Oceans ("Licensed Vessels") between 2001 and 2006 inclusive (the "Material Time") for which quota was purchased from PHMA and: (a) who at any time during the Material Time (i) were directors of PHMA; or (ii) were corporations in which a PHMA director owned more than 50% of the shares; or (b) who claim that they were in a partnership with a PHMA director in relation to a Licensed Vessel and the

	purchase of quota from PHMA at any time during the material Time

Court File No. A-188-21

FEDERAL COURT OF APPEAL

THE ATTORNEY GENERAL OF CANADA

Appellant

- and -

DIANE NASOGALUAK AS LITIGATION GUARDIAN OF JOE DAVID NASOGALUAK

Respondent

Class Proceeding

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