SUPREME COURT OF NOVA SCOTIA

Citation: *Elwin v. Nova Scotia Home for Coloured Children*, 2013 NSSC 411

Date: 20131212
Docket: Hfx No. 343536
Registry: Halifax

Between:

June Elwin, Harriet Johnson, and Deanna Smith

Plaintiffs

v.

The Nova Scotia Home for Colored Children, a body corporate and the Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia

Defendants

Judge:	The Honourable Justice Arthur LeBlanc
Heard:	March 28, 2013; April 2 and 29, 2013; June 10, 11, 12, 13 and 14, 2013; and July 8, 9, 10, 11 and 12, 2013, in Halifax, Nova Scotia
Final Written Submissions:	August 30, 2013
Counsel:	Ray Wagner, Q.C. and Michael Dull, for the Plaintiff Catherine Lunn and Peter McVey, for the Defendant Attorney General of Nova Scotia John Kulik, Q.C. and Ward Branch, for the Defendant Nova Scotia Home for Colored Children – Appearing on settlement as between Plaintiffs and The Nova Scotia Home for Colored Children

By the Court:

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Introduction

[1] The plaintiffs, June Elwin, Harriet Johnson, and Deanna Smith, each allege that, for a number of years during their respective childhoods, they were wards of the Province of Nova Scotia and were placed in the Nova Scotia Home for Coloured Children (hereafter “NSHCC” or “the Home”). They further allege that during their stay at the Home, they suffered physical, mental, and sexual abuse.

They have brought an action against the NSHCC and the Attorney General of Nova Scotia seeking damages for their injuries, and they now seek to have it certified as a class proceeding representing all “residents or former residents who, as wards of the Province, were placed in the NSHCC as residents.” In addition to general and special damages for negligence and breach of fiduciary duty, the plaintiffs seek declaratory relief, aggravated, punitive, and exemplary damages, interest and costs.

[2] The NSHCC has chosen to settle with the plaintiffs and that settlement has been approved. Accordingly, this certification decision will focus only on the Province as a proposed defendant.

Issues

[3] The issue is whether the class proceeding should be certified.

Law on Certification

[4] Class proceedings are powerful procedural tools that have many advantages over multiple individual actions. In *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, McLachlin C.J.C. identified as most important the promotion of: (1) access to justice; (2) judicial economy; and (3) behaviour modification (para. 15).

[5] Litigants do not have an automatic right to bring class proceedings. The legislation requires court certification. This is a procedural determination. The Chief Justice said in *Hollick, supra*, that the question on certification "is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action" (para. 16). The *Class Proceedings Act*, S.N.S. 2007, c. 28, sets out five criteria to be satisfied before the court will certify a class proceeding. Subsection 7(1) provides:

> **7 (1)** The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
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> **(a)** the pleadings disclose or the notice of application discloses a cause of action;
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> **(b)** there is an identifiable class of two or more persons that would be represented by a representative party;
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> **(c)** the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
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> **(d)** a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
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> **(e)** there is a representative party who
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> > **(i)** would fairly and adequately represent the interests of the class,
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> > **(ii)** has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
> >
> > **(iii)** does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

[6] With respect to s. 7(1)(a), the question is answered only by reference to the pleadings, and evidence is neither required nor admissible to aid in that determination. The requirement that the pleadings disclose a clause of action is "governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is 'plain and obvious' that no claim exists": *Hollick*, *supra*, at para. 25.

[7] With respect to ss. 7(1)(b)-(e), by contrast, the plaintiff has an evidentiary burden. In *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379, [1998] O.J. No. 2694 (Gen. Div.), affirmed at 42 O.R. (3d) 576, Sharpe J. said, at para. 4:

> … At a minimum, the court must be satisfied that there is a class of more [than] one person and that the issues raised by the members of the class satisfy the requirement that they raise common issues, and that a class proceeding would be the preferable procedure for the resolution of the common issues. In most class proceedings, these factual matters may well be obvious and require little evidence. Most class [proceedings] arise from situations where the fact of wide-spread harm or complaint is inherent in the claim itself… I do not say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. I do say, however, that there must, at the very least, be some basis in fact for the court to conclude that at least one other claim exists and some basis in fact for the court to assess of the nature of those claims that exist that will enable to court to determine whether the common issue and preferability requirements are satisfied. [Emphasis added.]

[8] Similarly, in *Hollick*, *supra*, the Chief Justice stated that the plaintiff "must show some basis in fact for each of the certification requirements" aside from the requirement to disclose a cause of action (para. 25).

[9] I will now review the considerations set out in s. 7(1) of the *Class Proceedings Act*.

Cause of Action: s. 7(1)(a)

[10] The first requirement for certification is that: "the pleadings disclose or the notice of application discloses a cause of action": *Class Proceedings Act*, s. 7(1)(a). The pleading in question is the Third Amended Statement of Claim (hereafter "the Statement of Claim"). Although only one cause of action is necessary to certify a class, the court must assess all of the causes of action pleaded in order to determine whether they disclose a cause of action: *Morrison Estate v. Nova Scotia (Attorney General)*, 2011 NSCA 68, at para. 28. It would be contrary to judicial economy to certify a cause of action and answer the possibly complex common issues raised by it if it is certain to fail. A class can only be certified on the basis of causes of action that pass the threshold test, and causes of action that do not must be struck out: see, e.g., *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24.

[11] The test under s. 7(1)(a) is not an analysis of the merits. In *Hollick*, *supra*, McLachlin C.J.C. considered a substantively identical provision in the Ontario *Class Proceedings Act* and concluded that this requirement is “governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is ‘plain and obvious’ that no claim exists” (para. 25). The same test applies under the Nova Scotia legislation, and that courts are expected to be sensitive to the possibility of amending pleadings: *Morrison Estate*, *supra* at paras. 26-27. The authorities thus import the test for summary judgment on the pleadings (formerly striking a pleading for failure to disclose a cause of action), with the main difference being that the onus lies on the plaintiff. In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, the Supreme Court of Canada considered the British Columbia rule on that issue and Wilson J. recited the test as follows at 980:

> [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

[12] This passage has been applied to Nova Scotia's rule on striking pleadings: see, e.g., *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44 at paras. 17-18.

[13] In the recent decision in *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143, the Court of Appeal confirmed that the *Class Proceedings Act* is "procedural not substantive. It does not relax the standard that pleadings must disclose a cause of action on their face. The test is not onerous. Pleadings are adequate provided that it is not 'plain and obvious' that the cause of action will fail" (para. 53). The statement of claim "must be read generously to allow for inadequacies owing to drafting frailties and the respondents' lack of access to documents and discovery…" (para. 54).

[14] Some questions of law can be decided on a motion for summary judgment on the pleadings. Rule 13.03 permits the court to determine a question of law where the judge is satisfied that "the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination" and that "the outcome of the motion depends entirely on the answer to the question": Rule 13.03(a) and (b). I also take note of the general principles of pleadings set out in Rule 38.02.

[15] Considering the similarity between the test applied on summary judgment on the pleadings and that under s. 7(1)(a) of the *Class Proceedings Act*, I believe it would be appropriate to apply the same criteria here, although, naturally, the answer would only need to determine the outcome of the s. 7(1)(a) analysis, not the entire motion for certification.

(1) The *Proceedings against the Crown Act*

[16] The Attorney General objects the class period commencing in 1921, arguing that no action could lie against the Crown for conduct occurring before the *Proceedings against the Crown Act*, S.N.S. 1951, c. 8, came into force on November 1, 1951. Section 27 of the 1951 Act provided that "[n]o proceedings shall be brought against the Crown under this Act in respect of any act or omission, transaction, matter or thing arising, occurring or existing before the date on which this Act comes into force." (The Attorney General takes the view that this point pertains to the s. 7(1)(b) analysis. I am satisfied that it is a matter that can be resolved as a question of law on the basis of the pleadings, and is appropriately dealt with at the outset. It concerns both the viability of the causes of action pleaded and the requirement for an identifiable class.)

[17] The plaintiffs concede that claims in negligence are barred prior to the 1951 Act. They also acknowledge that damages for equitable breaches cannot be ordered for that period. As such, no remedy in damages is available for conduct before that date. The plaintiffs submit, however, that declaratory relief may be ordered on account of breach of fiduciary duty by the Province, its servants, agents, or employees, as pleaded at para. 45(b) of the Statement of Claim. I am satisfied that this is a question of law that can be resolved on the pleadings. It is appropriate to determine if it is plain and obvious that no cause of action can be pursued against the Province for alleged breaches of fiduciary duty occurring before the *Proceedings against the Crown Act* came into force.

[18] The plaintiffs rely on *M.C.C. v. Canada (Attorney General)*(2003), 65 O.R. (3d) 492, [2003] O.J. No. 2698 (Div. Ct.)(*sub nom. Cloud v. Canada (Attorney General*), where Cullity J., dissenting, would have certified a class period commencing in 1922 for a claim for damages for breach of fiduciary duty on the basis that it could have been brought under the *Exchequer Court Act* prior to the federal *Crown Liability Act 1953* (para. 42). The Ontario Court of Appeal reversed the majority decision, affirming much of Justice Cullity's analysis, without reference to the *Crown Liability Act* issue, which appears to have been conceded:

(2004), 247 D.L.R. (4th) 667, [2004] O.J. No. 4924, at paras. 6, 42-43. Leave to appeal to the Supreme Court of Canada was denied: [2005] S.C.C.A. No. 50. According to the plaintiffs, *Cloud* suggests that Crown proceedings legislation does not provide immunity from claims for declaratory relief related to breach of trust. In fact, Justice Cullity made no reference to purely declaratory relief.

[19] The Attorney General cites *Richard v. British Columbia*, 2008 BCSC 254, affirmed at 2009 BCCA 185, a case dealing with abuse at a provincial institution in British Columbia. The class period for claims in both tort and breach of fiduciary duty was limited to claims arising after the British Columbia *Crown Proceedings Act* came into force. It was thus plain and obvious that no cause of action before that date could survive.

[20] The plaintiffs argue that the 1951 *Proceedings against the Crown Act* authorized the assertion of tort claims against the Crown, though not equitable claims (see s. 5(1)). As such, it is argued, declaratory relief for breach of fiduciary duty is not sought "under" the Act (as per s. 27), and is not barred. Like the Ontario Act (and unlike the British Columbia Act), the 1951 Act includes the words "under this Act." The plaintiffs say it is not plain and obvious that declaratory relief is unavailable.

[21] The question of the availability of declaratory relief was considered in *Slark (Litigation Guardian of) v. Ontario*, 2010 ONSC 1726, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.), where Cullity J. held that a claim for breach of fiduciary duty was not barred, because it could have been pursued by petition of right. The statement of claim in *Slark* sought declarations both of liability and of entitlement to damages. Justice Cullity set out the relevant provisions of Ontario's *Proceedings Against the Crown Act*, S.O. 1962-63, c. 109:

> **28.** No proceedings shall be brought against the Crown under this Act in respect of any act or omission, transaction, matter or thing occurring or existing before the first day of September, 1963.
>
> **29(1).** A claim against the Crown existing on the first day of September, 1963 that, if this Act had not been passed, might have been enforced by petition of right may be proceeded with by petition of right subject to the grant of a fiat by the Lieutenant Governor as if this Act had not been passed.

[22] Nova Scotia has no provision equivalent to s. 29(1) of the Ontario Act. Proceeding by petition of right has never been part of Nova Scotia law: *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)* (1995), 137 N.S.R. (2d) 197, [1995] N.S.J. No. 12 (C.A.), at para. 11. Even if it had been, s. 25(1) of the *Proceedings against the Crown Act* provides that "[e]xcept as provided in this Act, proceedings against the Crown are abolished." Subsection 25(1) has no equivalent in the Ontario legislation. Reading s. 25(1) alongside s. 27 of the 1951 Act, it

appears that there is no way for residents who left the home before the *Proceedings against the Crown Act* came into force to advance a cause of action against the Province in negligence or breach of fiduciary duty. It is plain and obvious that such claims will fail.

[23] Alternatively, the plaintiffs submit, claims for breach of fiduciary duty would be governed by section 3 of the *Proceedings Against the Crown Act*, which merely removed the requirement for Crown consent. The specific reference appears to be to s. 3(3), which provides that "[s]ubject to this Act, where a person has a claim against an officer of the Crown or a corporation owned or controlled by the Crown that, if this Act had not been passed, might be enforced subject to the consent of an officer of the Crown, then the claim may be enforced as of right without such consent." The plaintiffs are not claiming against an officer of the Crown or a Crown corporation.

[24] The plaintiffs go on to argue that declaratory relief is available against the Crown without resort to the *Proceedings against the Crown Act*, and that it would not have required Petition of Right before 1951. They cite *MacNeil v. Nova Scotia Board of Censors* (1974), 9 N.S.R. (2d) 483, 1974 CarswellNS 161 (S.C.A.D.), where the respondent sought a declaration that certain statutory provisions were

ultra vires. The Attorney General argued that the requirements of the *Proceedings against the Crown Act* were not met. MacDonald J.A. stated that the Act

> seems to me to be restricted by s. 3 to claims arising out of torts, contracts and cases in which the lands, goods or money of the plaintiff are in the possession of the Crown. The application in issue does not fall within any of such classes; rather it is as the trial judge found:
>
> > ... a matter which deals with the rights of the public generally, and this type of proceeding has always been recognized by the Courts in the past...

[25] The court cited Rule 5.14 (of the *Civil Procedure Rules (1972)*), which provided that no "proceeding shall be open to objection on the ground that only a declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or could be claimed." (The current *Civil Procedure Rules* provide, at Rule 38.07(5), that a "party making a claim in an action or an application may plead or apply for a declaration of the legal status or right of a person.") MacDonald J.A. concluded that this Rule provided a general power to make a declaration at the instance of an interested party, regardless of whether there was a cause of action (para. 21). He said, at para. 24:

> It is my opinion, based on the foregoing and the reasons given by the trial judge that a proceeding seeking declaratory relief of the type sought in this case is not the kind of proceeding within the rule requiring petition of right to assert a declaratory remedy against the Crown and thus is not a "proceeding" to which the *Proceedings Against the Crown Act* of this province applies.

[26] The Appeal Division also held that plaintiffs seeking a declaratory judgment would not have been bound to proceed by Petition of Right if the proceeding was an action "which only indirectly affect the Crown and in which the Attorney General is but a nominal defendant…" By way of example, MacDonald J.A. cited *Tuxedo Holding Company v. University of Manitoba*, [1930] 3 D.L.R. 250 (Man. C.A.), where the court quoted *Robertson on Civil Proceedings* (1908), at 477, to the effect that where "the rights of the Crown are immediately in question, and the proceedings against the Crown are possible, they must be taken by petition of right, but where the interests of the Crown are only incidentally concerned in proceedings, the Attorney-General on behalf of the Crown may and must be made a defendant." (*MacNeil* was affirmed by the Supreme Court of Canada without reference to this point: [1976] 2 S.C.R. 265.)

[27] The Attorney General suggests that *MacNeil* was wrongly decided. Further, there are factual distinctions. The matter at issue in *MacNeil* was the constitutionality of a statute, arising in an administrative, rather than litigation, context. Further, the Attorney General alleges, the Crown is directly affected by a declaration of invalidity of a statute. Specifically, it argues, the Crown's rights are not "indirectly affected" as described in *Dyson v. Attorney-General*, [1911] K.B.

410 (C.A.). In this case, it is argued, the claim directly affects the reputation of the Crown. Further, the Attorney General says, the pleadings continue to call for monetary damages. The plaintiffs do not press that claim, however, and the Attorney General points to no authority for the proposition that purely declaratory relief would directly affect the Crown's rights. The Attorney General does not dispute that declaratory relief would have been available for claims that did not directly affect the "interests of the Crown" (as described in *Dyson*).

[28] I admit to some hesitation as to whether the relief requested can be considered a declaration of "legal status or right" as contemplated by Rule 38.07(5). However, the Attorney General appears to accept that the *Dyson* route would render declarations with an indirect effect on the Crown available during the relevant time period. I am not convinced that a declaration of the kind requested would directly affect the Crown. On the materials presented, I cannot conclude that a limited declaration of the kind sought in the pleading would be unavailable. I note the remarks of Lazar Sarna in *The Law of Declaratory Judgments*, 3d ed. (Thomson Carswell, 2007), at 27-28, that the courts

> have on occasion assumed jurisdiction to make a declaration which is devoid of legal effect, but likely to have some practical effect… While the applicant may have no real economic or patrimonial stake in obtaining the judgment, judicial sympathy has been forthcoming: especially where relief might effectively remove a slur upon the

> applicant's character, provide corrective or practical guidance to administrative officials, lead to a possible practical result, or simply declare a breach of law for the intrinsic social good.

[29] As such, I am not satisfied that it is plain and obvious that the plaintiffs' claim for purely declaratory relief for the period prior to 1951 is bound to fail.

[30] As an aside, the foregoing discussion makes it necessary to comment on one aspect of the 1951 *Proceedings Against the Crown Act*, the effectiveness of s. 27. Although there appears to be no statute repealing it, s. 27 does not appear in the current consolidated version of the *Proceedings against the Crown Act*, R.S.N.S. 1989, c. 360. It appears to have been omitted from the 1967 *Revised Statutes*, an error inherited by the 1989 revision. A similar omission occurred with an equivalent provision in Ontario. In *S.M. v. Ontario* (2003), 67 O.R. (3d) 97, [2003] O.J. No. 3236 (C.A.), the court held that the relevant sections remained in force. There are differences from the Nova Scotia circumstances; for instance, in Ontario's 1980 revision, the relevant sections were expressly named in a Schedule listing unrepealed and unconsolidated provisions (para. 16). In this case, Schedule A lists "the whole" of the *Proceedings against the Crown Act*, R.S.N.S. 1954, c. 225, among the statutes repealed by R.S.N.S. 1967. Subsection 5(3) of the *Statute Revision Act*, S.N.S. 1964, c. 11, says that any statutes so listed were repealed and replaced by the versions in R.S.N.S. 1967. Arguably, therefore, the absence of

section 27 from the 1967 revision means that it was repealed entirely. On the other hand, such a substantive change would be beyond the mandate of the revisers under s. 3 of the *Statute Revision Act*. I do not think it wise to give such an apparent oversight substantive effect when the result would be a substantive change to the legislation: see *R. v. Popovic and Askov*, [1976] 2 S.C.R. 308 at 321-323. In my view, s. 27 remains in force.

(2) Systemic Negligence

[31] The plaintiffs allege that the Province, by actions and omissions, negligently created or maintained a system inadequate to protect the plaintiff class from the harm alleged. Similar causes of action have been certified in other cases for alleged victims of abuse in institutional settings. The Attorney General admits that the allegations of systemic negligence are sufficient for plaintiffs who were wards of the Province, but disputes this ground for the two remaining subclasses. According to the Attorney General, the legislation that governed the Home in particular, and child protection generally, over the past century makes it plain and obvious that the Province owed no duty of care to children who were wards of Children's Aid Societies or were placed in the Home by other means.

[32] Each representative plaintiff has pleaded that they were a ward of the Province. This assertion must be assumed to be true for the purposes of the motion. For example, the June Elwin Statement of Claim says that "[f]rom approximately 1942 to 1953, June Elwin ordinarily resided at the NSHCC under the wardship (i.e. care and control) of the Province of Nova Scotia" (para. 9). There are similar paragraphs for the other plaintiffs.

[33] The plaintiffs argue that the Attorney General's admission that the Province owed a duty of care to its wards, and that the other requirements for negligence are pleaded sufficiently, ends the analysis, since each representative plaintiff has pleaded that they were a ward. They say the Court is not required to assess whether the pleadings disclose a cause of action for non-wards, and that a representative plaintiff can assert a cause of action on their own behalf that is not personally asserted on behalf of each class member: see *Matoni v. C.B.S. Interactive Multimedia Inc.*, 2008 CarswellOnt 228 (Sup. Ct. J.), at para. 76. The question, however, is not whether the representative can assert a cause of action for a subclass to which they do not belong; it is whether that cause of action requires a foundation in the pleadings. I am governed by *Morrison Estate*, *supra*, which

requires me "to consider *any and all* causes of action pleaded" (para. 28). The Court of Appeal also said, at para. 25:

> [I]t is illogical to suggest that one plaintiff must only establish one cause of action, and a certification judge must review only those parts of the pleadings to determine they establish one cause of action against one defendant, where multiple causes of action are set out by multiple plaintiffs (potentially representing multiple classes or sub-classes) against multiple defendants.

[34] Although this does not expressly address the situation of plaintiffs who plead a cause of action for a subclass to which they do not belong, the reasoning demands that the viability of such causes of action be assessed. The question arises as to whether I should determine at the certification stage whether members of the proposed subclasses were wards of the Province.

[35] In the Statement of Claim, the plaintiffs identify the class as "themselves and a Class of other residents or former residents who, as wards of the Province, were placed in the NSHCC as residents." They add that the class would be further defined in the certification motion (para. 20). In the original Notice of Motion for Certification the proposed classes were (1) former residents who, as wards of the Province, were placed in the NSHCC as residents; and (2) former residents who resided in the Home but who were not wards of the Province. Several of the proposed common issues requested answers for both proposed classes. It was to

this classification that the Attorney General was responding in its initial brief. In my view it was open to the Attorney General to argue that members of the second class had no cause of action.

[36] The plaintiffs subsequently amended the Notice of Motion. They now propose three subclasses distinguished not by wardship status but by how the class members arrived at the Home. As they are now framed, the proposed subclasses are: (1) former residents of the Home placed there by the Province; (2) former residents of the Home placed there by children's aid societies (other than the Home itself); and (3) former residents of the Home placed there by any means other than (1) or (2).

[37] The Attorney General says it is proper at this stage to assess whether a duty of care is owed to non-wards. In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, where, McLachlin C.J.C. emphasized that a motion to strike is not concerned with possible future evidentiary developments, but with what has actually been pleaded. New developments are properly dealt with by amending the pleadings (paras. 23-24). It is appropriate to conduct a duty of care analysis on the assumption that the facts as pleaded are true.

[38] The plaintiffs say the Attorney General seeks a finding of fact that wards of child protection agencies were not wards of the Province. They argue that this cannot be done, since the pleadings allege systematic negligence by child protection agencies. They also say the Attorney General cannot, at this stage, seek an interpretation of the historical statutes in order to determine the status and attributes of child protection agencies, since findings of fact or law that the child protection agencies were not acting as agents of the Province will require consideration not only of the statutes, but of evidence of the conduct of the Province and its relationship with the child protection agencies.

[39] I cannot disregard the question of wardship at this stage. The plaintiffs plead that the Home was empowered as a Children's Aid Society (para. 24), but they do not specifically plead that child protection agencies are agents of the Province. Paragraph 23 states, *inter alia*, that "the Province of Nova Scotia … is deemed to include all its … agents..." This general reference to "agents" is not an allegation that Children's Aid Societies are among them. As a proposition not pleaded by the plaintiffs, I am not required to assume its truth.

[40] It is also not clear that the plaintiffs have actually pleaded that wards of Children's Aid Societies were wards of the Province. Paragraph 20 of the

Statement of Claim defines the class as "residents or former residents who, *as wards of the Province*, were placed in the NSHCC as residents" (emphasis added). It is unclear whether the class is defined to exclude non-wards, or whether this is a factual allegation that all former residents were wards of the Province by virtue of their residency at the Home. In my view, I cannot adopt the latter interpretation. The Attorney General is entitled to know the case it has to meet. The pleading must provide enough information to identify the class to whom the defendant is alleged to be liable. If the plaintiffs intended to plead that all former residents were wards, this ought to have been done explicitly. Paragraph 20 incorporates by reference the three subclasses identified in the Notice of Motion for Certification. This description is objective on its face, but does not fully address the fact that a cause of action has only been pleaded for wards. If certified, there is still the potential to bind individuals to the result of an action before they can determine whether they are wards.

[41] Paragraph 23 pleads that the Province "was responsible for the care, maintenance, education, protection and supervision of the Plaintiffs and Class Members *as wards in custody of the Province*" (emphasis added). This paragraph adequately pleads that the Province has a relationship with those class members

who were its wards. A duty of care in such situations has been recognized at law: *Broome v. Prince Edward Island*, 2009 PECA 1, affirmed at 2010 SCC 11. The Attorney General has admitted to such a duty, and admits that the Statement of Claim adequately pleads the elements of a cause of action in negligence for wards. However, there does not appear to be a pleading of a duty of care for non-wards. I cannot, therefore, assume this to be true for purposes of the motion.

[42] For residents who were under the guardianship of the Province, it is objectively verifiable whether they were wards. For individuals under the guardianship of Children's Aid Societies, this can be determined on the basis of whether those societies were agents of the Province. For individuals under another form of guardianship, wardship status could also be determined on the basis of whether the Home itself was an agent of the Province. (That is not to say that agency is the only way the Province could be attributed with a duty toward the residents of the Home.)

[43] As such, the proposed subclasses cannot be certified without determining whether the class members were wards of the Province. If this is a pure question of fact, then I must reject certification except for the representative plaintiffs and the first proposed subclass, because only the representative plaintiffs have pleaded that

they were wards of the Province, and only for the first subclass is it objectively determinable whether they were wards of the Province. For the other two subclasses, it is possible to frame the issue of wardship as a question of law which can be determined on the pleadings.

[44] An entity would only have the authority to place a child in the Home (1) if it was the legal guardian or (2) it acted on the instructions of the legal guardian. In my view, therefore, the pertinent distinction between classes is legal guardianship. This distinction does not potentially include individuals who would only know to which group they belong after the resolution of the proceeding. I would reconfigure the relevant groups as:

> (1) Former residents of the NSHCC for whom the Province was the direct legal guardian;
>
> (2) Former residents of the NSHCC for whom a provincial Children's Aid Society was the direct legal guardian; and
>
> (3) Former residents of the NSHCC for whom neither the Province nor a provincial Children's Aid Society was the direct legal guardian.

[45] There are several questions to be addressed by reference to the statutes, including whether Children's Aid Societies were agents of the Province when caring for their wards, and whether the Home was an agent of the Province when

caring for its residents. On the pleadings, the question is whether the statutory framework created agency relationships.

[46] The plaintiffs maintain that the societies were agents of the Province. They submit that the Province had oversight of all child welfare services, whether through legislation, regulation, or funding. Child welfare services were provided directly through Provincial offices or through the Province's agents, namely children's aid societies, to which it sometimes delegated its authority. The plaintiffs argue that the Province had ultimate legal responsibility for guardianship of wards under its, or its agents', care, and was obliged to ensure that the requirements of child welfare legislation were observed. This responsibility, the plaintiffs say, was equivalent to "that of a parent or guardian for the child's care and custody…." Further, the plaintiffs say, the Province had "responsibilities vis-à-vis organizing its agents and visiting and inspecting orphanages."

[47] The child welfare legislation of the first half of the twentieth century made Children's Aid Societies fundamentally local institutions, with funding primarily from the relevant municipalities, but a provincial supervisory role was beginning to evolve. As early as 1912, the Superintendent of Neglected and Dependent Children (later the Director of Child Welfare) had the duty to "encourage and assist in the

organization and establishment in the various parts of the province of Children's Aid Societies" and to "to advise Children's Aid Societies and committees thereof, and to assist and instruct them, whenever necessary, in the performance of their duties": *Children's Protection Act*, S.N.S. 1912, c. 4, ss. 7(a) and (d). The Superintendent possessed "throughout the Province … all the powers conferred by this act upon Children's Aid Societies": s. 8. The Superintendent's power was expanded in 1913, with the granting of the power to take delivery of an apprehended child and place them in a temporary home or shelters: S.N.S. 1913. C. 55. s. 5, amending s. 18 of the 1912 Act. Where a child was committed to the care of a Children's Aid Society, the Society became the legal guardian of that child, and was obliged to "use special diligence in providing a suitable home for such child," where the child would receive, *inter alia*, "kind and proper treatment": S.N. S. 1912, c. 21.

[48] Under the 1912 Act, the Societies' constitutions and by-laws required approval of the Governor-in-Council: s. 11. Pursuant to subsequent amendments, societies were authorized to amend their by-laws (S.N.S. 1920, c. 45, s. 1) and constitutions (S.N.S. 1926, c. 52, s. 7) without the approval of the Governor-in-Council. Funding of societies and maintenance for children in care remained

municipal responsibilities: S.N.S. 1912, c. 4, s. 22; S.N.S. 1913, c. 55, ss. 1 and 6; S.N.S. 1915, c. 34, s. 1.

[49] The Governor-in-Council was later granted the power to determine the territorial jurisdiction of children's aid societies: S.N.S. 1919, c. 63, s. 1, amending S.N.S. 1917, c. 2, s. 15. Under the 1917 *Children's Protection Act*, S.N.S. 1917, c. 2, the Superintendent was authorized to "exercise such care of and control over neglected and delinquent children as by this Act is required" (s. 9(b)) and was granted status as a children's aid society (s. 10(1)), with powers that included the duty to take care and control of children if a society had its incorporation revoked (s.16).

[50] A further expansion of the Province's powers to deal with children's aid societies came with amendments to the *Children's Protection Act* in S.N.S. 1942, c. 25, s. 3, pursuant to which the Governor-in-Council was permitted to make regulations prescribing standards and methods of work of children's aid societies in order to qualify for provincial payments out of the consolidated revenue fund; qualification of agents for societies; territorial jurisdiction; information and evidence to be submitted in order to receive provincial funding; and timing of such payments. The Governor-in-Council made regulations in 1942: N.S. Reg. 6/42.

[51] For the purposes of the class period in this case, the most relevant legislation commences with the *Child Welfare Act*, S.N.S. 1950, c. 2, which entered force on January 1, 1951. The Act provided for municipal funding of general expenses, in addition to Provincial grants and subsidies: ss. 15 and 16. The Province remained responsible for wards committed to care in areas without local societies: ss. 5, 29, 38. The new Act maintained the requirement for the Governor-in-Council to approve a society's constitution and by-laws (including amendments), and to regulate such matters as agents' qualifications and standards and methods of work necessary to qualify for funding: ss. 9-10.

[52] Under the 1950 Act the Governor-in-Council was authorized to "by order declare that on or after a day to be named therein a Society shall not be competent to accept the care and custody of neglected children": s. 14(1). All children committed to the care and custody of such a Society would subsequently be deemed to be under the care and custody of the Director: s. 14(2). As such, the regulation-making power was supplemented by the power to revoke the societies' powers. In 1952, the Province was granted to power to stop provincial payments to societies where necessary to bring about compliance with "standards and methods of work" demanded by regulation: S.N.S. 1952, c. 78, s. 2. Therefore, by 1952 the

Province had the power to withdraw funding where Societies did not comply with provincially-determined standards, and ultimately to revoke a Society's powers.

[53] The Province's regulatory power was expanded in 1959 to permit provincial evaluation of the work of children's aid societies, with the continued possibility of payment being cut off if the Minister was not satisfied that the prescribed "standards and methods of work" were being met: S.N.S 1959, s. 15, ss. 1, 2. In 1961 the power to approve amendments to societies' constitutions and by-laws was transferred from the Governor-in-Council to the Minister: S.N.S. 1961, c. 17, s. 2.

[54] The 1950 Act additionally provided for ministerial approval (at s. 51) of "child caring institutions", being a building or other accommodation "wherein care, food and lodging are furnished, with or without charge, for two or more children living apart from their parents or guardians, or any place of accommodation designated as a child caring institution by the Minister": s. 49. Such an institution was obliged to "meet and maintain the standards prescribed by the Governor-in-Council by regulation" in order to receive funding from the Province: s. 54. More generally, the Director was required to "assist and encourage child caring institutions in the improvement of their accommodation, equipment, staff and policies, and the nutrition, education, recreations, medical attention, and

general care provided to the children therein. By regulations passed in 1959, the Director of Child Welfare was assigned the duty of inspecting child caring institutions, in addition to the duty to "encourage and advise" such institutions in providing "adequate care and facilities: N.S. Reg. 4/59, ss. 1(c) and (f). The regulations also, *inter alia*, imposed standards for the physical condition of the buildings, and imposed standards of nutrition: ss. 11-15. There is a general reference to the Home as a "care facility" in which the Province placed children (para. 36(g)), and there is an allegation that the Province "chose to provide less than appropriate financing to the NSHCC when compared to other homes, schools, and institutions of a similar kind" (para. 36(m)). Nothing in the pleadings amounts to an assertion that the Home was a "child caring institution" within the meaning of the legislation, however.

[55] The *Children's Services Act*, S.N.S. 1976, c. 8, replaced the 1950 *Child Welfare Act*. The traditional structure of local jurisdiction for children's aid societies survived, still supplemented by a residual provincial power to Act in areas without local societies. Societies appointed their own agents, with approval of the Administrator of Family and Child Welfare (formerly the Director): s. 90(d). An "agent" was either an agent of the Administrator (or the Minister), or an agent of a

local society: s. 2(d). The Governor-in-Council could regulate the "qualifications, appointment and duties" of such agents: s. 88(1)(a). The Minister was accordingly, by regulation, granted the power to approve appointments to "executive, administrative, supervisory, or field work" positions, as well as persons responsible for agency accounts: *Children's Services Regulations*, 1976, s. 31.

[56] Pursuant to ss. 89-93 of the 1976 *Children's Services Act*, children's aid societies remained local and private organizations. They were required to have Governor-in-Council approval for their constitution and by-laws, as well as names being approved by cabinet. Their powers were determined by statute and by their own constitutions, and cabinet retained the power to revoke the powers of a society and assign them to an administrator. Funding remained a municipal responsibility. The 1976 Act also permitted the Administrator to examine and audit the books, records and accounts of a society: s. 92. The Attorney General accepts that s. 88 "expanded somewhat the regulation-making powers of the Governor in Council."

[57] By its 1915 act of incorporation, the Nova Scotia Home for Colored Children was "empowered to act as a Children's Aid Society for matters affecting the children of the colored race, and to receive and keep the same under their care" pursuant to the *Children's Protection Act*, 1912: S.N.S. 1912, c. 107, s. 3. The

1915 Act incorporating the Home was revised pursuant to S.N.S. 1978, c. 64, which provided, at s. 8(2), that the Home "may, pursuant to the Children's Services Act, carry out he functions and duties of a Family and Children's Services Agency."

[58] The *Children's Services Act* was succeeded by the *Children and Family Services Act*, S.N.S. 1990, c. 5, which came into force on September 4, 1991. This is the legislation that remains in force today. The class period ends before the current legislation came into force.

[59] The plaintiffs also sought admission of two letters, one from Raymond Morse, on behalf of several of the defendant children's aid societies, dated July 18, 2008, and one from Peter McVey on behalf of the Minister of Community Services dated June 30, 2011. Both letters arose from inquiries respecting, *inter alia*, document requests by plaintiffs' counsel. In the 2008 letter, Mr. Morse wrote:

> I note the request for documents concerning practices, procedures and protocols for provincial wards. Your correspondence also confirms that you are only looking for production of such documents for the relevant timeframe which in this case … would be 1970 to 1984.
>
> If we are talking about child welfare practices, procedures and protocols respecting the interview of wards, it would be the Department of Community Services who would be responsible for establishing the appropriate standards and would not be up

> to the individual agencies to establish appropriate practices, procedures and protocol respecting the interviews of wards.

[60] It was not argued that the Morse letter constituted hearsay, although a hearsay concern is obvious. Had this been argued, I would have been satisfied that the letter should be admitted on the basis of the principled exception: see *R. v. Khelawon*, 2006 SCC 57.

[61] In the 2011 letter, Mr. McVey wrote:

> Child protection agencies are an administrative agency of government operating solely under the statutory mandate provided for in the *Children and Family Services Act*.
>
> Child protection agencies do not conduct investigations of allegations of historical, physical and sexual abuse unless that history is directly relevant to the circumstances of the child whom can be identified and is now under the age of 16 years.

[62] The plaintiffs claimed that these letters were relevant to common issues under s. 7(1)(c), while the Attorney General submitted that they were being offered in order to support a cause of action under s. 7(1)(a), which does not permit of evidence beyond the pleadings. I will deal with this issue at this stage, as the letters relate to the statutory relationship of child protection societies to the Province.

[63] At the hearing I reserved on the question of whether the statements in these letters constituted admissions of fact. If they are, even to the extent that they relate

to the present legislation (which would not be relevant in view of the class period), they would also pertain to predecessor acts if they were substantially similar. Although the inquiries by plaintiffs' counsel, and the replies from defendants' counsel, were in respect of individual actions, those prospective plaintiffs are either representative plaintiffs or potential plaintiffs in the class proceeding. If they are admissions of fact, I am satisfied that they would be probative and not unduly prejudicial. If they are admissions of law, however, they would be of limited weight, as it is for the court to determine the law.

[64] I conclude that the letters are admissions of law. Aside from saying that an agency relationship exists, the McVey letter does not give any basis to find such a relationship, whether by contract, conduct, estoppel, or statute. Absent a factual basis, an admission that an agency relationship exists is only a bare legal assertion. Moreover, the statement was in the present tense, and was only admitted on the basis that it could be relevant if the current legislation is substantively identical to the legislation during the class period. At most, it is an admission that the relationship was created by statute, but that is purely a question of statutory interpretation and it makes the admission one of law. As to the Morse admissions, even if the societies are ultimately agents for the purpose of liability, they remain

separate corporate entities and, at the time the statement was made, were parties adverse in interest to the Province. As such, I am not convinced that such an admission would bind the Province. Accordingly, I do not ascribe any weight to the admissions in the two letters.

[65] Returning to the main issue, the plaintiffs maintain that the societies were agents of the Province. They submit that the Province had oversight of all child welfare services, whether through legislation, regulation, or funding. Child welfare services were provided directly through Provincial offices or through the Province's agents, namely children's aid societies, to which it sometimes delegated its authority. The plaintiffs argue that the Province had ultimate legal responsibility for guardianship of wards under its, or its agents', care, and was obliged to ensure that the requirements of child welfare legislation were observed. This responsibility, the plaintiffs say, was equivalent to "that of a parent or guardian for the child's care and custody…." Further, the plaintiffs say, the Province had "responsibilities vis-à-vis organizing its agents and visiting and inspecting orphanages."

[66] The Attorney General argues, during the proposed class period those children who were not wards of the Province were wards of local children's aid

societies, administered and funded within their municipalities, with local boards of directors. The Attorney General says the statutes did not create a relationship of "guardianship or wardship" between the Province and the society wards. Further, it is argued, the power to prescribe "standards and methods of work to be maintained and adopted by Societies" in order to qualify for funding did not create direct Provincial control over societies placing children in the Home. As such, the Attorney General says, it is "plain and obvious" that the claim in negligence by non-ward members of the proposed class cannot succeed, and therefore the test under s. 7(1)(a) is not met in respect of non-wards.

[67] The Province's power over the Children's Aid Societies in the years after 1950 was, it seems to me, broader than the Attorney General would suggest. In essence, the Province had a funding role, as well as the ability to set standards, and had the ultimate ability to revoke the powers of a Society. Throughout the period after 1950 there was a degree of Provincial oversight and ultimate responsibility arising from the relevant child welfare legislation that I am satisfied rendered the societies agents of the Province for the purposes of that legislation. As noted earlier, the Statement of Claim does not specifically plead that the societies were

agents of the Province, but it would be open to the plaintiffs to seek an amendment to that effect.

[68] The plaintiffs submit that the Province had a statutory duty to assist in the organization of the Home, and to "visit and inspect" it, pursuant to the applicable child protection legislation throughout the years of the proposed class period. By its 1915 act of incorporation, the Home was "empowered to act as a Children's Aid Society for matters affecting the children of the colored race, and to receive and keep the same under their care" pursuant to the 1912 *Children's Protection Act*. The 1915 Act was revised pursuant to S.N.S. 1978, c. 64, which, at s. 8(2), permitted the Home to "carry out he functions and duties of a Family and Children's Services Agency." There is no pleading that it actually did so, under either Act.

[69] The Attorney General maintains that the failure to plead that the Home was a children's aid society is fatal, arguing that the incorporating statute alone does not give the Home status as a children's aid society. The Attorney General cites the principle that private statutes – such as the 1915 Act incorporating the Home – "invite a strict interpretation: they are exceptions to the general law, and because they are drafted by their promoters are consequently construed to their

disadvantage": Pierre-André Cŏté, *The Interpretation of Legislation in Canada*, 2d edn. (1991) at 195; see also *Great Northerm Piccadilly and Brompton Railway v. Attorney General*, [1909] A.C. 1 (H.L.); Dwyer v. Port Arthur (Town)(1893), 22 S.C.R. 241; *Cie pour l'éclairage au gaz de St. Hyacinthe v. Cie des pouvoirs hydrauliques de St. Hyacinthe* (1895), 25 S.C.R. 168; and *Ottawa (City) v. Royal Trust Co.*, [1964] S.C.R. 526. I am not convinced by these authorities that the plaintiffs are in a position which demands that the 1915 Act be strictly interpreted against them, nor am I convinced that the 1915 Act purports to create an "exception" to the general child welfare laws which would demand strict interpretation. The "public versus private statute" issue is essentially a red herring.

[70] That being said, I am unable to conclude that the Home was an agent of the Province pursuant to its incorporating legislation. That legislation, on its own, does not incorporate the elements of oversight and control that came to characterize the relationship between the Province and children's aid societies. Nor does it indicate that the Home was a child caring institution (which is not pleaded, in any event). As such, the Home would only be an agent if it acted as a CAS.

[71] Accordingly, I conclude that the pleadings as they now stand do not adequately plead that the children's aid societies were agents of the Province, or

that the Home acted as a CAS. No cause of action can therefore be certified with respect to proposed plaintiffs who were placed in the Home by a CAS or through other means. This finding does not foreclose any opportunity for the plaintiffs to seek an amendment for the purpose of making the pleading sufficient.

(3) Breach of Fiduciary Duty

[72] The plaintiffs allege (at para. 36 of the Statement of Claim) that the Province breached a fiduciary duty to the class members. In order to make out a claim breach of fiduciary duty, the statement of claim must set out material facts that are sufficient to identify the (1) nature of the fiduciary relationship; (2) the nature of the duty owed by the fiduciary; (3) how the duty was breached; (4) how the defendant put its own interests ahead of the plaintiff's; and (5) the appropriate remedy for the breach: *Cooper v. Atlantic Provinces Special Education Authority*, 2008 NSCA 94, at para. 14.

[73] The Attorney General primarily objects to this pleading on two bases: firstly, that governments owe fiduciary duties only in limited circumstances: and secondly, that none of the specified actions or omissions disclose any allegation that the Province profited from the alleged conduct, or placed anyone else's interests above

those of the class members. According to the Attorney General, the duty to financially support children committed to care rested with municipalities and children's aid societies, and did not create a fiduciary relationship between society wards and the Province. Any such relationship, it is submitted, could only arise in relation to true wards of the Province, in areas where there was no children's aid society.

[74] In *Elder Advocates, supra*, McLachlin C.J.C. confirmed "the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances" (para. 37). In *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, the court held that an ad hoc fiduciary duty will only arise where the alleged fiduciary undertakes to act in accordance with a duty of loyalty, whether expressly or by implication (para. 124, cited in *MacQueen*, supra, at para. 158).

[75] The fact that governments will owe fiduciary duties in rare circumstances, however, does not make it plain and obvious that no fiduciary duty claim is sustainable here. In *Broome, supra*, the Prince Edward Island Court of Appeal held that the Province did not owe a fiduciary duty to the children in the facility, but

qualified this by saying that “the Province would have had a fiduciary relationship with and fiduciary duty as guardian to children who were its wards during the period of wardship” (para. 142). The Supreme Court of Canada affirmed the decision (and this finding specifically). In light of that decision, it is not plain and obvious that the Province did not owe a fiduciary duty to class members who were wards. Similarly, I cannot find that it is plain and obvious that the Province did not owe a fiduciary duty to Society wards, having found the Societies to be agents of the Province.

[76] As to the second objection, the plaintiffs allege that the Province “placed its interests in conflict with the interests of the Plaintiffs and Class Members” and that it “profited at the expense of the Plaintiffs and Class Members” (para. 36). This is a bare assertion. It does not describe *how* the defendant put its own or someone else’s interests ahead of the class members. In *Cooper*, *supra*, the court held that similar language was “simply a statement of law of what a fiduciary duty is and a claim that it was breached”, providing no “particulars or description” of what the defendant allegedly did or how it put its interests ahead of the plaintiffs’ (para. 16). The plaintiffs, however, advance several grounds on which they say disloyalty is in fact alleged by this paragraph. They say:

> (1) Children rely on their parents to provide resources required to meet the necessities of life. The Province's wards were vulnerable children who relied on the Province for these resources. The pleadings allege that the provision of these resources was inadequate. Instead of spending the necessary funding to ensure that its wards met the necessities of life, the Province kept it for itself, thereby benefiting at its wards' expense.
>
> (2) Children rely on their parents to take reasonable steps to ensure that their "health and well-being" are adequately cared for. If these reasonable steps come at a cost (financial, time, or otherwise), parents are expected to incur that cost. The Plaintiffs relied on the Province to take these reasonable steps. If it cost time or funds to adequately investigate complaints of abuse, or adequately supervise their placement, the Province was required to spend these resources. The Plaintiffs allege that the Province (and its agents) benefited by withholding the time and funds required to ensure that their "health and well-being" were adequately cared for… [Emphasis added].

[77] The second paragraph implies that any failure to meet the needs of the children was automatically a breach of fiduciary duty, a position explicitly rejected in *K.L.B. v. British Columbia*, 2003 SCC 51, where McLachlin C.J.C. emphasized the requirement in the context of parental fiduciary duty to show disloyalty, that is, "putting someone's interests ahead of the child's in a manner that abuses the child's trust. Negligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust in this sense" (para. 49). A third ground, suggesting that public embarrassment and "mud-slinging" motivated the Province relies entirely on evidence and has no basis in the pleadings. Accordingly, I ignore it.

[78] I am satisfied, however, that the first ground advanced by the plaintiffs is implicit in the Statement of Claim. Paragraphs 36(m) and (n) say that the Province "chose to provide less than appropriate financing to the NSHCC when compared to other homes, schools and institutions of similar kind" (36(m)) and "discriminated against the students of the NSHCC by providing insufficient means to train, hire and supervise appropriate trained workers as was the standard in other care facilities" (36(n)). In my view, an allegation that the Province withheld funding implies an allegation that it retained those funds to be applied to other purposes. Although para. 36(m) could be interpreted as an allegation of simple negligence (failing to adequately assess the appropriate level of financing), the comparison to other homes implies that the Province favoured those other homes. Further, para. 36(n), read in the context of para. 6, alleges racial discrimination. In my view, both paragraphs adequately allege disloyalty.

[79] The Attorney General further argues that no cause of action can lie for a pleading of inadequate funding. If this is correct, paras. 36(m) and (n) cannot be used to substantiate the claim for breach of fiduciary duty. The claim of "inadequate funding" is not a separate cause of action, but is pleaded as an element of breach of fiduciary duty and systemic negligence.

[80] The Attorney General argues that the Home's funding was determined by the legislature or by senior Crown officials, and therefore fell within the category of "pure policy decisions regarding the allocation of scarce public resources" discussed in *Imperial Tobacco*, *supra*, for which there is no liability. The Supreme Court of Canada held that "core policy" decisions of government "protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith…" (para 90). The Attorney General says the budgetary decisions in respect of the Home fall within that definition and that the pleadings do not allege that these decisions were made irrationally. Therefore, it is submitted, it is plain and obvious that this aspect of the plaintiff's case will fail.

[81] The plaintiffs respond that the Attorney General is improperly conflating decisions regarding the care of children with other less important government decisions. They claim that the Attorney General's position amounts to a suggestion that a guardian can disregard the health and well-being of children as an "exercise of discretion." A guardian, they submit, has no discretion to "disregard the health

and well-being" of a child. The plaintiffs provide no authority for their position. In my view, decisions about child protection funding would be core policy decisions.

[82] That being said, the plaintiffs are not required to show that it is obvious that they will succeed. The question is whether it is plain and obvious that the allegations in paras. 36(m) and (n) are unsustainable in negligence or fiduciary duty. In my view, it is not plain and obvious that the claim is doomed to fail, at least in respect of fiduciary duty. In *Elder Advocates*, *supra*, Chief Justice McLachlin noted that imposing a duty on the Crown to put the best interests of a beneficiary before its own "is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance" (para. 44). This was said that in the context of explaining why such duties should be rare, but the comment implies that where a fiduciary duty does exist, the Crown may be required to prioritize the beneficiary in funding decisions.

[83] In this case, the class members plead that they were wards of the Province, and it is adequately pleaded that the Province owed them a fiduciary duty. Therefore, I cannot say that it is plain and obvious that the Crown is immunized

from liability for decisions which are disloyal to the alleged beneficiaries, even if they are core policy decisions.

[84] In addition, I do not think it is accurate to say that the plaintiffs have failed to plead that the funding decisions were irrational or made in bad faith. Although it is true that those specific words were not used, para. 36(m) alleges that the Home received less funding than other similarly situated group homes, and para. 36(n) alleges that these decisions were discriminatory. In addition, para. 6 alleges the existence of a pervading atmosphere of racism in Nova Scotia and in the NSHCC specifically. In my view, inherent in the claim of racial discrimination is an allegation that the relevant decisions were irrational.

[85] The Attorney General argues that an allegation of irrationality is bound to fail on the basis of *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 at 435, where the Supreme Court of Canada stated that it is "relatively rare" for a decision to be so "patently unreasonable" as to exceed governmental discretion. However, "rare" does not mean "bound to fail." A low probability that something will happen is still more than a certainty that it will not. It is not plain and obvious that the allegation will fail.

[86] I do not believe that it is necessary to decide whether the Province could be liable in negligence for the inadequate funding claims, since the other elements in paragraph 36 adequately plead negligence in other ways. However, my comments on the racism allegations could equally apply to the negligence claim.

[87] With respect to the claim for breach of fiduciary duty, I repeat my earlier comments about the inadequacy of the pleading to encompass claims by plaintiffs placed in the home by children's aid societies or through other means.

(4) Vicarious Liability

[88] At para. 39 of the Statement of Claim the plaintiffs "plead the doctrine of *respondeat superior* and state that the Defendants are vicariously liable for the actions of its or their agents, employees, servants and contractors." The Attorney General claims that vicarious liability is a separate cause of action that has not been adequately pleaded. The Supreme Court of Canada set out the elements of vicarious liability in *K.L.B.*, *supra*, at para. 19:

> To make out a successful claim for vicarious liability, plaintiffs must demonstrate at least two things. First, they must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate. **[…]** Second, plaintiffs must demonstrate that the tort is

> sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise.

[89] The Attorney General argues that a pleading that the Home received "some *per diem* funding" from the Province (para. 29) does not make out the material facts for vicarious liability. Further, it is submitted, neither the 1915 nor the 1978 Acts governing the NSHCC imposed duties on the Province. Nor did the child protection statutes impose duties or authority on the Province respecting the internal operations of a "privately run" institution such as the Home. According to the Attorney General, the Province had no supervisory role, only a regulatory one, which evolved gradually from an inspection power pursuant to the 1917 *Children's Protection Act*, into a licensing process. In addition, the pleadings do not suggest that the Province had employees at NSHCC. In these circumstances, the Attorney General says, it is plain and obvious that the Province cannot be vicariously liable.

[90] The plaintiffs argue that vicarious liability is not a separate cause of action. Plainly, an entity can be vicariously liable for conduct for which it is not directly liable, and in that sense vicarious liability is not an element of direct liability, nor is it simply a way to foreclose a defence in direct liability. The plaintiffs must plead that an employee or agent of the Province was negligent. Pleading the material facts is crucial, whether or not vicarious liability is a separate cause of action.

[91] The legal test for vicarious liability includes at least the two elements listed in *K.L.B.*, *supra*. However, the plaintiffs are not required to plead the legal test, only the material facts to support the claim. In paras. 23 and 36, they do so. Paragraph 23 deems the "Province" to include "contractors, sub contractors, agents, servants, employees and appointees." The effect of this language is that every allegation of breach of fiduciary duty in para. 36 is repeated for every category named in para. 23. Paragraph 37 states that the same conduct is asserted as systemic negligence. In my view the plaintiffs have adequately pleaded that those entities harmed the plaintiffs, and para. 39 adequately asserts vicarious liability against the Province in breach of fiduciary duty and systemic negligence. At trial the plaintiffs would need to identify which entities did what, and show that their relationship to the Province was sufficiently close to ground vicarious liability. I cannot conclude that it is plain and obvious that the claim will fail.

[92] That said, vicarious liability is not sufficiently pleaded if the plaintiffs seek to hold the Province accountable for the actions of the NSHCC alleged in para. 35. That paragraph sets out the claim in fiduciary duty against the Home. I have rejected the proposition that an agency relationship between the Province and the Home arose through the statutes. As such, the pleadings as they now stand are not

specific enough to indicate to the Province that it might be in jeopardy of being found vicariously liable for any of the claims set out in para. 35. The plaintiffs, however, are entitled to seek an amendment to the Statement of Claim in order to provide an adequate basis to advance the claim. The plaintiffs, however, are entitled to seek an amendment to the Statement of Claim to effect an appropriate basis to advance the claim.

(5) Non-Delegable Duty

[93] As a general rule, a person who employs an independent contractor is not liable for the contractor's negligence. There is an exception for non-delegable duties. Where such a duty exists, the ultimate responsibility remains with the person who employed the contractor. In concurring reasons in *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, McLachlin J. (as she then was) described this doctrine at para. 50:

> In essence, a non-delegable duty is a duty not only to take care, but to ensure that care is taken. It is not strict liability, since it requires someone (the independent contractor) to have been negligent. But if it applies, it is no answer for the employer to say, "I was not negligent in hiring or supervising the independent contractor." The employer is liable for the contractor's negligence. The employer already has a personal duty at common law or by statute to take reasonable care. The non-delegable duty doctrine adds another obligation -- the duty to ensure that the independent contractor also takes reasonable care. [Emphasis added.]

[94] As to when such a duty should arise, the majority in *Lewis*, *supra*, noted that it "will depend upon the nature and the extent of the duty owed by the defendant to the plaintiff" (para. 17). In that case the majority considered the statutory framework and the competing policy arguments.

[95] As amended, para. 40 of the Statement of Claim now contains a pleading of non-delegable duty; the plaintiffs allege that the Province "owed them, and Class Members, a non-delegable duty which was breached by various Children's Aid Societies and other such child protection agencies. The Province … owed a duty of care in exercising its powers to all neglected children taken into custody, whether it did so by means of servants or contractors."

[96] As with vicarious liability, since this claim requires proof that a contractor hired by the party was negligent or otherwise liable, those facts must be pleaded. I am satisfied that paras. 23 and 36, read together, adequately make these allegations, though not para. 35. Paragraph 40, read generously, supplements para. 23. It makes clear that the plaintiffs assert that the duties created by a wardship relationship and pleaded in para. 23 are, in fact, non-delegable.

[97] The plaintiffs appear to allege the existence of duties apart from those pleaded in para. 23. In submissions, they refer to three statutes which, collectively, span the entire proposed class period: *Children's Protection Act,* S.N.S. 1917, c. 2, s. 9(b); *Child Welfare Act,* S.N.S. 1950, c. 2, s. 54; and *Children's Services Act*, S.N.S. 1976, c. 8, s. 3(1). Paragraph 40 of the Statement of Claim contains little detail. It does not cite the statutes, nor does it refer to the duties allegedly created by them. However, statutes, like law generally, do not ordinarily need to be pleaded. The *Interpretation Act*, R.S.N.S. 1989, c. 235, provides, at s. 5, that "[e]very Act shall be judicially noticed by all judges, justices of the peace and others without being specially pleaded."

[98] I conclude that the material facts necessary to make out a violation of the alleged statutory duties have not been pleaded. The provisions in themselves do not set out duties beyond carrying out the requirements of the relevant Acts. As noted by Chief Justice McLachlin in *R. v. Imperial Tobacco*, *supra*, at para. 44:

> Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry … or removing children from harmful environments… In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public.

[99] More importantly, the pleadings never say how such requirements were breached. A similar comment can be made about each of the statutory duties asserted by the plaintiffs. These duties, if they are owed to the class members, arise by the terms in the statute and not exclusively out of the wardship relationship alleged to exist between the Province and the plaintiffs. It is not sufficient only to plead the wardship relationship and attempt to incorporate into that any duty that might apply to the Province for other reasons. Rather, the plaintiffs must plead the material facts to show that those duties are owed to them. As it stands, para. 40 amounts to an assertion of law without the support of material facts. It therefore does not meet the requirements of pleading in rule 38.02(4), except insofar as it supplements paragraph 23. It would be open to the plaintiffs to seek an amendment to this effect.

(6) Causes of action: summary

[100] In summary, I am satisfied that causes of action are sufficiently pleaded in negligence and breach of fiduciary duty for the class comprised of plaintiffs placed in the Home directly by the Province. As I have indicated, this does not preclude amendments designed to incorporate pleadings that children’s aid societies were agents of the Province, and that the Home itself was a children’s aid society. I have

also found that vicarious liability is adequately pleaded for agents of the Province, as well as non-delegable duty for contractors, albeit both with qualifications. Additionally, I am not satisfied that it is plain and obvious that a claim for purely declaratory relief for breach of fiduciary duty for the period prior to the *Proceedings against the Crown Act* is bound to fail.

Identifiable Class: s. 7(1)(b)

[101] The second stipulation of s. 7(1) of the *Class Proceedings Act* is that "there is an identifiable class of two or more persons that would be represented by a representative party": s. 7(1)(b). In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, McLachlin C.J.C. said "[c]lass definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment" (para. 38). She went on to state (at para. 38) that the definition

> should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria. [Emphasis added.]

[102] It is not necessary that all class members share "the same interest in the resolution of the asserted common issue", but the class must not be overly broad, in the sense that it "could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue": *Hollick, supra*, at para. 21. The Ontario Court of Appeal summarized as follows in *Cloud*, at para. 45, referring to *Hollick*:

> … The appellants are required to show that the three proposed classes are defined by objective criteria which can be used to determine whether a person is a member without reference to the merits of the action. In other words, each class must be bounded and not of unlimited membership. As well, there must be some rational relationship between the classes and the common issues. The appellants have an obligation, although not an onerous one, to show that the classes are not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues.

[103] If potential class members have a claim on the face of the pleadings, the possibility that specific defences – such as limitations defences – may pertain to individual claims should not interfere with certification: *MacQueen v. Sydney Steel Corp.*, 2011 NSSC 484, at para. 73.

[104] As currently configured, the Notice of Motion proposes the following classes:

> (1) Former residents of the NSHCC placed into the NSHCC by the Province of Nova Scotia;
>
> (2) Former residents of the NSHCC placed into the NSHCC by Children's Aid Societies (other than the NSHCC); and
>
> (3) Former residents of the NSHCC placed into the NSHCC by any means other than (a) or (b).

[105] The Attorney General claims that the class period can begin no earlier than entry into force of the *Proceedings Against the Crown Act* 1951. This issue has been dealt with. I have determined that it is plain and obvious that the pre-1951 claims will fail, and the class period should therefore begin on November 1, 1951.

[106] The proposed period ends in 1990. The Attorney General says the cut-off date should be June 27, 1986, the last residency date for any of the deponents. The authorities, however, do not demand a precise correspondence of the class period to the available evidence. In *Seed v. Ontario*, 2012 ONSC 2681, for instance, the court certified a class period that exceeded the number of years for which there was evidence, with the following comments by Horkins J., at paras. 118-123:

> The defendant argues that the class definition is too broad because there is no evidence to support the existence of the class after 1985. The class definition covers the period of January 1, 1951 up to the present day. Former students of Ross MacDonald have provided some evidence of their experience that starts in 1951 and ends in 1985.

> While the defendant agrees that the plaintiff is not required to provide some evidence for every year in the class period, it nevertheless urges the court to restrict the class definition to the period 1951-1985 given the lack of evidence from any students after 1985.
>
> The defendant relies on the court's restriction of the class definition in [*Slark (Litigation guardian of) v. Ontario*, [2010] O.J. No. 5187]. The problem in *Slark* was more pronounced. The proposed class definition reached back to 1876 and there was no evidence of any mistreatment at the school until 1961. There was some evidence to support the allegations of mistreatment from 1961 through 1979. Cullity J. limited the class period to the years 1961-1979. However, in doing so he did not conclude that the plaintiffs had an obligation to provide some evidence for every year in the class period. Such an approach is inconsistent with the low burden of the some evidence requirement and contrary to how other courts have applied the identifiable class requirement.
>
> For example, in [*Cloud v. Canada (Attorney General)*, [2003] O.J. No. 2698 (Div. Ct.) rev'd [2004] O.J. No. 4924 (C.A.); leave to appeal ref'd, [2005] S.C.C.A. No. 50] the Court of Appeal certified a class spanning 1922 through 1970 when it only had evidence of class members' experiences between 1943 and 1967, or some 24 of the 48 years. In comparison, Mr. Seed seeks to certify a similar class period, from 1951 onward and has proffered evidence in support of 1951 through 1985.
>
> *Brown v. Canada (Attorney General)*, [2010] O.J. No. 2253 at paras. 44-45, 157 (S.C.J.), is another claim that considered systemic wrongs. The court accepted a class definition that included aboriginal children who were removed from their parents and placed in foster homes during the period 1965 to 1984. The evidence before the motions judge only covered the time frame of 1965 to 1977.
>
> Unlike *Slark*, the evidence on this motion covers 57% of the proposed class period whereas in *Slark* the original evidence covered only 13% of the proposed class period.

[107] In making a similar determination in *W.P. v. Alberta(No. 2)*, 2013 ABQB 296, Rooke A.C.J. commented that “it is preferable to err on the side of inclusion, not exclusion, and not leave a possible claimant outside the class. The definition

could be subsequently narrowed, if necessary, to reflect the evidence" (para. 27). I agree. The end-point for the class is 1990.

[108] The Attorney General goes on to assert that conflict between proposed class members is a further basis upon which to find that the class is not sufficiently identifiable. Specifically, a number of proposed class members are alleged by other proposed class members to have participated in the alleged abuse. Such opposing interests, it is submitted, threaten to impede the workability of the class.

[109] In *Nixon v. Canada (Attorney General)*(2002), 21 C.P.C. (5th) 269, [2002] O.J. No. 1009 (Ont. Sup. Ct. J.), Molloy J. declined to certify a class due to conflict. The proposed class consisted of penitentiary inmates who alleged harm arising from the conduct of correctional officers responding to fires that some of the inmates had started. The conflict arose from the inclusion in the proposed class of the inmates who started the fires. Molloy J. said, at para. 3:

> … Those inmates not only may be prevented from recovery by reason of their own wrongdoing, but also may be liable in damages to other inmates uninvolved in setting the fires as well as to the defendant. Also, those inmates who impeded the correctional officers attempting to put out the fires may also be prevented from recovery and/or liable to others by reason of their conduct. Thus, there is an inherent conflict within the proposed class. This is not a situation where the conflict within the class is merely hypothetical. The conflict has already been identified and raised by the defendant. The only thing that is uncertain is the identity of the wrongdoers,

> although it is clear that they are among the members of the class as initially proposed.

[110] There was no workable way to redefine the class so to make its membership objectively definable. A “series of mini-trials” would have been necessary “to determine the members of the class by weeding out those individuals who set the fires and identifying those who impeded the efforts of the correctional officers attempting to extinguish the fires” (para. 7). For this reason, among others (including the small size of the proposed class, and the antipathy of the proposed representative plaintiff for certain other class members) certification was denied.

[111] The plaintiffs deny that the alleged conflict has been shown to make the class unworkable. They cite *Rumley v. British Columbia*, 2001 SCC 69, where the defendant institution argued that there was a conflict within the proposed class by reason of the fact that the class included students who abused other students. The chambers judge agreed that there was a potential conflict, but could not find at the certification stage that it would affect the common issues: 25 C.P.C. (4th) 186; [1998] B.C.J. No. 2588, at paras. 52-53, varied on other grounds, 1999 BCCA 689. The identifiable class criterion was not at issue before the Supreme Court of Canada: *Rumley v. British Columbia*, 2001 SCC 69, at para. 26. While it would not be strictly correct to refer to the chambers judge’s comments as the binding word

of the Supreme Court of Canada, it does not appear that the courts above took issue with the certification judge on this point.

[112] The plaintiffs say the alleged conflict is irrelevant to the common issues. They submit that the claim alleges that the Province's failures forced them to live in an atmosphere of unsupervised abuse, which itself gave rise to the alleged conflict within the class.

[113] As was the case in *Rumley*, I am satisfied that there is the potential for a conflict, but I cannot conclude at this stage that it will render the class unworkable and affect the common issues, which are concerned with systemic allegations. Further, if excessive conflict were to emerge, it would be possible to create a sub-class for class members who were alleged to have abused other class members. The s. 7(1)(b) criterion is met.

Common Issues: s. 7(1)(c)

[114] The third requirement for certification is that "the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members": s. 7(1)(c). *The Class Proceedings Act* defines "common issues" as follows, at s. 2(e):

> (i) common but not necessarily identical issues of fact, or
>
> (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts…

[115] The Supreme Court of Canada made the following comments about the "common issue" aspect of the analysis in *Dutton*, *supra*, at para. 39:

> … The commonality question should be approached purposively. 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. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit. [Emphasis added.]

[116] The Ontario Court of Appeal provided the following summary of principles relating to common issues in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443:

> 81 There are a number of legal principles concerning the common issues requirement in s. 5(1)(c) that can be discerned from the case law. Strathy J. provided a helpful summary of these principles in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, 87 C.P.C. (6th) 276. Aside from the requirement just described that there must be a basis in the evidence to establish the existence of the common issues, the legal principles concerning the common issues requirement as described by Strathy J. in *Singer*, at para. 140, are as follows:
>
> > The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] S.C.R. 534 at para. 39.

An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud*, at para. 53.

There must be a rational relationship between the class identified by the plaintiff and the proposed common issues: *Cloud*, at para. 48.

The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick*, at para. 18.

A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Dutton*, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 46 B.C.L.R. (4th) 234, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-46 and 160.

A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, at para. 39, aff'd (2001), 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and [2003] O.J. No. 1161 (C.A.); *Fehringer v. Sun Media Corp.* (2002), 27 C.P.C. (5th) 155 (S.C.J.), aff'd (2003), 39 C.P.C. (5th) 151 (Div. Ct.).

Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.*, 2003 CanLII 35843 (C.A.), at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, at para. 139.

Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would

> ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 29.
>
> 82 As Strathy J. commented in *Singer*, at para. 140, these legal principles are "by no means exhaustive". I would also add that it is up to the motion judge to decide what legal principles are the contentious ones in any particular case and to focus the analysis accordingly. The motion judge will then consider the pertinent legal principles with reference to the evidence adduced on the motion to decide if there is some basis in the evidence to establish the existence of the common issues.

[117] Paragraph 81 was cited with approval by the Nova Scotia Court of Appeal in *MacQueen*, *supra*, at para. 123.

[118] The Court cautioned in *Rumley*, *supra*, that “[i]t would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings” (para. 29). The Ontario Court of Appeal noted in *Cloud* that “the fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure” (para. 58). Further, “an issue can constitute a substantial ingredient of the claims” and satisfy the common issue requirement “even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its

resolution" (para. 53). The common issues may be further particularized as the proceeding moves forward (para. 72).

[119] The Province does not dispute that the common issue requirement sets a "low bar." The common issues proposed by the plaintiffs in respect of the claim against the Province are as follows (restated to reflect the three classes):

> (1) What was the legal relationship and the extent of the obligations owed by the Defendant, the Attorney General of Nova Scotia, to the former residents who comprise each of the three Classes?
>
> (2) Did the Defendant, the Attorney General of Nova Scotia, owe a duty of care to the former residents who comprise each of the three Classes?
>
> (3) If the answer to (b) is yes, did the Defendant, the Attorney General of Nova Scotia, breach its duty of care?
>
> (4) Did the Defendant, the Attorney General of Nova Scotia, owe a fiduciary duty to the former residents who comprise each of the three Classes?
>
> (5) If the answer to (d) is yes, did the Defendant, the Attorney General of Nova Scotia, breach its fiduciary duty?
>
> (6) Is the Defendant, the Attorney General of Nova Scotia, vicariously liable for the conduct of their agents, employees and staff?
>
> (7) Does the conduct of the Attorney General of Nova Scotia justify an award of punitive and/or aggravated damages, and if so, in what amount?

[120] The plaintiffs say the proposed common issues are rationally connected to the class members' claims; that they can be resolved without involving individual class members; and that their resolution is necessary to the resolution of each class

member's claim. Adopting the language of McLachlin C.J.C. in *Rumley*, supra, they say, “no class member can prevail without showing duty and breach. Resolving those issues, therefore, is ‘necessary to the resolution of each class member's claim’” (*Rumley* at para. 27, citing *Dutton*, supra, at para. 39.)

[121] With respect to the common issues of negligence and breach of fiduciary duty, the Attorney General says the length of the class period leads to “insurmountable complexity” exposing “the lack of same interest by all class members in the resolution of the proposed common issues.” The alleged complexity apparently arises from the changes in child welfare practices and legislation over the relevant time. The eight-decade class period which so concerned the Attorney General is now shortened by half. The legislative scheme governing child welfare changed once during the relevant period, when the *Children’s Services Act* was enacted in 1976. I am mindful of the Court of Appeal’s caution in *MacQueen*, *supra*, respecting the variation in a standard of care over time (see paras. 149-154). However, it has been held that in institutional abuse cases, variation in the content of a standard of care over time need not defeat certification. The Supreme Court of Canada stated in *Rumley*, *supra*, that the fact “[t]hat the standard of care may have varied over the relevant time period simply

means that the court may find it necessary to provide a nuanced answer to the common question" (para. 32). The Attorney General argues that the class period in *Rumley* was shorter, that *Rumley* dealt with "an operational nature of obligations to the claimants", and that multiple sub-classes would be unworkable in this case. I am not convinced that the length of the class period will render the common issues unduly complex.

[122] One of the proposed common issues relates to punitive or aggravated damages. The Supreme Court of Canada said in *Rumley*, *supra*, at para. 34:

> … In this case resolving the primary common issue -- whether JHS breached a duty of care or fiduciary duty to the complainants -- will require the court to assess the knowledge and conduct of those in charge of JHS over a long period of time. This is exactly the kind of fact-finding that will be necessary to determine whether punitive damages are justified: see, e.g., *Endean*, *supra*, at para. 48 ("An award of punitive damages is founded on the conduct of the defendant, unrelated to its effect on the plaintiff."). Clearly, the appropriateness and amount of punitive damages will not always be amenable to determination as a common issue. Here, however, the respondents have limited the possible grounds of liability to systemic negligence -- that is, negligence not specific to any one victim but rather to the class of victims as a group. In my view the appropriateness and amount of punitive damages is, in this case, a question amenable to resolution as a common issue…

[123] I am satisfied that the same reasoning applies here.

[124] Common issues substantially similar to those proposed here have been approved in previous institutional abuse class proceedings, such as *Rumley*, *supra*.

The question of whether the Province breached legal obligations respecting supervision of the residents or the Home is a necessary and substantial part of each class member's claim. No former resident can succeed without establishing the existence of, and breach of, such obligations. The common issues focus on the defendants' conduct. Addressing them at a common issues trial will prevent duplication in fact-finding and legal analysis, serving the purpose of judicial economy, encouraging settlement, and leaving only damages.

[125] The Attorney General maintains that the common issue respecting the legal relationship and the extent of any obligations owed by the Province is overly broad and duplicative of other common issues. Further, the Attorney General denies that this issue would advance the claims of any of the plaintiffs "given the nature of the claims which are based on either private placement of children or children in care." It is also suggested that the plaintiffs' caselaw is distinguishable on the basis that the institutional abuse in those cases involved facilities owned or managed by the government or the church. I do not accept these vague objections. I agree with the plaintiffs on this point.

[126] As to vicarious liability, the Attorney General says the plaintiffs have not established "sufficient material facts or demonstrated in law how the Crown would

be bound by vicarious liability." The Attorney General's primary argument on this point is really one of sufficiency of pleadings, and I refer to my earlier comments. There is also a general allegation that given "the relevant provisions of the child welfare statutes over the decades and the enabling legislation of NSHCC, together with the evidence on record, … there is no rational connection between the two classes and the common issues in respect to vicarious liability." I do not find this convincing.

[127] The Attorney General further submits that while the incorporating acts permitted the Home to act as a children's aid society, there was no evidence that it actually did so. The plaintiffs maintain that the historic statutory framework – particularly the provisions empowering the Home to act as a children's aid society, in combination with affidavit evidence that, in 1974, the Province found it necessary to investigate the question of whether the Home was in fact a children's aid society, provides some basis in fact to suggest that the Home was a children's aid society.

[128] There was other evidence on the record that could support the claim that the Province considered itself to be in a position of responsibility for the residents of the Home; for instance, in a 1959 letter to the Acting Minister of Public Welfare,

the Deputy Minister referred to the Home as “a child caring institution coming under the Child Welfare Act,” adding that “the Minister is given certain powers and authority in connection with it.”

[129] The common issues as they have been framed can be resolved without reference to the claims of individual plaintiffs; they are concerned with the determination of the duties allegedly owed to the plaintiffs by the Province, and with the form in which liability may take as a result. Whether the Province owed a duty of care or a fiduciary duty to the members of each class may be determined without reference to the individuals. Similarly, whether the Province breached any such duties is a question of the Province’s acts and omissions, as is the related issue of whether such conduct calls for punitive or aggravated damages. The question of vicarious liability is, similarly, one that can be dealt with without reference to individual claimants. Moreover, the determination of the common issues will be determinative of the defendant’s liability. I am satisfied that the common issues advanced by the plaintiffs are sufficient to meet the requirements of s. 7(1)(c).

Preferable procedure: ss. 7(1)(d) and 7(2)

[130] The next criterion for certification is set out at s. 7(1)(d) of the *Class Proceedings Act*, which requires the court to be satisfied that "a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute." Certain relevant factors relevant to this inquiry are enumerated at s. 7(2), which requires the court to consider:

> (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
>
> (c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and
>
> (f) any other matter the court considers relevant.

[131] The plaintiffs rely on the Ontario Court of Appeal decision in *Cloud*, *supra*, as a guide to the proper application of the "preferable procedure" stage of the certification analysis. Goudge J.A. said, for the court, at paras. 73-75:

> As explained by the Supreme Court of Canada in *Hollick*, *supra*, at paras. 27-28, the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice, and behaviour modification and must consider the degree to which each would be achieved by certification.
>
> *Hollick* also decided that the determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in their context. The inquiry must take into account the importance of the common issues in relation to the claim as a whole.
>
> At para. 30 of that decision the Court also makes clear that the preferability requirement in s. 5(1)(d) of the CPA can be met even where there are substantial individual issues and that its drafters rejected the requirement that the common issues predominate over the individual issues in order for the class action to be the preferable procedure. This contrasts with the British Columbia legislation in which the preferability inquiry includes whether the common issues predominate over the individual cases.

[132] It will be noted that s. 7(2)(a) of the Nova Scotia Act requires consideration of whether the common issue predominates over questions involving individuals. The Supreme Court of Canada decision in *Rumley*, *supra*, a case which, like the present one, involved claims of systemic and institutional negligence and breach of duty, is instructive on this point. The court said, at para. 36:

> The first factor is "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members": s. 4(2)(a). As I noted above, it seems likely that there will be relevant differences between class members here. <u>It should be remembered, however, that as the respondents have limited their claims to claims of "systemic" negligence, the central issues in this suit will be the nature of the duty owed by JHS to the class members and whether that duty was breached</u>. Those issues are amenable to resolution in a class proceeding. While the issues of injury and causation will have to be litigated in individual

> proceedings following resolution of the common issue (assuming the common issue is decided in favour of the class, or at least in favour of some segment of the class), in my view the individual issues will be a relatively minor aspect of this case. There is no dispute that abuse occurred at the school. The essential question is whether the school should have prevented the abuse or responded to it differently. I would conclude that the common issues predominate over those affecting only individual class members. [Emphasis added.]

[133] I am satisfied that the systemic nature of the allegations here leads to the conclusion that the common issues would prevail over individual ones.

[134] The advantages of class proceedings in institutional cases involving "systemic wrongs" and institutional abuse have been considered in several cases. In *J.L.G. v. A.W.W.*, 2002 BCSC 1219, affirmed at 2003 BCCA 367, dealing with a proposed class action involving the placement of children in abusive environments. Cole J. said, at paras. 41-42:

> In this case, I find it is likely that a determination of the common issues in a class proceeding would permit the individual actions to proceed more efficiently and be resolved more quickly. It may in fact encourage settlement of the subsequent individual actions, depending on the court's decision on liability of the Province. These are advantages over individual actions or the joinder of some actions. The proposed common issues will need to be determined in any individual proceeding against the Province. To require each individual to separately address the common issues when a class action can resolve the issues for all class members in one proceeding would be a waste of resources and would unnecessarily prolong this matter. This would especially be true if the ultimate conclusion is that the Province is not liable.
>
> Further, a class action is efficient in that it guards against potential inconsistent decisions regarding the common issues. The risk arises in individual proceedings that the benefit of admissions made by the Province in one action will not extend to the claims of other proposed class members: see *Dalhuisen*, *supra*, where the Court noted at para. 8 that a "bare admission will not bind the Defendant against all class members unless embodied in a Court Order within a certified class proceeding".

[135] In *Seed v. Ontario*, 2012 ONSC 2681, the court said, at para. 151:

> Access to justice and judicial economy are paramount concerns in this case and will be served by this action continuing as a class proceeding. An action of this kind will be extremely expensive to pursue. The documentary evidence will likely be extensive and time-consuming to collect and review. Expert witnesses will likely be retained in the course of the proceedings. Most individuals cannot afford to pursue litigation on this scale. Certification will ensure the class has meaningful access to justice. There is no feasible alternative procedure available for class members to pursue their claims.

[136] The plaintiffs submit that certification is a preferable on the basis of judicial economy in several senses. It will prevent the necessity for a multiplicity of individual proceedings and the potential for inconsistent determinations. The common issues, it is submitted, are integral to each class member's claim, and their determination will materially advance the claims of each class member. Finally, they submit, if the Attorney General succeeds at trial, the litigation is over; however, if the plaintiffs succeed on a common issues trial, the court will have discretion to determine the most expedient and fair manner of determining the remaining issues of causation and damages.

[137] Where the claim involves an institution and the defendant's involvement, "a single trial would make it unnecessary to adduce more than once evidence of the

history of the establishment and operation of the School and the involvement of each of the respondents": *Cloud, supra*, at para. 86. The plaintiffs also submit that one factor supporting a class proceeding as a preferable procedure is where "[m]any of the class members are elderly and unlikely to survive protracted litigation and inevitable appeals on an individual basis": *Anderson v. Canada (Attorney General)*, 2010 NLTD(G) 106, at para. 121, affirmed at 2011 NLCA 82. They also take the position that victims of sexual abuse are particularly vulnerable.

[138] It has proven unwieldy to litigate the plaintiffs' claims individually. Of more than 60 individual claims commenced from 2001 onwards, there have been particulars demanded of each, and interrogatories served on each. Most of the individual cases have not moved past the pleading stage. The earliest trial is scheduled to commence in April 2014. The result, in the plaintiffs' submission, would be a gap of several years between a request for date assignment and the commencement of trial, repeated more than 140 times, if the matter does not go forward as a class proceeding. Only 56 of the 63 original claimants remain alive. Elderly plaintiffs, it is submitted, are unlikely to survive the course of litigation.

[139] The Attorney General says the phrase "a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute" differs

from the language of the Ontario and British Columbia legislation. Those Acts instead require that a class proceeding be the preferable procedure for "the resolution of the common issues." The Attorney General submits that this suggests a lower threshold in Ontario and British Columbia. McLachlin C.J.C. considered a similar distinction in *Hollick, supra*, and said, at paras. 29-30:

> The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues" [emphasis added by McLachlin C.J.C.], and not that a class action be the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes:
>
> > The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy." The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinctio[n] can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.
> >
> > See Branch, *supra*, at para. 4.690. I would endorse that approach.
>
> The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement … that the common issues "predominate" over the individual issues... I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other

> methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (emphasis added): M. G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act*, 1992 (1993), at p. 27.

[140] I note also *Bryson v. Canada (Attorney General)*, 2009 NBQB 204, where the court considered the equivalent provision of the New Brunswick legislation, which also refers to the "dispute" rather than the "common issues." McNally J. held that this "distinction in the wording does not appear to provide for any significant difference in the analytical approach to be undertaken than what is required with respect to the preferability criteria under the Ontario CPA" (para. 75). I would apply the same interpretation to the Nova Scotia provision.

[141] The Province submits that the following principles govern the court's reasoning under s. 7(1)(d) and 7(2): the inquiry is "conducted through the lens of three objectives underlying class proceedings: access to justice, judicial economy, and behaviour modification"; and the common issues are examined in context, with consideration of whether they predominate in relation to the claims as a whole; the word "preferable" is construed broadly, considering whether the class proceeding would be a "fair, efficient, and manageable method of advancing the claims", in preference to alternatives such as test cases, consolidation, joinder, and alternative dispute mechanisms. In addition, the court should consider the

individual issues remaining after the resolution of the common issues, and take account of the factors in s. 7(2) of the *Class Proceedings Act*.

[142] The Province identifies several factors which allegedly militate against certification as the preferable procedure in this case. These include the number and importance of issues requiring individual determination; the number of individual cases that have already been brought; the fact that three test cases are already scheduled for hearing in 2014 and 2015; the alleged lack of a role for behaviour modification; the alleged lack of evidence of the plaintiffs' lack of financial resources; and the assertion that individual issues would make the proposed class proceeding "unfair, inefficient, and unmanageable." According to the Province, even if common issues are determined, the individual issues would overwhelm them, so that the common issues would not significantly advance the litigation, nor would they predominate over the common issues.

[143] I have stated above that I am satisfied that the common issues prevail over the individual issues. As in *Rumley*, *supra*, each class member will be required to make an individual showing of damage and causation, and "there is little evidence here to suggest that any significant number of class members would prefer to proceed individually" (para. 37). Further, the institutional setting indicates that

other means of resolving the claims would be less practical and efficient. Only a small number of individual cases have made any progress to speak of. While the Province's comments (noted above) are well-taken, I cannot conclude that the objectives of the *Class Proceedings Act* would be better served by a finding that a class proceeding would not be the preferable procedure. As with many other institutional abuse cases, it is my view that the relevant factors weigh in favour of the conclusion that a class proceeding is the preferable procedure.

Representative Plaintiff: s. 7(1)(e)

[144] The fifth requirement for certification is set out at s. 7(1)(e) of the *Class Proceedings Act*, which requires that there be a representative party who

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
>
> (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

[145] There are three proposed representative plaintiffs: (1) Deanna Smith, who was born on August 16, 1965. Ms. Smith was taken into care, made a ward of the Province, and placed at NSHCC on November 25, 1976; she lived at NSHCC from

November 1976 to July 1979, and again from August 1979 to July 1980. (2) Harriet Johnson, who was born on March 13, 1969. Ms. Johnson lived at NSHCC for periods in April 1977, February and March 1980, and from June 1983 to July 1984. (3) June Elwin (nee Young), who was born on July 25, 1940, and was committed to the CAS of Queens and placed in NSHCC on February 26, 1943. She lived at NSHCC until around 1953, when she moved to a foster home.

[146] All three proposed representative plaintiffs allege, *inter alia*, that they were subject to physical, emotional and sexual abuse. The Attorney General says the proposed representative plaintiffs fail to meet the requirements of s. 7(1)(e) on the basis of conflict of interest, and absence of a cause of action against the Province.

(1) Cause of action on the part of the representative plaintiff

[147] According to the Attorney-General, neither Harriet Johnson nor June Elwin has a cause of action against the Province, based on the assertion that they were not wards of the Province, and therefore neither has a cause of action against the Province, nor can they represent prospective plaintiffs who were wards in respect to a common issue. The Attorney General argues that each representative plaintiff must have a cause of action against each defendant; in other words, that each

plaintiff must have a cause of action against the Province. The Attorney General concedes that there is conflicting caselaw on this point, none of it in Nova Scotia. However, the Attorney General argues, where there is a single defendant, as is the case here, if the representative plaintiff does not have a sustainable cause of action, there would be no basis for the common issue to be advanced. As I have already discussed, the proposed representative plaintiffs have all pleaded that they were wards of the Province, and I have found that pleading sufficient to underpin a cause of action, should material facts be pleaded.

[148] In *Graham v. Imperial Parking Canada Corp. (c.o.b. Impark)*, 2010 ONSC 4982, leave to appeal denied, 2011 ONSC 991, the court said, "[p]rovided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact…" (para. 197).

[149] At a minimum, the proposed representative plaintiffs were wards of children's aid societies, and I have determined that it is not plain and obvious that their claim must fail on the basis of agency. I reject the Attorney General's argument on this point.

(2) Conflict of interest

[150] Subparagraph 7(1)(e)(iii), as noted above, mandates that the representative party "does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members." They point to *T.L. v. Alberta (Director of Child Welfare)*, 2008 ABQB 114, at paras. 44-45, affirmed at 2009 ABCA 182, and *Queackar-Komoyue Nation v. British Columbia*, 2006 BCSC 1517, at paras. 62-65, as examples of cases where proposed representative parties were rejected on the basis of conflict of interest.

[151] The Attorney General claims that a conflict arises from Deanna Smith's assertion that her abusers included fellow residents of NSHCC. As such, it is argued, she cannot adequately and fairly represent the class. The Attorney General says the claim of systemic negligence will be complicated by the question of whether the alleged abusers acted of their own free will or whether their conduct was caused by the systemic conditions that existed in the institution. Further, the Attorney General speculates, the alleged torfeasors within the class could make similar allegations against the representative plaintiff, creating even more serious conflict. The Attorney General makes a similar objection with respect to Ms. Elwin, who also identifies certain fellow residents as abusers. The plaintiffs point

to the evidence of Ms. Smith on cross-examination, to the effect that she regarded other residents who abused her as fellow victims of systemic negligence.

[152] A disqualifying conflict does not arise from a mere possibility that the common issues will have different impact on different class members. In *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32, [2008] O.J. No. 2996 (Ont. Sup. Ct. J.), affirmed at 95 O.R. (3d) 269, [2009] O.J. No. 821 (Ont. Sup. Ct. J. (Div. Ct.)), Cullity J. said, "[a]t this stage, the possibility that conflicts that may affect decisions with respect to the prosecution of the plaintiffs' case will arise from the different types of harm is quite speculative. If and when they do arise, an order certifying the proceeding can be amended to designate subclasses with separate representation." Similar comments appear in *Caponi v. Canada Life Assurance Co.* (2009), 72 C.P.C. (6th) 331, [2009] O.J. No. 114 (Ont. Sup. Ct. J.), at paras. 55-56. I believe it would be speculative to find that a disqualifying conflict of interest exists at this stage. The claims against the Province are systemic ones, and the alleged disqualifying conflict remains speculative.

(3) Litigation plan

[153] The *Class Proceedings Act* requires the representative party to produce a litigation plan that "sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding": s. 7(1)(e)(ii). The purpose of a litigation plan was discussed in *Fakhri v. Alfalfa's Canada, Inc. (c.o.b. Capers Community Market)*, 2003 BCSC 1717, affirmed at 2004 BCCA 549. Gerow J. said, at para. 77:

> The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members…

[154] The litigation plan, as submitted, provides for the appointment of the Wagner firm as class counsel (para. 2). The plaintiffs propose to circulate a notice of the certification, informing class members that, *inter alia*, the class proceeding is certified; that persons falling within the class definitions will be bound by the determination of common issues unless they opt out in writing prior to a deadline fixed by the court; and that further notice will be provided after judgment on the common issues, whereupon, if the common issues are determined favourably, claimants may be required to register, file a claim, and prove additional facts in

order to receive compensation (para. 5). The plaintiffs propose to disseminate the notice, *inter alia*, through counsel's website and toll-free phone line, by direct mail to last known addresses of known members, by press release circulated by wire service, and through notices in various Nova Scotia newspapers as well as the Toronto *Globe and Mail* (para. 6). The plaintiffs indicate that they will seek to share the costs of notice with the defendants (para. 8).

[155] The plaintiffs propose that once the certification order is finalized, counsel will seek a case conference before the case management judge to finalize the terms of the order and notice of certification (para. 7). Ongoing reporting of the status of the proceeding would be posted on counsel's website, on which certain documents would also be posted, with updates within two weeks of a proceeding or receipt of a document (para. 10).

[156] The plaintiffs propose a case management conference to deal with disclosure of documents within 60 days of entry of the certification order, to be followed by examinations for discovery on the common issues (paras. 13-14). Further case management hearings would occur every two months, with non-urgent interlocutory applications being dealt with at that time (paras. 15, 17-18). The litigation plan goes on to address such matters as document management, potential

mediation and common issues resolution, and experts' reports in general terms (paras. 16, 19-21, 24).

[157] The litigation plan projects a trial on the common issues within twelve months after the completion of examinations for discovery and document production (para. 22). The plan goes on to provide for steps to be taken by the court in the event of resolution of the common issues, as well as the proposed contents for the notice of common issues (paras. 26-28). The plaintiffs then set out a claims process, to be overseen by referees agreed by the parties and approved by the court, with rights, powers and duties as directed by the court, as well as procedures to be followed in assessing individual claims, with different procedures for claims over and under $100,000.00 (para. 29).

[158] The plaintiffs submit that the litigation plan is "adequate, workable and conforms to the jurisprudence." The Attorney General calls it a "minimalist" plan that is "far from adequate to address the individual issues." The Attorney General appears to be characterizing this as a complex proceeding, and therefore one demanding a more detailed litigation plan.

[159] It is rare that a litigation plan will provide a basis to deny certification: see, for instance, *Pearson v. Inco Ltd.* (2006), 261 D.L.R. (4th) 629, [2005] O.J. No. 4918 (Ont. C.A.), at para. 97, leave to appeal denied, [2006] S.C.C.A. No. 1. The Attorney General says *Pearson* is distinguishable on the basis that the motions judge who initially denied certification erred by requiring that all necessary information be contained within the litigation plan itself, rather than being supplemented by affidavits. The Court of Appeal held that sufficient information could be derived from the plan and the affidavit together (para. 97).

[160] The plaintiffs submit that the litigation plan at the certification stage "need only provide … a reasonable framework for the issues which are reasonably expected to arise as the case proceeds": *Wheadon v. Bayer Inc.*, 2004 NLSCTD 72, at para. 159; leave to appeal denied, 2005 NLCA 20; leave to appeal denied [2005] S.C.C.A. No. 211. In *Cloud*, *supra*, the Ontario Court of Appeal described a litigation plan as "something of a work in progress" whose "shortcomings due to its failure to provide for when limitations issues will be dealt with or how third party claims are to be accommodated can be addressed under the supervision of the case management judge once the pleadings are complete" (para. 95). The Attorney General says *Cloud* is distinguishable because the motions judge's objection to the

litigation plan had to do with its specific details respecting a common minimum award of damages, which was held to be insufficient basis on which to find the plan unworkable (para. 95).

[161] The Attorney General points to Cullity J's remark in *LeFrancois v. Guidant Corp.* (2008), 56 C.P.C. (6th) 268, [2008] O.J. No. 1397 (Sup. Ct. J.), that "[i]f the plaintiffs cannot produce a workable litigation plan in a complex proceeding, this casts a special and unfavourable light on the requirement that a class proceeding is preferable to other alternatives - including individual actions" (para. 97). Cullity J. went on to say, however (in a passage not cited by the Attorney General):

> … For this reason, certification has been denied in some cases in which the court has found that the proceeding - and, in particular, the methods of resolving individual issues - would be unmanageable... An unmanageable proceeding will not promote the legislative objective of access to justice and may have no, or negligible, benefits in respect of judicial economy. At the same time, neither the parties nor the court is blessed with perfect foresight at this stage of the proceeding and the future course of the litigation may depend upon the findings of fact and the decisions made at the trial of the common issues. For this reason section 25 of the CPA confers a wide discretion on the trial judge to decide how the individual issues will be dealt with.…

[162] In *Andersen v. St. Jude Medical Inc.* (2004), 48 C.P.C. (5th) 312, [2004] O.J. No. 132 (Sup. Ct. J.), Cullity J. made the following comments respecting the role of the litigation plan in the consideration of the preferable procedure:

> … At this stage, the plan must necessarily be tentative and, for that reason, not all procedural details need be provided. Its purpose is to assist the motions judge to make a practical judgment - on the basis of, among other things - a costs/benefit analysis - on the fundamental question whether the goals of the legislation will be served by certification. A costs/benefits analysis is important because certification will not be justified if a resolution of the common issues in favour of the plaintiffs will not advance their case sufficiently to enable them to pursue their claims for compensation by dealing with the remaining individual issues efficiently and economically. [Emphasis added.]

[163] The Attorney General submits that in establishing the "manageability" of the litigation plan, the plaintiff must establish "a complete plan of proceedings," as it was put in *Sharbern Holding Ltd. v. Vancouver Airport Centre Ltd.*, 2005 BCSC 896, at para. 24. However, the certification judge in that case found it "sufficient to include in the plan a provision that a case management conference will be convened following the trial of the common issues to determine the manner of the determination of the individual issues" (para. 24). The Attorney General also cites the following "authoritative" statements from Winkler J.'s decision in *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173, [1999] O.J. No. 1662, 1999 CarswellOnt 1456 (Sup. Ct. J.), at para. 98, on the purpose of the litigation plan, and the degree of detail that is required:

> A practice has developed in class proceedings of accepting litigation plans in support of certification motions that are sparse and lacking in detail. While this may appropriate in more straightforward cases, in complex litigation such as the instant case, a detailed plan which meets the requirements of the Act is of critical importance.

[164] *Carom* was affirmed by the Divisional Court (46 O.R. (3d) 315), but set aside by the Ontario Court of Appeal (196 D.L.R. (4th) 344, leave to appeal denied, 157 O.A.C. 399 (note)(S.C.C.)). It does not appear, however, that any of the courts above addressed this point.

[165] The Attorney General says the Ontario Court of Appeal rejected the suggestion that deficiencies in the litigation plan could be remedied after certification in *Ontario v. Phaneuf*, [2009] O.J. No. 5618. In fact this was a decision of the Superior Court of Justice (Divisional Court), not the Court of Appeal. The Province had raised various objections to the litigation plan. The Divisional Court found the plan inadequate, stating, "[t]he representative Plaintiff must provide a detailed plan with schedules and strategies to advance the litigation and to allow the court to review and approve the plan as part of the certification motion, failing which, certification would not be appropriate" (para. 72). The Divisional Court decision was affirmed (without reference to this point) at 2010 ONCA 901.

[166] While the Attorney General maintains that *Phaneuf* supersedes earlier Ontario Court of Appeal decisions such as *Cloud* and *Pearson*, this appears to be

based on the misapprehension that the relevant comments in *Phaneuf* came from the Ontario Court of Appeal, rather than the Divisional Court. In fact, the Court of Appeal did not speak to these points. In the recent Ontario decision in *Schwoob v. Bayer Inc.*, 2013 ONSC 2207, the court expressed concerns about the litigation plan, but directed further discussion, given that the proceeding was only at the "procedural stage" (para. 54).

[167] Similarly, in *Parker*, *supra*, the plaintiffs argued that the litigation plan was a "work in progress" that could be revised to address deficiencies. The Province argued that it was "unrealistic and inadequate" and did not "detail how any individual issues would be managed" (paras. 121-122, 124). Rooke A.C.J.Q.B. said, at paras. 123 and 125:

> The Plaintiffs argued that the standard for the litigation plan is one of "satisfactory, adequate or sufficient" for certification and since the plan is a work in progress, some flexibility is required. The Plaintiffs pointed to the factors set out in *Bellaire v Independent Order of Foresters* (2004), 5 CPC (6th) 68 at para 53 (ONSCJ) for what a litigation plan should contain:
>
> > (a) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
> >
> > (b) the collection of relevant documents from members of the class as well as others;
> >
> > (c) the exchange and management of documents produced by all parties;
> >
> > (d) ongoing reporting to the class;

> (e) mechanisms for responding to inquiries from class members;
>
> (f) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries;
>
> (g) the need for experts and, if needed, how those experts are going to be identified and retained;
>
> (h) if individual issues remain after the determination of the common issues, what plan is proposed for resolving those individual issues, and;
>
> (i) a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided.
>
> ….
>
> With respect to their litigation plan, I agree with most of the Plaintiffs' arguments. I find that it is adequate enough for the purpose of this provisional decision and is not, in itself, a bar to certification. However, were certification to proceed, it would require further refinement.

[168] A similar list was set out by the Saskatchewan Court of Appeal in *Sorotski v. CNH Global N.V.*, 2007 SKCA 104 at para. 78, leave to appeal denied, [2007] S.C.C.A. No. 590.

[169] The Attorney General says the plaintiffs have failed to establish on a balance of probabilities that they have a workable plan to carry the litigation to resolution. The Attorney General says the plan is deficient in relation to individual issues, resulting in individual claimants likely being “cut adrift” after the common issues trial. The plan, it is submitted, makes no provision for documentary or oral

discovery of individual claims under $100,000, despite the large number of issues to be resolved in relation to each such claim. The Attorney General claims (without details) that the proposed “reference system” is one “normally used by the Court to avail itself of expert assistance or for accounting or quantification of damages” and that it is “too limited to address the wide range of individual issues….”

[170] The Attorney General says the plaintiffs have failed to provide evidence on various points, including the different circumstances of should there be both settling and non-settling defendants; methods to identify and locate witnesses, and gather their evidence; methods for collecting and managing relevant documents, including those originating with settling defendants; on-going procedures for reporting to class members; procedures for handling expert witnesses; a discovery plan for common issue witnesses; a case management system for both class issue and individual trials; plans for providing legal representation to class members when pursuing individual claims; plans for applying defences to individual claims; a reference procedure for quantifying and distributing damages; plans for settling legal fees and disbursements for class counsel, and for informing class members before the opt-out date; and, finally, plans for addressing substantive individual issues respecting liability and damages. In summary, the Attorney General says the

plaintiffs have failed to provide in the proposed litigation plan a workable procedure for the class trial, or for resolution of the individual issues requiring resolution as part of the class proceeding.

[171] The plaintiffs argue that a “reasoned cooperative approach” is a better reflection of Nova Scotia law. I am, however, forced to agree with the Attorney General’s view that the litigation plan, as it now stands, is in need of refinement before it can be considered a workable one. That being said, I am not convinced that the current deficiencies in the litigation plan should lead to a complete dismissal of the certification motion where the other factors indicate support at least partial certification. This brings me to my intended resolution of the current motion.

Conclusion

[172] As noted earlier, I would be prepared to certify the class action in regard to the class of proposed plaintiffs who were placed in the Home by the Province. I am satisfied that it is not plain and obvious that the causes of action pleaded on behalf

of that class are bound to fail. I qualify this result with the observations set out above regarding the possibility of amendment with respect to the other two classes. Otherwise, the only obstacle to at least a partial certification is the deficient litigation plan.

[173] Accordingly, I intend to adjourn the motion pursuant to s. 8(1) of the *Class Proceedings Act*, which permits the court to "adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced." This was the procedure adopted in *Slark*, where Cullity J. adjourned to allow the plaintiffs to resolve "issues relating to the litigation plan, and in order to accommodate the possibility that the plaintiffs may wish to file further evidence" (para. 178). The purpose of the adjournment will be to permit the plaintiffs to address any proposed amendments to the statement of claim in accordance with my conclusions in this decision, and to address the litigation plan. I am mindful that there have been prior amendments to the pleading. I am, however, convinced that the purposes of the Act are best served by permitting the plaintiffs a further opportunity to address these issues before finally disposing of the motion for certification.

[174] Accordingly, the plaintiffs may provide further materials on the issues with respect to the causes of action and the litigation plan by March 31, 2014.

LeBlanc, J.