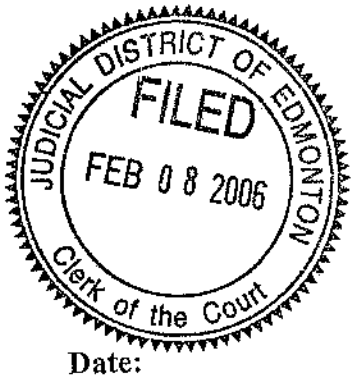
Court of Queen's Bench of Alberta



Citation: LaBonte v. Alberta (Director of Child Welfare), 2006 ABQB 104

Date:
Docket: 0403 12898
Registry: Edmonton

Between:

Tanya LaBonte

Plaintiff

- and -

Her Majesty the Queen in Right of Alberta
as Represented by the Director of Child Welfare

Defendant

Restriction on Publication: No one may publish any information serving to identify a child or guardian of a child who has come to the Minister's or a director's attention under the *Child, Youth and Family Enhancement Act*. See the *Child, Youth and Family Enhancement Act*, s. 126.2.

Reasons for Judgment
of the
Honourable Mr. Justice Frans F. Slatter

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[1] This is an application to certify these proceedings as a class action. The premise of the action is that the class members, who were minors at the time and under the care of the Defendant, suffered a personal injury (the "primary tort") at the hands of a third party tortfeasor (the "primary tortfeasor"). It is alleged that the Defendant Director of Child Welfare had a duty to sue the primary tortfeasor on behalf of the minor, but did not do so. As a result, it is alleged that the class members lost certain rights, and they now seek to recover damages from the Defendant Director.

[2] This is therefore not an action about any failure of the Defendant to react properly to the abuse itself. This is a lawsuit about lawsuits. The thrust of the Plaintiff's claim is that she and other members of the class suffered personal injuries that would have entitled them to damages, or would have entitled them to make claims under the Victims of Crime legislation. The allegation is that the Defendant should have pursued those claims on behalf of the plaintiff class, and did not do so.

Facts

[3] A certification application is not a determination of the merits, and none of the allegations in the pleadings have at present been proven. In this particular action, the circumstances of the various potential class members will vary widely, distinguishing this action from some others that have been certified. The circumstances of some of the individual potential class members are useful in providing some context for the application. The record discloses the circumstances of three potential class members.

The LaBonte Claim

[4] Ms. LaBonte, the proposed representative plaintiff, deposes that she was abused by her step-father between the ages of 7 and 14. The first involvement of the Defendant with the family actually occurred when Ms. LaBonte was nine years old, and involved a report of mental abuse by her step-father. Both Ms. LaBonte and her mother denied the abuse, and the file was closed.

[5] In about September of 1986, Ms. LaBonte and her mother and sister went to a facility for battered women. At that time Ms. LaBonte reported physical abuse by her step-father to the Defendant. Ms. LaBonte was 14 years old. Ms. LaBonte deposes that she was made the subject of a Permanent Guardianship Order at this time, but the Defendant's records do not confirm that. The Defendant and the Plaintiff's mother did enter into a "Support or Custody Agreement with Guardian" for a three-month period from September 11, 1986 to December 18, 1986. The Support Agreement is a standard form one-page document, which recites that it was made pursuant to the provisions of the *Child Welfare Act*. The agreement has a place to check off "Support Agreement", or "Custody Agreement", and the former was checked. The agreement states that "the guardian(s) and the Director agree:", and the only operative clause is clause 5 which reads as follows:

> 5. The guardian(s) delegate(s) to the director the authority to make the following decisions:
>
> ☐ Day to day child care
> ☐ Social activities
> ☐ School enrollment, vocational training, and employment
> ☐ Acquisition of recreational licenses and permits (excluding firearms and driver's license)
> ☐ Consent to ordinary medical/dental care
> ☐ Consent to emergency treatment or surgical procedures
> ☐ Not applicable
> ☐ Other

The only box checked off was the one marked "Not applicable". It therefore appears that a fairly low level of involvement by the Defendant was anticipated. The purpose of the Support Agreement was apparently to allow the Defendant to provide the Plaintiff with a youth worker and counselling services.

[6] In December of 1986, Ms. LaBonte's counsellor reported that she was doing well. There was a restraining order in place against her step-father, the Department workers concluded that the family was doing well, and the file was closed on January 26, 1987.

[7] In May of 1987, Ms. LaBonte disclosed prior sexual abuse to her mother, who contacted the Department. A further Support Agreement was entered into between July 7, 1987 and January 6, 1988. It was similar in form to the previous Support Agreement. Further counselling was arranged, but Ms. LaBonte apparently did not attend.

[8] The second Support Agreement was terminated early on September 2, 1987 when Ms. LaBonte's mother arranged for her to move and reside with an aunt. On September 29, 1987 the aunt reported some difficulties with Ms. LaBonte. In October of 1987, Ms. LaBonte overdosed and was admitted to hospital. On October 29, 1987, Ms. LaBonte was "apprehended into the custody of a director" under s. 17(9)(a) of the *Act*, on the basis that Ms. LaBonte was lost or abandoned or had no guardian, as neither her mother nor her aunt were willing to take responsibility for her.

[9] On November 10, 1987, the Provincial Court issued a Temporary Guardianship Order with respect to Ms. LaBonte. The order was made permanent on October 20, 1988. That order stayed in effect until her 18th birthday on July 19, 1990. At that point, Ms. LaBonte left the Child Welfare system, and *prima facie* the limitation periods on her claims would have started to run again (see *infra*, para. 77). During this time the Department arranged counselling for Ms. Labonte and her mother, and she resided in various foster homes (from which she sometimes ran away).

[10] In 1988, Ms. LaBonte's step-father was charged with criminal offences relating to the abuse, and in 1990 he was convicted and sentenced to a term in prison.

[11] A summarized chronology of the LaBonte claim is as follows:

LaBonte Chronology	
July 19, 1972	Date of Birth
1979	Abuse starts (age 7)
August, 1981	First Involvement of Children's Services (emotional abuse)
August, 1986	Abuse ends (age 14)

Sept. 11-Dec. 18, 1986	Physical abuse reported; Support Agreement and counselling
May, 1987	Sexual abuse reported to mother and Department
July 7-Sept. 2, 1987	Support Agreement; moves to aunt
October 29, 1987	Apprehended (age 15)
November 10, 1987	Temporary Guardianship Order
1988	Step-father charged
October 20, 1988	Permanent Guardianship Order (age 16)
July 19, 1990	Turns 18; leaves Child Welfare system; limitations start to run?
1990	Step-father convicted
July 19, 1992	Turns 20; two years from re-start of limitations
August, 1996	Ten years after abuse ends
May, 1997	Ten years after disclosure
March 1, 1999	New *Limitations Act* in effect
July 19, 2000	Turns 28; ten years after re-start of limitations
March 1, 2001	Two years after new *Limitations Act*; transitional period over
June 29, 2004	Action commenced

[12] It is unclear whether Ms. LaBonte's history represents a typical pattern of the proposed class. It can be seen that on two occasions she was under "Support Agreements" for short periods of time. She was the subject of a Temporary Guardianship and then a Permanent Guardianship Order for approximately 31 months. Since her step-father was convicted, it is clear that she was the victim of a tort. It also seems likely that she might have had a claim under the *Criminal Injuries Compensation Act*. She was not however under the care of the Defendant at the time of the tort, and she was not apprehended directly as a result of the tort. Her eventual apprehension was as a result of her aunt having problems with her, and because of her overdose. However, the Defendant was aware of the tort at the time of the apprehension in October of 1987.

S. J. Claim

[13] It was originally proposed that S.J. would be the representative plaintiff, but Ms. LaBonte was substituted in her place. S. J. was born in 1961. She deposes that she was sexually and physically assaulted by a number of relatives and friends of the family. When she was 14 years

old she became pregnant as a result of a sexual assault by a relative. That relative was subsequently convicted of the crime. S. J. lived a very unstable life, and in her later teens she was abused or exploited by other persons, and had three other children.

[14] S. J.'s involvement with the Defendant was somewhat limited. Between 1965 and 1968 the family was involved with the City of Calgary's Children's Aid Department, not the Defendant. The Defendant assumed supervision of the family in December of 1968, when S. J. was about seven years old. At one point, S. J.'s sister was the subject of a Temporary Guardianship Order. In addition to the Defendant's monitoring of the home, S. J. was the subject of a Temporary Custody Agreement under s. 35 of the *Act*, dated May 31, 1977. The agreement provided that "the Director agrees to take the child into care". It gave the Director authority to provide medical care for S. J., and allowed the Director to collect the Family Allowance payments. It was anticipated that the agreement would be in force for six months, but it was terminated after two months on August 1, 1977. On that date S. J. was moved from a foster home back to her parents.

[15] S. J. was apparently never the subject of a Temporary Guardianship Order or a Permanent Guardianship Order. Apart from the Temporary Custody Agreement that was in place for about two months, the involvement of the Defendant with S. J. amounted to "monitoring" of the family. The involvement of the Department with S. J. was therefore qualitatively different than its involvement with Ms. LaBonte. While S. J. was assaulted many times, the primary assault occurred in 1975, which would suggest that the presumptive limitation period would have expired in 1977. The record is somewhat unclear, but the limitation might have expired during the term of the Temporary Custody Agreement. This raises the issue of the responsibility of her guardians to commence the action either before, or during the currency of the Temporary Custody Agreement. If the Defendant had a duty to sue on her behalf, and did not do so, the limitation period on S. J.'s cause of action against the Defendant might well have expired in 1983. At the time that this action was commenced, S. J. was over 28 years of age, which suggests that the ultimate limitation period might have expired (see *infra*, paras. 55(a) and 77).

Claim of J. J. S.

[16] J. J. S. is put forward as another person who might be a member of the class. J. J. S. was born on May 28, 1988. He was accordingly 16 years old when this action was commenced, and he is 17 today. A Next Friend commenced an action on his behalf in 2004, but it is suggested that this claim would be absorbed into the class action.

[17] J. J. S. was apparently made the subject of a Temporary Guardianship Order in November of 1993, when he was five years old. J. J. S. was placed in a foster home, where he was assaulted by another foster child in late 1993 or early 1994. The other foster child was convicted as a result of these assaults.

[18] The claim of J. J. S. therefore differs significantly from the claim of S. J. and Ms. LaBonte. The primary tort against him occurred while he was under the joint guardianship of the

Defendant. The limitation period against the primary tortfeasor would have arisen under the old *Limitation of Actions Act*. By the time the new *Limitations Act* came into place in 1999, it is likely that the limitation period had already run, subject to the question of whether he was under the "actual custody" of a parent or guardian (see *infra*, para. 50). If the tort had occurred after 1999, the limitation period would still be suspended in favour of J. J. S. under the new *Limitations Act*, because he is a minor (see *infra*, para. 52).

[19] This brief summary of the allegations of Ms. LaBonte, S. J., and J. J. S., shows the wide variety of circumstances in which the claims of class members might arise. This factual context must be kept in mind in determining whether this action should proceed as a class action.

The Statute

[20] This application is brought under the *Class Proceedings Act,* R.S.A. 2000, c. C-16.5. The most relevant provisions of the *Act* are as follows:

> **5(1)** In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
>
> (i) will fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

Evidentiary Issues

[21] The Plaintiff and Defendant tendered evidence in this application. A good deal of that evidence was inadmissible.

Evidence on Legal Issues

[22] An affidavit was filed by S. J., who was originally put forward as the representative plaintiff. She deposed in part "I have reviewed the proposed litigation plan attached as Exhibit A and believe it would provide a proper framework for dealing with the claims." Whether the litigation plan is appropriate is a matter for argument by counsel, and a decision by the certifying judge. It is not an appropriate topic for expert evidence, much less evidence of a lay litigant.

[23] The Plaintiff also filed an affidavit of Deborah Stewart, a barrister with a large personal injury practice in Edmonton. Ms. Stewart deposed that she once represented a client known as Ms. J. Ms. J. had been sexually abused by her step-father, and was so traumatized by the experience that she was unable to participate in any litigation to protect her rights. She could not even participate in examinations for discovery or independent medical examinations. Ms. Stewart deposed that plaintiffs like Ms. J. would benefit from a class proceeding, because they would not have to participate directly in the proceedings. To this extent Ms. Stewart's affidavit was unobjectionable, even if of slight materiality, as the circumstances of Ms. J. were so extreme and unusual that they are unlikely to be representative of the majority of class members. The affidavit also did not explain how a plaintiff like Ms. J. would handle the individual phase of this litigation: see *infra*, para. 58.

[24] Ms. Stewart's affidavit, however, went on to depose that "based on my experience and observations as Next Friend for Ms. J., I believe that there are many advantages to prosecuting S.J.'s lawsuit as a representative action." Again, whether a class proceeding is "the preferable procedure for the fair and efficient resolution of the common issues" is a matter for argument and decision. It is not an appropriate topic for expert evidence: Furthermore, Ms. Stewart's affidavit was full of hearsay. It recounted things that third parties had disclosed to Mr. Lee, and that Mr. Lee had then passed on to Ms. Stewart, who then swore that she verily believed them to be true. This sort of double hearsay is of so little probative value as to be of no use to the Court: ***Dudziak v. Boots Drug Stores Canada Ltd.*** (1983), 40 C.P.C. 140 at para. 6; ***Edwards v. Law Society of Upper Canada*** (1995), 40 C.P.C. (3d) 316 (Ont. Gen. Div.) at para. 15. If there are third parties with factual information of assistance in the certification hearing, those third parties should themselves swear the affidavits.

Statements of Counsel

[25] The Plaintiff also attempted to rely on statements made in court by counsel retained by the Defendant in other similar litigation. These statements were made during argument in those cases, sometimes in response to questions from the presiding judge. What counsel says in court about issues of fact is not evidence: ***Cairns v. Cairns***, [1931] 3 W.W.R. 335, 26 Alta. L.R. 69 (C.A.); ***Ravoy v. Ravoy***, 2000 ABCA 114, 255 A.R. 293 at para. 18; ***Mitran v. Guarantee RV Centre Inc.*** (1999), 251 A.R. 77, at para. 17; ***Principal Savings and Trust Co. v. Amo Pecuniam Holdings***, [1984] A.J. No. 578 at para. 36. Counsel of course has implied authority to make binding admissions of fact in an action. But such admissions are regarded as mere waivers of the need to prove the fact in that case, and are not binding in subsequent actions: *Phipson on Evidence* (16th ed., 2005) at para. 4-19. Any purported "admissions" on matters of law are not binding on the court, even in the action in which they are made: ***Avco Delta Corp. Canada Ltd. v. MacKay*** (1977), 4 A.R. 565, [1977] 5 W.W.R. 4 (App. Div.); ***V. W. v. D. S.***, [1996] 2 S.C.R. 108, at para. 17.

[26] Statements made by counsel to the court during argument are rarely admissions at all. They often are no more than examples offered by counsel to show the consequences of the arguments of that counsel, or his or her opponent. Sometimes they are merely responses to probing questions or "kite flying" by the judge. Statements made by counsel in argument in other cases are not relevant. For example, in ***British Thomson-Houston Company, Limited v. British Insulated and Helsby Cables, Limited***, [1924] 1 Ch. 203, the plaintiff argued that it was impossible to draw a tungsten filament by following a particular patent. In a previous action it had argued the opposite. The case (i.e. the factum) filed by the plaintiff in the House of Lords in the earlier action was held not to be admissible in the present action. In ***Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)***, 2002 FCA 106, the Court refused to include in the appeal books the arguments of counsel in a previous related action. Even the reasons for judgment in a previous action involving the same parties have no probative value: ***Marthaller v. Lansdowne Equity Venture Ltd.*** (1997), 52 Alta. L.R. (3d) 329, 200 A.R. 226 (C.A.) at para. 46; ***Edwards v. Law Society of Upper Canada***, *supra*, at para. 9.

[27] Related to the rule that the arguments of counsel are irrelevant in subsequent cases is the rule that the comments of the judge during argument are not official pronouncements. As Viscount Simon said in a *Practice Note*, [1942] W. N. 89:

> During the hearing of an appeal Viscount Simon L.C., referring to reports which might be made of the case, said that it was well understood that interlocutory observations of members of the Board or of a Court were not judicial pronouncements. They did not decide anything, even provisionally. They were made to elucidate the argument, to point the question, or to indicate what were the matters which the judicial spokesman thought needed to be investigated, and that was all. It would be a very great pity, and a profound error, if anybody, foreigner or fellow-subject, supposed that interlocutory observations were anything more.

See also ***R. v. Hodson***, 2001 ABCA 111, 281 A.R. 76, at para. 33; ***Alberta Union of Provincial Employees v. Continuing Care Employees' Bargaining Association***, 2002 ABCA 148, 4 Alta. L.R. (4th) 206, 303 A.R. 137. Any rule that the client is forever bound by statements made by its counsel in argument could only impede the frank dialogues between counsel and the Court that are often used as a part of the adversarial process of problem solving. The transcripts of argument in other cases relied on by the Plaintiff are of no probative value, and are vexatious.

Evidence of Other Actions

[28] The Defendant also attempted to produce evidence on whether the class proceeding is the "preferable procedure for the fair and efficient resolution of the common issues". The evidence was an affidavit deposing that 33 individual actions had been commenced against the Defendant that overlapped with the claims that would be included in the class action. This, the Defendant argued, showed that these claims can be efficiently resolved in individual actions.

[29] Not surprisingly, the Plaintiff attempted to cross-examine on this affidavit. She wanted the Defendant to identify each of the 33 actions, and then to give the status of the actions. The Plaintiff proposed to show that some of the 33 actions had been abandoned, discontinued, struck out, or summarily dismissed. This it was said would show that a class proceeding was the preferable procedure.

[30] An application to compel the Defendants to provide further information about the 33 actions was dismissed, on the basis that the evidence was not relevant and material. The reasons can be summarized as follows:

(a) Whether a procedure is "preferable" is largely a question of law. It is determined by the certification judge based on his or her knowledge of how court procedures work. Evidence on questions or conclusions of law is not appropriate: ***Canada Post Corp. v. Smith*** (1994), 20 O.R. 173, 118 D.L.R. (4th) 454 (Div. Ct.); ***R. v. S. (G.)*** (1988), 67 O.R. (2d) 198, 31 O.A.C. 161, 46 C.C.C. (3d) 332 (C.A.), aff'd [1990] 2 S.C.R. 294; ***R. v. Oliver*** (1997), 48 Alta. L.R. (3d) 180, 193 A.R. 241 (C.A.); ***Ontario (Ministry of Natural Resources) v. Ontario Federation of Anglers and Hunters*** (2001), 143 O.A.C. 103, 32 Admin. L.R. (3d) 282 (Div. Ct.); ***Marquis of Camden v. Inland Revenue Commissioners***, [1914] 1 K.B. 641 at pg. 650. For example, evidence of this type was rejected in ***Bramalea Inc. (Trustee of) v. KPMG*** [2000] S.C.C.A. No. 278, 143 O.A.C. 399 (whether issue important enough to justify leave to appeal); ***Alberta Human Rights Commission v. Blue Cross***, [1983] 6 W.W.R. 758, 28 Alta. L.R. (2d) 1, 48 A.R. 192 at para. 8 (whether procedural steps unreasonable); ***Chevron Canada Resources v. Canada (Executive Director of Indian Oil and Gas Canada)***, 1998 ABQB 910, [1999] 7 W.W.R. 47, 239 A.R. 138 (whether proceeding an abuse of process); ***Hovsepian v. Westfair Foods Ltd.***, 2003 ABQB 641, [2004] 5 W.W.R.

519, 22 Alta. L.R. (4th) 241, 341 A.R. 1 at para. 54 (whether matter *res judicata*).

(b) Some of the proposed evidence did not appear to be relevant. For example, if an action was dismissed or abandoned because of the expiry of a limitation period, that would have nothing to do with whether a class proceeding was preferable or not. Either way the action would be statute barred.

(c) The evidence is not material, because at the end of the day it is not probative. As I pointed out in ***Robertson v. Edmonton (City) Police Service (#9)***, 2004 ABQB 243, 39 Alta. L.R. (4th) 239, 355 A.R. 281 at paras. 12-20 attempting to draw generalized conclusions from individual examples is rarely helpful.

(d) This evidence is also not admissible because it would cause the Court to have to inquire into 33 separate collateral issues. One could only conclude that the 33 actions were or were not being successfully prosecuted individually by examining the circumstances of each one. Where the actions had been abandoned, discontinued, or struck out, one would have to examine them individually to see whether they would have been more successful as a class proceeding. The system simply cannot devote the resources needed for this kind of collateral inquiry: ***Robertson v. Edmonton***, *supra*, at para. 20. In any event, even if the inquiry was conducted it is unlikely that any probative evidence would result.

(e) Further, it should be noted that the issue in the *Act* is whether the common issues can be more efficiently decided in the class action. Because individual issues and individual actions have been resolved does not necessarily speak to the preferable way of resolving the common issues.

In determining whether a class proceeding is the preferable procedure to follow, I have accordingly disregarded any evidence of the results of particular individual actions.

Publication Ban

[31] The proposed representative Plaintiff brought an application to prosecute this action using a pseudonym, and for an order that information that would disclose her identity not be published. In accordance with Practice Note No. 11, notice was given to the media of this application. The Defendant took no position on the application.

[32] The Supreme Court has, on many occasions, made it clear that justice should be administered in public. As the Court recently held in ***Toronto Star Newspapers Ltd. v. Ontari*** [2005] 2 S.C.R. 188, 2005 SCC 41, 253 D.L.R. (4th) 577 at paras. 1-4:

> [1] In any constitutional climate, the administration of justice thrives on exposure to light -- and withers under a cloud of secrecy.
>
> [2] That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2 of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
>
> [3] The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
>
> [4] Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration*.

An open judicial system is one of the hallmarks of our democratic constitution. As such, publication bans should be exceptional.

[33] There are some cases where the victims of sexual assaults have been permitted to sue using pseudonyms: ***Nickason v. Alberta***, 2006 ABQB 115 at para. 10. Many of these cases were decided before the leading decisions on the constitutional importance of keeping the courts open. Most of them were not decided on notice to the media, and many do not discuss the *Charter* implications of a publication ban.

[34] When considering a publication ban, there are special considerations that apply to a class action. When a person comes forward and purports to be a representative plaintiff, there is much to be said for the argument that the other members of the class are entitled to know who it is that purports to represent them: see ***B. B. v. Quebec (Procurer General)***, [1998] R.J.Q. 317. Section 20 of the *Act* requires that notice of certification be given to the class. Section 20(6)(a) requires that the name and address of the representative plaintiff be disclosed. It would be somewhat artificial to provide for a publication ban, or the use of a pseudonym, when the name and address of the representative plaintiff must be publicized to the class. In all of the circumstances, it is inappropriate to allow the representative Plaintiff to sue by use of a pseudonym, and the application is accordingly dismissed.

The Merits

[35] Section 6(2) of the *Act* provides that a certification application is not a determination of the merits: see also ***Hollick v. Toronto (City)***, [2001] 3 S.C.R. 158, 2001 SCC 68 at para. 16. Section 5(1)(a) requires only that the pleadings disclose a cause of action. A certification application is therefore not in the nature of a summary judgment application, although sometimes the defendant will bring a cross-application for summary judgment at the time of certification: ***Pauli v. ACE INA Insurance Co.***, 2004 ABCA 253, 32 Alta. L.R. (4th) 205, at para. 7; ***Papaschase Indian Band v. Canada (A.G.)***, 2004 ABQB 655, 43 Alta. L.R. (4th) 41, at para. 1.

[36] Nevertheless, the merits of the action are relevant to determining whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. It is necessary to explore the merits to identify the common issues and to define the class: ***Cloud v. Canada (A.G.)*** (2004), 73 O.R. (3d) 401, 247 D.L.R. (4th) 667 (C.A.) at para. 48. Further, while the certification motion is not the appropriate place for deciding difficult questions of fact or law, if it appears on the face of the proceeding that the action is doomed to fail, there is little point in certifying the class proceeding. The following issues relating to the merits are relevant to the certification motion.

Social Welfare Legislation

[37] Since Alberta became a province in 1905, there have been five statutes relating to the protection of children:

> *The Children's Protection Act of Alberta*, S.A. 1909, Chapter 12; in force February 15, 1909 (the "*1909 Act*");
>
> *The Child Welfare Act*, S.A. 1925, Chapter 4; in force November 1, 1931 (the "*1925 Act*");
>
> *The Child Welfare Act*, S.A. 1944, Chapter 8; in force May 1, 1944 (the "*1944 Act*");
>
> *The Child Welfare Act*, 1966, S.A. 1966, Chapter 13; in force July 1, 1966 (the "*1966 Act*");
>
> *Child Welfare Act*, S.A. 1984, Chapter C-8.1; in force July 1, 1985 (the "*1984 Act*").

The *1984 Act* was substantially amended, and renamed the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12 ("*C.Y.F.E. Act*") as of November 1, 2004. The *1984 Act* having been in force for the last 20 years, as a practical matter most of the class members were probably involved with the Defendant pursuant to its provisions.

[38] Not surprisingly the legislation has changed over time. It is not necessary to explore all of the differences in the legislation over the last century, but a few comments about the concept of guardianship are appropriate.

[39] The *1909 Act* did not deal with guardianship. The *1925 Act* provided that the Director, or a private children's aid society would be the legal guardian of a child who became a permanent ward. Under the *1944 Act*, the Superintendent became the legal guardian "of the person of the child" when a child was made a permanent ward.

[40] By s. 10 of *An Act to Amend the Child Welfare Act*, S.A. 1961, c. 11, the Superintendent became the "sole legal guardian of the person *and estate* of the child" (emphasis added). The statute provided that the rights of the Public Trustee with respect to any property held by him for the child were not affected by the guardianship of the Superintendent.

[41] The *1984 Act* expanded the options available to the Department. Section 7 of the *1984 Act* authorized support agreements "with respect to the provisions of support services to the family or the child", if the welfare of the child would be adequately protected if he or she stayed with his or her guardian. Section 8 of the *1984 Act* allowed for custody agreements under which a Director would be given custody of a child for a period not exceeding six months. Custody agreements could be renewed, but the total duration of the custody could not be more than two years. Under s. 9, a custody agreement had to deal with a number of issues, including "the extent of the delegation of the authority of the guardian to the Director".

[42] The *1984 Act* also allowed for Supervision Orders, Temporary Guardianship Orders, and Permanent Guardianship Orders. A Supervision Order could be made for a period not exceeding six months where a child was in need of protective services, and the child's needs could adequately be dealt with by the child's guardian, subject to the supervision of the Director.

[43] If the needs of the child could not be met by the child's guardian, then the Director could apply for a Temporary Guardianship Order. A Temporary Guardianship Order could be in place for no more than one year, at which time the Temporary Guardianship Order could be renewed for one more year, or a Permanent Guardianship Order could be granted.

[44] The *1984 Act* did not appear to contemplate any change in guardianship as a result of a Supervision Order. When a Temporary Guardianship Order was made, s. 29(2) provided that the Children's Guardian would become a joint guardian with any other guardian of the child. When a Permanent Guardianship Order was granted, s. 32(3) provided:

> **32(3)** If the court makes a permanent guardianship order, the Children's Guardian is the sole guardian of the person of the child and the Public Trustee is the *sole trustee of the estate of the child.* (emphasis added)

In 1988 the Children's Guardian was replaced by the Director, but otherwise the provisions of the *1984 Act* were unchanged: see *C.Y.F.E. Act*, ss. 31(2) and 34(4). Thus, from 1961 to 1985 the Superintendent was the "guardian of the estate" of the child. From July 1, 1985, the Public Trustee has been the trustee of the estates of children subject to permanent guardianship orders. See ***Blood v. Alberta (Minister of Children's Services)***, 2004 ABQB 788, 365 A.R. 179, 7 C.P.C. (6th) 174.

Victims of Crime Legislation

[45] One branch of the claim asserts that the class members have lost claims to compensation under the statutes in place to assist victims of crime. There have been two such statutes in force in Alberta: *The Criminal Injuries Compensation Act*, R.S.A. 1980, c. C-33 ("*C.I.C.A.*") which was in force from October 1, 1969 to November 1, 1997, and the *Victims of Crime Act*, R.S.A. 2000, c. V-3 ("*V.C.A.*"), which has been in force from November 1, 1997 to the present. The benefits available under the statutes vary.

[46] The *C.I.C.A.* (s. 2(3)(a)) required that the claim be made within one year of the injury, although the Board had a discretion to extend the time. Claims under the *V.C.A.* must (since it was amended in 2001) be made within two years of discovery of the injuries (s. 12). The discretion to extend the time remains, but ignorance of the existence of the *V.C.A.* is apparently not considered a sufficient reason.

[47] The *C.I.C.A.* (s. 9(1)) allowed for out-of-pocket expenses and pecuniary damage including wage loss. The *V.C.A.* (under the *Victims of Crime Regulation*, AR 63/2004) contains a detailed list of injuries, and rates them by severity. Compensation is provided by a formula based on the assessed severity, to a maximum of $110,000.00 (Reg. 8(4)). In some cases the applicant might potentially receive more, and in other cases less, under the *V.C.A.* than the *C.I.C.A.*

Government Policy on Legal Rights of Children

[48] The Defendant has for some time had written policies in place to provide for legal representation (when appropriate) for children respecting a child's own involvement in the Child Welfare system, and for children in care who become involved in the youth criminal justice system. Written policies respecting the legal representation of children in care who might have civil claims are more recent. Recognizing that this is not a determination of the merits, they appear to be as follows:

The 1989 Policy

> N. LEGAL AID FOR CHILDREN IN CARE
> There may be a situation in which a child has the right to initiate civil legal action and will require legal counsel. The child welfare worker shall refer these to the Regional Manager of Children's Services to determine the appropriate action to take to protect the rights of the child.

The 1991 Policy

CRIMINAL OR CIVIL

If a child with status is a party to a criminal or civil action, even if proceedings continue past the 18th birthday:

1. Determine whether the child should have a lawyer.

2. If the child needs a lawyer, advise the regional manager, child welfare services.

3. Arrange for a lawyer.

If a child in care has the right to initiate civil action, refer the matter to the regional manager, child welfare services. The regional manager, child welfare services determines what action to take to protect the child's rights.

The 1992 Policy

CRIMINAL OR CIVIL

If a child *under guardianship* is a party to a criminal or civil action, even if proceedings continue past the 18th birthday:

1. Determine whether the child should have a lawyer.

2. If the child needs a lawyer, inform the *district manager*.

3. Arrange for a lawyer.

If a child *under guardianship* has the right to initiate civil action, refer the matter to the *district manager* who decides what action to take to protect the child's rights. (changes from 1991 Policy highlighted)

The 2005 Policy

Purpose	To inform Ministry staff of the interim process for protecting the legal interests of children under permanent guardianship.
Background	A recent ruling from the Court of Queen's Bench suggests that the Public Trustee (Alberta Justice) has the authority and the responsibility to pursue civil claims on behalf of

children under permanent guardianship. This does not mean that the Public Trustee must pursue all claims that come to his attention. Rather, the Public Trustee is entitled to assess potential claims to determine if they are of sufficient merit to justify the expense and risk of legal action, and to consider, in consultation with the Director of Child, Youth, and Family Enhancement, whether litigation is in the best interests of the child.

In order to carry out this responsibility, the Public Trustee will be relying on Children's Services to identify cases involving harm to children under permanent guardianship and refer those cases to the Public Trustee for assessment and appropriate action.

Pending further clarification concerning the role of the Public Trustee, CFSAs and DFNAs are requested to implement the following process, effective immediately.

Process

Advise the Legal Services branch of Children's Services of *all* cases that meet *any one* of the following criteria:

- A child under permanent guardianship has been sexually assaulted.
- A child under permanent guardianship has sustained serious physical injury requiring significant medical attention, or resulting in residual medical problems.
- A lawyer or insurance company has contacted a child under permanent guardianship, or the child's worker, with respect to settlement of an injury or accident.
- A child under permanent guardianship has indicated that he or she wishes to commence a civil action.

Legal Services will subsequently refer these cases to the Public Trustee for assessment and appropriate action.

The "recent ruling" referred to in the 2005 Policy is my prior decision in ***Blood v. Alberta (Minister of Children's Services)***, *supra*, para. 44, which held that a natural parent has no standing to sue on behalf of a child who is the subject of a Permanent Guardianship order. The

decision held that the Public Trustee should commence such actions, and that the natural parent has a moral (and possibly legal) duty to report all possible actions to the Public Trustee or the Director.

Limitations

[49] The statutes of limitation will be a major issue in this litigation. They will operate at two levels:

(a) when and how the limitation period expired against the primary tortfeasors, which is said to trigger the liability of the Defendant, and

(b) when and how the limitation period expires on this claim by the class members against the Defendant.

The issue is further complicated by the fact that two different statutory regimes relating to limitations have been in place in Alberta during the relevant period.

[50] Up to March 1, 1999, limitations were governed by the *Limitation of Actions Act*, R.S.A. 1980, c. L-15. Section 51(b) of that *Act* provided a general two-year limitation (triggered by discoverability of the injury) in cases of personal injury. Of importance were the provisions relating to minors:

> **59**(1) When a person entitled to bring an action to which this Part applies is under disability at the time the cause of action arises, he may commence the action at any time within 2 years from the date he ceases to be under disability.
>
> (2) Subsection (1) does not apply
>
> (a) if the person under disability is a minor in the *actual custody of a parent or guardian*, . . .
>
> (emphasis added)

Thus, if the class member was under the "actual custody" of the Defendant in its capacity as guardian, time would run against the class member. But if the class member was not in the "actual custody" of his or her guardian, time would not start to run until the class member turned 18 years of age. Under s. 57 of the old *Limitation of Actions Act*, fraudulent concealment of the cause of action might also stop time from running.

[51] The old *Limitation of Actions Act* would apply to any tort that occurred before March 1, 1999. It would also apply to some of the claims by class members against the present Defendant,

where the alleged negligence of the Defendant was discoverable prior to March 1, 1999, although the length of the limitation period on those claims is a live issue.

[52] After March 1, 1999, limitations in Alberta have been governed by the new *Limitations Act*, R.S.A. 2000, c. L-12. That *Act* has a transitional provision that applied up to March 1, 2001, but which is unlikely to have effect on most of the class claims. The new *Limitations Act* provides for a general two-year limitation period on all claims, calculated from discoverability. Significantly, it also has a ten-year "ultimate" limitation on all claims, calculated from the date the conduct complained of occurred. Time under the new *Limitations Act* does not run against minors (s. 5.1(2)), persons under a disability (s. 5), and where there has been fraudulent concealment (s. 4). Persons are defined as being disabled if they are subject to an order under the *Dependent Adults Act*, R.S.A. 2000, c. D-11, or they meet the criteria of the *Dependent Adults Act* even if no order is in place: see Alberta Law Reform Institute, *Limitations*, Report No. 55, pg. 51.

[53] Since this action was commenced on June 29, 2004, it is governed by the new *Limitations Act*. It is likely that some of the primary torts are also governed by the new *Limitations Act*, for example if they occurred after March 1, 1999. The ultimate ten-year limitation period also applies to this action, *prima facie* barring any claims that arose prior to June 29, 1994.

[54] There are therefore several "layers" to the limitations issue:

(a) The limitation on the primary tort

i) where the tort was discoverable before March 1,1999 (old *Limitation of Actions Act*).

ii) where the tort was discoverable after March 1,1999 (new *Limitations Act*).

(b) The limitation against the present Defendant under the old *Limitation of Actions Act*, where the limitation arguably expired before March 1, 1999 (or the end of the transitional period under the new *Limitations Act*, March 1, 2001), and so the action was barred under the old limitations regime.

(c) The limitation against the present Defendant under the new *Limitations Act*, since this action is *prima facie* governed by the new *Limitations Act*.

(d) The ultimate limitation period of ten years.

These layers must all be kept in mind when defining the class and the common issues.

[55] I repeat again that a certification motion is not an adjudication on the merits. It does appear however that

(a) Any class member who was over the age of 28 on the date the Statement of Claim was issued will have to prove disability or fraudulent concealment to avoid the ultimate limitation period, because when he or she turned 18 the ten-year period started to run.

(b) Where the primary tort was discoverable more than two years before the class member came under the care of the Defendant, there will likely be an argument that the damage had already been done.

(c) Since time under the new *Limitations Act* is unconditionally suspended for minors, any class member who is still a minor (or possibly was a minor when the claim was issued on June 29, 2004) may still have a claim against the primary tortfeasor, at least where the tort occurred after March 1, 1999.

Again, these factors must be kept in mind in setting the common issues, and in defining the class.

Conditions for Certification

[56] Section 5(1) of the *Act* (*supra*, para. 20) sets out the five requirements for certification:

(a) a cause of action

(b) an identifiable class

(c) common issues

(d) a suitable representative plaintiff, and

(e) that the class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.

Each of these requirements are discussed in the following sections of these reasons.

A Cause of Action

[57] The statute requires that the claim disclose a cause of action. The premise of the claim is that:

(a) Each class member was injured in a tort, which might also have been a crime.

(b) If the class member had sued the primary tortfeasor, the class member would have been awarded, and would have actually recovered damages, or the class member could have made a claim under the Victims of Crime statutes.

(c) At a relevant point in time the class member came under the care of the Director of Child Welfare in some way, sometimes as a result of the very tort in issue.

(d) The Director owed a duty to the class member to protect his or her legal rights.

(e) In all the circumstances, it was prudent and in the best interests of the child that an action be commenced, or a Victim of Crime claim be made.

(f) The Director negligently failed to take appropriate steps to advance the claim against the primary tortfeasor, or under the Victims of Crime statutes.

(g) As a result of the omission of the Director, the class member has lost his or her claim against the primary tortfeasor, usually because a limitation has run, but possibly just because pursuit of the claim has been made more difficult by the passage of time.

The Defendant concedes that this pleading does disclose a cause of action.

[58] It will be apparent that, apart from any common issues, each individual claim will involve a "trial within a trial", much like a lawyer's negligence action. As the Court noted in ***Kelly v. Lundgard***, 2001 ABCA 185, 202 D.L.R. (4th) 385, [2001] 9 W.W.R. 399, 95 Alta. L.R. (3d) 11, 286 A.R. 1, 7 C.C.L.T. (3d) 1 at para. 328:

> The prevailing practice in Alberta to ascertain damages in a [legal] professional malpractice action is to conduct a "trial within a trial" on the substantive action from which the negligence arose: *Alberta (Worker's Compensation Board) v. Riggins* (1992), 3 Alta. L.R. (3d) 66 (C.A.); *Fisher v. Knibbe* (1992), 3 Alta L.R. (3d) 97 (C.A.). A "trial within a trial" requires a trial judge to try the hypothetical action that a plaintiff would have against the original defendant had the cause of action not been missed. The issues to be dealt with include liability, causation and damages.

In order to determine damages for each class member, it will be necessary to try the potential action he or she would have had against the primary tortfeasor. This will include issues of liability, limitations against the primary tortfeasor, causation, quantum, and whether the primary tortfeasor had any assets to satisfy a judgment.

Identifiable Class

[59] The statute requires an identifiable class of two or more persons. The Plaintiff proposes to define the class as follows:

> All persons who claim that:
>
> a) they were assaulted, sexually assaulted or injured while under the age of majority, and
>
> b) they were under the care and control of, or guardianship of Child Welfare at the time of or subsequent to the assault or injury, and
>
> c) Child Welfare failed to take steps to obtain compensation on their behalf.

While the proposed definition of the class has evolved over time, the Defendant argues that this definition is still inappropriate for several reasons.

[60] The Defendant argues that the class is too wide and varied. The factual context suggests there might be several subgroups of class members. Different statutory regimes were in place from time to time, and different class members may have been in care under different regimes. Different limitations may apply depending on when the underlying tort occurred, when the class member was in care, which statute was in force, and whether the class member is still a minor. Without providing a definitive list, the Defendant also argues that different subclasses exist, depending on the following levels of involvement by the Defendant:

a) Screening
b) Investigation
c) Assessment
d) Support Agreement with Guardian
e) Support Agreement with Child
f) Custody Agreement with Guardian or Child
g) Apprehension Order
h) Supervision Order
i) Interim Custody Order
j) Temporary Guardianship Order
k) Permanent Guardianship Agreement
l) Permanent Guardianship Order
m) Extended Care and Maintenance

The Defendant argues that the circumstances of the various subgroups are so varied, and the legal implications of each different form of involvement are so different, that it is unlikely that there is one answer to the question "did the Defendant owe a duty of care to this class member?" The

Defendant raised several specific objections to the proposed class definition, which are discussed in the following sections.

[61] The Plaintiff acknowledges the breadth of the class, without conceding that all the possible categories identified by the Defendant would amount to "care and control", but argues that it is not necessary for all class members to be similarly situated. Differences between the class members are not a bar if there are common issues. The Plaintiff cites ***Western Canadian Shopping Centres Inc. v. Dutton***, 2001 S.C.C. 46, [2001] 2 S.C.R. 534, at para. 54.

> The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess rescissionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

See also ***Rumley v. British Columbia***, 2001 SCC 69, [2001] 3 S.C.R. 184 at paras. 32-3. The Plaintiff argues that the differences that exist do not negate the common features of the class. If a duty is found for those class members in the "care and control" of the Defendant, it will be a question of fact at the individual phase of the proceedings whether each class member was in "care and control".

"Claims to Be" Definition

[62] The preface of the proposed class definition is "All persons who claim that". The Defendant argues that a class should not be defined based on a subjective "claim" of a potential class member. The Defendant argues that a class definition must be objective and presently ascertainable, citing the following passage from the *Manual for Complex Litigation, Third* (1995, West Publishing) at p. 217, quoted with approval in ***Bywater v. Toronto Transit Commission*** (1998), 27 C.P.C. (4th) 172 at para. 10:

> Class definition is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled to notice in a class action. It is therefore necessary to arrive at a definition that is precise, objective, and presently ascertainable. . . . Definitions should avoid criteria that are subjective (eg. a plaintiff's state of mind) or that depend on the merits (eg., persons who were discriminated against). Such definitions frustrate efforts to identify class members, contravene the policy against considering the merits of a

> claim in deciding whether to certify a class, and create potential problems of manageability.

The importance of a clear class definition was also discussed in ***Western Canadian Shopping Centres Inc. v. Dutton***, *supra*, at para. 38:

> First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. 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.

The Defendant argues that defining the class as those who "claim" something incorporates a subjective state of mind into the definition.

[63] The Plaintiff points out that claims-based classes have been certified in other actions. ***Rumley v. British Columbia***, 1999 BCCA 689, 72 B.C.L.R. (3d) 1, aff'd 2001 SCC 69, [2001] 3 S.C.R. 184 was an action by former students of a residential school for the deaf, concerning allegations that the students had been abused for many years. The British Columbia Court of Appeal certified the action, and varied the class definition to cover all students who "claim to have suffered injury". The Supreme Court of Canada dismissed an appeal from this decision. While ***Rumley*** did approve this form of definition of the class, counsel for the Plaintiff fairly pointed out that neither court actually discussed this aspect of the definition: see ***Rumley*** at para. 26.

[64] ***Pardy (Wheadon) v. Bayer Inc.*** (2004), 237 Nfld. & P.E.I.R. 179 aff'd 2005 NLCA 20, 246 Nfld. & P.E.I.R. 157 was a pharmaceutical products liability class action. A class described as those "who claim personal injury" was found to be acceptable. While the defendant argued that the class definition was based on a subjective consideration, the Court concluded that "whether or not one makes a claim can be objectively determined." ***Walls v. Bayer Inc.***, 2005 MBQB 3, 189 Man. R. (2d) 262, leave to appeal denied 2005 MBCA 93, 15 C.P.C. (6th) 377 was a parallel pharmaceutical products liability class action. It also approved a class of those "who claim personal injury".

[65] In my view, claims-based class definitions are based on a subjective consideration, and are *prima facie* problematic. As the Court held in ***Western Canadian Shopping Centres***, it is important to know from the beginning who will be bound by the decision in the class action, win, lose or draw. It is not an acceptable situation for a class member to potentially argue in the future that they are not bound by the result of the class proceedings, or a settlement, because they never "claimed" anything, or that they never claimed anything at a relevant point in time.

[66] Furthermore, a claims-based definition is not necessary. In the ***Bayer*** cases it would have been just as easy and effective to define the class as all those who consumed the drug in question and suffered personal injury as a result. Likewise, in ***Rumley***, the definition would have been just the same if it had covered all students who were in fact assaulted at the school. If a situation arose where the class could not be defined except based on those who advanced a claim, a "claims-based" definition of the class might be appropriate, but that will not generally be the case.

[67] The source of the "claims based" class definitions appears to be an attempt to avoid a merits based class definition. A merits based definition defines the class as those who have a valid cause of action, and so results in a circular definition. Those class members who lose were never part of the class to start with. Thus a definition of all those "who have suffered loss or damage as a result of the defendants'" conduct was found to be merits based in ***Chadha v. Bayer Inc.*** (2001), 54 O.R. (3d) 520 (Div. Ct.) at paras. 47-50, aff'd (2003), 63 O.R. (3d) 22 (C.A.) at para. 69. This problem is supposedly avoided by defining the class as those who "claim" injury, but this introduces a subjective element to the definition. There is however a difference between "damage" and "damages". "Damage" is an injury to person or property. "Damages" is a legal remedy, consisting of a sum of money paid to someone who has suffered compensable damage". It is merit based to define the class as "all those who are entitled to damages" from the defendant, because the entitlement to damages depends on a finding of liability. It is not merit based to define the class as all those who suffered "damage" or "personal injury". Damage is an essential element of a tort: without damage there is no tort. The suffering of damage does not always result in compensation (i.e. damages), or does not always result in compensation from the named defendant. In my view the resort to "claims based" class definitions is an attempt to avoid an artificial problem, and there is nothing wrong with requiring that the members of the class be only those who have suffered injury. Those without injury have no cause of action against anyone: ***Chadha***, *supra*, at para. 19 (Div. Ct.).

[68] In this action the essential characteristic of the class is the suffering of personal injury as a result of a tort while under the care of the Defendant. There is no need to resort to a claims-based definition of the class.

"Care and Control"

[69] A second key part of the proposed definition of the class is that the class members were "under the care and control of, or guardianship" of the Defendant. The concept of "care and control" is taken from the decisions in ***Kocur v. Meunier***, 2003 ABQB 539, 15 Alta. L.R. (4th) 370, 345 A.R. 383, and ***Thomas v. Radvak*** (1997), 51 Alta. L.R. (3d) 327 (C.A.) at paras. 19-21. Those decisions held that a child was under the "actual custody of a parent or guardian" within the meaning of s. 59(2)(a) of the *Limitation of Actions Act* (reproduced *supra*, para. 50) where the Director had "effective care and control" of the child. The issue in ***Kocur*** was whether the limitation period had run against the plaintiff during the time that he was the subject of a Permanent Guardianship Order. The proposed incorporation of "care and control" into the

definition of the class therefore relies on a judicial gloss on the exact words of the statute, which are "the actual custody of a parent or guardian".

[70] The incorporation of "guardianship" into the proposed definition of the class also finds its source partly in s. 59(2)(a) of the *Limitation of Actions Act*. However, it is more directly related to those provisions of the *Child Welfare Act* that relate to permanent guardianship, temporary guardianship, and the like. The concept of "guardianship" would cover only a limited number of the potential levels of involvement, listed *supra*, at para. 60. The concept of "care and control" is less precise, and might apply to many of the different categories of involvement.

[71] In my view, the concept of "care and control" is too imprecise a basis for a definition of the class. Whatever the merits of the ***Kocur*** and ***Thomas*** decisions, it is unlikely that the courts intended the expression "care and control" to be a universal substitute for the exact wording of the statute. It is inappropriate to build the entire definition of the class on that foundation. Further, since s. 59(2)(a) only relates to "parents or guardians", it will only be engaged in this action where the Defendant was a "guardian". Care and control through some other relationship will not be enough. The definition must therefore encompass care and control "and" guardianship, not "or" guardianship.

[72] The fundamental relationship between the class members and the Defendant arises from the *Child Welfare Act*. While the wording of the *Limitation of Actions Act* will be important in the claims of many class members, it is the *Child Welfare Act* that is the foundation of the relationship. The class definition should therefore be tied back to the *Child Welfare Act*.

[73] The argument of the Defendant that the present class definition on its face encompasses too many different levels of involvement in the care of children is valid. If the class definition was to encompass all of the different levels of involvement set out, *supra*, para. 60, the action would become unmanageable. In my view, the class should be limited to specific subgroups: "permanent wards" under the *1966 Act*, and those subject to Temporary Guardianship Orders, those subject to Permanent Guardianship Orders, and those subject to Permanent Guardianship Agreements under the *1984 Act*. Those are the situations where the Defendant had "guardianship" and the greatest involvement with the children and their estates, and they are the categories the Plaintiff indicated might amount to "care and control".

[74] It is true that this definition of the class might well exclude some persons who are similarly situated to the class, such as S.J. However, it is important that the class action remain manageable. If too many of the different subcategories of children in care are included, the action will become unwieldy. The decision in the class action will likely provide some guidance even for those persons who are excluded from the class. While the decision will not have the advantage of binding the Defendant and the non-class members, it may nevertheless prove to be of some practical utility. In order to maintain the manageability of this class action, it is appropriate to limit the class as specified.

Torts Only

[75] The Defendant notes that the proposed definition covers all persons who were "injured". On the face of it, this would include children who simply fell off their bicycles, or tripped at the playground, and would not have a civil claim against anybody. Since the premise of the claim is that the class members had legal rights against a tortfeasor that were not protected by the Defendant, it is obvious that the class is only intended to include persons who were injured as a result of a tort. The class should be defined accordingly.

Minors

[76] Under s. 5.1(2) of the new *Limitations Act*, time does not run against minors. The new *Act* does not make the suspension of the limitation period dependent on whether the minor is in the actual custody of a guardian. Since the premise of this action is that the class members have claims against primary tortfeasors that have been barred by statute, the Defendant argues that any class member who was still a minor when the Statement of Claim was issued would have no claim, and should be excluded from the class. Such persons could sue on their own once they turn 18, and would have a duty to mitigate. There is some merit to this argument, and it seems unlikely that many persons who were still minors on the date the Statement of Claim was issued would have a claim in this action. If the present *Limitations Act* had been in force throughout the relevant time period, the argument would have much merit. However, there is the possibility that there are some potential class members who were under 18 when the Statement of Claim was issued, but had claims against primary tortfeasors that became barred by time before 1999 when the new *Limitations Act* came into force. Inclusion of the minors in the class will not unduly complicate the litigation, and the proposed definition of the class is not objectionable because it includes them.

Persons Over 28

[77] The Defendant also argues that no person over the age of 28 can have a claim against the Defendant, because when that class member turned 18, the ultimate limitation period will have started to run. The Plaintiff essentially concedes that persons, like herself, who are over the age of 28 will either have to prove a disability under s. 5, or fraudulent concealment under s. 4 of the *Limitations Act* in order to succeed. Again, while the claims of this category of the class may be more difficult, including them in the class will not unduly complicate the litigation. Whatever the status of their individual claims, there is merit in having them bound by the decision on the common issues.

"Delay Claims"

[78] The proposed class action envisages three ways that a class member might have suffered loss. The first is that the limitation period against the primary tortfeasor has passed. The second is that a claim under the Victims of Crime statutes can no longer be advanced because of the passage of time. The third is that while a claim could still be advanced, the passage of time has

made the prosecution of the claim more difficult because of the fading of memories, the disappearance of witnesses and documents, and other matters of that sort. The Defendant argues that the third category of loss is qualitatively different from the first two.

[79] It is true that the third type of loss will involve different questions of proof than the first two. It will, if nothing else, be difficult to prove what a witness would have been able to remember if only he or she had not forgotten it. Nevertheless, considerations of that sort are more likely to arise during the individual phase of the class proceeding, and not during the determination of the common issues. As a result, the inclusion of all three types of loss within the class definition is not inappropriate.

Merits

[80] It is clear that a class definition should not be merits based, in the sense that inclusion in the class should not depend on success in the class action. That creates a circular definition. The Defendant argues that this class definition is merit based, because it depends on each class member showing that they had a valid claim against the primary tortfeasor. The circularity only arises, however, if the definition is based on the merits of this action, that is on the class action respecting the failure of the Defendant to sue on the original cause of action. The merits of the original cause of action on the primary tort raise an issue of quantum, but do not create circularity in the class definition.

Non-Residents

[81] Section 7(3) of the *Act* requires that a separate class be created for non-residents of the province. The Defendant noted that the Plaintiff has not proposed such a subclass, nor has the Plaintiff put forward a proposed representative plaintiff to represent the non-resident subclass.

[82] The *Act* was based on Report No. 85 of the Alberta Law Reform Institute entitled *Class Actions* (December 2000). The Report contemplated (at para. 227) that the non-resident subclass would have its own representative plaintiff. The *Act* appears to require a separate subclass for non-residents partly at least for constitutional reasons. Some class actions may encompass causes of action that arose in many different jurisdictions. Further, under the *Act* resident class members must opt out of the class action, while non-resident class members must opt in.

[83] The Defendant pointed to a British Columbia decision that appears to suggest that there must always be a separate representative plaintiff for each subclass, particularly the non-resident subclass: ***Endean v. Canadian Red Cross Society*** (1997), 36 B.C.L.R. (3d) 350, at para. 32. Compare ***Pearson v. Boliden*** (2001), 94 B.C.L.R. (3d) 133, at paras. 75-6.

[84] Section 7(1) of the *Act* merely provides that the Court "may" appoint a representative plaintiff for the subclass. While it is contemplated that the representative plaintiff will be a member of the subclass, s. 7(4) does provide for a non-member to be the representative plaintiff "to avoid a substantial injustice to the subclass". In my view, s. 7(1) is permissive, and it is not

always necessary to appoint a representative for a subclass, even where a subclass is created: ***Anderson v. Wilson*** (1999), 44 O.R. (3d) 673 (C.A.).

[85] In this case the creation of a separate subclass for non-residents is something of a formality. Because the operations of the Defendant have always been limited to the Province of Alberta, any cause of action against the Defendant will have arisen in the Province of Alberta. All of the class members must have been subject to the Alberta *Child Welfare Act* at one time or another. If there are non-resident subclass members, it is because they have since emigrated from Alberta. There is no conflict of interest between the representative Plaintiff and the non-resident subclass. Since the statute requires it, there will have to be a subclass for non-resident members. However, there is no need at this time to have a separate representative plaintiff for that subclass.

Temporal Limitations

[86] The Defendant pointed out that the subclass is defined broadly enough to encompass all persons who were under care since the *Children's Protection Act of Alberta* was passed in 1909. Not only have the provisions of the statute varied significantly over time, the very structure of the child protection system has changed. The Defendant argues that when these factors are combined with the many different levels of care that are possible (see *supra*, para. 60), the entire action becomes completely unmanageable.

[87] The Plaintiff notes that class actions have been certified even though they cover lengthy periods of time. For example, the ***Rumley*** case, *supra*, covered a period of 42 years. The ***Woodlands*** case (***W.J.R. v. British Columbia***, 2005 BCSC 372) covered a period of 118 years. These class actions arose, however, out of abuse at single institutions, and largely related to abuse by the same type of tortfeasor (i.e. employees of the institution). While there were undoubtedly differences in the way the institutions were operated over the years, there was still the unifying factor of the institution throughout. Further, all the class members had the same relationship to the institution (ie. they were residents), whereas the class members in this case had varied relationships to the Defendant.

[88] The Defendant raises a valid point on this issue. At the end of the day the class action must be manageable at a practical level. The class should not be unduly broad: ***Hollick***, *supra*, at para. 21; ***Bywater v. Toronto Transit Commission*** (1998), 27 C.P.C. (4th) 172, at para. 10. To attempt to cover every combination of care and statutory provision that has existed since 1909 is unworkable. It is also likely that any older claims will in practical terms be unsustainable at this point. In order to maintain the viability of the class action, the class should be limited to those class members who were in care under the *1966 Act* or the *1984 Act*, which covers the period after July 1, 1966. That will essentially cover the last 40 years, and should capture most of the viable claims.

[89] Subject to the submissions of counsel on the exact wording, the appropriate class is defined, *infra*, at para. 151(b).

Common Issues

[90] The statute requires that the action raise common issues, which can be common issues of fact, or common issues of law arising out of similar facts. An issue is "common" where its resolution is needed for the determination of the claim of each class member: ***Western Canadian Shopping Centres v. Dutton***, *supra* at para. 39. An issue is "common" if deciding it will avoid duplication of fact-finding or legal analysis, and if the issue is a "substantial ingredient" of each individual claim: ***Hollick***, *supra*, at para. 18. A class proceeding will always consist of some common issues that are decided once, followed by a number of individual issues that are decided by some suitable procedure: ***Metera v. Financial Planning Group***, 2003 ABQB 326, 12 Alta. L.R. (4^{th}) 120 at para. 69.

[91] For an issue to be "common", it is not necessary that it will dispose of the entire cause of action: ***Cloud v. Canada***, (2004), 73 O.R. (3d) 401 (C.A.), at para. 53. As I previously stated in ***Metera***, *supra*, at para. 71:

> Given that there are common issues, the proper question is "how best can the common issues be decided?" This question must be answered in the overall context of the litigation, recognizing that the individual issues must also be decided at some point, and searching for the procedure that is most efficient globally. Regard must also be had to the other primary objective of class actions: access to justice.

To this should be added the point made in s. 5(1)(d), ***Western Canadian Shopping Centres***, *supra*, at para. 51, and ***Chadha v. Bayer Inc.***, *supra*, at para. 18 that the structure of the common issues must be fair to all parties.

[92] It is also clear that the certification of a common issue is no guarantee that the trial judge will be able to answer it. If it is too general it may have to be amended, or it may not be capable of an answer: ***Cloud v. Canada***, *supra*, at para. 72.

[93] The Plaintiff proposes the following common issues:

(a) Did the Defendant owe a duty to class members to protect their legal rights by taking appropriate steps to obtain compensation on their behalf?

(b) If the answer to common issue no. 1 is yes, did the Defendant breach its duty or duties by failing to take reasonable measures in its operations or management to ensure that appropriate steps would be taken to obtain compensation on behalf of class members?

(c) If the answer to question 2 is yes, was the Defendant guilty of conduct that justifies an award of punitive damages?

(d) If the answer to question 3 is yes, what amount of punitive damages should be awarded?

The Defendant argues that these questions are not appropriate.

The Duty

[94] The proposed class would include children who were the victims of torts, and subsequently were under the care of the Defendant. In some cases the abuse will have been one, and perhaps the primary, reason for the apprehension of the child. The action therefore goes to the heart of the nature of a Child Welfare apprehension. Is the apprehension merely to ensure that the child receives "protective services", or does the apprehension go further and require the Defendant to protect the civil legal rights of the apprehended child? In other words, does the Defendant discharge its duty by simply ensuring that the child is placed in a safe environment, or must the Defendant also then pursue the legal rights of the child for the abuse that resulted in the apprehension? What is the effect of the statutory provisions making the Defendant the guardian of the children? Would the social workers employed by the Defendant be distracted from the protection of the children if they had to attend to their legal rights as well? These are issues that are central to this litigation, and common to the class.

[95] The Defendant argues that the "duty" issue is incapable of an answer because of the many levels of care involved (see *supra*, para. 60), the different statutory regimes in place, the long time period covered, and similar issues. The duty may also vary depending on whether the tort occurred before or while the class member was in care. The Plaintiff replies that she just wants a simple answer to a simple question about the duty owed to all those in the "care and control" of the Defendant. In my view the Plaintiff's position does not answer the objection. A common issue should not be framed so as to only accommodate the theory of the plaintiff, but rather must be open to responding to the theories of all parties. It is not open to either party to say they want a "yes or no" answer, and that they are not seeking a "nuanced response" if that seems to be the only response possible. On the other hand, the differences identified by the Defendant can be dealt with by limiting the class, or by giving different answers (if necessary) for the different categories of class members. There may obviously be different answers to the question, depending on the statutory regime in force from time to time, and depending on the degree of involvement by the Defendant. The fundamental question is however the same.

[96] I therefore conclude that the issue of the duty of the Defendant to the class is a common issue. Deciding this issue once will prevent duplication of fact-finding and legal analysis. The resolution of the duty issue is necessary for the resolution of the claim of each class member. The first common issue proposed by the Plaintiff is appropriate in this form:

> Did the Defendant owe, between 1966 and 2004, a duty to some or all of the various types of class members to protect their legal rights by taking steps to obtain compensation on their behalf, and if so, what was the nature of that duty?

Systemic Negligence and Policies

[97] The second proposed common issue is whether the Defendant breached any duty that it might have owed to some or all of the class. The Plaintiff does not propose as a common issue whether the Defendant might have breached its duty with respect to any individual class member. Rather, the Plaintiff proposes as a common issue whether the Defendant's operations and management themselves were a breach of duty. In other words, the Plaintiff proposes to argue that there was a "systemic breach" of duty by the Defendant.

[98] The Defendant argues that any issue of systemic breach is inappropriate in this case. The Defendants notes that some of the features of the Child Welfare system may have arisen as a result of policy decisions, whereas decisions with respect to individual children were likely operational. The liability of the Defendant may vary depending on the nature of the decision: ***Just v. British Columbia,*** [1989] 2 S.C.R. 1128. The Defendant argues that this prevents any meaningful analysis of the alleged systemic breach of duty in a way that would apply to all class members. The Defendant argues that the Plaintiff has drafted the common issues with a high level of abstraction, giving an artificial appearance of commonality.

[99] The Defendant also argues that the situation of the various class members is too divergent to permit any systemic analysis of the breach of duty. In this case the class members were under various types of care, at different points in time, under different statutory regimes, and while differing policies of the Defendant were in place. Some were injured while in care, others before they were in care in events unrelated to their apprehension, and some before they were in care in events resulting in apprehension. The Defendant distinguishes cases like ***Rumley v. British Columbia***, 2001 SCC 69, [2001] 3 S.C.R. 184, where systemic breach was certified as a common issue, on this basis. The Defendant notes that in ***Rumley*** sexual abuse of the plaintiff class was admitted, the plaintiff class all attended one institution, all the abuse happened there, and there was a much higher level of commonality between them.

[100] The Plaintiff relies on decisions like ***Rumley***, and argues that systemic breach is an appropriate common issue. The Plaintiff acknowledges that the issue of systemic breach has been intentionally structured in a manner that makes the case more amenable to certification, and argues that she is entitled to do so. The Plaintiff cites ***Rumley***, at para. 30, as follows:

> As Mackenzie J.A. noted, the respondents' argument is based on an allegation of "systemic" negligence – "the failure to have in place management and operations procedures that would reasonably have prevented the abuse" (pp. 8-9). The respondents asserts, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if

> the established breach were that JHS had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9). [Emphasis in original]

The Plaintiff argues that if a systemic breach of duty is found, it would still be open to the Defendant to prove in the case of each individual class member that the systemic breach was not operative in causing any damage with respect to that individual class member.

[101] ***Rumley*** was a class action proceeding arising out of sexual abuse of students at a school for the deaf. Over the years there had been numerous reports of abuse at the school that had not been responded to appropriately. The government directed that an inquiry be conducted, and the resulting report concluded that there had been abuse, and that the response had been inadequate. The government then set up a compensation scheme for the former students, but some of them elected to proceed by class action instead. The representative plaintiff proposed a common issue of systemic negligence, much like the one proposed in this case. The trial judge rejected this common issue, holding that it was too generalized to be of any practical utility. The British Columbia Court of Appeal and the Supreme Court of Canada disagreed, holding that such questions of "systemic negligence" were appropriate for certification. The Court held that, within reason, the plaintiffs were entitled to narrow their claim if they chose, and that if the issue was too generalized that would simply make it more difficult for individual class members to prove their claims. That was however a choice that the class members were entitled to make.

[102] The representative plaintiff may well be entitled to "restrict the grounds of negligence she wishes to advance to make the case more amenable to class proceedings". There are however limits on the ability of the representative plaintiff to define the issues: ***Rumley***, at para. 28. ***Rumley*** states that the plaintiffs are entitled to "limit the grounds of negligence" they rely on to make certification possible, not that they are entitled to define the common issues as they choose. Class proceeding statutes are largely procedural in nature. They are designed to deal more efficiently and effectively with mass litigation. Class proceedings are not intended to create new substantive rights, to vary the substantive law relating to the issues, or to reverse the burden of proof: ***Chadha v. Bayer Inc.***, *supra*, at paras. 18-19. The common issues must not only be capable of resolution at a practical level, they must also be fair, and that means they must be fair to both the class and the defendant: s. 5(1)(d); ***Caputo v. Imperial Tobacco Ltd.*** (2004), 236 D.L.R. (4th) 348, 44 C.P.C. (5th) 350 (Ont. S.C.) at para. 50; ***Chadha v. Bayer Inc.***, *supra*, at para. 18. I do not read ***Rumley*** as holding that the class is always entitled as a matter of right to have "systemic breach" as a common issue. Because the courts had the advantage of the public inquiry into conditions at the school, ***Rumley*** may be at the extreme edge of the type of case that can be certified.

[103] Systemic breach issues should not be stated so generally that the answer to the systemic breach issue is unlikely to be of much practical assistance in resolving the claims of individual class members. The Plaintiff presumably wishes to demonstrate that the policies that the Defendant had in place, and the way the Child Welfare system as whole was managed, was negligent. Even if this could be shown, the answer will be so abstract as to be of little practical utility. Take, for example, the situation of two large grocery stores. Both grocery stores realize that there is a risk that customers could slip on produce that finds it way onto the floors in the produce department. The one grocery store has in place a rigid policy requiring regular sweeping of the produce department, and the recording of the sweeping in a detailed log. The second grocery store has no such policy in place. If systemic breach of duty was set as a common issue in this case, one might well conclude that the second grocery store was in breach of its systemic duty. Suppose however that it was revealed that the first grocery store simply did not follow its policies and procedures, despite their supposed universal applicability. On the other hand, suppose it was shown that the second grocery store had particularly diligent management and staff, who meticulously cleaned the produce department despite the fact that there was no policy requiring them to do so. In evaluating the claim of any member of the class of customers who slipped on produce, the finding of systemic breach of duty would be practically meaningless. Even if the finding of systemic negligence was of some general validity, one would still have to examine the situation that prevailed on the particular day that any class member slipped on produce. Apart from perhaps reversing the burden of proof, the finding of systemic negligence would be of little assistance. The presence of, absence of, or content of policies will not equate to a systemic breach of duty, and neither will any assessment of the generic "operation" or "training" of the Child Welfare system. The "operation" of the system can only be tested at the individual level, by seeing how the rights of individual children were handled.

[104] In this case the class consists of thousands of persons who were under the care of hundreds of different social workers, in many different situations. At the end of the day, whether an action should have been commenced on behalf of any particular child is going to depend on individualistic issues such as the quality of the evidence available, the identity of the defendant, whether that defendant had any resources to satisfy the judgment, whether the primary tort was the reason for the apprehension, and matters of that sort: see para. 58, *supra*. Overriding the entire decision to commence proceedings would be the question of whether it was in the best interests of the child to commence those proceedings: s. 2 of the *C.Y.F.E. Act* makes the interests of the child the overriding factor in all child welfare decisions. In this climate the system of policies and operations that the defendant had in place will be relatively unimportant. The standard of care may be little more than "consider each case individually". This can be compared with a case like ***Rumley*** (see B.C.C.A. at para. 18) where the duty to prevent sexual abuse had no individualistic character to it. It is significant that in ***Rumley*** only the sexual abuse claim was considered to be sufficiently discrete to allow certification, and the other claims were not certified. The allegation of "systemic negligence" in this case is more analogous to the allegation of "educational malpractice" than the court refused to certify in ***Rumley***. ***Andersen v. Wilson*** (1999), 44 O.R. (3d) 673, and ***Endean v. Canadian Red Cross Society*** (1997), 36 B.C.L.R. (3d) 350, rev'd other grounds (1998), 48 B.C.L.R. (3d) 90 (C.A.), other cases relied on by the Plaintiff, can also be distinguished because the "systemic negligence" focussed respectively on

very discrete issues about the sterilization of medical instruments, and the screening of blood donors, not the general operation of the defendants' systems. The present action is the type of case where determining a breach of duty "would ultimately break down into individual proceedings": ***Nieberg (Litigation Guardian of) v. Simcoe County District School Board*** (2004), 48 C.P.C. (5th) 164 (Ont. S.C.), at paras. 40-42; ***Fehringer v. Sun Media Corp.*** (2002), 39 C.P.C. (5th) 151 (Ont. S.C.J.) at paras. 17, 19 and 24, aff'd 39 C.P.C. (5th) 151 (Div. Ct.); ***Sutherland v. Canadian Red Cross Society*** (1994), 17 O.R. (3d) 645. At the end of the day, this is not an appropriate case in which to attempt to decide if there has been a "systemic breach of duty".

[105] The Plaintiff did not outline how she proposes to prove systemic negligence. If the intention is to prove systemic negligence by proving individual acts of negligence, the class proceeding is unlikely to be the "preferred procedure". Given the individualistic nature of the inquiry (discussed *supra*, paras. 104-5) this type of proof is to be expected. Any issue to be proved in this way is presumptively an "individual issue", not a common issue. Proving a general proposition by proving individual examples involves a type of similar fact analysis, and is an inefficient and usually inappropriate method of proof: ***Robertson v. Edmonton (City) Police Service (#9)***, 2004 ABQB 243, 355 A.R. 281 at paras. 12-20. Notwithstanding the superficial attractiveness of a common issue, the Court must have regard to the practicalities of having a trial with respect to the common issue. General and theoretical questions, that would not be sufficiently particular to place in a pleading, are not appropriate.

[106] Here the Plaintiff argues that it would still be open to the Defendant to prove in any particular case that any systemic breach of duty did not cause any loss to any particular class member. This would effectively reverse the burden of proof, and if an accurate statement it would be one reason not to certify the systemic breach issue. However the burden of proof would not shift. It would still be up to each class member to prove causation: ***Rumley*** at para. 30.

[107] The Plaintiff pointed to other cases where systemic breach had been certified as a common issue: ***Cloud v. Canada (A.G.)***, *supra*; ***White v. Canada (Attorney General)***, 2004 BCSC 99, 24 B.C.L.R. (4th) 347; ***Griffiths v. Winter***, 2002 BCSC 1219, 23 C.P.C. (5th) 336, affirmed 2003 BCCA 367; 15 B.C.L.R. (4th) 390, 34 C.P.C. (5th) 216; ***Richard (W.J.R.) v. Canada***, 2005 BCSC 372; and ***Larcade v. Ontario (Ministry of Community and Social Services)*** (2005), 197 O.A.C. 287, 16 R.F.L. (6th) 156 (Div. Ct.). The decision in ***Larcade*** related to the provision of medical services to disabled children. ***Larcade*** certified specific questions of statutory interpretation, and did not certify systemic negligence as a common issue. In ***Griffiths v. Winter***, the "systemic negligence" related to the proper hiring and supervision of one specific foster parent, and did not raise truly "systemic" issues. The other cases related to sexual and physical abuse of children in institutional settings. The prevention of physical or sexual abuse is always imperative, and is not subject to the "best interests of the child". In these cases any systemic negligence arising from the way that the residential facilities were operated was found to be a common issue. However, the circumstance of the class members in these cases were more uniform than in this one. The requirements of a policy would have been more rigid than is likely to be the case here. In the end there is unlikely to be much saving of legal or factual analysis by

determining systemic breach as a common issue in this case, and a significant risk of unfairness to the Defendant. I note that in none of these cases was it expressly considered whether the allegation of systemic negligence was one that could be fairly responded to by the defendants, and the decisions proceeded on the assumption that there was no such unfairness. All of these cases assumed that the issue of systemic negligence could be decided without exploring in detail individual claims. If it is actually proposed to prove systemic negligence by proving acts of negligence in individual cases, the identification of systemic negligence as a "common" issue will be illusory.

[108] It is instructive to note that the experience in the ***Rumley*** action was not entirely happy. An application was subsequently brought to decertify the action: ***Rumley v. British Columbia (#2)***, 2003 BCSC 234, 12, B.C.L.R. (4th) 121. As the case progressed, it became apparent that the attempt to determine negligence at a systemic level was actually turning into a trial of many different individual instances of abuse: see paras. 64 to 69. As the Court stated at para. 60:

> The question then remains whether any general finding that can be made in such a class proceeding can be of any assistance to the members of the plaintiff class who must then prove on an individual basis that they suffered damage and that the systemic breach was an effective cause of their injury.

The chambers judge went on to conclude that "the difficulty is that all of this must have been known by the Court of Appeal when they decided it was possible to certify a common issue", but I would note that the *Act* specifically provides for decertification just because it is impossible for the court to predict exactly how a class action will unfold. ***Rumley*** shows that an attempt to prove systemic negligence by proving many individual examples of negligence is unworkable. A careful reading of ***Rumley (#2)*** is instructive, because it is clear that if the chambers judge was deciding the matter afresh, she would not have certified systemic negligence as a common issue. While the case management judge felt that the class action could continue through "aggressive case management", and some refinement of the common issues, she did conclude at para. 91 that the action had "reached a precarious balance between a potentially workable class proceeding and unmanageable confusion".

[109] As noted (*supra*, para. 61) a significant amount of divergence is possible within the class. In some cases it will be possible to certify systemic negligence as a common issue. But the more divergent the class, and the more varied the circumstances giving rise to the alleged breach of duty, the less likely it will be that a workable systemic breach common issue will be possible. In this case the class is very divergent. The individual breaches of duty alleged raise polycentric and individual considerations that go far beyond the generalized "policies and operations" of the Defendant. In this case "breach of the standard of care" is essentially an individual issue that must be decided in the second phase of the proceedings, and attempting to frame it as an issue of "systemic negligence" is really an attempt to bootleg individual issues as a common issue. The appearance of commonality is an artificial result of the generality of the question. The proposed systemic breach common issue is not fair or workable in this case.

[110] There is however one common issue of fact that would be usefully determined as a common issue. It can be stated as follows:

> What policies, practices and systems did the Defendant have in place between 1966 and 2004 relating to the prosecution of civil claims on behalf of children in care?

Deciding this issue of fact once will eliminate the need for repetitive factual inquiries, and it is accordingly an appropriate common issue. Whether, in all the circumstances, the Defendant breached any duty it might owe is not a suitable common issue.

Punitive Damages

[111] The third and fourth common issues proposed by the Plaintiff relate to the liability of the Defendant for punitive damages. The Plaintiff points to cases that have certified punitive damages as an appropriate common issue: ***Rumley***, *supra*, at para. 34.

[112] The Plaintiff has identified, in the very structure of the third proposed common issue, that it is not possible to decide if the systemic operation of the Child Welfare system justifies an award of punitive damages, without deciding if there has been some systemic breach of duty. Having concluded that the systemic breach issue is not an appropriate one for common determination, it follows that the determination of punitive damages is not appropriate as a common issue. Whether any class member has been dealt with in such a way that he or she is entitled to punitive damages will have to be dealt with as part of the assessment of individual claims.

[113] There is however one aspect of the Defendant's conduct that could possibly be examined globally to determine if it itself justifies punitive damages. As previously indicated, one appropriate common issue is the determination of the policies that the Defendant had in place from time to time. The following common issues may therefore also be appropriate:

(a) Was the existence of, absence of, or content of the policies of the Defendant relating to the protection of the civil rights of children in care at any time between 1966 and 2004 so egregious or highhanded as to justify an award of punitive damages?

(b) If so, what quantum of punitive damages should be paid, and to whom?

Assessing the policies in this way at one time will possibly avoid duplication of factual and legal analysis, and this is also an appropriate common issue. If it turns out that this issue cannot be efficiently addressed in isolation, the question can be amended or withdrawn.

Limitations

[114] The Plaintiff has not proposed any common issue with respect to limitations. As previously noted (*supra*, paras. 49-55) limitations will play a large part in this litigation. Since the limitations applicable to each class member, and when the applicable limitation started to run, will vary widely, it is impossible to state any common issue with respect to limitations generally.

[115] There is however one aspect of the limitations argument that is amenable to common determination. As previously noted (*supra*, para. 77), there is an argument that the claim of any class member over the age of 28 is barred. Such a class member will have to demonstrate either fraudulent concealment of the cause of action, or disability. Disability is an individual issue that is not amenable to common determination. The same would apply to any fraudulent concealment of the claim of an individual class member. However, the argument that there was systemic fraudulent concealment is amenable to common determination, and the following common issue is appropriate:

> Did the Defendant operate the Child Welfare system at any time between 1966 and 2004 in such a way as to fraudulently conceal any breach of duty by it to the class members?

The determination of this common issue will avoid repetitive factual finding and legal analysis. Again, if the question turns out to be unworkable, it can be withdrawn.

A Suitable Representative Plaintiff

[116] Section 5(1)(e) of the *Act* requires that there be a suitable representative plaintiff. S. J. was originally proposed as the representative plaintiff. The Defendant objected to her suitability, and Ms. LaBonte was substituted as the proposed representative plaintiff. The Defendant argues that Ms. LaBonte is also not a suitable representative Plaintiff.

[117] The Defendant argues that the proposed representative Plaintiff is not a suitable member of the class, because her claim is statute barred. Subsection 2(4) creates a presumption in favour of the representative plaintiff being a member of the class, and states that a non-member may only be the representative plaintiff if "to do so will avoid a substantial injustice to the class". The requirement that the representative plaintiff be a member of the class is not the same thing as requiring that the representative plaintiff prove, at the certification stage, that he or she has a valid cause of action. In other words, being a member of the class is not the same thing as being able to succeed on an immediate summary judgment application on the entire cause of action. The Defendant undoubtedly has an arguable defence against the specific claim of the named representative Plaintiff, but that does not mean that she is not a member of the class.

[118] Ms. LaBonte asserts in the claim that she made disclosure to the Defendant's officials in 1987 or 1988. It is possible that if Ms. LaBonte did have a cause of action against the Defendant,

it may have become barred on her 28th birthday on July 19, 2000, at which time the ten-year ultimate limitation period in the *Limitations Act* would have expired. If the expiry of the limitation was conceded, then Ms. LaBonte might not be a suitable representative. However, her counsel indicated she will reply to any limitation defence with a plea of "fraudulent concealment" or possibly "disability". Her claim is therefore sufficiently viable to allow her to represent the class.

[119] As previously indicated (*supra*, para. 73), there are actually a number of subcategories of persons covered by the proposed class. Ms. LaBonte is a representative of those who were subject to a Permanent Guardianship Order after the abuse in question had ceased. The fact that Ms. LaBonte is not identically situated with all possible class members does not preclude her from being a proper representative plaintiff: see s. 7, which makes the certification of subclasses discretionary, and ***Western Canadian Shopping Centres***, *supra*, at para. 41. However, the Court must still examine whether, all things considered, she is a suitable representative Plaintiff.

[120] Ms. LaBonte had undoubtedly had a very difficult life, and has not been afforded many of the advantages we hope children receive. She herself deposes that she has lived "a horrible life of poverty and sadness". She is not employed and has no financial resources. She has not deposed to her educational achievements, but it is unlikely that she has any skills, training, or education that will assist her in discharging the responsibilities of a representative plaintiff.

[121] One could argue that with all of her challenges, Ms. LaBonte is not suitable to represent the class. However, the circumstances are that many children who were abused would face similar impediments. The more resilient members of the class who have gone on to pursue successful lives despite the challenges they faced may not be easily identified, or may not wish to pursue their claims. Those who do wish to pursue their claims are more likely to be in the same position as Ms. LaBonte. In the circumstances, Ms. LaBonte is a suitable representative plaintiff despite the challenges she faces.

[122] The Defendant argues that Ms. LaBonte would be unable to satisfy any costs award against her, because she is admittedly impecunious. The ability of the representative Plaintiff to answer a costs award is a relevant factor, but not an absolute bar: see ***Pearson v. Inco Ltd.***, [2005] O.J. No. 4918 (C.A.) at paras. 95-6. If it appeared that a representative plaintiff had been selected deliberately because he or she was judgment proof, or if it appeared that there were suitable representative plaintiffs of means who were being held back, the Court might be disinclined to approve the proposed representative plaintiff. However, one of the purposes of the *Class Proceedings Act* is to ensure access to justice. Where it appears that the class as a whole is disadvantaged, and it seems unlikely that a member of the class of substantial means could be identified to pursue the action, it would be contrary to the very purposes of the *Act* to deny certification based on impecuniosity. This factor is therefore not an impediment in this case.

[123] Section 2(1) of the *Act* provides that "one member" of a class may commence a proceeding. While the *Act* clearly authorizes a single representative plaintiff, that does not mean that a single representative plaintiff will always be appropriate. Since the representative plaintiff

purports to represent the interests of a large group, there is much to be said for having a manageable group of class members running the litigation. Counsel for the Plaintiff advised that a single representative plaintiff was being proposed, as it is easier to take instructions from a single plaintiff, and therefore the administration of the action is easier. That may be so, but the convenience of counsel is not a primary consideration. Class proceedings are often criticized as being "lawyer-driven", and that argument is only strengthened if it appears that the class itself does not have control of the litigation. There are good reasons for requiring the self-appointed representative plaintiff to consult with other members of the class.

[124] Further, s. 18(2) of the *Act* provides that the defendants can only examine the representative plaintiff as of right. Where there is significant diversity between the members of the class, it is appropriate to permit a wider examination than a single representative plaintiff can permit. Furthermore, when the matter goes to trial it is helpful if the trial judge has a wider range of factual circumstances to give context to the common issues. Ms. LaBonte's claim may turn out to be an extreme one, because her tortfeasor was criminally convicted, and the trial judge may find other cases of assistance.

[125] As previously indicated (*supra*, para. 77) Ms. LaBonte's claim will be met with a limitation defence of some arguable merit. Where the claim of the proposed representative plaintiff is possibly vulnerable, it is appropriate to have multiple plaintiffs to ensure the continuity of the action.

[126] Where the proposed representative plaintiff is a particularly strong representative, a single representative plaintiff might be appropriate. In this case however, Ms. LaBonte has acknowledged her own limitations and challenges. In some cases there may be difficulty in identifying more than one representative plaintiff. I note however that the record discloses that over 200 persons have approached counsel for the Plaintiff, indicating that they are potential members of the class and wish to be included. In the circumstances, there is no reason to believe that there are not other appropriate representative plaintiffs available, and accordingly there is no reason to appoint a single representative. Therefore, while Ms. LaBonte is a suitable representative plaintiff, the action should only proceed as a class action if two or three other suitable representative plaintiffs are also added.

The Litigation Plan

[127] Section 7(1)(b) of the *Act* requires that the representative plaintiff present a proposed litigation plan. Section 9 does not make the approval of the plan one of the mandatory provisions of a certification order. Section 13 of the *Act* contemplates continual case management of the action, and variations of the litigation plan as required. Neither party discussed the litigation plan in great detail during argument on the certification motion, and the exact contents of the litigation plan will have to be dealt with at a suitable time in the future if the other hurdles to certification can be overcome.

[128] This factor overlaps however with the absence of necessary parties (see *infra*, paras. 138 *ff.*). The Plaintiff has a plan to try the common issues, and the "trials within trials" needed to resolve individual claims could be managed in some way (see *supra*, para. 58), but there is at present no viable plan presented to deal with the rights, duties and interests of third parties.

The Preferred Procedure

[129] The statute requires that a class action be the "preferable procedure" for the "fair and efficient" resolution of the common issues. The class proceeding regime is a tool of civil procedure. It is intended to be a practical, working device. As I summarized the situation in *Metera*, *supra*, at para. 88:

> In *Western Canadian Shopping Centres* the Court at paras. 44-46 and 51 emphasized the need for a "liberal and flexible" approach to certification, and the need to balance "efficiency and fairness". In *Elms* the Court noted at paras. 46-52 that trial judges must be given the flexibility to "make the proceedings work" and to achieve the objectives of class proceeding statutes. Class proceedings were said to require a "cost/benefit analysis", not to provide "perfect justice" but to enable the "fair and efficient resolution" of common issues. *Hollick* at para. 28 and *Rumley* at para. 35 speak of the need for class proceedings to be "fair, efficient and manageable". These cases also make the point that a class action can be decertified if it turns out to be an unsuitable procedure: *W.C.S.C.* at paras. 55-6; *Elms* at para. 48.

This pragmatic approach must be used to determining if the class action is the "preferable procedure", or if the action will turn out to be a "monster of complexity and cost": ***Tiemstra v. Insurance Corp. of British Columbia*** (1997), 95 B.C.A.C. 144, 38 B.C.L.R. (3d) 377 (C.A.) at para. 13.

[130] The Court may consider any relevant matter in deciding if the class action is the "preferable procedure", but the *Act* sets out some mandatory factors:

> 5(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:
>
> > (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;
> >
> > (b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;

> (c) whether the class proceeding would involve claims 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.

Each of these factors is considered below. Another relevant factor in this case is the rights of third parties.

Whether Common Issues Predominate

[131] A factor commonly considered in deciding whether or not to certify a proceeding is whether the common issues predominate over the individual issues. The statute requires that the class proceeding be the preferable, efficient and fair approach to deciding the "common issues". Section 5(1)(c) of the *Act* allows certification even if the common issues do not "predominate". Again, as I noted in ***Metera***, *supra*, at para. 69, it would be extremely rare for a class proceeding to contain only common issues, with no individual issues to be determined. The question is always whether a class proceeding is the preferable way to resolve what common issues there are. Of course, using the pragmatic approach to certification, the presence and scope of the individual issues must also be considered. The ultimate goal is to resolve all of the individual claims, and the Court must determine that a class proceeding will ultimately be of some practical utility in doing that: see ***Hollick***, *supra*, at para. 29; ***Chadha v. Bayer Inc.***, *supra*, at paras. 13-17 (Div. Ct.) and paras. 53-4 (C.A.).

[132] The Defendant argues that this litigation is "inverted". The Defendant argues that it cannot be known whether any class member should pursue this claim until it is known that they suffered an actionable wrong that would have resulted in a damage recovery which is now barred by the passage of time. Since virtually all class actions deal with common issues, followed up by an assessment of individual claims, this argument could be made with respect to any class action. It is really an argument that the individual issues predominate over the common issues. The statute however provides that the common issues need not dominate the individual issues, so long as the class proceeding is the preferable, efficient and fair method of deciding the common issues. Of course, while the Plaintiff is entitled to "limit the grounds of negligence she relies on" (see *supra*, para. 100), the more limited the common issues, the more the individual issues will predominate, and the less efficient will be the class proceeding.

[133] It is clear that in this case, while there are common issues, the individual issues will substantially predominate over the common issues. Even after the common issues are decided, there will be a lot of work to be done before it can be determined if any individual class member has a valid claim. Each individual claim will require a "trial within a trial": see para. 58, *supra*.

While the overall benefits will be slight, there is still some practical utility in deciding the common issues once.

Separate Proceedings

[134] The second and third factors to be considered are whether the prospective class members might have an interest in individually controlling their own actions, and whether the class claims are already the subject of other proceedings. On the first factor, each class member will still retain a significant element of control over his or her own claim, simply because the individual issues predominate over the common issues. Even after the common issues are decided, the class members will have a significant amount of control over the adjudication of the individual claims. There is nothing about the common issues that would suggest that the class members have any interest in maintaining control through separate prosecutions: see ***Rumley*** at para. 37.

[135] The record does disclose a number of other proceedings that might be overtaken by the class proceeding. There is however some evidence that at least some of the plaintiffs in those individual proceedings would prefer to have their claims absorbed by the class action. For those that do not, there is always the option of "opting out" of the class proceeding pursuant to the terms of s. 17. On balance, the presence or likelihood of parallel private claims is not an impediment to certification in this case.

Practicality of Other Procedures

[136] The fourth factor in s. 5(2) is whether other means of resolving the claims are less practical or less efficient. In this case there is not a sharp demarcation between the efficiency of the class proceeding, and the efficiency of hypothetical individual actions. This is again because the individual issues predominate over the common issues. In this particular situation, a great deal of the work in resolving the claims is going to have to happen at the individual level, and considered overall the practicality of the competing procedures is not significantly different. Certainly it is more efficient and practical to decide the common issues once and for all, and this factor is also not an impediment to certification, although again the benefits are marginal.

Difficulty in Administration

[137] The final mandatory consideration under s. 5(2) is whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. In this case it is likely that the class members might well be among the more vulnerable and less advantaged members of society: see, *supra*, paras. 120-21. As the Court stated in ***Rumley*** at para. 39: "Allowing the suit to proceed as a class action may well go some way towards mitigating the difficulties that will be faced by the class members" if they attempted to pursue their claims individually. This is accordingly a factor that speaks in favour of certification.

Third Parties

[138] The Defendant argues that this action is not the preferable way to determine the common issues because there are numerous third parties who are necessary parties. The Defendant identifies the following categories of potential parties:

(a) the primacy tortfeasors who committed the torts or crimes.

(b) First Nations to whom child welfare responsibilities were delegated (there are about 18 possible third parties).

(c) Regional Authorities created under the *Child and Family Services Authorities Act* to administer child protection services (there were 18, and are now 10 authorities).

(d) Charitable and for-profit service providers who were given responsibility over child protection from time to time.

(e) The Public Trustee, who is the trustee by statute of many class members.

The Defendant argues that the common issues cannot, or should not, be decided in the absence of these parties.

[139] Section 21 of the *C.Y.F.E. Act* permits the delegation of the powers under the *Act* to a child and family services authority or to any other person. The Defendant placed on the record delegations of authority to First Nations child welfare agencies. These documents delegate to the agency all the powers of a director under the *Act*, and many of the Ministerial powers. The accompanying child welfare agreements appear to grant the authority wide-ranging powers relating to the provision of child welfare services. The delegation of authority created by these documents might well have a significant impact on the existence and scope of any duty of care the Defendant might owe to the plaintiff class.

[140] The representative plaintiff argues that she is entitled to pick her defendants, and there is no obligation on the class to sue all persons who might potentially be liable. The representative plaintiff has chosen to sue the Defendant government only, and has not engaged the liability of other defendants. The representative plaintiff undoubtedly has significant flexibility in choosing defendants, if only because of the common law rule that any joint tortfeasor is responsible for 100% of the damage caused to the plaintiff. However, if necessary parties are not joined in the litigation, that might be a factor which precludes certification of the class action. If the proper parties are not joined, the class action may no longer be the "preferable procedure".

[141] First of all, it is useful to draw a distinction between true "third parties" and "necessary parties". In some cases the defendant may claim a right to be indemnified by another person who is not a party to the litigation, and the defendant may propose to add that other person as a third

party. In those situations of a pure indemnity claim, it may be quite possible to proceed with the class action without adding the third parties: for example ***Attis v. Canada (Minister of Health)*** (2005), 75 O.R. (3d) 302. However, the more common situation is where the "third parties" are persons who are potentially jointly liable with the named defendant. For example, in ***Baxter v. Canada (Attorney General)***, [2005] O.T.C. 391 the representative plaintiffs sued over abuse at Indian residential schools. The plaintiff initially sued both the federal government and a number of different religious groups that actually operated the schools. The presence of this many parties was a hurdle to the certification of the class action, or at least prevented the certification of the class action without all of the third parties being given an opportunity to speak to the issue of certification. In response to this problem, the plaintiffs apparently proposed to limit their claim to the several liability of the federal government only, thereby supposedly enabling the exclusion of the defendant religious groups from the action. With respect, the suggestion that the interests of the other defendants could be severed in this way is illusory. How could the court fairly decide that the federal government was, say, severally liable for 25% of the damages without affording the third parties a reasonable opportunity to be heard? What if it was the third parties' position that the federal government was liable for 50% of the damages, or 75%? It would be fundamentally unfair to the other potential tortfeasors to purport to decide the several liability of one party without the others being part of the litigation. On this point I respectfully disagree with the premise of ***Baxter*** and with the similar conclusions in ***Endean v. Canadian Red Cross Society***, *supra*, at paras. 56-9. Deciding the proportional liability of one defendant in the absence of other necessary parties creates a real risk of inconsistent judicial decisions, and violates the principle of natural justice that the rights of persons should not be decided unless they are extended a right to be heard in the proceedings: ***Sutherland v. Canadian Red Cross Society*** (1994), 17 O.R. (3d) 645 at pg. 652. In my respectful view the other defendants in ***Baxter*** were "necessary parties", not "third parties", and they had to be a part of the action before the issues of duty and proportional liability could possibly be decided. Similar issues arise in this action.

[142] Further, while the Plaintiff relies on the ***Baxter*** decision as authority for the proposition that the presence of third parties is not a bar to certification, the ***Baxter*** decision only decided whether the certification motion should proceed before or after certain motions proposed by the third parties. It is not authority for the proposition that the presence of third parties is irrelevant to certification. ***Baxter*** also did not draw any distinction between true third parties and necessary parties.

[143] In ***Attis v. Canada (Minister of Health)***, *supra*, it was held at paragraph 14 that "until such time as the action is certified, the nature of the proceeding is not yet crystallized so as to require the third party's participation. In consequence, the third party would have no standing to participate in the certification motion in any event." I am unable to accept that there is any such general rule. If the only claim against the third party is a claim for indemnity, as was the case in ***Attis***, severance of the third party claim may be possible. However, in most cases it is essential that all necessary and proper defendants be a part of the action. The deliberate decision of the plaintiff not to name proper defendants in an attempt to make the proceeding more amenable to certification will in fact often backfire, and the absence of those necessary defendants will often mean that the action cannot be certified: ***Bittner v. Louisiana-Pacific Corp.*** (1997), 43 B.C.L.R.

(3d) 324; ***Charette v. Minerve Canada Compagnie de Transport Aériens Inc.***, unrep. Que. S.C., May 3rd, 1988, No. 500-06-000002-887; ***Dumoulin v. Société de transport de la Communauté Urbaine de Montreal***, [1999] J.Q. No. 4899. I repeat that the *Act* is a tool of civil procedure, and is not intended to override other substantive and procedural rules, such as Rule 38(3) which requires the presence of all necessary parties: ***Edwards v. Law Society of Upper Canada*** (1995), 40 C.P.C. (3d) 316 (Ont. Gen. Div.) at para. 22. While s. 41(2) provides that the *Act* prevails over inconsistent Rules, there is nothing in the *Act* dispensing with the need to join all necessary parties.

[144] One potential defendant is noticeably absent: the Public Trustee. In ***Blood v. H.M.Q.***, *supra*, para. 44, it was determined that the Public Trustee is the one who has the primary responsibility for enforcing the legal rights of children. Whatever the merits of that decision, it would appear that the Public Trustee is a necessary party to this litigation, if for no other reason than the Public Trustee is specifically mentioned in the *C.Y.F.E. Act*. It is at least theoretically possible that the trial judge in this proceeding might determine that the Defendant does not have any duty as alleged, because that duty falls on the Public Trustee. It would be inappropriate for the trial judge to make such a determination without hearing submissions from the Public Trustee, and without having the Public Trustee being bound to that conclusion. If such a determination was made, and the Public Trustee subsequently challenged it, there would be the risk of inconsistent decisions of the Court. Furthermore, if that was the conclusion of the trial judge, the resolution of the common issue would be of no practical utility. It is accordingly inappropriate to certify this class proceeding for any class member who was in care after 1985, unless the Public Trustee can be made a defendant.

[145] Similar concerns exist with respect to the other potential third parties identified by the Defendant. While the Defendant has not yet filed a defence, it seems likely that the Defendant might argue that whatever duty it had to pursue the civil remedies of the class fell in whole or in part on the third parties, and not on the Defendant. The Plaintiff might argue in response that the Defendant had a non-delegable duty to the class and remains liable notwithstanding the involvement of the third parties. The Defendant might argue that whatever duty it has was discharged by putting the class members in the care of responsible third parties. I express no opinions on the correct answers to these difficult issues. It is obvious however that whatever decisions are made should only be made after the potential third parties have been given a fair opportunity to make submissions. Further, any decisions made on these issues should be binding on all those third parties.

[146] Another group of potential necessary parties is absent: the other guardians of the class members. It appears that the involvement of the Defendant short of Temporary Guardianship did not result in a change of guardianship, and that Temporary Guardianship itself resulted in shared guardianship (see *supra*, para. 44). Even those class members who were subject to Permanent Guardianship Orders would have had other guardians before, and possibly after, the Permanent Guardianship Order. In some cases the primary tort, or the expiration of the limitation period may have occurred under that other guardianship. The interaction of any duty of the Defendant to pursue

the civil claims of the class members, and the corresponding duty of these other guardians, is not something that could easily be decided in the absence of those other guardians.

[147] On the other hand, I am not satisfied that it is necessary to join the original primary tortfeasors to this action. The premise of the litigation is that the limitation period has expired against the primary tortfeasors, and on that assumption it is unlikely that the rights of the primary tortfeasors will be affected by this litigation. They are not necessary parties. For the same reason, the various agencies that were under contract to provide child welfare services are not necessary parties simply because they might have been vicariously liable for the acts of the primary tortfeasor, because the claim of vicarious liability is presumably subject to the same limitation period.

[148] The Defendant argues that the other child welfare agencies are also necessary parties to this action because most of the documentation with respect to the class members is with those agencies. In my view this itself is not an impediment to certification. Rule 209 provides for the production of relevant documents by third parties. Furthermore, the production of documentation with respect to individual class members will only become critical when the individual claims are assessed in the second phase of the class proceedings.

[149] To summarize, while the representative plaintiff may have a right to pick the defendants that are to be sued, the representative plaintiff must ensure that all necessary parties are joined to the litigation. The *Class Proceedings Act* does not override the general principles of civil litigation and R. 38(3) requires the joining of all necessary parties. The representative plaintiff has to take the Child Welfare system as it existed, and it appears that the system was, to a considerable extent, operated through third party agencies. It is not the "preferable procedure" to try and determine these difficult issues in the absence of those key third parties. It is therefore inappropriate for this class proceeding to be certified unless the necessary and appropriate third parties are joined.

[150] As indicated, the Defendant has identified a number of possible third parties. Without hearing from each of them, and without hearing from the Plaintiff, it would be inappropriate to determine which of them are truly necessary to this proceeding. Some of them may become necessary, or may be excluded as being not necessary, depending on the final definition of the class. In other words, if the time period covered by the action is changed, the number of necessary third parties may be reduced. Furthermore, it might be possible to eliminate some third parties by narrowing the class. For example, if the class was defined to exclude class members under the care of particular categories of third parties, that might solve the problem. Alternatively, it might be possible to limit the class to only those children who were under the direct care of the Defendant, and were not thereafter placed under the care of third parties. No final decision on this issue should be made without giving the Plaintiff and the Defendant the opportunity to make further representations if they are so advised. However, as the action is presently structured, it would be inappropriate to certify it as a class action.

Summary

[151] In summary, and subject to the submissions of counsel on the specific wording:

(a) the proceeding discloses a cause of action.

(b) the following class can be identified as an appropriate class of plaintiffs:

All persons who suffered personal injury while a minor as a result of a tort by a third party, and between July 1, 1966 and June 29, 2004 were in the actual custody of the Defendant:

i) as a permanent ward,

ii) under a Permanent or Temporary Guardianship Order, or

iii) under a Permanent Guardianship Agreement,

and the Defendant did not commence a civil action or make a Victims of Crime application to obtain compensation on their behalf.

(c) there must be a subclass for non-resident members of the class who are not residents of Alberta on the date of certification.

(d) the following common issues can be identified:

(i) Did the Defendant, between 1966 and 2004, owe a duty to some or all of the various types of class members to protect their legal rights by taking steps to obtain compensation on their behalf, and if so, what was the nature of that duty?

(ii) What policies, practices and systems did the Defendant have in place between 1966 and 2004 relating to the prosecution of civil claims on behalf of children in care?

(iii) Was the existence of, absence of, or content of the policies of the Defendant relating to the protection of the civil rights of children in care at any time between 1966 and 2004 so egregious or highhanded as to justify an award of punitive damages?

(iv) If the answer to question (iii) is affirmative, what quantum of punitive damages should be paid, and to whom?

(v) Did the Defendant operate the Child Welfare system at any time between 1966 and 2004 in such a way as to fraudulently conceal any breach of duty by it to the class members?

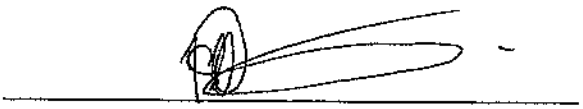
(e) the proposed representative plaintiff is suitable, but the proceedings should not be certified unless approximately two or three other suitable representative plaintiffs are proposed as well.

(f) while the advantages in this case will be marginal, a class proceeding would be the preferable procedure for deciding the common issue, excepting only that there are certain other parties who must necessarily be joined to the action before it can be certified.

(g) the application to sue by pseudonym is dismissed.

[152] The parties may speak to costs, and may seek other advice and directions as they are advised.

Heard on the 26th day of October, 2005.
Dated at the City of Edmonton, Alberta this 8th day of February, 2006.



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