Federal Court  Cour fédérale

Date: 20210623

Docket: T-1304-18

Citation: 2021 FC 504

Ottawa, Ontario, June 23, 2021

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

DIANE BIGEAGLE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

AMENDED ORDER AND REASONS

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I. Introduction

[1] This is a motion for this action to be certified as a class action under Rule 334.16 of the *Federal Courts Rules*, SOR/98-106 [*Rules*]. The Plaintiff in the proposed class action is requesting declarations and monetary damages for the families of victims of missing and murdered Indigenous Canadian women because of the policies and alleged conduct of the Royal Canadian Mounted Police [“RCMP”] over a period of 50 years across Canada.

[2] Specifically, the Second Amended Statement of Claim to the Defendant ["Statement of Claim"] says there has been a failing to "investigate and prosecute" and focus on their investigation of missing and murdered Indigenous women, girls, and members of the Two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual ["2SLGBTQQIA"] Indigenous community.

[3] The Applicant is the proposed representative plaintiff, Diane BigEagle [the "Plaintiff"]. Her daughter, Danita, went missing in February of 2007 and is still missing at the time of this decision.

[4] I think it is important to note at the outset the statement by the RCMP in their submissions (paragraph numbers and short forms omitted):

> The dark and painful experiences of violence against Indigenous women, girls and 2SLGBTQQIA individuals have been shared through the National Inquiry into missing and Murdered Indigenous Women and Girls.
>
> Together with First nations, Inuit and Metis, Indigenous organizations, and provincial, territorial, and municipal partners, the Government of Canada continues to walk the path of reconciliation, listening to the voices of families and survivors, as well as grassroots organizations and Indigenous leaders, to work collectively to address this national tragedy. The National Inquiry, and the ongoing collective response to the *Reclaiming Power and Place: The final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, are ways in which this multivariate, broad ranging public tragedy is being address.
>
> Canada acknowledges the experience of the families, extended families, estates and community members of the Indigenous victims whose murders or disappearances remain unresolved. However, this proposed class action is not an appropriate mechanism to remedy this tragedy.

[5] The Defendant is named as Her Majesty the Queen, the Royal Canadian Mounted Police.

[6] This motion is the first step in a complicated action, and is, subsequently, a complicated motion.

[7] The Class as pled is defined as:

> (a) All persons in Canada who have one or more Indigenous Immediate Family Members who are Victims (the "Immediate Family Class");
>
> (b) All persons in Canada who have one or more Indigenous Extended Family Members who are Victims (the "Extended Family Class");
>
> (c) All persons in Canada who, by reason of his or her relationship to a Class Member or Victim, are entitled to make claims under any of the Dependant Statutes as a result of injury to the Class Member or Victim (the "Statutory Dependants Class");
>
> (d) The heirs, assigns, and estates of all Victims (the "Estate Class"); and
>
> (e) All persons in Canada who are in relation to a Victim,
>
> (collectively, the "Class", "Class Members", or "Plaintiffs").
>
> (Statement of Claim, at para 6)

[8] The Plaintiff declared that this is not a novel case because in previous class actions, all of the causes of action she is claiming have been certified. The Plaintiff submits that this matter is "eminently suited for certification". She said that this case is analogous to institutional abuse and systemic discrimination class actions because "the wrongs have been perpetuated against an identified group of vulnerable Indigenous women and their families through the implementation

and operationalization of discriminatory polices and an institutional tolerance for systemic racism." (Plaintiff's Memorandum of Fact and Law, at para 5 ["PMFL"])

[9] The RCMP have vigorously defended each part of the certification test with no concessions. I note this because some of the jurisprudence relied on by the Plaintiff, the viability of the causes of action, are either by consent or only some causes of actions are disputed.

[10] Though I do not agree with all of Canada's challenges to this motion, for the reasons that follow, I will dismiss the certification motion.

II. Preliminary Issues

A. *Appropriate Parties*

[11] During oral arguments, the Plaintiff appeared to extend the action to include, as defendants, all federal government departments because the action was against "Her Majesty the Queen". Though it occurred in the Plaintiff's Reply, I need to address this as a preliminary issue.

[12] Pursuant to the *Federal Courts Act*, RSC, 1985, c F-7 s 48 and schedules, the appropriate action is brought against Her Majesty the Queen. In the Statement of Claim at paragraph 3, the pleading names the defendant, Her Majesty the Queen, represents the federal government of Canada and the RCMP and relies on the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 ss 3, 23(1), and 36.

[13] The Statement of Claim, starting at paragraph 7, sets out the allegations and material facts against the RCMP as a defendant. Starting at paragraph 73, it pleads only the duty of care owed by the RCMP as well as the alleged breaches, again, only by the RCMP. The written submissions to this motion only set out the causes of action against the RCMP. In submissions, the Plaintiff indicates the claim is "…aimed at Canada's vicarious liability for the misconduct of the RCMP officers and administrators whose actions have let to and enabled the negligence complained of." (PMFL, at para 67).

[14] It is not appropriate to submit, for the first time, at the reply stage, that the Defendant is to be expanded beyond the RCMP. The other departments have not had the opportunity to respond. More importantly, there are no allegations pled beyond the RCMP or damages sought from any department but the RCMP.

[15] Just as in *Canada (Attorney General) v Jodhan*, 2012 FCA 161 at paragraphs 85-89, where the pleadings were against the treasury board and the applicants then put forward new grounds against and additional 106 departments—which had not been pointed to in the Pleadings—the parties in the instant case must be limited to the policies at issue and to the actions of the at-issue department. Here, that means the RCMP.

[16] The Crown is immune to liability directly; only the actions or omissions of servants (or agents) of the Crown are to be assessed (*Hinse v Canada (Attorney General)*, 2015 SCC 35 at para 58). The agent of the Crown whose acts or omissions in question in the Pleadings of the Plaintiff is the RCMP.

[17] Further, determining exactly what or who is a public servant is not always easy. Peter Hogg, on Crown agency, explains that:

> The Crown includes the departments of government that are headed by a minister. It is the control of the minister that provides the link to the Crown. Municipal bodies, school boards, universities, hospitals, regulatory agencies, administrative tribunals and public corporations, even if they are performing "governmental" functions, are not agents of the Crown, unless they are controlled by a minister or expressly declared by statute to be an agent of the Crown. A question often arises as to whether a public body is or is not an agent of the Crown.
>
> (Peter Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 13)

[18] Because of the strict requirements to determine what an agent of the Crown is, it is necessary to plead specifically who the agent alleged is. The RCMP was named in the Statement of Claim, and no other branch of government is specifically mentioned. This infers that the only agent of the Crown alleged of any wrongdoing in this action would be the RCMP. So, the Defendant as named in the Pleadings at paragraph 3 being "Her Majesty the Queen represents the Federal Government of Canada" cannot now be extended to any other branch other than the RCMP in this action.

B. *Affidavits filed by RCMP*

[19] The Plaintiff alluded that the RCMP purposely put forth affidavits from witnesses not tendered as representatives of Canada or the RCMP, circumventing the requirement for disclosure of material facts as required by Rule 334.15(5) of the *Rules*.

[20] I wish to address that point early in the decision because I find that allegation to be baseless. The witnesses put forth were ones that had direct knowledge regarding specifics that were pled. The RCMP's witnesses were cross-examined and gave undertakings and there was a motion for refusals. There was no requirement for Canada to put forth a proper officer at this stage and I find that they put forth witnesses that were appropriate for a certification motion (*Fischer v IG Investment Management Ltd.*, 2016 ONSC 4405).

III. Facts

[21] The proposed representative Plaintiff in the action is Diane BigEagle, the mother of Danita BigEagle. Danita was born March 6, 1984. Diane and Danita resided in the City of Regina at the time of her disappearance. Danita was a member of the Ocean Man First Nation and she and her family had "travelled back and forth from time to time between Regina and Ocean Man" at the time she was reported missing by her family.

[22] Danita has been missing since Sunday, February 11, 2007, and is presumed to be deceased. She is also presumed to be a victim. Danita is survived by her two children, mother and family members.

[23] An additional six members of the proposed class have sworn affidavits. They are Crystal Sylvestre, Loreen Jack, Lorna Thomas-Twin, Linda MacNeil, Lorraine Blyan, and Jan Turner. All of them allege RCMP policies and inaction in the cases of loved ones who are either missing or deceased. A further 36 Indigenous women are listed as victims in the motion record.

[24] It is of note that the alleged incidents related by family and community members of victims range from 1968 to 2016, as well as over many different provinces and municipalities and cities that have their own police forces as well as some that engage the RCMP as their policing power, and there is nothing in the Statement of Claim that specifies a limited period of time for potential victims or class members.

[25] The Plaintiff claims that the policies, actions and inactions of the RCMP have caused damage to some members of the Indigenous communities across the country. The Plaintiff defines a "Victim" of the actions of the RCMP as:

> …an Indigenous woman or two-spirited individual who (1) was murdered (and whose murder was reported to the RCMP but remains unresolved) or (2) has been missing for more than 30 days and whose disappearance was reported to the RCMP.
>
> (Statement of Claim, at para 5)

[26] The Plaintiff' Second Amended Statement of Claim (filed October 4, 2019) brought the action on behalf of the class as defined as: "Immediate Family"; "Extended Family"; "Statutory Dependants"; those in the "Estate Class"; and "Community Members in relation to a Victim".

[27] At the hearing, the Plaintiff requested to amend the Second Amended Statement of Claim to change the "Community Members in relation to a Victim" definition to "all persons in Canada who reside on a First Nation where a Victim resided at the time of the Victim's murder or disappearance". The Plaintiff's amendment was accepted by direction at the hearing.

[28] The Motion asks for an Order certifying a class action including a number of classes with Diane BigEagle as the representative plaintiff. The claims asserted include systemic negligence, breach of common law duties, breach of the *Charter of Rights and Freedoms*, breach of the *Civil Code of Quebec*, CQLR c CCQ-1991 ["*CCQ*"], breach of the Quebec *Charter of Human Rights and Freedoms*, CQLR c C-12 ["*Quebec Charter*"], breach of the *Crimes against Humanity and War Crimes Act*, SC 2000, c 24 ["*Crimes Against Humanity Act*"] and that the relief sought is in the nature of general, special, aggravated, punitive, or exemplary damages, as well as other procedural orders.

[29] The common issues asked to be certified are attached as Annex "B".

IV. Issue

[30] The issue is whether the action should be certified as a class proceeding.

V. Evidentiary Background

A. *Evidence filed*

[31] The Plaintiff has supported her certification motion with the following evidence:

- Affidavit of Diane BigEagle, sworn May 7 2019
    i. Overview of Resource Allocation in Canadian Police Services, 2007
    ii. List of Parties with Standing in the National Inquiry, February 5, 2019
    iii. Agency Response Guide to Missing Persons Situations in Saskatchewan, March 3, 2014
    iv. Thunder Bay Police Services Board Investigation Final Report, November 1, 2014
    v. Missing and Murdered Indigenous Women's Inquiry Wages Court Fight for RCMP Files-CBC, April 29, 2019

vi. RCMP Regulations, 2014- Code of Conduct, April 30, 2019
vii. The National Inquiry into Missing and Murdered Indigenous Women and Girls- Interim Report, 2007

- Second Affidavit of Diane BigEagle, sworn June 5, 2019
  i. National Inquiry Calls for Transformative change to Eradicate Violence Against Indigenous Women, Girls and 2SLGBTQQIA, June 03, 2019
  ii. The Final Report on The National Inquiry into Missing and Murdered Indigenous Women and Girls- Volume 1a, 2019
  iii. The Final Report on The National Inquiry into Missing and Murdered Indigenous Women and Girls- Volume 1b, 2019
  iv. A Supplementary Report on The National Inquiry into Missing and Murdered Indigenous Women and Girls- Volume 2, 2019
  v. Supplementary Report on The National Inquiry into Missing and Murdered Indigenous Women and Girls- A Legal Analysis of Genocide, 2019
  vi. Executive Summary of The Final Report on The National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019
  vii. "Trudeau Says Deaths and Disappearances of Indigenous Women and Girls Amount to Genocide" - CBC News, June 04, 2019.
  viii. Transcript of the Cross Examination of Diane BigEagle, February 12, 2020
  ix. Letter from Tim Schwartz to Diane BigEagle, January 21, 2011
  x. Search Called in Regina for Missing Woman- An Article by Andrew Matte Sage from Saskatchewan Sage, January 01, 2020
  xi. Native Women's Association of Canada - Storytelling: Danita's Story
  xii. Response to Undertakings of Diane BigEagle
    1. RPS Witness Statement - February 22, 2007
    2. RPS Witness Statement - March 4, 2007
    3. RPS Witness Statement - August 9, 2007
- Affidavit of Lorraine Blyan, sworn August 23, 2018
  i. "Coroner doubts evidence at inquest" - The Edmonton Journal, August 3, 1968
  ii. Certificate of Coroner Before Summoning Jury, July 1968
- Affidavit of Loreen Jack, sworn May 3, 2019
  i. Crime Stoppers Flyer regarding a Missing Family
- Affidavit of Linda MacNeil, sworn May 01, 2019
  i. Response to Written Examination of Linda MacNeil, February 28th, 2020
- Affidavit of Crystal Sylvestre, sworn January 24, 2019
  i. "Janet Sylvestre" - CBC News, dated July 07, 2019
  ii. Opinion: Looking Back at Just Another Indian - Eagle Feather News, August 17, 2016
- Affidavit of Lorna Thomas-Twin, sworn August 23, 2018
- Affidavit of Jan Turner, sworn April 29, 2019
  i. Statement given by Jan Turner, 2015
  ii. Three polygraph test results
  iii. Video Interview of Jan Turner by Cpl. Fitzpatrick, February 25, 2020

    iv. Email Brian Merriman to Jan Turner, October 15, 2019
    v. Transcript of the Cross Examination of Jan Turner, February 21, 2020
    vi. Response to Undertakings of Jan Turner
- Affidavit of Dr. Thomas Gabor, sworn April 15, 2019
    i. Expert Report of Dr. Thomas Gabor, April 05, 2019

[32] The Defendant filed the following evidence:

- Affidavit of Cst. Cathleen Falebrinza, sworn November 23, 2019
    i. Transcript of the Cross Examination of Cathleen Falebrinza, February 25, 2020
    ii. Excerpt from RCMP "E" Division's operational manual re chapter 37-3, "Missing Persons"
    iii. RCMP National Policy on Missing Persons
    iv. Notes of Cst. Cathleen Falebrinza
    v. Response to Undertakings of Cst. Cathleen Falebrinza
    vi. Response to Refused Questions of Cst. Cathleen Falebrinza
- Affidavit of Cheryl Mancell, sworn November 21, 2019
    i. Aboriginal Peoples in Canada
    ii. Aboriginal Peoples Highlight Table
    iii. Membership in a First Nation or Indian Band
    iv. National Household Survey: Aboriginal Peoples
    v. Transcript of the Cross Examination of Cheryl Mancell dated February 21, 2020
- Affidavit of Dr. Ronald-Frans Melchers, sworn November 28, 2019
    i. Expert Report of Dr. Ronald-Frans Melchers
    ii. Transcript of the Cross Examination of Dr. Ronald-Frans Melchers dated February 6, 2020
    iii. List of Reference Documents
    iv. Thunder Bay Police Service Board Investigation
    v. Statistics Canada Report, Criminal Victimization in Canada 2014, November 23, 2015
    vi. Report of P. Feinstein and M. Pearce dated February 26, 2015
    vii. Missing and Murdered Aboriginal Women: A National Operational Overview- RCMP, dated 2014
    viii. Impact Evaluation and Development Report - NONIE
    ix. Collected Data on Aboriginal People in the Criminal Justice System- Statistics Canada, May, 2005
    x. Measuring Violence Against Women - Statistics Canada, October, 2006
    xi. Criminal Victimization in Canada - Statistics Canada, November 23, 2015
    xii. Victimization of Aboriginal People in Canada - Statistics Canada, dated June 28, 2016
    xiii. The Canadian Police Performance Metrics Framework: Standardized Indicators for Police Services in Canada - Statistics Canada, September 11, 2019

xiv. The Canadian Police Performance Metrics Framework: Standardized Indicators for Police Services in Canada - Statistics Canada, September 11, 2019

- Affidavit of Cst. Tim Schwartz
  i. Transcript of the Cross Examination of Cst. Tim Schwartz dated February 11, 2020
  ii. RCMP Notes
  iii. RCMP Sources of Information
  iv. Response to Undertakings of Cst. Tim Schwartz
- Affidavit of Superintendent Jeanette Theisen, sworn November 28, 2019
  i. Transcript of the Cross Examination of Jeanette Theisen dated February 26, 2020
  ii. Missing Persons Policy, January 24, 2019
  iii. Operational Manual excerpt (Part 37, Chapter 3), dated November 21, 2016
  iv. Response to Undertakings of Supt. Jeanette Theisen
  v. 62 Responses to Refused Questions of Supt. Jeanette Theisen

B. *Evidentiary Issues*

[33] I do not need to determine the weight or credibly of any of the evidence. However, a determination of admissibility is necessary to find whether the reports filed can be used as material facts given the inquiries different evidentiary burdens of the inquiries than at trial. I must also consider how to treat the expert reports and the proposed methodology contained within.

(1) Reports

[34] Many reports from inquiries and commissions were filed, and it would seem are relied on by the Plaintiff as material facts, to base the causes of actions on. The main report relied on is the "Final Report on The National Inquiry into Missing and Murdered Indigenous Women and Girls" [Final Report].

[35] A number of newspaper articles were also filed and relied on. This included, among others, articles about the Prime Minister's response to the Final Report, as well as the RCMP Commissioner's comments.

[36] It must be stated that the reports and inquires are all of great importance and they address a real and tragic public concern. That is, however, not the concern that is being addressed here.

[37] The RCMP expressed concerns about these reports being submitted as evidence and thus the basis for the material facts for this motion. Though the RCMP agreed that it was acceptable to admit the reports and inquiries, they added the caveat that they are wholly unreliable and riddled with issues including hearsay and inadmissibility. This was due to the nature of how the information was gathered at the inquiries. Generally, the utility of the reports was questioned given the hearsay (and on occasion triple hearsay) resulting from the nature of the fact gathering at the hearings.

[38] It is acknowledged that the Final Report was created after an inquiry, and an inquiry does not have the same evidentiary tests as a civil case does. The inquiry was a place for women and members of the Indigenous communities to tell their stories without boundaries or evidentiary rules.

[39] It is without question that the information in reports is given without the same evidentiary rules as required by a court. The information from the reports is not taken under oath, can be hearsay, there is no opportunity for cross-examination, and no due process or procedural

fairness necessary. The report contains anecdotal and opinion remarks from non-experts. The findings are based on information that would not be evidence at a trial and given without judicial scrutiny regarding possible exceptions to the rules of evidence. This is not surprising given that the reports are not intended for use in courts, but rather for, among other things, healing, reconciliation, and to encourage government action.

[40] On occasion, reports from inquiries have not been admitted into class action proceedings for the differences of evidentiary standards at hearings: *Ernewein v General Motors of Canada Ltd*, 2005 BCCA 540 (US secretary of Transport Report); *Robb Estate v St Joseph's Health Care Centre*, [1998] OJ No 5394, (Ont GD) (Royal Commission of Inquiry into the Blood System-Grace & Krever Reports); *LR v British Columbia*, 2003 BCSC 234 (Ombudsman and Berger Reports).

[41] This type of evidence being used in certification motions was dealt with in the "Motherisk Drug Testing Laboratory" case by the Ontario Superior Court. Justice Perell in *RG v Hospital for Sick Children*, 2017 ONSC 6545 [*Motherisk ONSC*] was appealed to the Ontario Divisional Court, and was affirmed there (*RG v Hospital for Sick Children*, 2018 ONSC 7058 [*Motherisk DC*]). That case involved testing mothers' hair to screen for drugs and alcohol where the positive tests were then used to refer the individual to child protection agencies.

[42] *Motherisk ONSC* is a helpful review of the dilemma faced by the certification motion judge. In that case, the admissibility of an "Independent Review Report" was at issue. The defendant argued the report ought to be inadmissible evidence for the certification review for

various reasons—largely because of the non-adjudicative process, presence of hearsay, and lack of due process protections (*Motherisk ONSC,* at paras 16-18). The plaintiff in that motion argued that the report ought to be admissible for certification since the motion is procedural and not a determination on the merits (*Motherisk ONSC*, at para 20). Further, the plaintiff argued that there was no prejudice to the defendant "…from admitting the Independent Review for the limited purposes of establishing some basis in fact for four of the five certification criteria…" (*Motherisk ONSC,* at para 22). Of note, it was apparently not used for determining if the causes of actions were sufficiently pled in order not to be struck.

[43] Justice Perell allowed the report in for the limited purposes of the certification motion. He did so with much skepticism and criticism of both parties' use of the report. The report was allowed, not for proof of the merits of the claim or for issue estoppel, but for uncontentious facts, the issues (as they were not hearsay), and recognized exceptions to the hearsay rule such as business records. He concluded that "the fact of the Independent Review having occurred is part of the historical background to Ms. Green's and the putative class members' claims and some of the Independent Review is admissible simply for having been said—but not necessarily for the truth of what was said" (*Motherisk ONSC,* at para 26). Justice Perell went on to say that "the *Independent Review* is admissible and the use to be made of it will depend on a contextual analysis of the matter in issue in the discussion that follows" (*Motherisk ONSC,* at para 27).

[44] On appeal of *Motherisk ONSC,* Justice F L Myers, on upholding Justice Perell's dismissal of the certification motion commented:

> It is apparent that the plaintiff has drawn her allegations of systemic negligence from the independent review report. Ignoring

> for this motion or appeal any admissibility issue relating to the use of the report at trial, **the plaintiff has chosen to approach the case based on the findings in a report that were not intended to be a statement of civil liability. Nor were they intended to state a cause of action (a right to sue) for any individual or group.**
>
> (*Motherisk DC*, at para 22, emphasis added)

[45] Additionally and importantly for this case, Justice de Montigny in *Canada v John Doe*, 2016 FCA 191 [*John Doe*] warned about accepting reports and evidence at the cause of action stage as "enough" to support a cause of action. He said: "…to the extent that the motions judge turned his mind to the requirement of pleading material facts in support of each cause of action, **he seems to be satisfied with the Privacy Commissioner's Report and the other evidence filed. This is clearly an error, as he failed to draw a distinction between elements in the pleadings and those that are in evidence on the motion**" (*John Doe*, at para 37, emphasis added). Justice de Montigny goes on to say that:

> In my view, the motions judge erred in accepting, without much discussion, that this pleading was sufficient to ground the cause of action. **First of all, there is a total lack of any material facts to support this pleading, and that is in and itself a sufficient basis to dismiss that cause of action.**
>
> (*John Doe*, at para 45, emphasis added. See also paras 53,56 and57 for elements of the cause of action set out and then no material facts to support the elements)

[46] The approach taken in the *Motherisk* decisions and *John Doe*, is a just approach in respect to allowing the report to be admitted, but not for the truth of the facts or as material facts. The reports and inquiries are admitted, but only to help put the facts pled into context (*Johnson v Ontario*, 2016 ONSC 5314, at para 67; *Ewert v Canada (Attorney General)*, 2016 BCSC 962, at paras 39-40).

[47] The newspaper articles that were filed concerning statements of the Prime Minister or the RCMP commissioner will likewise be admitted, not for the truth of the statements, but for context. The existence of those articles hint at evidence that could exist to be produced at trial, and I am prepared to admit them for that purpose, which is relevant to the common issues and litigation plan.

(2) Expert Evidence

[48] The Plaintiff proffered an expert report by Dr. Thomas Gabor to suggest a methodology to determine whether "provided sufficient documentation, it would be possible to determine whether the RCMP carried out its duties to the class/victims in a 'markedly different manner' than with other citizens."

[49] The RCMP filed an expert report by Dr. Ronald-Frans Melchers that essentially states the methodology set out by the Plaintiff's expert would make it impossible to answer the question and then describes what, in his opinion, is a viable methodology.

[50] Both expert reports are not put forward regarding the merits of the causes of action, but regarding the certification requirements.

[51] The parties do agree that on a certification motion, I do not examine the expert reports and make a finding on the merits or on which expert to rely on (*Irving Paper Ltd v Atofina Chemicals Inc*, 2010 ONSC 2705, at paras 55 and 64). They disagree on whether the Plaintiff's expert met the legal test on whether there is a viable methodology on a class-wide basis.

[52] The RCMP claim that the reports proposed by the Plaintiff's expert are not admissible at the common issues trial. The RCMP indicate that the methodology is not demonstrably better than other methods to find missing and murdered Indigenous women and girls already being used. And finally, that the methodology regarding determining the differences in the RCMP's tactics when dealing with Indigenous versus non-Indigenous persons is not grounded in facts. In contrast, the Plaintiff argues that if I look at which methodology is better, it amounts to the weighing of evidence.

[53] In *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*], the Supreme Court of Canada ["SCC"] discussed how a motion judge should treat evidence in a certification motion, and that it should not be subjected to rigorous scrutiny (*Pro-Sys*, at para 103).

[54] The test at this stage is to only review to see if the methodology set forth by the Plaintiff's expert is a "credible or plausible methodology" (*Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2009 BCCA 503, at para 68, leave to appeal to SCC refused, 2010 CanLII 32435 (June 3, 2010)).

[55] To summarize, I do not make the determination of which expert to prefer—a certification court is ill equipped to do assessments of evidentiary weight. As well, I am not to determine how strong the Plaintiff's expert is, but just to satisfy myself that the methodology has some basis in fact to satisfy the commonality requirement. "The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question.

There must be some evidence of the availability of the data to which the methodology is to be applied" (*Pro-Sys*, at para 118). Neither do I weigh the conflicting expert reports at this stage as doing so could only lead to a merit-based evaluation (*Tluchak Estate v Bayer Inc*, 2018 SKQB 311, at para 60, leave to appeal to SKCA refused, 2019 SKCA 64 (July 25, 2019); leave to appeal to SCC refused, 2020 CanLII 13139 (February 20, 2020)).

[56] The report proffered by the Plaintiff, when subjected to modest scrutiny, does set out a methodology that is not theoretical or hypothetical, and that meets the some basis of fact for the commonality requirement.

VI. The Law of Class Actions

[57] The requirements for an action to be certified as a class action are set out in the *Rules* at 334.16(1)(a)-(e) (attached in Annex "A").

[58] Justice Stratas writing for the Federal Court of Appeal ["FCA"] in *Wenham v Canada (Attorney General)*, 2018 FCA 199, at paragraph 17 [*Wenham*], echoes the *Rules*, indicating that to be certified as a class proceeding, the Court required these things:

> (a) the pleadings disclose a reasonable cause of action;
>
> (b) there is an identifiable class of two or more persons;
>
> (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
>
> (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
>
> (e) there is an adequate representative plaintiff or applicant.

[59] These requirements make up the sub-issues in this motion:

1. Is it plain and obvious that there is a cause of action

    i. for systemic negligence?

    ii. because of a negligent police investigation?

    iii. for misfeasance in public office?

    iv for a breach of the *Charter*

        a) under s. 7?

        b) under s. 15?

    v. because of breaches and violations for residents of Quebec:

        a) of the *CCQ*?

        b) of the *Quebec Charter*?

    vi. due to breaches of *Crimes Against Humanity Act*?

2. Is there an identifiable class of two or more persons?

3. Is there a common question of law or fact to be resolved?

4. Is the class proceeding the preferable procedure?

5. Is the representative plaintiff a suitable representative for the class?

[60] The language in the *Rules* is mandatory so that if the test is met, the Court has no discretion, and must certify (*Murphy v Cie Amway Canada*, 2015 FC 958, at para 30 and *Samson Cree Nation v Samson Cree Nation (Chief and Council)*, 2008 FC 1308, at paras 34-35, aff'd 2010 FCA 165).

[61] In the Order sought, the Plaintiff reminded the Court that it has "liberal and flexible" remedial options if the criteria are not satisfied. Including that the Court may unconditionally certify, adjourn to permit further evidence or an opportunity to amend, or to certify on conditions that specified changes are made to the class definition, common issues, or litigation plan.

[62] The SCC in *Pro-Sys* has set tests and the burdens for certification of actions (*Pro-Sys*, at paras 63 and 99-104). There are two standards for the five certification criteria: one for the cause of action, and another for the four remaining criteria.

[63] To determine if there is a cause of action, I must review each alleged cause of action and determine if it is plain and obvious that it will fail (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959, at p 980, 74 DLR (4th) 321; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, at paras 23 and 25 [*Imperial Tobacco*]). The test is the same as whether to strike a pleading or not.

[64] When assessing whether it is plain and obvious that a cause of action will fail, the material facts must be taken to be true and I am not to weigh evidence (*John Doe*, at para 23; *Wenham*, at paras 24-25). But, it must not be forgotten that the facts pled are assumed to be true unless the facts are "manifestly incapable of being proven" (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19, at para 87 [*Atlantic Lottery*] citing *Imperial Tobacco*, at para 22).

[65] Chief Justice McLachlin said "[t]his is not a decision on the merits of the action, but on whether the causes of action pleaded are supportable at law. The question is whether the pleadings, assuming the facts pleaded to be true, disclose a supportable cause of action. If it is

plain and obvious that the claim cannot succeed, it should be struck out" (*Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, at para 4 [*Alberta Elders*]).

[66] A class action motion for certification has been described as a procedural motion with the court in the role of a gatekeeper. Although this is essentially a procedural screening exercise it must still be meaningful and be more than symbolic scrutiny of the evidence or else it would be a meaningless exercise where all class action motions are granted.

[67] Justice Rothstein emphasised this point:

> Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (CPA, s. 5(7**)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny."**
>
> (*Pro-Sys*, at para 103, emphasis added)

[68] In addition, the allegations cannot be baseless: "Bald assertions of conclusions are not allegations of material fact and cannot support a cause of action…" (*John Doe*, at para 23). The FCA has stated that "[w]hile the facts alleged are assumed to be true, **they must still be pleaded in support of each cause of action**" (*John Doe*, at para 23, emphasis added). "As previously mentioned, material facts must be pleaded in support of each cause of action alleged" (*John Doe*, at para 33; see also *Merchant Law Group v Canada (Revenue Agency)*, 2010 FCA 184, at para 34 [*Merchant Law*]).

[69] It is not my role to assess challenges the Plaintiff may face at trial or as Justice Stratas said "[w]agering on whether the cause of action will cross the finish line is not part of the court's task" (*Wenham*, at para 29).

[70] For the remaining four criteria, the test to be met is whether there is "some basis of fact" to support the certification order (*Hollick v Toronto (City)*, 2001 SCC 68, at para 25).

[71] With these warnings to not evaluate the evidence ringing in my ears, I will begin by examining: whether the Plaintiff has pled material facts—that are not manifestly incapable of being proven or bald assertions incapable of being proven—to support each element of each cause of action, or if is it plain and obvious that the cause of action will fail and should be struck.

VII. Analysis of Causes of Action

A. *Systemic Negligence*

[72] The first cause of action in the Statement of Claim is systemic negligence. The elements of negligence are: a) existence duty of care; b) breach of that duty; and c) damages flowing from the breach of the duty of care.

[73] To be systemic it must be a widespread harm to a number of individuals: "[the] negligence [is] not specific to any one victim but rather to the class of victims as a group" (*Rumley v British Columbia*, 2001 SCC 69, at para 34 [*Rumley*]). The Plaintiff indicates that the individual nature of the wrongs should not be focused on, as significant elements of the wrong

can be decided on a class-wide basis and the individualization does not have to be so pervasive that it overwhelms what is plead as a systemic wrong.

[74] The central question is whether the material facts, assuming them true as plead, have the elements necessary for systemic negligence including whether the RCMP have a duty of care to the class members.

[75] The Pleadings for this section are at paragraphs 73b to 78 of the Statement of Claim, with paragraph 73 setting out "The RCMP's Duties of Care" (attached in Annex "C").

[76] The Plaintiff claims damages for the "systemic negligence of the RCMP for which the defendant is vicariously liable" and also included damages for the breach of the *Charter* and aggravated, punitive and exemplary damages.

[77] Further, the Plaintiff suggests that because of the injuries suffered, the Plaintiff and the class have sustained certain special damages, losses and expenses for medical treatment, rehabilitation, psychological counselling, and other care.

[78] She asserted it is systemic because of colonial thinking. The memorandum submits that:

> The breaches of the duty for which compensation is sought are not breaches of the duty in individual, specific cases (although they provide the backdrop against which systemic conduct is evaluation), but failures on the part of Canada to implement policies, practices, procedures and protocols that ensure the protection of Victims and, by extension, Class Members. These failures were systemic, occurred over a long period of time, and were the result of a general failure to devise, develop, and

> implement appropriate policies that would have protected Victims and Class Members (as described above) from the harms which ultimately occurred.
>
> (PMFL, at para 68, referring to the Statement of Claim, at paras 72j, 74b and 75c)

[79] The Plaintiff's position is that because many other class actions have been certified against government and institutions for systemic negligence resulting from design and implementation of policies and that "…many examples confirm that this cause of action is reasonably asserted in a class context", then this Court should certify the proceeding.

[80] The Plaintiff provided a list of systemic negligence class actions, all certified, and suggests that should be enough in this situation. She included examples such as *Tippett v Canada*, 2019 FC 869, a decision about diversion program operated by Canadian Armed Forces [CAF], where class members physically and sexually abused by CAF members. She also cites *Pederson v Saskatchewan (Minister of Social Services)*, 2016 SKCA 142, where Social Services failed to pursue legal action for injuries sustained by minors in foster care.

(1) Duty of Care

[81] The causes of action are set out above in paragraph 59. The causes of action of systemic negligence and negligent police investigation both require the element of a duty of care.

[82] The Plaintiff stated that the RCMP have a duty of care to the members of the class. The Plaintiff presented that the duty of care is one that is already established so this element is established.

[83] In the alternative, she says that simply because this duty has not been recognized to date does not mean that it does not exist. It just means that the Plaintiff has an uphill battle in trying to prove that it does.

[84] As a subset of that argument, the Plaintiff's submissions are that the duty of care is in an already established category due to there being a fiduciary duty from the RCMP to the Indigenous female population. In that alternative, they argue if I find it not to be an established category then it could arise as a novel fiduciary duty.

[85] The Plaintiff declared that there is a RCMP duty—not to the deceased, but for the benefit of the family, the close community, and to bring closure to those close to the victims. The Plaintiff indicates that the derivative claims are not hopeless as there are provincial statutes that allow for recovery, and even if there is no statute, that this area of law is developing—but this is more a standing issue. This submission is in relation to the fact that the duty of care of the RCMP is alleged to be to the class member who is a family or community member and not to the victim themselves.

(2) The Law

[86] The FCA, in *Paradis Honey Ltd v Canada (Attorney General of Canada)*, 2015 FCA 89 [*Paradis Honey*], said the first step for a duty of care analysis is to ask these two questions in the context of that case:

> 1. Do the facts pleaded give rise to a relationship of proximity in which Canada's failure to take reasonable care might foreseeably cause loss or harm to the beekeepers?

> 2. Are there policy reasons why a duty of care should not be recognized?
>
> (*Paradis Honey*, at para 88)

[87] They summed up the test to meet as follows:

> 47 As noted above, the law on the liability of public authorities in negligence is determined by the test in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.) (*Anns*), adopted by the Supreme Court of Canada in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.), and explained in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.). This law was most recently canvassed in *Imperial Tobacco*, cited above.
>
> 48 The *Anns* test is a two part test: (1) do the facts disclose a *prima facie* duty of care, that is, a relationship of proximity which makes it just and reasonable to impose an obligation to take reasonable care to prevent foreseeable harm; and (2) are there policy reasons why this *prima facie* duty of care should not be recognized.
>
> (*Paradis Honey*, at paras 47-48. See also *Anns v Merton London Borough Council* (1977), [1978] AC 728 (UK HL) [*Anns*]; *Cooper v Hobart*, 2001 SCC 79 [*Cooper*])

[88] I agree with the Plaintiff that just because a cause of action has never been recognized does not mean that will preclude it from going ahead at this preliminary stage. Conversely, it does not mean that simply because it is novel, it will go ahead just so that the judiciary can advance the reform or extend legal doctrine. This is best said by Justice Stratas:

> When the courts consider a novel claim, they must keep in mind a line. On one side of the line is a claim founded upon a responsible, incremental extension of legal doctrine achieved through accepted pathways of legal reasoning. On the other is a claim divorced from doctrine, spun from settle preconceptions, ideological visions or freestanding opinions about what is just, appropriate and right**. The former is the stuff of legal contestation and the courts; the latter is the stuff of public debate and the politicians we elect.**

(*Paradis Honey*, at para 117, emphasis added)

[89] Chief Justice McLachlin in *Alberta Elders* taught the approach to determine if there is a duty of care at the cause of action stage in a certification motion.

[90] I will have to do the same analysis as she did, and thus I will rigidly follow her approach and methodology.

[91] First, she stressed that "[t]his is not a decision on the merits of the action, but on whether the causes of action pleaded are supportable at law" (*Alberta Elders*, at para 4). To test the claim, she then set out the plaintiff's pleadings and analyzed them against the lengthy background she had set up regarding the elements of a fiduciary duty pleading. She stated that:

> [i]t thus emerges that a rigorous application of the general requirement for fiduciary duty will of necessity limit the range of cases in which a fiduciary duty on the government is found. … Plaintiffs suing for breach of fiduciary duty must be prepared to have their claims tested at the pleadings stage, as for any cause of action.
>
> (*Alberta Elders*, at para 54)

[92] When the Chief Justice analyzed the negligence claim she said:

> [t]he first and central question is whether the pleadings, assuming the facts alleged to be true, support a duty of care on Alberta to members of the plaintiff class. This requires us to determine first whether Alberta and the class members were in a relationship that gave rise to a ***prima facie* duty of care, based on foreseeability and proximity. If a *prima facie* duty of care is established, the second step is to ask whether it is negated by policy considerations**: see *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *City of Kamloops v. Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2; *Cooper v. Hobart*, 2001 SCC 79,

> [2001] 3 S.C.R. 537, at para. 30; and *Reference re Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360, at para. 14.
>
> (*Alberta Elders*, at para 66, emphasis added)

[93] The Chief Justice then surveyed the law, analyzed the pleadings and found that "assuming the facts pleaded to be true, the negligence claim is bound to fail at the first step of the *Anns/Cooper* inquiry. Absent a statutory obligation to do the things that the plaintiffs claim were done negligently, the necessary relationship of proximity between Alberta and the claimants cannot be made out." (*Alberta Elders*, at para 73). In the end, she found that "[p]ut simply, the pleadings against the Crown are too vague to permit the inference of a fiduciary duty on the Crown toward the plaintiff class" (*Alberta Elders*, at para 60). She determined that the "pleas of fiduciary duty, negligence and bad faith in the exercise of discretion disclose no cause of action and should be struck out in their entirety, but that the claim for unjust enrichment should survive" (*Alberta Elders*, at para 5).

(3) Analysis of duty of care

[94] What will become clear in the analysis is that this particular certification motion is unique, and does not fit into the boxes that the Plaintiff alleges it does. The class members are not the victims themselves as the alleged incidents range over 50 years, and are alleged to have taken place across Canada, including in areas that have their own police forces—without the RCMP involvement or jurisdiction, as well as incidents within the RCMP's jurisdiction. While the National Inquiry covered such wide subject matter, and rightly so given its purpose and procedures, the facts stemming from it are less amenable to finding a duty of care that is viable at

law (see also the use of reports, above). As Justice Stratas said in *Paradis Honey*: some matters are best left for politicians to determine (*Paradis Honey*, at para 117).

(a) *Fiduciary Relationship*

[95] Fiduciary duty as a cause of action in itself is dealt with in the next section of these reasons. However, I also have to deal with here it to respond to the Plaintiff's arguments that a duty of care relationship is established by a fiduciary relationship, which in turn allows the first step in a claim for systemic negligence. The Plaintiff argues the private law duty of care is established because of the fiduciary relationship of the RCMP and the class members. She submitted that the fiduciary duty arises in at least two ways in this case.

[96] Her submissions are that courts have accepted that a fiduciary duty arises when the crown accepts "discretionary control over some specific aboriginal interest (often, but not exclusively land interests)…" (PMFL, at para 73). To support this, the Plaintiff cites *Brown v Canada (Attorney General)*, 2013 ONSC 5637, at paragraph 37 [*Brown*].

[97] The Plaintiff presents that the duty arises is that "the RCMP is tasked with preserving the peace and upholding generally the laws of Canada and the laws of the various provinces in which they work." She argues that the RCMP has a special role to protect Indigenous people as "an arm of the Federal Government [and is] is subject to *Charter* oversight (with s. 7 and s. 15 being of particular application here)." The Plaintiff says that, regarding investigation and pursuit of cases of victims, "…the exercise of 'discretionary control' has led to the harms alleged in this case",

and that the "RCMP failed to take sufficient steps to protect this peculiarly vulnerable population" that they have a fiduciary relationship with (PMFL, at para 74).

[98] The Plaintiff further purports that the RCMP owes an existing duty to Indigenous persons because the SCC said there is a "trust-like, rather than adversarial" relationship between Canada and Indigenous persons (*R v Sparrow*, [1990] 1 SCR 1075, at 1108 [*Sparrow*]). Because of this, she suggests that the class members fit into an established category because there is a fiduciary duty between the class members and the RCMP.

[99] The second way the Plaintiff argues for a fiduciary duty to be found is the fact the Indigenous women (alleged wards of the state whose care and welfare are a political trust of the highest obligation) are vulnerable and at a disproportionate risk of harm. This, she asserts, makes the duty a heightened one.

[100] She says that there are three elements required for a fiduciary relationship to be found: an undertaking, a defined vulnerable person, and a legal or practical interest. The Plaintiff submits that all the three elements are present to find an *ad hoc* fiduciary duty.

[101] Regarding the undertaking element, the Plaintiff submits that the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*] is an undertaking by the Federal Crown to "…provide policing services to *all* Canadians, and which purports to guarantee impartiality and equal access and protection including to the Indigenous peoples." As well, each member is subject to a code of conduct.

[102] Secondly, the Plaintiff says that there is a defined class of victims of which is "peculiarly vulnerable, whose social circle and family members are therefore equally more peculiarly vulnerable." In fact, she argues these class members' vulnerability is heightened because they are *more* dependant on the RCMP.

[103] The final element, a legal or practical interest, is also present in this action, according to the Plaintiff. She voices that this element is met because "[t]here is therefore a 'glimmer of actionability" in the allegation that Canada should have done more to ensure adequate policing in respect of the Victims, and in failing to do so, it breaches its trust with Indigenous persons and thus acted disloyally." She submits that paragraph 51 of *Brown* is analogous.

[104] Finally, the Plaintiff argued that if the duty of care is to be deemed novel, that analysis is subject matter for the trial judge and not for the motion's judge to determine.

(b) *The Law of Fiduciary Relationship*

[105] Chief Justice McLachlin in *Alberta Elders* sets out the requirements for a fiduciary relationship to be recognized at this preliminary stage to be a duty of care. *Alberta Elders* was a class action alleging that the government conduct in artificially elevating elderly individual's required contributions to reside in Alberta care homes breached fiduciary duties, negligence, bad faith and unjust enrichment. The reasoning behind the case was that the government is responsible for the medical care of residents, but that the residents can contribute to costs related to housing and meals by paying accommodation costs. The class argued that the government raised the accommodation fees artificially, so they could subsidize the government of Alberta's

medical expenses. She struck the causes of action for fiduciary duty, negligence and bad faith but not the cause of action for unjust enrichment.

[106] At paragraph 36 of *Alberta Elders*, there is a summary of the three requirements to find an *ad hoc* fiduciary duty. As indicated by the Plaintiff, the requirements are:

> (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
>
> (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and
>
> (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.
>
> (*Alberta Elders*, at para 36)

[107] She explained that "*[a]d hoc* fiduciary relationships must be established on a case-by case basis" (*Alberta Elders*, at para 33). She then says that the general principles apply to private actors but also can apply to government. She cautions, though, that because "...special characteristics of government responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances" (*Alberta Elders*, at para 37). Her reliance on *Guerin v Canada*, [1984] 2 SCR 335 [*Guerin*] and *Wewaykum Indian Band v Canada*, 2002 SCC 79 [*Wewaykum*] is for support that "[p]ublic law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary duty" (*Guerin*, at p 385 (Dickson J)), and regarding the relationship to the Indigenous people "therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary" (*Wewaykum*, at para 96). She finds that in *Sparrow* at page 1108, the *sui generis* relationship raises a fiduciary

duty to the "…**Aboriginal peoples with respect to their lands**…" (*Alberta Elders*, at para 39, emphasis added).

[108] The Chief Justice indicates that "[i]t is now clear that **vulnerability alone** is insufficient to support a fiduciary claim" (*Alberta Elders*, at para 28, emphasis added). The "hallmarks" of establishing a fiduciary duty are not only vulnerability arising from the relationship; the alleged fiduciary must have given an undertaking of responsibility to act in the best interests of a beneficiary (*Alberta Elders*, at paras 30-32 and 36). That undertaking must be "[t]he party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favor of those of the beneficiary's interest, in relation to the specific legal interest at stake" (*Alberta Elders*, at para 31). This undertaking can be imposed by statue or "…an express agreement to act as trustee of the beneficiary's interests" (*Alberta Elders*, at para 32).

[109] Regarding the second condition that must be met, the Chief Justice noted that "the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them. Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties" (*Alberta Elders*, at para 33).

[110] The final condition is that "…the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary…" (*Alberta Elders*, at para 34). This legal or practical interest of the beneficiaries is one "…that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control" (*Alberta Elders*, at para 36).

(c) *Application of Principles to this Case*

[111] Following the SCC in *Alberta Elders*, I will examine if the three branches of the test for an *ad hoc* fiduciary duty are set out in this case as well as the vulnerability arising from the relationship (*Alberta Elders*, at para 36 referring to *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81, Wilson J; see also *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14)).

(i) Branch 1-Undertaking

[112] The Pleadings do mention the *RCMP Act* and refer to the code of conduct at paragraph 73, item (l) and the *Criminal Code*, RSC, 1985, c C-46 [*Criminal Code*], at paragraph 73(a) to explain why they held that the RCMP owed a duty to class members. However, there is nothing in those pieces of legislation that support an undivided loyalty towards the claimant class as those acts only support the interests of all Canadians generally. There is no obligation or undertaking in those statutes that would create a trust relationship between the class members and the RCMP other than that they would be included in the general public duty. There are no facts plead that establish a private duty to the class members. Even with a generous reading of the Pleadings and with no weighing of any evidence it is plain and obvious that the Pleadings do not support a fiduciary duty.

(ii) Branch 2-Defined Class (Vulnerable Individuals)

[113] Just as in *Alberta Elders* at paragraph 56, these Pleadings do emphasise the vulnerability of the class members. And like in that decision, I do not find that the state of vulnerability is enough to find a fiduciary relationship because I do not find that vulnerability comes from the relationship of the class members with the RCMP (*Alberta Elders*, at para 57).

[114] It is uncontroversial that there is a special relationship between Indigenous people and Canada. However, the duty of loyalty as set out in *Alberta Elders* has not been extended to all Indigenous people in all situations. In *Alberta Elders*, the context of the duty is in terms of land rights and, possibly, where there is a private duty being carried out by the government. Clearly, on these facts the RCMP are only preforming a public duty. Further, the Plaintiff does not reproduce the quote in context, and cuts off the end in her submissions completely changing the meaning:

> For similar reasons, where the alleged fiduciary is the government, it may be difficult to establish the second requirement of a defined person or class of persons vulnerable to the fiduciary's exercise of discretionary power. The government, as a general rule, must act in the interest of all citizens… In the Aboriginal context, an exclusive duty **in relation to Aboriginal lands** is established by the special Crown responsibilities owed to this sector of the population and none other. Similarly, where the government duty is in effect a **private duty** being carried out by government, this requirement may be established. **Outside such cases**, a specific class of persons to whom the government owes an exclusive duty of loyalty **is difficult to posit.**
>
> (*Alberta Elders*, at para 49, emphasis added)

[115] Fiduciary duty is not a cloak that settles on all Indigenous peoples in all situations. I think it is unfair to project this antiquated idea that Indigenous people are "wards of the state" (*St Ann's Island Shooting and Fishing Club Ltd v Canada*, [1950] SCR 211, [1950] 2 DLR 225). In *Alberta Elders*, after surveying many of the cases relied on by the plaintiff for this proposition, Chief Justice McLachlin states:

> The unique and historic nature of Crown-Aboriginal relations described in these cases negates the plaintiff class' assertion that they serve as a template for the duty of the government to citizens in other contexts. The same applies to the only other situation where a Crown fiduciary duty has been recognized-such as where the Crown acts as the public guardian and trustee.
>
> (*Alberta Elders*, at para 40)

[116] I do not find that there is an automatic fiduciary duty in this action just because it involves Indigenous peoples who are the class members and the RCMP in the investigation of murdered and missing Indigenous women. There is no jurisprudence that has found that this is an existing category, and so based on the reasons as set out in *Alberta Elders*, the exercise of determining if there is a novel fiduciary duty must be done.

[117] Regarding the class, though they may be vulnerable individuals in their own right, the Pleadings do not support the second branch of this test. The RCMP does have discretionary power over individuals in Canada as a whole. This power is via the Canadian *Criminal Code*, the *RCMP Act* and other federal statues and agreements with some provinces and territories. The RCMP do not have a discretionary power over the class members any more so than they have with the public at large. There is no specific relationship between the RCMP and the members of this class even if the victims or class members are vulnerable members of Canadian society.

(iii) Branch 3-Legal or Substantial Interest of Beneficiary Affected Adversely by Fiduciary Discretion

[118] Given that the Plaintiff does not meet the other two branches there is no need to deal with branch 3.

[119] I conclude that on the material facts pled there is no *ad hoc* fiduciary duty owed by the RCMP to the class members.

(d) *Established or Recognized Duty of Care (other than Fiduciary)*

[120] The Plaintiff submits that "there can be no question that a duty of care exists between the RCMP (as an agent of the Federal Crown with obligations to protect the interest of Indigenous peoples) and victims" (PMFL, at para 80). The Plaintiff submits that the class members are dependent on the RCMP because 1) the *RCMP Act* guarantees impartiality and equal access and protection to all Canadians including Indigenous peoples; and 2) there is a defined class of peoples who are particularly vulnerable (class members and victims). This means, according to the Plaintiff, that they acted disloyally. She cites *Brown* at paragraph 56 to make the point that if a fiduciary duty exists, then that will establish a *prima facie* duty of care.

[121] The question for a trial judge, according to the Plaintiff, will be whether there is enough of a relationship between the class members and the RCMP to establish foreseeability—that is whether the RCMP should have reasonably foreseen the potential for harm. She asserts that the answer is "yes" because the RCMP exercised specific judgments to not communicate with the

class members. She also notes that there need not be a direct relationship between a government actor and the finding of a duty of care.

[122] The Plaintiff's position is that when the *Anns/Cooper* test is applied, there is sufficient proximity between the class members and the RCMP as well as the harms being reasonably foreseeable. She says that proximity was established when the government entities did not "make rational, evidence-based decisions (in this case, the treatment of Victims, Victims' families, and the investigation of crimes related to Victims) has been found in the past to warrant a finding of proximity." (PMFL, at para 78). The Plaintiff acknowledges that:

> Courts have been very wary about refusing to recognize a duty of care on speculative assertions that to do so would interfere with police investigations or the ability of police to generally do their job. In this case, the suggestions, if it were made, that treating victims and their families as equals to non-Indigenous Canadians would somehow interfere with the RCMP's public duties cannot be given any credence particularly in the absence of any evidentiary record on point.
>
> (PMFL, at para 79)

[123] Further, the Plaintiff noted that "there need not be a direct relationship between a government actor and the individual harmed for a duty of care to be found." (PMFL, at para 80). This argument was explained as "…the RCMP exercised specific judgments to not communicate or keep class members up-to-date—an indication that their role was considered but disregarded." (PMFL, at para 80). Sometimes, according to the Plaintiff, there would be direct contact between the class members and the RCMP, and sometimes there was not, but that does not "negate proximity because the harm to these individuals remains at all times foreseeable." (PMFL, at para 83).

[124] She stated that the second stage of the test determining whether there will be any policy considerations rendering a duty of care to be impractical or inadvisable has been traditionally left to the trial, rather than on a pleadings motion, and cites *Walsh Estate v Coady Estate*, 2016 NSCA 60, at paragraphs 56, 65, 68-73 and 88-96. She asserts that expert evidence will be required, and that these determinations are not pure matters of law.

[125] This, she argues, means that I should not apply an overly strict approach to the Pleadings and if "…there is in a pleading a glimmer of a cause of action, even though vaguely or imperfectly stated, it should…be allowed to go forward" (*Shubenacadia Indian Band v Canada (Minister of Fisheries and Ocean)*, 2001 FCT 181, at para 6).

[126] The Plaintiff's position is that when the *Anns/Cooper* test is applied, it is easily met in this case because any potential policy implications should be left for the trial judge to determine given it would include the weighing of evidence. Thus, she argues that "[i]t is not 'plain and obvious' or beyond a 'glimmer' to assert that the duty owed by the RCMP to victims would not extend to the Class Members" (PMFL, at para 83).

(i) Established Duty of Care Analysis

[127] The cases that are relied on by the Plaintiff are distinguishable from the facts in the instant case. *Rumley* was a case where the class was certified for students attending a provincial residential school for the deaf who were physically, sexually and emotionally abused. In that case, the systemic negligence of the duty of care was conceded in respect of sexual abuse of the students, but the liability was not. There was proximity and foreseeability, given that they were

students at a residential school, and the abuse was by staff and peers. The cause of action for the fiduciary claim and the systemic negligence for the family members was found not to be legally supportable (*Rumley*, at paras 21 and 41).

[128] *Cloud v Canada (Attorney General)* (2004), 247 DLR (4th) 667, [2004] OJ No 4924 (Ont CA) is a case that involved allegations by former students of the Mohawk Institute Residential School, in Brantford, Ontario. At the Ontario Court of Appeal, the parties had agreed to that there were causes of action and a duty of care to support those causes. They focused on other certification issues. However, finding a duty of care in residential school actions is not transferable to this set of facts, as there is a clear duty from those who run the school to the students that is not evident between the RCMP and Indigenous women and girls—and especially not a clear duty to their families.

[129] In *Tippett*, Justice Southcott certified an action. This action involved a sea cadet program operated by the CAF that was partnered with the British Columbia Department of Youth and Child development to run a program as an alternative to incarceration for juvenile offenders. The juvenile offenders were not cadets themselves but some, including the plaintiff, did live on the base with CAF members, while others were day participants. The allegation was that a supervising CAF member that lived in the same bunkhouse abused him. In that case, the defendant conceded that there was a duty of care owed to the youth participants of the program and accepted that the claim disclosed a cause of action for negligence though not that it was breached (*Tippett*, at para 35). The facts in *Tippett*, however, are quite far removed from the instant case given the proximity that live-in programs of youths had to the supervising members.

In comparison, the RCMP do not operate any school or live in program of which the class members were a part.

[130] I do not accept this action is analogous to any of the certified actions brought up by the Plaintiff, and so further analysis must be done.

[131] I do not find the RCMP have a private law duty to the members of the members of this class. While it is true that there are exceptions to this foundational statement, on these facts it is plain and obvious that the RCMP cannot be found to owe a private law duty of care to the families and community members of victims.

[132] Support for this finding is found in the jurisprudence. There have been a number of cases where it was found that the public duty of police could not be found to be a private duty such as is sought in this pleading. Any exceptions to that "rule" are exceptional and as will be seen that there are not the material facts pled in this wide, vague, temporally wide pleading to fit into an exception.

[133] *Good v Toronto (City) Police Services Board*, 2013 ONSC 3026 [*Good*] was a class action brought against the Toronto Police Services (and other defendants) for actions that occurred during the G20 summit held Toronto in June 2010. The motion for certification had the proposed defendants: the Attorney General of Canada, Her Majesty the Queen in the Right of Ontario, the Regional Municipality of Peel Services Board and included multiple causes of action including causes applicable to our case being "abuse of public office, systemic negligence,

and breaches of the [*Charter*]…" (*Good v Toronto Police Services Board*, 2014 ONSC 4583, at para 9 [*Good 2014*]; aff'd 2016 ONCA 250, leave to appeal to SCC refused, [2016] SCCA No 255 (November 10, 2016).

[134] The RCMP owe a general duty to all of the Canadian public (*Good*, at paras 59, 72 and 73). The findings related to the causes of action not certified in the motion hearing were not overturned, as the appeal courts did not consider any causes of action as issues (*Good 2014*, at para 17). The motion judge determined that none of the claims against some defendants (Canada, Ontario and the Peel police) disclosed a cause of action in the pleadings that could meet the test. She only allowed the claim to proceed against Toronto Police Services for false imprisonment, battery (except against individuals detained; assault; conversion and trespass to chattels, the *Charter* and human rights). The claims for systemic negligence and abuse of public office were struck. The Divisional Court, on appeal, confirmed that the plaintiff had dropped the cause of actions that the motions judge had not made out.

[135] The finding that the police have a public duty to all the public is not a novel finding and has been held in a number of cases where victims and families of victims seek to have the police found negligent or negligent in their investigation (*Wellington v Ontario*, 2011 ONCA 274, at para 20, leave to appeal to SCC refused, [2011] SCCA No 258; *Goldman v Weinberg*, 2019 ONCA 224, at para 6; *Connelly v Toronto (City) Police Services Board*, 2018 ONCA 368, at para 3, leave to appeal to SCC refused, 2019 CanLII 16463 (SCC); *RVB v Levin*, 2018 ABQB 887, at para 36; *Jones v Canada (Attorney General)*, 2018 NBCA 86, at para 30; *Spencer v Canada (Attorney General)*, 2010 NSSC 446, at para 58; *Deloitte Restructuring Inc v Canada*

(Attorney General), 2019 NBQB 201, at paras 233 and 235-236; *McLean v McLean*, 2017 SKQB 127, at para 29; and *Odhavji Estate v Woodhouse*, 2003 SCC 69, at para 40 (in *obiter*) [*Odhavji*]).

[136] In certain cases, a police officer has been found to owe a private duty of care. The proximity that is necessary for the exceptions has been found between the police and a person in custody or a particular suspect is under investigation, or to a very specific group of individuals that are known to be at a particular risk from a particular person. Each of those situations has been found to have a proximity between the police and the particular interests of the individual after a careful review that determined in that circumstance there was a duty of care.

[137] Nowhere in this case is it pled that the Plaintiff or class member was a suspect under investigation as was the case in *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 [*Hill*], in custody, or of a similar proximity as was found in *Jane Doe v Toronto (Metropolitan) Commissioners of Police*, (1998), 160 DLR (4th) 697, 39 OR (3d) 487 [*Jane Doe*].

[138] In *Jane Doe*, the police failed to warn the plaintiff of a man who was sexually assaulting and targeting single women that lived on second and third floor apartments in a certain geographical areas. The victims were all white, single, and female. The rapist gained entry through all of their balcony doors. The police knew this, and did not warn potential victims because they feared scaring the rapist away before catching him (*Jane Doe*, at para 129). The judge found both foreseeability and proximity and in these very limited factual situations,

leading to a finding that the police had a private duty to that plaintiff. She was from a distinct group of potential victims from a specific threat in a small area of a city within their jurisdiction, and it was foreseeable that the rapist would target the plaintiff.

[139] *Jane Doe* is distinguished because this case does not have a distinct and specific group of potential victims as pled that is proximate and foreseeable. As pled the material facts are all Indigenous girls and women in Canada and across Canada over a very long time period without a specific threat within the jurisdictions of numerous police forces. *Jane Doe* stands for a very narrow exception to the generally accepted principle that the police do not owe a private duty of care, and *Jane Doe* does not assist the Plaintiff in putting her claim into an established category.

[140] In *Good*, the plaintiff alleged that the systemic negligence that claimed the duty arose from the planning of the G20 summit and the overseeing of police operations. Just as in this case the duty is alleged to arise from some policing agreements across the country as well as RCMP policies. There is no recognized duty that would assist the Plaintiff in this motion to find a private duty of care. The Plaintiff or potential class members have no legal interest in the investigation or the prosecution as these are squarely in the public interest and public law.

[141] The Plaintiff's argument to leave this determination to the trial judge also fails given I am preforming the same analysis as what Chief Justice McLachlin in *Alberta Elders* did to determine whether the cause of action as pled was plain and obvious it would fail.

[142] The Pleadings are plain and obvious, and there is not an established duty of care.

(ii) Duty of Care that is Novel

[143] Given it has not been established that the duty of care already exists, the Court must rigorously go through the *Anns/Cooper* test on the material facts pled. Following *Alberta Elders*, this is done at this stage based on the pleadings rather than leaving it to the trial judge (*Alberta Elders*, at paras 66-75).

[144] Justice Karakatsanis, writing for the majority in *Rankin (Rankin's Garage & Sales v JJ*, 2018 SCC 19 [*Rankin*] when describing the methodology to use, said:

> [18] …If it is necessary to determine whether a novel duty exists, the first stage of the *Anns/Cooper* test asks whether there is a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the Plaintiff: (*Imperial Tobacco*, at para 39; see also *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para 12; *Cooper*, at para 30). Once foreseeability and proximity are made out, a *prima facie* duty of care is established.
>
> [19] Whether or not a duty of care exists is a question of law and I proceed on that basis: *Galaske v. O'Donnell*, 1994 CanLII 128 (SCC), [1994] 1 S.C.R. 670, at p. 690. The plaintiff bears the legal burden of establishing a cause of action, and thus the existence of a prima facie duty of care: *Childs*, at para. 13. In order to meet this burden, the plaintiff must provide a sufficient factual basis to establish that the harm was a reasonably foreseeable consequence of the defendant's conduct in the context of a proximate relationship. In the absence of such evidence, the claim may fail: see, e.g., *Childs*, at para. 30.
>
> [20] Once the plaintiff has demonstrated that a prima facie duty of care exists, the evidentiary burden then shifts to the defendant to establish that there are residual policy reasons why this duty should not be recognized: *Childs*, at para. 13; *Imperial Tobacco*, at para. 39.
>
> (*Rankin*, at paras 18-20)

[145] In the earlier SCC decision of *Cooper*, the issue was grappled with of when policy considerations should be considered when looking at a novel duty. The Court indicated that "[t]he importance of *Anns* lies in its recognition that policy considerations play an important role in determining proximity in new situations…" (*Cooper*, at para 25). The Court held:

> In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
>
> (*Cooper*, at para 30, emphasis in original)

Foreseeability & Proximity – Analysis

[146] The first step of the test asks of there was foreseeability by the alleged tortfeasor of the injury caused (*Cooper*, at para 21) but "…must be supplemented by proximity" (*Cooper*, at para 31). Necessary limiting principles in negligence law include reasonable foreseeability and the proximity of parties.

[147] *Rankin* indicated that "…[t]he proximity analysis considers the 'expectations, representations, reliance, and the property or other interests involved' as between the parties…" (*Rankin*, at para 23). Of great importance in the *Rankin* case was that the question asked by framed "…whether harm is foreseeable with sufficient analytical rigour to connect the failure to take care to the type of harm caused to persons in the Plaintiffs situation" (*Rankin*, at para 25). *Rankin* had to determine if there was a "…duty of care to someone who is injured following the theft of a vehicle from its premises" (*Rankin*, at para 27). In that case, they found that bodily harm resulting from the theft of the automobile was not reasonable foreseeable (*Rankin*, at para 56).

[148] The underlying violence behind this case is horrible, and like the *Rankin* case where an accident occurred with horrific results, I find the statement by the SCC particularly suited to his situation: "Courts should be vigilant in ensuring that the analysis is not clouded by the fact that the event in question actually did occur. The question is properly focused on whether foreseeability was present *prior* to the incident occurring and not with the aid of 20/20 hindsight..." (*Rankin*, at para 53).

[149] In this case, it is important to consider that the Defendant is the RCMP and yet many of the negligent actions or breaches pled are solely in the jurisdiction of other police services. This makes it unforeseeable as well as not establishing any proximity.

[150] The class members include victim's families and community members. Even if the RCMP had jurisdiction over the victim, there would be no foreseeability. It cannot be seen that it

was foreseeable that policies and actions of the RCMP would damage the family of a victim, or a community member in a private capacity, and when investigating a missing person would have a duty to specific class members other than the statutory, public duty they have to everyone in Canada. The RCMP could not have reasonably in the objective sense contemplated or foreseen the type of harm the Plaintiff pled.

[151] Even if there could be a shred of foreseeability, there is no proximity, as will become clear below.

[152] The Plaintiff has argued that there is proximity given the RCMP's unique (*sui generis*) relationship to Indigenous people and especially given they know that Indigenous girls and women are vulnerable.

[153] Proximity was discussed in *Cooper*, at paragraph 35:

> The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic. As stated by McLachlin J. (as she then was) in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, 1992 CanLII 105 (SCC), [1992] 1 S.C.R. 1021, at p. 1151: "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (cited with approval in *Hercules Managements*, supra, at para. 23). Lord Goff made the same point in *Davis v. Radcliffe*, [1990] 2 All E.R. 536 (P.C.), at p. 540:
>
> > . . . it is not desirable, at least in the present stage of development of the law, to attempt to state in broad general propositions the circumstances in which such proximity may or may not be held to exist. On the contrary, following the expression of opinion by Brennan J in *Sutherland Shire Council v Heyman* (1985) 1988 ABCA 234 (CanLII), 60 ALR 1 at 43-

> 44, it is considered preferable that 'the law should develop categories of negligence incrementally and by analogy with established categories'.

[154] The Plaintiff has attempted, in the Pleadings, to categorize the victims as all being vulnerable and that this vulnerability creates the proximity. On these facts, however, the victims have gone missing or died over the course of many years, and thought the only defendant is the RCMP, the investigations took place by many police forces, at times without any RCMP involvement. The Statement of Claim sets no temporal limits on liability, so presumably it would be anyone during the entire tenure of the RCMP that went missing. The class members would be anyone that has a family member or part of a community that includes all Indigenous women in Canada, over the course of many years, and across Canada that are missing or killed. This simply does not meet the test of proximity.

[155] *Jane Doe* is also no assistance here to the Plaintiff because it was a case of one person targeting a specific type of victim in an extremely limited geographical area. While *Cooper* does stand for the fact that the categories of proximity are open, it does require analogy with established categories. I see no analogy with the very narrow proximity found in *Jane Doe* that would warrant any comparison with the present case.

[156] Nor can the fact the RCMP supplying a service in this case policing to some jurisdictions be sufficient to establish proximity. *Alberta Elders* at paragraph 72 states: "… As in *Broome*, the mere supplying of a service is insufficient, without more, to establish a relationship of proximity between the government and the claimants."

[157] Proximity cannot be founded alone on general public statements from the RCMP commissioner or from the RCMP promising they "can do better". The RCMP having programs such as Projects DEVOTE, KARE, and E-pana do not establish a proximity and foreseeability in themselves. A particular fact situation regarding an Indigenous women identified in the project as being vulnerable and targeted, as was the case in *Jane Doe*, may establish a connection, but wide spread projects over years and different geographical areas do not make this pleading meet the legal threshold of proximity (*Imperial Tobacco*, at paras 49-50).

[158] Further, it is not even the victim who is the Plaintiff, as is the case in *Jane Doe*, but those connected with the victim. The proximity, therefore, is even further removed. Remembering that the class members would make it impossible for the RCMP to have any proximity whatsoever in cases where they are not part of the police force that investigated or had jurisdiction.

[159] Also, as taught by the SCC, policy does enter into the stage of proximity (*Cooper*, at para 31). The RCMP's existing policies, or lack there of as alleged, does not give this action the foreseeability necessary to make the RCMP duty of care anything other than public. Especially because the material facts pled do not base the duty on operations but rather policy (*Francis v Ontario*, 2021 ONCA 197, at para 98; *Brazeau v Canada (Attorney General*, 2020 ONCA 184, at para 120).

[160] Having found that the first step of the *Anns/Cooper* test has not been satisfied, there is no need to deal with the second step in any detail. But, given the jurisprudential findings, it would seem similarly that this case would also fail at the second step.

[161] Chief Justice in *Alberta Elders* concluded that:

> Were the pleadings to satisfy the first step of the *Anns*/*Cooper* test, they would fail at the second step, which asks whether the *prima facie* duty of care is negated by policy considerations. **Where the defendant is a public body, inferring a private duty of care from statutory duties may be difficult, and must respect the particular constitutional role of those institutions:** *Welbridge Holdings Ltd. v. Greater Winnipeg*, 1970 CanLII 1 (SCC), [1971] S.C.R. 957, per Laskin J., as he then was, for the Court**. Related to this concern is the fear of virtually unlimited exposure of the government to private claims, which may tax public resources and chill government intervention.** It is arguable that to impose a duty of care on the plaintiff class on the facts pleaded would open the door to a claim in negligence by any patient in the health care system with an entitlement to receive funding for health services, whether primary or extended. **This raises the spectre of unlimited liability to an unlimited class, decried by Cardozo C.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444:** see *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at paras. 59-66.
>
> **For these reasons, I would find that the pleadings do not disclose a duty of care and that the cause of action as pleaded is bound to fail. I would therefore strike the plea of negligence in its entirety.**
>
> (*Alberta Elders*, at paras 74-75, emphasis added)

[162] The RCMP statutes (including *RCMP Act*, s 18, and the regulations) confirms the public law nature of the duty of care. The general proposition concerning the RCMP's duties to the general public as not been dislodged and thus there is not private law duty that is necessary to ground an action in negligence. This legislative scheme does not give rise to a private law duty, and any duty was owed to the public at large and not to specific individuals or to the group as alleged.

[163] A duty of care is the first element of the cause of action for systemic negligence and for the reasons above, I find that the Pleadings do not disclose a duty of care and the cause of action as plead is doomed to fail. There is no need to analyse the remaining elements of systemic negligence.

[164] In summary, it is plain and obvious that the systemic negligence cause of action will fail given there is no private law duty of care found, and that there is no possible foreseeability or proximity by the RCMP to the class members (see also: negligent police investigation below).

B. *Fiduciary Duty: Cause of Action*

[165] Though the Plaintiff did not specifically plead that there was a breach of fiduciary duty, she argued that because of the argument set out in paragraph 52(b) of the PMFL which states that a cause of action is not "crystalized by the mention of specific words" such as negligence or breach of duty, combined with paragraph 9 of the Statement of Claim which alleges that the RCMP has a "special responsibility for the protection of Indigenous peoples", the specific pleading is not necessary for this Court to certify this as a cause of action.

[166] What is required, she argues, is simply the "factual situation the existence of which entitles one person to obtain from the court a remedy against another person." (PMFL, at para 52). In support of this she cites *Shubaly v Coachman Insurance*, 2012 ONSC 5455, at paragraph 15. For these reasons, the Plaintiff indicates that the Pleadings disclose a cause of action pursuant to Rule 334.16(1)(a) of the *Rules* for a breach of fiduciary duty.

[167] The Plaintiff argues that "[i]n this case there is an existing duty of care flowing from Canada's fiduciary duty to the Indigenous population as a whole." (PMFL, at para 71). She says that "[i]f a fiduciary duty is found to exist, that will establish *prima facie* that a duty of care exists." (PMFL, at para 76). Here the Plaintiff said that because there is a fiduciary duty therefore there must exist a duty of care. The Plaintiff submits that the RCMP already owed a duty to the members of this class and as a result, no overriding policy considerations could take that duty away.

[168] There is confusion related to what argument is related to the alleged fiduciary relationship which is the stand-alone cause of action, and what relates to the fiduciary duty alleged to be the foundation of the private law duty of care of the RCMP to the class.

[169] Madam Justice S L Martin, prior to her ascent to the SCC, addressed this in a somewhat similar situation in *Andriuk v Merrill Lynch Canada Inc.*, 2013 ABQB 422; aff'd 2014 ABCA 177 [*Andriuk*]. There, the plaintiffs had not specified in their pleading the allegation of negligent misrepresentations (*Andriuk*, at para 89), nor was their claim adequately particularized for unjust enrichment by not addressing the third element needed for unjust enrichment (*Andriuk*, at para 91). And, like in the instant case, the claim for breach of fiduciary duty is only referenced in a paragraph regarding limitation periods (*Andriuk*, at para 92).

[170] Justice Martin found that "… [t]he Defendant is entitled to know the material facts upon which the Plaintiffs rely to support each area of negligence; generalized allegations of negligence are not sufficient" (*Andriuk*, at para 89). She referred to *Martin v Astrazeneca Pharmaceuticals*

Plc, 2012 ONSC 2744, where Justice Horkins found that "[T]he pleadings failed to acknowledge the differences between the various types of negligent activity; instead of precision and clarity, the pleadings were muddled and vague: *Martin* at para 132" (*Andriuk,* at para 73).

[171] In the end, she concluded:

> **…What is most problematic is that the pleadings lack certain essential elements which cannot be filled in even if the Court turns to the evidence other material in support of the application.**
>
> **There is some debate in the jurisprudence over the role of the certification judge in "entering the ring" and remedying the class definition or other aspects of the application for certification**. Winkler J in *Caputo v. Imperial Tobacco Ltd* (2004), 236 D.L.R. (4th) 348 (ONSC) at para 41 rejected the plaintiffs' request to redefine the class in any way necessary to render the action certifiable…
>
> (*Andriuk,* at paras 106-107, emphasis added)

[172] I find the same is the situation on our facts. The essential elements for fiduciary duty or many of the other cause of actions are not set out clearly with the material facts for each of the essential elements for each of the causes of action. I would guess the reason why they are not is that inclusion is impossible given that this action is vague, expansive and over such a long period of time with so many different factors and actors that it is impossible. Too many moving parts to be suitable for a class action no matter what a valiant attempt was made on behalf of the Plaintiff.

[173] There is no reference in the Statement of Claim to a fiduciary duty and this is not sufficient to find it a cause of action (*Andriuk,* at paras 92-93).

[174] Without the Statement of Claim setting out the material facts or even the elements necessary for a cause of action for a breach of fiduciary duty, I am unable to certify a cause of action for breach of fiduciary duty.

C. *Negligent Police Investigation: Cause of Action*

[175] The Plaintiff claims that the tort of "negligent police investigation", established by the duty of care owed by police to the suspects they are investigating, could be "inverted" or "turned on its head" to also include the victims and, by relationship, the class. She proposes that it is not plain and obvious that an inverted duty of care will not be found at the common issues trial, and that this cause of action is reasonably certified.

[176] The Plaintiff pled that:

> 78f. The Supreme Court of Canada has previously recognized the tort of negligent police investigation as it relates to a suspect who, due to the ongoing police investigations, suffers compensable harm and is ultimately acquitted or cleared of any wrongdoing: *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41. For clarity, the pleadings at paras. 78d through 78i are not based on the cause of action outlined in *Hill* but on an inverted characterization of the issue.
>
> 78g. The allegations at para. 74 to 78 are incorporated by reference with respect to the claim for negligent police investigation.
>
> 78h. The RCMP owed a standard of care to the Plaintiff and to each member of the Class to investigate, in accordance with the RCMP Duties, the murder or disappearance of associated Victims.
>
> 78i. As a consequence of the Circumstances and the RCMP's obligation to uphold the Crown's duties toward Indigenous individuals, the standard of care owed by the RCMP to the Plaintiff and to each member of the Class is heightened over that owed to members of the public generally.

> 78j. The RCMP knew or ought reasonably to have known that a breach of the RCMP duties and the applicable standard of care would be likely to cause harm to the Class.
>
> 78k. The RCMP through its negligent police investigative practices breached the applicable standard of care, causing foreseeable and compensable damage to the Plaintiff and to each member of the Class as pleaded herein.
>
> (Statement of Claim, at paras 78f-k)

[177] The Plaintiff anticipates the RCMP to claim "no cause of action" because they do not have standing with the RCMP to assert a claim and cite *Hill* and *Jane Doe*. But, in response states that the courts have not closed off a duty of care to the class.

[178] She then asserts that the class is within the circle of people with whom the RCMP would reasonably have in mind as a person who could potentially be harmed by a negligent investigation. To bolster this, the Plaintiff makes reference to the dependants statutes, provincial statutes which extend the right of recovery to those who would be left out by the common law. She also asserts that common law derivative claims are not hopeless, and cites several cases to support this claim.

(1) Analysis

[179] The test for a breach of this tort is the same as for any negligence analysis; the *Hill* decision used the *Anns/Cooper* test to find a new duty of care, and then review policy considerations. The "new" tort is more accurately referred to as a new duty of care in negligence (*Hill*, at paras 19-50).

[180] To date, the courts have been clear and unequivocal that the duty of care applicable to a negligent investigation is to a person that is being investigated. This is too large of leap to go from someone that is being investigated to a victim or victim's family or members of this class. There is no proximity that could establish a duty of care on the material facts pled in this case (see above paragraphs related to systemic negligence duty of care analysis as it applies also to negligent investigation duty of care).

[181] Though there is no case directly on point with our facts that cannot be surprising as this is a matter where it is very difficult to find foreseeability or proximity.

[182] There is no need to even speculate or go to the second stage of the *Anns/Cooper* test to determine whether there will be any policy considerations rendering a duty of care to be impractical or inadvisable, as none are pled. There may be some truth to the Plaintiff's argument that traditionally policy reasons are best left to the trial judge given the necessary weighing of evidence. But, given that I reject the proposition that the police owe a private law duty to the Plaintiff (and potential class members) on the strength of the private duty of care owed to a suspect being investigated, I do not need to go any further in the analysis.

[183] As well, I reference back to Justice Martin in *Andriuk* when she said that even taking a generous approach, there are so many difficulties in relation to the cause of action that without the material facts to it, the gaps cannot be filled in (*Andriuk*, at para 108).

[184] For those reasons, it is plain and obvious that the negligent investigation cause of action will fail.

D. *Misfeasance in Public Office*

[185] The Plaintiff acknowledges that this tort will not be made out on negligence alone, but asserts that there is some evidence of misfeasance in public office. She claims that government decision making, while not normally enough for this intentional tort, has been shown by the publication of the Inquiry's Final Report (PMFL, at paras 90-92).

[186] The Plaintiff argues that the elements of the tort of misfeasance in public office are:

> The essential elements of the tort of "misfeasance of public office" are as follows (and are plead in the Claim as indicated): (a) the defendant must be a public official or public authority; (b) the defendant must have engaged in deliberate unlawful conduct in his or her capacity as a public official or public authority; (c) the defendant must have a culpable mental state; namely the public official must have been aware that: (i) his or her conduct was unlawful, and (ii) that the conduct was likely to harm the plaintiff; and (d) the conduct must cause the plaintiff harm;115 and (e) the harm must be of the type compensable under tort law.
>
> (PMFL, at para 90)

[187] *Odhavji* sets out the elements:

> In my view, there are two such elements**. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff**. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact

> that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.
>
> (*Odhavji*, at para 23, emphasis added)

[188] There is disagreement whether the Plaintiff must name a specific person, or group of persons for this tort to be made out. The Plaintiff argues that it is unnecessary to name a specific individual. In *Merchant Law*, Justice Stratas agrees, saying "In many cases, it may be impossible for a plaintiff to identify by name the particular individual who was responsible" (*Merchant Law*, at para 38). However, he goes on to say:

> …in cases such as this, a plaintiff should be able to identify a particular group of individuals who were dealing with the matter, one or more of whom were allegedly responsible. This might involve identifying job positions, an organizational branch, an office, or a building in which those dealing with the matter worked. Often such information is readily available from the oral and written communications and dealings among the parties that gave rise to the claim. In cases such as this, identification at least at this level of particularity, will usually be sufficient.
>
> (*Merchant Law*, at para 38)

[189] The Plaintiff argued that:

> Misfeasance in public office is an intentional tort, and will not be made out on the basis of negligence alone. However, the Indigenous element informs the analysis. Not canvassed in the authorities is the question of whether government decision-making can disregard, or intentionally choose to disfavour, the specially protected rights of the Indigenous population. While governmental decision-making might not ordinarily give rise to a claim for misfeasance in public office, the question takes on a different complexion when viewed through an Indigenous lens. Here the

> Inquiry Report, the examinations of the Defendants' affiants, and the Gabor Report informs.
>
> (PMFL, at para 92)

[190] The Plaintiff relies on *Goyal v Niagara College of Applied Arts and Technology*, 2018 ONSC 2768 [*Goyal*], a case that narrowed the alleged misfeasance to a specific immigration office, for the fact that no specifics are required. She argues that the FCA said identify of an individual is contrary to their authority and that identifying a group like the RCMP is enough especially given this is just a motion. However, this is not how I read either *Merchant Law* or *Goyal*. *Merchant Law* clearly says that some level of specification is needed. *Goyal* pointed to a specific branch of an immigration office, not the entire IRCC. In this case, it is all of the RCMP that is identifiable but then lacks any particularization to which the defendant is entitled.

[191] While there is a generalized allegation that the RCMP did not implement proper procedures or policy it is not particularized and does not meet either of the branches of the test, there being no intentional conduct that could in anyway be foreseen to harm the Plaintiff. There is no timeframe or location (other than Canada at large) to any particularized harm to an individual.

[192] This is not sufficient, and amounts to just throwing out what is at best a "Hail Mary" with no chance of success. The material facts are directed at an organization and not a particular RCMP division or detachment. That in itself would not always be fatal but on these facts, it is. Other than general statements, there are no material facts of deliberate and unlawful conduct that is necessary to be pled.

[193] To conclude, there were no material facts pled that would lead me to find that this cause of action was anything other than doomed to fail.

E. *Breach of the Charter*

[194] The Plaintiff asserts that because of an ongoing and continuing breach of sections 7 and 15 of the *Charter*, flowing from the inadequacies of the RCMP investigations, she is entitled to damages under section 24.

[195] In submissions, she asserts that there is systemic negligence in the operation of the system, and that there is an environment of systemic racism and anti-Indigenous attitudes and approaches within the RCMP. She further alleges that victims and class members were harmed by the RCMP's inadequate investigations, training and operations, and that they had a duty to carry out investigations and operations taking into account the unique and well-known needs of the class and victims:

> 98. The Plaintiff claims on her own behalf and on behalf of the Class for damages pursuant to s. 24 of the *Charter* flowing from the Defendant's ongoing and continuing breaches of the *Charter* (and particularly ss. 7 and 15 thereof) flowing from the inadequacies of the RCMP investigations.
>
> 99. The RCMP, by virtue of the *RCMP Act*, are tasked with upholding Canadian law, including the *Charter*, and are expected to do everything in their power to ensure that everyone will have the *benefit* of s. 7 of the *Charter*. The failure to adequately investigate reports of missing Indigenous women (often leading to their death) was a breach of s. 7 of the *Charter* in respect of those Victims.
>
> 100. In part, the failures of the RCMP can be attributed to systemic negligence in the operation of the system. But in part, the failures of the RCMP are also attributable to an environment in which systemic racism and anti-Indigenous attitudes and approaches [*sic*] have been commonplace and infectious throughout the organization.

> The record is replete with examples of discriminatory thinking and approaches by officers to investigative actions, so much so that the National Inquiry ultimately concludes that Canadian police forces, including the RCMP, were a part of a pattern of genocide.
>
> 101. Discrimination on the basis of Aboriginal identity is contrary to s. 15 of the *Charter* and we submit there can be no question that there is more than *some basis in fact* for the contention that such discrimination was sysetmatic [*sic*] within the RCMP.
>
> 102. Jamieson in *Using Section 24(1) Charter Damages to Remedy Racial Discrimination in the Criminal Justice System* suggests that the *Charter* has historically proven to be an inefficient mechanism for securing monetary damages flowing from its breaches, in part because of the limited scope of judicial review proceedings and the technical nature of many *Charter* arguments – but that particularly where racial discrimination is alleged, the Court has a significant power, if only it were exercised, to ensure compensation flows.
>
> 103. Here, it is established that the Defendant's failure to implement or employ policies, procedures, mechanisms, monitoring, and enforcement tools harmed Victims and Class Members in two polarized ways. First, Victims (and therefore Class Members) were harmed by the Defendant's inadequate investigations, training, and operations. Second, the RCMP had a duty, but failed to satisfy the duty, to carry out its investigations and operations taking into account the unique, but well known and documented, social, economic, political, and familial needs of the Class and Victims.
>
> 104. It is not plain and obvious that these claims will fail, and they should be certified and sent forward to the common issues trial accordingly.
>
> (PMFL, at paras 98-104)

[196] The Pleadings regarding the breach of the *Charter* are found starting at 78l to 784 of the Statement of Claim. Paragraph 79 states:

> The Defendant has breached the Victims' rights to security of the person by failing to adequately investigate and prosecute reports that they were missing or had been murdered and by committing (individually and collectively) the RCMP Breaches particularized above.

[197] The Pleadings state the principles of fundamental justice including that "administrative officials have a duty to act fairly" and that "every person has dignity and worth, generally held revulsion against punishment of the morally innocent." The Pleadings included that the RCMP "breached these against the class and the victims with the RCMP Breaches, the Operational Decision, and other breaches asserted herein" (Statement of Claim, at para 79i). Also, she pleads that the Defendant has:

> …breached the Class' right to be free from discrimination on the basis of ethnicity by, inter alia, committing the aforementioned RCMP Breaches and Operational Decision in respect of Victims while applying and enforcing different standards and policies in respect of non-Indigenous Victims or, alternatively, by failing to adapt their standards and policies to reflect the unique Circumstances faced by victims.
>
> Discrimination, based on ethnicity, as asserted herein against the Defendant, is a part of the compendium of historical, traditional grounds of stigmatization of Victims perpetuated and institutionalized by the Defendant through the RCMP Breaches and the Operational Decision.
>
> (Statement of Claim, at paras 80-80a)

[198] I find these are statements and conclusions rather than material facts. The FCA has taught that: "… [b]are assertions of conclusions are insufficient and cannot support a cause of action" (*John Doe*, at para 33). That in itself would be sufficient enough to dismiss this cause of action. However, if I am wrong there are other reasons this cause of action is doomed to fail. I will canvas them below.

[199] One of the assertions human dignity being a principle of fundamental of justice has been canvased by the SCC in *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 [*Rodriguez*]. Justice Sopinka, writing for the majority, while acknowledging how important

"respect for human dignity is [and] one of the underlying principles upon which our society is based", goes on to say that he has "difficulty, however, in characterizing this in itself as a principle of fundamental justice within the meaning of s. 7" (*Rodriguez*, at para 30).

[200] The RCMP argues that these claims are actually "negligent investigation claims cloaked in the language of the *Charter*…" and therefore cannot succeed.

[201] I agree with the Defendant that the Pleadings, though under a heading of the *Charter*, are in fact negligence claims that I have already found that the Pleadings do not disclose a duty of care.

[202] The section 15 cause of action is based on Pleadings that the rights of members of the victim's family and community members have been violated due to discrimination. The Plaintiff asserts that there is systemic negligence in the operation of the system, and that there is an environment of systemic racism and anti-Indigenous attitudes and approaches. She alleges that victims and class members were harmed by the RCMP's inadequate investigations, training and operations, and that the RCMP had a duty to carry out its investigations an operations taking into account the unique and well known needs of the class and victims, and that their actions resulted in a violation of their section 15 *Charter* rights.

[203] The RCMP says that any alleged breach of section 15 *Charter* rights do not give rise to a cause of action for a family or community member.

[204] *Thibaudeau v Canada*, [1995] 2 SCR 627, 124 DLR (4th) 449, Justices McLachlin and L'Heureux-Dubé of the SCC (in separate dissents) held that family status would be a constituting ground where the section 15 *Charter* claims of parents is not based on their own identity, but is on the identity of their child. This could be stated as a derivative claim.

[205] Analogous here is the class member's claims under s 15 of the *Charter* cannot be based on an alleged discrimination to the victim of the class member. The FCA in *Deol v Canada*, 2002 FCA 271 [*Deol*] was clear that the equality rights alleged to be violated in that case could not be the applicant's father's rights under section 15. Justice Evans then went on to say: "Nor can a person establish that he or she has been denied their section 15 rights simply by proving discrimination against another: *R. v. Edwards*, [1996] 1 SCR 128 at 145" (*Deol*, at para 54). The reliance by the Plaintiff on this being a novel approach or fitting into a yet unexplored exception cannot save this given the lack of material facts and vacuity of the Pleadings.

[206] *Charter* breaches are personal to an individual (*Ward v Vancouver (City)*, 2010 SCC 27, at para 22). The members of the class are not the victims themselves and the class members do not have a section 7 or 15 claim themselves.

[207] The absence of policies to protect the section 7 *Charter* rights of the class members is not a breach of a constitutional requirement of the Government of Canada. Any inadequacy of programing by the government cannot be seen as the basis for this cause of action (*Scott v Canada (Attorney General)*, 2017 BCCA 422, at para 89).

[208] Also, the SCC has told us that as of now, positive obligations are not required by section 7 of the *Charter* (*Gosselin v Quebec (Attorney General)*, 2002 SCC 84, at paras 81-82); *Kreishan v Canada (Minister of Citizenship and Immigration)*, 2019 FCA 223, at para 136).

[209] In the future, a positive obligation case may be successful, but to date there is no jurisprudence suggesting that there is one here. This is not the case that could establish positive section 7 obligations; no material facts were plead to suggest that they could possible be successful. *Charter* breaches are personal to the person to whom they happen; in this case, the relatives and community members are making the claims, not the victims themselves, and so there cannot be a positive obligation to them for deprivation of life, liberty, or security of the person to other people.

[210] Much like Justice Linden wrote in *Covarrubias v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365 at paragraph 36 [*Covarrubias*]:

> The appellants are, in essence, seeking to expand the law in section 97 so as to create a new human right to a minimum level of health care. While their efforts are noble, the law in Canada has not extended that far. McLachlin C.J. and Major J., in concurring reasons in the decision of *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, at paragraph 104, stated that the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act*, 1982, Schedule B, *Canada Act* 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (the *Charter*) does not confer on Canadians a freestanding constitutional right to health care. If that is so, then a freestanding right to health care for all of the people of the world who happen to be subject to a removal order in Canada would not likely be contemplated by the Supreme Court.

[211] In the instant case, the Plaintiff is attempting to expand the *Charter* rights far beyond what they are currently, and, as in *Covarrubias*, they have no chance of success.

[212] Even if I am wrong and this cause of action is not plain and obvious that no claim exists for the reasons above, section 7 is only infringed when the deprivation is not in accordance with the principles of fundamental justice (*R v Malmo-Levine*, 2003 SCC 74, at para 83). The Plaintiff has pled a general duty of the RCMP to act fairly, but has not pled with specificity regarding how the police investigating crimes are "administrative officials" or pled specifically what the principle of fundamental justice that is alleged to have been be breached in this case. Pleading that "every person has dignity and worth" does not make out that a breach was not in accordance to a principle of fundamental justice. There was nothing in their submissions to connect the actions or omissions of the RCMP with a breach that was not done in accordance with the principle.

[213] In conclusion, it is plain and obvious this cause of action will fail.

F. *Violations of Quebec Law*

(1) Is there a valid cause of action due to of violations of the *Civil Code of Quebec*?

[214] The Plaintiff claims that Articles 1457 and 1621 of the *CCQ* gives rise to liability and punitive damages, respectively. The elements required are: a) that the defendant committed a fault; b) that the plaintiff suffered an injury; and c) that there is a causal link between the fault and the injury.

[215] The Plaintiff pled:

> 84a. The facts alleged supra are incorporated with respect to this claim.

> 85. Where the actions of the RCMP took place in Québec, they constitute:
>
> > (a) fault giving rise to the extracontractual civil liability towards the Plaintiff and Class members, pursuant to the *Civil Code of Québec*, S.Q. 1991, c. 64 (the "*Civil Code*"), Art. 1457, the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 (the "*Québec Charter*"), ss. 1, 4, 10, 10.1 and 16, and the *CPLA*, s. 3(a)(i); and
> >
> > (b) unlawful and intentional interference with the rights of the Plaintiff and Class members, from which arises liability of the Crown to pay punitive damages to the Plaintiff and Class Members, pursuant to the *Québec Charter*, s. 49 and the *Civil Code*, Art. 1621
>
> 86. Where the actions of the RCMP and its members took place in Québec, the Class have been unable to act, within the meaning of the *Civil Code*, Art. 2904.
>
> (Statement of Claim, at paras 84a-86)

[216] The Plaintiff in argument said that when the actions of the RCMP took place in Quebec they give extra contractual civil liability towards the Plaintiff and class members.

[217] The RCMP's position is that because Quebec has a provincial police force (and First Nations police services) that there is no class or issues in relation to alleged breaches of Quebec legislation.

[218] There are no material facts pled to support any cause of action in Quebec. There are no material facts pled to give the Defendant any particularity in which to defend. There are only generalities pled, and this is not sufficient to support a cause of action.

[219] Though no material facts were pled, the Plaintiff did say in the cross-examination on her affidavit that she was told by some women in Quebec with whom she is friends, that there were RCMP investigations in Quebec regarding potential class members. However, it was not clear if it was the RCMP, and no material facts were pled that would suggest that the RCMP has investigated any potential class member's murders or disappearances in Quebec. It is plain and obvious that this cause of action must fail.

[220] Even if I am wrong and there are sufficient material facts pled to support this cause of action then this would certainly fail as the preferable procedure stage. Given that this is a highly individualized task that would related to jurisdiction. Similarly as discussed above Justice Martin found that when the facts are not pled it is proper to step into the role as class counsel.

(2) Is there a valid cause of action due to violations of the *Quebec Charter of Human Rights and Freedoms*?

[221] Similar to the cause of action based in the *CCQ*, there is little, and nothing material pled, regarding this cause of action (see above Pleadings at paragraph 215).

[222] The Plaintiff's argument is that there could potential be punitive damages awarded under the *Quebec Charter*. In order to show this, she cites *Ludmer v Attorney General of Canada*, 2018 QCCS 3381. The Plaintiff argued:

> 108. Regarding the *Quebec Charter*, the Plaintiff alleges that the following *Charter* rights afforded to Québec residents were breached, entitling them to damages therefrom: (a) the right to "personal security": art. 1; (b) the right to safeguard of a person's "dignity": art. 4; and (c) the right to "full and equal recognition and exercise of his human rights and freedoms" without discrimination,

> analogous to s. 15 of the *Charter*: art. 10 and 10.1. Quebec courts routinely certify class action that include *Charter* claims (a breach of which would justify an award of inter alia punitive damages).127
>
> 109. Quebec courts have on occasion suggested that the *Charter of Human Rights and Freedoms* does not apply to actions of the federal crown.128 However, in *Ludmer v Attorney General of Canada*, 2018 QCCS 3381 the Court considered the application of the *Charter* to the demand for punitive damages regarding a claim against Canada Revenue Agency, a governmental branch. Punitive damages were denied on the merits, but not on the basis of the *Charter* having no application. The Plaintiff submits that on these conflicting authorities, the *Charter* claim cannot be deemed to be "doomed to fail".
>
> (PMFL, at paras 108-109)

[223] But, as a gatekeeper, I must look to the Pleadings, and this Statement of Claim lacks material facts that support such a cause of action.

[224] The policing services in Quebec are conducted by the Sûreté du Québec, municipal or First Nations police services. Quebec law should not be applicable to any torts allegedly committed by RCMP to class members outside of Quebec (*Tolofson v Jensen*, [1994] 3 SCR 1022, at para 43, 120 DLR (4th) 289). Nothing pled suggests that the RCMP were responsible for any breaches of Quebec law.

[225] It would seem that this cause of action is doomed to fail, and therefore cannot be certified. Even if I am wrong, then this is a highly individualized cause of action and the best approach would be to have individual trials given that the defendants would unlikely be the RCMP.

[226] In both “Quebec” claims there are no pleadings of material facts, making it difficult even to address why the cause of action must fail. But, that in itself is the reason this cause of action is doomed to fail.

G. *Violations of the Crimes Against Humanity Act*

[227] The Pleadings alleging breaches of the *Crimes against Humanity Act* are plead from paragraphs 86a to 86h in the Statement of Claim, and are a recitation of the conclusions of the National Inquiry report, dated June 3, 2019, and at 86f concludes that “[t]he Plaintiff pleads that the Defendant’s acts and omissions against the victims and the Class include those stated by the National Inquiry and the Final Report”. The Pleadings indicate that the offences of genocide and crimes against humanity were committed against the victims and class by: a) committing the RCMP breaches; b) engaging in the operational decision; c) willfully ignoring the circumstances and engaging in other acts or omissions as asserted herein in breach of Canadian and international laws. The Plaintiff seeks payment from the Crimes Against Humanity Fund for the families of the victims and class for the alleged genocidal actions.

[228] Citing the recent decision in *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 [*Nevsun*], the Plaintiff claims potential liability under domestic iterations of international law.

[229] The claims are alleged to have support because of the findings of the National Inquiry, and because of breaches of the *Rome Statute of the International Criminal Court*, 1998, UN Doc A/CONF 183/9 [*Rome Statute*] (the treaty that confers jurisdiction to the International Criminal Court) and the international obligations of Canada. While there are Canadian definitions in the

Crimes against Humanity Act, they defer to general principles of law recognized by the community of nations, and so I have used the definitions found in the *Rome Statute*.

[230] The Plaintiff's submissions quote the *Nevsun* decision where the Court asserts that the merits of the approach is for the trial judge to consider. The Plaintiff said it is not plain and obvious that this new cause of action, derived from international law, will fail and it is inappropriate for me to not leave it to the trial judge to decide.

(1) Genocide

[231] The elements of the crime of genocide are set out in the *Rome Statute*, the *Crimes Against Humanity Act* and other international legal instruments. In order for a crime to be considered genocide, the genocidal acts must be done with a specific intention to destroy a national, ethical racial or religious group, in whole or in part (*Criminal Code*, s 318(2)). The intention does not include recklessness or negligence. Those acts are either:

> a) killing members of the group;
>
> b) causing serious bodily or mental harm to members of a group;
>
> c) deliberately inflicting on the group conditions of like calculated to bring about its physical destruction in whole or in part;
>
> d) imposing measures intended to prevent births within the group;
>
> e) forcibly transferring children of the group to another group.
>
> (*Rome Statute*, art 6)

[232] Genocide is a criminal offence and is not a civil cause of action. No civil cause of action is currently recognized (*Brown v Canada*, 2013 ONCA 18, at para 10; *Thompson v Manitoba*

(Minister of Justice), 2016 MBQB 169, at para 30). In contrast to this, the SCC has said that the law surrounding breaches of customary international law is unsettled and could lead to civil remedies (*Nevsun*, at para 69). However, this does not matter because the Plaintiff has not pled the required elements of genocide.

[233] The report the Plaintiff relies on is evidence and not material facts. That report dealt with Canada over 200 years and cannot be said to fulfill the elements of the RCMP committing genocide or crimes against humanity. In a cause of action analysis, I must look at the Pleadings and the alleged RCMP breaches as characterized in the Statement of Claim and that they do not meet the elements of the legal definition of genocide.

[234] For example, at 75j, it is alleged that the RCMP willfully ignore circumstances. "Circumstances" is a defined term as set out in the Pleadings at 75(d). The Plaintiff defines "Circumstances" as:

> The RCMP knew or ought to have known at all material times that the Victims (as compared with non-Indigenous women or two-spirited individuals), the Plaintiff, and the Class have been, and continue to be, impacted by unique societal, cultural, criminological, and other circumstances that could be expected to impact on the nature, scope, methodologies, approach, or resource allocation requirements in respect of police investigations relating to missing or murdered Victims (the "Circumstances").

[235] That does not particularize that the RCMP have committed genocide or an element of genocide. It is pled merely as the state, and negligence cannot be the basis for genocide. Negligence cannot ground genocide because the requisite intention is not present (*R v*

Munyaneza, 2014 QCCA 906, at para 178, leave to appeal to SCC refused, 2014 CanLII 76857 (December 18, 2014)).

[236] The Plaintiff, in oral argument, indicated that in the final genocide report it determined that genocide can be a composite act. The Plaintiff said we have the Prime Minister's acceptance of the report (newspaper article filed) and thus genocide is something I must certify.

[237] However, the words of a Prime Minister are not law and are not pled as a material fact, but were put to me as evidence. Previously it was determined that newspaper articles are helpful as background information with all the evidentiary frailties previously discussed. I am basing my decision on the legal definition of genocide, and the lack of material facts pled to support the elements of the cause of action.

[238] Further, the support from *Nevsun* sought by the Plaintiff for the cause of action is a case about a mine in Eritrea owned by a Canadian mining company, and the alleged breaches of international law relating to the staffing of the mine. There were no allegations of genocide. It is even more remote given that the Pleadings do not make out it was the RCMP that met the elements of the genocide test. While *Nevsun* allowed claims for breaches of international law by a Canadian company, they were not concerned with the requisite pleadings for genocide. Here, the Pleadings do not meet the test and it is plain and obvious that this cause of action is doomed to fail.

(2) Crimes against Humanity

[239] The RCMP submit that the Plaintiff has plead no facts or law regarding this cause of action.

[240] In the Plaintiff's Statement of Claim it is plead that:

> The *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 ("*Crimes Against Humanity Act*") allows for the living interpretation of the offences of the said act which is consistent with the evolution of customary international law.
>
> (Statement of Claim, at para 86b)

[241] The Plaintiff relies on portions of the National Inquiry for its definition of genocide in international law and crimes against humanity. The material facts that are pled to support the cause of action for both genocide and crimes against humanity are found at paragraph 86g and are listed as:

> a) committing the RCMP breaches;
>
> b) engaging in the operational decision;
>
> c) willfully ignoring the circumstances; and
>
> d) engaging in other acts or omissions as asserted herein in breach of Canadian and international laws.

[242] Crimes against humanity are defined in the *Rome Statute*:

> 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

> (a) Murder;
>
> (b) Extermination;
>
> (c) Enslavement;
>
> (d) Deportation or forcible transfer of population;
>
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> (f) Torture;
>
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
>
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
>
> (*Rome Statute*, art 7)

[243] For the same reasons stated above, I find that this cause of action will fail for lack of material facts that support the elements of the cause of action. There is nothing pled to suggest the RCMP acted in a way to further any of the above defined acts, committed as part of "a widespread or systematic attack directed against a civilian population" that would constitute a crime against humanity.

VIII. Conclusion

[244] This motion is dismissed given that it is plain and obvious that this Statement of Claim will fail. That does not mean that individual actions cannot proceed.

[245] Of note is that there is a response to the Final Report anticipated as well as the ability of the class members to bring individual actions.

[246] The defects in the Statement of Claim do not amount to "drafting deficiencies" and because of the scope and breadth of the proposed action (*Alves v First Choice Canada Inc.*, 2011 SKCA 118, at para 45). As set out by the FCA:

> When a plaintiff seeks leave to amend deficient pleadings, it is relevant for the motions judge to consider all of the relevant circumstances, which may include (a) the history of the pleadings in issue, particularly with regard to past amendments (or past attempts to amend) those pleadings, (b) any formal particulars provided by the party whose pleadings are challenged, and (c) any other evidence submitted by that party to establish that the pleadings are capable of being amended to cure the deficiency.
>
> (*Heli Tech Services (Canada) Ltd v Weyerhaeuser Co*, 2011 FCA 193, at para 25)

[247] In this case, the Plaintiff has amended the Pleadings several times, without curing the deficiencies, and no evidence has been submitted suggesting she will be able to amend the Pleadings to focus on a manageable cause of action. This matter will not be fixed by further amendments.

[248] Given my findings there are no causes of action, it is unnecessary to go any further to determine if this class action meets the requirements of Rule 334.16(1).

[249] But having heard the arguments on the remaining requirements to be certified it is clear that the application as it currently stands would not met the preferable procedure step or that the those common questions predominate over questions affecting only individual members; given all the individual issues that span far more issues than the common issues (*Rules*, 334.16(1)(c)-(d)) This is an overly broad claim that when the Pleading were reviewed had no material facts to support a rational connection to the arguments made.

[250] This motion for certification is dismissed and the Statement of Claim is struck without leave to amend.

AMENDED ORDER IN T-1304-18

THIS COURT ORDERS that:

1. The motion for certification is dismissed and the Statement of Claim is struck without leave to amend.

"Glennys L. McVeigh"
Judge

ANNEX A – Relevant legislation

Crown Liability and Proceedings Act (R.S.C., 1985, c. C-50)

Liability and Civil Salvage	**Responsabilité et sauvetages civils**
Liability	**Responsabilité**
3 The Crown is liable for the damages for which, if it were a person, it would be liable	3 En matière de responsabilité, l'État est assimilé à une personne pour :
(a) in the Province of Quebec, in respect of	a) dans la province de Québec :
(i) the damage caused by the fault of a servant of the Crown, or	(i) le dommage causé par la faute de ses préposés,
(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and	(ii) le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;
(b) in any other province, in respect of	b) dans les autres provinces :
(i) a tort committed by a servant of the Crown, or	(i) les délits civils commis par ses préposés,
(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.	(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.

Federal Courts Rules (SOR/98-106)

Motion for Certification	**Requête en autorisation**
Content of affidavit	**Signification et dépôt**
334.15 (5) A person filing an affidavit under subsection (1) or (4) shall set out in the affidavit	334.15 (1) L'avis d'une requête en vue de faire autoriser l'instance comme recours collectif et l'affidavit à l'appui sont signifiés et déposés aux moments suivants :
(a) the material facts on which the person intends to rely at the hearing of the motion;	a) dans le cas de la demande d'autorisation de contrôle judiciaire visée à l'article 72 de la Loi sur l'immigration et la protection des réfugiés, dans les délais fixés par le juge responsable de la gestion de l'instance;
(b) that the person knows of no fact material to the motion that has not been disclosed in the person's affidavit; and	b) dans le cas de toute autre instance, au moins quatorze jours avant la date

(c) to the best of the person's knowledge, the number of members in the proposed class.

Conditions

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(e) there is a representative plaintiff or applicant who

(i) would fairly and adequately represent the interests of the class,

(ii) has prepared 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 as to how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative

d'audition de la requête indiquée dans l'avis.

Conditions

334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

a) les actes de procédure révèlent une cause d'action valable;

b) il existe un groupe identifiable formé d'au moins deux personnes;

c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;

d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

e) il existe un représentant demandeur qui :

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

plaintiff or applicant and the solicitor of record.

Matters to be considered

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Facteurs pris en compte

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l’objet d’autres instances;

d) l’aspect pratique ou l’efficacité moindres des autres moyens de régler les réclamations;

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d’autres mesures de redressement.

ANNEX B

PROPOSED COMMON QUESTIONS OF FACT AND LAW

Background and Context

a) Are Victims impacted by any unique societal, cultural, criminological, or other circumstances- as compared with non-Indigenous women or two-spirited individuals -that could be expected to impact on the nature, scope, methodologies, approach, or resource allocation requirements in respect of police investigations relating to missing or murdered Victims, and if so, what are they (the "Circumstances")?
b) Is the Defendant aware of the Circumstances? [f so, since when and to what scope?

Negligence and Common Law Duties

c) Does the Defendant owe the Class a duty of care, or any common law duty of care when investigating and prosecuting the disappearances and murders of Victims (the "Duty") generally or due to the Circumstances, including but not limited to a duty to do any or all of the following:
    i. to take reasonable care to enforce the provisions of the Criminal Code and investigate and prosecute persons who commit the offences therein related to Victims' cases;
    ii. to investigate and prosecute disappearances and murders of Victims in a manner that is consistent with and reactive to the Circumstances faced by such Victims;
    iii. to have policies, practices, and systems m place to address Issues with Victims' cases;
    iv. to assign and maintain resources to investigate Victims' cases;
    v. to increase resources as required to investigate Victims ' cases;
    vi. to develop, implement, monitor, and enforce policies, practices, procedures, and systems to ensure an investigation of Victim' s cases;
    vii. to assign and maintain resources to develop, implement, monitor, and enforce policies, practices, procedures, and systems to ensure an investigation of Victim's cases;
    viii. to follow up on tips, information, and sources of Victim's cases;
    ix. to establish and pursue suspect-based investigations for Victims' cases;
    x. to confirm or rule out suspects in a systematic fashion based on the available evidence in Victims' cases;
    xi. to address multi-jurisdictional Issues and collaborate effectively across departments and with provincial and municipal police forces to assist in Victims' cases;
    xii. to supervise and manage Victims' case investigations appropriately;
    xiii. to engage in internal reviews to monitor, inter alia, languishing investigations and to take corrective action where required for Victims' Cases; and
    xiv. to comply with the *RCMP Act*, including ss 18, 37, and 38 (including Code of Conduct); (collectively, the "RCMP Duties")

d) If the answer to question (c) is yes, what is the standard of care to which these duties are owed? Is the standard of care impacted by the Circumstances and if so, how?
e) Did the Defendant carry out the RCMP Duties, or any other common law duty owed to the Class, Victims, or both, in a markedly different manner than it carried out the RCMP Duties, or any other common law duty, owed to everyone other than the Class or Victims?
f) What policies, practices, and systems did the Defendant have in place since 1982 to carry out its RCMP Duties, Duty, or any other related common law duties?
    i. Was the operational implementation of these policies, practices, and systems sufficient to discharge the RCMP Duties, Duty, or any other related common law duties owed by the Defendant to the Class or Victims? and
    ii. If the standard of care for the RCMP Duties was set by the Circumstances, was the operational implementation of these policies, practices, and systems sufficient to discharge the RCMP Duties, Duty, or any other related common law duties owed by the Defendant to the Class or Victims?
g) Was it reasonably foreseeable to the Defendant that a breach of the aforementioned duties of care would be likely to cause injury to the Class?
h) Was the Defendant negligent, or systemically negligent, in carrying out its Duty, RCMP Duties, or any other common law duty owed to the Class, either by:
    i. affording Victims and the C lass a comparatively deficient level of service as compared with everyone else; or
    ii. failing to afford Victims and the Class a level and degree of service that was responsive to the Circumstances in which their cases arose?

Misfeasance in Public Office

i) Were the decisions of the RCMP to:
    i. afford Victims and the Class a comparatively deficient level of service as compared with everyone else; or in the alternative
    ii. afford Victims and the Class a level and degree of service that was unresponsive to the Circumstances in which their cases arose, intentional decisions oft he RCMP?
j) If the answer to question (i) is yes, were those decisions unlawful with respect to the manner and the criteria upon which they were made?
k) If the answer to questions (h) and (i) are both yes, did the RCMP know that the making of these decisions would be likely to cause harm to the Victim and the Class?

Canadian Charter of Rights and Freedoms

l) Did the Defendant breach rights guaranteed to the Class pursuant to the *Canadian Charter of Rights and Freedoms* in carrying out its Duty, RCMP Duties, or any other common law duty owed the Class and if so, should damages be awarded for that breach?

Crimes Against Humanity and War Crimes Act

m) Did the acts or omissions of the Defendant, including those defined as the RCMP Breaches, the Operational Decision, and the Genocidal Actions in the Statement of Claim:
    i. breach the Crimes Against Humanity and War Crimes Act, SC 2000, c 24 and if so, is the Class entitled to compensation from the Crimes Against Humanity Fund?
    ii. result in the offence of genocide against the Victims and the Class as defined by Canadian and International laws? or
    iii. (iii) result in the offence of crimes against humanity against the Victims and the Class as defined by Canadian and International laws?

For Residents of Quebec

n) Did the Defendant breach rights guaranteed to Class members who are residents of Quebec pursuant to the Civil Code of Quebec, SQ 1991, c 64 in carrying out its Duty or RCMP Duties, and if so, should damages be awarded for that breach?
o) Did the Defendant breach rights guaranteed to Class members who are residents of Quebec pursuant to the Charter of Human Rights and Freedoms, RSQ, c C-12 in carrying out its Duty or RCMP Duties, and if so, should damages be awarded for that breach?

Damages

What damages are the Class members entitled to recover from the Defendant? To what extent may those damages be compensated through an aggregated award?

p) If the answers to questions (g), (h), (i)-(k), (1), (m), or (n) are in the affirmative, is the Defendant obliged to pay exemplary or punitive damages, and, if so, how much, to whom, and how is it to be distributed?

ANNEX C

SYSTEMIC NEGLIGENCE CLAIMS

73b. The facts alleged supra are incorporated with respect to this claim.

74. The Plaintiff and the Class have been subjected to unnecessary and preventable mental anguish and psychological harm through the failures of the RCMP to adhere to the RCMP Duties, including a failure to properly investigate and prosecute the disappearances and murders of Victims.

74a. The acts or omissions of the Defendant for the purposes of not preventing mental anguish, psychological harm, and causing damages to the Class as asserted herein can be determined without reference to the circumstances of any individual Class member.

74b. The failures of the RCMP to carry out the RCMP Duties as asserted herein were systemic.

75. The RCMP and its members owed a duty of care to the Plaintiff and to the Class to enforce the rule of law, and to utilize all available investigative strategies and techniques to solve reported cases of missing or murdered Indigenous women.

75a. The duty of the RCMP to adhere to the RCMP Duties was clear and immutable at all material times.

75b. The duty of the RCMP to adhere to the RCMP Duties was common to the Victims, the Plaintiff, and the Class.

75c. The failure of the RCMP to adhere to the RCMP Duties constituted a general practice over a number of years and fell below any and all applicable standards of care to the duties owed to the Victims or the Class.

75d. The RCMP knew or ought to have known at all material times that the Victims (as compared with non-Indigenous women or two-spirited individuals) , the Plaintiff, and the Class have been, and continue to be, impacted by unique societal, cultural, criminological, and other circumstances that could be expected to impact on the nature, scope, methodologies, approach, or resource allocation requirements in respect of police investigations relating to missing or murdered Victims (the “Circumstances”).

75e. The Defendant was aware of the Circumstances.

75f. The Defendant was aware that the Circumstances would have an impact on any and all applicable standards of care to the duties owed to the Class and Victims.

75g. In the context of the Circumstances, the Defendant’s conduct towards the Class and Victims as asserted herein fell below any and all applicable standards of care to the duties owed to the Class and Victims.

75h. The Defendant and the RCMP carried out the RCMP Duties and other common law duties

owed to the Class and Victims in a markedly different manner than it carried out the RCMP Duties and other common law duties owed to everyone other than the Class and Victims.

75i. The Defendant and the RCMP did not have in place since at least 1982 the requisite policies, practices, and systems in place to carry its RCMP Duties and any other related common law duties owed to Class.

75j. The decision of the Defendants to not have in place since at least 1982 the requisite policies, practices, and systems in place to carry its RCMP Duties and any other related common law duties owed to Class and Victims either being aware of the Circumstances or not, was an operational decision (the "Operational Decision).

75k. The Operational Decision of the Defendant and the RCMP resulted in the Defendant and the RCMP:

(a) Carrying out the RCMP Duties and any other related common law duties owed to Class in a negligent or systemically negligent manner;
(b) affording Victims and the Class a comparatively deficient level of service as compared with everyone else; and
c) failing to afford Victims and the Class a level and degree of service that was responsive to the Circumstances in which their cases arose.

76. The RCMP breached its duty of care to the Plaintiff and to the Class by failing to comply with the RCMP Duties collectively and individually, including by, inter alia:

(a) choosing not to thoroughly, extensively, or expansively investigate reports of missing or murdered Indigenous women and girls by the Class, having appropriate and reasonable regard to the unique Circumstances facing Victims;
(b) choosing not to reasonably supervise its members or take reasonable measures to ensure that its members were carrying out their duties in a responsible, non-discriminatory fashions vis-a-vis Victims;
(c) choosing not to be transparent and accountable to the Class about the investigations, prosecutions, and oversight conducted regarding a Victim's disappearance or death;
(d) choosing not to see and be aware of and not investigating and becoming aware of events which were clearly there to be seen;
(e) failing to warn Victim's about their inability to support their rights to security of person;
(f) providing false assurances of safety to the Victims and the Class;
(g) providing inadequate training to its members to enable them to effectively carry out investigations in and related to Indigenous communities;
(h) failing to employ investigative strategies that took into account the Indigenous background of witnesses and Victims;
(i) failing to follow up on tips and mismanagement of information and information sources;
(j) providing inadequate programs and services to the Class;
(k) creating or tolerating a culture that discouraged the Class from pursuing complaints or reporting potential misconduct;
(l) creating or tolerating attitudes of racism by members of the RCMP which created the stereotypical thinking that resulted in inadequate investigations;

(m) creating through its members distrust by Indigenous people which interfered with investigations;
(n) creating through inadequate investigations and the failure to prosecute a knowledge that the lives of Indigenous women and girls had a lesser value than those of other women and girls, that prosecution for wrongs to Indigenous women and girls was unlikely to be prosecuted, and in the result the absence of a fear of prosecution and retribution incurred and caused increased violence and death for Indigenous women and girls; and
(0) failing to keep the Class informed of the progress of investigations relating to Victims.
(the "RCMP Breaches")

76b. The RCMP's Breaches include breaches of the Code of Conduct of the Royal Canadian Mounted Police.

76c. In particular, the RCMP's Breaches include, but are not limited to, the RCMP and its members failing to execute their duties and responsibilities pursuant to section 37 of the Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10 by:

(a) failing to respect the rights of all persons, by not respecting the aforementioned rights of Victims and the Class based on the discriminatory common denominator of Indigenous status;
(b) failing to maintain the integrity of the law, law enforcement and the administration of justice;
(c) failing to perform their duties promptly, impartially and diligently, in accordance with the law and without detracting their authority;
(d) failing to ensure that improper or unlawful conduct of members were not concealed or permitted to continue;
(e) failing to act in a courteous, respectful and honourable manner;
(f) failing to maintain the honour of the Force and its principles and purposes, in that they inter alia:

(i) failing, pursuant to section 18(a) of the Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10, to perform their duties in relation to preventing crime and offences against the Victims and apprehending criminals and offenders against the Victims who may be lawfully taken into custody;
(ii) failing, pursuant to the mandate provided by the Honourable Ralph Goodale, P.C., M.P., Minister of Public Safety and Emergency Preparedness, to Commissioner Brenda Lucki, as set out in the Commissioner's Mandate Letter, to enhance the role of the RCMP in reconciliation with Indigenous Peoples, thereby diminishing the efficacy, the credibility and trust upon which the RCMP's authority depends;
(iii) failing, pursuant to said Commissioner's Mandate Letter, to lead the RCMP through a transformation of culture and management practices by failing to ensure that the RCMP efficiently and effectively delivers policing services based on appropriate priorities while keeping the Victims and Class, as Canadians, safe and protecting their civil liberties;
(iv) failing, pursuant to said Commissioner's Mandate Letter, to be a modern organization that reflects Canadian values and culture, such as the inclusion of

interests of Indigenous Peoples, and failed to ensure that the RCMP has the trust, confidence and the enthusiastic support of the Indigenous Peoples, including the Victims and Class, that they should also serve;

(v) failing, pursuant to the RCMP's values in its Commitment To Our Communities, to be unbiased and respectful in the treatment of the Victims and Class, to be accountable to the Victims and Class, to be culturally sensitive to the Victims and Class, to be open and honest with the Victims and Class, to effectively and efficiently use resources towards in the Victims and the Class, to provide quality and timely service to the Victims and the Class;

(vi) failing, pursuant to the RCMP's vision statement, to be a progressive, proactive and innovative organization, to provide the highest quality service in partnership with the Victims and Class as Indigenous Peoples as one of the diverse communities that the RCMP serve, to promote safe communities to the Victims and the Class;

(vii) failing, pursuant to the RCMP's mission statement, to commit to preserve peace in the interest of the Victims and Class as well, to uphold the law in the interest of the Victims and Class as well, and to provide quality service in partnership with the Class as members of the Indigenous community;

(viii) failing, pursuant to the Core Values of the RCMP, to be guided by integrity, honesty, professionalism, compassion, respect and accountability towards the Victims and the Class.

77. The RCMP knew or ought to have known that its actions and omissions (and the actions or omissions of its members) including, but not limited to the RCMP Breaches, were of a kind reasonably capable of causing harm to the Class and that the Class would suffer damages as a result.

78. The RCMP Breaches are ongoing.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1304-18
STYLE OF CAUSE:	DIANE BIGEAGLE v HER MAJESTY THE QUEEN
PLACE OF HEARING:	REGINA, SASKATCHEWAN
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