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COURT OF APPEAL FOR ONTARIO

CATZMAN, MOLDAVER AND GOUDGE JJ.A.

B E T W E E N:	)	
	)	
MARLENE C. CLOUD, GERALDINE ROBERTSON, RON DELEARY, LEO NICHOLAS, GORDON HOPKINS, WARREN DOXTATOR, ROBERTA HILL, J. FRANK HILL, SYLVIA DELEARY, WILLIAM R. SANDS, ROSEMARY DELEARY, and SABRINA YOLANDA WHITEYE	)	**Kirk M. Baert and Russell M. Raikes for the appellants**
	)	**Paul Vickery, Monika Lozinska and Donald Padget for the respondent Attorney General of Canada**
Plaintiffs (Appellants)	)	
	)	
- and -	)	
	)	**Robert B. Bell for the respondent New England Company**
THE ATTORNEY GENERAL OF CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON and THE NEW ENGLAND COMPANY	)	**Brian T. Daly and Lisa Gunn for the respondent Diocese of Huron**
Defendants (Respondents)	)	
	)	
	)	
	)	**Heard: May 10 and 11, 2004**

On appeal from the order the Divisional Court (Justice R. T. Patrick Gravely, Justice George T. Valin and Justice Maurice Cullity) dated June 23, 2003, reported at (2003), 65 O.R. (3d) 492.

GOUDGE J.A.:

INTRODUCTION

[1] The appellants seek to bring this action on behalf of the former students of the Mohawk Institute Residential School, a native residential school in Brantford, Ontario, and their families. They seek to recover for the harm said to have resulted from attending the School. The action is against those said to be responsible for running the School, namely Canada, the Diocese of Huron and the New England Company.

[2] The question before us is whether the action should be certified pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the CPA).

[3] The motion judge and the majority of the Divisional Court found that the action should not be certified, primarily because they saw no identifiable class of plaintiffs and no common issues, and, therefore, a class action could not be the preferable procedure. Rather, they viewed the case as one in which the issues were almost exclusively unique to each student and hence required adjudication individual by individual.

[4] Cullity J. dissented in the Divisional Court. He found that the criteria for certification set out in s. 5(1) of the CPA were met. He found that there were common issues of sufficient relative importance in the context of the action as a whole that it should be certified.

[5] In a case like this, set in the context of a residential school, the primary challenge is to determine if there are common issues and then, in light of the almost inevitable individual issues, to assess the relative importance of those common issues in relation to the claim as a whole. That question is centre stage in this appeal.

[6] Cullity J. decided in favour of certification. I agree with his conclusion and, in large measure, with his analysis. Thus, for the reasons that follow, I would allow the appeal and certify the action.

THE BACKGROUND

[7] The legislative context for this appeal is found in s. 5(1) of the CPA. It provides that an action must be certified if certain specified criteria are met. The subsection reads as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[8] The facts relevant to this appeal centre on the Mohawk Institute Residential School which was located in Brantford near the Six Nations Reserve. The School began its existence in 1828 as a residential school for First Nations children. It was founded by the New England Company, an English charitable organization dating back to the 17th century, with the mission of teaching the Christian religion and the English language to the native peoples of North America.

[9] The New England Company ran the School until 1922, when it leased the School to the federal government. Under the lease, Canada agreed to continue the School as an educational institution for native children and agreed to continue to train them in the teachings and doctrines of the Church of England. Indeed, in 1929, Canada sought to appoint an Anglican clergyman as principal of the School and looked to the Bishop of the Diocese of Huron to nominate appropriate candidates, a selection process that was repeated in 1945. The lease also entitled the New England Company to maintain some

measure of control over the premises. It was renewed in similar terms in 1947 and ran until 1965, when the New England Company sold the School to Canada. Four years later, in 1969, the School closed.

[10] This action covers the years from 1922 to 1969. During that time, there were 150 to 180 students at the School each year, ranging in age from 4 to 18 and split roughly equally between boys and girls. All were native children, that is Indians within the meaning of the *Indian Act*, R.S.C. 1906, c. 81, as amended. In all, approximately fourteen hundred native children attended the School in these years. They constitute the primary class of claimants proposed for this action. The appellants put forward two additional classes, a "siblings" class (namely the parents and siblings of the students) and a "families" class (namely their spouses and children).

[11] The appellants are members of the various First Nations from which the students came. They allege that Canada, the New England Company and the Diocese of Huron, either singly or together, were responsible for the operation and management of the School.

[12] Broadly put, their claim is that the School was run in a way that was designed to create an atmosphere of fear, intimidation and brutality. Physical discipline was frequent and excessive. Food, housing and clothing were inadequate. Staff members were unskilled and improperly supervised. Students were cut off from their families. They were forbidden to speak their native languages and were forced to attend and participate in Christian religious activities. It is alleged that the aim of the School was to promote the assimilation of native children. It is said that all students suffered as a result.

THE JUDGMENTS BELOW

[13] The statement of claim commencing this action was issued on October 5, 1998. It seeks damages on behalf of the students for breach of fiduciary duty, negligence, assault, sexual assault, battery, breach of aboriginal rights and breach of Treaty rights. Damages are also claimed on behalf of the siblings and families of the students for breach of fiduciary duty and for loss of care, guidance and companionship pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3. Finally, the statement of claim advances a claim for punitive damages.

[14] In June of 2001, the appellants sought certification of the action pursuant to the CPA, although they excluded the claims for sexual assault from that request.

[15] Haines J. dismissed the motion. He dealt in turn with each of the criteria for certification set out in s. 5(1) of the CPA. He found that it is plain and obvious that any

claims arising from acts or omissions before May 14, 1953, when the *Crown Liability Act*, S.C. 1952-53, c. 30 came into effect, cannot succeed because the Superior Court of Justice has no jurisdiction to consider those claims. For the period from 1953 to 1969 he concluded that the pleadings were sufficient to disclose a cause of action for breach of fiduciary duty, for the torts alleged, and for breach of aboriginal rights, but not for breach of Treaty rights. Finally, he found it plain and obvious that the claims of the siblings and family members could not succeed.

[16] The motion judge then examined whether there was an identifiable class and whether there were any common issues. He found neither, because in essence he could see no cause of action common to all the students who attended the school between 1922 and 1969. He found that the circumstances and experiences of the students were far too diverse to support the notion that the respondents owed identical duties to each student, nor could it be said that, to the extent these duties were breached against one, they were breached against all.

[17] The motion judge then briefly addressed the preferability criterion. He concluded that it was not met because of the wide variety of important individual issues requiring independent inquiry, and thus certification would not serve the objectives of access to justice, judicial economy and behaviour modification.

[18] Lastly, the motion judge found the appellants to be suitable representatives but the proposed litigation plan to be unworkable in that it sought a common minimum award of damages for each student who had attended the school.

[19] In dismissing the motion for certification, the motion judge summed up his conclusion at para. 80 of his reasons:

> I have concluded that the statement of claim does disclose a cause of action with respect to certain claims of the student plaintiffs. I have found, however, that the plaintiffs have failed to establish there is an identifiable class and have failed to demonstrate their claims raise common issues. In the result, the motion for certification is dismissed.

[20] On appeal, the majority of the Divisional Court upheld this conclusion. They agreed with the motion judge that the Superior Court of Justice has no jurisdiction over claims arising before May 14, 1953, and that the claims of family members under the *Family Law Act*, must fail because they are based on legislation first enacted in 1978 that cannot be given retroactive effect, as decided in this Court's decision in *Bonaparte v. Canada (Attorney General)* (2003), 64 O.R. (3d) 1.

[21] Although the majority noted that the motion judge found no common issues, they did not discuss either that conclusion or his finding that there was no identifiable class. Rather, they found it necessary to address only the preferability criterion in s. 5(1)(d) of the CPA. They concluded that there was no evidence of access to justice difficulties with individual students pursuing individual claims and no need to consider behaviour modification because residential schools are now a thing of the past in Canada. Most importantly, they concluded that no judicial economy would be achieved by certification because no matter how any common issues might be framed, their resolution would do nothing to avoid or limit the individual claims which would be inevitable, given the diverse experiences of each student. Finally, they said that a class action would be unfair to the defendants and would create an unmanageable trial.

[22] Cullity J. dissented. He found each of the five criteria in s. 5(1) of the CPA to be satisfied, and concluded that the appeal should be allowed and the action certified.

[23] In addressing whether the pleadings disclose a cause of action as required by s. 5(1)(a) he found that claims against the Crown for vicarious liability for the actions of its employees prior to May 14, 1953, can be brought in the Superior Court of Justice because of the jurisdiction given to that court by the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 as amended, and because the ban in s. 24(1) of the *Crown Liability Act* does not extend to claims like this because they could have been brought against the Crown before May 14, 1953, in the Exchequer Court.

[24] Similarly, he found that the claim against the Crown for breach of fiduciary duty is a claim in equity that could have been brought against the Crown in the Exchequer Court before May 14, 1953, and can therefore now be brought in the Superior Court even if it arises before that date. Although he does not say so expressly, it is implicit in his reasons that he treated the claim for breach of aboriginal rights in the same way, because he found it to be a common issue as well.

[25] However, he agreed with the motion judge that the claims in tort for breach of duty owed by the Crown directly to class members can only be advanced if they arose after May 14, 1953. Finally, he also agreed that the claim pursuant to the *Family Law Act* cannot stand.

[26] He found that the requirement that there be an identifiable class was also met. He held that the members of the class of individuals who were students at the school between 1922 and 1969 could be ascertained by objective criteria rationally linked to the common issues he identified.

[27] He also concluded that the families and siblings of the students both constituted identifiable classes, provided that the claim for breach of fiduciary duty owed to them by

the Crown could be said to disclose a cause of action sufficient to meet the criterion in s. 5(1)(a).

[28] He then turned to examine in more detail whether the claims of class members raised common issues as required by s. 5(1)(c). He began by describing the sizeable challenge faced by the motion judge on this score, given that the litigation plan first presented by the plaintiffs proposed a list of fifty-three common issues. Many, such as how the operations of the school were funded, were drafted with such particularity that their resolution would be of little moment in the trial of these claims. He quite rightly pointed out that although class actions often require active and continual management of the proceedings by the court, plaintiffs' counsel nonetheless has the responsibility to establish that the criteria for certification are met, including the identification of common issues. Counsel cannot expect the judge on a certification motion to single-handedly fashion the common issues in order to meet the requirements of s. 5(1)(c).

[29] By the time of the appeal to the Divisional Court, the appellants had reworked their list and were proposing eight more broadly framed common issues. Cullity J. found that with some further refashioning there were common issues sufficient to satisfy s. 5(1)(c). He placed considerable reliance on the reasons of the Supreme Court of Canada in *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 which were released after the decision of the motion judge here. He focused on the duty of care said to be owed to all members of the student class and the fiduciary duty owed both to them and the families and siblings classes. He found that the common issues could be defined in terms of these duties and their breach. He described his conclusion about the common issues at paras. 25 and 31 of his reasons:

> As in *Rumley*, they would include a failure to have in place management and operations procedures that would reasonably have prevented abuse and, in addition, issues similar to those described by the Court of Appeal in *Lafrance Estate* as the essence of the claims for breach of fiduciary duty against the Crown in that case: namely, whether "the very purpose of the Crown's assumption of control over the primary plaintiffs was to strip the Indian children of their culture and identity, thereby removing, as and when they became adults, their ability 'to pass on to succeeding generations the spiritual, cultural and behavioural bases of their people.'"
>
> …

> While I would not accept without modification the original formulation – or the reformulation – of the common issues proposed on behalf of the plaintiffs, such issues could, I believe, be defined in terms of the existence and breach of duties of care, and fiduciary duties, owed by the defendants to class members – and the infringement of the aboriginal rights of the members – with respect to the purposes, operations, management and supervision of the Mohawk Institute and with respect to each of the categories of harm referred to in paragraphs 51 and 52 of the statement of claim. The issues relating to the existence and breach by the Crown of duties of care in tort would be confined to conduct that occurred after May 13, 1953. I would also include as common issues the claim for punitive damages arising from any of the above breaches that are proven and the possibility of an aggregate assessment of damages.

[30] He did, however, go on to reject the claim for vicarious liability, finding that because the claim addressed the conduct of particular employees towards particular students it could not qualify as a common issue.

[31] Finally, he turned to the preferability requirement of s. 5(1)(d). He found that any deference owed to the motion judge on this issue was displaced because the preferability analysis can be properly done only in light of the common issues identified and the motion judge identified none. He went on to conclude that the trial of the common issues he identified would be a fair, efficient and manageable method of advancing the claims pleaded and would be preferable to other procedures. Unlike his colleagues, he accepted the evidence of the vulnerability of class members and thus found that the objective of access to justice would be served to an appreciable extent by certification. However, he gave most weight to the judicial economy to be achieved by having one trial of the common issues rather than fourteen hundred.

[32] In summary, he found that the focus of the trial of the common issues would be on the conduct of the respondents rather than on the precise circumstances of particular class members and that the existence of individual issues such as limitation periods or causation of harm to individual students was not enough to outweigh the conclusion that resolution of the common issues would significantly advance this action.

[33] He concluded by finding that although the proposed litigation plan required reformulation in light of his findings, its deficiencies were not sufficient to deny the motion. He would have allowed the appeal, granted certification, and left the details of

the litigation plan to be resolved by counsel under the supervision of the judge assigned to case manage the proceedings.

ANALYSIS

[34] With leave, the appellants appeal to this court, seeking an order setting aside the orders of the Divisional Court and the motion judge and certifying the action. They invite us to do so on the basis of the reasoning of Cullity J. which they fully endorse. They argue that all of the five of the criteria in s. 5(1) of the CPA are met and that the court must therefore certify. The respondents contest each of these, some more vigorously than others, most pointedly the preferability requirement.

[35] Before addressing in turn each of these factors, it is helpful to repeat the full subsection and set out the principles applicable to its application as they have been developed by the Supreme Court of Canada and this court. Section 5(1) reads as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[36] The Supreme Court of Canada has issued three important decisions to guide the development of class actions in Canada: *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere* (2001), 201 D.L.R. (4th) 385; *Hollick v. Toronto (City)* (2001), 205 D.L.R. (4th) 19, and *Rumley*, supra. In *Hollick*, the Supreme Court of Canada had its first opportunity to enunciate the interpretive approach to be applied to the CPA in general and to its certification provisions in particular.

[37] Speaking for the Court at paras. 14-16, McLachlin C.J.C. made clear that in light of its legislative history, the CPA should be construed generously and that an overly restrictive approach must be avoided in order to realize the benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause harm. She underlined the particular importance of keeping this principle in mind at the certification stage.

[38] In addition, she emphasized that the certification stage is decidedly not meant to be a test of the merits of the action, but rather focuses on its form. As she said at para. 16, "The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action."

[39] For its part, this court has said that because of the expertise developed in this new and evolving field of class actions by the small group of judges across the province who have significant experience in hearing certification motions, an appellate court should proceed with deference and should restrict its intervention to matters of general principle. See *Carom v. Bre-X Minerals Ltd*. (2000), 51 O.R. (3d) 236 (C.A.). This admonition is somewhat complicated in this particular case because both Haines J. and Cullity J. have been part of that small group.

[40] It is against this backdrop then that the debate between the parties on each of the requirements of s. 5(1) must be considered.

THE CAUSE OF ACTION CRITERION – s. 5(1)(a)

[41] It is now well established that this requirement will prevent certification only where it is "plain and obvious" that the pleadings disclose no cause of action, as that test was developed in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[42] Although the parties originally differed on whether that test is met here, by the time of argument in this court they had come to agree that the appellants' pleadings disclose the following causes of action within the meaning of that test:

(a) The claim for vicarious liability of the defendants over the full period of this action namely, 1922 to 1969 (although the appellants do not contest Cullity J.'s conclusion that these claims do not give rise to any common issue);

(b) The claim for breach of fiduciary duty owed to the members of the student class over the full time frame of the action;

(c) The claim for breach of fiduciary duty owed to the members of the families and siblings classes over the full time frame of the action (given this court's decision in *Bonaparte*, *supra*); and

(d) The claims for negligence of the defendants but only between 1953 and 1969.

[43] I agree with the parties that these causes of action survive the test in s. 5(1)(a). Although it was not the subject of separate argument before us, I would reach the same conclusion concerning the claim for breach of the aboriginal rights of the members of the student class over the full time frame of the action, because this claim is so closely akin to the claim for breach of fiduciary duty.

[44] On the other side of the coin, the appellants also now properly concede that the following claims cannot be proceeded with:

(a) The claims of the members of the families and siblings classes pursuant to the *Family Law Act*;

(b) The claims for negligence occurring before 1953; and

(c) The claims for breach of Treaty rights (which the motion judge found were not made out on the pleadings and which the appellants did not thereafter pursue).

THE IDENTIFIABLE CLASS REQUIREMENT – s. 5(1)(b)

[45] *Hollick*, *supra*, at para. 17, describes what is necessary to meet this requirement. The appellants are required to show that the three proposed classes are defined by

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

[46] As I have said, Haines J. found that the appellants failed to establish any identifiable class. In my view, he applied the wrong test in doing so by requiring that all students fully share a cause of action. This is inconsistent with *Hollick*, *supra*, which makes clear that the shared interest need only extend to the resolution of the common issues. The application of a wrong test is an error in principle and the decision which results can attract no deference. For its part, the majority of the Divisional Court did not address the identifiable class issue. However Cullity J. found that the requirement in s. 5(1)(b) had been satisfied by the appellants.

[47] In my view, he was correct in doing so. The appellants satisfy all the dimensions of this requirement. Membership in the student class is defined by the objective requirement that a member have attended the school between 1922 and 1969. Membership in the families class requires that a person meet the objective criterion of being a spouse, common law spouse or child of someone who was a student. Likewise the siblings class is defined as the parents and siblings of those students. None of the three proposed classes is open-ended. Rather all are circumscribed by their defining criteria. All three classes are rationally linked to the common issues found by Cullity J. in that it is the class members to whom the duties of reasonable care, fiduciary obligation and aboriginal rights are said to be owed and they are the ones who are said to have experienced the breach of those duties. Finally, because all class members claim breach of these duties and that they all suffered at least some harm as a result, these classes are not unnecessarily broad. All class members share the same interest in the resolution of whether they were owed these duties and whether these duties were breached. Any narrower class definition would necessarily leave out some who share that interest. Thus I conclude that the identifiable class requirement is met.

THE COMMON ISSUES REQUIREMENT – s. 5(1)(c)

[48] As with each of the criteria in s. 5(1) the common issues requirement must be discretely addressed and satisfied for the action to be certified. However, there is no doubt that this analysis will often overlap with that required by other factors in s. 5(1). Indeed in some cases these inquiries may be somewhat interdependent. For example, the identification of common issues will often depend in part upon the definition of the identifiable class and vice versa. This particular interrelationship is reflected in the

requirement that there be some rational relationship between the identifiable class and the common issues. Hence the discussion of common issues must have in mind the identifiable class, just as the discussion of identifiable class proceeded in light of the common issues.

[49] Moreover, like the other criteria in s. 5(1), save for the disclosure of a cause of action, the common issues criterion obliges the class representative to establish an evidentiary basis for concluding that the criterion is met. McLachlin C.J.C. put it this way in *Hollick*, *supra*, at para. 25: "In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action."

[50] *Hollick* also makes clear that this does not entail any assessment of the merits at the certification stage. Indeed, on a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

[51] *Hollick* also explains the legal test by which the common issues requirement is to be assessed. After dealing with the identifiable class factor, the Supreme Court addressed this question at para. 18:

> A more difficult question is whether "the claims…of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act, 1992*. As I wrote in *Western Canadian Shopping Centres*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial…ingredient" of each of the class members' claims.

[52] This requirement has been described by this court as a low bar. See *Carom, supra,* at para. 42. Indeed this description is consistent with the commonality finding in *Hollick* itself. The class action proposed there was on behalf of some thirty thousand people who lived in the vicinity of a landfill site that was alleged to cause harm through noise and physical pollution. The Supreme Court found that the issue of whether the site emitted pollutants into the air met the test of s. 5(1)(c) because each class member would have to show this or see his claim fail. The Court did not see this conclusion to be at all undermined by the fact that this common issue was but one aspect of the liability issue

and a small one at that. It clearly accepted that after the trial of the common issue the many remaining aspects of liability and the question of damages would have to be decided individually. Yet it found the commonality requirement to be met.

[53] In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial. This is consistent with the positive approach to the CPA urged by the Supreme Court as the way to best realize the benefits of that legislation as foreseen by its drafters.

[54] Neither the reasons of the motion judge nor those of the majority of the Divisional Court reflect this approach to the commonality assessment. The motion judge focused on those aspects of the claim that in his view would require individual determination, student by student. Although he did not have the benefit of the Supreme Court decision in *Hollick*, *supra*, he did not analyze what parts of the claim could be said to be common as explained in that decision. Moreover, in my view, he erred in his ultimate conclusion that there were no common issues. For its part, the majority of the Divisional Court felt it unnecessary to address this criterion.

[55] On the other hand, I think Cullity J. approached the commonality issue correctly and reached the right result. As I have described, rather than focusing on how many individual issues there might be and concluding from that that there could be no common issues, Cullity J. analyzed whether there were any issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims.

[56] Relying on *Rumley*, he found that a substantial part of each claim was the alleged breach of the various legal duties said to be owed to all class members. For the student class these duties are framed in negligence, fiduciary obligation and aboriginal rights. For the other two classes the claim is one of fiduciary obligation. The need to determine the existence of these duties and whether they were breached in respect of all class members is a significant part of the claim of each class member. Finally, he found that the claim for an aggregate assessment of damages for the breaches found and the claim for punitive damages for the respondents' conduct also met the commonality requirement. Thus he found that s. 5(1)(c) was met.

[57] The appellants urge us to adopt Cullity J.'s conclusion. On the other hand the respondents attack it in several ways.

[58] The respondents' basic challenge is that the claims of the class members are so fundamentally individual in nature that any commonality among them is superficial. I do not agree. Cullity J. focused on the appellants' claim of systemic breach of duty, that is whether, in the way they ran the School, the respondents breached their lawful duties to all members of the three classes. In my view, this is a part of every class member's case and is of sufficient importance to meet the commonality requirement. It is a real and substantive issue for each individual's claim to recover for the way the respondents ran the School. As the analysis in *Hollick*, *supra*, exemplifies, the fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure.

[59] The respondents also argue that the claim of systemic negligence in running the School cannot serve as a common issue because the standard of care would undoubtedly change over time as educational standards change. However, in my view this argument is answered by *Rumley*, which was also a claim based on systemic negligence in the running of a residential school for children. There the Supreme Court found that the class action proceeding is sufficiently flexible to deal with whatever variation in the applicable standard of care might arise on the evidence. In that case the claim covered a forty-two year period. Here, in analogous circumstances, the negligence claim covers only sixteen years, from 1953 to 1969.

[60] The respondents also say that the affidavit material shows that many of the appellants and other class members did not suffer much of the harm alleged, such as loss of language and culture. They argue that this underlines the individual nature of these claims and negates any commonality. Again, I disagree. There is no doubt that causation of harm will have to be decided individual by individual if and when it is found in the common trial that the respondents owed legal duties to all class members which they breached. However, this does not undermine the conclusion that whether such duties were owed, what the standard of care was, and whether the respondents breached those duties constitute common issues for the purposes of s. 5(1)(c).

[61] Equally the respondents' assertion of limitations defences does not undermine the finding of common issues. In the context of these issues, these defences must await the conclusion of the common trial. They can only be dealt with after it is determined whether there were breaches of the systemic duties alleged and over what period of time and when those breaches occurred. Only then can it be concluded when the limitations defence arose. Moreover, because an inquiry into discoverability will undoubtedly be a part of the limitations debate and because that inquiry must be done individual by individual, these defences can only be addressed as a part of the individual trials following the common trial. As with other individual issues, the existence of limitations defences does not negate a finding that there are common issues.

[62] The respondents other than Canada also argue that, at least for them, the finding of common issues by Cullity J. is undermined by their assertion that their proximity to Canada in exercising control over the operation of the School varied over time. Again, I disagree. At best that assertion may provide these respondents with a defence to the appellants' claims in the common trial for certain periods of time. Nonetheless the common issues remain and require resolution.

[63] Lastly the respondents say that in reaching his conclusion about common issues Cullity J. should not have relied on *Rumley*, but should have distinguished it. They say this essentially for two reasons. First *Rumley* involved sexual abuse of students and therefore there could be little debate about the duty to prevent it owed by those running the school, whereas, here, the legal duties alleged are seriously contested. Second, they say that in *Rumley* there were very few individual issues requiring resolution because, for example, sexual abuse had been found to occur and there were no issues of vicarious liability or limitations requiring individual resolution.

[64] In my view neither of these renders *Rumley* inapplicable to this case. Although the existence of the systemic duty of care to all students and its precise nature may be more hotly contested here than in *Rumley,* nonetheless the issue is a significant one requiring resolution for each class member and is a proper common issue.

[65] Moreover, at para. 33 of *Rumley*, the Supreme Court made clear that the comparative extent of individual issues is not a consideration in the commonality inquiry although it is obviously a factor in the preferability assessment. Although the Court underlined that it was dealing with the British Columbia *Class Proceedings Act* (which explicitly states that the common issues requirement may be met whether or not these issues predominate over individual issues, whereas the CPA is silent on the point), in my view the same approach is implicit in the CPA. A weighing of the relative importance of the common issues and the remaining individual issues is necessarily an important part of the preferability inquiry. I do not think that the CPA contemplates a duplication of that task as part of the commonality inquiry. The CPA's silence on the point cannot be read as mandating the opposite of the B.C. legislation. Thus the extent of individual issues that may remain after the common trial in this case does not undermine the conclusion that the commonality requirement is met.

[66] I therefore agree that the appellants have met the commonality requirement. A significant part of the claim of every class member focuses on the way that the respondents ran the School. It is said that their management of the School created an atmosphere of fear, intimidation and brutality that all students suffered and hardship that harmed all students. It is said that the respondents did this both by means of the policies and practices they employed and because of the policies and practices they did not have that would reasonably have prevented abuse. Indeed, it is said that their very purpose in

running the School as they did was to eradicate the native culture of the students. It is alleged that the respondents breached various legal duties to all class members by running the School in this way.

[67] In the affidavits of the ten representative plaintiffs there is a clear showing of some basis in fact supporting this description of the way in which the School was run. Although their cross-examinations support the conclusion that students were not all treated the same way and did not all experience the same suffering, the appellants have shown some basis in fact for their assertion that the management and operation of the School raises the common issues required for certification by s. 5(1)(c). They have met their evidentiary burden.

[68] The appellants acknowledge that if they are successful in the common issues trial it will be necessary to separately establish causation of harm and quantification of damages for each individual class member for all three classes.

[69] Nevertheless, it is my view that whether the respondents owed legal obligations to the class members that were breached by the way the respondents ran the School is a necessary and substantial part of each class member's claim. No individual can succeed in his or her claim to recover for harm suffered because of the way the respondents ran the School without establishing these obligations and their breach. The common trial will take these claims to the point where only causation and harm remain to be established. In my view it will adjudicate a substantial part of each class member's claim by doing so. Hence the appellants have met the commonality requirement.

[70] I also agree with Cullity J. that in a trial of these common issues the claims for an aggregate assessment of damages and punitive damages are properly included as common issues. The trial judge should be able to make an aggregate assessment of the damages suffered by all class members due to the breaches found, if this can reasonably be done without proof of loss by each individual member. Indeed, this is consistent with s. 24 of the CPA. As well, given that the common trial will be about the way the respondents ran the School and their alleged purpose in doing so, it can also properly assess whether this conduct towards the members of the three classes as a whole should be sanctioned by means of punitive damages.

[71] In summary, I agree with Cullity J. that the appellants have met the requirements set by s. 5(1)(c) of the CPA. The focus of the common trial will be on the conduct of the respondents as it affected all class members, and how and for what purpose they ran the School. Although evidence from individuals that speaks to the respondents' systemic conduct may be relevant to this, findings of causation and extent of harm must await the individual trials to follow.

[72] As the class action proceeds, the judge managing it may well determine that the common issues should be restated with greater particularity in light of his or her experience with the class proceeding. To permit that process to unfold with flexibility, at this stage. I would state the common issues in general terms, as follows:

(1) By their operation or management of the Mohawk Institute Residential School from 1953 to 1969 did the defendants breach a duty of care owed to the students of the School to protect them from actionable physical or mental harm?

(2) By their purpose, operation or management of the Mohawk Institute Residential School from 1922 to 1969 did the defendants breach a fiduciary duty owed to the students of the School to protect them from actionable physical or mental harm, or the aboriginal rights of those students?

(3) By their purpose, operation or management of the Mohawk Institute Residential School from 1922 to 1969 did the defendants breach a fiduciary duty owed to the families and siblings of the students of the School?

(4) If the answer to any of these common issues is yes, can the court make an aggregate assessment of the damages suffered by all class members of each class as part of the common trial?

(5) If the answer to any of these common issues is yes, were the defendants guilty of conduct that justifies an award of punitive damages?

(6) If the answer to that is yes, what amount of punitive damages is awarded?

THE PREFERABLE PROCEDURE REQUIREMENT – s. 5(1)(d)

[73] As explained by the Supreme Court of Canada in *Hollick*, *supra*, at paras. 27-28, the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice,

and behaviour modification and must consider the degree to which each would be achieved by certification.

[74] *Hollick* also decided that the determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in their context. The inquiry must take into account the importance of the common issues in relation to the claim as a whole.

[75] At para. 30 of that decision the Court also makes clear that the preferability requirement in s. 5(1)(d) of the CPA can be met even where there are substantial individual issues and that its drafters rejected the requirement that the common issues predominate over the individual issues in order for the class action to be the preferable procedure. This contrasts with the British Columbia legislation in which the preferability inquiry includes whether the common issues predominate over the individual cases.

[76] In Ontario it is nonetheless essential to assess the importance of the common issues in relation to the claim as a whole. It will not be enough if the common issues are negligible in relation to the individual issues. The preferability finding in *Hollick* itself was just this and the requirement was therefore found not to be met. That decision tells us that the critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action.

[77] Neither the motion judge nor the majority of the Divisional Court properly addressed this vital aspect of the preferability inquiry and thus their conclusion cannot stand. As Cullity J. said, the determination of whether, in the context of the entire claim, the resolution of the common issues will significantly advance the action can only be done in light of the particular common issues identified. Here the motion judge found none and therefore could not make this assessment. The majority of the Divisional Court did not address the common issues requirement but simply stated its conclusion that any attempt to formulate common issues in terms of systemic negligence would not significantly advance the litigation given the numerous individual claims. With respect, without an articulation of what the common issues are, any assessment of their relative importance in the context of the entire claim cannot be properly made. It would risk a conclusion based not on relative importance but simply on the existence of a large number of individual issues. It would also preclude any appellate review.

[78] On the other hand, as I have outlined, Cullity J. found that in the context of the entire claim the resolution of the common issues he found would significantly advance the action and that otherwise the preferability requirement was met. I agree with that conclusion.

[79] As they did with the common issues, the respondents contest this finding in several different ways. Here too their primary attack is that the vast majority of issues require individual determination. They say that these issues involve individual acts of abuse, different perpetrators, unique individual circumstances both before and after attendance at the school widely varying impacts and damage claims, and an array of different limitations, triggers and discoverability issues. They argue that the common issues are negligible in comparison and that their resolution will not significantly advance the action.

[80] I do not agree. An important part of the claims of all class members turns on the way the respondents ran the School over the time frame of this action. The factual assertion is both that the respondents had in place policies and practices, such as excessive physical discipline, and that they failed to have in place preventative policies and practices, such as reasonable hiring and supervision, which together resulted in the intimidation, brutality and abuse endured by the students at the School. It is said that the respondents sought to destroy the native language, culture and spirituality of all class members. The legal assertion is that by running the School in this way the respondents were in breach of the various legal obligations they owed to all class members. Together these assertions comprise the common issues that must be assessed in relation to the claim as a whole.

[81] I agree with Cullity J. that whether framed in negligence, fiduciary obligation or aboriginal rights the nature and extent of the legal duties owed by the respondents to the class members and whether those duties were breached will be of primary importance in the action as framed. If class members are to recover, they must first succeed on this issue. It is only at that point that individual issues of the kind raised by the respondents would arise. Save for those relating to limitations they are all aspects of harm and causation, both of which the appellants acknowledge they will have to establish individual by individual. The limitations questions are all individual defences, which the appellants also acknowledge will require individual adjudication.

[82] The resolution of these common issues therefore takes the action framed in negligence, fiduciary duty and aboriginal rights up to the point where only harm, causation and individual defences such as limitations remain for determination. This moves the action a long way.

[83] The common issues are fundamental to the action. They cannot be described as negligible in relation to the consequential individual issues nor to the claim as a whole. To resolve the debate about the existence of the legal duties on which the claim is founded and whether these duties were breached is to significantly advance the action.

[84] This assessment is not quantitative so much as qualitative. It is not driven by the mere number of individual adjudications that may remain after the common trial. The finding in *Rumley* demonstrates this. The class there was defined as students at the residential school between 1950 and 1992 who reside in British Columbia and claimed to have suffered injury, loss, or damages as a result of misconduct of a sexual nature occurring at the school. The common issues were defined very similarly to those in this case. The Supreme Court recognized that following their resolution, adjudication of injury and causation would be required individual by individual. Although the number of individual adjudications appears to have been uncertain, the time frame of the action alone suggests that it might be relatively high. Yet the Court was able to conclude that the common issues predominated over those affecting only individual class members, which is a consideration required by the British Columbia legislation. This as an even higher standard than that set for preferability under the CPA, namely that viewed in the context of the entire claim, the resolution of the common issues must significantly advance the action. However, in both cases the assessment is a qualitative one, not a comparison of the number of common issues to the number of individual issues.

[85] In this case that qualitative assessment derives from the reality that resolving the common issues will take the action a long way. That assessment is also informed in an important way by the considerations of judicial economy and access to justice. Because residential schools for native children are no longer part of the Canadian landscape, the third objective of class proceedings, namely behaviour modification, is of no moment here.

[86] However, I think that a single trial of the common issues will achieve substantial judicial economy. Without a common trial, these issues would have to be dealt with in each individual action at an obvious cost in judicial time possibly resulting in inconsistent outcomes. As Cullity J. said, a single trial would make it unnecessary to adduce more than once evidence of the history of the establishment and operation of the School and the involvement of each of the respondents.

[87] Access to justice would also be greatly enhanced by a single trial of the common issues. I do not agree with the majority of the Divisional Court that there is nothing in the record to sustain this conclusion. The affidavit material makes clear that the appellants seek to represent many who are aging, very poor, and in some cases still very emotionally troubled by their experiences at the school. Cullity J. put it this way at para. 46 of his reasons:

> While the goal of behavioural modification does not seem to be a value that would be achieved to any extent by certification, I am satisfied that the vulnerability of members of the class – as evidenced by the uncontradicted statements

> in the affidavits sworn by the representative plaintiffs – is such that the objective of providing access to justice would be served to an appreciable extent. Each of the representative plaintiffs referred to the poverty of many of the former students, their inability to afford the cost of individual actions and the effect such proceedings would have on the continuing emotional problems from which they suffer as a result of their experiences at the Mohawk Institute. These statements were not challenged on cross-examination and, unlike my colleagues, I see no reason to reject their truth or their significance.

[88] In short, I think that the access to justice consideration strongly favours the conclusion that a class action is the preferable procedure. The language used by the Chief Justice in *Rumley* at para. 39 is equally apt to this case:

> Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members.

[89] The respondents also attack Cullity J.'s preferability finding by saying that a class action would be unfair to them and would create an unmanageable proceeding. I do not agree. The common issues require resolution one way or the other. It is no less fair to the respondents to face them in a single trial than in many individual trials. Nor, at this stage, is there any reason to think that a single trial would be unmanageable. The common issues centre on the way the respondents ran the School and can probably be dealt with even more efficiently in one trial than in fourteen hundred.

[90] That conclusion is not altered even if one takes into consideration the individual adjudications that would follow. The fact of a number of individual adjudications of harm and causation did not render the action in *Rumley* unmanageable and does not do so here. Moreover, the CPA provides for great flexibility in the process. For example, s. 10 allows for decertification if, as the action unfolds, it appears that the requirements of s. 5(1) cease to be met. In addition, s. 25 contemplates a variety of ways in which individual issues may be determined following the common issues trial other than by the presiding trial judge. Thus at this stage in the proceedings, when one views the common issues trial in the context of the action as whole, there is no reason to doubt the conclusion that the class action is a manageable method of advancing the claim.

[91] Lastly, the respondents argue that Cullity J. was wrong because the class action is not preferable to other means of resolving class members' claims. They support this position with fresh evidence filed in this court describing the alternative dispute resolution system that has been put in place by Canada to deal with claims of those who attended native residential schools.

[92] Even if we were to admit this fresh evidence I do not agree that this ADR system displaces the conclusion that the class action is the preferable procedure. It is a system unilaterally created by one of the respondents in this action and could be unilaterally dismantled without the consent of the appellants. It deals only with physical and sexual abuse. It caps the amount of possible recovery and, most importantly in these circumstances, compared to the class action it shares the access to justice deficiencies of individual actions. It does not compare favourably with a common trial.

[93] Thus I conclude that each of the respondents' attacks must fail and that Cullity J. was correct to find that the appellants have met the preferability requirement.

THE WORKABLE LITIGATION PLAN REQUIREMENT – s. 5(1)(e)(ii)

[94] Although it was not strenuously pursued in oral submissions, the respondents also argue in their factums that the action cannot be certified because the appellants have not yet produced a workable litigation plan.

[95] I do not agree that the appellants' certification motion should fail on this basis. The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any shortcomings due to its failure to provide for when limitations issues will be dealt with or how third party claims are to be accommodated can be addressed under the supervision of the case management judge once the pleadings are complete. Most importantly, nothing in the litigation plan exposes weaknesses in the case as framed that undermine the conclusion that a class action is the preferable procedure.

CONCLUSION

[96] I conclude that the appellants have shown that their action satisfies all the requirements of s. 5(1) of the CPA. It must therefore be certified and remitted to the supervision of the Superior Court judge assigned to manage the action.

[97] That judge will undoubtedly face significant challenges as this class action unfolds. If they prove insurmountable, the CPA provides remedies. However, the CPA

also provides the judge with much flexibility in addressing these challenges and assessing them at this stage of the proceedings, I am not persuaded that they cannot be satisfactorily met within this form of proceeding.

[98] I would therefore allow the appeal, set aside the orders of the Divisional Court and the motion judge and substitute an order certifying the action consistent with these reasons.

[99] The parties have given us proposed bills of costs. However given the amounts at stake, I invite the parties to make written submissions as to the costs here and below. These submissions are to be exchanged and filed within six weeks of the release of these reasons and are not to exceed five pages, double spaced. Within a further two weeks, each party may then file a written reply not to exceed three pages, double spaced.

Released: December 3, 2004 "MAC"

"S.T. Goudge J.A."

"I agree: M.A. Catzman J.A."

"I agree M.J. Moldaver J.A."