Federal Court of Appeal | Cour d'appel fédérale

Date: 20230606

Docket: A-177-21

Citation: 2023 FCA 128

CORAM: **RENNIE J.A.**
MONAGHAN J.A.
ROUSSEL J.A.

BETWEEN:

DIANE BIGEAGLE

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Regina, Saskatchewan, on October 25, 2022.

Judgment delivered at Ottawa, Ontario, on June 6, 2023.

REASONS FOR JUDGMENT BY: ROUSSEL J.A.

CONCURRED IN BY: RENNIE J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

ROUSSEL J.A.

[1] The appellant, Diane BigEagle, appeals a decision of the Federal Court (2021 FC 504), refusing to certify her action as a class proceeding and striking her second amended statement of claim without leave to amend (hereinafter statement of claim).

[2] For the reasons set out below, I would dismiss Ms. BigEagle's appeal.

I. Background

[3] Ms. BigEagle resides in Regina, Saskatchewan. She is the mother of Danita Faith BigEagle, who has been missing since February 2007. Ms. BigEagle believes her daughter to be dead. Danita's children are in the care and custody of Ms. BigEagle.

[4] At the time of her disappearance, Danita was a member of the Ocean Man First Nation, located in southeast Saskatchewan. She and her family would travel back and forth from time to time between Ocean Man and Regina. When Danita went missing, Ms. BigEagle reported her disappearance to the "police authorities". She claims that they brushed her off with the assurance that Danita would probably come home.

[5] Ms. BigEagle further alleges that over the years, she has met in excess of fifty times with the Royal Canadian Mounted Police (RCMP). She believes that the RCMP has failed to give meaningful attention to the fact that her daughter has been missing and has ignored the information she has provided to them.

[6] In 2018, Ms. BigEagle commenced a proposed class action against the respondent seeking declarations and monetary damages on behalf of family and community members of Indigenous women and two-spirited individuals whose murders were reported to the RCMP but remain unsolved or who have been missing for more than thirty days and whose disappearance was reported to the RCMP (hereinafter the "victims"). The claim is directed against His Majesty the King, as the representative of the "Federal Government of Canada" and the RCMP.

[7] The causes of action asserted by Ms. BigEagle in the proposed class action include systemic negligence, misfeasance in public office, negligent police investigation, breach of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (*Charter*), breach of Quebec law, and genocide and crimes against humanity pursuant to the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

[8] As amended at the Federal Court hearing, the class is defined as follows:

> (a) All persons in Canada who have one or more Indigenous Immediate Family Members who are [v]ictims (the "Immediate Family Class");
>
> (b) All persons in Canada who have one or more Indigenous Extended Family Members who are [v]ictims (the "Extended Family Class");
>
> (c) All persons in Canada who, by reason of his or her relationship to a Class Member or [v]ictim, are entitled to make claims under any of the Dependant Statutes as a result of injury to the Class Member or [v]ictim (the "Statutory Dependants Class");
>
> (d) The heirs, assigns, and estates of all [v]ictims (the "Estate Class"); and
>
> (e) All persons in Canada who reside on a First Nation where a [v]ictim resided at the time of the [v]ictim's murder or disappearance.
>
> (Hereinafter, collectively, the "Class")

[9] On June 23, 2021, the motion judge dismissed the motion for certification on the ground that it was plain and obvious that the action would fail, as Ms. BigEagle's statement of claim disclosed no reasonable causes of action. She also found that the pleadings could not be reasonably amended, and struck the action.

II. The Impugned Decision

[10] After addressing preliminary and evidentiary issues and setting out the test for certification under Rule 334.16 of the *Federal Courts Rules*, SOR/98-106, the motion judge examined each cause of action pled.

[11] With respect to Ms. BigEagle's claim of systemic negligence, the motion judge found that the RCMP did not owe a private law duty of care to the Class, given the lack of foreseeability and proximity. The duty was both general and owed to the Canadian public at large. As the pleadings did not disclose a private law duty of care to the Class, the cause of action of systemic negligence as pled was doomed to fail.

[12] Although not specifically pled, the motion judge also considered whether there was a breach of fiduciary duty as a stand-alone cause of action. In the absence of any reference in the statement of claim to a fiduciary duty setting out the material facts or the necessary elements of the cause of action, she held that she could not certify a cause of action on this ground.

[13] Likewise, the motion judge held that it was plain and obvious that the claim for negligent police investigation was doomed to fail. Noting that the courts have unequivocally held that the duty of care applicable to a negligent police investigation is to the person being investigated, she found it was too large a leap to extend the duty to the Class, especially in the absence of material facts pled to establish proximity.

[14] Regarding the claim of misfeasance in public office, the motion judge found the claim too broad. The material facts were directed at the RCMP as an organization and not at a particular division or detachment. A generalized allegation that the RCMP did not implement proper procedures or policy did not meet either branch of the test of the tort of misfeasance, there being no intentional conduct that could in any way be foreseen to harm the Class. As no material facts of deliberate and unlawful conduct were pled, she concluded that this cause of action was doomed to fail.

[15] As for the claim of ongoing and continuing breaches of sections 7 and 15 of the *Charter* flowing from the inadequacies of the RCMP investigations and the failure to prosecute, the motion judge found the allegations in the statement of claim to be statements and conclusions rather than material facts. She agreed with the respondent that the claims were more akin to negligence claims, disguised in the language of the *Charter*, which she had already concluded did not disclose a duty of care. Noting that *Charter* breaches are personal to an individual and that the members of the Class were not the victims, she added they did not have a section 7 or 15 claim themselves. The absence of policies to protect their section 7 *Charter* rights could not be construed as a breach giving rise to a cause of action, particularly given that no material facts

were pled to establish a positive obligation under section 7 of the *Charter*. She was also of the view that Ms. BigEagle had not pled with specificity how the deprivation of section 7 rights violated the principles of fundamental justice. The motion judge concluded that it was plain and obvious that the causes of action would fail.

[16] Similarly, the motion judge found that Ms. BigEagle had not pled material facts to support any cause of action in Quebec. Without any material facts that would suggest the RCMP had investigated potential murders or disappearances in Quebec, and in the absence of particularized pleadings, she concluded that it was plain and obvious that the cause of action would fail. The motion judge added that if she was wrong on the sufficiency of the material facts pled, she was of the view that the motion would fail at the preferable procedure stage given that the RCMP would be unlikely to be the defendant in light of the different policing jurisdictions in Quebec.

[17] The last causes of action considered by the motion judge related to genocide and crimes against humanity. She noted that the pleadings alleging such breaches were a recitation of the conclusions of the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* dated June 3, 2019, and found that Ms. BigEagle had not pled the necessary material facts to support either cause of action. In particular, the motion judge noted that genocide requires a specific intention to destroy an identifiable group, in whole or in part, and that crimes against humanity require the commission of certain acts as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack. In both cases, she found that these causes of action would fail for lack of material facts supporting them.

[18] In conclusion, the motion judge dismissed the certification motion in the absence of a reasonable cause of action. She refused to permit amendment of the statement of claim on the basis that the defects did not amount to drafting deficiencies and because of the scope and breadth of the proposed action. Hence, she struck the statement of claim without leave to amend.

[19] Ms. BigEagle appeals the decision of the motion judge on several grounds. In essence, she submits that the motion judge erred in concluding that the causes of action advanced did not have a reasonable prospect of success, and in refusing to exercise her discretion to permit amendments to the statement of claim.

III. Analysis

[20] As a prelude to my analysis, I wish to emphasize that nothing in these reasons should be read as minimizing the concerns of, or the loss and the pain suffered by, the families, extended families, estates and community members of the Indigenous victims whose murders or disappearances remain unresolved. While I am sympathetic to their situation, the determinative issue to be decided in this appeal is whether the motion judge committed a reviewable error in dismissing the proposed class action on the basis that the pleadings did not disclose a reasonable cause of action, and then striking the statement of claim without leave to amend.

A. *General Principles Regarding Class Action Proceedings*

[21] Subsection 334.16(1) of the *Federal Courts Rules* sets out the five conditions that must be met for a proceeding to be certified as a class proceeding:

> (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 plaintiff or applicant and the solicitor of record.

[22] This Court recently articulated the test as follows in *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61:

> [18] The first certification condition, that the pleadings disclose a reasonable cause of action, is assessed on the same standard that applies on a motion to strike out a pleading. Thus, the question is whether it is plain and obvious, assuming the facts pleaded to be true (unless they are manifestly incapable of being proven), that the pleaded claims have no reasonable prospect of success: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 14; *Canada v. Greenwood*, 2021 FCA 186 at para. 91, leave to appeal to S.C.C. refused, 39885 (March 17, 2022). A claim that has no reasonable prospect of success will not satisfy the first condition.
>
> [19] No evidence is admissible on this issue. However, the pleading must be read generously, and as it might reasonably be amended to accommodate inadequacies attributable to drafting. Moreover, recognizing that the law is not static, the motion judge must err on the side of permitting a novel but arguable claim to proceed to trial: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 19-25. This Court has described as "onerous" the burden resting on a defendant seeking to defeat a certification motion on the basis that no reasonable cause of action is pleaded: *Greenwood* at para. 144.
>
> [20] To satisfy each of the remaining four conditions, a plaintiff seeking certification must adduce evidence that provides "some basis in fact" for concluding that the condition is met: *Greenwood* at para. 94, citing *Hollick v. Toronto (City)*, 2001 SCC 68, and *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, among other authorities. This is a threshold lower than the ordinary civil standard of balance of probabilities. But the motion for certification remains "a meaningful screening device," and "[t]here must be sufficient facts to satisfy the [motion] judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage": *Pro-Sys* at paras. 101-104.

[23] The motion judge considered these principles in determining the certification motion (Reasons at paras. 62-70).

B. *Standard of review*

[24] The parties submit that the standard of review applicable in this appeal is that set out in *Housen v. Nikolaisen,* 2002 SCC 33, such that the determination of whether Ms. BigEagle's statement of claim discloses one or more causes of action is a question of law and is reviewable on the standard of correctness (*Nasogaluak* at para. 21; *Canada (Attorney General) v. Jost*, 2020 FCA 212 at para. 21).

[25] In a recent decision (*Jensen v. Samsung Electronics Co. Ltd*., 2023 FCA 89), this Court indicated that a "Motion Judge's finding that the pleaded facts do not satisfy the requirements of the asserted cause of action, as opposed to the existence of that cause of action in Canadian law" is reviewable on the more deferential standard of palpable and overriding error because it engages a determination of mixed fact and law (*Jensen* at paras. 32-42). Nonetheless, I have applied the correctness standard, rather than the more deferential standard of palpable and overriding error, to both aspects of the first certification question because I am of the view that the outcome of this appeal would be the same.

[26] The assessment of the last four certification conditions (identification of a proper class, sufficient common questions, the preferable procedure, and representation by an adequate class representative) involves questions of fact or mixed fact and law, and is thus reviewable on the deferential standard of palpable and overriding error (*Nasogaluak* at para. 22; *Canada v. John Doe,* 2016 FCA 191 at para. 29). A palpable and overriding error is one that is obvious and affects the outcome of the case (*Feeney v. Canada*, 2022 FCA 190 at para. 4).

[27] The decision to grant or deny leave to amend pleadings is a discretionary one that is equally subject to review on the standard set out in *Housen* (*Ramos v. Canada (Attorney General)*, 2019 FCA 205 at para. 21; *Miller v. Canada*, 2019 FCA 61 at para. 10; *Heli Tech Services (Canada) Ltd. v. Weyerhaeuser Company Limited*, 2011 FCA 193 at para. 24).

C. *Grounds of Appeal*

[28] While the grounds of appeal raised by Ms. BigEagle are set out differently in her notice of appeal and her memorandum of fact and law, I intend to examine her grounds of appeal either generally or in the context of the specific causes of action to which they relate. However, before doing so, it is necessary for me to address a preliminary issue regarding the defendant in the underlying action.

(1) Allegations against the RCMP

[29] Ms. BigEagle claims that the motion judge erred in limiting the claim and recovery strictly to the RCMP because other departments within the federal government were not mentioned in the statement of claim. She argues that the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (CLPA) does not require that a claimant name a specific department, ministry or bureaucratic division.

[30] I agree with the motion judge that the defendant as named in the statement of claim cannot be extended to other branches of the federal government beyond the RCMP. The causes

of action articulated in Ms. BigEagle's pleadings are directed only at the RCMP (at paras. 73b-86h). She refers only to the RCMP's statutory mandate (at paras. 7-8) and sets out only the RCMP's alleged "duties of care" to the Class (at para. 73). Likewise, the alleged damages are based only on the alleged actions or omissions of the RCMP (at paras. 87-89b). Moreover, when she refers to the defendant being vicariously liable for the actions of its members, she identifies only the RCMP (at paras. 87, 92).

[31] I recognize that the CLPA does not require that a claimant name a specific department, ministry or bureaucratic division. However, under the CLPA, the Crown itself is immune to liability in tort and can only be held liable for the actions or omissions of its servants or agents (CLPA at s. 3; *Hinse v. Canada (Attorney General)*, 2015 SCC 35 at para. 58). A certain level of particularity is necessary to identify the servants or agents against whom liability is alleged (*Canada (Attorney General) v. Jodhan*, 2012 FCA 161 at paras. 87-89). This is so in order to allow for the determination of whether the person or body named is really a servant or agent of the Crown, and to provide that person or body the opportunity to respond to the allegations directed against them (*Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para. 38).

[32] If Ms. BigEagle intended to extend her claim to other branches of the federal government, she should have identified them and then pled the material facts to support the allegations of wrongdoing against them.

[33] I note that the statement of claim alludes, from time to time, to other provincial and municipal police forces, and seeks to bring them within the scope of pleading against Canada. These other police forces cannot be considered servants or agents of the Crown, as they do not fall under federal jurisdiction. Section 2 of the CLPA defines the Crown as "His Majesty in right of Canada". As for the RCMP, section 36 of the CLPA provides that "[f]or the purposes of determining liability in any proceedings by or against the Crown, a person who was at any time a member of the Canadian Forces or of the [RCMP] shall be deemed to have been at that time a servant of the Crown" (see, *e.g.*, *Good v. Toronto Police Services Board*, 2013 ONSC 3026 at para. 79, rev'd on other grounds, 2014 ONSC 4583, which was aff'd in 2016 ONCA 250).

[34] I am satisfied that the motion judge made no reviewable error in restricting the claim to the RCMP.

(2) Causes of Action

(a) *Failure to Consider the Pleadings Holistically*

[35] Ms. BigEagle submits that the motion judge "erred in law by failing to consider the pleadings holistically, and instead purporting to require that the material facts relevant to each cause of action be specifically and explicitly repeated in respect of each and every cause of action." She argues that a cause of action is not "crystal[l]ized" by the use of specific words and that "[w]hen assessing causes of action, the pleadings are to be construed liberally and with

allowances for perceived drafting deficiencies": Appellant's memorandum of fact and law (AMFL) at para. 37.

[36] This argument is unfounded.

[37] A review of the motion judge's reasons demonstrates that she adopted a thorough and holistic approach when reviewing the pleadings. Although Ms. BigEagle did not specifically plead a breach of a fiduciary duty as a cause of action, referring only in passing to the special relationship between the Crown and Indigenous peoples (statement of claim at paras. 9, 18, 78i), the motion judge nevertheless considered whether a fiduciary relationship existed, both as the foundation of a private law duty of care to the Class (Reasons at paras. 105-119), as well as in relation to a stand-alone cause of action (Reasons at paras. 165-174).

[38] I agree that the use of specific words is not necessary to crystallize a cause of action. However, Ms. BigEagle fails to plead any material facts to support her alleged causes of action. In setting out the various causes of action in the statement of claim, she begins each distinct section with: "The facts alleged *supra* are incorporated with respect to this claim". This statement is found at paragraph 73b (Systemic Negligence), paragraph 78a (Misfeasance in Public Office), paragraph 78e (Negligent Police Investigation), paragraph 78l (Breach of the *Canadian Charter of Rights and Freedoms*), paragraph 84a (Quebec Law) and paragraph 86a (*Crimes Against Humanity and War Crimes Act*). When reviewing the statement of claim, it is unclear which facts she is relying on.

[39] The specific requirement to plead material facts is embodied in Rules 174, 181, 221(1)(*a*) and 221(2) of the *Federal Courts Rules*. As this Court noted in *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, the "proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to prepare their case and to map a trial strategy" (*Mancuso* at para. 17). The statement of claim should tell the defendant "who, when, where, how and what gave rise to its liability" (*Mancuso* at para. 19). Bald assertions or statements of conclusions do not constitute material facts (*John Doe* at para. 23; *Mancuso* at para. 27; *Merchant Law* at para. 34).

[40] Although Ms. BigEagle has the right to choose how she frames her pleadings and is entitled to a broad reading of her statement of claim, it was incumbent upon her to plead in summary form, but with sufficient detail, the material facts supporting the various elements of each proposed cause of action and damages sought. Even if there is an overlap in the elements of some causes of action, each cause of action is distinct (*Mancuso* at para. 19). Ms. BigEagle cannot simply make general statements and expect the motion judge to sift through the pleadings to find the material facts necessary to support the different causes of action.

(b) *Failure to Incorporate the Reports into the Pleadings*

[41] In her statement of claim, Ms. BigEagle refers to various reports that have documented the circumstances of Indigenous peoples through various lenses. They include the RCMP's 2014 *Missing and Murdered Aboriginal Women: A National Operational Overview*, the *Aboriginal*

Justice Inquiry of Manitoba (1991), the *Royal Commission on Aboriginal Peoples (1996)*, the *Truth and Reconciliation Commission of Canada (2015)*, a *Committee to End Discrimination Against Women*, and *Human Rights Watch* reports, as well as the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. In addition, at paragraph 86f of the statement of claim, she pleads that "the Defendant's acts and omissions against the [v]ictims and the Class include those stated by the National Inquiry and the Final Report."

[42] Ms. BigEagle submits that the motion judge should have considered the relevant reports referred to in her pleadings, and in particular, the National Inquiry's Final Report, as they establish material facts. She also argues that it is not necessary to explicitly state in one's pleadings "we incorporate by reference" for the contents of reports to be considered as material facts supporting a cause of action.

[43] In her reasons, the motion judge observed that Ms. BigEagle appeared to rely on these reports as material facts upon which to base her causes of action. She noted that different evidentiary standards applied to the information contained in the reports and considered that, on occasion, reports from inquiries have not been admitted into class action proceedings. She admitted the reports, not for the truth of their content, nor as material facts, but to help put the facts into context.

[44] While the referral to reports may be used on a certification motion to help put uncontentious facts into context, to determine whether the references made in the statement of claim are accurately reflected and to assist in discharging the "some basis in fact" burden, the

reports cannot be used as a means to fill in the existing gaps or the blanks in the pleadings. The argument advanced by Ms. BigEagle would require the motion judge to review thousands of pages of reports to determine what material facts support each cause of action. It would also impose upon the motion judge the burden of sorting out the material facts from the evidence, the latter of which is not admissible to establish the "reasonable cause of action" condition of the test for certification. It is clearly not the role of the motion judge to comb through the reports in order to particularize broad allegations that might support Ms. BigEagle's causes of action.

[45] In support of her claim, Ms. BigEagle relies heavily on the issues identified by the Forensic Document Review Project (FDRP) and set out in the National Inquiry's Final Report. The Commissioners of the National Inquiry had established the FDRP to "identify potential systemic barriers or problems and areas of weakness relating to the protection of Indigenous women, girls, and 2SLGBTQQIA individuals" and to "make recommendations about the systemic causes of [their] disappearances and deaths…and acts of violence against them" (Appeal Book at 1637). During the course of the project, the FDRP obtained and reviewed 174 files and 35 previous reports and studies on policing. Its review was not limited to the RCMP but included other provincial and municipal police forces (Appeal Book at 1635, 1642). While the FDRP identified a number of issues and unanswered questions, it clarified that it did not have the authority to make specific findings of misconduct in respect of any identifiable person or organization, to reinvestigate police investigations or to make express conclusions or recommendations about the possible civil or criminal liability of any person or organization (Appeal Book at 1639).

[46] The primary concern with relying on commission reports as the basis for material facts stems from the fact that commissions of inquiry do not have the same evidentiary standards as those applied by a court, in part because they have a different purpose. Often, the information gathered is not taken under oath and constitutes hearsay. Likewise, the process followed does not automatically provide for due process, including the right to cross-examine during fact gathering (*Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440; *R. v. Dykstra*, [2008] O.J. No. 2745 (Ont. S.C.) (QL), 2008 CanLII 34355 at para. 21; *Robb v. St. Joseph's Health Care Centre*, [1998] O.J. No. 5394 (Ont. Gen. Div.) (QL) at paras. 18-19, aff'd in *Robb Estate v. Canadian Red Cross Society*, [2001] O.J. No. 4605 (Ont. C.A.) (QL), 2001 CanLII 24138 at paras. 209-210). Investigative and commission reports are also not intended to state a cause of action (*R.G. v. Hospital for Sick Children*, 2018 ONSC 7058 at para. 22).

[47] I am satisfied that the motion judge did not commit a reviewable error in not relying on the various reports as material facts to support the alleged causes of action.

(c) *Systemic Negligence and Negligent Police Investigation*

[48] In her statement of claim, Ms. BigEagle alleges in essence that the RCMP failed in its duties to take reasonable care in investigating the murders and disappearances of the victims, to be responsive to their unique circumstances, and to "develop, implement, monitor, and enforce policies and procedures to ensure that all citizens are afforded equal and equitable service including [v]ictims" (statement of claim at para. 73(c)). She further claims that these failures are

systemic and have caused “unnecessary and preventable mental anguish and psychological harm” to the Class (at para. 74).

[49] In this appeal, Ms. BigEagle submits that the motion judge erred in concluding that foreseeability and proximity could not be established in respect of the RCMP because many of the negligent actions or breaches were within the sole jurisdiction of other police forces. She argues that certification ought to have been granted against the RCMP for the benefit of those members of the Class who do have a claim against the RCMP.

[50] I find that this argument unduly isolates statements made by the motion judge and fails to consider both the entire analysis and her overall conclusion regarding the absence of a private duty of care towards the Class.

[51] In order to determine whether the statement of claim as pled gave rise to a cause of action of systemic negligence or negligent police investigation against the RCMP, the motion judge had to ascertain whether the RCMP has a duty of care to the Class. This involved examining whether such duty had already been recognized in law, and if not, whether a new duty of care should be recognized by applying what is known as the *Anns/Cooper* test to the facts pled (*Anns v. Merton London Borough Council*, [1978] A.C. 728 at 751-52 (H.L.); *Cooper v. Hobart*, 2001 SCC 79 at paras. 30-31).

[52] This two-part test provides a framework to determine when a duty of care arises. In *Nelson (City) v. Marchi*, 2021 SCC 41, the Supreme Court of Canada described the framework in novel duty of care cases as follows:

> [17] In novel duty of care cases, the full two-stage *Anns/Cooper* framework applies. Under the first stage, the court asks whether a *prima facie* duty of care exists between the parties. The question at this stage is whether the harm was a reasonably foreseeable consequence of the defendant's conduct, and whether there is "a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff" (*Rankin's Garage*, at para. 18). Proximity arises in those relationships where the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law upon the defendant" (*Cooper*, at paras. 32 and 34).
>
> [18] If there is sufficient proximity to ground a *prima facie* duty of care, it is necessary to proceed to the second stage of the *Anns/Cooper* test, which asks whether there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care (*Cooper*, at para. 30). As stated in *Cooper*, at para. 37, the residual policy stage of the *Anns/Cooper* test raises questions relating to "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally", such as:
>
> > Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?
>
> [19] When the duty of care at issue is *not* novel, there is generally no need to proceed through the full two-stage *Anns/Cooper* framework. Over the years, courts in Canada have developed a body of negligence law recognizing categories of cases in which a duty of care has previously been established […] In such cases, "the requisite close and direct relationship is shown" and the first stage of the *Anns/Cooper* framework will be complete, as long as the risk of injury was reasonably foreseeable […] The second stage of the *Anns/Cooper* test will rarely be necessary because residual policy concerns will have already been taken into account when the duty was first established […]

[53] In her analysis, the motion judge noted at the outset that both systemic negligence and negligent police investigation required the element of a duty of care. She then proceeded to examine Ms. BigEagle's arguments regarding the existence of an established duty of care.

[54] In her statement of claim, Ms. BigEagle alleged that the RCMP shares with the federal Crown the responsibility of protecting Indigenous peoples, and in particular, Indigenous women (at paras. 9, 13). Although Ms. BigEagle did not explicitly allege the existence of a fiduciary relationship, the motion judge nevertheless considered whether the RCMP had an established duty of care to the Class on this basis.

[55] Following the principles set out in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 (*Alberta Elders*), the motion judge examined the three elements required for the establishment of a fiduciary relationship: an undertaking, a defined vulnerable person or class of persons, and a legal or practical interest (*Alberta Elders* at para. 36).

[56] She first noted there was nothing in the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (RCMP Act) or the *Criminal Code*, R.S.C. 1985, c. C-46 supporting an undivided loyalty towards the Class, as the legislation only supported the interests of all Canadians generally. There was nothing in the statutes that created a trust relationship between the RCMP and the Class. She added that no facts were pled that could establish a private law duty to the Class.

[57] The motion judge then considered the vulnerability of the members of the Class under the second branch of the test. She noted the special relationship between Indigenous peoples and Canada, but was not persuaded that the duty of loyalty set out in *Alberta Elders* had been extended to all Indigenous peoples in all situations. In her view, it was "unfair to project this antiquated idea that Indigenous peoples are 'wards of the state'" (Reasons at para. 115).

[58] She concluded that the fact that the Class and the victims were Indigenous was insufficient to automatically establish the existence of a fiduciary duty. She also noted that while the Class may be composed of vulnerable individuals in their own right, neither the statement of claim nor the relevant legislation supported the existence of a special relationship between the RCMP and the Class.

[59] As the first two elements for establishing a fiduciary relationship were not demonstrated, she found it unnecessary to deal with the third element.

[60] After concluding there was no *ad hoc* fiduciary duty owed by the RCMP to the Class, the motion judge went on to examine whether another established duty of care existed. She considered the cases relied upon by Ms. BigEagle but found that they were distinguishable from the facts in this case (*Rumley v. British Columbia*, 2001 SCC 69; *Cloud v. Canada (Attorney General)*, [2004] O.J. No 4924 (Ont. C.A.) (QL), 2004 CanLII 45444; *Tippett v. Canada*, 2019 FC 869). The defendants in those cases had conceded the existence of a duty of care.

[61] The motion judge found that the jurisprudence did not support a private law duty of care to the Class. While she recognized that the police have been found to owe a private duty of care in certain cases, she was of the opinion that the material facts pled in this case did not have foreseeability and proximity analogous to that found in those very limited factual situations.

[62] Finding there was no established duty of care, the motion judge went on to consider the existence of a novel duty of care by applying the *Anns/Cooper* test to the facts pled.

[63] It is in the context of her analysis of foreseeability and proximity that the motion judge considered that many of the negligent actions or breaches pled were solely in the jurisdiction of other police services, and therefore lacked the elements of foreseeability and proximity. This observation was appropriate given that several of the claims asserted in the statement of claim related to victims whose disappearance or murder was reported, not to the RCMP, but to other municipal or provincial police forces.

[64] She further noted that the members of the Class included the victims' families and community members and found that, even if the RCMP had jurisdiction over the investigations, the foreseeability and proximity requirements were not met as the connection between the RCMP and the victims' families and community members was too far removed. She was also of the view that proximity could not be established by general public statements made by RCMP officials.

[65] Likewise, she observed that neither the RCMP's constituent act, nor the existing policies or lack thereof, established the relationship or foreseeability necessary to ground a private law duty of care. Any duty owed was to the public in general and not to specific individuals or groups.

[66] She concluded that since the pleadings did not disclose a duty of care, that is to say the first element of the cause of action for systemic negligence, it was plain and obvious that the systemic negligence cause of action was doomed to fail.

[67] Regarding the cause of action of negligent police investigation, the motion judge considered Ms. BigEagle's argument that where a duty of care is owed by the police to the suspects, this duty could be extended to include the victims, and by relationship the Class. She noted that the test for this tort was the same as any negligence analysis and that the courts have clearly and unequivocally stated that the duty of care in a negligent police investigation was to the person being investigated. She found it was too far a leap to extend it to a victim, or their family or community members, and concluded that it was obvious this cause of action would fail.

[68] That some of the breaches alleged may be attributable to the RCMP does not negate the requirement that a duty of care must exist to support the causes of action in systemic negligence or negligent police investigations. The motion judge applied the correct test and her findings that the police duties in investigating crimes and murders are public in nature and generally do not give rise to a private law duty of care to the victims' families and community members are well

supported by the case law (*Goldman v. Weinberg*, 2019 ONCA 224 at para. 6; *Connelly v. Toronto (Police Services Board)*, 2018 ONCA 368 at paras. 3, 7; *RVB v. Levin*, 2018 ABQB 887 at para. 36; *Jones v. The Attorney General of Canada (Royal Canadian Mounted Police) et al.*, 2018 NBCA 86 at para. 30; *Good* at paras. 80, 85; *Wellington v. Ontario*, 2011 ONCA 274 at paras. 20, 31, 43-44; *Spencer v. Canada (Attorney General)*, 2010 NSSC 446 at paras. 56, 58; *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 40 (in *obiter*)).

[69] The RCMP's governing legislative scheme also demonstrates that the RCMP's duty is owed to the public in general. It does not provide for a private duty of care to any particular member of the public (RCMP Act, ss. 18, 37; *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281, Schedule).

[70] The courts have found that the police owe a private duty of care to individuals in certain circumstances. For example, they have a duty to a particular suspect under investigation of alleged criminality (*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41), and a duty to warn a narrow and distinct group of potential victims of crime (*Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, [1998] O.J. No. 2681 (Ont. Gen. Div.) (QL), 1998 CanLII 14826). In this case, the claims asserted by Ms. Bigeagle on behalf of the Class do not fall within these exceptional categories of cases.

[71] Contrary to Ms. BigEagle's submission, the determinative issue for the motion judge was not that some of the claims were also directed against other police forces. It was the fact that the pleadings did not establish that the RCMP had a duty of care towards the victims' families and

their community members. The first condition for certifying a class proceeding is that the pleadings disclose a reasonable cause of action. Where the causes of action relate to negligence, systemic or otherwise, the first element that must be demonstrated is the existence of a duty of care. The motion judge found that there was no established duty of care and, as stated above, there was insufficient foreseeability and proximity between the RCMP and the victims' families and community members to establish a novel duty of care. I have no doubt that the Class members have a personal interest in the conduct and outcome of the investigations into the disappearances and murders of the victims. Nevertheless, the desire that a police investigation be conducted in a specific manner or that it lead to a particular result does not give rise to a relationship of proximity sufficient to ground a cause of action in negligence (*Wellington* at para. 33).

[72] In the absence of a duty of care, it was plain and obvious that these causes of action would fail.

[73] Ms. BigEagle also submits that the motion judge failed to distinguish "immune policy decisions from government activities that attract liability for negligence": AMFL at para. 56. She suggests that the motion judge conflated the pleadings with an arbitrary determination of what were the core policy decisions of the RCMP. According to Ms. BigEagle, "the onus is on the public authority to prove that it is immune from liability because a core policy decision is at issue": AMFL at para. 64. She claims that the motion judge erred in finding that the material facts pled did not base the duty on operations but rather on policy. I understand her argument to

be that the motion judge erred in conducting a stage two *Anns/Cooper* analysis at the certification stage, an exercise that she claims is better left to trial.

[74] I am not persuaded by this argument. To begin with, the motion judge did not conduct an analysis of the second stage of the *Anns/Cooper* test as she found that the first stage had not been satisfied. She concluded that there was insufficient foreseeability and proximity to ground a *prima facie* duty of care. Had she determined otherwise, it would have been necessary for her to proceed to the second stage, "which asks whether there are residual policy concerns outside the parties' relationship that should negate the prima facie duty of care" (*Marchi* at para. 18).

[75] Ms. BigEagle also argues that the motion judge erred in referring to the Supreme Court of Canada's decision in *Alberta Elders*. She claims that the decision is irrelevant because the circumstances in that case did not involve Indigenous peoples.

[76] I agree that the circumstances in *Alberta Elders* did not involve Indigenous peoples. The class in that case consisted of elderly residents in Alberta's long-term care facilities who alleged that the government artificially inflated their accommodation charges to subsidize the cost of medical expenses. They had initiated a class action against the province of Alberta and several regional health authorities claiming a breach of fiduciary duty, negligence, bad faith in the exercise of discretion, and/or unjust enrichment.

[77] Even so, it remains that one of the questions before the Supreme Court of Canada was whether the pleading of a breach of fiduciary duty disclosed a cause of action, assuming the facts

pled to be true. The Supreme Court examined the principles relating to the imposition of a fiduciary duty, including in the governmental context. As the pleadings of Ms. BigEagle contained allegations suggesting a fiduciary relationship between Indigenous peoples and the Crown, the motion judge referred to the principles set out by the Supreme Court to determine if an *ad hoc* fiduciary duty existed as a result of the relationship, and if so, whether it gave rise to a private law duty of care to the Class. The motion judge acknowledged the special relationship between Indigenous peoples and Canada, including the existence of the Crown's fiduciary duty to Indigenous peoples with respect to their land, but agreed with the Supreme Court that vulnerability alone was insufficient to ground a fiduciary claim (*Alberta Elders* at para. 28).

[78] For the above reasons, I find that the motion judge did not commit a reviewable error in concluding that it was plain and obvious that the causes of action of systemic negligence and negligent police investigation were bound to fail.

(d) *Misfeasance in Public Office*

[79] Ms. BigEagle submits that it was an error to require the identification of specific individuals responsible for the alleged wrongdoings. She claims that a more general level of particularity was accepted in *Merchant Law* and *Goyal v. Niagara College of Applied Arts and Technology*, 2018 ONSC 2768, aff'd in 2019 ONCA 263. In her opinion, the RCMP as a "branch" of the Department of Public Safety and Emergency Preparedness should then have been considered as adequately identified.

[80] Misfeasance in public office is distinct from the tort of negligence. It is an intentional tort that is directed at the conduct of public officials in the exercise of their duties. In *Odhavji Estate,* at paragraph 32, the Supreme Court of Canada summarized the elements of the tort in the following manner:

> To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[81] The allegations regarding misfeasance in public office in the statement of claim are as follows:

> 78a. The facts alleged *supra* are incorporated with respect to this claim.
>
> 78b. Whether the RCMP (a) chose to allocate fewer resources and engage in less expansive investigations with respect to [v]ictims than with respect to non-Indigenous individuals, or (b) failed to allocate sufficient resources or make sufficiently rigorous investigations in light of the unique Circumstances facing [v]ictims, these choices, made on the basis of the [v]ictims' Indigenous identity, were intentional and deliberate choices of the RCMP.
>
> 78c. The RCMP knew that making such choices on the basis of a [v]ictim's Indigenous identity was discriminatory and unlawful.
>
> 78d. The RCMP knew that these choices would be likely to bring harm to the [v]ictim and to the Class.

[82] In my view, the motion judge did not err in concluding that, other than general statements, there were no material facts pled of deliberate and unlawful conduct. The claims were directed at the RCMP as an organization, across Canada, and over an undefined period of time. She appropriately noted that while there was a generalized allegation that the RCMP did not implement procedures or policy, it was not sufficiently particularized and did not meet the required elements of intentional conduct and foreseeability. She properly distinguished *Merchant Law* by noting that, while this Court found that in many cases it may be impossible for a plaintiff to name the particular individual responsible, it also indicated that some level of specification was needed, such as identifying the job positions, the organizational branch, the office, or even the building in which those dealing with the matter worked (*Merchant Law* at para. 38). The motion judge also properly distinguished *Goyal* by noting that the claim in that case focused on the actions of officials in a single branch of the immigration office, not the entire department.

[83] I am satisfied that the motion judge did not err in concluding that it was plain and obvious that this cause of action was doomed to fail.

(e) *Quebec Law*

[84] Ms. BigEagle submits that the motion judge erred in requiring a specific pleading that the actions of the RCMP occurred in the province of Quebec, in contrast to all other provinces and territories. She also argues that the motion judge erred when she relied on the respondent's evidence to state that the policing services in Quebec were conducted by the Sûreté du Québec, municipal or First Nations police services.

[85] I agree that it is unclear from the reasons how the motion judge came to make the statement regarding the jurisdiction of policing services in Quebec. She may have taken judicial notice, but in any event, there is no serious question as to whether the motion judge's conclusion in this regard was correct. That said, Ms. BigEagle pled as follows in the statement of claim:

> ***Quebec Law***
>
> 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.

[86] The motion judge did not base her overall conclusion on the RCMP's policing role in Quebec but rather on the failure to plead material facts specific to Quebec, on the causal connection between fault and damage, as required by the *Civil Code of Québec*, S.Q. 1991, c. 64, and on the required elements of a successful claim under the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

[87] The failure to plead any material facts to suggest that the RCMP investigated any potential murders or disappearances in Quebec or specific to Quebec victims meant that the causes of action related to Quebec law were doomed to fail. I see no reviewable error on the part of the motion judge.

(f) *Breach of Fiduciary Duty, Charter Breaches, Genocide, and Crimes Against Humanity*

[88] In her memorandum of fact and law, Ms. BigEagle does not raise any specific issues in relation to the causes of action for breach of fiduciary duty and of the *Charter*, for genocide and crimes against humanity. In oral argument, she stated however that she was indeed appealing these issues.

[89] In my view, it would be inappropriate for this Court to consider them for two reasons.

[90] First, it is insufficient to raise a ground in the notice of appeal without addressing it in the memorandum of fact and law and then expect to be able to argue it at the hearing of the appeal (Subsection 70(1) of the *Federal Courts Rules; Sibomana v. Canada*, 2020 FCA 57 at para. 6).

[91] Second, even if it was appropriate for Ms. BigEagle to raise these issues during the oral hearing, I find that her counsel did not clearly articulate the alleged errors of the motion judge. With the exception of stating that the material facts suffice to certify each cause of action and including a table containing references to paragraphs in the statement of claim and to various

reports without more, Ms. BigEagle does not articulate any argument in relation to these causes of action.

[92] That said, I will nevertheless offer a few comments on these alleged causes of action.

[93] The pleadings with respect to genocide and crimes against humanity are in essence a recitation of the conclusions of the National Inquiry's Final Report. At paragraph 86g of her statement of claim, Ms. BigEagle pled that "the offences of genocide and crimes against humanity" were committed against the victims and the Class by: "(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."

[94] The motion judge found, after setting out the required elements of genocide and crimes against humanity, that Ms. BigEagle had not pled the material facts to support the required elements of either cause of action. Having reviewed the paragraphs relied upon by Ms. BigEagle to establish the material facts, I am not convinced that the motion judge made a reviewable error in finding that the causes of action would fail for lack of material facts. As for Ms. BigEagle's reliance on the Prime Minister's statements contained in newspaper articles, I agree with the motion judge's finding that these documents should not be admitted for the truth of their contents.

[95] Regarding Ms. BigEagle's *Charter* claims, the statement of claim asserts that the RCMP breached sections 7 and 15 of the *Charter*. She alleges that the Class is entitled to damages under section 24 of the *Charter*. Upon review of paragraphs 78l to 84 of the statement of claim, I agree with the motion judge that they contain statements and conclusions rather than material facts, and that, to some degree, the claims made are more akin to negligent investigation claims, which I have addressed earlier in these reasons. The other paragraphs upon which Ms. BigEagle relies similarly do not support causes of action in favour of the Class for breach of the *Charter*. Where the statement of claim implies discrimination, it is in reference to the victims and not the Class. The only reference to the Class' right to be free from discrimination (at para. 80) is a conclusionary statement unsupported by facts. Where she alleges a violation under section 7 of the *Charter*, she fails to explain how the alleged deprivation of rights does not accord with the principles of fundamental justice. Ms. BigEagle has not demonstrated a reviewable error in any of the motion judge's analysis of these causes of action.

[96] As for the cause of action of fiduciary duty, I find that the paragraphs Ms. BigEagle claims establish the material facts do not assist her.

[97] As previously mentioned, Ms. BigEagle did not specifically plead a cause of action for breach of fiduciary duty in her statement of claim. She asserts in a footnote of her memorandum of fact and law that it is not necessary to specifically plead the fact that a fiduciary duty exists. The motion judge considered this same argument in her reasons. This led her to examine the claim for breach of fiduciary duty both as the foundation of a private law duty of care of the RCMP to the Class and as a stand-alone cause of action. She found that she was unable to certify

this cause of action since the statement of claim did not set out the material facts or the constituent elements for a breach of fiduciary duty.

[98] The Supreme Court of Canada noted in *Alberta Elders*, "[f]iduciary duty is a doctrine originating in trust. It requires that one party, the fiduciary, act with absolute loyalty toward another party, the beneficiary or *cestui que trust*, in managing the latter's affairs" (at para. 22). "The party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake" (at para. 31). To hold that the RCMP has a fiduciary duty towards the Class would be incompatible with its duty to the public in general.

[99] Ms. Bigeagle has not demonstrated a reviewable error in the motion judge's analysis or findings.

[100] To conclude with respect to Ms. BigEagle's arguments relating to the causes of action, she has failed to persuade me that the motion judge decided the merits of the claim. She considered each cause of action and their required elements, and looked to the statement of claim in a holistic manner to determine if the material facts pled were sufficient to support the causes of action.

(3) Leave to amend

[101] Ms. BigEagle claims that the motion judge erred when she concluded that it was impossible to amend the pleadings in order to correct the alleged deficiencies, and that no evidence had been submitted demonstrating the pleadings could be amended to focus on a manageable cause of action. She argues that the provision of evidence is irrelevant to the pleadings. Also, the mere fact that the pleadings were amended in the past should not preclude further amendments. She further asserts that the motion judge erred when she struck the claim on her own motion. The motion judge should have allowed her to renew the motion on a changed record, or permitted the action to proceed as an individual action.

[102] I agree with Ms. BigEagle that the respondent did not specifically seek an order striking the claim. However, the Federal Court has the inherent jurisdiction to manage its own process and proceedings (*Lee v. Canada (Correctional Services Canada)*, 2017 FCA 228 at paras. 6-8). The motion judge noted that the pleadings had been amended several times without curing the deficiencies and found that the defects in the statement of claim did not amount to “drafting deficiencies” (Reasons at para. 246).

[103] In my view, it was open to the motion judge to find that that the claim was too broad and could not be cured by amendment. When she referred to the absence of evidence, it was not in terms of proof. It was that no suggestion had been made as to how the pleadings might be amended. Likewise, Ms. BigEagle has not identified to this Court how the pleadings could have

been amended to support the alleged causes of actions. I have not been persuaded that the motion judge committed a reviewable error in this regard.

(4) Other Issues

[104] In addition to the issues above, Ms. BigEagle raises other arguments which do not affect the outcome of this appeal, given my findings that the motion judge correctly concluded that the causes of action advanced had no reasonable prospect of success. I will nonetheless make the following observations.

[105] First, Ms. BigEagle contends that the motion judge conflated the cause of action analysis with preferable procedure because of a statement she made indicating that even if she were wrong about the sufficiency of material facts pled to support the cause of action, the cause of action would fail at the preferable procedure stage. In my view, the motion judge did not conflate the cause of action analysis with preferable procedure, as her statement was clearly *obiter*.

[106] Second, Ms. BigEagle contends that the motion judge erred in finding that the witnesses put forth by the respondent were appropriate for the certification motion. Ms. BigEagle had argued before the motion judge that the RCMP had purposely circumvented its obligations under paragraph 334.15(5)(*b*) of the *Federal Courts Rules* and that the witnesses were not tendered as representatives of Canada or the RCMP. Under subsection 334.15(5), a person filing an affidavit is required to set out (1) the material facts on which the person intends to rely; (2) an affirmation that they know of no fact material to the motion that has not been disclosed; and (3) to the best of

that person's knowledge, the number of members in the proposed class. Ms. BigEagle explains that cross-examination of the respondent's witnesses revealed the non-disclosure of policy and procedure manuals, as well as existing directives. Moreover, she argues that the witnesses had little understanding of the issues and that none provided evidence in response to the reports relied upon in the statement of claim.

[107] I need not address this argument as the decision of the motion judge is based solely on the first condition for certification, which does not allow for the consideration of evidence.

[108] Furthermore, Ms. BigEagle argues that the motion judge erred when concluding that the proposed Class did not include a distinct and specific group of victims, and was not temporally defined. Although I consider Ms. BigEagle to have misconstrued the motion judge's statement on the broadness of the claim and to have conflated the duty of care analysis with the subsequent conditions for certification, as these arguments do not pertain to the first condition for certification, I do not need to address them.

IV. Conclusion

[109] For the above reasons, I conclude that the motion judge did not err in dismissing the motion for certification on the ground that it was plain and obvious that the causes of action would fail. Moreover, Ms. BigEagle has not persuaded me that the motion judge erred in determining that the pleadings could not be reasonably amended and in striking the statement of

claim. As a result, I would dismiss the appeal. In accordance with Rule 334.39 of the *Federal Courts Rules*, and the submissions of the parties, no costs are awarded.

"Sylvie E. Roussel"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
K. A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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